



PR 2006/67 - Income tax: ITC Red Mahogany Project 2006 - Post 30 June 2006 Growers

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 This document has changed over time. This is a consolidated version of the ruling which was published on *3 May 2006*



Product Ruling

Income tax: ITC Red Mahogany Project 2006 – Post 30 June 2006 Growers

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ⓘ This Ruling 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, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are 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 Tax Office **does not** sanction or guarantee this product. Further, we give 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. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products and how the product fits an existing portfolio. We recommend 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. Potential participants may wish to seek assurances from the promoter that the scheme will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office will be undertaking review activities to confirm the scheme has been implemented as described below and to ensure that the participants in the scheme include in their income tax returns income derived in those future years.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the 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 Ruling.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant taxation provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Ruling, the scheme is sometimes referred to as the 'ITC Red Mahogany Project 2006' or simply as 'the Project'.

Relevant taxation provision(s)

2. The taxation provisions dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - section 8-1 of the ITAA 1997;
 - section 17-5 of the ITAA 1997;
 - section 25-25 of the ITAA 1997;
 - Division 27 of the ITAA 1997;
 - Division 35 of the ITAA 1997;
 - Subdivision 61-J of the ITAA 1997;
 - Division 328 of the ITAA 1997;
 - Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
 - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 82KZL of the ITAA 1936;
 - sections 82KZME to 82KZMG of the ITAA 1936; and
 - Part IVA of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Goods and Services Tax

3. All fees and expenditure referred to in this 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 its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

Changes in the Law

4. Although this Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Entities who are considering participating in the Project 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

6. 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 Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

Class of entities

7. The class of entities to whom this Ruling applies is the entities more specifically identified in the Ruling part of this Product Ruling and who enter into the scheme specified below on or after the date this Ruling is made. They will 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 this involvement as set out in the description of the scheme. In this Ruling, these entities are referred to as 'Growers'.

8. The class of entities to whom this Ruling applies does not include:

- entities who intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- Growers who enter into finance arrangements with entities associated with this Project, other than those specified in paragraphs 44 to 51; or
- Growers who enter the Project before 30 June 2006 or after 30 April 2007.

Qualifications

9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 17 to 52.

10. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this 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 Ruling may be withdrawn or modified.

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Date of effect

12. This Ruling applies prospectively from 3 May 2006, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

16. This Product Ruling is withdrawn and ceases to have effect after 30 June 2009. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entities' involvement in the scheme.

Scheme

17. The scheme that is the subject of this Ruling is described below. This scheme incorporates the following documents:

- Application for Product Ruling as constituted by documents received on 27 February 2006, 20 March 2006, 24 March 2006, 28 March 2006, and 4 April 2006 and additional correspondence dated 4 April 2006 and 13 April 2006;
- Draft **Product Disclosure Statement** for the ITC Speciality Timber Project 2006 to be issued by ITC Project Management Limited ('Responsible Entity'), received 21 April 2006;
- Draft ITC Red Mahogany Project 2006 **Scheme Constitution**, received 4 April 2006;
- Draft Compliance Plan for the ITC Red Mahogany Project 2006, received 27 February 2006;
- Draft **Land Agreement** between ITC Project Management Ltd ('Lessor') and the Grower, received 27 February 2006;
- Draft **Memorandum (Land Agreement Provisions)** for the ITC Red Mahogany Project 2006, received 4 April 2006;
- Draft **Agreement to enter into Land Agreement**, received 27 February 2006;
- Draft **Management Agreement** between ITC Project Management Limited and the Grower, received 27 February 2006;
- Draft **Memorandum (Management Agreement Provisions)** for the ITC Red Mahogany Project 2006, received 4 April 2006;

