



PR 2008/29 - Income tax: ITC Hardwood Project 2008 (Pulpwood Option)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *19 March 2008*



Product Ruling

Income tax: ITC Hardwood Project 2008 (Pulpwood Option)

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ⓘ 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 under-paid 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 provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. Unless otherwise indicated, all legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997). In this Product Ruling, the scheme is referred to as the ITC Hardwood Project 2008 (Pulpwood Option) or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations; and
- can rely on the taxation benefits;

set out in the Ruling section of this Product Ruling.

3. The members of the class of entities who are subject to those taxation obligations and who can rely on those taxation benefits are referred to as Growers.

4. Growers will be those entities that are accepted to participate in the scheme specified below as initial participants¹ on or after the date this Product Ruling is made and who will have executed the relevant Project Agreements set out in paragraph 35 of this Ruling on or before 30 June 2008.

5. 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:

- participate in the scheme other than as initial participants;
- are accepted into this Project before the date of this Ruling or after 30 June 2008;
- participate in the scheme through offers made other than through the Product Disclosure Statement (PDS);
- enter into finance arrangements with entities associated with this Project, other than those arrangements specified in paragraphs 77 to 88 of this Ruling;
- have not paid the Establishment Services Fee by 30 June 2008, where they have not entered into a finance arrangement as detailed in paragraphs 77 to 88 of this Ruling; or

¹ For the purposes of this Product Ruling an 'initial participant' means a participant who has obtained their interest in the scheme from the Responsible Entity or the Manager of the scheme.

- have their application conditionally accepted by a lending institution subject to finance for the payment of the Establishment Services Fee, where the finance has not been approved by the lender by 30 June 2008 or the finance has been approved but the funds have not been made available to ITC Project Management Limited (the 'Responsible Entity') by 30 June 2008.

Qualifications

6. 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 35 to 89 of this Ruling.

7. 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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Superannuation Industry (Supervision) Act 1993

9. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Date of effect

10. This Product Ruling applies prospectively from 19 March 2008, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 19 March 2008 until 30 June 2008, 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 2010.

11. 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.

12. 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)).

13. 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.

14. 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

15. 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.

16. 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

17. 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

18. 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

19. 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 into the scheme described below at paragraphs 35 to 89 of this Ruling.

20. The Grower's participation in the Project must constitute the carrying on of a 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 Land Agreement (or Agreement to enter into Land Agreement) and Management Agreement.

21. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced.

Concessions for 'small business entities'²

22. From the 2007-08 income year, a range of concessions, previously available under the simplified tax system (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

23. A 'small business entity' can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Ruling.

² The meaning of 'small business entity' is explained in section 328-110.

Deductions for the Establishment Services Fee**Section 8-1 and Division 27 of the ITAA 1997 and section 82KZMG of the Income Tax Assessment Act 1936**

24. Other than where a 'CGT event'³ happens to their interest within 4 years of 30 June 2008 (see paragraph 25 of this Ruling), a Grower who is an initial participant in the scheme may claim tax deductions for the following amount on a per Plantation Unit basis.

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Establishment Services Fee	\$4,950 See Notes (i) and (ii)	Nil	Nil

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) Under section 82KZMG of the *Income Tax Assessment Act 1936* (ITAA 1936), the Establishment Services Fee is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 104 to 109 of this Ruling) and is deductible in the income year in which it is incurred.

'CGT event' within 4 years for Growers who are 'initial participants'**Section 82KZMGA**

25. A deduction for the Establishment Services Fee is not allowable where a 'CGT event' happens in relation to a Grower's interest before 1 July 2012 (subsection 82KZMGA(1) of the ITAA 1936).

26. Where deductions for these amounts have already been claimed by a Grower, the Commissioner may amend their assessment at any time within two years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

27. Growers whose deductions are disallowed are still required to include in their assessable income the market value of the interest at the time of the 'CGT event' or the decrease in the market value of the interest as a result of the 'CGT event' (see paragraphs 110 to 112 of this Ruling).

³ Defined in section 995-1.

