



PR 2011/9 - Income tax: TFS Sandalwood Project 2011

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 This document has changed over time. This is a consolidated version of the ruling which was published on *15 June 2011*



Product Ruling

Income tax: TFS Sandalwood Project 2011

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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.

[Note: This is a consolidated version of this document. Refer to the ATO Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

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 or the entities that applied for the Product Ruling, and their associates, will

abide by its strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

What this Product 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 TFS Sandalwood Project 2011, or simply as 'the Project'.

2. All legislative references in this Product 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 Growers.

5. Growers 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 and on or before 30 June 2011.

6. A Grower will have executed the relevant Project Agreements set out in paragraph 46 of this Ruling on or before 30 June 2011 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 2011;
- who participate in the scheme through offers made other than through the Product Disclosure Statement (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;
- whose Establishment Fees, including all loan money,
are not paid in full to TFS Properties Ltd (Responsible
Entity) by 30 June 2011;
- who enter into finance agreements with Arwon Finance
Pty Ltd (Arwon), other than as specified in
paragraphs 88 to 94 of this Ruling; or
- who elect to collect and market their own produce.

Superannuation Industry (Supervision) Act 1993

8. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The 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 46 to 94 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 6 April 2011, the date this Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 6 April 2011 until 30 June 2011, being the closing date for entry into the scheme. This 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, this 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 Ruling. Any such changes will take precedence over the application of this Ruling and, to the extent of those amendments, this 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 this Ruling is issued.

Goods and Services Tax

17. 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.

Ruling

Structure of the Project

18. The Project is a 'forestry managed investment scheme' as defined in subsection 394-15(1). Its purpose is the establishment and tending of Sandalwood Trees 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 3 to 7 of this Ruling) who are accepted to participate in the 'forestry managed investment scheme' described below at paragraphs 46 to 94 of this Ruling between 6 April 2011 and 30 June 2011 inclusive.

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. Although not relevant for the purposes of Division 394, a Grower (as described in paragraphs 4 to 7 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 of the ITAA 1997 (see paragraphs 41 to 44 and 128 to 134 of this Ruling).

Concessions for 'small business entities'³

22. From the 2007-08 income year, a range of concessions previously available under the simplified tax system (STS) became 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 Product Ruling.

¹ See subsection 394-15(5).

² See section 394-30.

³ The meaning of 'small business entity' is explained in section 328-110

The '70% DFE rule' and the establishment of the Trees***Section 394-35 and subsection 394-10(4)***

24. The taxation obligations and benefits set out below have been determined using the information provided to the Commissioner by the Responsible Entity (referred to as the 'forestry manager' in Division 394). On the basis of that information the Commissioner has decided that on 30 June 2011 it will be reasonable to expect that the '70% DFE rule'⁴ 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'.

25. This Ruling will only apply if the Responsible Entity 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.⁵ For this Project the Trees must be established before 31 December 2012.

26. 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 (see paragraph 52 of this Ruling). The Responsible Entity 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 2012.

Allowable deductions***Sections 8-5, 394-10 and 394-20 and Division 27***

27. A Grower in the Project can claim deductions for the amounts shown in the Table below that are paid to the Responsible Entity (sections 8-5 and 394-10).

28. 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) pursuant to Division 27.

Fee	Amount	Year(s) deductible
Establishment Fee	\$13,750 per Sandalwood Lot for up to 5 Sandalwood Lots \$13,200 per Sandalwood Lot for 6 or more Sandalwood Lots	The income year in which the Establishment Fee is paid
Annual Fees payable under the Annual Investment Option	\$913 per Sandalwood Lot per annum (increased by 3% annually from the 2012-13 income year onwards)	The income year in which the Annual Fee is paid

⁴ The '70% DFE rule' is set out in section 394-35.

