



PR 2000/82 - Income tax: ITC Pulpwood Project - 2000 Prospectus No. 2 - Supplementary Prospectus

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Product Ruling

Income tax: ITC Pulpwood Project – 2000 Prospectus No. 2 -Supplementary Prospectus

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Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons and Qualifications** sections), **Date of effect**, **Withdrawal**, **Previous Rulings**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product as an investment. Further, we give 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 investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

Terms of Use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the 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 Ruling.

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the ITC Pulpwood Project – 2000 Prospectus No. 2 - Supplementary Prospectus, or just simply as 'the Project'.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- section 8-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
 - section 27-5 (ITAA 1997);
 - section 27-30 (ITAA 1997);
 - section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
 - section 82KZM (ITAA 1936);
 - section 82KZMA (ITAA 1936);
 - section 82KZMB (ITAA 1936);
 - section 82KZMC (ITAA 1936);
 - section 82KZMD (ITAA 1936); and
 - Part IVA (ITAA 1936).
3. On 11 November 1999, the Government announced further changes to the tax system as part of The New Business Tax System. A number of those changes, especially those to do with 'tax shelters', could affect the tax laws dealt with in this Ruling. Some of the changes apply from the date of announcement and others are proposed to apply from nominated dates in the future.
4. Although this Ruling mentions certain of those announced changes, the information given on the treatment of expenditure which may be affected by them is not binding on the Commissioner. Legally binding advice in respect of those changes cannot be given until the relevant law(s) are enacted.
5. However, if the changes become law the operation of that law will take precedence over the application of this Ruling, and to that extent, this Ruling will be superseded. If requested, when the relevant law(s) are enacted, the Commissioner will formalise the non-binding

information shown in this Ruling by issuing a new Product Ruling that describes the operation of those law(s).

Class of persons

6. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant agreements until their term expires) and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as ‘Growers’.

7. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

Qualifications

8. The Commissioner rules on the precise arrangement identified in this Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangement entered into is not the arrangements ruled upon; and
- the Ruling will be withdrawn or modified.

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Date of effect

10. This Ruling applies prospectively from 21 June 2000, the date the Ruling is made. However, the Ruling does 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 Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

11. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the

income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

12. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Previous Rulings

13. This Ruling replaces Product Ruling PR 2000/38, which is withdrawn on and from the date this Ruling is made. Product Ruling 2000/38 will continue to apply to investors who entered into the Project on or before 21 June 2000.

Arrangement

14. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- Application for Product Ruling dated 10 January 2000 and 9 June 2000;
- Draft ITC Pulpwood Project – 2000 Prospectus No. 2, undated, issued by ITC Project Management Limited (ITCPM). The Prospectus pertains to the four Schemes listed below;
- Draft Identical Constitution for each Scheme executed by ITCPM, undated.
- Draft Compliance Plan for each Scheme executed by ITCPM as the Responsible Entity, undated;
- **Draft Lease for each Scheme, between ITCPM and the Grower (except the Queensland Scheme);**

- **Draft Forest Right for the Queensland Scheme, between ITCPM and the Grower;**
- **Draft Management Agreement for each Scheme between ITCPM (the ‘Manager’) and the Grower.**
- Draft Supplementary Prospectus, dated 16 June 2000;
- Draft Loan Application between ITC Finance Pty Ltd and the Grower.
- Additional correspondence dated 23 February 2000, 9 March 2000, 14 March 2000, 16 March 2000, 22 March 2000, 27 March 2000 and 9 June 2000.

Note: Certain information received from ITC Project Management Limited has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

15. The documents highlighted are those the Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of the Grower, will be a party to, with the exception of finance agreements, to which paragraph 41 applies. The effect of these agreements is summarised as follows.

