


PR 2011/4 - Income tax: West Coast Hardwood - Resale Offer

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Product Ruling

Income tax: West Coast Hardwood – Resale Offer

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	9
Ruling	11
Scheme	16
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	20
Appendix 2:	
Detailed contents list	27

ⓘ 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.

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 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 Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling part apply to the defined class of entities who participate in the scheme to which this Product Ruling relates.
2. In this Product Ruling this scheme is referred to as the West Coast Hardwood Project – Resale Offer or simply as 'the Project'.

Class of entities

3. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits.
4. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities who, on or after 11 June 2003 and on or before 30 June 2004, entered into the specified scheme that is set out in paragraphs 14 to 45 of Product Ruling PR 2003/41 and paragraphs 16 to 19 of this Ruling. They must have had a purpose of staying in the scheme until its completion (that is, being a party to the relevant agreements until their term expires) and deriving assessable income from this involvement.

Superannuation Industry (Supervision) Act 1993

5. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). The Commissioner gives no assurance that the scheme 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 scheme may contravene the provisions of SISA.

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 14 to 45 of PR 2003/41 and paragraphs 16 to 19 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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Date of effect

9. This Product Ruling applies only to the specified class of entities identified in paragraphs 3 and 4 of this Ruling and applies for the income years from 2009-10 to 2011-12.

10. 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.

Ruling

Continuing application of PR 2003/41

11. Although now withdrawn, the tax benefits set out in PR 2003/41 continue to apply to Growers who are within the specified class of entities to which the Product Ruling applied and who entered into the specified scheme between 11 June 2003 and 30 June 2004. This is subject to there being no material difference in the scheme or in the entities involved in the scheme.

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

Section 35-55 – annual exercise of Commissioner's discretion

12. For each of the income years from 2009-10 to 2011-12, the Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied for the year concerned:

- the Grower carried on their business of afforestation during the income year; and
- the business activity that is carried on is not materially different to that in the scheme described in paragraphs 14 to 45 of PR 2003/41 and paragraphs 16 to 19 of this Ruling; and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

13. If these conditions are met for a given year, the Commissioner will exercise the discretion for that year under:

- paragraph 35-55(1)(b) for a Grower in the Project who satisfies the income requirement in subsection 35-10(2E); and
- paragraph 35-55(1)(c) for a Grower in the Project who does not satisfy the income requirement in subsection 35-10(2E).

14. If the Commissioner determines that the discretion will not be exercised for a particular year or years the Grower will be informed of that decision and the reasons. In any year where the discretion is not exercised losses incurred by a Grower will be subject to the loss deferral rule in section 35-10 and the Grower will not be able to offset the losses from the Project against other assessable income.

15. The issue of this Product Ruling of itself does not constitute the exercise of the Commissioner's discretion in subsection 35-55(1) for any income years.

Scheme

16. The scheme that is the subject of this Ruling is identified and described in paragraphs 14 to 45 of Product Ruling PR 2003/41. It also incorporates the following additional documents and facts:

- Application for a Product Ruling dated 13 October 2010;
- List detailing the Projects and the number of investors involved in the West Coast Hardwood – Resale Offer provided on 21 January 2011;
- Lease and Management Agreement for Project No 1 provided on 13 October 2010;
- Modifications of the Constitution for Project No 1 provided on 13 October 2010;
- Resolution passed by the West Coast Hardwood Project No 1 Growers provided on 3 November 2010;
- Resolution passed by the West Coast Hardwood Project No 2 Growers provided on 21 January 2011;
- Lease and Management Agreement for Projects No 2, 3 and 4 provided on 21 January 2011;
- Consolidated Constitution for Project No 2 provided on 21 January 2011;
- Original Constitution for Projects No 3 and No 4 provided on 21 January 2011; and

- The modified Constitution for Projects No 3 and 4 provided on 21 January 2011.

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

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

18. The documents described in paragraph 14 of PR 2003/41 and paragraph 16 of this Product Ruling are those that a Grower may enter into. For the purposes of describing the scheme to which this Product 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.

19. Growers in the West Coast Hardwood Projects No 1 on 2 September 2010 and Growers in the West Coast Hardwood Project No 2 on 21 October 2010 passed a resolution to extend the scheme until the income year ending 30 June 2012. The resolution was taken to extend the life of the project to ensure that the trees would be commercially viable when harvested. Growers in the West Coast Hardwood Projects No 3 and No 4 were not required to pass a resolution as the Lease and Management Agreements and Constitution continue until 30 June 2013.

Commissioner of Taxation

9 March 2011

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.***

Deferral of losses from non-commercial business activities and the Commissioner’s discretion

Sections 35-10 and 35-55

20. Based on information provided with the application for this Product Ruling, a Grower accepted into the Project between 11 June 2003 and 30 June 2004 who carries on a business of afforestation individually (alone or in partnership) is expected to incur losses from their participation in the Project which will be subject to Division 35.¹ These losses will be subject to the loss deferral rule in section 35-10 unless an exception applies or, for each income year in which losses are incurred, the Commissioner exercises the discretion in subsection 35-55(1) on 30 June of that specific income year.

21. The exceptions to the loss deferral rule depend upon the circumstances of individual Growers and are outside the scope of this Ruling.

22. The Commissioner will apply the principles set out in Taxation Ruling TR 2007/6 *Income tax: non commercial business losses: Commissioner’s discretion* when exercising the discretion.

23. Where a Grower with income for NCL purposes of less than \$250,000 (that is, the Grower satisfies the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(b) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the 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, the Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C).

¹ Division 35 does not apply to Growers who do not carry on a business or who carry on a business other than as individuals (alone or in partnership).

24. Where a Grower with income for NCL purposes of \$250,000 or more (that is, the Grower does not satisfy the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(c) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the Grower will not produce assessable income greater than the deductions attributable to it; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, the Grower's business activity will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C).

25. A Grower will satisfy the income requirement in subsection 35-10(2E) where the sum of the following amounts is less than \$250,000:

- taxable income for that year (ignoring any loss arising from participation in the Project or any other business activity);
- total reportable fringe benefits for that year;
- reportable superannuation contributions for that year; and
- total net investment losses for that year.

26. In each individual year where the Commissioner's discretion is exercised a Grower within either paragraph 23 or paragraph 24 who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later income year is able to offset that loss against their other assessable income.

Appendix 2 – Detailed contents list

27. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	1
Class of entities	3
Superannuation Industry (Supervision) Act 1993	5
Qualifications	6
Date of effect	9
Ruling	11
Continuing application of PR 2003/41	11
Division 35 – deferral of losses from non-commercial business activities	12
Section 35-55 – annual exercise of Commissioner’s discretion	12
Scheme	16
Appendix 1 – Explanation	20
Deferral of losses from non-commercial business activities and the Commissioner’s discretion	20
Sections 35-10 and 35-55	20
Appendix 2 – Detailed contents list	27

References

Previous draft:

Not previously issued as a draft

- ITAA 1997
- ITAA 1997 Div 35
- ITAA 1997 35-10

Related Rulings/Determinations:

TR 2007/6; PR 2003/41

- ITAA 1997 35-10(2)
- ITAA 1997 35-10(2C)
- ITAA 1997 35-10(2E)
- ITAA 1997 35-55

Subject references:

- Commissioner's discretion
- non commercial loss
- product rulings

- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(b)
- ITAA 1997 35-55(1)(c)
- SISA 1993
- TAA 1953

Legislative references:

- Copyright Act 1968
-

ATO references

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