⁵ See subsection 394-10(4)

Annual Rent payable under the Annual Investment Option	\$275 per Sandalwood Lot per annum (increased by 3% annually from the 2012-13 income year onwards)	The income year in which the Annual Rent is paid
Amounts payable under the Annual Deferred Investment Option for the 2012-13 to 2013-14 income years	3.3% of the Gross Proceeds of Sale for each income year where Annual Fees and Annual Rent are deferred	The income year in which the Grower is entitled to proceeds and the Deferred Fee is paid from those proceeds
Amounts payable under the Annual Deferred Investment Option for the 2014-15 to 2017-18 income years	2.2% of the Gross Proceeds of Sale for each income year where Annual Fees and Annual Rent are deferred	The income year in which the Grower is entitled to proceeds and the Deferred Fee is paid from those proceeds
Amounts payable under the Annual Deferred Investment Option for the 2018-19 to 2023-24 income years	1.1% of the Gross Proceeds of Sale for each income year where Annual Fees and Annual Rent are deferred	The income year in which the Grower is entitled to proceeds and the Deferred Fee is paid from those proceeds
Costs of Harvest and Processing	Actual costs	The income year in which the Grower is entitled to proceeds and the Costs of Harvest and Processing are paid from those proceeds
Selling and Marketing Fees	5.5% of the Gross Proceeds of Sale	The income year in which the Grower is entitled to proceeds and the Selling and Marketing Fees are paid from those proceeds
Incentive Fees	33% of the amount by which the Net Proceeds of Sale exceed the Target Net Proceeds of Sale	The income year in which the Grower is entitled to proceeds and the Incentive Fees are paid from those proceeds

Notes:

- (i) The Responsible Entity will inform Growers of the income year in which fees set out in the Table above have been paid from proceeds and accordingly, when Growers are entitled to claim deductions.

29. The deductibility of these amounts remains subject to the requirement that:

- the Responsible Entity 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; and
- a CGT event⁶ does not happen in relation to the Grower's 'forestry interest' before 1 July 2015 (see paragraphs 33 to 36 of this Ruling).

30. An amount referred to in the table at paragraph 28 of this Ruling is deductible in the income year in which it is paid, or is paid on behalf of the Grower (subsection 394-10(2) and section 394-20). This requires cash to flow from the Grower, or from another entity on the Grower's behalf, to the Responsible Entity's bank account in the year in which the deduction is claimed. Any form of payment that does not involve the movement of cash into the Responsible Entity's bank account will not qualify for a deduction under subsection 394-10(2).

31. Where a Grower 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.

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

Interest on Loans to finance 'forestry interest' and borrowing costs

Sections 8-1 and 25-25

32A. A Grower may claim tax deductions for the following fees and expenses set out in the following table.

⁶ Defined in section 995-1.

Fee	Amount	Year(s) deductible
Interest payable to Arwon	As determined by the loan agreement	30 June in the year in which the interest is incurred See note (i)
Borrowing Costs for Principle and Interest Loan with Arwon	\$300 plus 0.5% of the loan amount	See note (ii)
Borrowing Costs for 12 month interest fee loan with Arwon	\$100 Administration fee per applicant	2010-2011 income year See note (ii)

Notes

- (i) Interest payable for loans with Arwon Finance Pty Ltd (Arwon) is deductible in the year in which it is incurred. However, the deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Arwon is outside the scope of this Ruling. Growers who borrow from lenders other than Arwon or who choose to prepay their interest may request a private ruling on the deductibility of the interest incurred or may self assess the deductibility of the interest incurred.
- (ii) The Borrowing Costs payable to Arwon 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 is spread over the period of the loan or over five years, whichever is shorter. Where the Borrowing Cost is \$100 or less, the whole of the borrowing expense is deductible in the year in which it is incurred. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Arwon is outside the scope of this Ruling.

‘CGT event’ within 4 years for Growers who are ‘initial participants’***Subsections 394-10(5), 394-10(5A) and 394-10(6)***

33. Deductions for the Establishment Fees, the Annual Fees and the Rent are not allowable where a ‘CGT event’ happens in relation to the ‘forestry interest’ of a Grower before 1 July 2015 (subsection 394-10(5)).

