



# ***PR 2009/5 - Income tax: TFS Sandalwood Project 2009***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *4 March 2009*



## Product Ruling

### Income tax: TFS Sandalwood Project 2009

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**! This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

### **No guarantee of commercial success**

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The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

### **Terms of use of this Product Ruling**

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This Product Ruling has been given on the basis that the entity(s) who applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

## What this Ruling is about

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the TFS Sandalwood Project 2009, or simply as 'the Project'.

### Class of entities

2. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations; and
- can rely on the taxation benefits;

set out in the Ruling section of this Product Ruling.

3. The members of the class of entities who are subject to those taxation obligations and who can rely on those taxation benefits are referred to in this Product Ruling as 'Growers'.

4. Growers are those entities that:

- meet the definition of 'initial participant' in subsection 394-15(5); and
- are accepted to take part in the scheme specified below on or after 4 March 2009.

5. A Grower will have executed the relevant Project Agreements set out in paragraph 48 of this Ruling on or before 30 June 2009 and will hold a 'forestry interest' in the Project.

6. The class of entities who can rely on this Product Ruling does **not** include Growers:

- who are accepted into this Project before 4 March 2009 or after 30 June 2009;
- who participate in the scheme through offers made other than through the Product Disclosure Statement;
- whose Establishment Fees, including all loan moneys, are not paid in full to TFS Properties Ltd (Responsible Entity) by 30 June 2009;
- enter into finance arrangements with Arwon Finance Pty Ltd (Arwon) or MIS Funding No. 1 Pty Ltd (MIS), other than as specified in paragraphs 89 to 97 of this Ruling; or
- Growers who elect to collect and market their own produce.

**Superannuation Industry (Supervision) Act 1993**

7. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product ruling as to whether investment in this product may contravene the provisions of SISA 1993.

**Qualifications**

8. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 48 to 98 of this Ruling.

9. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:

- this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Product Ruling may be withdrawn or modified.

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**Date of effect**

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11. This Product Ruling applies prospectively from 4 March 2009, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 4 March 2009 until 30 June 2009, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for all income years up to the income year in which the scheme is terminated in accordance with the Project agreements.

12. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## **Changes in the law**

16. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments to the law may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to the extent of those amendments this Product Ruling will be superseded.

17. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

## **Note to promoters and advisers**

18. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling is issued.

## **Goods and Services Tax**

19. All fees and expenditure referred to in this Product Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in any creditable acquisition that it makes, it must be registered or required to be registered for GST and hold a valid tax invoice.

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## Ruling

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### Structure of the Project

20. The Project is a 'forestry managed investment scheme' as defined in subsection 394-15(1). Its purpose is the establishment and tending of sandalwood Trees for felling in Australia.

21. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for an 'initial participant'<sup>1</sup> in the defined class of entities (see paragraphs 2 to 6 of this Ruling) who is accepted to participate in the forestry managed investment scheme described below at paragraphs 48 to 98 of this Ruling on or after 4 March 2009 and on or before 30 June 2009.

22. An entity that takes part in the Project as a 'subsequent participant'<sup>2</sup> is not covered by this Product Ruling but may request a private ruling on their participation in the Project. A subsequent participant is an entity that does not meet the definition of initial participant in subsection 394-15(5).

### Carrying on a business

23. Although not relevant for the purposes of Division 394, a Grower (as described in paragraphs 2 to 6 of this Ruling) who will stay in the Project until it is completed will be considered to be carrying on a business of primary production. Such Growers who are individuals will be subject to the operation of Division 35 (see paragraphs 45 and 46 of this Ruling).

### Concessions for 'small business entities'<sup>3</sup>

24. From the 2007-08 income year, a range of concessions previously available under the simplified tax system (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

25. A 'small business entity' can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Growers who qualify as a small business entity is not able to be dealt with in this Ruling.

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<sup>1</sup> See subsection 394-15(5).

<sup>2</sup> See section 394-30.

<sup>3</sup> The meaning of 'small business entity' is explained in section 328-110.

## **The '70% DFE rule' and the establishment of the Trees**

### ***Section 394-35 and subsection 394-10(4)***

26. The taxation obligations and benefits set out below have been determined using the information provided to the Commissioner by the Responsible Entity, (referred to as the 'forestry manager' in Division 394). On the basis of that information the Commissioner has decided that on 30 June 2009 it will be reasonable to expect that the '70% DFE rule'<sup>4</sup> will be satisfied. The Tax Office may undertake review activities during the term of the Project to verify the information relied on for the purposes of the '70% DFE rule'.

27. The Ruling will only apply if the Responsible Entity establishes all of the Trees that were intended to be established under the Project within 18 months of the end of the income year in which the first 'participant' in the Project is accepted.<sup>5</sup> For this Project the Trees must be established before 31 December 2010.

28. In the context of this Project the Trees will be established when they are planted on the land acquired for the purposes of the Project at the average rate of 433 Trees per hectare. The Responsible Entity is required by section 394-10 of Schedule 1 of the TAA to notify the Tax Office if the Trees are not established by 31 December 2010.

