


PR 2008/68A1 - Addendum - Income tax: Gunns Plantations Woodlot Project 2009 - Option 3

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Addendum

Product Ruling

Income tax: Gunns Plantations Woodlot Project 2009 – Option 3

This Addendum amends Product Ruling PR 2008/68 to reflect the decision of the Full Federal Court in *Hance v FC of T; Hannebery v FC of T* [2008] FCAFC 196; 2008 ATC 20-085, and the withdrawal of Draft Goods and Services Tax Ruling GSTR 2008/D1.

PR 2008/68 is amended as follows:

1. Paragraph 20

Omit paragraph; substitute:

20. 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 any creditable acquisition that it makes it must be registered or required to be registered for GST and hold a valid tax invoice.

2. Paragraph 21

Omit paragraph.

3. Paragraph 24

After the paragraph, insert:

Carrying on a business

24A. Although not relevant for the purposes of Division 394, a Grower (as described in paragraphs 4 to 6 of this Ruling) who will stay in the Project until it is completed will be considered to be carrying on a business of primary production. Such Growers who are individuals will be subject to the operation of Division 35 (see paragraphs 43A to 43B of this Ruling).

PR 2008/68**4. Paragraph 29**

Omit paragraph.

5. Paragraph 31

Omit the table and notes; substitute:

Fee	Amount	Year(s) deductible
Establishment Fee	\$7,480 See Note (i)	2009
Maintenance Fee	8.8% of Net Wood Sale Proceeds	Any year in which this amount is paid See Note (ii)
Rent	5.5% of Net Wood Sale Proceeds	Any year in which this amount is paid See Note (ii)
Sales Commission	2.2% of Net Wood Sale Proceeds	Any year in which this amount is paid See Note (ii)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of the outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) Growers will be notified by GPL of the years in which these amounts are paid, but harvests are expected to occur in the 2022 and 2027 income years. A clear-fell harvest is expected to take place in 2034.

6. Paragraph 43

After the paragraph, insert:

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

Section 35-55 – exercise of Commissioner’s discretion

43A. A Grower who will stay in the Project until its completion will be considered to be carrying on a business of primary production. Such a Grower, who is an individual, and accepted into the Project in the year ended 30 June 2009, may make losses from the Project that may be affected by the loss deferral rule in section 35-10. Division 35 does not apply however, to Growers who do not carry on a business.

43B. The discretion in paragraph 35-55(1)(b) will be exercised for a Grower to whom the loss deferral rule would otherwise apply, for the income years ended 30 June 2009 to 30 June 2033. Exercise of the discretion in this case however is conditional on the Project being carried out in the manner described in paragraphs 45 to 95 of this Ruling, but will allow Growers referred to who make losses, to offset them against their other assessable income in the income years in which those losses arise.

7. Paragraph 44

(a) Omit heading; substitute:

Prepayment provisions and anti-avoidance provisions

(b) Omit sub-heading; substitute:

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

(c) Omit second dot point.

8. Paragraph 45

Omit the first dot point; substitute:

- Application for a Product Ruling as constituted by documents provided on 11 June 2008, 16 June 2008 and 11 September 2008 and additional documents and correspondence between GPL and the Tax Office received on 27 June 2008, 23 July 2008, 13, 20 and 29 August 2008, 1 October 2008 and 9, 13, 18, 20, 24 and 25 March 2009;

9. Paragraph 48

Omit ‘, South Australia, Victoria’.

10. Paragraph 49

- (a) Omit ‘, South Australia, Victoria’ in the table.
- (b) Omit ‘\$6,800’ in the table; substitute ‘\$7,480’.
- (c) Omit ‘15%’ in the table; substitute ‘16.5%’.

11. Paragraph 55

Omit ‘, South Australia, Victoria’.

12. Paragraph 83

Omit '\$6,800'; substitute '\$7,480'.

13. Paragraph 85

- (a) Omit '15%', substitute '16.5%'.
- (b) Omit '8%', substitute '8.8%'.
- (c) Omit '5%', substitute '5.5%'.
- (d) Omit '2%', substitute '2.2%'.

14. Paragraph 86

Omit '10%', substitute '11%'.

15. Paragraph 97

After the paragraph, insert:

Is the Grower carrying on a business?

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

97B. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Ruling, the Full Federal Court in *Hance v. FC of T; Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

97C. Application of these principles to the arrangement set out above leads to the conclusion that a Grower (as described in paragraphs 4 to 6 of this Ruling), who stays in the Project until its completion will be carrying on a business of primary production involving afforestation activities.

16. Paragraph 131

After the paragraph, insert:

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

131A. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ended 30 June 2009 to 30 June 2033 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.

131B. 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.

131C. The exercise of the Commissioners discretion under paragraph 35-55(1)(b) for Growers who will stay in the Project until its completion is conditional on the Project being carried out 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.

17. Paragraph 136

(a) Insert:

Carrying on a business	24A
Division 35 – deferral of losses from non-commercial business activities	43A
<i>Section 35-55 – exercise of Commissioner’s discretion</i>	43A
Is the Grower carrying on a business?	97A
Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner’s discretion	131A

(b) Omit:

Prepayment provisions, non-commercial losses and
anti-avoidance provisions 44

*Division 35 and sections 82ZKL, 82KZM,
82KZME, 82KZMF and Part IVA of the ITAA 1936* 44

Substitute:

Prepayment provisions and anti-avoidance provisions 44

Sections 82KZL, 82KZM, 82KZME, 82KZMF and Part IVA 44

18. References

(a) Omit the Related Rulings/Determinations references;
substitute:

TR 97/7; TR 97/11; TR 98/22; TR 2007/6

(b) Insert into the Legislative references:

- ITAA 1997 Div 27
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)

(c) Insert into the Case references:

- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196;
2008 ATC 20-085

This Addendum applies on and from 8 April 2009.

Commissioner of Taxation

8 April 2009

ATO references

NO: 2006/20258

ISSN: 1441-1172

ATOlaw topic: Income Tax ~~ Product ~~ timber