34. Where deductions for these amounts have already been claimed by a Grower the Commissioner may amend their assessment at any time within two years of the ‘CGT event’ happening

(subsection 394-10(6)). The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936.

35. Growers 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'.

36. However, deductions will not be affected where the 'CGT event' happens because of circumstances outside of the Grower's control and the Grower could not reasonably have foreseen the 'CGT event' happening when they acquired the 'forestry interest' (subsection 394-10(5A)).

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

Sections 6-10, 17-5, and 394-25

37. Where a 'CGT event' happens to a 'forestry interest' held by a Grower 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 Grower (sections 6-10 and 394-25), less any GST payable on those proceeds (section 17-5).

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

39. '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 Grower; or
- any other 'CGT event' that results in a reduction of the market value of the 'forestry interest' held by the Grower.

Amounts received by Growers from insurance proceeds

Sections 6-5 and 17-5

40. An amount received by a Grower as insurance proceeds is a distribution of ordinary income that arises as a result of a Grower holding a 'forestry interest' in the Project. Growers include their share of any insurance proceeds 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).

Division 35 – deferral of losses from non-commercial business activities***Section 35-55 – annual exercise of Commissioner’s discretion***

41. For each of the income years from 2010-11 to 2023-24 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 this Product Ruling; and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

42. 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).

43. 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.

44. 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 year.

Prepayment provisions and anti-avoidance provisions***Sections 82KL and Part IVA of the ITAA 1936***

45. Where a Grower is accepted to participate in the Project, the following provisions of the ITAA 1936 have application as indicated:

- 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

46. 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 13 December 2010, 6 January 2011, 27 January 2011, 8 February 2011, 15 February 2011, 21 February 2011, 22 February 2011, 23 February 2011, 2 March 2011, 18 March 2011, 28 April 2011, 29 April 2011, 5 May 2011 and 17 May 2011;
- Draft Product Disclosure Statement (PDS) for the TFS Sandalwood Project 2011 issued by TFS Properties Ltd (Responsible Entity), received 18 March 2011;
- Draft **Constitution** for the TFS Sandalwood Project 2011, received 13 December 2010;
- Draft **Lease and Management Agreement** between the Responsible Entity, TFS Leasing Pty Ltd (Lessor) and the Grower, received 18 March 2011;
- Draft **Agreement for Sub-Lease** between the Responsible Entity, TFS Leasing Pty Ltd and the Grower, received 13 December 2010;
- Draft Compliance Plan for the TFS Sandalwood Project 2011, received 18 March 2011;
- Draft Plantation Management Agreement between the Responsible Entity and Tropical Forestry Services Ltd, received 13 December 2010;
- Draft Head Lease between the Responsible Entity, TFS Leasing Pty Ltd and the Security Holder, received 13 December 2010;
- Draft TFS Sandalwood Project 2011 **Finance Application** and Draft Arwon **Loan Agreement**, received 18 May 2011;
- Draft **Loan Agreement** between Arwon Finance Pty Ltd and the Borrower, received 13 December 2010; and
- TFS Land Selection Policy, received 27 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.

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

48. 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. The effect of these agreements is summarised as follows.

Overview

49. The main features of the Project are as follows:

Location	Land surrounding Kununurra, Western Australia including Ivanhoe Plain, Packsaddle Plain and Kingston Rest; and Burdekin region of northern Queensland.
Species of Trees to be planted under the scheme	Indian Sandalwood (<i>Santalum album</i>)
Term of the Project	Approximately 15 years
Date all Trees are due to be planted on scheme land	31 December 2012
Number of Trees per hectare	Targeted survival rate of approximately 420 Trees per hectare
Number of hectares offered for cultivation	Approximately 500 hectares
Size of each 'forestry interest'	0.167 hectares
Minimum allocation of 'forestry interests' per Grower	One forestry interest (Sandalwood Lot)
Minimum subscription	Nil
Initial cost	\$13,750 per Sandalwood Lot for up to 5 Sandalwood Lots, and \$13,200 per Sandalwood Lot for 6 or more Sandalwood Lots
Ongoing costs and other costs	Annual Fees; Rent; Insurance costs; Costs of Harvest and Processing; Selling and Marketing Fees; and Incentive fee

50. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. TFS Properties Limited has been issued with an Australian Financial Service Licence 241192 and will be the Responsible Entity for the Project.

