


CR 2007/47 - Income tax: treatment of payments received under the Cod Grounds Commonwealth Marine Reserve Structural Adjustment package 2004: * Licence Buyout Adjustment * Business Advice Assistance

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Class Ruling

Income tax: treatment of payments received under the Cod Grounds Commonwealth Marine Reserve Structural Adjustment package 2004:

- Licence Buyout Adjustment
- Business Advice Assistance

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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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided 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.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant 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 15-10 of the ITAA 1997;
- Subdivision 20-A of the ITAA 1997;
- Part 3-1 of the ITAA 1997;

- section 104-25 of the ITAA 1997;
- subsection 110-40(3) of the ITAA 1997;
- subsection 110-45(3) of the ITAA 1997;
- subsection 110-55(6) of the ITAA 1997;
- Part 3-3 of the ITAA 1997; and
- Division 392 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is applicants who apply for and receive a Licence Buyout Adjustment payment under the Cod Grounds Commonwealth Marine Reserve Structural Adjustment Package 2004 (the Package).

Qualifications

4. The Commissioner makes this Ruling based on the proposed arrangement identified in the Ruling.

5. 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 13 to 25 of this Ruling.

6. 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

8. This Ruling applies from 1 July 2006 to 30 June 2008. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

9. 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.

10. If this 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)).

11. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the 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.

12. 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).

Scheme

13. The following description of the scheme is based on information provided by the applicant. The scheme that is the subject of the Ruling is described below. This description is based on:

- an Application for Class Ruling from the Department of the Environment and Water Resources (formerly the Department of the Environment and Heritage) received in the Tax Office on 14 July 2006; and
- the draft Deed for Surrender of Fishing Entitlements received on 21 March 2007.

14. Rezoning of the Cod Grounds Marine Reserve (CGMR) will come into effect during the life of this ruling. In accordance with the Australian Government's *Marine Protected Areas and Displaced Fishing policy*, the Government is providing a structural adjustment package to ensure the fair and equitable treatment of those fishers, fishery related businesses, employees and communities that can demonstrate they have experienced or will experience negative impacts due to the rezoning.

15. The overall objective of the Package is to assist fishing businesses to manage, in the most cost-effective manner, adverse impacts attributable to the introduction of the proposed CGMR.

Licence Buyout Adjustment

16. Fishery licence packages relating to the Ocean Trap and Line fishery are the subject of the Licence Buyout Adjustment component of the Package. The details of the Licence Buyout Adjustment are set out in the draft Deed for Surrender of Fishing Entitlements (the Deed).

17. The Fishing Entitlements eligible to be surrendered are fishing entitlements acquired by the Fishing Business Owner under the *Fisheries Management Act 1994* (NSW) or Regulations, which are associated with the Fishing Business, and include the following:

- Commercial Fishing Shareholding;
- Net Registrations;
- Fishing Boat Licences (LFB);
- Permits;
- Commercial Fishing Licence; and
- Catch History.

18. Fishing Entitlements enable the Fishing Business Owner (or a person nominated by the Fishing Business Owner) to take fish in certain waters of New South Wales for sale.

19. The Commonwealth is seeking the surrender of commercial fishing entitlements to ensure that commercial fishing pressure is not increased in areas adjacent to the proposed Cod Grounds Marine Reserve or within the Ocean Trap and Line fishery generally, as a result of declaration of the Cod Grounds Marine Reserve.

20. The Fishing Business Owners are voluntarily surrendering their Fishing Entitlements under this scheme.

21. The State Fisheries Management Agency will cancel the surrendered Fishing Entitlements without delay on receipt of the surrendered entitlements.

22. The Commonwealth will make a payment in consideration of the Fishing Business Owner's surrender of their Fishing Entitlements and their agreement to the other matters set out in the Deed.

23. The Licence Buyout Adjustment will not be used for the acquisition of capital equipment used in relation to the buyout (for example, primary and tender fishing vessels, fishing apparatus and other related equipment on the vessel). Some Ocean Trap and Line fishing businesses of the Cod Grounds also hold share fishing (quota) entitlements for the rock lobster fishery. It is envisaged that such operators will be considered for licence buyout assistance where they are prepared to surrender all their Ocean Trap and Line (and any related fishing entitlements – such as beach seine netting) and use the adjustment assistance payments to increase their holding of rock lobster fishing shares.