- Draft **Tree Farm Loan Agreement** between the Nominated Financier, ITC Finance Pty Ltd and/or their nominees ('the Lender') and 'the Borrower', received 4 April 2006;
- Draft **Terms Payment Application Form**, received 13 April 2006;
- Draft Forestry Management Agreement between Integrated Tree Cropping Ltd ('ITC') and ITC Project Management Ltd ('ITCPM'), relating to Various Projects, received 27 February 2006;
- Draft Service Agreement between Australian Plantation Timber Limited and Integrated Tree Cropping Limited, received 27 February 2006;
- Draft Management Plan for Taifalos Tree Farm , received 27 February 2006;
- Draft Independent Forester's Report , received 15 February 2006;
- Draft Memorandum of Association ITC Project Management Limited, received 27 February 2006;
- Summary of Estimated Project Revenue and Costs for the ITC Red Mahogany Project 2006, received 27 February 2006;
- Cash flow Statement for one Red Mahogany Unit in the ITC Red Mahogany Project 2006, received 27 February 2006;
- 2005 Annual report for Integrated Tree Cropping Limited, received 27 February 2006; and
- Half-year financial report for the half-year ended 31 December 2005, received 27 February 2006.

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

18. The documents highlighted are those that Growers 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.

19. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of these agreements is summarised as follows.

Overview

20. The salient features of the ITC Red Mahogany Project 2006 (Post 30 June 2006 Growers) are as follows:

Location	Coastal strip of the wet tropics region of far north Queensland
Type of business to be carried on by each participant	Commercial growing and cultivation of <i>Eucalyptus Pellita</i> (Red Mahogany) for the purpose of producing Red Mahogany timber for value added timber processing.
Number of hectares offered for cultivation	Approximately 500 hectares
Size of each interest (Plantation Unit)	Approximately one hectare
Minimum Investment	One Plantation Unit under the ITC Specialty Timber Project Product Disclosure Statement 2006
Number of trees per hectare	Approximately 1,000 stems per hectare at planting
Term of the Project	Approximately 18 years from Planting
Initial cost per Plantation Unit	\$4,400
Initial cost per hectare	\$4,400
Ongoing costs	Deferred Management Fees – (24.75% of Harvest Proceeds); Item 2 Schedule 3 of the Memorandum (Management Agreement Provisions).
	Deferred Land Fees – (35.2% of Harvest Proceeds). Schedule 2 of the Memorandum (Land Agreement Provisions).
Other costs	Deferred Harvest and Marketing Fee – (1.1% of Harvest Proceeds). Item 3 Schedule 3 of the Memorandum (Management Agreement Provisions).
	Compulsory post Harvest Commencement Insurance – Payable from Harvest Proceeds.

21. The Project is registered as a Managed Investment Scheme under the *Corporations Act 2001*. The Responsible Entity for the Project is ITC Project Management Ltd ('ITCPM'). Under the ITC Specialty Timber Project Product Disclosure 2006 ('PDS'), ITCPM proposes to offer interests called 'Plantation Units'. There is no minimum subscription for the Project.
22. The PDS offers a choice of two projects to be managed by the Responsible entity. This Ruling only applies to the Red Mahogany Project.
23. The land will be assessed by ITCPM as being suitable for the establishment of commercial plantations in accordance with a methodology endorsed by the Independent Forester. The land for the project will primarily be leased from a related entity, ITC Timberlands Ltd.
24. Under this offer, a Grower may enter the Project during the period from the date of this Ruling to 30 June 2006 or 1 July 2006 to 30 April 2007. Growers entering the Project during the period commencing 1 July 2006 and ending on 30 April 2007 may be covered by this Product Ruling. Product Ruling PR 2006/66 may apply to Growers who enter the Project on or before 30 June 2006.
25. Growers participating in the scheme will enter into a Land Agreement with ITCPM. The Land Agreement is executed over an identifiable area of land called a 'Plantation Unit'. Each Plantation Unit will generally comprise an area of approximately one hectare. The exact size will be identified on the Responsible Entity's records.
26. Growers will also enter into a Management Agreement with ITCPM for the management of their Plantation Units. ITCPM will be responsible for establishing, cultivating and harvesting the trees. The trees are expected to be harvested approximately 18 years after planting. ITCPM will arrange for the sale of the timber.
27. To participate in the Project, Growers must pay an Establishment Services Fee. The balance of the fees, including a Management Services Fee and Land Fee will be deducted from any amounts payable to the Grower from the Project Proceeds.
28. Upon application, Growers will execute a Power of Attorney enabling ITCPM to act on their behalf as required. This will enable ITCPM to enter into Project agreements on behalf of the Growers.

