

PR 2001/160 - Income tax: T.F.S. Sandalwood Project No.2

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *5 December 2001*



Product Ruling

Income tax: T.F.S. Sandalwood Project No. 2

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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**, **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. 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.

Participants must form their own view about the commercial and financial viability of the product. This involves 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 this product fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for participants 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, participants lose the protection of this Product Ruling. Participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Participants 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.

Participants 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.

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 'T.F.S. Sandalwood Project No. 2' or just simply as 'the Project'.

Tax laws

2. The tax law dealt with in this Ruling is:
- Division 35 (ITAA 1997);

Goods and Services Tax

3. All fees and expenditure referred to in this 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 its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

Changes in the Law

4. The Government is currently evaluating further changes to the tax system in response to the Ralph *Review of Business Taxation* and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers participating in the Project 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

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for participants in projects 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 Ruling is issued.

Class of persons

7. The class of persons to whom this Ruling applies is those who entered into the arrangement described below during the year ended 30 June 2000. 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, each of these persons, referred to as 'Growers', will have accepted an offer made under subsections 708(1)-(11) of the Corporations Act.

8. 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

9. The Commissioner rules on the precise arrangement identified in the 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. The Ruling will be withdrawn or modified.

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Date of effect

11. This Ruling applies prospectively from 5 December 2001 for the class of persons specified above. 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).

12. 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, this Ruling applies to

the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

13. 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 entered into the arrangement specified below. 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.

Arrangement

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

- Application for Product Ruling, dated 20 June 2001;
- Information Memorandum issued by Tropical Forestry Services Ltd ('Manager'), undated;
- **Sub-Lease Agreement** between Tropical Forestry Services Ltd ('Manager') and the Grower;
- **Management Agreement** between Tropical Forestry Services Ltd ('Manager') and the Grower;
- **Loan Deed** between Arwon Finance Pty Ltd ('the Lender') and 'the Borrower'; and
- Additional correspondence from the Applicant dated 26 October 2001, 30 October 2001 and 15 November 2001.

NOTE: certain information 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 that Growers entered or may have entered into. For the purposes of describing the arrangement 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 arrangement. The effect of these agreements is summarised as follows.

Overview

16. This arrangement is called the T.F.S. Sandalwood Project No. 2. The salient features of the arrangement are:

Location	Kununurra, Western Australia
Type of business each participant is carrying on	Commercial growing, and cultivation of Indian Sandalwood (<i>Santalum album</i>) trees for the purpose of harvesting and selling timber.
Number of hectares offered for cultivation	35
Size of each leasehold area	3 or 5 hectares
Number of Sandalwood trees per hectare	Survival rate of 416
Expected production	12,480 kg per hectare
The term of the investment	15 years
Initial cost	\$166,644 – 3 hectares \$250,740 – 5 hectares
Initial cost per hectare	\$55,548 – 3 hectares \$50,148 – 5 hectares
Ongoing costs	Lease and Management Fees (may be paid annually, prepaid or deferred). Harvesting costs, costs of sale and Incentive Fees payable from harvest proceeds. Optional insurance premiums

17. The Project is conducted on part of the land described as King Location 254, near the Ord River in Kununurra, Western Australia.

18. Growers participating in the arrangement entered into a Sub-Lease Agreement. Under the Sub-Lease a Grower leases an area of land called a 'Woodlot' until the final distribution of the sale proceeds is made to the Grower or until the Project is terminated. Each leased area is either 3 hectares or 5 hectares and overall 35 hectares were available to be leased to Growers.

19. The Growers also entered into a Management Agreement for the management of their Woodlot. The Manager is responsible for establishing and cultivating the trees and the harvesting of the timber. Each leased area was planted with 463 Sandalwood seedlings and 1,852 host plants or trees per hectare. The trees are expected to be harvested in the year 2015. A Grower may elect to take their forest produce or the Manager will sell the produce on their behalf.

20. Growers will execute a Power of Attorney enabling the Manager, Tropical Forestry Services Ltd, to act on their behalf as required, when they make an application for a Woodlot.

Interest in land

21. Growers participating in the arrangement entered into a Sub-Lease Agreement with Tropical Forestry Services Ltd. Growers were granted an interest in land in the form of a sub-lease to use their leased area for the purpose of conducting their afforestation business.

22. Each Grower must pay rent to the Lessor for each year of the Project in an amount specified in Item 4 of the Schedule to the Sub-Lease Agreement.

