



PR 2010/10 - Income tax: Elders Diversified Forestry Project 2010 - Regular Contribution Investors

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 This document has changed over time. This is a consolidated version of the ruling which was published on *12 May 2010*



Product Ruling

Income tax: Elders Diversified Forestry Project 2010 – Regular Contribution Investors

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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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives 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. The Commissioner recommends 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. In this Product Ruling this scheme is referred to as the scheme, the Elders Diversified Forestry Project 2010 – Regular Contribution Investors, or simply as 'the Project'.

2. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. Where used in this Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). In this Ruling, terms defined in the Project agreements have been capitalised.

Class of entities

3. 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.

4. 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 in this Product Ruling as Investors.

5. Investors are those entities that:

- meet the definition of 'initial participant' in subsection 394-15(5); and
- are accepted to take part in the scheme specified below on or after the date this Product Ruling is made.

6. An Investor will have executed the relevant Project Agreements set out in paragraph 41 of this Ruling on or before 30 June 2010 and will hold a 'forestry interest' in the Project.

7. The class of entities who can rely on this Product Ruling does **not** include:

- entities who are accepted into this Project before the date of this Ruling or after 30 June 2010;
- entities that participate in the scheme through the Product Disclosure Statement (PDS) as a Single Contribution Investor or as a Wholesale Applicant as defined in the Scheme Constitution;
- entities who participate in the scheme through offers made other than through the PDS or who enter into an undisclosed arrangement with:
 - the promoter or a promoter associate, or

- an independent adviser,
that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or harvest returns) in any way;
- entities whose Initial Contribution, including all loan moneys, are not paid in full to Elders Forestry Management Ltd by 30 June 2010, either by the Investor and/or on the Investor's behalf by a lending institution; or
- entities who enter into finance agreements with Elders Forestry Finance Pty Ltd outside the terms specified in paragraphs 74 to 82 of this Ruling.

Superannuation Industry (Supervision) Act 1993

8. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Australian Taxation Office (ATO) 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.

Qualifications

9. 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 41 to 82 of this Ruling.

10. 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

12. This Product Ruling applies prospectively from 12 May 2010, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 12 May 2010 until 30 June 2010, 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 all income years up to the income year in which the scheme is terminated in accordance with the Constitution.

13. 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.

Changes in the law

14. 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.

15. 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

16. 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 ATO 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

17. All amounts and percentages referred to in this Product Ruling exclude the Goods and Services Tax (GST), unless otherwise specified. The transactions in respect of this scheme may, where appropriate, have GST implications. Those GST implications are outside the scope of this Product Ruling.

Ruling

Structure of the Project

18. The Elders Diversified Forestry Project 2010 – Regular Contribution Investors is a ‘forestry managed investment scheme’ as defined in subsection 394-15(1). Its purpose is the establishment and tending of four species of trees, being *Eucalyptus globulus* (or similar pulpwood variety), *Eucalyptus pellita*, *Santalum album*, and *Tectona grandis*, for felling in Australia.

19. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for an ‘initial participant’¹ in the defined class of entities (see paragraphs 4 to 7 of this Ruling) who is accepted to participate in the ‘forestry managed investment scheme’ described at paragraphs 41 to 82 of this Ruling on or after 12 May 2010 and on or before 30 June 2010.

20. An entity that takes part in the Project as a ‘subsequent participant’² is not covered by this Product Ruling but may request a private ruling on their participation in the Project. A ‘subsequent participant’ is an entity that does not meet the definition of ‘initial participant’ in subsection 394-15(5).

Carrying on a business

21. An Investor (as described in paragraphs 4 to 7 of this Ruling) in the Project is not considered to be carrying on a business of primary production.

The ‘70% DFE rule’ and the establishment of the trees

Section 394-35 and subsection 394-10(4)

22. The taxation obligations and benefits set out below have been determined using the information provided to the Commissioner by Elders Forestry Management Ltd, who is the ‘forestry manager’ as defined in Division 394. On the basis of that information, the Commissioner has decided that on 30 June 2010 it will be reasonable to expect that the ‘70% DFE rule’³ will be satisfied. The ATO may undertake review activities during the term of the Project to verify the information relied on for the purposes of the ‘70% DFE rule’.

¹ See subsection 394-15(5).

² See section 394-30.

³ The ‘70% DFE rule’ is set out in section 394-35.

23. The Ruling will only apply if the forestry manager establishes all of the trees that were intended to be established under the Project within 18 months of the end of the income year in which the first 'participant' in the Project is accepted.⁴ For this Project the trees must be established before 31 December 2011.