Business Advice Assistance

24. Business advice assistance under the package is available on a once-only basis for businesses wishing to seek financial, business planning or legal advice prior to deciding whether to submit an offer for a payment of Licence Buyout Adjustment. Up to \$1,500 may be payable to reimburse eligible applicants for the costs associated with obtaining business advice.

25. Business advice assistance will also assist businesses wishing to proceed with a submission for Licence Buyout Adjustment.

Ruling

Licence Buyout Adjustment

Section 6-5 – income according to ordinary concepts

26. A payment received under the Licence Buyout Adjustment component of the Package is not income according to ordinary concepts. No part of the total receipts constitutes assessable income under section 6-5.

Section 15-10 – bounty or subsidy

27. A payment received under the Licence Buyout Adjustment component of the Package is not a bounty or subsidy that is received in relation to carrying on a business. No part of the total receipts constitutes assessable income under section 15-10.

Capital gains tax

28. A payment received under the Licence Buyout Adjustment component of the Package is subject to the capital gains tax (CGT) provisions in Parts 3-1 and 3-3.

29. CGT event C2 under section 104-25 happens when a Fishing Entitlement (together with ancillary items such as catch history) is surrendered and then cancelled by the State Fisheries Management Agency. The Licence Buyout Adjustment represents the capital proceeds for the CGT event.

Primary production income

30. A payment received under the Licence Buyout Adjustment component of the Package is not treated as 'assessable primary production income' for the purposes of calculating the 'averaging' adjustment available under Division 392.

Business Advice Assistance

Reimbursement of costs of advice sought prior to deciding whether to submit an offer for Licence Buyout Adjustment

Section 6-5 – income according to ordinary concepts

31. The cost of obtaining advice prior to deciding whether to submit an offer for Licence Buyout Adjustment is deductible under section 8-1. Reimbursement of this cost of obtaining advice received under the Business Advice Assistance component of the Package is income according to ordinary concepts and is assessable income under section 6-5.

Capital gains tax

32. The payment of Business Advice Assistance is a recoupment of the costs of obtaining the business advice. However, where the recoupment relates to the cost of obtaining advice prior to deciding whether to submit an offer for Licence Buyout Adjustment, there are no CGT consequences.

Primary production income

33. A payment of this nature received under the Business Advice Assistance component of the Package is 'assessable primary production' income for the purposes of calculating the 'averaging' adjustment available under Division 392.

Reimbursement of costs of advice sought in proceeding with a submission for Licence Buyout Adjustment

Section 6-5 – income according to ordinary concepts

34. A payment of Business Advice Assistance as a reimbursement of the costs of obtaining business advice in proceeding with an application for a Licence Buyout Adjustment is not income according to ordinary concepts and is therefore not assessable income under section 6-5.

Section 15-10 – bounty or subsidy

35. The payment received under the Business Advice Assistance component of the package is not a bounty or subsidy that is received in relation to carrying on a business under section 15-10.

Subdivision 20-A – assessable recoupment

36. A deduction is not allowable for the costs of obtaining business advice in proceeding with an application for a Licence Buyout Adjustment. Accordingly a reimbursement of those costs is not an assessable recoupment of a deductible loss or outgoing under Subdivision 20-A.

Capital gains tax

37. A payment of Business Advice Assistance is a recoupment of the costs of obtaining the business advice. Where the costs are incurred in proceeding with an application for Licence Buyout Adjustment, they are excluded from the cost base or the reduced cost base of the relevant CGT asset (subsection 110-40(3) or 110-45(3), or subsection 110-55(6)).

Commissioner of Taxation30 May 2007

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.*

Licence Buyout Adjustment

Section 6-5 – income according to ordinary concepts

38. Subsection 6-5(1) provides that an amount is included in assessable income if it is income according to ordinary concepts (ordinary income). The meaning of the expression 'ordinary income' is considered in Taxation Ruling TR 2006/3 at paragraphs 84 to 85.

39. The receipt of the Licence Buyout Adjustment payment is compensation for the surrender and transfer of each licence and associated fishing entitlements. Each licence and associated entitlements form part of the profit yielding structure of the licensed fishing operation. Accordingly, payments received under the Licence Buyout Adjustment component of the package are capital in nature and do not constitute assessable income under section 6-5. See Example 14 at paragraphs 78 to 81 of TR 2006/3.