51. The Project will involve establishing an Indian Sandalwood Plantation. Approximately 14 years after the Establishment Period the Sandalwood will be Harvested, Processed and then sold.

52. The Project will be conducted on the land surrounding Kununurra, Western Australia and may also include land in the Burdekin region of northern Queensland. All land selected will be deemed suitable in accordance with the TFS Land Selection Policy.

53. An offer to participate in the Project will be made through a PDS. The offer under the PDS is for 3,000 Sandalwood Lots of 0.167 hectares each. There is no minimum subscription for the Project.

54. An entity that participates in the Project as a Grower will do so by acquiring an interest in the Project on or before 30 June 2011 which will consist of a minimum of one Sandalwood Lot.

55. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints the Responsible Entity to execute, on behalf of the Grower, the Constitution, which includes the Lease and Management Agreement and any other documents required to hold an interest in the Project.

56. The Sandalwood Lots will be planted out with Sandalwood seedlings at a sufficient rate to meet the survival target of 420 Trees per hectare. Water for the Ivanhoe Plain section of the Project will be supplied from Lake Argyle and water for the Kingston Rest property will be sourced from a private dam. Sufficient water will be available for any Sandalwood Lots located in the Burdekin region of northern Queensland.

57. The Manager of the Project will provide the irrigation system in accordance with silvicultural standards suitable for Sandalwood plantations.

58. Each Grower will use their Sandalwood Lot(s) for the purpose of carrying on a business of cultivating and Harvesting Sandalwood Trees and selling the harvested timber.

Constitution

59. The Constitution establishes the Project and operates as a deed binding all Growers and TFS Properties Ltd. The Constitution sets out the terms and conditions under which TFS Properties Ltd 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.

60. In order to acquire an interest in the Project, an entity must make an application for 'forestry interests' in accordance with clauses 11.2 and 11.3. Among other things, the Application must be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, lodged at the registered office of the Responsible Entity (or such other place as the Responsible Entity

may nominate from time to time) and accompanied by payment of the Application Money in a form acceptable to the Responsible Entity.

61. Under the terms of the Constitution the Responsible Entity will create two separate funds. Application Moneys will be paid into an Application Fund and the proceeds of the sale of the Forest Produce will be paid into a Proceeds Fund (clause 2.5).

62. The Application Moneys will be released from the Application Fund and applied towards payment of the Fees payable under the Lease and Management Agreement when the Responsible Entity is reasonably satisfied that the criteria specified in clause 14 of the Constitution have been satisfied.

63. The Constitution also sets out provisions relating to:

- Project Property (clause 3);
- complaints handling (clause 5);
- winding up the Project (clause 6);
- distribution of proceeds (clause 16);
- retirement and removal of the Responsible Entity (clause 25); and
- Register of Growers (clause 26).

Compliance Plan

64. 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.

Head Lease

65. The owner (the Responsible Entity or an unrelated entity) of the Project land will enter into a Head Lease with TFS Leasing Pty Ltd, as the Lessee, in respect of land required for the Project.

66. The Lessee must use the land only for the commercial silviculture of Indian Sandalwood Trees (clause 5.2 and item 6 of the Schedule).

67. The Lessee will sub-lease the land or any part of the land to Growers in the Project, for the purpose of commercial silviculture of Indian Sandalwood Trees. The Sub-Lease must be entered into in the form of a Lease and Management Agreement on the same or substantially identical terms as set out in Schedule 1 of the Constitution (clause 9.1).

