



***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 cover sheet is provided for information only. It does not form part of *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 document has been finalised by [TD 2010/15](#).

 There is a Compendium for this document: [TD 2010/14EC](#); [TD 2010/15EC](#) .



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## Draft Taxation Determination

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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?

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

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation 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.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### Ruling

1. Yes. Failure to plant in this circumstance means that the conditions under which an amount can be deducted under Division 394 of the *Income Tax Assessment Act 1997* (ITAA 1997) are not satisfied.
2. However, where a business is or was being carried on, the amount incurred which fails the test in Division 394, may nonetheless still be deductible under section 8-1 of the ITAA 1997. Such amounts will be subject to the operation of Subdivision H of Division 3 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) (Subdivision H).

### Example

3. *Zane paid an amount under a forestry managed investment scheme in 2008. Due to the insolvency of the forestry manager, it is apparent that all the trees intended to be established under the scheme will not be planted by 31 December 2009. The content of the agreements indicate that a business is also being carried on. The amounts incurred remain deductible under section 8-1 of the ITAA 1997 and are subject to the operation of Subdivision H.*

# TD 2009/D14

## **Class of persons**

4. This draft Determination applies to participants in schemes that are either subject to a current product ruling, or were subject to a product ruling which has been withdrawn with effect from immediately before any material difference occurred.

## **Date of effect**

5. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**

28 October 2009

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## Appendix 1 – Explanation

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

### Explanation

6. Under subsection 394-10(1) of the ITAA 1997, a deduction is allowed for amounts paid to acquire a forestry interest provided certain conditions are met, one of which is that subsection 394-10(4) of the ITAA 1997 is satisfied. Subsection 394-10(4) provides that if 18 months have elapsed since the end of the year of income in which amounts were first paid under the scheme and all the trees intended to be established have not been established then the conditions for deduction have not been met.

7. However, where the conduct of the forestry managed investment scheme also constitutes the carrying on of a business, expenditure may also have been deductible under section 8-1 of the ITAA 1997. In the event that expenditure satisfies the tests in both provisions, section 8-10 of the ITAA 1997 operates to ensure that the deduction is allowed under the most appropriate provision. That is, if the deduction was to be allowed under Division 394 then section 8-10 would prevent the amount also being claimed under section 8-1. However, in the situation where a business is being carried on, and a deduction is not allowable under Division 394, such as where planting did not occur within the prescribed time, then a deduction may be allowable under section 8-1 in respect of the expenditure.

8. Where agreements entered into are of a similar nature to those entered into by the taxpayers in *Hance v. FC of T*; *Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 it is likely to be concluded that a business is being carried on. In *Commissioner of Taxation v. Sleight* [2004] FCAFC 94; (2004) 136 FCR 211; 2004 ATC 4477; (2004) 55 ATR 555 the business of the taxpayer was found to have commenced at the time of entering into the relevant agreements. Refer to the judgment of Hill J at paragraphs 9 and 61.

9. The impact of Subdivision H will need to be considered in respect of any amounts allowable under section 8-1 of the ITAA 1997. Section 82KZMG of the ITAA 1936 will not apply if the period for providing establishment services extends over the 18 month period envisaged by Division 394. If this is the case, then the more general rules under sections 82KZME and 82KZMF of the ITAA 1936 may apply, and any deduction would be spread over the eligible service period (as defined in section 82KZL of the ITAA 1936).

## Appendix 2 – Your comments

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10. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

11. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at [www.ato.gov.au](http://www.ato.gov.au)

Please advise if you do not want your comments included in the edited version of the compendium.

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- advance expenses & payments
- afforestation expenses
- forest operations
- forestry
- prepayments
- primary production

*Legislative references:*

- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL

- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 82KZMG
- ITAA 1997 8-1
- ITAA 1997 8-10
- ITAA 1997 Div 394
- ITAA 1997 394-10(1)
- ITAA 1997 394-10(4)

*Case references:*

- Commissioner of Taxation v. Sleight [2004] FCAFC 94; (2004) 136 FCR 211; 2004 ATC 4477; (2004) 55 ATR 555
- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

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ATO references

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