24. In the context of this Project, the trees will be established when they are planted on the land acquired for the purposes of the Project at the following rate per hectare (each variety planted separately from other varieties): 700 to 1,000 Pulpwood trees; 1,000 Red Mahogany trees; 500 Indian Sandalwood trees; and 1,000 Teak trees. The forestry manager is required by section 394-10 of Schedule 1 of the TAA to notify the ATO if all of the trees are not established by 31 December 2011.

Allowable deductions

Sections 8-5, 394-10 and 394-20

25. An Investor in the Project can claim deductions for the amounts shown in the Table at paragraph 29 of this Ruling that are paid to the forestry manager (sections 8-5 and 394-10).

26. The deductibility of these amounts remains subject to a requirement that a CGT event⁵ does not happen in relation to the Investor's 'forestry interest' within 4 years of the Investor first paying an amount under the scheme (see paragraphs 36 to 38 of this Ruling).

27. The amount is deductible in the income year in which it is paid, or is paid on behalf of the Investor (subsection 394-10(2) and section 394-20). This requires cash to flow from the Investor, or from another entity on the Investor's behalf, to the bank account of Elders Forestry Management Ltd (the forestry manager) in the year in which the deduction is claimed. Any form of payment that does not involve the movement of cash into the forestry manager's bank account will not qualify for a deduction under subsection 394-10(2).

28. Where an Investor does not fully pay an amount, or it is not fully paid on their behalf in an income year, it is deductible only to the extent to which it has been paid. Any unpaid amount is then deductible in the year or years in which it is actually paid.

⁴ See subsection 394-10(4).

⁵ Defined in section 995-1.

29. Amounts that are allowable deductions under Division 394 cannot also be claimed as deductions under section 8-1 (section 8-10).

Fee	Amount	Income year(s) deductible
Initial Contribution	\$7,500	2009-10
Regular Contribution	\$500 per Plantation Unit, adjusted by the increase in the consumer price index	Any year in which this amount is paid
Harvest Activities Contribution	Actual cost	Any year in which this amount is paid
After Harvest Activities Contribution	Actual cost	Any year in which this amount is paid
Deferred Contributions	50% of Net Product Sales Proceeds from commercial Thinning 10% of Net Product Sales Proceeds from Clearfall Harvest and 10% of Net Product Sales Proceeds from any Insurance Proceeds and/or Insurance Proceeds Adjustment.	Any year in which this amount is paid

Note:

- Amounts included in the table above do not include GST; and
- Investors will be notified by Elders Forestry Management Limited (the Responsible Entity for the Project) of the amount and the income years in which the costs in the above table are to be paid.

'CGT event' within four years for Investors who are 'initial participants'**Subsections 394-10(5) and (6)**

30. Deductions for the Initial Contribution and the Regular Contribution are not allowable where a 'CGT event' happens in relation to the 'forestry interest' of an Investor before 1 July 2014 (subsection 394-10(5)).

31. Where deductions for these amounts have already been claimed by an Investor the Commissioner may amend their assessment at any time within two years of the 'CGT event' happening (subsection 394-10(6) of the ITAA 1997). The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936.

32. Investors whose deductions are disallowed because of subsection 394-10(5) are still required to include in assessable income the market value of the 'forestry interest' at the time of the 'CGT event' or the decrease in the market value of the 'forestry interest' as a result of the 'CGT event'.

Interest on loans to finance the 'forestry interest' of an Investor

Section 8-1

33. Where an Investor in the Project borrows from Elders Forestry Finance Pty Ltd on the terms set out at paragraphs 74 to 82 of this Ruling, they can claim deductions for interest incurred to fund their investment in the Project (paragraph 8-1(1)(a)). Investors who borrow from other financiers may apply for a private ruling on the deductibility of loan interest or may self assess the deductibility of the interest.

Borrowing costs

Section 25-25

34. Where an Investor borrows the Initial Contribution from Elders Forestry Finance Pty Ltd, a Loan Application fee must be paid to the lender of \$250 or 0.25% of the loan amount, whichever is the greater. The Loan Application fee is a borrowing expense and is deductible under section 25-25: where the term of the loan is less than five years, the deduction for the borrowing expense is spread over the period of the loan on a straight line basis from the date the loan begins; and where the term of the loan is five years or more, the deduction for the borrowing expense is spread over 5 years on a straight line basis from the date the loan begins.

35. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Elders Forestry Finance Pty Ltd is outside the scope of this Ruling.