Deductions for loan interest, insurance cost, borrowing costs, and administration fee***Sections 8-1, 25-25 and 40-880 and Division 27***

28. A Grower who is an initial participant in the scheme may also claim tax deductions for the following fees and expenses on a per Plantation Unit basis, as set out in the Table.

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Interest on loans with ITC Finance Pty Ltd or the Nominated Financier	Nil	As incurred See Notes (iii) and (vi)	As incurred See Notes (iii) and (vi)
Insurance Cost	As incurred See Notes (i) and (iii)	As incurred See Notes (i) and (iii)	As incurred See Notes (i) and (iii)
Application fee for loans with ITC Finance Pty Ltd or the Nominated Financier	Must be calculated See Notes (i) and (iv)	Must be calculated See Notes (i) and (iv)	Must be calculated See Notes (i) and (iv)
Terms Payment Administration Fee	Must be calculated See Note (v)	Must be calculated See Note (v)	Must be calculated See Note (v)

Notes:

- (iii) Interest on loans with ITC Finance Pty Ltd or the Nominated Financier as described at paragraphs 84 to 88 of this Ruling and the Insurance Cost paid by the Grower to the Responsible Entity are deductible in the income year that the relevant amount is incurred (section 8-1).
- (iv) The Loan Application Fee of \$250 plus 0.4% of the loan amount payable to ITC Finance Pty Ltd or the Nominated Financier is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing money that is used or is to be used during that income year solely for income producing purposes. The deduction for the borrowing expense 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 ITC Finance Pty Ltd or the Nominated Financier is outside the scope of this Ruling.

- (v) The Terms Payment Administration Fee of \$275 payable to the Responsible Entity in respect of the Terms Payment Agreement is not deductible in full when it is incurred. Under section 40-880, it is deductible in equal proportions over five income years beginning in the year in which the administration fee is incurred (see paragraphs 123 to 124 of this Ruling).
- (vi) The deductibility or otherwise of interest arising from agreements entered into with financiers, other than ITC Finance Pty Ltd or the Nominated Financier, is outside the scope of this Ruling. Prepayments of interest to any lender, including ITC Finance Pty Ltd or the Nominated Financier, are also not covered by this Product Ruling. Growers who enter into agreements with other financiers and/or prepay interest may request a private ruling on the deductibility of the interest incurred (see paragraph 103 of this Ruling).

Assessable income from 'CGT events' for Growers who are 'initial participants'

Sections 6-10, 17-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936

29. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning)⁴ happens to the interest held by a Grower who is an initial participant in this Project, the market value of the interest, or the decrease in the market value of the interest, is included in the Grower's assessable income (section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936), less any GST payable on those proceeds (section 17-5 of the ITAA 1997).

30. The amount is included in the Grower's assessable income in the income year in which the 'CGT event' happens (subsection 82KZMGB(2) of the ITAA 1936).

31. 'CGT events' for these purposes include those relating to:

- a **clear-fell harvest of all or part of the trees** grown on the Grower's Plantation Unit;
- the **sale, or any other disposal** of all or part of the 'interest' in the Project held by the Grower; or
- any other 'CGT event' that results in a reduction of the market value of the 'interest' in the Project held by the Grower.

⁴ A thinning of the trees includes a selective harvest of immature trees to facilitate better outcomes at harvest. A thinning differs from a clear fell of a percentage of mature trees which may occur over two or more income years.

32. Where an amount arising from a 'CGT event' is included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936, the anti-overlap provisions in section 118-20 of the ITAA 1997 will operate to exclude that amount from the capital gains provisions in Part 3-1 of the ITAA 1997.