## **Allowable deductions**

### ***Sections 8-5, 394-10 and 394-20 and Division 27***

29. A Grower in the Project can claim, on a per Sandalwood Lot basis, deductions for the amounts shown in the Table below that are paid to the Responsible Entity (sections 8-5 and 394-10).

30. The deductibility of these amounts remains subject to a requirement that a CGT event<sup>6</sup> does not happen in relation to the Grower's 'forestry interest' before 1 July 2013.

31. The amount is deductible in the income year in which it is paid, or is paid on behalf of the Grower (subsection 394-10(2) and section 394-20). Where a Grower does not fully pay an amount, or it is not fully paid on their behalf in an income year, it is deductible only to the extent to which it has been paid. Any unpaid amount is then deductible in the year or years in which it is actually paid.

32. If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.

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<sup>4</sup> The '70% DFE rule' is set out in section 394-35.

<sup>5</sup> See subsection 394-10(4).

<sup>6</sup> Defined in section 995-1.

33. Amounts that are allowable deductions under Division 394 cannot also be claimed as deductions under section 8-1 (section 8-10).

<b>Fee</b>	<b>Amount</b>	<b>Income Year(s) deductible</b>
Establishment Fees	\$12,925 for up to 5 Sandalwood lots \$12,375 for 6 or more Sandalwood lots	2008-09
Annual Fees	\$1,100 per annum (indexed from the 2011-12 onwards)	2010-11 to 2021-22
Annual Rent	\$220 per annum (indexed from the 2011-12 onwards)	2010-11 to 2021-22
Deferred Fee 2010-11 to 2011-12	3.3% of the Gross Proceeds of Sale for each income year annual fees deferred	Income year entitled to proceeds
Deferred Fee 2012-13 to 2015-16	2.2% of the Gross Proceeds of Sale for each income year annual fees deferred	Income year entitled to proceeds
Deferred Fee 2016-17 to 2021-22	1.1% of the Gross Proceeds of Sale for each income year annual fees deferred	Income year entitled to proceeds
Costs of Harvest and Processing	Actual costs	Income year entitled to proceeds
Selling and Marketing Fees	5.5% of the Gross Sale Proceeds	Income year entitled to proceeds
Incentive Fees	33% of the amount by which the Net Proceeds of Sale exceed the Target Net Proceeds of Sale	Income year entitled to proceeds

**'CGT event' within 4 years for Growers who are 'initial participants'**

***Subsections 394-10(5) and (6)***

34. Deductions for the Establishment Fees, the Annual Fees and the Rent are not allowable where a 'CGT event' happens in relation to the forestry interest of a Grower before 1 July 2013 (subsection 394-10(5)).

35. Where deductions for these amounts have already been claimed by a Grower the Commissioner may amend their assessment at any time within two years of the CGT event happening (subsection 394-10(6) of the ITAA 1997). The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936.

36. Growers whose deductions are disallowed because of subsection 394-10(5) are still required to include in assessable income the market value of the forestry interest at the time of the CGT event or the decrease in the market value of the forestry interest as a result of the CGT event.

### **Interest on loans to finance the forestry interest of a Grower and insurance premiums**

#### **Section 8-1**

37. A Grower in the Project can claim deductions for interest incurred on a loan to fund their investment in the Project (paragraph 8-1(1)(a)). This Ruling only applies to loans between a Grower and Arwon or MIS. Growers who borrow from other financiers may apply for a private ruling on the deductibility of loan interest or may self assess the deductibility of the interest.

38. Insurance fees incurred by a Grower to insure their Sandalwood Lot (including the Trees and Forest Produce), will be deductible under section 8-1. The deduction is allowable in the year in which the insurance fee is incurred. The Responsible Entity will advise the Grower each year of the amount of the insurance fee.

### **Borrowing costs**

#### **Section 25-25**

39. The loan Administration Fee of \$250 plus 0.5% of the Principal Sum payable to Arwon or MIS and stamp duty for the loans are borrowing expenses and are deductible under section 25-25.

40. The deduction for the borrowing expense must be calculated. The amount deductible will depend on the term of the loan.

<b>Loan Term</b>	<b>Amount</b>	<b>Year(s) deductible</b>
1 to 4 years	Must be calculated	See Note (ii)
5 or more years	Must be calculated	See Note (iii)

#### **Notes:**

- (i) For loan terms of up to 4 years, the deduction for the borrowing expense is spread over the period of the loan on a straight line basis from the date the loan begins.
- (ii) For loan terms of 5 years or more, the deduction for the borrowing expense is spread over 5 years on a straight line basis from the date the loan begins.

41. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Arwon or MIS is outside the scope of this Ruling.

**Assessable income, CGT events and the forestry interests of Growers who are initial participants*****Sections 6-10, 17-5 and 394-25***

42. Where a CGT event happens to a forestry interest held by a Grower in this Project the market value of the forestry interest, or the decrease in the market value of the forestry interest, is included in the assessable income of the Grower (sections 6-10 and 394-25), less any GST payable on those proceeds (section 17-5).

43. The relevant amount is included in the Grower's assessable income in the income year in which the CGT event happens (subsection 394-25(2)).