Assessable income, 'CGT events' and the 'forestry interests' of Investors who are 'initial participants'**Sections 6-10, 17-5, and 394-25**

36. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning⁶ – see paragraph 39 of this Ruling) happens to a 'forestry interest' held by an Investor in this Project the market value of the 'forestry interest', or the decrease in the market value of the 'forestry interest', is included in the assessable income of the Investor (sections 6-10 and 394-25), less any GST payable on those proceeds (section 17-5).

37. The relevant amount is included in the Investor's assessable income in the income year in which the 'CGT event' happens (subsection 394-25(2)).

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

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

Amounts received by Investors where the Project trees are thinned**Section 6-5**

39. An amount received by an Investor in respect of a thinning of the trees grown in this Project is not received as a result of a 'CGT event' and is not otherwise assessable under Division 394. The amount is a distribution of ordinary income that arises as a result of an Investor holding a 'forestry interest' in the Project. Investors include amounts received for thinning the trees in their assessable income in the income year in which the amounts are derived (section 6-5) less any GST payable on those proceeds (section 17-5).

⁶ 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.

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

Division 35 of the ITAA 1997, sections 82KZM, 82KZME, 82KZMF, 82KL and Part IVA of the ITAA 1936

40. Where an Investor is accepted to participate in the Project set out at paragraphs 41 to 82 of this Ruling, the following provisions of the ITAA 1936 or the ITAA 1997 have application as indicated:

- interest paid by an Investor to Elders Forestry Finance Pty Ltd does not fall within the scope of sections 82KZM, 82KZME and 82KZMF;
- losses arising from participation in the Project are not within the scope of Division 35;
- 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

41. 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 30 March 2010;
- Documents and information provided 19 January 2010, 30 March 2010, 8 April 2010, 14 April 2010, 15 April 2010, 16 April 2010, 20 April 2010 and 27 April 2010;
- Draft Product Disclosure Statement for the Elders Diversified Forestry Project 2010, received 19 January 2010;
- Draft Supplementary Product Disclosure Statement for the Elders Diversified Forestry Project 2010 received 30 March 2010;
- Draft **Constitution** for the Elders Diversified Forestry Project 2010, between Elders Forestry Management Ltd and each Investor, received on 19 January 2010;
- Draft Compliance Plan for the Elders Diversified Forestry Project 2010 received on 19 January 2010;
- Draft Forestry Management Agreement for the Elders Diversified Forestry Project 2010 between Elders Forestry Management Ltd and Elders Forestry Ltd, received on 19 January 2010;

- Draft **Tree Farm Loan** Application and Tree Farm Loan Deed for loans between Elders Forestry Finance Pty Ltd and Investors, received 27 April 2010;
- Land selection protocols received 30 March 2010; and
- **Application Form** for Plantation Units and one year interest free loans, received 30 March 2010.

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

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

43. The documents highlighted are those that an Investor 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 an Investor, or any associate of an Investor, will be a party to, which are a part of the scheme. The effect of these agreements is summarised as follows.

Overview

44. The main features of the Elders Diversified Forestry Project 2010 – Regular Contribution Investors are as follows:

Species of trees to be planted under the scheme	Pulpwood, Red Mahogany, Indian Sandalwood, and Teak
Location	Pulpwood – Albany and/or Esperance in Western Australia, and or along the Victorian/South Australian border, and/or any other suitable area. Red Mahogany – Wet tropics coastal region of Far North Queensland. Indian Sandalwood – Kununurra in Western Australia and/or the Lakeland region, west of Cooktown in Far North Queensland. Teak – Wet tropics coastal region of Far North Queensland.
Term of the Project	Approximately 21 years
Date all trees must be planted on scheme land under Division 394	31 December 2011
Number of hectares offered for cultivation	Approximately 5,900

Size of each 'forestry interest'	Approximately 0.9 hectares, comprising: 0.72 hectares of Pulpwood 0.06 hectares of Red Mahogany 0.06 hectares of Indian Sandalwood and 0.06 hectares of Teak.
Approximate number of trees to be planted per hectare	Pulpwood, 700 to 1,000 trees Red Mahogany, 1,000 trees Indian Sandalwood, 500 trees Teak, 1,000 trees
Minimum allocation of 'forestry interests' per Investor	One
Minimum subscription	No minimum subscription
Initial cost	\$7,500
Ongoing costs	payable annually for four years, calculated as \$500 adjusted for the increase in the consumer price index
Other costs	Harvest Activities Contribution After Harvest Activities Contribution Deferred Fees equal to: 50% of Net Product Sales Proceeds from commercial Thinning 10% of Net Product Sales Proceeds from Clearfall Harvest or any Insurance Proceeds and/or Insurance Proceeds Adjustment

45. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Elders Forestry Management Ltd has been issued with Australian Financial Service Licence number 247019 and will be the Responsible Entity for the Project.