Overview

16. This arrangement is called ITC Pulpwood Project – 2000 Prospectus No. 2 - Supplementary Prospectus

Composition of the Project	<ul style="list-style-type: none"> • ITC Pulpwood 2000 Green Triangle Scheme; • ITC Pulpwood 2000 West Australian Scheme; • ITC Pulpwood 2000 Esperance Scheme; and • ITC Pulpwood 2000 Queensland Scheme.
Unit of investment	Plantation Unit
Locations	<ul style="list-style-type: none"> • Green Triangle region of western Victoria and south eastern South Australia; • South west and southern coastal regions of Western Australia;

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	<ul style="list-style-type: none"> • Esperance region of Western Australia; and • Sub-tropical region of southern Queensland.
Type of business each participant (Grower) is carrying on	Commercial growing, and cultivation of Tasmanian blue gum (<i>E. globulus</i>), or flooded gum (<i>E. grandis</i>) and river red gum, a flooded gum hybrid, (<i>E. grandis</i> x <i>E. camaldulensis</i>) in the Queensland Scheme, for the purpose of producing timber for woodchipping and any other suitable product.
Number of hectares under cultivation	10,000
Name used to describe the product	ITC Pulpwood Project – 2000 Prospectus No. 2 - Supplementary Prospectus
Size of each Plantation Unit	Varies, average sizes are*: <ul style="list-style-type: none"> • 0.87 hectares for the Green Triangle & Western Australia; • 1.08 hectares for Esperance; and • 0.94 hectares for Queensland.
Number of trees per hectare	800
Expected production	Varies, average m ³ /hectare are*: <ul style="list-style-type: none"> • 300 in the Green Triangle and Western Australia; • 260 in Esperance; and • 350 in Queensland.
Term of the investment in years	Approximately 10
Initial cost per hectare (for a minimum subscription of three (3) Plantation Units excluding 3000 'Project 2000 Class Shares')	<ul style="list-style-type: none"> • \$4,827 for the Green Triangle & Western Australia; • \$3,889 for Esperance; and • \$4,468 for Queensland.

Initial cost (for a minimum subscription of three (3) Plantation Units plus '3000 Project 2000 Class Shares')	\$15,600
Ongoing costs	Nil

Note: Expected production per Plantation Unit is 260 m³.

17. Growers applying under the Draft Prospectus enter into a Lease or Forest Right and a Management Agreement with ITCPM (the Project Manager). The lease/forest right gives a Grower a lease/forest right from ITCPM, over an identifiable area of land called a 'Plantation Unit' until the trees are harvested and sold, and net income distributed.

18. The Project Land is situated in four locations:

- the Green Triangle region of western Victoria and south eastern South Australia;
- South west and southern coastal regions of Western Australia;
- Esperance region of Western Australia; and
- Sub-tropical region of southern Queensland.

19. ITC estimates that approximately 50% of the land will be owned by ITC Timberlands Limited and the remainder will be leased.

20. ITC Timberlands Limited will either lease the properties or grant a Forest Right to ITCPM. ITCPM will then sublease or grant a Forest Right for the same land (as Plantation Units) to the Grower to carry on the Grower's business.

21. There is no minimum subscription for this Project. The Prospectus states that 10,000 hectares of land have been selected and further land may be acquired for planting if needed. Each investor is required to subscribe for a minimum of three (3) Plantation Units in any combination of areas, at a cost of \$3,000 per Plantation unit plus 1,000 Project 2000 Class Shares of \$1 each in ITC Timberlands Limited plus a fixed fee of \$3,000. The expected yield from each Plantation Unit is 260 cubic metres of timber. As soil type, climatic conditions and tree species affect projected yields the Plantation Units will vary in size on the basis of expected return in relation to those variables. The average size of a Plantation Unit in each Scheme are:

- 0.87 hectares for the Green Triangle & Western Australia;
- 1.08 hectares for Esperance; and

- 0.94 hectares for Queensland.

Trees will be planted during winter in each area except Queensland where the planting will be in summer.

22. Possible projected returns for Growers are outlined on pages 7 - 10 of the Draft Prospectus. The projected returns depend on a range of assumptions and the Project Manager does not give any assurance or guarantee whatsoever in respect of the future success of or financial returns associated with entering into the Project. Based on the table set out on page 7 of the Draft Prospectus, a Grower could expect to achieve after tax returns in the range of 7.1% to 10.4% depending on the location and the number of Plantation Units purchased. Growers will execute a Power of Attorney enabling ITCPM as the Project Manager to act on their behalf as required when they make an application for Plantation Units.