44. CGT events for these purposes include those relating to:

- a **clear-fell harvest of all or part of the Trees** grown under the Project;
- the **sale, or any other disposal** of all or part of the forestry interest held by the Grower; or
- any other CGT event that results in a reduction of the market value of the forestry interest held by the Grower.

**Division 35– deferral of losses from non-commercial business activities*****Section 35-55 – exercise of Commissioner's discretion***

45. Growers who will stay in the Project until its completion will be considered to be carrying on a business of primary production. Such Growers who are individuals and are accepted into the Project in the year ended 30 June 2009 may make losses from the Project that may be affected by the loss deferral rule in section 35-10 of Division 35. Division 35 does not apply however, to Growers who do not carry on a business.

46. The discretion in paragraph 35-55(1)(b) will be exercised for such Growers to whom the loss deferral rule would otherwise apply, for the income years ending 30 June 2009 to 30 June 2022. Exercise of the discretion in this case however is also conditional on the Project being carried out in the manner described in paragraphs 48 to 98 of this Ruling, but will allow Growers referred to who make losses, to offset them against their other assessable income in the income years in which those losses arise.

## Prepayment provisions and anti-avoidance provisions

### **Sections 82KZM, 82KZME, 82KZMF and 82KL and Part IVA of the ITAA 1936**

47. Where a Grower is accepted to participate in the Project set out at paragraphs 48 to 98 of this Ruling, the following provisions of the ITAA 1936 have application as indicated:

- interest paid by a Grower to either Arwon or MIS does not fall within the scope of sections 82KZM, 82KZME and 82KZMF;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

## Scheme

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48. The scheme that is the subject of this Ruling is specified below. This scheme incorporates the following:

- Application for a Product Ruling as constituted by documents provided on 3 September 2008, 12 September 2008, 7 October 2008, 12 November 2008, 19 November 2008, 20 November 2008, 26 November 2008, 10 December 2008, 15 December 2008, 19 December 2008, 6 January 2009, 15 January 2009, 16 January 2009, 2 February 2009, 3 February 2009, 13 February 2009, 17 February 2009, 18 February 2009 and 19 February 2009;
- Draft Product Disclosure Statement (PDS) for the TFS Sandalwood Project 2009 issued by TFS Properties Ltd (Responsible Entity), received 19 February 2009;
- Draft **Constitution** for the TFS Sandalwood Project 2009, received 19 February 2009;
- Draft **Lease and Management Agreement** between the Responsible Entity, TFS Leasing Pty Ltd (Lessor) and the Grower, received 19 February 2009;
- Draft Compliance Plan for the TFS Sandalwood Project 2009, received 3 September 2008;
- Draft Plantation Management Agreement between the Responsible Entity and Tropical Forestry Services Ltd, received 3 September 2008;

- Draft TFS Properties Head Lease between the Responsible Entity, TFS Leasing Pty Ltd and Commonwealth Bank of Australia Ltd, received 3 September 2008;
- Draft **Finance Package** for the TFS Sandalwood Project 2009, received 3 September 2008;
- Policy and Procedures for Arwon Finance Pty Ltd, received 3 September 2008;
- Draft **Loan Agreement** between Arwon Finance Pty Ltd and the Borrower, received 3 September 2008 and amendment received on 17 February 2009;
- Draft **Loan Agreement** between MIS Funding No. 1 Pty Ltd and the Borrower, received 3 September 2008;
- Amendment and Restatement deed and Annexure A therein titled – 'Multi Option Facility Agreement' for the TFS Sandalwood Project, received 15 September 2008;
- Origination and Management Deed between MIS Funding No. 1 Pty Ltd, Arwon Finance Pty Ltd and Tropical Forestry Services Ltd, received 3 September 2008;
- Summary of Terms and Conditions for Arwon Finance Pty Ltd, received on 19 December 2008; and
- Harvesting and Processing Plantation Grown Indian Sandalwood for Tropical Forestry Services Ltd, dated April 2005.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

49. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

50. The documents highlighted are those that a Grower may enter into. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the scheme. The effect of these agreements is summarised as follows.

**Overview**

51. The main features of the Project are as follows:

Location	Ivanhoe Plain and Kingston Rest, Kununurra, Western Australia
Species of Trees to be planted under the scheme	Indian Sandalwood ( <i>Santalum album</i> )
Term of the Project	Approximately 15 years
Date all Trees are due to be planted on scheme land	31 December 2010
Number of Trees per hectare	Targeted survival rate of approximately 433 trees per hectare
Number of hectares offered for cultivation	Approximately 950 hectares
Size of each 'forestry interest'	0.167 hectares
Minimum allocation of forestry interests per Grower	One forestry interest (Sandalwood Lot)
Minimum subscription	Nil
Initial cost	\$12,925 for up to 5 lots and \$12,375 for 6 lots or more
Ongoing costs and other costs	Annual Fee and Rent (if not deferred) and insurance premiums. Costs of Harvest and Processing, Selling and Marketing Fees and Incentive Fee

52. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. TFS Properties Ltd has been issued with an Australian Financial Service Licence 241192 and will be the Responsible Entity for the Project.