46. The Project will involve establishing, tending, felling and harvesting the timber from several varieties of trees planted in a variety of locations around Australia, for the purpose of selling the timber.

47. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer under the PDS is for approximately 5,900 hectares, which corresponds to approximately 6,555 'forestry interests' in the Project.

48. An entity that participates in the Project as an Investor will do so by acquiring a 'forestry interest' in the Project on or before 30 June 2010, which will consist of a minimum of one Plantation Unit of approximately 0.9 hectares in size.

49. Investors may elect at the time of application to enter the Project as a Single Contribution Investor or as a Regular Contribution Investor. This Product Ruling applies only to the Regular Contribution Investors and Product Ruling PR 2010/11 relates to Single Contribution Investors.

50. An entity applies to enter the Project by completing and lodging the Application Form attached to the PDS. An application cannot be accepted unless it is valid, and until the full Initial Contribution per Plantation Unit is paid by or on behalf of the applicant. The application is accepted when the Responsible Entity enters the Applicant's details onto the Register of Investors.

51. For the purposes of this Ruling, applicants who are accepted to participate in the Project after the date this Ruling issues and on or before 30 June 2010 will become Investors in the Project and will be bound by the Constitution.

52. As of the date of this Product Ruling, the Responsible Entity has secured a portion of suitable land for the Project, though it has not been formally allocated to this Project. The Responsible Entity is in the process of securing further land for the Project. All land to be used for planting the trees must meet the requirements set out in the Independent Forester's report in the PDS and must meet the Responsible Entity's land selection protocols.

53. The species of trees to be planted are:

- Pulpwood – Tasmanian Blue Gum (*Eucalyptus globulus*);
- Red Mahogany (*Eucalyptus pellita*);
- Indian Sandalwood (*Santalum album*); and
- Teak (*Tectona grandis*).

54. A Plantation Unit of approximately 0.9 hectares will be comprised of four plots of land located in different parts of Australia. The anticipated planting timetable for the trees is as follows:

- Teak and Red Mahogany – between November 2010 and February 2011;
- Indian Sandalwood – between May 2011 and July 2011; and
- Pulpwood – between June 2011 and August 2011.

55. The final Clearfall Harvest for the Project (which will be for Teak) will take place approximately 20 years after planting.

56. By 7 July 2010, the Responsible Entity will transfer from its own funds an amount equivalent to 50% of the Initial Contributions to a Forestry Protection Fund for the Project. For the 2012-13 to the 2015-16 income years, an amount equivalent to 8% of the Initial Contributions will be transferred to this fund each year by the Responsible Entity. This fund will be used by the Responsible Entity to fund Direct Forestry Expenditure of the Project. The fund will terminate on 1 July 2017.

Constitution

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

58. To acquire an interest in the Project, an entity must make an application for 'forestry interests' in accordance with clause 17. Among other things, the Applicant must use the Application Form attached to the PDS, it must be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, and lodged at the office of the Responsible Entity.

59. Under clause 17.1 of the Constitution, the Responsible Entity holds the application monies on bare trust, and will deposit all such monies received from applicants in the Applications Bank Account.

60. Note that under clause 4, the applicant must pay the full Initial Contribution per Plantation Unit before the application can be accepted.

61. Once the Responsible Entity has accepted the application and all of the Project Documents have been executed and remain in force, the application monies must be transferred from the Applications Bank Account and paid to the Responsible Entity (clauses 17.7 and 17.8).

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

- the obligations of the Responsible Entity to carry out the Establishment, Management, Harvest and After Harvest Activities (clause 13);
- complaints procedures (clause 6);
- winding-up of the scheme (clause 7);
- the Responsible Entity's entitlement to be paid out of Scheme Property (clauses 8 and 9);
- Investors rights to withdraw from the scheme (clause 11);
- the Register of Investors (clause 19); and
- insurance (clause 21).

Compliance Plan

63. As required by the Corporations Act, 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 Investors are protected.

Lease

64. The Responsible Entity will enter into a number of leases to make land available to the Scheme for the term of the Project. The leases will permit the Responsible Entity to use the land for tree farming purposes, including the preparation of the land for planting, construction of roads and irrigation, and the planting, cultivating, managing and harvesting of the trees and their products. An Investor will be entitled to their Investor's Forestry Interest, and has no other interest in the land.

Forestry Management Agreement

65. Under the Forestry Management Agreement between the Responsible Entity and Elders Forestry Ltd, the Responsible Entity will appoint Elders Forestry Ltd as Forestry Manager to perform the Plantation Management Services consisting of Establishment Services, Management Services, Harvest Services, and After Harvest Services. The services to be provided by the Forestry Manager have the same meaning as the Activities defined in the Constitution.