Constitution

29. The Constitution establishes the Project and operates as a deed binding on all of the Growers and the Responsible Entity. The Constitution sets out the terms and conditions under which ITCPM agrees to act as Responsible Entity and thereby manage the Project. Growers are bound by the Constitution by virtue of their participation in the Project.

30. Under the terms of the Constitution, all moneys received from applications shall be paid to the Responsible Entity, which shall deposit those moneys into an Application Fund, held by the Custodian (ITC Timberlands Ltd) (clause 5.1). The Application Moneys will be released when ITCPM is reasonably satisfied that certain specified criteria in the Constitution have been met (clauses 8 and 9.1).

31. The proceeds from the sale of timber will be paid direct to the Responsible Entity who must deposit them into a Proceeds Fund (clause 30). Each Grower will have a share in the Proceeds Fund, which will be distributed amongst them according to their Proportional Interest (clause 31). The terms 'Proceeds Fund' and 'Proportional Interest' are defined in clause 1.1.

32. The Responsible Entity will also:

- prepare the Management Agreement and the Land Agreement (clause 6);
- keep a register of Growers (clause 28);
- appoint an auditor(s) of the Project (clause 33); and
- maintain records and prepare accounts for the Project (clause 34).

Compliance Plan

33. ITCPM has prepared a Compliance Plan as required by the Corporations Act. Its purpose 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.

Land Agreement

34. Upon application, ITCPM will enter into an Agreement to enter into a Land Agreement with the Grower. This agreement will only be entered into if ITCPM can procure suitable land and provide the Establishment services within 12 months of the Grower incurring the fees for those services. If the land is procured ITCPM will execute a Land Agreement on behalf of the Grower.

35. Under the Land Agreement Growers acquire an interest in land called a Plantation Unit. The size of each Plantation Unit will generally be one hectare. Growers will have a right to use their Plantation Units during the Term of the Project for the purpose of conducting their afforestation business.

36. The Land Agreement incorporates the provisions of the Memorandum (Land Agreement Provisions). Some of the conditions of the Memorandum are that the Grower will:

- not use the Plantation Units for a purpose other than growing and harvesting trees (clause 4(a));

- comply with sound silvicultural and environment practices adopted within the forestry industry (clause 4(b)); and
- comply with all laws and regulations relating to the use and occupancy of the Grower's Plantation Units (clause 4(c)).

Management Agreement

37. A Management Agreement will be entered into between ITCPM and the Grower. The Agreement provides that each Grower appoints ITCPM to perform services under the Agreement. ITCPM must perform the services in a proper and efficient manner and will maintain access to such staff, personnel, consultants and other specialist services as may be reasonably necessary. The provisions of the Memorandum (Management Agreement Provisions) are incorporated in the Management Agreement.

38. The services which ITCPM must perform are specified in Schedule 2 of the Memorandum. The services include the following:

Item 1 – Establishment Services

- procure sufficient trees, to the specifications recommended in the Management Plan;
- prepare the land for planting, in accordance with the Management Plan;
- plant trees; and
- supervise and secure management of the works described above.

Item 2 – Management Services

- manage the tree crop in accordance with the Management Plan and good silvicultural practices;
- maintain adequate stocking of the Plantation by replacing any contiguous area of dead or missing trees in accordance with the Management Plan;
- prune the Tree Crop as and when required in accordance with the Management Plan;
- supervise livestock grazing (if any);
- monitor nutrient status and apply fertiliser in accordance with the Management Plan;
- control weeds in accordance with good silvicultural practice;
- carry out non-commercial thinning for the Tree Crop (that is, any Thinning intended to be carried out purely for silvicultural reasons, and from which ITCPM does not expect sale proceeds to be derived) as and when required in accordance with the Management Plan;

