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## Draft Taxation Determination

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Income tax: does the disposal or termination of an interest in a non-forestry managed investment scheme which arises as a result of circumstances outside the control of the taxpayer result in the denial of deductions previously allowed under paragraph 8-1(1)(b) of the *Income Tax Assessment Act 1997* in respect of your contributions to the scheme?

**❗ This publication provides you with the following level of protection:**

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation 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.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### Ruling

1. No.
2. Investors in non-forestry managed investment schemes may incur expenditure that is deductible under section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997). Special rules about the year of income in which that expenditure can be claimed are contained in Subdivision H of Division 3 of Part III (Subdivision H) of the *Income Tax Assessment Act 1936* (ITAA 1936). There are no rules in Subdivision H applicable to non-forestry schemes that subsequently deny deductions that have been claimed if the scheme is discontinued because, for example, it is wound up on the basis that the purpose of the scheme cannot be accomplished.

# TD 2009/D10

## **Example**

3. *Jane invested in a horticultural managed investment scheme in 2007, and claimed deductions in her 2007 and 2008 taxation returns. In 2009, due to the insolvency of the Responsible Entity, the scheme assets were sold by a liquidator, and the scheme was wound up. Jane's interest in the scheme came to an end as a result of circumstances outside the control of either herself, or the Responsible Entity. Jane will remain entitled to the relevant deductions.*

## **Date of effect**

4. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will 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 Determination (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**

30 September 2009

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## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

### Explanation

5. Section 82KZMG in Subdivision H of the ITAA 1936 and Division 394 of the ITAA 1997 apply only to forestry managed investment schemes. In certain circumstances deductions claimed under these provisions can be subsequently denied if a CGT event happens in relation to the forestry interests to which the deductions relate.

6. Expenditure incurred in respect of participation in a non-forestry managed investment scheme will generally be deductible under section 8-1 of the ITAA 1997: *Hance v. FC of T*; *Hannebery v. FC of T* 2008 ATC 20-085. The year of income in which those deductions are allowable is governed by Subdivision H of the ITAA 1936.

7. However, where there is evidence that the investor intends at the time of entering into the scheme to exit the scheme once deductions for the initial fees are claimed and the resultant tax savings obtained or before income is due to flow the investor, or the intention is not to maintain the scheme interest beyond the initial years, then the inference may be drawn that the investor entered the scheme for the sole or dominant purpose of obtaining a tax deduction. In such a case the total anticipated allowable deductions will far exceed the total assessable income reasonably expected to be derived until the time of termination. Accordingly the rule in *Fletcher & Ors v. FC of T* 91 ATC 4950) may have application or, alternatively, the general anti-avoidance rule in Part IVA of the ITAA 1936 may apply.

8. Where there is no evidence upon which to draw the inference mentioned above, and the scheme itself comes to an end, for example because the Responsible Entity is no longer able to discharge its obligations and the scheme is wound up, the deductions previously claimed will continue to be allowable.

9. That is, there is no section equivalent to section 82KZMGA of the ITAA 1936 or subsection 394-10(5) of the ITAA 1997 (about deductions for forestry managed investment schemes) that applies to non-forestry managed investment schemes.

## Appendix 2 – Your comments

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10. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

11. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10; TD 2009/D9; TD 2009/D11

*Subject references:*

- advance expenditure
- advance expenses and payments

*Legislative references:*

- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZMG

- ITAA 1936 82KZMGA

- ITAA 1936 Pt IVA

- ITAA 1997 8-1

- ITAA 1997 8-1(1)(b)

- ITAA 1997 Div 394

- ITAA 1997 394-10(5)

*Case references:*

- Fletcher & Ors v. FC of T 91 ATC 4950
- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

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ATO references

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Income Tax ~~ Deductions ~~ primary production expenses  
Income Tax ~~ Tax integrity measures ~~ schemes