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

Section 35-55 – exercise of Commissioner's discretion

33. A Grower who is an individual accepted into the Project in the year ended 30 June 2008 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 2008 to 30 June 2018**. 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

34. For a Grower who commences participation in the Project and incurs expenditure as required by the Land Agreement and the 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

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

- Application for a Product Ruling as constituted by documents provided on 12 November 2007 and additional correspondence, including emails, received on 18 December 2007, 19 December 2007, 11 January 2008, 4 February 2008, 18 February 2008, 20 February 2008, 27 February 2008 and 6 March 2008;

- Draft **Product Disclosure Statement** and Application Form for the ITC Hardwood Project 2008, received on 12 November 2007;
- Draft Scheme Constitution made by ITC Project Management Limited establishing the ITC Hardwood Project 2008, received on 12 November 2007;
- Draft Compliance Plan for ITC Project Management Limited, received on 12 November 2007;
- Draft **Land Agreement** between ITC Project Management Limited and the Grower, received on 12 November 2007;
- Draft **Memorandum (Land Agreement Provisions)** for the ITC Hardwood Project 2008, received on 12 November 2007;
- Draft **Agreement to enter into Land Agreement** between ITC Project Management Limited and the Grower, received on 12 November 2007;
- Draft **Management Agreement** between ITC Project Management Limited and the Grower, received on 12 November 2007;
- Draft **Memorandum (Management Agreement Provisions)** for the ITC Hardwood Project 2008, received on 11 January 2008;
- Draft **Tree Farm Loan Application** (including the **Tree Farm Loan Deed**) for the ITC Hardwood Project 2008, received on 19 December 2007;
- Draft Deed (Tree Farm Loan) between ITC Finance Pty Ltd and the Nominated Financier, received on 12 November 2007;
- Draft Head Interest between the Lessor and ITC Project Management Limited, received on 4 February 2008;
- Draft Forestry Management Agreement for ITC Hardwood Project 2008 between Integrated Tree Cropping Ltd and ITC Project Management Limited, received on 12 November 2007;
- Service Agreement dated 30 June 2003 between Australian Plantation Timber Limited and Integrated Tree Cropping Ltd, received on 12 November 2007;
- Draft Pulpwood Tree Farm Management Plan for the ITC Hardwood Project 2008 – Pulpwood Planting Option, received on 4 February 2008;
- Independent Forester's Report, received on 12 November 2007.

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

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

37. 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.

38. The main features of the ITC Hardwood Project 2008 (Pulpwood Option) are as follows:

Location	The plantations will be predominantly located in the Albany or Esperance regions in Western Australia, or the Green Triangle Region of SW Victoria and SE South Australia.
Type of business to be carried on by each Grower	Commercial growing and cultivation of different species of trees for the purpose of harvesting and selling wood produce.
Term of the Project	Approximately 10 years from planting
Number of hectares offered for cultivation	10,000 hectares
Size of each Plantation Unit	Approximately 0.8 to 1.2 hectares
Minimum allocation per Grower	1 Plantation Unit
Minimum subscription	Nil
Initial cost	\$4,950
Insurance costs before clearfall	Compulsory insurance until clearfall harvest commencement date and related insurance administration fee
Deferred costs	Deferred Management Fees – 18.81% of Harvest Proceeds Item 4(a) Schedule 4 of the Memorandum (Management Agreement Provisions)
Deferred costs	Deferred Land Fees – 5.94% of the Harvest Proceeds Item 1(ii) – Schedule 2 of the Memorandum (Land Agreement Provisions)

Other costs	Cost of Harvest and Marketing – payable from project proceeds (including the cost for insurance premiums from the clearfall harvest commencement date)
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39. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. ITC Project Management Limited has been issued with the Australian Financial Services Licence 247019 and will be the Responsible Entity for the Project.

40. The Project will involve establishing and cultivating native Australian hardwoods plantations, and then harvesting and selling of timber. The trees are expected to be harvested approximately 10 years after planting.

41. An offer to participate in the Project will be made through a PDS. The offer under the PDS is for two Planting Options, the High Value Timber Option and the Pulpwood Option. This Ruling only applies to the ITC Hardwood Project 2008 (Pulpwood Option). Growers who participate under the High Value Timber Option may be covered by Product Ruling PR 2008/28.

42. The offer is for approximately 10,000 hectares, with provisions to accept applications in excess of this level, provided that the Responsible Entity can secure suitable land and complete the delivery of Establishment Services within the 12 months after the Grower incurred the Establishment Services Fee.

43. An entity that participates in the Project will do so by acquiring an interest in the Project on or before 30 June 2008, which will consist of a minimum of one Plantation Unit.