- monitor and implement contingency plans for pests and diseases;
- maintain access roads and culverts;
- liaise with Local Government Authorities and volunteer bush fire brigades;
- maintain fire equipment and emergency water points;
- maintain fire breaks;
- undertake periodic site inspections;
- establish timber industry plots and measure the plots regularly;
- prepare an annual report on the state of the Tree Crop;
- secure the property and only allow authorised access;
- until the Clearfall Harvest Commencement Date, arrange for insurance against loss by fire for the Tree Crop, at the Grower's cost, if requested by the Grower;
- monitor and report the outcome when industry trends and development of alternative products could affect the economic return from the Tree Crop;
- monitor and report the outcome of significant research and development relevant to the silviculture industry and economic return from the Tree Crop;
- liaise with adjoining land owners in respect of disputes or common issues that may arise from time to time;
- not breach the covenants set out in the Land Agreement;
- arrange for payment of deferred fees on behalf of the Grower;
- arrange for distribution to the Grower of moneys the Grower is entitled to receive;
- monitor markets for plantation grown timber and report to the Grower as to marketing activities and outcomes; and
- supervise and administer post-Harvest and sales activities.

Item 3 – Harvesting and Marketing Services

- use reasonable endeavours to arrange the sale of the Tree Crop, and enter into a sale agreement or sale agreements as agent for the Grower pursuant to which the proceeds of sale will be paid to ITCPM;
- arrange for payment on behalf of growers of the Costs of Harvest and Marketing;

- prepare a Harvesting plan for the Tree Crop and manage the Thinning and the Clearfall Harvest;
- obtain all necessary approvals for the Harvesting;
- arrange the Harvesting and provide supervision and administration;
- select and engage contractors to carry out the Harvest;
- manage the Harvesting in accordance with the Harvesting Plan;
- liaise with processors and operators of port facilities, and use reasonable endeavours to procure access to such infrastructure on economic terms, as required; and
- effect insurance after the Clearfall Harvest Commencement Date, as required in accordance with this Agreement.

39. ITCPM will complete the delivery of all Establishment Services within 12 months of the date the Establishment Services Fee is incurred by the Grower, or within 12 months after the Grower pays the fee, whichever is the earlier.

40. The Management Services will commence from 1 July 2006 or the date of the execution of the Management Agreement, whichever is later (clause 3.2 of the Management Agreement Memorandum).

Fees

41. The following amounts are payable to ITCPM for each Plantation Unit:

- **Establishment Services Fee** of \$4,400 payable on or before the date of execution of the Management Agreement. The Establishment Services for this fee will be completed within 12 months from the date the fee is incurred or from the date the fee is paid, whichever is the earlier (clause 3.2(a) and item 1 of Schedule 3 of the Management Agreement Memorandum);
- **Management Services Fee** equal to 24.75% of the Harvest Proceeds, (defined in clause 1 of the Management Agreement Memorandum) deducted from these proceeds. This fee is for Management Services conducted from 1 July 2006 or the date of the execution of the Management Agreement (whichever is later) to completion of the agreement (clause 3.2(b) and Item 2 of Schedule 3 of the Management Agreement);

- **Land Fee** equal to 32.5% of the Harvest Proceeds, deductible from these proceeds. This fee is for the lease of an area of land from the date of the execution of the Land Agreement to the termination date (clause 7 of the Land Agreement and Schedule 2 to the Land Agreement Memorandum);
- **Harvest and Marketing Service Fee** equal to 1.1% of the Harvest Proceeds. This fee does not include the Cost of Harvest and Marketing. This fee is deferred and shall be payable each time than an instalment of the Harvest Proceeds is distributed to the Grower (clause 31 of the Constitution and Item 3 of Schedule 3 to the Management Agreement Memorandum) ;
- **Costs of Harvest and Marketing**, equal to the Grower's proportion of the Harvesting and Marketing costs, which may be deducted from the Proceeds Fund (clause 9 of the Management Agreement Memorandum). This fee is for 'Costs of Harvest and Marketing' as defined in clause 1.1 of the Management Agreement Memorandum; and
- **Insurance Premiums** to insure the Grower's tree crop, from the harvest commencement date (the 30th June immediately before the commencement of the clearfell Harvest), against loss or damage caused by fire. These premiums will be paid by ITCPM and deducted from the Project Proceeds (clause 10 of the Management Agreement Provisions Memorandum and clause 32 of the Constitution).

