



PR 2007/16 - Income tax: TFS Sandalwood Project 2007 (pre 30 June Growers)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *20 June 2007*



Product Ruling

Income tax: TFS Sandalwood Project 2007 (pre 30 June Growers)

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[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

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

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

The Tax Office **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.

Potential participants must form their own view about the commercial and financial viability of the product. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

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

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the TFS Sandalwood Project 2007 or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits.

3. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and who have executed the relevant Project Agreements set out in paragraph 27 of this Ruling on or before 30 June 2007. They must have a purpose of staying in the scheme until it is completed (that is being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement.

4. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- are accepted into this Project before 7 March 2007, the date of this Ruling or after 30 June 2007;
- participate in the scheme through offers made other than through the Product Disclosure Statement;
- elect to market their own produce (see paragraph 39 of this Ruling);
- enter into finance arrangements with entities associated with this Project, other than those specified in paragraphs 80 to 88 of this Ruling; or
- have their application conditionally accepted by the Responsible Entity subject to finance from Arwon Finance Pty Ltd for the payment of the Establishment Fee, where the funds have not been made available to the Responsible Entity by 30 June 2007.

Qualifications

5. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 27 to 89 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:

- this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Product Ruling may be withdrawn or modified.

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Date of effect

8. This Product Ruling applies prospectively from 7 March 2007, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 7 March 2007 until 30 June 2007, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2009.

9. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;
- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Changes in the Law

13. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments to the law may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to the extent of those amendments this Product Ruling will be superseded.

14. Entities who are considering participating in the scheme 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

15. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes 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 Product Ruling is issued.

Goods and Services Tax

16. All fees and expenditure referred to in this Product 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.

Ruling

Application of this Ruling

17. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters (see paragraphs 2 to 4 of this Ruling) into the scheme described at paragraphs 27 to 89 of this Ruling.

18. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Lease and Management Agreement.

The Simplified Tax System (STS)

Division 328

19. To be an 'STS taxpayer' a Grower must be eligible to be an STS taxpayer and must have elected to be an STS taxpayer (Division 328 of the ITAA 1997). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower was an STS taxpayer prior to 1 July 2005 and continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

20. For these Growers only, a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

25% entrepreneurs tax offset

Subdivision 61-J

21. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for a tax offset of up to 25% of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

Assessable income

Section 6-5 and section 17-5

22. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

Deduction for Establishment Fee, Annual Management Fee, Rent borrowing expenses and interest

23. A Grower may claim tax deductions for the following fees and expenses on a per Sandalwood Lot basis, as set out in the Table below.

Fee Type	Year ending 30 June 2007	Year ending 30 June 2008	Year ending 30 June 2009
Establishment Fee	See Notes (i) and (ii)	Nil	Nil
Annual Management Fee	Nil	Nil	See Notes (i), (iii), (iv) and (vii)
Rent	Nil	Nil	See Notes (i), (iii), (iv) and (vii)
Loan application fee and stamp duty for loan with Arwon Finance Pty Ltd	See Note (v)	See Note (v)	See Note (v)
Interest on loan with Arwon Finance Pty Ltd	Nil	As incurred See Note (vi) and (vii)	As incurred See Note (vi) and (vii)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) The Establishment Fee is payable on Application for services to be provided in the Establishment Period. Under section 82KZMG of the *Income Tax Assessment Act 1936* (ITAA 1936) the Establishment Fee is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 106 to 108 of this Ruling) and is deductible in the income year in which it is incurred.

The amount that is incurred will depend upon the number of Sandalwood Lots held by the Grower. These amounts are set out in the Table at paragraph 66 of this Ruling.
- (iii) The Annual Management Fee and Rent incurred by a Grower are deductible in the year in which they are incurred under section 8-1.