44. A Plantation Unit is the area of land that is expected to produce 225 cubic metres of Pulpwood. The area of Plantation Unit varies from property to property depending upon the estimated productivity of the property. Each Plantation Unit will have an approximate area in range of 0.8 hectares to 1.2 hectares.

45. 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 Land Agreement, Management Agreement and any other documents required to hold an interest in the Project.

46. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Land Agreement and the Management Agreement on or before 30 June 2008 will become 2008 Growers.

47. Land utilised by the Project is selected by the Responsible Entity based on a detailed documented protocol referred to by the Independent Forester at page 6 of the Independent Forester's Report attached to the PDS.

48. This Land will be leased by the Responsible Entity from a related entity, ITC Timberlands Pty Ltd or a third party.

49. To participate in the Project, Growers must pay an Establishment Services Fee and other costs. The Management Services Fee and Land Management Fee will be payable from each Grower's share of Harvest Proceeds (at the time of distribution of Harvest Proceeds), or in the case of loss by an insured event, as set out under section 4.7 of the PDS.

50. Each Grower will use their Plantation Unit(s) for the purpose of carrying on a business of cultivating and harvesting timber and the sale of harvested produce.

Constitution

51. The Constitution establishes the Project and operates as a deed binding all Growers and ITC Project Management Limited (ITCPM). The Constitution sets out the terms and conditions under which ITCPM 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.

52. In order to acquire an interest in the Project, the Grower must make an application for a Plantation Unit in accordance with clause 4.2. The application must be completed in a form approved by the Responsible Entity, signed by or executed by or on behalf of the Applicant, lodged at the office of the Responsible Entity and accompanied by payment of the appropriate Application Price in a form acceptable to the Responsible Entity.

53. Under clause 5.1 of the Constitution, the Responsible Entity holds the Application Money on bare trust. The Responsible Entity will deposit all Application Moneys received from applicants in an Application Fund (clauses 3.3 and 5.1).

54. The Application Moneys will be released when the Responsible Entity is reasonably satisfied that certain specified criteria in the Constitution have been met (clauses 9.1 and 10).

55. The Responsible Entity will also create other separate funds, being a Proceeds Fund and a Withdrawal Fund (clause 3.3).

56. Each fund will be maintained as a separate fund within a trust bank account and the accounting records of the Responsible Entity.

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

- the Register of Applicants and Growers (clause 27);
- distributions from Proceeds Fund (clause 30); and
- complaint procedures (clause 34).

Compliance Plan

58. 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.

Land Agreement and Memorandum (Land Agreement Provisions)

59. The Responsible Entity will enter into a Land Agreement with the Grower, which identifies the number of Plantation Units, and provides a description of them (Item 2 of the Reference Schedule to the Land Agreement), and binds the parties to follow the Memorandum (Land Agreement Provisions) document (clause 3 of the Land Agreement). The Responsible Entity is the lessee or holder of a profit à prendre over certain land, including the land referred to in Item 2 of the Reference Schedule.

60. The Memorandum sets out the rights, obligations, and covenants of the Grower, which include, the Grower:

- has the right to plant, establish, cultivate, manage and Harvest the trees, and sell the products (clause 3);
- shall not use the Plantation Units for any purpose other than growing and harvesting trees (clause 4(a));
- must comply with sound silvicultural and environment practices adopted within the forest industry (clause 4(b));
- must comply with all laws and regulations relating to the use and occupancy of the Grower's Plantation Unit (clause 4(c)); and
- must pay the Land Fee to the Responsible Entity (clause 7).

Agreement to enter into Land Agreement

61. Where there is no Project Land available for a Grower, the Grower and the Responsible Entity can enter into the Agreement to enter into Land Agreement, whereby a Land Agreement will be entered into as soon as land becomes available.

62. Under the Agreement, the subsequent Land Agreement must be executed on or before the Last Day, which is defined as the earlier of:

- 9 months after the date of the Agreement to enter into Land Agreement, and

- the latest date on which the Responsible Entity considers that it will be able to grant a Land Agreement to the Grower, while still ensuring that it will have enough time, after granting it, to complete the Establishment Services within 12 months after the Grower incurred the Establishment Services Fee.

