


# ***CR 2020/62 - Marine Scalefish Fishery reform - voluntary licence surrender program***

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## Class Ruling

# Marine Scalefish Fishery reform – voluntary licence surrender program

### **❶ Relying on this Ruling**

This publication (excluding appendix) 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.

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### **What this Ruling is about**

1. This Ruling sets out the tax consequences of receiving a monetary payment under the Marine Scalefish Fishery Reform: Voluntary Licence Surrender Program (the Program).<sup>1</sup>
2. Full details of this scheme are set out in paragraphs 19 to 33 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to you if you are a licence holder in the South Australian Marine Scalefish Fishery or Restricted Marine Scalefish Fishery (Licence Holder) who receives monetary payment under the Program.

### **When this Ruling applies**

5. This Ruling applies from 24 May 2020 to 30 June 2021.

<sup>1</sup> The Program is described in the Government of South Australia 2020, *Marine Scalefish Fishery Reform: Voluntary Licence Surrender Program Plan*, Government of South Australia, 24 May 2020.

**Ruling**

6. Under the scheme, Licence Holders are invited to submit a proposal to the Minister of Primary Industries and Regional Development South Australia (the Minister) for the surrender of their fishing licence. If the proposal is accepted by the Minister, the Licence Holder will enter a Deed of Voluntary Surrender (Surrender Deed) with the Minister, whereby the Licence Holder will surrender their fishing licence, and the Minister will make payment to the Licence Holder for the surrender of the licence (Surrender Payment).

7. The amount of the Surrender Payment received by a Licence Holder will depend on the type of fishing licence they surrender - a line licence or a net licence.

8. A Licence Holder will receive:

- \$140,000 (excluding goods and services tax (GST)) for a line licence, and
- \$180,000 (excluding GST) for a net licence.

9. Where a Licence Holder is registered for GST, the Surrender Payment will be grossed up to include GST.

10. A Licence Holder will receive a separate Surrender Payment for each fishing licence they surrender under the scheme.

**Section 6-5 – income according to ordinary concepts**

11. The Surrender Payment is an amount received for the surrender of a fishing licence (a capital asset) and is not income according to ordinary concepts. Therefore, the receipt of the Surrender Payment is not assessable income under section 6-5.

**Section 15-10 – bounty or subsidy received in relation to carrying on a business**

12. The Surrender Payment is an amount received for the surrender of a fishing licence (a capital asset) and is not a bounty or subsidy that is received in relation to carrying on a business. Therefore, the receipt of the Surrender Payment is not assessable income under section 15-10.

**Capital gains tax**

13. The Surrender Payment is received for the surrender of a fishing licence (a capital asset) and is subject to the capital gains tax (CGT) provisions in Parts 3-1 and 3-3. CGT event C2 under section 104-25 will happen when the Surrender Deed is executed (when the contract is entered into).

14. A capital gain is made if the capital proceeds exceed the cost base of the fishing licence, and a capital loss is made if the capital proceeds are less than the reduced cost base (subsection 104-25(3)).

15. The amount of the Surrender Payment, as detailed in paragraph 8 of this Ruling, represents the capital proceeds for the CGT event in accordance with subsection 116-20(1).

16. If the fishing licence was issued to the Licence Holder as a result of the transition from a fishing licence issued under the *Fisheries Act 1982* (now repealed), and that earlier licence was acquired before 20 September 1985, provided the terms and conditions of the fishing licence are not substantially different to the original fishing licence and the

underlying activity authorised by the current fishing licence has not changed from the original licence (based on the individual circumstances of the Licence Holder), the Licence Holder may be able to disregard the capital gain or capital loss, under paragraph 104-25(5)(a) as a pre-CGT asset, by virtue of a replacement asset rollover under Subdivision 124-C.

### **Primary production income**

17. The Surrender Payment is received for the surrender of a capital asset and is not treated as 'assessable primary production income' for the purposes of calculating the 'averaging adjustment' available under Division 392.

### **Goods and services tax**

18. The surrender of a fishing licence is a supply for consideration and is connected with the indirect tax zone. Provided a Licence Holder is carrying on an enterprise and is registered or required to be registered for GST, the surrender of the fishing licence will be a taxable supply for the purposes of section 9-5 of *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and GST will be payable on the Surrender Payment by a Licence Holder.

### **Scheme**

19. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

20. The South Australian Government has committed to reducing the number of commercial marine scalefish fishing licences (line licences and net licences) from the marine scalefish fishery (the Fishery).

21. As at 1 May 2020, there were 307 fishing licences in the Fishery with approximately 90% of licences actively used.

22. Marine scalefish fishing licences were originally established under the repealed *Fisheries Act 1982*. The *Fisheries Management Act 2007* (Fisheries Act) includes transitional provisions which cause fishing licences issued under the repealed Act to be taken to be fishing licences issued under the Fisheries Act.

23. The South Australian Government established the Program to remove up to 150 fishing licences from the Fishery.

24. The fishing licences will be surrendered under section 56 of the Fisheries Act.

25. Under the Program, all Licence Holders have been invited to submit a proposal to the Minister for the surrender of their whole fishing licence, which includes associated registrations and entitlements (Surrender Proposal). The Program commenced on 25 May 2020 and all Surrender Proposals must be received by the Minister by 13 November 2020.