- (iv) **No deduction is available for the Annual Management Fee and Rent in a year in which they have been deferred under the Annual Deferred Investment Option** (see paragraphs 71 and 72 of this Ruling).
- (v) The loan application fee and stamp duty payable to Arwon Finance Pty Ltd are borrowing expenses and are deductible under section 25-25. They are incurred for borrowing money that is used or is to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Arwon Finance Pty Ltd is outside the scope of this Ruling.
- (vi) The deductibility or otherwise of interest arising from agreements entered into with financiers other than Arwon Finance Pty Ltd, is outside the scope of this Ruling.
- (vii) This Ruling does not apply to Growers who choose to prepay the Annual Management Fee or Rent or who choose, or who are required to prepay interest under a loan agreement (see paragraphs 101 and 102 of this Ruling). Subject to certain exclusions, amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.

Joint Venture Growers

24. A Joint Venture Grower may claim the following deductions where fees have been paid annually:

- for the first Joint Venture Grower, the Establishment Fee and the loan application fee, stamp duty and interest (if applicable) as set out in the Table at paragraph 23 of this Ruling; and
- for the second Joint Venture Grower, the Annual Management Fee and Rent and the loan application fee, stamp duty and interest (if applicable) as set out in the Table at paragraph 23 of this Ruling.

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

Section 35-55 – exercise of Commissioner’s discretion

25. A Grower who is an individual accepted into the Project in the year ended 30 June 2007 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for Growers for the income years ended **30 June 2007 to 30 June 2020**. This conditional exercise of the discretion will allow those losses to be offset against the Grower’s other assessable income in the income year in which the losses arise.

Prepayment provisions and anti-avoidance provisions

Sections 82KZME, 82KZMF and 82KL and Part IVA

26. For a Grower who commences participation in the Project and incurs expenditure as required by the Lease and Management Agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- 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.

Scheme

27. The scheme that is the subject of this Ruling is specified below. This scheme incorporates the following documents:

- Application for a Product Ruling as constituted by documents provided on 10, 16 and 25 October 2006, 5, 7 and 12 December 2006, 15, 25, 30 and 31 January 2007 and 1, 2, 7, 9, 15, 16, 19, 22, 23 and 26 February 2007;
- Additional correspondence received 25 March 2007 and 16, 19, 26 and 27 April 2007, 18, 29 and 31 May 2007 and 7, 11 and 13 June 2007;
- Draft Supplementary Product Disclosure Statement of the TFS Sandalwood Project 2007, received 7 June 2007;

- Draft Offer to Lease Rural Property, between an unrelated party and TFS Properties Ltd, dated 11 May 2007;
- Draft TFS Properties Head Lease between TFS Properties Ltd, TFS Leasing Pty Ltd and the Security Holder, received 11 June 2007;
- Draft **Product Disclosure Statement** for the TFS Sandalwood Project 2007, received on 23 February 2007;
- Draft **Constitution** for the TFS Sandalwood Project 2007, received 15 February 2007;
- Draft Compliance Plan for the TFS Sandalwood Project 2007, received 5 December 2006;
- Draft **Lease and Management Agreement** between TFS Properties Ltd (Responsible Entity), TFS Leasing Pty Ltd (Lessor) and the Grower, received 16 February 2007;
- Draft Plantation Management Agreement between TFS Properties Ltd (Responsible Entity) and Tropical Forestry Services Ltd (Manager), received 10 October 2006;
- Draft **Finance Application Form** for Arwon Finance Pty Ltd, received 15 February 2007;
- Draft **Loan Agreement** between Arwon Finance Pty Ltd and the Grower, received 25 January 2007; and
- Draft **Terms Agreement** for the TFS Sandalwood Project 2007, received 10 October 2006.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

28. The documents highlighted are those that a Grower may enter into. For the purposes of describing the scheme 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 scheme. The effect of these agreements is summarised as follows.

29. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

30. The main features of the TFS Sandalwood Project 2007 are as follows:

Location	Kununurra, Western Australia
Type of business to be carried on by each Grower	Commercial growing and cultivation of Indian sandalwood (<i>Santalum album</i>) trees, for the purpose of harvesting and selling timber

Term of the Project	Up to 15 years
Number of hectares offered for cultivation	550
Size of each Sandalwood Lot	0.167 hectares
Minimum allocation per Grower	1 Sandalwood Lot
Minimum subscription	None
Initial cost	\$12,100
Ongoing costs	Annual Management Fee and Rent (if not deferred) and optional insurance premiums
Other costs	Harvest and Processing costs, Selling and Marketing Fee and Incentive Fee

31. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. TFS Properties Ltd has been issued with an Australian Financial Service Licence 241192 and will be the Responsible Entity for the Project.