Management Agreement and Memorandum (Management Agreement Provisions)

63. Under the Management Agreement, the Grower appoints the Responsible Entity to perform all required services subject to the terms and conditions of the Agreement and the Memorandum. The Management Agreement will commence on the date the Responsible Entity executes the Management Agreement and shall continue until its termination under Item 3B of Schedule 1 to the Memorandum.

64. The Responsible Entity will commence the provision of the Establishment Services and Management Services from the date the Grower enters into the Project.

65. The Establishment Services are detailed in Item 1 of Schedule 3 to the Memorandum, being:

- procure sufficient trees to the recommended specifications;
- prepare land for planting;
- plant Trees; and
- supervise and secure management of the Establishment Services.

66. The Establishment Services will be completed by the earlier of:

- 12 months after the date the liability for the Establishment Services fee is incurred by the Grower; or
- 12 months after the Grower pays the Establishment Services Fee (clause 3.2(a)).

67. Management Services are detailed in Item 2 of Schedule 3 to the Memorandum, and include:

- manage the Tree Crop after the establishment phase;
- maintain adequate stocking of the plantation by replacing any contiguous area of dead or missing Trees;
- monitor nutrient status and apply fertiliser;
- carry out non-commercial thinning (as and when required);

- prepare an annual report on the state of the Tree Crop;
- use reasonable endeavours to arrange the sale of the Tree Crop and enter into a sale agreement or sales agreements as agent for the Grower, pursuant to which the proceeds will be paid to the Responsible Entity;
- prepare a Harvesting plan;
- select and engage contractors to carry out the Harvest;
- manage the Harvesting (Clearfall Harvesting); and
- effect insurance, at the Grower's cost.

The Forestry Management Agreement

68. Under the Forestry Management Agreement, the Responsible Entity appoints the Manager as an independent contractor to carry out services on the Grower's Plantation Unit(s) and to harvest and market the timber produce (clause 2.1). The Manager must perform the services in accordance with, and to the standard of, generally accepted forestry practices and good silvicultural and environmental practices adopted within the forestry industry, and must comply with the requirements of the relevant code of practice for the Project species timber plantations (clause 3.1).

Pooling of Timber and Grower's Entitlement to Net Proceeds

69. The Responsible Entity shall collect the proceeds from the sale of the timber and other Project income into a separate Proceeds Fund (clause 3.3(a) and 30.1 of the Constitution).

70. The Responsible Entity is authorised to deduct a number of expenses from the Proceeds Fund, including the costs of harvest and marketing, reimbursement of expenses, taxes and so on (clauses 29.2, 30.5 and 31 of the Constitution and clause 6 of the Memorandum (Management Agreement Provisions)).

71. Clause 30 of the Constitution outlines the process for the distribution of proceeds to Growers from the Proceeds Fund.

72. Clause 8 of the Memorandum (Land Agreement Provisions) and clause 8.2(c) of the Memorandum (Management Agreement Provisions) set out the Grower's entitlement to insurance proceeds in the event of fire or other insured event affecting a Grower's Plantation Unit.

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

- only Growers who have contributed to the Proceeds Fund are entitled to the distributions of the proceeds from the pool; and
- any pooled proceeds must consist only of wood produce contributed by Growers of the same Project Class.

Fees

74. Under the terms of the Management Agreement and Memorandum (Management Agreement Provisions), and the Land Agreement and Memorandum (Land Agreement Provisions), a Grower will make payments as described below on a per Plantation Unit basis.

Fees payable under the Management Agreement and Memorandum (Management Agreement Provisions)

75. Clauses 5, 6, 8 and Schedule 4 of the Memorandum (Management Agreement Provisions) provide that the Grower will pay the Responsible Entity the following amounts:

- **Establishment Services Fee** of \$4,950 payable on or before the date of execution of the Management Agreement;
- **Management Services Fee** calculated as 18.81% of the Harvest Proceeds, payable each time an instalment of Harvest Proceeds is distributed to the Grower;
- **Insurance Cost** up to clearfall – each Grower to pay a proportional share of insurance and the insurance administration fee, payable within 21 days after the request for payment made by the Responsible Entity;
- **Costs of harvesting and marketing** which may be deducted from the Proceeds Fund; and
- **Insurance** after clearfall, to be deducted from the Proceeds Fund.