53. The Project involves establishing an Indian Sandalwood plantation. Approximately 14 years after the Establishment Period the sandalwood will be Harvested, Processed and then sold.

54. The Project may be conducted at two main locations. The Ivanhoe Plain area is situated approximately 7 Kilometres north of Kununurra and 'Kingston Rest' is a property located approximately 70 kilometres south west of Kununurra.

55. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer pertains to 5,700 Sandalwood Lots of 0.167 hectares each. There is no minimum subscription for the Project.

56. An entity that participates in the Project will do so by acquiring an interest in the project on or before 30 June 2009, which will consist of a minimum of one Sandalwood Lot. For Joint Venture Growers, the minimum allocation is two Sandalwood Lots.

57. Applicants execute a power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints the Responsible Entity to execute, on behalf of the Grower, the Constitution, which includes the Lease and Management Agreement and any other documents required to hold an interest in the Project.

58. The Sandalwood Lots will be planted out with sandalwood seedlings at a rate that the site can support when trees are 14 years old. TFS has set a survival target of approximately 433 trees per hectare. Water for the Ivanhoe Plain section of the Project will be from Lake Argyle, where water for the Kingston Rest property will be from its own private dam.

59. The Manager of the Project will provide the irrigation system in accordance with silvicultural standards suitable for sandalwood plantations.

60. Each Grower will use their Sandalwood Lot(s) for the purpose of carrying on a business of cultivating and harvesting sandalwood trees and selling the harvested timber.

### **Constitution**

61. The Constitution establishes the Project, and sets out the terms and conditions under which TFS Properties Ltd agrees to act as Responsible Entity and manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

62. In order to acquire an interest in the Project, the Grower must make an application for a Sandalwood Lot(s) pursuant to the PDS.

63. Under the terms of the Constitution the Responsible Entity will create two separate funds. Application Moneys will be paid into an Application Fund and the proceeds of the sale of Forest Produce will be paid into a Proceeds Fund.

64. The Application Moneys will be released from the Application Fund and applied towards payment of the fees payable under the Lease and Management Agreement when the Responsible Entity is reasonably satisfied that the criteria specified in clause 14 of the Constitution have been met.

## Compliance Plan

65. As required by the *Corporations Act 2001*, the Responsible Entity has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that the Responsible Entity manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

## Head Lease

66. The owner of the Project land will enter into a Head Lease with TFS Leasing Pty Ltd, in respect of this land.

67. TFS Leasing Pty Ltd will sub-lease the Project land to the Growers in the Project, for the purpose of commercial silviculture of Indian sandalwood Trees.

## Lease and Management Agreement

68. Growers participating in the scheme will enter into a Lease and Management Agreement with TFS Leasing Pty Ltd as the Lessor and TFS Properties Ltd as the Responsible Entity. Growers are granted an interest in the land in the form of a Lease to use their Sandalwood Lot(s) for the purposes of conducting their afforestation business. The Lease term will be for a period of approximately 15 years when the final distribution of sale proceeds is made to the Grower or until the Project is terminated. Growers are specifically granted rights to harvest timber on their Sandalwood Lot(s) for this purpose. The Lease is granted upon the terms and conditions outlined in the Lease and Management Agreement.

69. Under the Lease and Management Agreement each Grower appoints the Responsible Entity to perform the Services and the Responsible Entity accepts the appointment. The Responsible Entity will supervise and manage all silvicultural activity on behalf of the Grower in accordance with good silvicultural practice. Item 7 of the Schedule to the Lease and Management Agreement specifies the Establishment Services (item 7A) and On-going Services (item 7B) to be performed by the Responsible Entity.

70. The Establishment Services include:

- acquire appropriate seeds and seedlings;
- carry out weed control, surveying and ground preparation for each Sandalwood Lot;
- plant sandalwood seedlings on each Sandalwood Lot at a rate which would reasonably be expected to provide an average survival rate of 433 trees per hectare, at the end of the third year after the Commencement Date;
- plant on the Sandalwood Lot host trees;

- irrigate, cultivate, tend, cull, prune, fertilise, spray, as required in support of planting; and
- use all reasonable measures to keep the Sandalwood Lot, free of infestation from rabbits and other vermin.

71. The Ongoing Services include:

- irrigate, cultivate, tend, cull, prune, fertilise, replant, spray, maintain and otherwise care for the Trees as and when required;
- plant on the relevant Sandalwood Lot such other Trees as it may consider to be necessary to enable or encourage the growth of the sandalwood seedlings;
- replant the relevant parts of the Plantation with sufficient seedlings or Trees if the Responsible Entity deems necessary, with the replanting fee to be paid by the Responsible Entity;
- use all reasonable measures to keep the Sandalwood Lot free of infestation from rabbits and other vermin;
- furnish to the Grower reports as and when required;
- carry out, or arrange to be carried out, the Harvest and Processing of the Trees in a manner which maximises the return for the relevant Grower; and
- arrange for the sale of Forest Produce.