32. The Project will involve establishing and maintaining an Indian sandalwood plantation. Approximately fourteen years after the Establishment Period the sandalwood will be Harvested, Processed and then sold.

33. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). This offer under the PDS is for 550 hectares, which corresponds to approximately 3,300 Sandalwood Lots in the Project.

34. An entity that participates in the Project will do so by acquiring an interest in the Project on or before 30 June 2007, which will consist of a minimum of one 'Sandalwood Lot, being 0.167 hectares in size.

35. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints the Responsible Entity to enter into, on behalf of the Grower, a Lease and Management Agreement required for the Grower to hold an interest in the Project.

36. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Lease and Management Agreement on or before 30 June 2007 will become 'Pre 30 June Growers'.

37. The land for the Project is located within the Ord River Irrigation Area in Kununurra, Western Australia and is described as:

- King Location 240 and 257, Farmhill Road; and
- King Location 259, Weaber Plains Road.

38. The land at Farmhill Road is owned by the Responsible Entity. For the land at Weaber Plains Road the Responsible Entity has entered into an 'offer to lease' with an unrelated party. The Responsible Entity will lease the Farmhill Road property and the Weaber Plains property (when the lease with the unrelated party is entered into) to TFS Leasing Pty Ltd, who will divide the land into 0.167 hectare lots and sub-lease the lots to the Growers accepted in the Project. The Responsible Entity will then plant the land with sandalwood seedlings and host plants.

39. The Responsible Entity will Harvest and Process the timber. A Grower may elect to take their Forest Yield and sell their own produce (Electing Grower) or the Responsible Entity will sell the produce on their behalf (Non-Electing Grower). This Ruling does not apply to Electing Growers.

Constitution

40. The Constitution establishes the Project and operates as a deed binding all Growers and the Responsible Entity. The Constitution sets out the terms and conditions under which TFS Properties Ltd agrees to act as Responsible Entity and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

41. In order to acquire an interest in the Project, the Grower must make an Application for Sandalwood Lot(s) in accordance with clause 11.2. Among other things, the Application must be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, lodged at the registered office of the Responsible Entity and accompanied by payment of the Application Money.

42. Under the terms of the Constitution, all moneys received from Applications shall be deposited into an Application Fund. The Application Moneys will be released when the Responsible Entity is reasonably satisfied that certain specified criteria in the Constitution have been met (clauses 13 and 14).

43. In summary, the Constitution also sets out provisions relating to:

- complaints handling (clause 5);
- winding up the Project (clause 6);
- distribution of proceeds (clause 16);
- retirement and removal of the Responsible Entity (clause 25); and
- register of Growers (clause 26).

Compliance Plan

44. As required by the *Corporations Act 2001*, the Responsible Entity has prepared a Compliance Plan. The purpose of the Compliance Plan 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.

Leases

45. The Project land at Farmhill Road and Weaber Plains Road, will be leased by the Responsible Entity to TFS Leasing Pty Ltd.

46. TFS Leasing Pty Ltd will sub-lease both areas of land to Growers in the Project, for the commercial silviculture of Indian Sandalwood Trees.

Lease and Management Agreement

47. Growers participating in the scheme will enter into a Lease and Management Agreement with the Responsible Entity and TFS Leasing Pty Limited (Lessor).

48. Growers are granted an interest in land in the form of a sub-lease to use their Sandalwood Lot(s) for the purpose of conducting their afforestation business.

49. The Lessor acknowledges that the Grower's Trees will remain the property of the Grower during the Term of the sub-lease, provided that the Lease and Management Agreement has not been terminated in accordance with its terms (clause 5.14).

50. In addition, the Agreement provides that each Grower appoints the Responsible Entity to manage the Sandalwood Lots and to carry out the management services subject to the terms and conditions of the Agreement.

51. The management services to be performed are the 'Establishment Services', 'Ongoing Services' and 'Selling and Marketing Services' which are listed at Items 7A, 7B and 7C respectively of the Schedule to the Agreement.