Fees payable under the Land Agreement and Memorandum (Land Agreement Provisions)

76. Clause 7 and Item 1(ii) of Schedule 2 to the Memorandum (Land Agreement Provisions) provide that the Grower must pay a Land Fee of 5.94% of the Harvest Proceeds to the Responsible Entity.

Finance

77. A Grower who does not pay the Establishment Services Fee in full upon application can execute a Terms Payment Agreement with the Responsible Entity, borrow from ITC Finance Pty Ltd (a lender associated with the Responsible Entity), or the Nominated Financier, or borrow from an independent lender external to the Project.

78. 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 a finance arrangement with ITC Finance Pty Ltd or with the Nominated Financier 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, other than the Nominated Financier, may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

79. Other than where a Terms Payment Agreement is in place, Growers cannot rely on any part of this Ruling if the Establishment Services Fee is not paid in full on or before 30 June 2008 by the Grower or, on the Grower's behalf, by a lending institution. Where an application is accepted subject to finance approval by any lending institution other than ITC 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 2008.

Terms Payment Agreement

80. The Responsible Entity offers to the Grower an interest free terms payment for the Establishment Services Fee, under the Terms Payment Agreement which forms part of the PDS (section 14.7 of the PDS).

81. Where the Responsible Entity accepts an application from a Grower to pay the Establishment Services Fee under a Terms Payment Agreement, a deposit of 10% of the Establishment Services Fee must be paid by 15 June 2008 for applications accepted before that date. Where the Responsible Entity accepts an application after 15 June 2008 and on or before 30 June 2008, a deposit of 10% of the Establishment Services Fee may also be required.

82. The balance of the Establishment Services Fee together with a Terms Payment Administration Fee of \$275 are payable by direct debit in 11 equal monthly payments on the last day of the month from 31 July 2008 to 31 May 2009.

83. If a Grower defaults on payments, then interest of 14.95% compounded monthly will apply to amounts overdue and the Grower will also be liable for other unspecified legal fees and costs.

Finance offered by ITC Finance Pty Ltd or the Nominated Financier

84. A Grower can obtain long term finance for part of their Establishment Services Fees from either ITC Finance Pty Ltd or the Nominated Financier.

85. Both lenders use the same package of documents which contains the Tree Farm Loan Application, the Tree Farm Loan Schedule and the Tree Farm Loan Deed.

86. Subject to acceptance of the loan application by the relevant lender, the Grower will be bound by the terms and conditions of the Tree Farm Loan Deed.

87. The loan terms and conditions are as follows:

- the maximum loan amount is 90% of the Establishment Services Fee per Plantation Unit;
- the Grower incurs a loan application fee of \$250 plus 0.4% of the loan amount, capitalised in the total borrowings;
- the Nominated Financier requires a minimum loan amount of \$15,000;
- the term options require the repayment of the principal plus interest by monthly (direct debit) instalments over 3, 5, or 8 year periods;
- the Nominated Financier offers an 8 year loan option whereby interest only is paid for the first 2 years, and then principal plus interest for the remaining 6 years;
- the interest rates for the loan will be fixed for the term of the loan and are set on a commercial basis by the Nominated Financier at the time of release of the Project. The same interest rate will be adopted by ITC Finance Pty Ltd; and
- the loan can only be used to pay the Establishment Services Fees for the Project and will be paid by the lender directly to the Responsible Entity by no later than 30 June 2008.

88. The financiers will offer the finance on a full recourse basis. Security will be a fixed charge over the borrower's interest in the Project. Normal debt recovery procedures, including legal action, will be taken in the case of defaulting borrowers.

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 ITC Finance Pty Ltd or the Nominated Financier, are involved or become involved in the provision of finance to Growers for the Project.