23. The Project 2000 Class Shares entitle the owner to preference dividends paid from the rental payments made by the Growers under this Project. The rental is paid at the time of harvest and is 22.5% of the Harvest Proceeds. After the final preference dividend has been paid the shares will convert to ordinary shares in ITC Timberlands Limited and will rank equally with ordinary shares in all respects.

Constitution

24. The Constitution establishes the responsibilities of ITCPM as the Responsible Entity. It sets out the terms and conditions under which the Responsible Entity agrees to act for the Growers and to manage the Project. The Responsible Entity:

- ensures that Application Funds are not released until appropriate agreements etc are in place (cl. 8);
- prepares the Management Agreement & lease documents (cl. 6);
- distributes the profits (cl. 30); and
- keeps a register of Growers (cl. 27).

Compliance Plan

25. The Project Manager has prepared a Compliance Plan in accordance with the Corporations Law. Its purpose is to ensure that the Project Manager meets its obligations as the Responsible Entity of the Project and that the rights of the Growers are protected.

Interest in Land

26. A Lease or a Forest Right, for the Queensland project is granted by the Responsible Entity to the Grower under the terms of the Lease or Forest Right (cl. 2). Growers are granted an interest in land in the form of a Lease or a Forest Right to use the said land for the purpose of conducting their afforestation business (cl. 4). Growers must pay the granter of the Lease or Forest Right at the time the Harvest Proceeds are distributed an amount of 22.5% of the Grower's share of the Harvest Proceeds (cl. 7). The term of a Grower's Lease or Forest Right is up to the date the trees on the Plantation Units have been harvested and sold and the Responsible Entity pays the proceeds into the Proceeds Fund. In certain circumstances Growers are entitled to assign their Lease or Forest Right (cl. 13).

Management Agreement

27. A Management Agreement is entered into between the Responsible Entity and the Grower for each Plantation Unit. The termination of the Project is after completion of harvest of all plantations comprising the Project (item 5 of schedule 1).

28. Growers contract with the Responsible Entity to establish and maintain the plantation until maturity. Growers pay the Management Fees for the term of the Project. The initial Management Fee is \$3,200 per Plantation Unit plus a fixed fee of \$3,000 for plantation preparation and establishment costs including the provision of Management Plan and seedlings (item 1 of schedule 3). The fee for planting is 1.5% of the Grower's share of the Harvest Proceeds payable at the time the Harvest Proceeds are distributed (item 2 of schedule 3). The fee for Annual Services is 6% of the Grower's share of the Harvest Proceeds payable at the time the Harvest Proceeds are distributed (item 3 of schedule 3).

29. The Responsible Entity will purchase and plant *Eucalyptus globulus* trees for the Green Triangle, Western Australia and Esperance Schemes and *Eucalyptus grandis* and *Eucalyptus grandis* x *Eucalyptus camaldulensis* hybrid trees for the Queensland Scheme. It will also cultivate, maintain, replant, fertilise, water, prune, tend maintain and otherwise care for the Plantation Unit as and when required according to good silvicultural and forestry practices to produce mature trees suitable for woodchipping.

30. The Responsible Entity guarantees that if the Grower invests in the Project by 28 June 2000 and providing that land is available for investment the Primary Services consisting of the preparation of a Management Plan, obtaining all necessary approvals, purchase of seedlings, supervision & management of work and administration

(item 1 of schedule 2 to the Management Agreement) will be provided by 30 June 2000 (Draft Prospectus page 2).

31. The Responsible Entity will harvest and sell the timber produce on the Growers' behalf (item 4 of schedule 2). The Grower may elect to market and arrange for the sale of the Tree Crop (cl. 9). The Responsible Entity will arrange insurance for the Growers at their request and cost (item 3(s) of schedule 2).

32. The Responsible Entity may be removed from its appointment by an ordinary resolution of Growers if the Growers take action under Division 1 of Part 2G.4 of the Corporations law if the Responsible Entity:

- is in breach of the Management Agreement and has not remedied the breach(cl. 6); or
- has retired or is removed as the Responsible Entity (cl. 6).