52. The Establishment Services will be provided during the Establishment Period, which is, the period of 12 months from the 'Commencement Date'. The Commencement Date is the date upon which a Grower's Application is accepted by the Responsible Entity.

53. The Ongoing Services commence at the end of the Establishment Period (see the definition of 'Annual Management Fee' at clause 1.1).

54. The Responsible Entity will supervise and manage all silvicultural activities on behalf of each Grower including, but not limited to, the provision of the following Services:

Establishment Services

- acquire appropriate seeds and seedlings;
- carry out weed control, surveying and ground preparation of the Sandalwood Lot as required in respect of planting;
- plant Sandalwood seedlings or Trees on the Sandalwood Lot, in accordance with good silvicultural and forestry practices, at a rate sufficient to provide an average survival rate of 433 Trees per hectare at the end of the third year after the Commencement Date; and
- plant other Trees (hosts) as necessary to enable or encourage the growth of the sandalwood seedlings or Trees.

Ongoing services

- irrigate, cultivate, tend, cull, prune, fertilise, replant, spray, maintain and otherwise care for the Trees;
- plant other Trees (hosts) as necessary to enable or encourage the growth of the sandalwood seedlings or Trees;
- replant the relevant parts of the Plantation with sufficient seedlings or Trees to provide an average survival rate of 433 Trees per hectare at the end of the third year after the Commencement Date, with the replanting fee to be paid by the Responsible Entity;
- keep access roads and firebreaks in good repair;
- use all reasonable measures to keep the Sandalwood Lot free of infestation from rabbits and other vermin;
- maintain the Sandalwood Lot according to good silvicultural and forestry practices; and
- furnish to the Grower reports as and when required.

Harvesting, Selling and Marketing Services

- carry out or arrange to be carried out the Harvest and Processing of the Trees;
- supervise and manage the negotiating and making of sales of Forest Yield at the maximum practicable price available;
- supervise and manage the writing of a marketing plan; and
- maintain an international database of all potential buyers of Sandalwood in the years preceding the Harvest.

55. According to the Harvest Plan, Harvest is expected to take place during years 13 to 14, however this may vary dependent upon the assessment of heartwood and oil yields (clause 14 of the Lease and Management Agreement).

56. The Term of the Lease and Management Agreement for Electing Growers is from the Commencement Date until the final distribution of the sale proceeds is made to the Grower or until the Project is terminated.

Plantation Management Agreement

57. Under the Plantation Management Agreement, the Responsible Entity will engage the Manager, Tropical Forestry Services Ltd, to establish the Growers' Sandalwood Lots and to manage and maintain the Sandalwood Lots.

58. In addition, the Manager will be engaged to supervise the Harvest of the sandalwood and the Processing of the sandalwood into clean logs and their transport to store.

59. In performing the services in the Plantation Management Agreement, the Manager will be subject to the direction of the Responsible Entity. The Responsible entity remains liable to the Growers for the manner in which the Services are performed.

Pooling of produce and Grower's entitlement to proceeds

60. The Lease and Management Agreement sets out provisions relating to the receipt of the proceeds of sale of the produce and the payment to the Grower of these proceeds.

61. The Gross Proceeds of Sale from the produce of Non-Electing Growers will be paid direct to the Responsible Entity which must deposit them into a Proceeds Fund (clause 18.1 of the Lease and Management Agreement).

62. Within 10 days of receiving the Gross Proceeds of Sale, the Responsible Entity must pay to itself the Non-Electing Grower's Proportional Share of the costs of Harvesting, Processing, marketing and sale (clause 18.2 of the Lease and Management Agreement). Within a further 5 business days, the Responsible Entity will pay to itself any other fees or amounts owing and distribute the remainder to the Non-Electing Growers on a proportionate basis.

63. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed to the Proceeds Fund are entitled to benefit from distributions of proceeds from the pool; and
- any pooled proceeds must consist only of proceeds contributed by Growers who are accepted to

participate in the Project on or after 7 March 2007 and on or before 30 June 2007.