Commissioner of Taxation

19 March 2008

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 paragraphs 24 and 28 of this Ruling to constitute allowable deductions, the Grower's afforestation activities as a participant in the ITC Hardwood Project 2008 (Pulpwood Option) 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 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 ITC Hardwood Project 2008 (Pulpwood Option). 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 ITC Hardwood Project 2008 (Pulpwood Option) is accepted to be carrying on a business of growing and harvesting wood produce for sale.

Deductibility of the Establishment Services Fee and loan interest

Section 8-1

95. The Establishment Services Fee is 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 Services Fee (see paragraphs 49 to 51 of TR 2000/8).

96. 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 99 to 109 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.)

97. Some Growers may finance their participation in the Project through a Loan Agreement with ITC Finance Pty Ltd or the Nominated Financier. Applying the same principles as that used for the Establishment Services Fee, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

98. Other than where the prepayment provisions apply (see paragraphs 99 to 103 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

99. 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.

100. 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 of their interaction with section 82KZMG of the ITAA 1936 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

101. Other than the Establishment Services Fee (see below), the fees payable under the scheme to which this Product Ruling applies are payable out of harvest proceeds and the interest payable to ITC Finance Pty Ltd or to the Nominated Financier is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application.

102. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project chooses or is required to prepay interest under a loan agreement (including loan agreements with lenders other than ITC Finance Pty Ltd or the Nominated Financier).

103. As stated in Note (vi) of paragraph 28 of this Ruling, prepayments of interest are not covered by this Product Ruling and Growers who make such prepayments may instead request a private ruling on the tax consequences of the prepaid interest.

Section 82KZMG

104. 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.

105. Section 82KZMG of the ITAA 1936 provides a '12 month rule' that, in effect, facilitates an immediate deduction for certain prepaid expenditure⁵ incurred under an 'agreement for planting and tending trees for felling' (subsection 82KZMG(3) of the ITAA 1936).

106. 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 (subsection 82KZMG(4) of the ITAA 1936). Seasonally dependent agronomic activities are explained in Taxation Determination TD 2003/12.

107. 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 income year following the 'expenditure year' (see subsections 82KZMG(1) and (2) of the ITAA 1936).

108. Under the Management Agreement, each Grower incurs an Establishment Services Fee of \$4,950 per Plantation Unit in the income year ended 30 June 2008 for 'seasonally dependent agronomic activities' that will be carried out during the 'establishment period' of the trees.

109. The expenditure for 'seasonally dependent agronomic activities' meets all other requirements of section 82KZMG of the ITAA 1936 and, therefore, other than where section 82KZMGA applies (see paragraphs 110 to 112 of this Ruling), a deduction is allowable in the income year ended 30 June 2008 for the full amount of expenditure incurred by the Grower for the Establishment Services Fee.

'CGT event' within 4 years for Growers who are initial participants

Section 82KZMGA

110. A Grower who is an initial participant in the Project cannot deduct an amount that meets the requirements of section 82KZMG of the ITAA 1936 if a 'CGT event' happens in relation to the Grower's interest within 4 years of 30 June 2008 (subsection 82KZMGA(1) of the ITAA 1936). In this Project, only the Establishment Services Fee meets the requirements of section 82KZMG of the ITAA 1936. Accordingly, the deduction of \$4,950 per 'interest' for the Establishment Services Fee will not be allowable if a 'CGT event' happens to the Grower's interest within the 4 year period.

⁵ The expenditure must be incurred on or before 30 June 2008 (subsection 82KZMG(2) of the ITAA 1936).

111. Where subsection 82KZMGA(1) of the ITAA 1936 applies, the Commissioner may amend any affected Grower's assessment within 2 years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

112. A Grower whose deduction for the Establishment Services Fee is disallowed because of section 82KZMGA of the ITAA 1936 is still required to include in their assessable income either the market value of the interest at the time of the 'CGT event', or the decrease in the market value of the interest as a result of the 'CGT event' (section 82KZMGB of the ITAA 1936).

Assessable income from 'CGT events' for Growers who are initial participants

Sections 6-10, 10-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936

113. Section 6-10 of the ITAA 1997 includes in assessable income amounts that do not constitute ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 of the ITAA 1997 and include amounts that are included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936.