66. The Forestry Management Agreement will begin on the Commencement Date, being the first date that an application is received by the Responsible Entity. The agreement will end on the Termination Date, being when all Plantation Management Services are completed or terminated under clause 8 or 9.

67. The Forestry Manager's remuneration is detailed at clause 6 of the Schedule.

Entitlement to Net Proceeds

68. The Responsible Entity must undertake the Harvest Activities and arrange the sale of the Product.

69. The Responsible Entity is entitled to recover from the Product Sale Proceeds and Other Plantation Income the Harvest Activities Contribution, the After Harvest Activities Contribution, the Deferred Contribution, the Carbon Revenue Contribution, and any other amounts the Responsible Entity is entitled to deduct under the Constitution (clauses 15.2 and 15.4 of Constitution).

70. If the expenses exceed the income from the Project and the Investor contributions, the Investors must pay the excess expenses (clauses 15.3 and 15.4 of the Constitution).

71. After deduction of all amounts that the Responsible Entity is entitled to deduct from the Product Sale Proceeds and Other Plantation Income, an Investor is entitled to a proportional interest of the amount remaining (clauses 1.1 and 15.5 of the Constitution).

72. If an Investor has taken out optional insurance and there are insurance proceeds, insured Investors are entitled to a proportional interest of the Insurance Proceeds Pool (after deduction of Deferred Contributions).

Fees

73. Under the terms of the Constitution an Investor will make payments as described below on a per Plantation Unit basis.

- Initial Contribution of \$7,500 to be paid on application;
- a Regular Contribution of \$500 per annum (adjusted for the increase in the consumer price index) must be paid on or before 30 June in each year of the Project, commencing 30 June 2011 until 30 June 2014;
- a Deferred Contribution of 50% of the Net Product Sales Proceeds from commercial Thinning, and 10% of Net Product Sales Proceeds from Clearfall Harvest, Insurance Proceeds, and/or Insurance Proceeds Adjustment;
- Harvest Activities Contribution, being the Investor's Proportional Interest of all costs and expenses incurred by the Responsible Entity in carrying out the Harvest Activities, paid from the Product Sales Proceeds;
- After Harvest Activities Contribution, being the Investor's Proportional Interest of the costs and expenses of transport, sale, marketing, and processing; paid from the Product Sales Proceeds;
- Carbon Revenue Contribution, being the Investor's Proportional Interest of the costs of arranging and marketing any Carbon Sequestration Benefit; payable from Other Forestry Income; and
- the Investor's Proportional Interest of any other expenses of the scheme (clause 15.4(a)) as and when advised by the Responsible Entity.

Finance

74. To finance all or part of the cost of their 'forestry interest' an Investor can enter into a finance arrangement with Elders Forestry Finance Pty Ltd, or alternatively, borrow from an independent lender external to the Project.

75. Only the finance arrangements set out below are covered by this Product Ruling. An Investor cannot rely on this Product Ruling if they enter into a finance arrangement with Elders Forestry Finance Pty Ltd that materially differs from that set out in the documentation provided with the application for this Product Ruling. An Investor who enters into a finance arrangement with an independent lender external to the Project other than Elders Forestry Finance Pty Ltd may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

76. An Investor cannot rely on any part of this Ruling if the Initial Contribution is not paid in full on or before 30 June 2010 by the Investor or by a lending institution on the Investor's behalf.

Finance offered by Elders Forestry Finance Pty Ltd

77. An Investor can finance the cost of their Initial Contribution by borrowing that amount from Elders Forestry Finance Pty Ltd (as the Lender). The Lender offers two types of finance: a 1 Year Interest Free Loan; or a Tree Farm Loan.

78. Subject to the Lender accepting the Investor's application, the Investor will be bound by the terms and conditions of the 1 Year Interest Free Loan or the Tree Farm Loan.

79. The 1 Year Interest Free Loan is offered by the Lender with the following conditions:

- Loan Application Fee of \$250, added to the loan amount;
- maximum loan amount of 100% of the Initial Contribution plus the Loan Application Fee and any stamp duty;
- no interest, unless the loan is not repaid; and
- must be repaid by direct debit in 12 equal monthly repayments, concluding 30 June 2011.