23. The conditions of the lease are outlined in clause 6 of the Sub-Lease. The Grower is to use the Woodlot solely for the purpose of commercial forestry of Sandalwood trees and must permit the Manager to perform its obligations under the Sub-Lease.

Management Agreement

24. Growers participating in the arrangement entered into a Management Agreement with Tropical Forestry Services Ltd as 'Manager'. The Management Agreement provides that each Grower appoints the Manager to perform services under the agreement over the term of the Project. The services are described in Item 3 of the Schedule to the Management Agreement entitled Plantation Services. The Manager will supervise and manage all silvicultural activities on behalf of each Grower and must:

- acquire appropriate seeds and seedlings;
- plant Sandalwood seedlings or trees on the land at a rate of 463 trees per hectare;
- plant other trees as it may consider to be necessary to enable or encourage the growth of the Sandalwood seedlings or trees;
- replant each year to maintain a minimum stocking of 416 Sandalwood trees per hectare at 30 June 2001, 30 June 2002 and 30 June 2003;
- keep access roads, firebreaks and irrigation channels in good repair and the Woodlots free from vermin; and
- harvest or procure a suitably qualified person to harvest the trees at market rates.

Fees

25. Fees are payable by the Grower to the Manager for each Woodlot. The following amounts were payable in full upon a Grower becoming a participant in the Project. For each 3 hectare Woodlot:

- a management fee of \$163,800 payable for services relating to the establishment of the plantation for the period from the Commencement Date until 30 June 2000 (referred to in this Ruling as the 'Initial Period');
- Rent of \$2,844 for the Initial Period.

26. For each 5 hectare Woodlot:

- a management fee of \$246,000 payable for services relating to the establishment of the plantation for the period from the Commencement Date until 30 June 2000 (the 'Initial Period');
- Rent of \$4,740 for the Initial Period.

27. The Project agreements provided for three options for the payment of lease and management fees for the term of the Project after the Initial Period. These options are described below.

Option 1 - Annual Lease and Management Fees

28. Under this option the Grower is required to make an annual contribution for lease and management fees. The following amounts are, or were, payable for each Woodlot of 3 hectares:

- for the year commencing 1 July 2000, Rent of \$3,227 was payable in two equal instalments on 1 July 2000 and 1 January 2001;
- for each year thereafter the amount of Rent is set at the amount of the fee in the prior year indexed at the greater of 3% per annum or the annual rate of inflation and payable in two equal instalments on each 1 July and 1 January;
- for the year commencing 1 July 2000, a fee for Plantation Services of \$25,171 was payable in two equal instalments on 1 July 2000 and 1 January 2001; and
- for each year thereafter the amount of the fee for Plantation Services is set at the amount of the fee in the prior year indexed at the greater of 3% per annum or the annual rate of inflation and payable in two equal instalments on each 1 July and 1 January.

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29. The following amounts are, or were, payable for each Woodlot of 5 hectares:

- for the year commencing 1 July 2000, Rent of \$5,379 was payable in two equal instalments on 1 July 2000 and 1 January 2001;
- for each year thereafter the amount of Rent is set at the amount of the fee in the prior year indexed at the greater of 3% per annum or the annual rate of inflation and payable in two equal instalments on each 1 July and 1 January;
- for the year commencing 1 July 2000, a fee for Plantation Services of \$37,802 was payable in two equal instalments on 1 July 2000 and 1 January 2001; and
- for each year thereafter the amount of the fee for Plantation Services is set at the amount of the fee in the prior year indexed at the greater of 3% per annum or the annual rate of inflation and payable in two equal instalments on each 1 July and 1 January.

Option 2 – Prepayment of Lease and Management Fees

30. Growers may have elected on or before 30 June 2000 to prepay all annual lease and management fees due for the life of the Project after the Initial Period. The amounts in the following table were payable in accordance with each relevant agreement:

	3 hectare Woodlot	5 hectare Woodlot
Rent	\$17,246	\$28,743
Management fees	\$147,747	\$246,246
Total	\$164,993	\$274,989

NOTE: The fees in the table above are subject to the prepayment rules in sections 82KZME and 82KZMF.

Option 3 - Deferment of Management Fees

31. Growers may have elected on or before 30 June 2000 to defer all Management fees payable after the Initial Period until sale of the harvest produce is effected. The following amounts are payable by the Grower under this option. For each Woodlot of 3 hectares:

- management fees of an amount equal to 27.5% of the gross proceeds of sale for each Woodlot; and

- Rent payable in accordance with the annual payment method described above at the first two dot points of paragraph 28.
32. For each Woodlot of 5 hectares:
- management fees of an amount equal to 24.75% of the gross proceeds of sale for each Woodlot; and
 - Rent payable in accordance with the annual payment method described above at the first two dot points of paragraph 28.