Section 15-10 – bounty or subsidy

40. Section 15-10 provides that an amount is included in assessable income if it is:

- a bounty or subsidy;
- received in relation to carrying on a business; and
- not assessable as ordinary income under section 6-5.

Bounty or subsidy

41. The meaning of the terms 'Bounty or Subsidy' is considered in TR 2006/3 at paragraphs 93 to 98. The Licence Buyout Adjustment payment is considered to be a bounty or subsidy for the purposes of section 15-10.

Received in relation to carrying on a business

42. The meaning of the expression 'in relation to carrying on a business' is considered in TR 2006/3 at paragraphs 99 to 106. Payments made to commence or to cease a business or to surrender part of the profit earning structure are not considered to have been made in relation to carrying on a business.

43. Where the licensed fishing operation has only one licence and associated fishing entitlements, the payment received under the Licence Buyout Adjustment component of the Package is a payment for the surrender of the licence and associated entitlements and is not received in relation to the carrying on of a business. It is received in relation to the cessation of the taxpayer's business. Accordingly, it is not assessable under section 15-10.

44. A payment received for giving up or selling part of the profit yielding structure of the business is not received in relation to carrying on a business. Where a licensed fishing operation has more than one licence and associated fishing entitlements and surrenders one or more of these while continuing to operate with the remainder, the payment received under the Licence Buyout Adjustment component of the Package is not in relation to carrying on the taxpayer's business but rather for giving up part of the taxpayer's profit yielding structure. Accordingly, a Licence Buyout Adjustment payment to a business for the surrender of a licence and associated entitlements that is part of the profit yielding structure of the business is not assessable under section 15-10.

Capital gains tax

45. A Fishing Entitlement, such as a licence or a permit, is a CGT asset under section 108-5. CGT event C2 under section 104-25 happens when ownership of the Fishing Entitlement ends by being surrendered and then cancelled by the State Fisheries Management Agency.

46. A payment under the Licence Buyout Adjustment component of the Package represents the capital proceeds for CGT event C2. If a lump sum payment is received under the Package for more than one Fishing Entitlement, the capital proceeds must be apportioned between the entitlements under section 116-40 in such amounts as are reasonably attributable to each entitlement. Ancillary entitlements such as catch history, which are surrendered with the Fishing Entitlement, are not in themselves CGT assets, and no part of the payment needs to be apportioned to them.

47. A capital gain is made if the capital proceeds exceed the cost base of the Fishing Entitlement, and a capital loss is made if the capital proceeds are less than the reduced cost base of the entitlement (section 100-35).

48. Any capital gain or capital loss which results from the surrender of a Fishing Entitlement acquired before 20 September 1985 (pre-CGT) is disregarded (paragraph 104-25(5)(a)).

49. If an original Fishing Entitlement such as a licence was acquired before 20 September 1985 and an additional licence was acquired on or after that date, the new licence is not a capital improvement to the original pre-CGT Fishing Entitlement. The capital gain or loss on the surrender of the new licence is to be worked out separately.

50. A capital gain can be reduced by the general CGT discount if the relevant requirements of Subdivisions 115-A, 115-B and 115-C are met.

51. A capital gain can be reduced or deferred by the small business CGT concessions if the requirements of Division 152 are met. The concessions available are:

- small business 15-year exemption;
- small business 50% active asset reduction;
- small business retirement exemption; and
- small business rollover.

52. Each Fishing Entitlement referred to in paragraph 17 of this Ruling that is a CGT asset used in carrying on a commercial fishing operation is an active asset for the purposes of the small business CGT concessions.

53. The small business rollover referred to in paragraph 51 of this Ruling may be available to fishing businesses that use the adjustment funds to purchase other fishing entitlements. The requirements are set out in Subdivision 152-E.

Primary production income

54. Subsection 392-80(2) provides that a taxpayer's 'assessable primary production income' for the current year is the amount of that taxpayer's basic assessable income for the current year that was derived from, or resulted from, their carrying on a primary production business.

55. A taxpayer's basic assessable income for an income year is defined in subsection 392-45(2) as their assessable income for the income year less, among other things, any net capital gains included in their assessable income under Division 102.

56. Accordingly, a payment received under the Licence Buyout Adjustment component of the Package is not 'assessable primary production income' for the purposes of subsection 392-80(2).

Business Advice Assistance

Reimbursement of expenses for advice sought prior to deciding whether to submit an offer for Licence Buyout Adjustment

Section 6-5 – income according to ordinary concepts

57. The cost of obtaining advice prior to deciding whether to submit an offer for Licence Buyout Adjustment is deductible under section 8-1.