80. The Tree Farm Loan is offered by the Lender with the following conditions:

- A fixed loan amount of \$7,500 per Plantation Unit, plus GST, the Loan Application Fee and any stamp duty;
- loan terms of three, five or seven years;
- the option of variable or fixed interest;
- indicative interest rates for unsecured personal loans, currently 12% to 14% per annum;
- repayment of the principal plus interest by equal monthly direct debit instalments;

- Investors are required to insure their Forestry Interest and the Lender recorded as mortgagee on the policy; and
- a Loan Application Fee of \$250 or 0.25% of the loan amount, whichever is greater, capitalised into the loan.

81. The loans offered by Elders Forestry Finance Pty Ltd are made on a full recourse commercial basis and normal debt recovery procedures, including legal action, will be taken in the case of defaulting borrowers.

Other qualifications relating to finance

82. This Ruling does not apply if the finance arrangement entered into by the Investor 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 Elders Forestry Finance Pty Ltd, are involved or become involved in the provision of finance to Investors 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.*

Structure of the Project

83. In return for payment of the Initial Contribution and the other fees and expenses required under the Constitution during the term of the Project, Investors will hold a 'forestry interest' in a 'forestry managed investment scheme'. The Project qualifies as a 'forestry managed investment scheme' because its purpose is for 'establishing and tending trees for felling in Australia' (see subsection 394-15(1))

84. Under the Constitution of the Project and the other supporting agreements, the holding of a 'forestry interest' in the Project gives each Investor a right to a share in the proceeds of any thinning and the harvest of the trees grown on the Project land. That share of proceeds is determined using the number of 'forestry interests' held by an Investor as a proportion of all 'forestry interests' held by 'participants'⁷ in the Project.

Is the Investor carrying on a business?

85. 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?

86. 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 'Investors' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

87. Application of these principles to the arrangement set out above leads to the conclusion that an Investor (as described in paragraphs 4 to 6 of this Ruling), in the Project is not considered to be carrying on a business of primary production involving afforestation activities.

⁷ The term 'participant' is defined in subsection 394-15(4).

Allowable deductions

Sections 8-5, 12-5, 394-10, and 394-20

88. Section 8-5 allows certain specific deductions to be claimed against the assessable income of a taxpayer. The list of specific deductions is shown in a table in section 12-5 and includes payments under a 'forestry managed investment scheme' that meet the requirements of subsection 394-10(1).

The '70% DFE rule'

Paragraph 394-10(1)(c) and section 394-35

89. The threshold test for Investors in the Project to be entitled to deductions under subsection 394-10(1) is the '70% DFE rule' in paragraph 394-10(1)(c). Under that rule it must be reasonable to expect that on 30 June 2010, the amount of 'direct forestry expenditure'⁸ under the scheme will be no less than 70% of the amount of payments under the scheme.⁹

90. The amount of all 'direct forestry expenditure' is the amount of the net present value of all 'direct forestry expenditure' that the Responsible Entity, as 'forestry manager'¹⁰ of the Project, has paid or will pay under the scheme (subsection 394-35(2)).

91. The 'amount of payments under the scheme' is the amount of the net present value of all amounts (that is, the fees and expenses) that all current and future 'participants' in the scheme have paid or will pay under the scheme (subsection 394-35(3)).

92. Both of the above amounts are determined as at 30 June 2010 taking into account

- the timing requirements in subsections 394-35(4) and (5);
- any amounts that can reasonably be expected to be recouped (subsection 394-35(6));
- the discount rate in subsection 394-35(7); and
- the market value rule in subsection 394-35(8).

93. Applying all of these requirements to the information provided by the Responsible Entity of the Project the Commissioner has determined that the Project will satisfy the '70% DFE rule' on 30 June 2010.

⁸ See section 394-45.

⁹ See subsection 394-35(1) and section 394-40.

¹⁰ Defined in section 394-15(2).

The other elements for deductibility under subsection 394-10(1)

94. The requirement of paragraph 394-10(1)(d), that Investors in the Project not have day to day control over the operation of the Project, is clear from the Project Agreements as are the alternative elements of paragraph (e) relating to the number of Investors in the scheme and the Responsible Entity's role in other managed investment schemes.

95. The final requirement for deductibility requires all the Project trees to be established within 18 months of 30 June 2010 (see paragraph 394-10(1)(f) and subsection 394-10(4)). The planting timeline provided with the application for this Ruling by the Responsible Entity indicates that all the trees required to be established under the scheme will be planted on the Project land by 31 December 2011.

96. Accordingly, subject to the qualifications set out below, amounts paid by Investors to the Responsible Entity in relation their 'forestry interests' satisfy all requirements of subsection 394-10(1). The amounts are allowable deductions in the income year in which they are paid (subsection 394-10(2)).

97. Amounts that are allowable deductions under Division 394 cannot also be claimed as deductions under section 8-1 (section 8-10).

