

PR 2008/70A1 - Addendum - Income tax: Kiri Park Projects - 2009 Growers

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Addendum

Product Ruling

Income tax: Kiri Park Projects – 2009 Growers

This Addendum amends Product Ruling PR 2008/70 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 2008/70 is amended as follows:

1. Paragraph 20

Omit the 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 the 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 44A and 44B of this Ruling).

4. Paragraph 29

Omit the paragraph.

PR 2008/70**5. Paragraph 31**

Omit the table and notes; substitute:

| Fee | Amount | Income year(s) deductible |
|-----------------------------|--|---|
| Project Subscription Moneys | \$6,800 See Note (i) | 2008-09 |
| Management Fees | \$685.30 per annum See Note (i) | 2009-10 and 2010-11 |
| Management Fees | \$706.20 per annum (indexed from the 2012-13 income year onwards) See Note (i) | All income years from 2011-12 to 2017-18 |
| Rent | \$88 per annum See Note (i) | 2009-10 and 2010-11 |
| Rent | \$91.30 per annum (indexed from the 2012-13 income year onwards) See Note (i) | All income years from 2011-12 to 2017-18 |
| Harvesting Costs | Actual costs per annum See Note (i) | All income years from 2015-16 to 2018-19 |
| Harvest Marketing Costs | 5.5% of the Gross Sale Proceeds per annum See Note (i) | All income years from 2015-16 to 2018-19 |

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.

6. Paragraph 44

After the paragraph, insert:

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

Section 35-55 – exercise of Commissioner’s discretion

44A 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 in Division 35. Division 35 does not apply however, to Growers who do not carry on a business.

44B. 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 2014. Exercise of the discretion in this case however is conditional on the Project being carried out in the manner described in paragraphs 46 to 92 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 45

(a) Omit the heading; substitute:

Prepayment and anti-avoidance provisions

(b) Omit the subheading; substitute:

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

(c) Omit the second dot point.

8. Paragraph 49

Omit '\$6,182'; substitute '\$6,800'.

9. Paragraph 74

Omit '5%'; substitute '5.5%'.

10. Paragraph 76

(a) Omit '\$6,182'; substitute '\$6,800'.

(b) Omit '\$5,479'; substitute '\$6,027'.

(c) Omit '\$623'; substitute '\$685'.

(d) Omit '\$80'; substitute '\$88'.

11. Paragraph 77

(a) Omit '\$623'; substitute '\$685'.

(b) Omit '\$642'; substitute '\$706.20'.

(c) Omit '\$80'; substitute '\$88'.

(d) Omit '\$83'; substitute '\$91.30'.

12. Paragraph 79

(a) Omit '5%'; substitute '5.5%'.

(b) Omit '25%'; substitute '27.5%'.

13. Paragraph 94

After the paragraph, insert:

Is the Grower carrying on a business?

94A. 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?

94B. 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).

94C. 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.

14. Paragraph 128

After the paragraph, insert:

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

128A. 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 2014 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.

128B. 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.

128C. 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.

15. Paragraph 133

(a) Insert:

| | |
|---|------|
| Carrying on a business | 24A |
| Division 35 – deferral of losses from non-commercial business activities | 44A |
| <i>Section 35-55 – exercise of Commissioner’s discretion</i> | 44A |
| Is the Grower carrying on a business? | 94A |
| Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner’s discretion | 128A |

(b) Omit:

| | |
|---|----|
| Prepayment provisions, non-commercial losses and anti-avoidance provisions | 45 |
| <i>Division 35 of the ITAA 1997 and sections 82KZL, 82KZM, 82KZME, 82KZMF and Part IVA of the ITAA 1936</i> | 45 |

Substitute:

| | |
|---|----|
| Prepayment provisions and anti-avoidance provisions | 45 |
| <i>Sections 82KZL, 82KZM, 82KZME, 82KZMF and Part IVA</i> | 45 |

16. References

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

TR 97/7; TR 98/22; TR 97/11; 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 20 May 2009.

Commissioner of Taxation

20 May 2009

ATO references

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