Lease and Management Agreement

68. Growers participating in the Scheme will enter into a Lease and Management Agreement with TFS Leasing Pty Ltd, as the Lessor, and TFS Properties Ltd, as the Responsible Entity. Growers are granted an interest in the land in the form of a Lease to use their Sandalwood Lot(s) for the purposes of conducting their afforestation business. The Term of the Lease will be for a period of approximately 15 years commencing on the date on which the Grower's Application is accepted by the Responsible Entity (Commencement Date) and ending when the final distribution of sale proceeds is made to the Grower or when the Project is terminated. Growers are specifically granted rights to harvest timber on their Sandalwood Lot(s) for this purpose. The Lease is granted upon the terms and conditions outlined in the Lease and Management Agreement.

69. Under the Lease and Management Agreement, each Grower appoints the Responsible Entity to perform the Services and the Responsible Entity accepts the appointment. The Responsible Entity will supervise and manage all silvicultural activity on behalf of the Grower in accordance with good silvicultural practice. Item 7 of the Schedule to the Lease and Management Agreement specifies the Establishment Services (item 7A) and Ongoing Services (item 7B) to be performed by the Responsible Entity.

70. The Establishment Services include:

- the acquisition of appropriate Seeds and seedlings;
- carrying out weed control, surveying and ground preparation for each Sandalwood Lot;
- planting Sandalwood seedlings on each Sandalwood Lot at a rate which, at the end of the third year after the Commencement Date, would reasonably be expected to provide an average survival rate of 420 Trees per hectare;
- planting short term host Trees on the Sandalwood Lot;
- irrigation, cultivation, tending, culling, pruning, fertilising, and spraying, as required in support of planting; and
- the use of all reasonable measures to keep the Sandalwood Lot free of infestation from rabbits and other vermin.

71. The Ongoing Services include:

- the irrigation, cultivation, tending, culling, pruning, fertilising, replanting, spraying, maintenance and otherwise caring for the Trees as and when required;
- planting on the relevant Sandalwood Lot such other Trees as may be considered necessary to enable or encourage the growth of the Sandalwood seedlings;

- replanting the relevant parts of the Plantation with sufficient seedlings or Trees if the Responsible Entity deems it necessary, with the replanting costs to be paid by the Responsible Entity;
- the use of all reasonable measures to keep the Sandalwood Lot free of infestation from rabbits and other vermin;
- maintaining in good repair and condition adequate fire-breaks in and about the Leased Area;
- maintaining the Leased Area according to good silvicultural and forestry practices;
- furnishing the Grower with reports as and when required;
- carrying out, or arranging to be carried out, the Harvest and Processing of the Trees in a manner which maximises the return for the relevant Grower; and
- arranging for the sale of the Forest Produce.

Agreement for Sub-Lease

72. Where the Responsible Entity has not secured suitable land for the Project, it can still accept Growers into the Project under the Agreement for Sub-Lease. Under this Agreement, the Responsible Entity must secure suitable land and arrange for the Grower to enter into a Lease (the sub-lease of the Leased Area) with the Lessor in sufficient time for the Responsible Entity to perform the Establishment Services within the initial 18 month establishment period from the Commencement Date.

Pooling of Timber and Entitlement to Net Proceeds

73. The Responsible Entity plans to Harvest and Process the Trees in years 13 (maximum of 20%) and 14 and may engage a suitably qualified person for this process. The Harvest may be deferred if the Responsible Entity believes it would be in the best interests of the Growers to defer the Harvests to a later date. If the Harvest is deferred, no additional Annual Fees or Rent will be payable.

74. The Responsible Entity is appointed to market and sell the Forest Produce on behalf of the Growers who do not make an election under clause 15 of the Lease and Management Agreement (Non-Electing Growers), on such terms and conditions as the Responsible Entity considers appropriate (clause 17 of the Lease and Management Agreement).