### **Pooling of Timber and Grower's Entitlement to Net Proceeds**

72. In Years 13 and 14 the Trees will be harvested and processed. The Responsible Entity will Harvest and Process, or engage a suitably qualified person to Harvest and Process the percentage of trees as set out in the Lease and Management Agreement, unless the Responsible Entity believes that it would be in the best interests of the Growers to defer the Harvests to a later date.

73. The Responsible Entity is appointed to market and sell the Forest Produce on behalf of the Growers who do not make an election under clause 15 of the Lease and Management Agreement (defined for the purposes of this Ruling as 'Non-Electing Growers') on such terms and conditions as the Responsible Entity considers appropriate.

74. The Lease and Management Agreement sets out provisions relating to the pooling of Growers' Timber and the distribution of proceeds from the sale of the Timber (clause 18 of the Lease and Management Agreement).

75. The Responsible Entity must ensure that the Gross Sale Proceeds are deposited into the Proceeds Fund (clause 18 of the Lease and Management Agreement). The Responsible Entity will pay any outstanding fees from the Proceeds Fund, with the remaining balance to be paid to the Grower in accordance with each Grower's Proportional Share.

## **Fees**

### ***Establishment fee***

76. The Establishment Fee payable to the Responsible Entity on application is \$12,925 for up to 5 Sandalwood Lots and \$12,375 per lot for 6 lots or more.

### ***Annual Fee and Rent***

77. The amount of the Annual Fee is \$1,100 per lot and the Rent is \$220 per lot. The amounts are payable on or before 14 January in each financial year, following the financial year in which the Establishment Period ends (Clause 19.2 of the Lease and Management Agreement).

78. The Annual Fee and Rent will be indexed in each financial year, following the first financial year in which the Annual Fee and Rent are payable (item 9B of the Schedule to the Lease and Management Agreement).

79. Where a Grower's Annual Fee and Rent are deferred, the Responsible Entity is entitled, for each financial year the Fees are deferred, a percentage of Gross Proceeds of sale as follows:

Years 1 – 2	3.3% per year
Years 3 – 6	2.2% per year
Years 7 -12	1.1% per year

80. If all, or substantially all of the trees on the Grower's Sandalwood Lots are destroyed before the Harvest can take place, the Grower will be liable to pay an amount equal to 55% of the Annual Fees and Rent for all years prior to the destruction (clause 22.6 of the Lease and Management Agreement).

### ***Other fees***

81. The following amounts are payable to the Responsible Entity from the Project's proceeds:

- Costs of Harvest and Processing (clause 18.2 of the Lease and Management Agreement);

- Selling and Marketing Fees, being 5.5% of the Gross Sale Proceeds (clause 18.2 of the Lease and Management Agreement); and
- an Incentive Fee equal to 33% of the amount (if any), by which the Net Proceeds of Sale exceed the Target Net Proceeds of Sale for each Sandalwood Lot (clause 18.3 of the Lease and Management Agreement).

### ***Insurance***

82. The Responsible Entity will insure the Plantation against fire until the end of the Establishment Period. Thereafter, the Responsible Entity will arrange insurance of the Sandalwood Lot(s) on behalf of the Grower, if so requested, to cover against fire and other usual risks. The cost of such insurance will be payable to the Responsible Entity by the Grower (clause 22 of the Lease and Management Agreement).

### **Joint Venture**

83. The Project will also allow two Growers to enter into a Joint Venture. They will be bound by the Joint Venture terms set out in the Joint Venture Agreement attached to the PDS. The Joint Venture option is only available for those Growers who enter the Annual Investment Option and do not defer any of the Annual Fees and Rent.

84. Under this Joint Venture:

- the first Joint Venture Grower will be responsible for procuring the preparation and establishment of the Sandalwood Lot by payment of the Establishment Fee;
- the second Joint Venture Grower will be responsible for procuring the ongoing provision of land and maintenance of the Sandalwood Lot by payment of the Annual Fees and Rent; and
- each Joint Venture Grower will be responsible for the fees payable out of the Project proceeds (clause 4 of the Joint Venture Agreement contained in the PDS).

85. The Joint Venture terms provide that each Joint Venture Grower will be entitled to 50% each of the Joint Venture Property (a minimum allocation of two lots) and, in particular, all saleable timber from the Sandalwood Lots.

### **Finance**

86. To finance all or part of the cost of their forestry interest a Grower can:

- apply for the '12 Months Interest Free Loan' with Arwon;
- enter into the 'Finance Package' with Arwon or MIS; or

- borrow from an independent lender external to the Project.

87. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with Arwon or MIS that materially differs from that set out in the documentation provided with the application for this Product Ruling. A Grower who enters into a finance arrangement with an independent lender external to the Project other than MIS may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

88. A Grower cannot rely on any part of this Ruling if the Establishment Fee is not paid in full on or before 30 June 2009, by the Grower or, on the Grower's behalf, by a lending institution.

### ***12 Months Interest Free Loan offered by Arwon***

89. A Grower choosing to pay the Establishment Fee by entering into the 12 Month Interest Free Loan arrangement with Arwon must complete the application form attached to the PDS.

