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Ruling Compendium – TD 2010/14 and TD 2010/15

This is a compendium of responses to the issues raised by external parties to draft Taxation Determinations:

- TD 2009/D13 Income tax: does a failure to plant trees intended to be established under a forestry scheme affect the timing of deductions for expenditure on seasonally dependent agronomic activities where section 8-1(1)(b) of the *Income Tax Assessment Act 1997* and section 82KZMG of the *Income Tax Assessment Act 1936* have previously been ruled to be satisfied?
- TD 2009/D14 Income tax: does failure to plant all the trees intended to be established under a forestry managed investment scheme covered by Division 394 of the *Income Tax Assessment Act 1997* mean that no deduction is allowable under Division 394 in respect of a participant's initial contribution to the scheme?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	GENERAL COMMENTS ON TD 2009/D13 We agree with the Commissioner's position in allowing an upfront deduction for expenditure incurred under subsection 82KZMG(2) of the ITAA 1936, notwithstanding that the planting of the trees under the scheme has not occurred due to reasons outside the control of the parties.	No response is required.
2.	SPECIFIC COMMENTS ON TD 2009/D13 Outside the control of the parties At paragraph 2 of TD 2009/D13, if it transpires that the thing is not done, for reasons 'outside the control of the parties' the timing of the deduction would be governed by section 82KZMG of the ITAA 1936. We note that the 'outside the control of the parties' concept is not legislated, however, having regard to the comments in the Assistant Treasurer's Media Release No. 74, we consider the approach of the Commissioner to be appropriate.	No response is required.

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3.	<p>Further, with the deduction being subject to section 82KZMG of the ITAA 1936, we suggest that the Commissioner confirms that only subsection 82KZMG(2) of the ITAA 1936 needs be satisfied rather than all the relevant conditions under subsection 82KZMG(1) of the ITAA 1936.</p> <p>If subsections 82KZMG(4) and (5) of the ITAA 1936 were applicable, we do not consider subsection 82KZMG(1) of the ITAA 1936 would apply as all the planting would not have been achieved during the 'establishment period'.</p>	<p>The ATO has adjusted paragraph 2 of the Determination to clarify the operation of subsection 82KZMG(2) of the ITAA 1936.</p>
4.	<p>We suggest a comment be made that section 82KZMG only applies where the eligible service period is no more than 12 months, pursuant to paragraph 82KZMG(2)(b) of the ITAA 1936. If that period exceeds 12 months, then the investor would need to rely on sections 82KZME and 82KZMGF of the ITAA 1936.</p>	<p>Paragraph 6 already explains that section 82KZMG of the ITAA 1936 only applies where the eligible service period is no more than 12 months. It is considered unnecessary to also state that if the period exceeds 12 months then the investor would need to rely on sections 82KZME and 82KZMGF of the ITAA 1936. This is because the Determination applies to investors in schemes covered by product rulings where section 82KZMG of the ITAA 1936 has been ruled to be satisfied.</p>
5.	<p>The example used at paragraph 3 only relates to a situation where an administrator or liquidator has been appointed.</p> <p>To provide certainty to taxpayers, we suggest that other examples showing circumstances 'outside the control of the parties' be outlined. We envisage such examples to include natural disasters such as drought, fire or floods which may prevent the planting of trees from proceeding.</p>	<p>Agreed. An example dealing with natural disaster has been added.</p>
6.	<p>Application of section 8-1 of the <i>Income Tax Assessment Act 1997</i></p> <p>Paragraph 2 states that the expenditure may 'still be relevantly incurred for the purposes of the general deduction provision, section 8-1 of the ITAA 1997, at the time that the expenditure was made'.</p>	<p>This is a valid comment but it has not been taken on board as it over complicates the desired message.</p>

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6. cont	<p>For certainty, we suggest that an additional comment be inserted explaining that the expenditure, whilst incurred, would be subject to all of the section 8-1 of the ITAA 1997 requirements and the timing of that deduction determined under section 82KZMG of the ITAA 1936 (that is, an upfront deduction available where the relevant conditions under that provision apply).</p> <p>In particular, comment should be provided as to the possibility of a deduction being denied on the basis that the investor is not carrying on a business or the expenditure is on capital account.</p> <p>We suggest that such comments be inserted both in the body of the determination and at Appendix 1.</p>	
7.	<p>GENERAL COMMENTS ON TD 2009/D14</p> <p>The Entities agree with the Commissioner's position in disallowing a tax deduction for expenditure incurred under Division 394 of the ITAA 1997 on the basis that there are legislative limitations in that provision which would not allow an upfront deduction to the investor.</p> <p>Further we agree that, provided that the limbs under section 8-1 of the ITAA 1997 are met, the deduction may be available but spread over the eligible service period under Subdivision H of Division 3 of Part III of the ITAA 1936.</p>	No response is required to this general comment on TD 2009/D14.
8.	<p>SPECIFIC COMMENTS ON TD 2009/D14</p> <p>Reliance on section 8-1 ITAA97</p> <p>Paragraph 2 in TD 2009/D14 states that where an upfront deduction is not available, the taxpayer may rely on the general deduction provisions.</p> <p>Notwithstanding that the investor may be considered to be carrying on a business, a deduction may be denied to the extent that the expenditure is on capital account pursuant to paragraph 8-1(2)(b) of the ITAA 1997, or otherwise fails to satisfy the section 8-1 requirements. We suggest the position be clearly stated.</p>	This is a valid comment but it has not been taken on board as it over complicates the desired message.

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Issue No.	Issue raised	ATO Response/Action taken
8. cont	<p>To the extent that section 8-1 of the ITAA 1997 applies, such amounts may be subject to the operation of Subdivision H of Division 3 of Part III of the ITAA 1936. Section 82KZMG of the ITAA 1936 would not apply as the planting of the trees would exceed the 12 month eligible service period allowed under that provision.</p> <p>In this case, the general rules under sections 82KZME and 82KZMF of the ITAA 1936 may apply, and any deduction would be spread over the eligible service period. We agree with that position.</p>	
9.	<p>Inconsistent application between TD 2009/D14 and TD 2009/D13</p> <p>The position in TD 2009/D14 should be contrasted to that in TD 2009/D13 where the taxpayer is entitled to an upfront deduction for expenditure incurred where the planting of trees has not occurred due to circumstances genuinely outside the control of the relevant parties.</p> <p>We acknowledge that a deduction is allowed under TD 2009/D13 on the basis that the eligible service period is no more than 12 months compared with the requirement under subsection 394-10(4) of the ITAA 1997 which, in broad terms, requires the trees to be planted within 18 months.</p>	Agree that the position in TD 2009/D14 stands in contrast to that in TD 2009/D13.
10.	<p>Due to the legislative requirements in Subdivision H of Division 3 of Part III of the ITAA 1936, a deduction for the expenditure may be spread over the eligible service period where Division 394 of the ITAA 1997 does not apply. This outcome could only be avoided if the impending amendments outlined in the Assistant Treasurer's Media Release No. 74 addressed this inconsistency.</p>	Comment acknowledged.