64. In the event of a total or partial destruction of the Trees on a Grower's Sandalwood Lot(s), the Proportional Share of the Grower's proceeds will be reduced by the damaged or destroyed proportion as determined by the Responsible Entity (clauses 22.5 to 22.7 of the Lease and Management Agreement).

Fees

65. An Establishment Fee, Annual Management Fees and Rent are payable by the Grower for each Sandalwood Lot, under one of the following options:

- Annual Investment Option; or
- Annual Deferred Investment Option.

Option 1 – Annual Investment Option

Establishment Fee

66. Under this option the Establishment Fee, payable on Application is:

Number of Sandalwood Lots applied for	Establishment Fee (per lot)
1 to 5	\$12,100
6 to 29	\$11,550
30 or more	\$11,000
(Item 9A of the Schedule to the Lease and Management Agreement)	

Annual Management Fee and Rent

67. The amount of the Annual Management Fee is \$1,100 per year and the Rent is \$220 per year. The amounts are payable on or before 14 January in each financial year, following the financial year in which the Establishment Period ends (clause 19.2 of the Lease and Management Agreement).

68. The Annual Management Fee and Rent will be indexed in each financial year, following the financial year in which the Establishment Period ends (item 9B of the Schedule of the Lease and Management Agreement).

69. The Annual Management Fee and Rent are payable until Harvesting is carried out under the Harvest Plan (item 9B of the Schedule of the Lease and Management Agreement).

Option 2 – Annual Deferred Investment Option*Establishment Fee*

70. Under this option the Establishment Fee payable on Application is set out in the Table, in paragraph 66 of this Ruling.

Annual Management Fee and Rent

71. Growers who pay management fees and Rent on an annual basis as described in Option 1 above, may elect to defer these fees for any particular financial year, until Harvesting is carried out under the Harvest Plan.

72. Where a Grower's Annual Management Fee and Rent are deferred, a percentage of the Gross Proceeds of Sale, as set out in the following Table, is payable to the Responsible Entity for each year that fees are deferred.

Financial Year of Deferral	Percentage of Gross Proceeds of Sale
Years 1-6	4.4% per year
Years 7-10	3.3% per year
Years 11-12	2.2% per year
(Item 9C of the Schedule to the Lease and Management Agreement)	

73. If all, or substantially all of the Trees on the Grower's Sandalwood Lot are destroyed before the Harvest can take place, the Grower will be liable to pay an amount equal to 55% of the Annual Management Fees and Rent for all years that would have otherwise been payable by an annual Grower up to the time the Trees were destroyed (clause 22.6 of the Lease and Management Agreement).

Other fees

74. The following amounts are payable to the Responsible Entity from the Project's proceeds:

- the Grower's Proportional Share of the costs of Harvest and Processing (clause 18.2 of the Lease and Management Agreement);
- a Selling and Marketing Fee, payable by Non-Electing Growers, equal to 5.5% of the Gross Proceeds of Sale (clause 19.5 of the Lease and Management Agreement); and
- an Incentive Fee equal to 33% of the amount (if any), by which the Net Proceeds of Sale exceed the Target Net Proceeds of Sale for each Sandalwood Lot (clause 19.4 of the Lease and Management Agreement).

75. The Responsible Entity will insure the Plantation against fire until the end of the Establishment Period. Thereafter, the Responsible Entity will arrange insurance of the Sandalwood Lot(s) on behalf of the Grower, if so requested, to cover against fire and other usual risks. The cost of such insurance will be payable to the Responsible Entity by the Grower (clause 22 of the Lease and Management Agreement).

76. If Growers fund the participation in the Project through Arwon Finance Pty Ltd, insurance of the Sandalwood Lot(s) is compulsory.

Joint Venture

77. The Project will also allow two Growers to enter into a Joint Venture. They will be bound by the Joint Venture terms set out in the Joint Venture Agreement attached to the PDS. The Joint Venture option is available only for those Growers who enter the Annual Investment Option and do not defer any of the Annual Management Fees and Rent.