Fees

33. Summary of the fees payable under clause 5 of the Management Agreement are:

	Year 1	Year 2	Year 3
Primary Services – fixed fee	\$3,000	Nil	Nil
Primary Services – per Plantation Unit	\$3,200	Nil	Nil
Total for three (3) Plantation Units	\$12,600	Nil	Nil

Note: an amount of \$3,000 for the Project 2000 Class Shares is also payable.

34. The initial Primary Services fee of \$3,200 per Plantation Unit plus a fixed fee of \$3,000 is for the preparation of a Management Plan for the Plantation Units, obtaining all necessary approvals, purchase of seedlings, supervision & management of work and administration (item 1 of schedule 2 to the Management Agreement). These initial fees are payable upon application to the Project.

35. The Planting Services fee is 1.5% of the Grower's share of the Harvest Proceeds payable at the time the Harvest Proceeds are distributed (item 2 of schedule 3 to the Management Agreement).

36. The fee for Annual Services for Year 2 through to the completion of the project, is 6% of the Grower's share of the Harvest Proceeds payable at the time the Harvest Proceeds are distributed

(item 3 of schedule 3 to the Management Agreement). The management fee is in respect of the management of the crop including fertilisation, weed & pest control, fire control, arranging insurance (when requested), inspection and preparation of reports.

37. The Independent Forester has stated in its report that
 ‘The claims made in the Prospectus and in supporting documents concerning growth rates are largely based on actual experience and appear achievable on a Project level provided the same high level of management applied to their existing estate is applied to the Project’ (p 37 of the Draft Prospectus).

38. The Application Monies will be banked in the Application Bank Account formed under the Project’s Constitution (cl. 3.3(b) of the Constitution). Upon acceptance of an Application the Responsible Entity shall release the relevant application monies from the Application Fund trust bank account and apply them in payment of the fees under the Management Agreement in respect of the Primary Services of the Management Agreement (cl. 9 of the Constitution).

Planting

39. *Eucalyptus globulus* trees will be planted in winter in the Green Triangle region of western Victoria and south eastern South Australia, South west and southern coastal regions of Western Australia and the Esperance region of Western Australia. *Eucalyptus grandis* and *Eucalyptus grandis* x *Eucalyptus camaldulensis* hybrid trees will be planted in summer in the sub-tropical region of southern Queensland. After planting the Responsible Entity will maintain the trees in accordance with good silvicultural practice. The services to be provided by the Responsible Entity over the Project’s term are outlined in the Management Agreement (cl. 3). The Responsible Entity will be responsible for arranging the marketing and sale of the timber produce (cl. 3). The Responsible Entity is entitled to a Harvest Fee of 5% of the Harvest Proceeds (item 4 of schedule 3 to the Management Agreement).

40. The proceeds of sale of the timber produce will be banked in the Proceeds Fund bank account formed under the Project’s Constitution (cl. 3.3(c)). Proceeds received by the Responsible Entity are to be distributed to the Grower after deductions of:

- amounts for any outstanding Annual Fees and to reimburse the Responsible Entity for operational expenses and harvest fee; and
- any other amounts of tax or duty which is payable by the Responsible Entity on behalf of the Grower (cl. 31.1 of the Constitution).

Finance

41. Growers investing in the Project may either fund their investment personally, arrange finance themselves or, subject to satisfying certain criteria, use a financing facility provided by ITC Finance Pty Ltd (ITCF), an associate of ITCPM. It is proposed that ITCF will borrow funds from a bank, and possibly ITC, and on-lend these funds to Growers who request finance. The term of the loan will be the full term of the Project. All funding will be on a full recourse basis.

42. The terms of ITC Tree Farm Loan offered by ITCF is for 10 years at 11% fixed interest per annum, interest free to 30 June 2000. Repayments are 120 fixed equal monthly principal and interest payments commencing 31 July 2000. Security for the loan will be the interest in the Plantation Units and borrowers must provide ITCF with authority to debit their bank account for repayments. Interest payments made under an ITC Tree Farm Loan is not considered to have any prepayment element attached.