90. Growers who enter into a Loan Agreement with Arwon are required to pay a deposit of 20% of the Principal sum on Application.

91. The balance after the 20% deposit is repayable in equal monthly instalments and must be paid within twelve months from the Application being accepted.

### ***Finance offered by Arwon and MIS***

92. A Grower can finance the cost of their Establishment Fee by borrowing that amount from Arwon or MIS.

93. The Grower will be bound by the terms and conditions of the Loan Agreement entered into with either Arwon or MIS.

94. The finance from both Arwon and MIS is available under the following arrangement:

- principal and interest (up to 10 years);
- interest only (up to 3 years) – not available for Arwon; and
- total term (maximum overall term – 10 years)

95. The following conditions apply to the above loan arrangements:

- monthly payments of interest only or monthly repayments of principal and interest;
- interest payable on Arwon loans – a fixed rate taking the Reserve Bank of Australia cash rate, plus a margin of up to 7% per annum;

- interest payable on MIS loans – a fixed rate taking the Australian Financial Markets Association base rate, plus a margin of up to 7% per annum;
- a deposit of 10% is required for Arwon loans;
- an Administration Fee of \$250 plus 0.5% of the Principal Sum; and
- stamp duty, as applicable.

96. Arwon will only provide loans to Growers where it has sufficient funds to do so.

97. The loans from Arwon and MIS are made on a full recourse commercial basis and normal debt recovery procedures, including legal action, will be taken in the case of defaulting borrowers. The loans will be secured by a charge over the Grower's interest(s) in the Project.

98. This Ruling does not apply if the finance arrangement entered into by the Grower includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Arwon or MIS, are involved or become involved in the provision of finance to Growers for the Project.

## Appendix 1 – Explanation

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**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### Structure of the Project

99. In return for payment of the Establishment Fees and the other fees and expenses required under the Project agreements during the term of the Project, Growers will hold a forestry interest in a 'forestry managed investment scheme'. The Project qualifies as a forestry managed investment scheme because its purpose is for 'establishing and tending Trees for felling in Australia' (see subsection 394-15(1)).

100. Under the Constitution of the Project and the other supporting agreements, the holding of a forestry interest in the Project gives each Grower a right to a share in the proceeds of the harvest of the Trees grown on the Project land. That share of proceeds is determined using the number of forestry interests held by a Grower as a proportion of all forestry interests held by 'participants'<sup>7</sup> in the Project.

### Is the Grower carrying on a business?

101. The general indicators used by the Courts in determining whether an entity is carrying on a business are set out in Taxation Ruling TR 97/11 Income Tax: am I carrying on a business?

102. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Ruling, the Full Federal Court in *Hance v. FC of T; Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

103. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 2 to 6 of this Ruling), who stay in the Project until its completion, will be carrying on a business of primary production involving afforestation activities.

### Allowable deductions

#### **Sections 8-5, 12-5, 394-10 and 394-20**

104. Section 8-5 allows certain specific deductions to be claimed against the assessable income of a taxpayer. The list of specific deductions is shown in a table in section 12-5 and includes payments under a forestry managed investment scheme that meet the requirements of subsection 394-10(1).

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<sup>7</sup> The term 'participant' is defined in subsection 394-15(4).

**The '70% DFE rule'*****Paragraph 394-10(1)(c) and section 394-35***

105. The threshold test for Growers in the Project to be entitled to deductions under subsection 394-10(1) is the '70% DFE rule' in paragraph 394-10(1)(c). Under that rule it must be reasonable to expect that on 30 June 2009, the amount of 'direct forestry expenditure'<sup>8</sup> under the scheme will be no less than 70% of the amount of payments under the scheme.<sup>9</sup>

106. The amount of all direct forestry expenditure is the amount of the net present value of all direct forestry expenditure that the Responsible Entity, as 'forestry manager'<sup>10</sup> of the Project, has paid or will pay under the scheme (subsection 394-35(2)).

107. The 'amount of payments under the scheme' is the amount of the net present value of all amounts (that is, the fees and expenses) that all current and future participants in the scheme have paid or will pay under the scheme (subsection 394-35(3)).

108. Both of the above amounts are determined as at 30 June 2009 taking into account:

- the timing requirements in subsections 394-35(4) and (5);
- any amounts that can reasonably be expected to be recouped (subsection 394-35(6));
- the discount rate in subsection 394-35(7); and
- the market value rule in subsection 394-35(8).

109. Applying all of these requirements to the information provided by the Responsible Entity of the Project the Commissioner has determined that the Project will satisfy the 70% DFE rule on 30 June 2009.

***The other elements for deductibility under subsection 394-10(1)***

110. The requirement of paragraph 394-10(1)(d) that Growers in the Project not have day to day control over the operation of the Project (despite having a right to be consulted or give directions) is clear from the Project agreements. As are the alternative elements of paragraph (e) relating to the number of Growers in the scheme and the Responsible Entity's role in other managed investment schemes.

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<sup>8</sup> See section 394-45.

<sup>9</sup> See subsection 394-35(1) and section 394-40.

<sup>10</sup> Defined in section 394-15(2).

