

# ***PR 2002/68 - Income tax: ITC Hardwood Timber Project 1999***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *22 May 2002*



# Product Ruling

## Income tax: ITC Hardwood Timber Project 1999

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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 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 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. Potential 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**

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' 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 Hardwood Timber Project 1999, or simply as 'the Project'.

### **Tax law(s)**

2. The tax law dealt with in this Ruling is:

- Division 35 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

### **Goods and Services Tax**

3. In this Ruling all fees and expenditure referred to include 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 persons who were accepted into the project between 17 March 1999 and 30 June 1999. 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. In this Ruling these persons are referred to as 'Growers'.

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

**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.

10. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no Product Ruling may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Manager, Legislative Services, AusInfo, GPO Box 1920, Canberra ACT 2601.

**Date of effect**

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11. This Ruling applies prospectively from 22 May 2002 for Growers who, between 17 March 1999 and 30 June 1999, entered into the specified arrangement that is set out below. 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 that private ruling if the income year to which it relates has ended or has commenced but not yet ended. However if the arrangement covered by the private ruling has not commenced, 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**

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13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, even following its withdrawal, in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specified arrangement that is set out below between 17 March 1999 and 30 June 1999. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

## **Arrangement**

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

- Application for a Product Ruling, dated 16 November 1998 and 1 April 1999;
- The Great Forests 1999 Project Prospectus prepared and issued by the 'Previous Manager', dated 17 March 1999;
- The Great Forests 1999 Supplementary Prospectus prepared and issued by the 'Previous Manager', dated 23 April 1999;
- The Great Forests 1999 Second Supplementary Prospectus prepared and issued by the 'Previous Manager', dated 19 May 1999;
- The Great Forests 1999 third Supplementary Prospectus prepared and issued by the 'Previous Manager', dated 8 June 1999;
- **Constitution between the 'Previous Manager' and each several Grower, dated 25 February 1999;**
- **Management Agreement between the 'Previous Manager' and the Grower, dated 25 February 1999;**
- Lease between the 'Previous Lessor' and the 'Previous Manager' ('the Lessee'), dated 25 February 1999;
- Lease between ITC Timberlands Ltd and ITC Project Management Ltd, dated 13 January 2000;
- **Forest Right between the 'Previous Manager' and the Grower, dated 25 February 1999;**

- Compliance Plan for ITC Hardwood Timber Project 1999 adopted by the 'Previous Responsible Entity', dated 26 February 1999;
- Deed of Appointment of New Management Company on Retirement of Management Company - The Great Forests 1999 Project between the 'Previous Responsible Entity' ('Retiring Responsible Entity') and ITC Project Management Ltd ('New Responsible Entity'), dated 25 February 2000;
- **Loan Proposal and Loan Agreement between the Financier named in Product Rulings PR 1999/9 and PR 1999/67 ('the Lendor') and the Borrower, undated;**
- **Personal Loan Offer with a nominated Australian Bank ('the Nominated Bank'), undated;**
- Correspondence from the Applicant dated 28 January 1999, 24 February 1999, 6 April 1999, 23 April 1999, 27 April 1999, 29 April 1999, 20 May 1999, 25 May 1999 and 4 June 1999; and
- Additional correspondence from the Applicant dated 14 December 2001, 30 January 2002, 1 May 2002 and 13 May 2002 and 14 May 2002.

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

15. The documents highlighted are those that the Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or an associate of the Grower will be a party to that are part of the arrangement to which this Ruling applies.

16. All Australian Securities and Investments Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of the agreements may be summarised as follows.

### **Overview**

17. The arrangement is called the ITC Hardwood Timber Project 1999 (previously known as the Great Forests 1999 Project).

Location	In Queensland and Northern New South Wales.
Type of business each participant is carrying on	Commercial Growing of hybrid crosses of <i>Eucalytus grandis</i> and <i>Eucalyptus camaldulensis</i> for the major portion, also incorporating seed stock of <i>E. cloeziana</i> , <i>E. grandis</i> , <i>E. dunnii</i> , <i>E. saligna</i> , <i>E. pellita</i> and <i>E. citriodora</i> .
Number of hectares to be under cultivation	The Prospectus provides for 3,000 hectares to be planted.
Minimum Application	Minimum of 1 Forest Lot per applicant.
Size of each Forest Lot	1 hectare
Number of trees per hectare	900 trees per hectare
Term of the investment	21 years
Initial cost per Forest Lot	Option A - \$9,000 Option B - \$3,750
Initial cost per hectare	Option A - \$9,000 Option B - \$3,750
Ongoing costs	Option A - Annual Forest Right Fee and Insurance.  Option B - Annual Management Fee, Annual Forest Right and Insurance.