75. The Constitution and the Lease and Management Agreement set out provisions relating to the pooling of Growers' timber and the distribution of proceeds from the sale of the timber (clause 16.2 of the

Constitution and clause 18 of the Lease and Management Agreement).

76. The Responsible Entity must ensure that the Gross Proceeds of Sale are deposited into the Proceeds Fund (clause 18 of the Lease and Management Agreement). The Responsible Entity will pay any outstanding fees from the Proceeds Fund, with the remaining balance to be paid to the Grower in accordance with each Grower's Proportional Interest.

77. In the event of a total or partial destruction of the Trees on a Grower's Sandalwood Lot(s), the Proportional Share of the Grower will be reduced by the damaged or destroyed proportion as determined by the Responsible Entity (clauses 22.5 to 22.7 of the Lease and Management Agreement).

Fees

78. Under the terms of the Lease and Management Agreement, a Grower will make payments as described below on a per Sandalwood Lot basis.

Establishment Fee

79. The Establishment Fee payable to the Responsible Entity on application is \$13,750 per Lot for up to five Sandalwood Lots and \$13,200 per Lot for six Sandalwood Lots or more (item 9A of the Schedule to the Lease and Management Agreement).

Annual Fee and Rent

80. Growers can elect to pay the Annual Fee and the Rent on an annual basis (the Annual Investment Option) or defer payment of these amounts (the Annual Deferred Investment Option). Annual Fees and Rent are payable for 12 years from Year 1 (the year after the Establishment Period Ends) until Year 12. If the Harvest is deferred, no additional Annual Fees or Rent will be payable.

81. For those Growers who have elected to pay under the Annual Investment Option, the amount of the Annual Fee is \$913 per Sandalwood Lot and the Rent is \$275 per Sandalwood Lot. These amounts, increased by a fixed 3% per annum, are payable on or before 14 January in each financial year, following the year in which the Establishment Period ends (clause 19.2(b) and item 9B of the Schedule to the Lease and Management Agreement).

82. Alternatively, for those Growers who have elected to defer these fees under the Annual Deferred Investment Option, the Responsible Entity is entitled to a percentage of the Gross Proceeds of Sale for each financial year as per the table below (clause 19.2(c) and item 9C of the Schedule to the Lease and Management Agreement):

Years 1 – 2	3.3% per year
Years 3 – 6	2.2% per year
Years 7 -12	1.1% per year

83. If all or substantially all of the Trees on the Growers' Sandalwood Lots are destroyed before the Harvest can take place, any Grower who has deferred their Annual Fee and Rent will be liable to pay an amount equal to 55% of the Annual Fees and Rent for all years prior to the destruction (clause 22.6 of the Lease and Management Agreement).

Other fees

84. The following amounts are payable to the Responsible Entity from the Project's proceeds:

- Costs of Harvest and Processing payable from the Grower's Gross Proceeds of Sale (clause 18.2 of the Lease and Management Agreement);
- Selling and Marketing Fees, being 5.5% of the Grower's Gross Proceeds of Sale (clause 18.2 of the Lease and Management Agreement); and
- an Incentive Fee equal to 33% of the amount, if any, by which the Grower's Net Proceeds of Sale exceed the Target Net Proceeds of Sale for each Sandalwood Lot (clause 18.3 of the Lease and Management Agreement).

Insurance

85. The Responsible Entity will insure the Plantation against fire until the end of the Establishment Period. Thereafter, if so requested, the Responsible Entity will arrange insurance of the Sandalwood Lot(s) on behalf of the Grower to cover the Sandalwood Lot(s) against fire and other usual risks. The cost of such insurance will be payable to the Responsible Entity by the Grower (clause 22 of the Lease and Management Agreement).

Finance

86. To finance all or part of the cost of their forestry interest a Grower can:

- apply for a '12 Months Interest Free Loan' with Arwon;
- apply for a 'Principle and Interest Loan' with Arwon; or
- borrow from an independent lender external to the Project.