42. A Grower who enters into the Tree Farm Loan finance package must insure the Grower's tree crop for the term of the loan (clause 7 of the Tree Farm Loan Deed). Therefore the Grower is liable for insurance premiums for the term of the loan.

43. Growers who do not enter into the Tree Farm Loan finance package can choose whether or not to insure their tree crop prior to the Harvest Commencement Date.

Finance

44. Growers can fund their initial fees (Establishment Services Fee) as follows:

- from their own financial resources;
- through a Terms Payment agreement with the Responsible Entity;
- through finance offered by ITC Finance Pty Ltd (a lender associated with the Responsible Entity);

- through finance available through a Nominated Financier; or
- by borrowing from an independent lender.

45. The Terms Payment agreement offered to Growers by the Responsible Entity will be provided on the following terms:

- Minimum 10% deposit payable on application;
- Administration Fee of \$275;
- Interest free; and
- Balance payable by 11 equal monthly instalments.

46. The finance provided by ITC Finance Pty Ltd and the Nominated Financier will be offered under the 'Tree Farm Loan' finance package. The terms and conditions for each financier are identical. Loan terms offered are 3, 5, 10 and 14 years. The minimum loan amount is \$15,000. Further details of the types of loans offered are:

3 year reducing balance

- Minimum deposit of 10%;
- Application Fee of \$250 plus 0.4% of the loan value;
- 36 monthly instalments of principal and interest; and
- interest rates will be fixed for the period of the loan and are set on a commercial basis.

5 year reducing balance

- Minimum deposit of 10%;
- Application Fee of \$250 plus 0.4% of the loan value;
- 60 monthly instalments of principal and interest; and
- interest rates will be fixed for the period of the loan and are set on a commercial basis.

10 year reducing balance

- Minimum deposit of 10%;
- Application Fee of \$250 plus 0.4% of the loan value;
- 120 monthly instalments of principal and interest; and
- interest rates will be fixed for the period of the loan and are set on a commercial basis.

14 year reducing balance

- Minimum deposit of 10%;
- Application Fee of \$250 plus 0.4% of the loan value;
- 168 monthly instalments of principal and interest; and

- interest rates will be fixed for the period of the loan and are set on a commercial basis.

47. The Nominated Financier will also provide the following Finance package:

10 year reducing balance (3 year interest only and 7 year principal and interest

- Minimum deposit of 10%;
- Application Fee of \$250 plus 0.4% of the loan value;
- 36 monthly instalments of interest then 84 monthly instalments of principal and interest; and
- interest rates will be fixed for the period of the loan and are set on a commercial basis.

14 year reducing balance (3 year interest only and 11 year principal and interest

- Minimum deposit of 10%;
- Application Fee of \$250 plus 0.4% of the loan value;
- 36 monthly instalments of interest then 132 monthly instalments of principal and interest; and
- interest rates will be fixed for the period of the loan and are set on a commercial basis.

48. The interest rate is fixed for the term of the loan or for the term of the loan after the Interest-Only Loan Period (as defined in clause 20 of the Tree Farm Loan Deed). The interest rate will be the same for finance provided by either ITC Finance Pty Ltd or the Nominated Financier.

49. All loans have an Application fee of \$250 plus 0.4% of the loan. The fee is capitalised in the total borrowing.

50. The deposit and the amount borrowed from ITC Finance Pty Ltd and the Nominated Financier will be paid into the Application Fund that is maintained by the Responsible Entity (clause 5 of the Constitution and clause 1(b) of the Tree Farm Loan Deed).

51. The financiers will offer the finance on a full recourse basis. Security will be a fixed charge over the borrower's interest in the Project. Normal debt recovery procedures, including legal action, will be taken in the case of defaulting borrowers.

52. This Ruling will not apply to Growers who enter into finance arrangements with ITCPM, ITC Finance Pty Ltd or the Nominated Financier, with terms and conditions that differ in any way from those set out in paragraphs 44 to 51.