18. For the purposes of this Ruling all references to the Responsible Entity, Manager and Lessor include the 'Previous Responsible Entity', the 'Previous Manager' and the 'Previous Lessor'.

19. Growers participating in the Project became a party to the Project Constitution under which a Forest Right over an identifiable area of land called a 'Forest Lot' was granted. The Land Owner leased land to the Manager who granted a Forest Right to the Grower. The Growers entered into a Management Agreement with the Manager to have certain Eucalyptus trees (which include hybrids of *Eucalyptus grandis* crossed with *Eucalyptus camaldulensis*) planted on the Forest Lot for the purpose of eventual felling and sale. Growers executed a power of attorney enabling the Manager to act on their behalf as required when they made an application for Forest Lots.

20. The establishment of the Project was subject to a minimum subscription of 50 Forest Lots being obtained on or before 15 June 1999 (cl. 10 of the Constitution). There were 3,000 Forest Lots on offer of approximately 1 hectare each at a cost of \$9,000 per

Forest Lot (Option A) or \$3,750 (Option B). A Grower was required to apply for a minimum of 1 Forest Lot. The total land area available for the Project was 3,000 hectares although the Manager had the right to accept over subscriptions. A minimum of 900 trees per Forest Lot were planted in the first 13 months following execution of the Management Agreement.

### **Constitution**

21. The Constitution is between Manager and each several Grower. It sets out the terms and conditions under which the Manager agrees to act for Growers and to manage the Project. Under the Constitution Forest Lots were allocated to Growers (cl. 10) and a Forest Lot Statement was issued to Growers (cl. 11). The Manager keeps a register of Growers (cl. 21.14). The Management Agreement, the Lease and the Forest Right are annexed to the Constitution and were executed on behalf of a Grower following them signing the Application and Limited Power of Attorney Form in the Prospectus.

### **Compliance Plan**

22. The Responsible Entity prepared a Compliance Plan in accordance with the *Corporations Act 2001*. The Compliance Plan's purpose 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.

### **Forest Right**

23. The Forest Right was granted by the Manager to Growers under the terms of the Constitution (cl. 2). Growers were granted an interest in land in the form of a *profit à prendre* to use their Forest Lot for the purpose of conducting their afforestation business (cl. 2.2). Growers do not have a right of exclusive occupation of the Forest Lot (cl. 2.2(a)). The term of the Forest Right is until 30 June 2019 at the earliest and 30 June 2021 at the latest. The Forest Right is subject to the terms of the Constitution.

### **Management Agreement**

24. The Management Agreement sets out the roles and obligations of the parties to the Agreement. It was entered into between the Manager and the Grower for each Grower's Interest. Under the Agreement the Grower appointed the Manager to establish, tend, maintain and harvest the trees and sell the Wood on the Grower's Forest Lot.

25. The Agreement commenced on the date the Grower's Application was accepted by the Responsible Entity. The Project will be terminated pursuant to the provisions of the Agreement or, upon the winding up of the Project in accordance with the Constitution. Therefore, the arrangement will terminate on 30 June 2019 or if the Manager exercises its discretion to extend the Project to a later date, as the Manager may determine, but not later than 30 June 2021.

26. The Management Agreement provides that each Grower appoints the Manager to perform services under the Agreement. The Manager is required to supervise and manage all silvicultural activities to be carried out on the Forest Lot on behalf of the Grower including, but not limited to, the provision of the following services:

- acquire appropriate seeds, seedlings and/or cuttings for not less than 900 trees per Grower's Forest Lot;
- establish, tend and maintain the trees in a proper and skilful manner;
- prepare, cultivate, spray herbicides and insecticides, plant and fertilise the seedling trees;
- repair damage to roads, tracks or fences on the Forest Lots or on neighbouring land resulting from the actions of the Manager or its contractors; and
- keep a public risk insurance policy to cover the liability of the Grower, the Manager and any other person that is nominated in writing by the Manager.

### **Fees**

27. Under the terms of the Management Agreement, the Forest Right and the Constitution a Grower will make payments per Forest Lot as described below. Growers were able to elect, when completing the Application to subscribe for Forest Lots, to pay Management Fees to the Manager under either payment Option A or payment Option B.

#### ***Fees – Option A***

28. Upon Application the Option A Applicants were required to pay **Subscription Moneys** of \$9,000 per Forest Lot. The Subscription Moneys were made up of the following:

- \$3,500 as Management Fees for plantation services, establishment and maintenance from the commencement of the Project until 31 March 2000;
- \$5,250 as Management Fees for plantation services from the earlier of the date thirteen months after the

acceptance of the Grower's Application and 1 April 2000 until 30 June 2019; and

- \$250 for Forest Right Fees until 31 March 2000.