111. The final requirement for deductibility requires all the Project Trees to be established within 18 months of 30 June 2009 (see paragraph 394-10(1)(f) and subsection 394-10(4)). The planting timeline provided with the application for this Ruling by the Responsible Entity indicates that all the Trees required to be established under the scheme will be planted on the Project land by 31 December 2010.

112. Accordingly, subject to the qualifications set out below, amounts paid by Growers to the Responsible Entity in relation their forestry interests satisfy all requirements of subsection 394-10(1). The amounts are allowable deductions in the income year in which they are paid (subsection 394-10(2)).

113. Amounts that are allowable deductions under Division 394 cannot also be claimed as deductions under section 8-1 (section 8-10).

114. Where a Grower does not fully pay an amount, or the amount is not fully paid on their behalf in an income year (see section 394-20), it is deductible only to the extent to which it has been paid. The unpaid balance is then deductible in the year or years in which it is actually paid. This may occur, for example, if all or part of the amount is borrowed and the financier fails to transfer the funds to the account of the forestry manager on or before 30 June in an income year.

### ***Loss of deductions previously allowed under section 394-10(1)***

115. Two situations may lead to a loss of deductions previously allowed to Growers.

116. The first of these situations will occur if the Responsible Entity fails to establish the Trees on the Project land within 18 months. Where this occurs the Responsible Entity is required to notify the Commissioner within 3 months of the end of the 18 month period (section 394-10 of Schedule 1 to the TAA).

117. The second situation where a Grower may have deductions disallowed is where a CGT event happens to their forestry interest within 4 years from 30 June of the income year they paid an amount under the scheme, for example, the Project Subscription Moneys (see subsection 394-10(5)).

118. For the purposes of this provision, the Commissioner is able to amend the assessment of a Grower within 2 years of the relevant CGT event happening. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 394-10(6) of the ITAA 1997).

119. Where a CGT event happens to the forestry interest of a Grower within 4 years, the market value of the forestry interest at the time of the CGT event or the decrease in the market value of the forestry interest as a result of the CGT event is still included in the assessable income of the Grower by section 394-25. The amount must be included in assessable income even where an amendment has disallowed or may disallow the deductions previously allowed under section 394-10.

### **Interest on loans to finance the forestry interest of a Grower**

#### **Section 8-1**

120. Where a Grower borrows money to fund their investment in the Project the deductibility of the interest incurred on the loan monies falls for consideration under the general deduction provisions of section 8-1. If the interest incurred by the Grower is deductible under the first positive limb in subsection 8-1(1) there is no requirement to consider whether it is also deductible under the second positive limb of that provision. Court decisions show that the same basic test applies to both limbs (see *Ronpibon Tin NL v. Federal Commissioner of Taxation* (1949) 78 CLR 47; (1949) 8 ATD 431, at CLR 56; ATD 435).

121. Under the first positive limb of subsection 8-1(1) the interest incurred by a Grower will be deductible if it is incurred in gaining or producing a Grower's assessable income and is not excluded by one of the negative limbs in subsection 8-1(2).

The question of whether an outgoing [is] ... incurred in gaining or producing the assessable income is a question of characterisation (*Fletcher & Ors v. Federal Commissioner of Taxation* (1991) 173 CLR 1; 91 ATC 4950; (1991) 22 ATR 613, at CLR 17; ATC 4957; ATR 621).

To the extent that ... outgoings of interest ... can properly be characterised as of a kind referred to in the first limb of [section 8-1] they must draw their character from the use of the borrowed funds (*Fletcher*, at CLR 19; ATC 4958; ATR 623).

[T]he characterisation of interest will generally be ascertained by reference to the objective circumstances of the use to which the borrowed funds are put (*Federal Commissioner of Taxation v. Roberts* (1992) 37 FCR 246; 92 ATC 4380; (1992) 23 ATR 494, at FCR 257; ATC 4388; ATR 504).

122. Growers in the Project use the borrowed funds to acquire a forestry interest in a forestry managed investment scheme. The holding of that forestry interest will produce assessable income for a Grower in the form of the proceeds of a full or part disposal of the forestry interest or, as a proportionate share of the harvest proceeds. The tests of deductibility of interest under the first limb of subsection 8-1(1) are, therefore, met unless one of the exclusions in subsection 8-1(2) applies.

123. For the purposes of this Project, only the capital exclusion in paragraph 8-1(2)(a) is relevant. The use of borrowed funds to purchase a capital asset, such as a forestry interest, does not mean that the interest outgoings are on capital account (see *Steele v. Federal Commissioner of Taxation* (1999) 197 CLR 459; 99 ATC 4242; (1999) 41 ATR 139, at CLR 470; ATC 4249; ATR 148).

Interest [is a] periodic payment for the use, but not the permanent acquisition of a capital item. Therefore, a consideration of the often-cited three matters identified by Dixon J in *Sun Newspapers Ltd v. FC of T ... assigns interest ... to revenue (Australian National Hotels Ltd v. Federal Commissioner of Taxation* (1988); 19 FCR 234; 88 ATC 4627; (1988) 19 ATR 1575, at FCR 241; ATC 4633-4634; ATR 1582).