98. Where an Investor does not fully pay an amount, or the amount is not fully paid on their behalf in an income year (see section 394-20), it is deductible only to the extent to which it has been paid. The unpaid balance is then deductible in the year or years in which it is actually paid. This may occur, for example, if all or part of the amount is borrowed and the financier fails to transfer the funds to the account of the 'forestry manager' on or before 30 June in an income year.

Loss of deductions previously allowed under subsection 394-10(1)

99. Two situations may lead to a loss of deductions previously allowed to Investors under subsection 394-10(1).

100. The first of these situations will occur if the Responsible Entity fails to establish the trees on the Project land within 18 months. Where this occurs the Responsible Entity is required to notify the Commissioner within 3 months of the end of the 18 month period (section 394-10 of Schedule 1 to the TAA).

101. The second situation where an Investor may have deductions disallowed is where a 'CGT event' happens to their 'forestry interest' within four years from 30 June of the income year they paid an amount under the scheme (see subsection 394-10(5)): for example, if a 'CGT' event happens within four years of an Investor paying the Initial Contribution on or before 30 June 2010.

102. For the purposes of this provision, the Commissioner is able to amend the assessment of an Investor within two years of the relevant 'CGT event' happening. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 394-10(6)).

103. Where a 'CGT event' happens to the 'forestry interest' of a Investor within four years, the market value of the forestry interest at the time of the 'CGT event' or the decrease in the market value of the 'forestry interest' as a result of the 'CGT event' is still included in the assessable income of the Investor by section 394-25. The amount must be included in assessable income even where an amendment has disallowed or may disallow the deductions previously allowed under section 394-10.

Interest on loans to finance the 'forestry interest' of an Investor

Section 8-1

104. Where an Investor borrows money to fund their investment in the Project the deductibility of the interest incurred on the loan monies falls for consideration under the general deduction provisions of section 8-1. If the interest incurred by the Investor is deductible under the first positive limb in subsection 8-1(1) there is no requirement to consider whether it is also deductible under the second positive limb of that provision. Court decisions show that the same basic test applies to both limbs (see *Ronpibon Tin NL v. Federal Commissioner of Taxation* (1949) 78 CLR 47; (1949) 8 ATD 431, at CLR 56; ATD 435).

105. Under the first positive limb of subsection 8-1(1), the interest incurred by an Investor will be deductible if it is incurred in gaining or producing an Investor's assessable income and is not excluded by one of the negative limbs in subsection 8-1(2).

The question of whether an outgoing [is] ... incurred in gaining or producing the assessable income is a question of characterisation (*Fletcher & Ors v. Federal Commissioner of Taxation* (1991) 173 CLR 1; 91 ATC 4950; (1991) 22 ATR 613, at CLR 17; ATC 4957; ATR 621).

To the extent that ... outgoings of interest ... can properly be characterised as of a kind referred to in the first limb of [section 8-1] they must draw their character from the use of the borrowed funds (*Fletcher*, at CLR 19; ATC 4958; ATR 623).

[T]he characterisation of interest will generally be ascertained by reference to the objective circumstances of the use to which the borrowed funds are put (*Federal Commissioner of Taxation v. Roberts* (1992) 37 FCR 246; 92 ATC 4380; (1992) 23 ATR 494, at FCR 257; ATC 4388; ATR 504).

106. Investors in the Project use the borrowed funds to acquire a 'forestry interest' in a 'forestry managed investment scheme'. The holding of that 'forestry interest' will produce assessable income for an Investor in the form of the proceeds of a full or part disposal of the 'forestry interest' or, as a proportionate share of the harvest and thinnings proceeds. The tests of deductibility of interest under the first limb of subsection 8-1(1) are, therefore, met unless one of the exclusions in subsection 8-1(2) applies.

107. For the purposes of this Project, only the capital exclusion in paragraph 8-1(2)(a) is relevant. The use of borrowed funds to purchase a capital asset, such as a 'forestry interest', does not mean that the interest outgoings are on capital account (see *Steele v. Federal Commissioner of Taxation* (1999) 197 CLR 459; 99 ATC 4242; (1999) 41 ATR 139, at CLR 470; ATC 4249; ATR 148).

Interest [is a] periodic payment for the use, but not the permanent acquisition of a capital item. Therefore, a consideration of the often-cited three matters identified by Dixon J in *Sun Newspapers Ltd v. FC of T ...* assigns interest ... to revenue (*Australian National Hotels Ltd v. Federal Commissioner of Taxation* (1988) 19 FCR 234; 88 ATC 4627; (1988) 19 ATR 1575, at FCR 241; ATC 4633-4634; ATR 1582).