53. This Ruling does not apply if a Grower enters into a finance agreement that 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 ITCPM, ITC Finance Pty Ltd or the Nominated Financier, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

54. This Ruling applies only to Growers who are accepted to participate in the Project during the period 1 July 2006 and ending on 30 April 2007 and who have executed a Management Agreement and a Land Agreement or an Agreement to enter into a Land Agreement on or before that date. The Grower's participation in the Project must constitute the carrying on of a business of primary production.

55. This Ruling does not apply to:

- entities who intend to terminate their involvement in the arrangements prior to its completion, or who otherwise do not intend to derive assessable income from it;
- Growers who enter into finance schemes with entities associated with this Project, other than those specified in paragraphs 44 to 51; or
- Growers who enter the Project before 1 July 2006 or after 30 April 2007.

The Simplified Tax System (STS)***Division 328***

56. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328 of the ITAA 1997). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different under the STS where a Grower who was an 'STS taxpayer' prior to the 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

57. For such Growers, a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

25% entrepreneurs tax offset***Subdivision 61-J***

58. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for a tax offset of up to 25% of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

Assessable income***Section 6-5***

59. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

60. A Grower will be assessable on ordinary income from carrying on their business of afforestation in the income year in which that income is derived.

Deductions for Establishment Services Fee, Interest and Borrowing Costs**Section 8-1 and section 25-25**

61. A Grower may claim tax deductions for the revenue expenses listed in the Table below on a 'per Plantation Unit' basis:

Fee Type	Year ended 30 June 2007	Year ended 30 June 2008	Year ended 30 June 2009
Establishment Services Fee	\$4,400 See Notes (i) & (ii)		
Interest	As incurred See Note (iii)	As incurred See Note (iii)	As incurred See Note (iii)
Borrowing costs (finance offered by ITC Finance Pty Ltd or by the Nominated Financier)	Must be calculated See Note (iv)	Must be calculated See Note (iv)	Must be calculated See Note (iv)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (Division 27).
- (ii) Under section 82KZMG of the ITAA 1936 the fee for Establishment Services is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 90 to 96) and is deductible in the income year in which it is incurred.

- (iii) Interest under a loan agreement with ITC Finance Pty Ltd or the Nominated Financier as described at paragraph 44 to 51 is deductible. The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than ITC Finance Pty Ltd or the Nominated Financier is outside the scope of this Ruling. However all Growers, including those who finance their participation in the Project other than with ITC Finance Pty Ltd and the Nominated Financier, should read the discussion of the prepayment rules in paragraphs 82 to 89 as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.
- (iv) The Loan Application Fee of \$250 plus 0.4% of the loan amount is a borrowing cost and is deductible under section 25-25. It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than ITC Finance Pty Ltd or the Nominated Financier is outside the scope of this Ruling.

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

62. A Grower who is an individual accepted into the Project by 30 June 2007 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for the years ending **30 June 2007 to 30 June 2024**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

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

63. For a Grower who participates in the Project and incurs expenditure as required by the Management Agreement and the Land Agreement the following provisions of the ITAA 1936 apply:

- expenditure by a Grower who participates in the Project does not fall within the scope of sections 82KZME and 82KZMF;

- 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.

Commissioner of Taxation

3 May 2006

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.*

Is the Grower carrying on a business?

64. For the amounts set out in the Table above to constitute allowable deductions the Grower's afforestation activities as a participant in the ITC Red Mahogany Project 2006 must amount to the carrying on of a business of primary production.

65. Where there is a business, or a future business, the gross proceeds from the sale of the wood produce will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

66. For schemes such as that of the ITC Red Mahogany Project 2006, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As TR 2000/8 sets out, these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

67. Generally, a Grower will be carrying on a business of afforestation, and hence primary production, if:

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's trees are established;
- the Grower has a right to harvest and sell the wood produce from those trees;
- the afforestation activities are carried out on the Grower's behalf;
- the afforestation activities of the Grower are typical of those associated with a afforestation business; and
- the weight and influence of general indicators point to the carrying on of a business.