78. Under this Joint Venture:

- the first Joint Venture Grower will be responsible for procuring the preparation and establishment of the Sandalwood Lot by payment of the Establishment Fee;
- the second Joint Venture Grower will be responsible for procuring the ongoing provision of land and maintenance of the Sandalwood Lot by payment of the Annual Management Fees and Rent; and
- each Joint Venture Grower will be responsible for the fees payable out of the Project proceeds, listed in paragraph 74 of this Ruling (clause 4 of the Joint Venture Agreement contained in the PDS).

79. The Joint Venture terms provide that each Joint Venture Grower will be entitled to 50% each of the Joint Venture property and, in particular, all saleable timber from the Sandalwood Lots (clause 5 of the Joint Venture Agreement contained in the PDS).

Finance

80. A Grower who does not pay the Establishment Fee in full upon Application can pay the amount by the Instalment Option, borrow from Arwon Finance Pty Ltd (an entity associated with the Project) or borrow from an independent lender external to the Project.

81. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into the Instalment Option with the Responsible Entity or the finance arrangement with Arwon Finance Pty Ltd that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling. A Grower who enters into a finance arrangement with an independent lender

external to the Project may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

82. Other than where the Instalment Option is in place, Growers cannot rely on any part of this Ruling if the Establishment Fee is not paid in full on or before 30 June 2007 by the Grower or, on the Grower's behalf, by Arwon Finance Pty Ltd. Where an application is accepted subject to finance approval by any lending institution other than Arwon Finance Pty Ltd, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution by 30 June 2007.

Instalment Option

83. Where the Responsible Entity accepts an application from a Grower to pay the Establishment Fee under the Instalment Option, a deposit of 20% is payable on Application. The balance is payable in equal monthly instalments and must be paid within twelve months from the Application being accepted.

84. On entering the Instalment Option, the Grower will be bound by the terms and conditions of the Terms Agreement.

Finance offered by Arwon Finance Pty Ltd

85. A Grower can finance the cost of their Establishment Fee by borrowing that amount from Arwon Finance Pty Ltd (as the Lender).

86. The Grower will be bound by the terms and conditions of the Loan Agreement.

87. The finance available is under the following arrangement:

- the Term of the loan for the Establishment Fee is up to 10 years from the Date of Advance of the Principal Sum;
- the interest rate is fixed, being the 'cash rate' at the time of Application, plus a margin of up to 7%;
- a deposit of 10%;
- regular monthly repayments of principal and interest commencing one month after the Date of Advance of the Principal Sum and with the final payment of all outstanding amounts due at the end of the Term of the loan;
- the loan is secured by a mortgage over the Grower's Sandalwood Lot(s) and Project interest;
- application fee of \$250, plus, 0.5% of the Principal Amount, up to a maximum of \$1,250; and
- stamp duty fees at cost.

88. Arwon Finance Pty Ltd will offer loans on a full-recourse commercial basis only to the extent it has funds available to lend to Growers.

89. 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 of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 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 Arwon Finance Pty Ltd, are involved or become involved in the provision of finance to Growers for the Project.

Appendix 1 – Explanation

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

Is the Grower carrying on a business?

90. For the amounts set out in paragraph 23 of this Ruling to constitute allowable deductions the Grower's afforestation activities as a participant in the Project must amount to the carrying on of a business of primary production.

91. Two Taxation Rulings are relevant in determining whether a Grower will be carrying on of a business of primary production.

92. The general indicators used by the Courts are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

93. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Project. As Taxation Ruling TR 2000/8 sets out, the relevant principles have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

94. Having applied these principles to the arrangement set out above, a Grower in the Project is accepted to be carrying on a business of growing and harvesting sandalwood for sale.

The Simplified Tax System

Division 328

95. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

96. Changes to the STS rules apply from 1 July 2005. The question of whether a Grower is eligible to be an STS taxpayer is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an STS taxpayer.

Deduction for Establishment Fee, Annual Management Fee, Rent and interest**Section 8-1**

97. The Establishment Fee, Annual Management Fee and Rent are deductible under section 8-1 (see paragraphs 43 and 44 of TR 2000/8). A 'non-income producing' purpose (see paragraphs 47 and 48 of TR 2000/8) is not identifiable in the arrangement and there is no capital component evident in the Establishment Fee, Annual Management Fee or Rent (see paragraphs 49 to 51 of TR 2000/8).

98. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Subject to the prepayment provisions (see paragraphs 101 and 102 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

99. Some Growers may finance their participation in the Project through a Loan Agreement with Arwon Finance Pty Ltd. Applying the same principles as that used for the Establishment Fee, Annual Management Fee and Rent, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

100. Other than where the prepayment provisions apply (see paragraphs 101 and 102 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

Prepayment provisions**Sections 82KZL to 82KZMG**

101. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example, the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same income year, then it is not expenditure to which the prepayment rules apply.

102. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and section 82KZMG of the ITAA 1936 (an operative provision). References to sections 82KZME and 82KZMF of the ITAA 1936 are made only in respect their interaction with section 82KZMG and to confirm that these provisions have no application to expenditure incurred by Growers who participate in the scheme set out in this Ruling.

Application of the prepayment provisions to this Project***Sections 82KZME and 82KZMF***

103. Other than the Establishment Fee (see paragraphs 106 to 108 of this Ruling) the fees payable under the scheme to which this Product Ruling applies are either payable annually for services to be wholly provided in the year in which those fees are incurred or, alternatively are payable out of the Harvest Proceeds. The interest payable to Arwon Finance Pty Ltd is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to expenditure incurred by Growers under this scheme.

104. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Lease and Management Agreement and/or prepays interest under a loan agreement (including loan agreements with lenders other than Arwon Finance Pty Ltd). Where such a prepayment is made these prepayment provisions will also apply to STS taxpayers because there is no specific exclusion in section 82KZME that excludes them from the operation of section 82KZMF.

105. As noted in the Ruling part above, Growers who prepay Annual Management Fee, Rent or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Section 82KZMG

106. Expenditure that meets the requirements of section 82KZMG of the ITAA 1936 is excluded from the application of the prepayment rules in sections 82KZME and 82KZMF of the ITAA 1936 that would otherwise apply. Section 82KZMG provides a '12 month rule' that, in effect, facilitates an immediate deduction for certain prepaid expenditure incurred under a plantation forestry managed agreement. The 12 month rule applies to expenditure for 'seasonally dependent agronomic activities' that will be carried out during the establishment period of a particular planting of trees. Seasonally dependent agronomic activities are explained in Taxation Determination TD 2003/12. Whilst the establishment period itself may exceed 12 months, each seasonally dependent agronomic activity must be completed within 12 months of commencement of its eligible service period (as defined in subsection 82KZL(1) of the ITAA 1936), and by the end of the following income year.

107. Under the Lease and Management Agreement each Grower incurs an Establishment Fee per Sandalwood Lot for 'seasonally dependent agronomic activities' that will be carried out during the 'Establishment Period' of the sandalwood Trees.

108. The expenditure for seasonally dependent agronomic activities meets all other requirements of section 82KZMG of the ITAA 1936 and, therefore, a deduction is allowable in the income year ended 30 June 2007 for the full amount of expenditure incurred by the Grower for the Establishment Fee.

Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner’s discretion

109. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years 30 June 2007 to 30 June 2020, the Commissioner has determined that for those income years:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

110. A Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

111. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Section 82KL – recouped expenditure

112. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of ‘additional benefits(s)’. Insufficient additional benefits will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

113. For Part IVA of the ITAA 1936 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).

114. The Project will be a scheme. A Grower will obtain a tax benefit from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraph 23 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

115. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the sandalwood. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22;
TR 2000/8; TR 2002/6;
TR 2002/11; PR 2005/116;
TD 2003/12

Subject references:

- advance expenses and payments for certain forestry expenditure
- carrying on a business
- commencement of business
- fee expenses
- forestry agreement
- interest expenses
- management fees expenses
- non-commercial losses
- primary production
- primary production expenses
- primary production income
- producing assessable income
- product rulings
- public rulings
- seasonally dependent agronomic activity
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

- ITAA 1936 82KZL(1)
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
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- ITAA 1936 177D
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- ITAA 1997 Div 35
- ITAA 1997 35-10
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- ITAA 1936 82KL
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