


# ***PR 2020/9 - Income tax: NTT Mahogany Project - 2018-19 to 2021-22 income years***

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## Product Ruling

### Income tax: NTT Mahogany Project – 2018–19 to 2021–22 income years

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#### **📌 Relying on this Ruling**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

#### **No guarantee of commercial success**

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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**

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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**

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section apply to the defined class of entities that takes part in the

scheme to which this Ruling relates. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.

2. In this Product Ruling the scheme is referred to as the NTT Mahogany Project (the Project).

## **Class of entities**

3. This part of the Product Ruling specifies which entities can rely on the Ruling section of this Product Ruling and which entities cannot rely on the Ruling section. Those entities that can rely on the Ruling section are referred to as Growers.

4. The class of entities that can rely on the Ruling section of this Product Ruling consists of those entities who:

- executed a Licence Agreement and a Project Operations Agreement
- were accepted to participate in the scheme that is set out in paragraphs 16 to 43 of withdrawn Product Ruling PR 2005/110 *Income tax: NTT Mahogany Project* and paragraphs 22 to 31 of this Product Ruling on or before 30 June 2004 (as 2004 Growers) or on or before 30 June 2005 (as 2005 Growers), and
- continue to have a purpose of
  - staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and
  - deriving assessable income from their involvement in the scheme that exceeds the deductible expenditure that they incur in respect of it.

5. The class of entities that can rely on the Ruling section of this Product Ruling does **not** include entities who:

- intend to terminate their involvement in the scheme prior to its completion
- do not intend to derive assessable income from the scheme that exceeds the deductible expenditure that they incur in respect of it, or
- have participated in the scheme through offers made other than through the Product Disclosure Statement.

## ***Superannuation Industry (Supervision) Act 1993***

6. 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 super fund. The trustees of super 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 the SISA.

### **Qualifications**

7. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out has been and continues to be carried out in accordance with the scheme described in paragraphs 16 to 43 of PR 2005/110 and paragraphs 22 to 31 of this Product Ruling.

8. If the scheme actually carried out is materially different from the scheme that is described in PR 2005/110 and 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
- may be withdrawn or modified.

### **Date of effect**

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9. This Product Ruling applies prospectively from 1 July 2018. It applies only to the specified class of entities from 1 July 2018 to 30 June 2021, being its period of application. This Product Ruling will continue to apply to the specified class of entities even after its period of application has ended for the scheme entered into by those entities.

10. 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**

11. Although this Product Ruling deals with the income tax laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

12. Growers who are 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**

13. 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 Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

## **Ruling**

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### **Continuing application of PR 2005/110**

14. Although now withdrawn, the tax benefits set out in PR 2005/110 continue to apply to Growers who are within the class of entities to which that Product Ruling applies. This is subject to there being no material difference in the scheme or in the entities' involvement in the scheme, other than those set out in paragraphs 22 to 31 of this Product Ruling.

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

15. A Grower who is an individual, alone or in partnership, and within the defined class of entities outlined in paragraph 4 of this Product Ruling (and not excluded from the class of entities in accordance with paragraph 5 of this Product Ruling) is expected to incur losses from their participation in the Project which will be subject to Division 35.<sup>1</sup>

16. Under the conditions outlined in paragraphs 88 and 89 of PR 2005/110, the Commissioner exercised the discretion in paragraph 35-55(1)(b) for each individual Grower for the 2003–04 to 2017–18 income years.<sup>2</sup>

17. The Responsible Entity advised on 1 November 2019 that the afforestation business of Growers would not produce a tax profit in the 2018–19 to 2021–22 income years and requested that the Commissioner extend the discretion to allow losses to be claimed in these income years. The Responsible Entity has forecast that the Growers will make tax profits in the 2022–23 income year.

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<sup>1</sup> 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): section 35-5.

<sup>2</sup> For the purposes of this Product Ruling, all income years end on 30 June.

**Section 35-55 – exercise of Commissioner’s discretion for the 2018–19 to 2021–22 income years**

18. For the 2018–19 to 2021–22 income years, the Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied:

- The Grower carried on their business of commercially growing and cultivating *Khaya senegalensis* (African Mahogany) for the purpose of producing timber during the income year.
- The business activity that is carried on is not materially different to that in the scheme described in PR 2005/110.
- The only changes to the scheme are those described in paragraphs 22 to 31 of this Product Ruling.
- The Grower has incurred a taxation loss for the income year from carrying on that business activity.