29. Option A Growers were required to pay the Manager an Annual Fee on 1 April 2000. The fee was a Forest Right Fee of \$250 per Forest Lot subject to Indexation from 1 April 1999.

30. Option A Growers are also required to pay the Manager an Annual Fee on 1 April of each year, commencing 1 April 2001. The fee is comprised of:

- Forest Right Fee of \$275 per Forest Lot subject to Indexation from 1 April 1999; and
- an additional management fee of \$137.50 per annum if the Manager exercises its discretion to continue the Project after 30 June 2019 and subject to Indexation from 1 April 1999.

### ***Fees – Option B***

31. Upon Application the Option B Applicants were required to pay **Subscription Moneys** of \$3,750 per Forest Lot. The Subscription Moneys were made up of the following:

- \$3,500 as Management Fees for plantation services, establishment and maintenance from the commencement of the Project until 31 March 2000; and
- \$250 for Forest Right Fees until 31 March 2000.

32. Option B Growers were required to pay the Manager an Annual Fee on 1 April 2000. The fee was subject to indexation from 1 April 1999 and was comprised of:

- Forest Right Fee of \$250 per Forest Lot; and
- annual Management Fees of \$225 per Forest Lot until 31 March 2001.

33. Option B Growers are required to pay the Manager an Annual Fee on 1 April of each year, commencing 1 April 2001. The fee is subject to indexation from 1 April 1999 and is comprised of:

- Forest Right Fee of \$275 per Forest Lot;
- annual Management Fees of \$247.50 per Forest Lot until 30 June 2019; and
- an additional management fee of \$137.50 per Forest Lot per annum if the Manager exercises its discretion to continue the Project after 30 June 2019.

***Fees – Option A and Option B***

34. In addition to the above fees payable by Option A and Option B Growers, the Manager, to the extent it has properly performed its duties, shall be entitled to receive the following fees pursuant to clause 3.5 of the Constitution:

- Harvest Fees calculated at a rate of 3.5% of the Proceeds and payable upon receipt of the proceeds of sale by the Manager; and
- Incentive Fees of one third of the amount by which the Proceeds payable to the Growers exceeds the net proceeds estimated in the Prospectus to be received by the Growers and shown as ‘Net Sales Proceeds’.

35. The Manager will arrange insurance for the Growers. The Manager will pay the insurance premiums until 30 June 2009. After that time the premiums will be paid from the Grower’s Net Income attributable to the Harvests (cl. 5).

**Harvesting**

36. During the first 13 month period the Manager was responsible for planting *Eucalyptus* trees on the Forest Lot. After the 13 month period the Manager is responsible for the maintenance of the trees in accordance with good silvicultural practice.

37. The Manager will be responsible for the harvesting of the Wood (cl. 9) and arranging the marketing and sale of the Wood for the best possible commercial price (cl. 8). There will be a thinning in approximately year nine (year ended 30 June 2008) and final harvest will occur in approximately year twenty (year ended 30 June 2019).

38. The Proceeds of sale of the Wood will be paid into the Trust Account. Proceeds received by the Manager are to be distributed in the following order of priority:

- (i) to the Manager for any outstanding Annual Fees and to reimburse the Manager for its out of pocket expenses and interest; and
- (ii) to the Growers under each Project Agreement and the Constitution. (cl. 6.2 of the Constitution).

**Finance**

39. Growers could fund their involvement in the Project by borrowing from the Financier named in Product Rulings PR 1999/9 and PR 1999/67 or from the Nominated Bank.

40. Those Growers were able to enter into the following finance arrangements.

*Financier named in Product Rulings PR 1999/9 and PR 1999/67 – Payment Option A*

41. The Borrower could borrow up to 95.55% of the Subscription Moneys payable on Application. The amount of the Loan was permitted to be up to \$8,600 per Forest Lot. The term of the Loan is 10 years.

42. The Borrower must make payments of principal and interest per Forest Lot as specified in the Schedule:

- (i) upon application - deposit of \$400 plus the first year's interest of \$871.75;
- (ii) three months after draw-down of the Principal Sum - \$900;
- (iii) at First Harvest - \$3,000; and
- (iv) yearly instalments of \$1,128.07 being a yearly prepayment of interest (at 11% the Lower Rate provided that payments are made by the due dates) for the following year and a reduction of the principal sum.

43. Default interest is at the Higher Rate of 18%. Clause 4 of the Loan Agreement sets out the Events of Default. Clause 5 sets out the Lender's rights on default.