Section 82KZMGB

114. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)⁶ happens to an interest held by a Grower who is an initial participant in this Project, section 82KZMGB of the ITAA 1936 includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted the Establishment Services Fee (shown in paragraph 24 of this Ruling); and
- subsection 82KZMG(1) of the ITAA 1936 applies to the timing of the deduction of the Establishment Services Fee (or would apply if section 82KZMGA of the ITAA 1936 were disregarded – see above).

Market value rule applies to 'CGT events'

115. If, as a result of the 'CGT event' the Grower either:

- no longer holds the interest; or

⁶ A thinning under this scheme is not a 'CGT event'.

- otherwise – where the Grower continues to hold the ‘forestry interest’ but there is a decrease in the market value of the interest;

then the market value of the interest at the time of the event, or the decrease in market value of the interest as a result of the event, is included in the assessable income of the Grower (subsection 82KZMGB(2) of the ITAA 1936). A market value rule applies rather than the amount of money actually received from the CGT event (subsection 82KZMGB(3) of the ITAA 1936). However, the market value and the actual amount of money received may be the same.

116. The market value amount included in the assessable income of a Grower is the value of the interest just before the ‘CGT event’, or where the Grower continues to hold their interest after the ‘CGT event’, the amount by which the market value of the interest is reduced by the ‘CGT event’ (subsection 82KZMGB(2) of the ITAA 1936).

117. This provision will apply where the interest is sold, is extinguished, or ceases, and will include ‘CGT events’ such as a full or partial sale of the interest or from a full or partial clear-fell harvest of the trees grown under the Project.

Anti-overlap provisions

Section 118-20

118. Generally, where as a result of a ‘CGT event’ a capital gain would otherwise be included in a taxpayer’s assessable income, section 118-20 will apply to reduce the capital gain if, because of the event, a provision of the ITAA other than the CGT provisions includes an amount in the taxpayer’s assessable income.

119. In the case of interests held by Growers who are initial participants in this Project the market value, or the reduction in the market value of the interest from a CGT event is included in assessable income by section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936. Therefore, section 118-20 of the ITAA 1997 will operate to reduce to nil any capital gain that would otherwise be assessable under the CGT provisions in Part 3-1 of the ITAA 1997.

Borrowing costs

Section 25-25

120. A deduction is allowable for expenditure incurred by a Grower in borrowing money to the extent that the borrowed money is used for the purpose of producing assessable income (subsection 25-25(1)).

121. In this Project, the Loan Application Fee of \$250 plus 0.4% of the loan amount payable to either ITC Finance Pty Ltd or the Nominated Financier is incurred to borrow money that is used or is to be used solely for income producing purposes during each income year over the term of the loan.

122. The deduction for the borrowing expenses is spread over the period of the loan or 5 years, whichever is the shorter (subsection 25-25(4)).

Administration Fee payable under a Terms Payment Agreement

Section 40-880

123. Growers who elect to pay their Establishment Services Fee under the Terms Payment Agreement must pay an administration fee of \$275. This expenditure does not constitute a borrowing expense and is therefore not deductible under section 25-25. As it is capital in nature it is also not deductible under section 8-1.

124. However, section 40-880 will allow the administration fee to be deducted in equal proportions over five income years starting in the year in which the Grower incurred the amount (subsection 40-880(2)). Section 40-880 applies to capital expenditure that is incurred in relation to a business and which is not taken into account elsewhere or denied deductibility under another provision of income tax law (subsection 40-880(1)).

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

125. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2008 to 30 June 2018**, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non commercial business losses: Commissioner’s discretion. Based on the evidence supplied, 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.

126. 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.

127. 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

128. 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

129. 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).

130. The ITC Hardwood Project 2008 (Pulpwood Option) 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 paragraphs 24 and 28 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.

131. 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 timber. 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; TD 2003/12;
TR 2007/6; PR 2008/28

Subject references:

- borrowing expenses
- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- tax avoidance
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
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- ITAA 1997 6-10
- ITAA 1997 8-1
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