58. The reimbursement of the cost of obtaining advice prior to deciding whether to submit an offer of assistance is given for a purpose that is part of the taxpayer's normal business operations, as explained in Example 6 at paragraphs 46 to 48 of TR 2006/3. Accordingly, it is considered the Business Advice Assistance is income according to ordinary concepts and is included as assessable income under subsection 6-5(1).

59. A taxpayer derives the assessable income when the expenditure is reimbursed under the terms of the Package.

Capital gains tax

60. The payment of Business Advice Assistance is a recoupment of the costs of obtaining the business advice. The cost of the business advice is an incidental cost incurred in relation to the surrender of the Fishing Entitlements.

61. However, where the recoupment relates to the cost of advice sought prior to deciding whether to submit an offer for Licence Buyout Adjustment, there are no CGT consequences. This is because those costs are deductible under section 8-1 and do not form part of the cost base or reduced cost base of the relevant Fishing Entitlement (subsection 110-40(2), 110-45(1B) or subsection 110-55(6)).

Primary production income

62. In order for income to be derived from, or result from, carrying on a primary production business, there must be a causal connection between the income received and the primary producer's trade or business.

63. Where a Government Industry Payment is made whilst a business or trading activity continues, and no decision has been taken to cease business, there is the necessary causal connection between the income received and the primary producer's trade or business.

64. Accordingly, the reimbursement of expenses for advice sought prior to deciding whether to submit an offer for Licence Buyout Adjustment is 'assessable primary production income' under subsection 392-80(2).

Business Advice Assistance

Reimbursement of expenses incurred in proceeding with a submission for Licence Buyout Adjustment

Section 6-5 – income according to ordinary concepts

65. Paragraph 26 of TR 2006/3 explains that Government Industry Payments to cease a business are not assessable as ordinary income of the recipient under section 6-5. A reimbursement of the cost of business advice incurred in proceeding with a submission for Licence Buyout Adjustment relates to the cessation of a business and therefore is not income according to ordinary concepts and is not assessable income under section 6-5.

Section 15-10 – bounty or subsidy

66. Paragraph 26 of TR 2006/3 explains that Government Industry Payments to cease a business are not assessable as a bounty or subsidy under section 15-10. The reimbursement of the cost of obtaining business advice is not received in relation to carrying on the taxpayer's business but in relation to the cessation of business, or a part of that business.

Subdivision 20-A – assessable recoupment

67. A reimbursement of the costs incurred in obtaining business advice to proceed with a submission for Licence Buyout Adjustment does not fall within Subdivision 20-A as assessable income. These costs are not deductible under any of the provisions of the ITAA 1997 listed in the table in subsection 20-30(1).

Capital gains tax

68. A payment of Business Advice Assistance is a recoupment of the costs of obtaining the business advice.

69. Expenditure that is recouped is excluded from the cost base of a CGT asset under subsection 110-40(3) or 110-45(3), or its reduced cost base under subsection 110-55(6), except where the recoupment is included in assessable income.

70. The amount of the recoupment that relates to the costs that were incurred in proceeding with a submission for Licence Buyout is not included in assessable income. Therefore, those costs are excluded from the cost base or the reduced cost base of the relevant CGT asset (subsection 110-40(3) or 110-45(3), or subsection 110-55(6)).

Appendix 2 – Detailed contents list

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References

- Previous draft:*
- ITAA 1997 Div 102
 - ITAA 1997 104-25
- Not previously issued as a draft
- ITAA 1997 104-25(5)(a)
- Related Rulings/Determinations:*
- TR 2006/3
- ITAA 1997 108-5
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 - ITAA 1997 Div 392
 - ITAA 1997 392-45(2)
 - ITAA 1997 392-80(2)
 - TAA 1953
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 - Copyright Act 1968
 - Fisheries Management Act 1994 (NSW)
- Subject references:*
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 - Capital Gains Tax
 - capital receipts
 - government grants income
 - income
 - ordinary income
 - primary production income
- Legislative references:*
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 - ITAA 1997 8-1
 - ITAA 1997 15-10
 - ITAA 1997 Subdiv 20-A
 - ITAA 1997 20-30(1)
 - ITAA 1997 Pt 3-1
 - ITAA 1997 100-35
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ATO references

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