68. In this Project, each Grower enters into a Management Agreement and a Land Agreement.

69. Under the Land Agreement each individual Grower will have rights over a specific and identifiable area of land called a Plantation Unit. The Agreement provides the Grower with an ongoing interest in the specific trees on the Plantation Units for the Term of the Project. Under the Agreement the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The Agreement allows the Responsible Entity to come onto to the land to carry out its obligations under the Management Agreement.

70. Under the Management Agreement the Responsible Entity is engaged by the Grower to establish and maintain the Grower's identifiable area of land during the Term of the Project. The Responsible Entity has provided evidence that it holds the appropriate professional skills and credentials to provide the services to establish and maintain the Plantation Units on the Grower's behalf.

71. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the wood produce grown on the Grower's Plantation Units.

72. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the Project's description for all the indicators.

73. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of the wood produce that will return a before-tax profit, that is, a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

74. The pooling of wood produce from trees grown on the Grower's Plantation Units with the wood produce of other Growers is consistent with general afforestation practices. Each Grower's proportionate share of the sale proceeds of the pooled wood products will reflect the proportion of the trees contributed from their Plantation Units.

75. The Responsible Entity's services are also consistent with general silvicultural practices. They are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses. While the size of a Plantation Unit is relatively small, it is of a size and scale to allow it to be commercially viable.

76. The Grower's degree of control over the Responsible Entity as evidenced by the Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, the Responsible Entity will provide the Grower with regular progress reports on the Grower's Plantation Unit and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Responsible Entity in certain instances, such as cases of default or neglect.

77. The afforestation activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the Growers' afforestation activities in the ITC Red Mahogany Project 2006 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

78. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

79. Changes to the STS rules apply from 1 July 2005. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of Establishment Services Fees

Section 8-1

80. Consideration of whether the Establishment Services Fee are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

81. The Establishment Services Fee associated with the afforestation activities will relate to the gaining of income from the Grower's business of afforestation (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of wood produce) is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the scheme. The fee appears to be reasonable. There is no capital component of the Establishment Services Fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Prepayment provisions***Sections 82KZL to 82KZMG***

82. 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 (for example, the performance of forestry services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

83. For this Project, only section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME, 82KZMF and 82KZMG of the ITAA 1936 are relevant. Subject to section 82KZMG, if the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1) of the ITAA 1936. These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

Sections 82KZME and 82KZMF

84. Other than expenditure deductible under section 82KZMG of the ITAA 1936, if the requirements of subsections 82KZME(2) and (3) of the ITAA 1936 are met, the formula in subsection 82KZMF(1) of the ITAA 1936 (see below) will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1) of the ITAA 1936).

85. The requirements of subsection 82KZME(3) of the ITAA 1936 will be met where the scheme has the following characteristics:

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year;
- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the scheme are managed by someone other than the taxpayer; and

- either:
 - a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
 - b) the entity who promotes, arranges or manages the agreement (or an associate of that entity) promotes similar agreements for other taxpayers.

86. For the purpose of these provisions, the scheme includes all activities that relate to the scheme (subsection 82KZME(4) of the ITAA 1936). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier other than ITC Finance Pty Ltd or the Nominated Financier. Although undertaken with an unrelated party, that financing would be an element of the scheme. The funds borrowed and the resulting interest deductions are directly related to the activities under the scheme. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF of the ITAA 1936.

87. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) of the ITAA 1936 is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1) of the ITAA 1936. However, for the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the scheme that is less than \$1,000. Such expenditure is immediately deductible.

88. Where the requirements of section 82KZME of the ITAA 1936 are met, section 82KZMF of the ITAA 1936 applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

89. In the formula 'eligible service period' (defined in subsection 82KZL(1) of the ITAA 1936) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

Section 82KZMG

90. Under subsection 82KZMG(1) of the ITAA 1936, expenditure is excluded from the prepayment rules that would otherwise apply, to the extent that the prepaid amount satisfies the requirements of subsections 82KZMG(2) to (4) of the ITAA 1936.