43. This Ruling does not apply if a Grower enters into a finance agreement that includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- entities associated with the Project, other than ITC Finance Pty Ltd, are involved in the provision of finance for the Project;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' will be granted to the borrowers for the purpose of section 82KL, or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan terms are of a non-arm's length nature;
- repayments of the principal and 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) back to the lender or any associate; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

Ruling

Goods and Services Tax

44. For a Grower who invests in the Project, sections 27-5 or 27-30 of the ITAA 1997 will apply to reduce the amount of any deduction allowable by any GST input tax credit to which the Grower is entitled or, in the case of section 27-5, a decreasing adjustment that a Grower has.

Allowable Deductions

45. For a Grower who invests in the Project by 28 June 2000, the following deductions will be available for the years ended 30 June 2000 to 30 June 2002:

Deductions available each year exclusive of GST

Fee Type	ITAA 1997 Section	Year 1 30/6/2000	Year 2 30/6/2001	Year 3 30/6/2002
Primary Services – fixed fee	8-1	\$3,000		
Primary Services – per Plantation Unit	8-1	\$3,200		
Interest on ITCF Tree Farm Loan	8-1	*	*	*
Total for three (3) Plantation Units		\$12,600	Nil	Nil

Note: Details of the amount of interest incurred must be obtained from the credit provider.

Sections 82KZM, 82KZMB – 82KZMD, 82KL and Part IVA

46. For a Grower who invests in the Projects the following provisions of the ITAA 1936 have application as indicated:

- (i) the expenditure by the Growers does not fall within the scope of section 82KZM;

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- (ii) the expenditure by the Growers does not fall within the scope of sections 82KZMB-82KZMD;
- (iii) section 82KL does not apply to deny the deductions otherwise allowable; and
- (iv) 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.

Proposed new laws

Losses from non-commercial business activities

47. Provisions introduced into Parliament, but not yet enacted, will mean that in some circumstances, losses arising from a business activity will not be allowed as deductions in the year that they arise. These provisions will only apply from 1 July 2000 to individual taxpayers (including individual taxpayers in general law partnerships) carrying on a business activity. They will not apply however, to an individual with a loss from a primary production business activity where their non primary production assessable income for the income year (excluding any net capital gain) is less than \$40,000 (proposed subsection 35-10(4)).

48. Under proposed subsection 35-10(2), where an individual taxpayer's business activity does not meet one of the objective tests set out in proposed sections 35-30, 35-35, 35-40 and 35-45 then, unless the Commissioner exercises the discretion in proposed section 35-55, a loss arising in an income year from the taxpayer's business activity cannot be claimed as a deduction in that year. A loss, in this context, refers generally to the excess of a taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

49. The Project's agreements, its (draft) prospectus, and its cash flow projections, show that Growers are expected to incur losses relating to interests in the Project during the Project's early years and, that none of the objective tests are expected to be met in those years. However, provided that a Grower's business activity under the Project is carried on during the income years specified below in the manner described in the Arrangement, the Commissioner will exercise his discretion under proposed paragraph 35-55(1)(b).

50. Provided the provisions are enacted as introduced, subject only to the above condition relating to the Arrangement (discussed below at paragraphs 74 and 75), exercise of the discretion will mean Growers can deduct losses arising from their interest(s) in the Project in the years that such losses arise.

Explanations

Section 27-5 and 27-30 – Goods and Services Tax

51. Section 27-30 of the ITAA 1997 operates to deny a deduction that would be otherwise available under section 8-1 for the year ended 30 June 2000 to the extent that the loss or outgoing (incurred after 30 November 1999 and on or before 1 July 2000) includes an amount relating to an input tax credit to which a Grower will be entitled on or after 1 July 2000.

52. Section 27-5 of the ITAA 1997 operates to deny a deduction, that would be otherwise available under section 8-1, to the extent that the loss or outgoing incurred (on or after 1 July 2000) includes an amount relating to an input tax credit to which a Grower is entitled or a decreasing adjustment that a Grower has.