87. Only the finance arrangement set out below is covered by this Product Ruling. A Grower cannot rely on this Ruling if they enter into a finance arrangement with Arwon that materially differs from that set out in the documentation provided with the application for this Ruling. A Grower who enters into a finance arrangement other than in accordance with paragraphs 88 to 93 of this Ruling may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Ruling.

12 Months Interest Free Loan offered by Arwon

88. A Grower choosing to pay the Establishment Fee by entering into a 12 Month Interest Free Loan arrangement with Arwon must complete the Application Form attached to the PDS. Each Application can be for one or more Sandalwood Lots.

89. Growers who enter into such a loan agreement with Arwon are required to pay on Application:

- a \$100 Administration Fee per Application; and
- a deposit of 20% of the Establishment Fee(s) for the acquisition of one or more Sandalwood Lots.

90. The balance of the Establishment Fee(s) remaining after the 20% deposit has been paid is repayable in 12 equal monthly instalments commencing on the 30th day of the month after the Grower's application has been accepted and must be paid in full within 12 months of the Application being accepted.

91. The loans from Arwon 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. The loans will be secured by a charge over the Grower's Interest(s) in the Project.

92. A Grower who enters into a 12 Month Interest Free Loan arrangement with Arwon can only deduct the Establishment Fee(s) in the year in which Arwon actually pays the amount into the Responsible Entity's bank account (see paragraph 30 of this Ruling).

93. The \$100 Administration Fee is deductible in the year in which it is incurred (see Note (iii) at paragraph 28 of this Ruling).

Principle and Interest Loan offered by Arwon

93A. A Grower choosing to pay the Establishment Fee by entering into a principal and interest loan with Arwon for up to 10 years must complete the application form attached to the PDS.

93B. Growers who enter into such agreement will be bound by the terms and conditions of the loan agreement.

93C. The loan agreement offered by Arwon requires:

- monthly payments of principle and interest;
- an application fee of \$300 plus 0.5% of the amount of the finance;
- a deposit of 10% may be payable;
- to be secured by a charge over the Growers interests in the Project.

93D. The finance provided by Arwon is made on a full recourse commercial basis and normal debt recovery procedures, including legal action will be taken in the case of defaulting borrowers.

93E. Arwon will only provide loans to Growers where it has sufficient funds to do so.

Other qualifications relating to finance

94. This Product Ruling does not apply if a 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 Arwon, are involved or become involved in the provision of finance to Growers for the Project.

PR 2011/9

6 April 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.*

Structure of the Project

95. In return for payment of the Establishment Fee and the other fees and expenses required under the Project agreements during the term of the Project, Growers 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)).

96. Under the Constitution of the Project and the other supporting agreements, the holding of a 'forestry interest' in the Project gives each Grower a right to a share in the proceeds of the Harvest of the Trees grown on the Project land. That share of proceeds is determined using the number of 'forestry interests' held by a Grower as a proportion of all 'forestry interests' held by 'participants'⁷ in the Project.

Is the Grower carrying on a business?

97. 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?*

98. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Product 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).

99. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 4 to 7 of this Ruling), who stay in the Project until its completion, will 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 and 394-10***

100. 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***

101. The threshold test for Growers 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 2011, 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

102. 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)).

103. 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)).

104. Both of the above amounts are determined as at 30 June 2011 taking into account:

- the timing requirements in subsections 394-35(4) and 394-35(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).

105. 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 2011.

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)

106. The requirement of paragraph 394-10(1)(d) that Growers in the Project not have day to day control over the operation of the Project (despite having a right to be consulted or give directions) is clear from the Project Agreements as are the alternative elements of paragraph 394-10(1)(e) relating to the number of Growers in the scheme and the Responsible Entity's role in other managed investment schemes.

107. The final requirement for deductibility requires all the Project Trees to be established within 18 months of 30 June 2011 (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 2012.