*Financier named in Product Rulings PR 1999/9 and PR 1999/67 – Payment Option B*

44. The Borrower could borrow up to 100% of the Subscription Moneys payable on Application. The amount of the Loan was permitted to be up to \$3,750 per Forest Lot. The term of the Loan is 5 years.

45. The Borrower must make payments of principal and interest per Forest Lot as specified in the Schedule:

- (i) upon application - the first year's interest of \$272.25;
- (ii) three months after draw-down of the Principal Sum - \$1,700; and
- (iii) yearly instalments of \$500 being a yearly prepayment of interest (at 11% the Lower Rate provided that payments are made by the due dates) for the following year and a reduction of the principal sum.

46. Default interest is at the Higher Rate of 18%. Clause 4 of the Loan Agreement sets out the Events of Default. Clause 5 sets out the Lender's rights on default.

*Finance from the Nominated Bank – Payment Options A and B*

47. Option A or B Growers could enter into a Loan Agreement with the Nominated Bank. The Borrower could borrow a minimum of \$5,000 and a maximum of \$30,000, though higher amounts were able to be considered on their merits. The term of the loan was for a minimum of 12 months to a maximum fixed term of 5 years. Repayments of principal and interest are made either monthly or fortnightly in arrears via direct debit to the Borrower's bank account or via a deposit book. The annual rate which applies to a Grower's loan during the fixed interest rate period is the Nominated Bank's Personal Loan Fixed Rate with interest charged monthly in arrears which applied on the date of the advance.

48. There was a Loan Approval Fee of a maximum of \$100, calculated with reference to the term of the loan, payable on the date of the advance. A Loan Administration Charge of \$25.00 is charged each quarter.

49. 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 or the funding arrangements transform the Project into a 'scheme' to which Part IVA 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 the Financier named in Product Rulings PR 1999/9 and PR 1999/67 or the Nominated Bank are involved or become involved in the provision of finance to Growers for the Project.

## **Ruling**

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

#### **Section 35-55 – Commissioner’s discretion**

50. For a Grower who is an individual and who enters the Project during the year ended 30 June 1999 the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner will decide for the income years ending 30 June 2001 to 30 June 2018 that the rule in section 35-10 does not apply to this activity provided that the Project is carried out in the manner described in this Ruling.

51. 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 (see paragraph 57 in the Explanations part of this ruling, below); or
- a Grower’s business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- a 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)).

52. Where, the ‘exception’ in subsection 35-10(4) applies, 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 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.

53. 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 paragraph 35-55(1)(b) 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**

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

54. 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 made by an individual (including an individual in a general law partnership) from certain business activities will not be taken into account 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.

55. 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.

56. 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.

57. 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 activity 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.

58. 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, or an interest in real property, (excluding any private dwelling) 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 (excluding cars, motor cycles and similar vehicles) are used on a continuing basis in carrying on the business activity in that year (section 35-45).

59. A Grower who participates in the Project will be carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling indicates that a Grower who acquires the minimum allocation of 1 Forest Lot in the Project is unlikely to ever pass one of the tests. Growers who acquire more than the minimum allocation in the Project may however, find that their activity meets one of the tests in a harvest year.

60. Therefore, 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.

61. 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 the business activity has started to be carried on and for that, or those income years;

- because of its nature, the business activity has not satisfied, or will not satisfy one of the tests set out in Division 35; and
- 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.

62. Information provided with this Product Ruling indicates that a Grower who acquires the minimum investment of 1 Forest Lot in the Project is expected to be carrying on a business activity that will produce a taxation profit, for the income years ended 30 June 2008 and 30 June 2019.

63. The Commissioner will decide for such a Grower that it would be reasonable to exercise the second arm of the discretion for all income years up to, and including the income year ended

30 June 2018. The taxation profit that is projected for the income year ended 30 June 2008 does not affect the period of the Commissioner's discretion as it is considered to be a 'one-off' event that is specific to the afforestation industry.

64. 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 that is set out in paragraphs 14 to 49 of this Product Ruling. If, however, the Project is not carried on during the income years specified above (see paragraph 50), in the manner described in the arrangement, 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.

65. In deciding that the second arm of the discretion in paragraph 35-55(1)(b) will be exercised on this conditional basis, 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; and
- independent, objective, and generally available information relating to the afforestation industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity.

## **Detailed contents list**

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**Commissioner of Taxation**

22 May 2002

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*Subject references:*

- carrying on a business
- commencement of a business
- management fees
- primary production
- producing assessable income
- product rulings
- public rulings
- schemes
- tax avoidance
- tax benefits
- viticultural expenses

- ITAA 1997 35-10(2)
- ITAA 1997 35-10(3)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
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