124. Therefore, the capital exclusion in subsection 8-1(2) does not apply to the interest and, subject only to the potential application of the prepayment provisions, a deduction for the interest can be claimed in the year in which it is incurred (Note: the meaning of 'incurred' is explained in Taxation Ruling TR 97/7.)

## **Prepayment provisions**

### **Sections 82KZL to 82KZMF**

125. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement that will not be wholly done within the same year of income as the year in which the expenditure is incurred. For schemes such as this Project, the main operative provisions are sections 82KZMD and section 82KZMF of the ITAA 1936.

126. However, subsection 394-10(7) of the ITAA 1997 specifically provides that sections 82KZMD and section 82KZMF of the ITAA 1936 do not affect the timing of amounts deductible under section 394-10 of the ITAA 1997.

127. Accordingly, under the scheme to which this Product Ruling applies, only deductions for interest payable under a loan with Arwon or MIS will potentially fall within the prepayment provisions. However, the conditions applying to the loans to which this Ruling applies (see paragraphs 92 to 97 of this Ruling) do not require any prepayment of interest over the term of the loan. Accordingly, the prepayment provisions have no application to Growers who enter into those loans.

128. If a Grower chooses to prepay interest on these loans that Grower may request a private ruling on how the prepayment provisions will affect the timing of their interest deduction.

**Borrowing costs****Section 25-25**

129. A deduction is allowable for expenditure incurred by a Grower in borrowing money to the extent that the borrowed money is used for the purpose of producing assessable income (subsection 25-25(1)).

130. In this Project, the Administration Fee payable to either Arwon or MIS, is incurred to borrow money that is used or is to be used solely for income producing purposes during each income year over the term of the loan.

131. The deduction for each borrowing expense is spread over the period of the loan or 5 years, whichever is the shorter (subsection 25-25(4)).

**Assessable income, CGT events and the forestry interests of Growers who are initial participants****Sections 6-10, 10-5 and 394-25**

132. Section 6-10 includes in assessable income amounts that are not ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 and include amounts that are included in the assessable income of initial participants of a forestry managed investment scheme by subsection 394-25(2).

**Subsection 394-25(2)**

133. Where a CGT event<sup>1</sup> happens to a forestry interest held by a Grower in this Project, subsection 394-25(2) includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted an amount under section 394-10; or
- the Grower would have met the condition immediately above if subsection 394-10(5) had not applied to disallow the deduction(s). Paragraphs 34 to 36 and paragraphs 117 to 119 of this Ruling explain when deductions will be disallowed under subsection 394-10(5).

**Market value rule applies to CGT events**

134. If, as a result of the CGT event the Grower either:

- no longer holds the forestry interest; or

- otherwise – where the Grower continues to hold the forestry interest, but there is a decrease in the market value of the forestry interest;

then the market value of the forestry interest at the time of the event, or the reduction of the market value of the forestry interest as a result of the event, is included in the assessable income of the Grower in the income year in which the CGT event happens (subsection 394-25(2)). A market value rule applies rather than the amount of money actually received from the CGT event (subsection 394-25(3)). However, the market value and the actual amount of money received may be the same.

135. The market value amount included in the assessable income of a Grower is the value of the forestry interest just before the 'CGT event', or where the Grower continues to hold their interest after the event, the amount by which the market value of the forestry interest is reduced as a result of the CGT event (subsection 394-25(2)).

136. Section 394-25 will apply where the forestry interest is sold, is extinguished, or ceases, and will include CGT events such as a full or partial sale of the forestry interest or from a full or partial clear-fell harvest of the Trees grown under the Project.

## **Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion**

137. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the for the income years ending 30 June 2009 to 30 June 2022, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non commercial business losses: Commissioner's discretion. Based on the evidence supplied, the Commissioner has determined that for those income years:

- it is because of its nature that the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

138. A Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

139. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) for Growers who will stay in the project until its completion is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling, a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

### **Section 82KL – recouped expenditure**

140. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Insufficient additional benefits will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

### **Part IVA – general tax avoidance provisions**

141. For Part IVA of the ITAA 1936 to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

142. The Project will be a scheme and a Grower will obtain a tax benefit from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 29 to 41 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

143. Growers to whom this Ruling applies will derive assessable income from holding or disposing of their forestry interest in the Project. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that Growers will enter into the scheme for the dominant purpose of obtaining a tax benefit.

## Appendix 2 – Detailed contents list

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## References

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*TR 97/7; TR 97/11; TR 98/22;  
TR 2007/6*Subject references:*

- 4 year holding period
- 70 per cent DFE rule
- carrying on a business
- DFE
- direct forestry expenditure
- forestry interest
- forestry MIS
- interest expenses
- managed investment schemes
- market value substitution rule
- payments under the scheme
- producing assessable income
- product rulings
- reasonable expectation
- tax avoidance
- taxation administration

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- ITAA 1936 82KL
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NO: 2008/16033  
ISSN: 1441-1172  
ATOlaw topic: Income Tax ~~ Product ~~ timber