Other Fees

33. The Grower is also required to pay the following amounts to the Manager that will be deducted from the gross proceeds of sale:

- the Grower's proportional share of the costs of harvest and sale; and
- an Incentive Fee of an amount equal to 27.5% of any amount by which the gross proceeds of sale exceed the projected sale proceeds of \$921,827 per hectare (clauses 1 and 5 of the Management Agreement).

34. The Manager will arrange insurance, including fire insurance, of the Woodlots on behalf of each Grower if so requested. The cost of such insurance plus 5.5% will be payable by the Grower to the Manager.

Planting

35. During the Initial Period to 30 June 2000, the Manager was responsible for planting Sandalwood seedlings or trees on the Woodlots at a rate of 463 per hectare. The Manager also planted other trees (hosts) required to encourage the growth of the Sandalwood seedlings or trees. After the Initial Period, the Manager maintained and will continue to maintain the trees in accordance with good silvicultural practice. The Woodlots will be replanted to maintain a rate of 416 Sandalwood trees per hectare at 30 June 2001, 30 June 2002 and 30 June 2003. The Woodlots will be maintained in accordance with sound silvicultural and environmental practices adopted within the forestry industry (clause 6(a) of the Management Agreement).

Harvesting and Sale

36. The Grower is entitled to harvest the trees and to remove and sell the products derived from the trees and to retain all income from

such sale (clause 8.2 of the Sub-Lease). Growers may elect on or before 30 June 2005 to take their own Collectable Produce by giving written notice to the Manager and thereby become an 'Electing Grower' (clause 8.1 of the Management Agreement) or the Manager will sell the forest produce on behalf of the Non-Electing Growers for the maximum practicable price available (clause 9.1 of the Management Agreement).

37. Harvesting will take place not later than 15 years from the Execution Date of the Management Agreement unless the Manager believes that it would be in the best interests of the Growers for harvesting to be deferred, such date being no later than 17 years from the Execution Date (clause 7 of the Management Agreement).

38. The gross proceeds of sale of the forest produce of Non-Electing Growers will be paid direct to the Manager who must deposit them into a Proceeds Fund (clause 11.1 of the Management Agreement). Within 10 days of receiving the gross proceeds of sale the Manager must pay to itself the Grower's proportional share of the costs of harvest and costs of sale. Within a further 5 business days, the Manager will pay to itself any other fees or amounts owing and distribute the remainder to the Non-Electing Growers. The term 'Proportional Share' is defined in clause 1 of the Management Agreement.

39. For an Electing Grower, the Grower's proportional share of the costs of harvesting, rent, fees and any other amounts owing to the Manager, are due for payment at the time specified by the Manager for collection of the Grower's collectable produce (clauses 8.2 and 8.3 of the Management Agreement).

Finance

40. Growers funded their participation in the Project themselves, borrowed from Arwon Finance Pty Ltd (a lender associated with the Manager) or may have borrowed from an independent lender.

41. The finance available from Arwon Finance Pty Ltd was under the following arrangement:

- the term of the loan is seven years from the date of execution of the Loan Deed;
- repayments of principal by equal consecutive monthly instalments;
- repayments of interest by consecutive monthly instalments in advance as calculated by the Lender on the outstanding amount;

- interest charged at the rate specified in Item 5 of the Schedule to the Loan Deed;
- the Lender has full recourse to the Grower and the loan was secured by a mortgage over the Grower's Leased Area.

42. 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;
- 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;
- 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 Finance Pty Ltd, are involved or become involved, in the provision of finance for the Project.

Ruling

Division 35 – Deferral of losses from non-commercial business activities

Section 35-55 - Commissioner's discretion

43. For a Grower who is an individual and who entered the Project during the year ended 30 June 2000, the rule in section 35-10 may apply to the business activity comprised by their involvement in the Project. Under paragraph 35-55(1)(b) the Commissioner has decided for the income years ending 30 June 2001 to 30 June 2014 that the

rule in section 35-10 does not apply to this business activity, provided that the Project has been, and continues to be carried on in a manner that is not materially different to the arrangement described in this Ruling.

44. This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- the exception in subsection 35-10(4) applies;
- a Grower's business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the Grower's business activity produces assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2)); or
- the Commissioner is precluded from exercising the discretion under paragraph 35-55(1)(b) because of subsection 35-55(2).