91. Subsection 82KZMG(2) of the ITAA 1936 requires that the expenditure is:

- incurred on or after 2 October 2001 and on or before 30 June 2008;
- the eligible service period must be 12 months or shorter and must end on or before the last day of the year of income after the expenditure year; and
- for the doing of a thing under the agreement that is not to be wholly done within the expenditure year.

92. To satisfy subsection 82KZMG(3) of the ITAA 1936 the agreement must satisfy the following requirements:

- it must be an agreement for planting and tending trees for felling;
- be an agreement where the taxpayer does not have day to day control over the operations arising out of the agreement. (a right to be consulted or to give directions does not equate to day to day control for the purposes of this requirement); and
- either:
 - a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
 - b) the manager manages, arranges or promotes the agreement, or an associate of the manager, manages, arranges or promotes similar agreements.

93. Under subsection 82KZMG(4) of the ITAA 1936 the expenditure incurred by the taxpayer must be paid for 'seasonally dependent agronomic activities' undertaken by the manager during the 'establishment period' for the relevant planting of trees for felling. The term 'seasonally dependent agronomic activities' is explained in Taxation Determination TD 2003/12.

94. Subsection 82KZMG(5) of the ITAA 1936 defines the 'establishment period to commence at the time that the first 'seasonally dependent agronomic activity' is performed in relation to a specific planting of trees and to conclude with the planting of trees. Where it is necessary to apply a fertiliser or herbicide to the trees at the same time as planting then those activities fall within the establishment period. Planting of trees refers to the main planting of the particular plantation and expressly excludes specific planting to replace existing seedlings that have not survived.

Application of the prepayment provisions to this Project

95. Under the Management Agreement, a Grower incurs a Year 1 Establishment Services Fee consisting of expenditure of \$4,400 per Plantation Unit for 'seasonally dependent agronomic activities'.

96. As the requirements of section 82KZMG of the ITAA 1936 have been met, a deduction is allowable in the income year ended 30 June 2007 for the expenditure incurred under the Management Agreement for 'seasonally dependent agronomic activities'.

Interest deductibility**Section 8-1***(i) Growers who use ITC Finance Pty Ltd or the Nominated Financier as the finance provider*

97. Some Growers may finance their participation in the Project through a loan facility with ITC Finance Pty Ltd or the Nominated Financier. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of lease and management fees.

98. The interest incurred for the year ended 30 June 2007 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation and growing trees – that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

99. As with the Management Services Fees and the Land Fees, in the absence of any application of the prepayment provisions (see paragraphs 82 to 89), the timing of deductions for interest will again depend upon whether a Grower is an 'STS taxpayer' or is not an 'STS taxpayer'.

(ii) Growers who DO NOT use ITC Finance Pty Ltd or the Nominated Financier as the finance provider

100. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than ITC Finance Pty Ltd or the Nominated Financier is outside the scope of this Ruling. Product Rulings only deal with schemes where all details and documentation have been provided to, and examined by the Tax Office.

101. While the terms of any finance agreement entered into between relevant Growers and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid. Alternatively, a Grower may choose to prepay such interest. Unless such prepaid interest is 'excluded expenditure' any tax deduction that is allowable will be subject to the prepayment provisions of the ITAA 1936 (see paragraphs 82 to 89).

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

Section 35-55 – exercise of Commissioner's discretion

102. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2007 to 30 June 2024** the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended 30 June 2007 up to and including 30 June 2024:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

103. Therefore a Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

104. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Section 82KL – recouped expenditure

105. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

106. For Part IVA of the ITAA 1936 to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

107. The ITC Red Mahogany Project 2006 will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed in paragraph 61 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.

108. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the wood produce. 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 participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/11; TR 98/22; TR 2000/8;
TR 2001/14; TD 2003/12;
PR 2006/66

Subject references:

- advance deductions and expenses for certain forestry expenditure
- carrying on a business
- commencement of business
- fee expenses
- forestry agreement
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- seasonally dependent agronomic activity
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

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- ITAA 1936 82KZME(2)
- ITAA 1936 82KZME(3)
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