108. Therefore, the capital exclusion in subsection 8-1(2) does not apply to the interest and, subject only to the potential application of the prepayment provisions, a deduction for the interest can be claimed in the year in which it is incurred (Note: the meaning of 'incurred' is explained in Taxation Ruling TR 97/7).

Prepayment provisions

Sections 82KZL to 82KZMF

109. 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 that will not be wholly done within the same year of income as the year in which the expenditure is incurred. For schemes such as this Project, the main operative provisions are sections 82KZMD and section 82KZMF of the ITAA 1936.

110. However, subsection 394-10(7) specifically provides that sections 82KZMD and section 82KZMF of the ITAA 1936 do not affect the timing of amounts deductible under section 394-10.

111. Accordingly, under the scheme to which this Product Ruling applies, only deductions for interest payable under a loan with Elders Forestry Finance Pty Ltd will potentially fall within the prepayment provisions. However, the conditions applying to the loans to which this Ruling applies (see paragraphs 94 to 98 of this Ruling) do not require any prepayment of interest over the term of the loan. Accordingly, the prepayment provisions have no application to Investors who enter into those loans.

112. If an Investor chooses to prepay interest on these loans that Investor may request a private ruling on how the prepayment provisions will affect the timing of their interest deduction.

Borrowing costs

Section 25-25

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

114. In this Project the Loan Application Fee of \$250 or 0.25% of the loan amount, payable to Elders Forestry Finance Pty Ltd 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.

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

Assessable income, 'CGT events' and the 'forestry interests' of Investors who are 'initial participants'

Sections 6-10, 10-5, and 394-25

116. Section 6-10 includes in assessable income amounts that are not ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 and include amounts that are included in the assessable income of 'initial participants' of a 'forestry managed investment scheme' by subsection 394-25(2).

Subsection 394-25(2)

117. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)¹¹ happens to a 'forestry interest' held by an Investor in this Project, subsection 394-25(2) includes an amount in the assessable income of the Investor if:

- the Investor can deduct or has deducted an amount under section 394-10; or
- the Investor would have met the condition immediately above if subsection 394-10(5) had not applied to disallow the deduction(s). Paragraphs 36 to 38 and paragraphs 99 to 103 of this Ruling explain when deductions will be disallowed under subsection 394-10(5).

¹¹ A thinning under this scheme is not a 'CGT event'.

Market value rule applies to' CGT events'

118. If, as a result of the 'CGT event' the Investor either:

- no longer holds the 'forestry interest'; or
- otherwise – where the Investor continues to hold the 'forestry interest', but there is a decrease in the market value of the 'forestry interest';

then the market value of the 'forestry interest' at the time of the event, or the reduction of the market value of the 'forestry interest' as a result of the event, is included in the assessable income of the Investor in the income year in which the 'CGT event' happens (subsection 394-25(2)). A market value rule applies rather than the amount of money actually received from the 'CGT event' (subsection 394-25(3)). However, the market value and the actual amount of money received may be the same.

119. The market value amount included in the assessable income of an Investor is the value of the 'forestry interest' just before the 'CGT event', or where the Investor continues to hold their interest after the event, the amount by which the market value of the 'forestry interest' is reduced as a result of the 'CGT event' (subsection 394-25(2)).

120. Section 394-25 will apply where the 'forestry interest' is sold, is extinguished, or ceases, and will include 'CGT events' such as a full or partial sale of the 'forestry interest' or from a full or partial clear-fell harvest of the trees grown under the Project.

Section 6-5 – amounts received by Investors where the Project trees are thinned

121. Section 394-25 specifically excludes from the operation of Division 394 a 'CGT event' that happens in respect of a thinning (see paragraph 394-25(1)(c)).

122. Thinning amounts received by an Investor in this Project do not arise as a result of a 'CGT event' and are not otherwise assessable under Division 394. The receipt of an amount arising from a thinning of the Project trees is a distribution that arises as an incident of the Investor holding a 'forestry interest' in the Project. It is an item of ordinary income and is assessable under section 6-5 in the year in which it is derived.

Section 82KL – recouped expenditure

123. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefit(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

124. 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).

125. The Elders Diversified Forestry Project 2010 will be a 'scheme' and an Investor will obtain a 'tax benefit' from entering into the 'scheme', in the form of tax deductions for the amounts detailed at paragraphs 25 to 29 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.

126. Investors to whom this Ruling applies will derive assessable income from holding or disposing of their 'forestry interest' in the Project. There are no facts that would suggest that Investors 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 Investors will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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