108. Accordingly, subject to the qualifications set out below, amounts paid by Growers to the Responsible Entity in relation to 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)).

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

110. Where a Grower 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)

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

112. 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 three months of the end of the 18 month period (section 394-10 of Schedule 1 to the TAA).

113. The second situation where a Grower 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, for example, the Establishment Fee (see subsection 394-10(5)).

114. For the purposes of this provision, the Commissioner is able to amend the assessment of a Grower 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)).

115. Where a 'CGT event' happens to the 'forestry interest' of a Grower 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 Grower 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.

116. However, subsection 394-10(5) will have no application where the 'CGT event' happens because of circumstances outside of the Grower's control and the Grower could not reasonably have foreseen the 'CGT event' happening when they acquired the 'forestry interest' (subsection 394-10(5A)).

Interest on loans to finance the 'forestry interest' of a Grower

Section 8-1

116A. Where a Grower 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 Grower 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).

116B. Under the first positive limb of subsection 8-1(1) the interest incurred by a Grower will be deductible if it is incurred in gaining or producing a Grower'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).

116C. Growers 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 a Grower in the form of the proceeds of a full or part disposal of the 'forestry interest' or, as a proportionate share of the harvest 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) apply.

116D. 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).

116E. 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

117. 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.

118. 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.

118A. Accordingly, under the scheme to which this Product Ruling applies, only deductions for interest payable under a loan with Arwon will potentially fall within the prepayment provisions. However, the conditions applying to the loans to which this Ruling applies (see

paragraphs 86 to 93E of this Ruling) do not require any prepayment of interest over the term of the loan. Accordingly, the prepayment provisions have no application to Growers who enter into those loans.

118B. If a Grower chooses to prepay interest on these loans that Grower may request a private ruling on how the prepayment provisions will affect the timing of their interest deduction.

Borrowing costs

Section 25-25

119. 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)).

120. In this Project the Borrowing Costs payable to Arwon 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.

121. Borrowing expenses of \$100 or less are deductible in the year in which they are incurred (subsection 25-25(6)). Where the amount exceeds \$100, 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 Growers who are 'initial participants'

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

122. 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)

123. Where a 'CGT event' happens to a 'forestry interest' held by a Grower in this Project, subsection 394-25(2) includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted an amount under section 394-10; or
- the Grower would have met the condition immediately above if subsection 394-10(5) had not applied to disallow the deduction(s). Paragraphs 33 to 36 and paragraphs 111 to 116 of this Ruling explain when deductions will be disallowed under subsection 394-10(5).

Market value rule applies to 'CGT events'

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

- no longer holds the 'forestry interest'; or
- otherwise – where the Grower 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 Grower 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.

125. The market value amount included in the assessable income of a Grower is the value of the 'forestry interest' just before the 'CGT event', or where the Grower 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)).

126. 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.

Insurance costs***Section 6-5***

127. The receipt of an amount arising from the payment of insurance costs is a distribution that arises as an incident of the Grower 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.

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

128. Based on information provided with the application for this Product Ruling, a Grower accepted into the Project in the 2010-11 income year who carries on a business of afforestation individually (alone or in partnership) is expected to incur losses from their participation in the Project for each of the income years from 2010-11 to 2023-24 which will be subject to Division 35.¹¹ These losses will be

¹¹ 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).

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.

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

130. 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.

131. 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)).

132. 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)).

133. 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.

134. In each individual year where the Commissioner's discretion is exercised a Grower within either paragraph 131 or paragraph 132 of this Ruling 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.

Section 82KL – recouped expenditure

135. 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 deductions otherwise allowable under section 8-1.

Part IVA – general tax avoidance provisions

136. 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 or carrying out the scheme to obtain a tax benefit (section 177D).

137. The Project will be a 'scheme' and a Grower will obtain a 'tax benefit' from entering into the 'scheme', in the form of tax deductions for the amounts detailed at paragraphs 27 to 32 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.

138. Growers to whom this Product 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 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 Growers will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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