Section 8-1

53. Consideration of whether lease and management fees are deductible under section 8-1, begins with paragraph 8-1(1)(a) and is made on the following basis:

- the outgoings in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under paragraph 8-1(1)(b) if they are incurred when the business has not commenced; and
- where all that happens in a year of income is a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the paragraph 8-1(1)(b) applies. However, that does not preclude the application of paragraph 8-1(1)(a), and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

54. An afforestation scheme can constitute the carrying on of a business. Where there is a business, or a future business, the gross sale proceeds from the timber's sale from the scheme, will constitute assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly

gain or produce this income. These operations will be the planting, tending, maintaining and harvesting of the trees.

55. Generally, an investor will be carrying on a business of afforestation where:

- the investor has an identifiable interest in specific growing trees coupled with a right to harvest and sell the timber;
- the afforestation activities are carried out on the investors behalf; and
- the weight and influence of the general indicators of a business as used by the Courts point to the carrying on of a business.

56. For this Project, Growers have, under the Lease or Forest Right and Management Agreement, rights in the form of a Lease or a Forest Right over an identifiable area of land consistent with the intention to carry on a business of growing trees. Under the Lease or Forest Right and Management Agreement Growers appoint ITCPM, as Responsible Entity, to provide services such as supplying seedlings, planting, fumigating and poisoning for exterminating and controlling the Plantation Unit from rabbits, insects and other vermin, spraying for control of weeds, fertilising, cultivating, tending and otherwise caring for the trees as and when required according to good silvicultural and forestry practices. Growers are considered to control their investment. The specific cost of the services provided by 30 June 2000 is \$3,000 plus \$3,200 per Plantation Unit.

57. The Lease or Forest Right gives Growers the full right, title and interest in the products and the right to sell or have the products sold for their benefit (clause 3) until the end of the lease term.

58. Growers have the right to use the land in question for afforestation purposes and to have the Responsible Entity come onto the land to carry out its obligation under the Management Agreement. The Growers' degree of control over the Responsible Entity, as evidenced by the Agreements and supplemented by the Corporations Law, is sufficient. Under the Project, Growers are entitled to receive regular progress reports on the state of the Tree Crop and ITCPM's activities. Growers are able to terminate arrangements with the Responsible Entity in certain instances, such as where the Responsible Entity has failed to perform any of its duties with due care and diligence. The afforestation activities described in the Lease or Forest Right Agreements and Management Agreements are carried out on the Growers' behalf.

59. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be

made from the arrangement's description for all the indicators. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained in the Draft Prospectus that suggest the Project should return a 'before-tax' profit to the Growers, i.e., a 'profit' in cash terms that does not depend in its calculation, on the fees in question being allowed as a deduction. The Independent Forester's assessment was that plantation yields will be economically viable.

60. Growers will engage the professional services of a Manager with appropriate credentials. There is a means to identify which trees Growers have an interest in. These services are based on accepted silvicultural practices and are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses.

61. Growers have a continuing interest in the trees from the time they are acquired until harvest. The afforestation activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. The Growers' afforestation activities will constitute the carrying on of a business.

62. The fees associated with the afforestation activities will relate to the gaining of income from this business and, hence, have a sufficient connection to the operations by which this income (from the sale of timber) is to be gained from this business. They will, therefore, come within paragraph 8-1(1)(a). Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. No capital component is identifiable. The tests of deductibility under section 8-1 are met. The exclusions do not apply.

Sections 82KZM and 82KZMB - 82KZMD

63. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure that would otherwise be immediately deductible, in full under section 8-1. The section applies to certain expenditure incurred under an agreement in return for doing of a thing under the agreement that is not wholly done within the same year of income as the execution of the relevant agreement.

64. Under the Management Agreement a fixed fee of \$3,000 plus a fee of \$3,200 per Plantation Unit will be incurred on the execution of that Agreement. The fee is charged for providing Primary Services to a Grower by 30 June of the year of execution of the Agreement. The fee is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the arrangement's description that the fee has been inflated to result in reduced fees being payable for subsequent years.