19. If these conditions are met for the 2018–19 to 2021–22 income years, the Commissioner will exercise the discretion for those years under:

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

20. 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.

21. 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.

## **Scheme**

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22. The scheme that is the subject of this Product Ruling is described in paragraphs 16 to 43 of PR 2005/110. It also incorporates the following additional documents:

- application for a Product Ruling as constituted by documents and correspondence received on 25 June 2019, 1 November 2019, 10 February 2020, and 17 June 2020

- Operational Management Agreement between the Responsible Entity and the Plantation Manager dated 18 February 2009, and
- Compliance Plan for the NTT Mahogany Project dated 27 May 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.

23. 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.

24. All Australian Securities and Investments Commission requirements are, or will be, complied with for the term of the agreements.

### **Change to Responsible Entity**

25. The entity identified as the original Responsible Entity in PR 2005/110 was replaced as Responsible Entity by Huntley Management Limited (HML) on 6 June 2008. As the new responsible Entity, and as at 6 June 2008, HML assumed the role of the original Responsible Entity under each of the relevant Project agreements pursuant to section 601FT of the *Corporations Act 2001*.

### **Change of Project Agreements**

26. The Responsible Entity Services Agreement and the Project Management Agreement entered into between the original Responsible Entity and the entity identified as the original Plantation Manager in PR 2005/110 were terminated and replaced by the Operational Management Agreement between HML (as the Responsible Entity) and a new Plantation Manager on 18 February 2009.

27. The Operational Management Agreement was subsequently terminated on 22 November 2010. Since this date HML has been responsible for the performance of all of the services referred to under the Project Operations Agreement.

28. HML has overseen the undertaking of a non-commercial thinning of the Trees. The initial harvest (commercial thinning) proposed to be conducted in year 10 of the Project has not been, and will not be, conducted.

29. The Licences provided to Growers for the Woodlots allotted to them under the terms of the Licence Agreement will continue until completion of the final harvest.

30. The Compliance Plan for the Project referred to in paragraph 16 of PR 2005/110 was replaced by a new Compliance Plan on 27 May 2011.

#### **Change to Ongoing Management Fee**

31. For the 2005–06 income year and beyond, the Ongoing Management Fee payable under the Project Operations Agreement by a Grower on a per Woodlot basis was reduced by an amount equivalent to the annual Licence Fee payable by the Grower on a per Woodlot basis to the Licensor under the Licence Agreement.

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**Commissioner of Taxation**

2 July 2020

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## Appendix 1 – Explanation

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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.***

### **Division 35 – deferral of losses from non-commercial business activities and the Commissioner’s discretion**

32. Based on the information provided with the application for this Product Ruling, a Grower within the class of entities that can rely on this Product Ruling and carries on a business of commercially growing and cultivating African Mahogany for the purpose of producing timber is expected to incur losses from their participation in the Project for each of the income years up to and including the 2021–22 income year, and will be subject to Division 35 where the Grower is an individual (alone or in partnership). These losses will be subject to the loss deferral rules 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.

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

34. 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.

35. As provided for by PR 2005/110 in respect of the 2003–04 to 2017–18 income years, where a Grower 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 PR 2005/110, and the discretion in paragraph 35-55(1)(b) as it applied 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)).

36. For the 2008–09 income year and onwards, an income requirement was introduced to Division 35. This income requirement applies to Growers for the 2018–19 to 2021–22 income years. Where a Grower with income for non-commercial loss purposes of less than \$250,000 (that is, a Grower who 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)).

37. For the 2018–19 to 2021–22 income years, where a Grower with income for non-commercial loss purposes of \$250,000 or more (that is, a Grower who 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)).

38. 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, and ignoring any assessable FHSS released amount for that year)
- total reportable fringe benefits for that year
- reportable superannuation contributions for that year, and
- total net investment losses for that year.

39. In each individual year where the Commissioner's discretion is exercised, a Grower to whom either paragraphs 36 or 37 of this Product Ruling applies, and 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**

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2007/6; PR 2004/105;  
PR 2005/110

*Legislative references:*

- ITAA 1997 Div 35  
- ITAA 1997 35-5

- ITAA 1997 35-10
  - ITAA 1997 35-10(2)
  - ITAA 1997 35-10(2C)
  - ITAA 1997 35-10(2E)
  - ITAA 1997 35-55
  - ITAA 1997 35-55(1)
  - ITAA 1997 35-55(1)(b)
  - ITAA 1997 35-55(1)(c)
  - Corporations Act 2001 601FT
  - SISA 1993
  - TAA 1953
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ATO references

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