45. Where the exception in subsection 35-10(4) applies, or the Grower's business activity satisfies one of the tests, or the discretion in subsection 35-55(1) is exercised, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of the deductions attributable to their business activity in excess of any assessable income from that activity, i.e., any 'loss' from that activity, to a later year. Instead, this 'loss' can be offset against other assessable income for the year in which it arises.

46. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner's decision to exercise the discretion in subsection 35-55(1) as an indication that the Tax Office sanctions or guarantees the Project or the product to be commercially viable. An assessment of the Project or the product from this perspective has not been made.

Explanations

Division 35 – Deferral of losses from non-commercial business activities

47. Division 35 applies to losses from certain business activities for the income year ended 30 June 2001 and subsequent years. Under the rule in subsection 35-10(2), a deduction for a loss incurred by an individual (including an individual in a general law partnership) from certain business activities will not be allowable in an income year unless:

- the exception in subsection 35-10(4) applies;

- one of four tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

48. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

49. Losses that cannot be taken into account in a particular year of income, because of subsection 35-10(2), can be applied to the extent of future profits from the business activity, or are deferred until one of the tests is passed, the discretion is exercised, or the exception applies.

50. For the purposes of applying Division 35, subsection 35-10(3) allows taxpayers to group business activities 'of a similar kind'. Under subsection 35-10(4), there is an 'exception' to the general rule in subsection 35-10(2) where the loss is from a primary production business and the individual taxpayer has other assessable income for the income year from sources not related to that activity, of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

51. In broad terms, the 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).

52. A Grower who was accepted into and commenced participation in the T.F.S. Sandalwood Project No. 2, is carrying on a business activity that is subject to these provisions.

53. Information provided with the application for this Product Ruling indicates that a Grower who commenced participation in the Project during the year ended 30 June 2000 is unlikely to pass one of the tests until the year ended 30 June 2015.

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54. Prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

55. The first arm of 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, the second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where:

- (i) the business activity has started to be carried on; and
- (ii) because of its nature, it has not yet met one of the tests set out in Division 35; and
- (iii) there is an expectation that the business activity of an individual taxpayer will either pass one of the tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

56. The information provided by the applicant indicates that a Grower in the Project is expected to be carrying on a business activity that will either pass one of the tests, or produce a taxation profit, for the year ended 30 June 2015. The Commissioner has decided for such a Grower that it would be reasonable to exercise the second arm of the discretion until the year ended 30 June 2014.

57. The applicant has stated that the business activity comprised by a Grower's involvement in this Project has started to be carried on, and will continue to be carried on in a manner that is not materially different to that described in the Arrangement in this Product Ruling. If, however, the Project is not carried on during the income years specified above (see paragraph 43), in the manner described in the Arrangement (see paragraphs 14 to 42), this Ruling may be affected. Specifically the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 9). Growers may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

58. In deciding to exercise the discretion in paragraph 35-55(1)(b) the Commissioner has relied upon:

- the report of the Independent Forester and additional evidence provided with the application by the Manager;
- the financial projections contained in the Information Memorandum; and
- independent, objective and generally available information relating to the Indian Sandalwood industry.

Detailed contents list

59. Below is a detailed contents list for this Product Ruling:

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Commissioner of Taxation

5 December 2001

<i>Previous draft:</i>	<i>Legislative references:</i>
Not previously released in draft form	- ITAA 1997 Div 35
	- ITAA 1997 35-10
	- ITAA 1997 35-10(2)
<i>Related Rulings/Determinations:</i>	- ITAA 1997 35-10(3)
PR 1999/95; TR 92/1; TR 92/20;	- ITAA 1997 35-10(4)
TR 97/11; TR 97/16; TD 93/34;	- ITAA 1997 35-30
TR 98/22	- ITAA 1997 35-35
	- ITAA 1997 35-40
	- ITAA 1997 35-45
<i>Subject references:</i>	- ITAA 1997 35-55
- carrying on a business	- ITAA 1997 35-55(1)
- commencement of business	- ITAA 1997 35-55(1)(a)
- fee expenses	- ITAA 1997 35-55(1)(b)
- interest expenses	- Copyright Act 1968
- management fees	- Corporations Act 708
- producing assessable income	- Corporations Act 708(1)
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- tax shelters project	- Corporations Act 708(8)
	- Corporations Act 708(9)
	- Corporations Act 708(10)
	- Corporations Act 708(11)

ATO references:

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