65. There is also no evidence that might suggest the services covered by the fee could not be provided in the same year of income as the expenditure in question is incurred. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial fee is for the Project Manager doing 'things' that are not to be wholly done within the year of income of the fee being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditure incurred by the Grower. New sections 82KZMB, 82KZMC and 82KZMD also have no application to this Project since the services to be provided in respect of the initial fee are completed in the same year of income as the expenditure is incurred (see paragraph 82KZMA(3)(c)).

Section 82KL

66. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefits'. In the project, there may be a loan provided by ITC Finance Pty Ltd to the grower. The loan is provided on a full recourse basis, and on commercial terms. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL. It will not apply to deny the deductions otherwise allowable under section 8-1.

Part IVA

67. For Part IVA 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). The Project will be a 'scheme', commencing when the Prospectus is issued. The Growers will obtain an initial 'tax benefit' from entering into the scheme, in the form of the deduction for the initial fee, allowable under section 8-1, that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

68. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the eventual harvesting of the trees. The Independent Forester's Report contained in the Prospectus states that the Project should achieve its financial objective if the forestry regimes set out in the report are followed, good marketing arrangements are put in place and the international economy and climatic factors (especially annual rainfall) are favourable. There are no features of the Project that might suggest the Project was so 'tax driven', and so designed to produce a tax deduction of a certain magnitude that would attract the operation of Part IVA.

Proposed changes to losses from non-commercial business activities

69. Under the rule in proposed subsection 35-10(2), a deduction for losses incurred by individuals (including individuals in general law partnerships) from certain business activities will not be allowable in an income year unless:

- one of four statutory objective tests is met; or
- the Commissioner exercises a discretion to allow the losses.

70. In broad terms, the statutory tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year) (section 35-35);
- (c) at least \$500,000 of real property is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets are used on a continuing basis in carrying on the business activity in that year (section 35-45).

71. For the purposes of applying the tests, subsection 35-10(3) allows taxpayers to group business activities of a similar kind. And, under subsection 35-10(4), there is an 'Exception' to the general rule in section 35-55(2) where the losses are from primary production business activities and the individual taxpayer has other assessable income for the income year of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of taxpayers they are beyond the scope of this Product Ruling and are not considered further.

72. Information provided with the application for this Product Ruling indicates that investors in the Project are unlikely to pass one of the statutory tests until the income year ended 30 June 2010 and therefore, unless the Commissioner exercises a discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer the loss from the business activity to a future year.

73. The discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, for individual investors who acquire interests in the Project, the Commissioner has determined that it would be unreasonable not to exercise the discretion in paragraph 35-55(1)(b).

74. The discretion in paragraph 35-55(1)(b) may be exercised where:

- (i) the business activity has started to be carried on; and
- (ii) there is an objective expectation that the business activity of an individual taxpayer with an interest in the Project will either pass one of the statutory tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

75. This Product Ruling is issued on a prospective basis (i.e., before an individual Grower's business activity starts to be carried on). Therefore, if the Project fails to be carried on during the income years specified above in the manner described in the Arrangement, the Commissioner's discretion will not have been exercised as one of the key conditions in paragraph 35-55(1)(b) will not have been met.

76. In deciding to exercise his discretion, should the proposed new law be enacted as introduced into Parliament, the Commissioner has relied upon:

- the report of the independent forester and additional expert or scientific evidence provided with the application by the Responsible Entity;
- independent, objective and generally available information relating to the viticulture industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity;
- anything else that may be relevant to the specific project and when, judged against industry norms, it would be reasonably expected that the business activity will pass 1 of the 4 objective tests, or produce a taxation profit.

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 TR 97/16;

Subject references:

- afforestation expenses
- carrying on a business
- commencement of business
- management fees expenses
- product rulings
- public rulings
- producing assessable income
- schemes and shams
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
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- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 Pt IVA
- ITAA 1997 8-1
- ITAA 1997 8-1(1)(a)
- ITAA 1997 8-1(1)(b)
- ITAA 1997 27-5
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- ITAA 1997 35-10(2)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
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