26. If the Minister accepts a Surrender Proposal, a Licence Holder will be required to enter into a Surrender Deed to surrender their fishing licence.

27. Under the terms of the Surrender Deed, a fishing licence is surrendered when a Licence Holder contemporaneously executes the Surrender Deed, executes the Notice of

Voluntary Surrender<sup>2</sup> (Surrender Notice), and returns their fishing licence to the Minister. The Surrender Notice also allows the Licence Holder to nominate a date for the surrender of the fishing licence which can be later than the date the Surrender Deed and Surrender Notice are executed.

28. The Minister must pay a monetary amount to the Licence Holder within 30 days of the date upon which the surrender of the fishing licence comes into effect in accordance with the Surrender Notice, subject to the Licence Holder meeting all obligations under the Surrender Deed.

29. The Surrender Payment represents the average licence value as assessed by BDOEconSearch within the report *Licences in the MSF*<sup>3</sup>, dated 12 September 2019.

30. The payment amount to be paid by the Minister to a Licence Holder for the surrender of a fishing licence (Surrender Payment) is:

- \$140,000 (excluding GST) for a line licence, and
- \$180,000 (excluding GST) for a net licence.

31. Where a Licence Holder is registered for GST the Surrender Payment will be grossed up to include GST.

32. A Licence Holder will be required to submit a separate proposal and enter a separate Surrender Deed for each fishing licence they intend to surrender and will receive a separate payment for each fishing licence they surrender.

33. The Surrender Payment relates only to the surrender of a fishing licence. The payment amount does not include other components, such as an amount for fishing gear or boats or an amount for loss of income.

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**Commissioner of Taxation**

4 November 2020

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<sup>2</sup> The Notice of Voluntary Surrender is an attachment to the Surrender Deed.

<sup>3</sup> Primary Industries and Regions South Australia 2019, report prepared by D Fechner, BDO Advisory (SA) Pty Ltd, Adelaide.

**Appendix – Explanation**

**❶** *This Explanation 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.*

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**Section 6-5 – income according to ordinary concepts**

34. Subsection 6-5(1) provides that assessable income includes income according to ordinary concepts ('ordinary income'). Taxation legislation does not provide a statutory definition of ordinary income.

35. The characteristics of ordinary income have been developed by case law and generally fall into three categories:

- income from providing personal services
- income from property, or
- income from carrying on a business.

36. Paragraph 85 of Taxation Ruling TR 2006/3 *Income tax: government payments to industries to assist entities (including individuals) to continue, commence or cease business* provides guidelines to assist in determining the nature of a receipt, which includes:

- whether or not a particular receipt is ordinary income depends on its character in the hands of the recipient
- regard must be given to all facts and, as such, a broad view must be taken of a taxpayer's situation and it is necessary to consider the total situation of the taxpayer
- a payment that is provided for a purpose which is not part of the recipient's business will not be income in nature
- a payment to compensate for the restriction of a person's capacity to perform services or to carry on a business may be a capital payment, and

- a payment for surrender of part of the profit-earning structure is a capital receipt.

37. The profit-earning structure of a business represents the property or assets used by the business to enable the production of income; it is generally of an enduring nature.

38. The fishing licence enables the income-producing activities of a Licence Holder and, as such, forms part of the property or assets used by the Licence Holder to generate income. It is therefore part of their profit-earning structure.

39. The loss of the fishing licence is a restriction of the capacity of the Licence Holder to produce income by fishing in the Fishery; it is a loss of an asset used by the Licence Holder to produce income and as such represents a loss of their profit-earning structure.

40. The loss of the asset and resultant compensation is also outside the normal income-producing activities of the Licence Holder.

41. Therefore, the Surrender Payment is a capital receipt and will not be ordinary income of the Licence Holder assessable under section 6-5.

### **Section 15-10 – bounty or subsidy received in relation to carrying on a business**

42. 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.

43. The meaning of ‘bounty’ or ‘subsidy’ is explained in paragraphs 93 to 98 of TR 2006/3. Of importance, paragraph 97 states:

Not all government grants are bounties or subsidies for the purposes of section 15-10. It is essential to determine what the grant is actually for. The question as to the nature and quality of any payment must be determined by reference to the agreement or the terms which created in the recipient the right to the government grant. Any factors used to calculate the amount of payment are of marginal, if any, assistance in determining what the payment is for.

44. Paragraph 96 of TR 2006/3 clarifies the meaning of grant (footnotes omitted):

‘Grant’ is defined to include ‘that which is granted, as a privilege or right, a sum of money, as for a student’s maintenance, or a tract of land’. A reference to ‘bounty or subsidy’ includes a grant that encourages business or trade and also a grant to address a detrimental effect on a business or trade.

45. Thus, a payment of a grant from government to address a detrimental effect on a business or trade would be a bounty or subsidy in accordance with section 15-10.

46. The Surrender Payment represents a grant from the Government of South Australia for the surrender of the fishing licence, which is to compensate the Licence Holder for the value of the licence. The surrender of a fishing licence would be detrimental to any fishing business of the Licence Holder, and the payment will be a bounty or subsidy in accordance with section 15-10.

47. For a bounty or subsidy to be assessable under section 15-10 it must be received in relation to carrying on a business. Paragraphs 104 to 106 of TR 2006/3 make it clear that a government payment received in relation to giving up or selling part of the profit-earning structure of the business will not be in relation to carrying on a business.

Rather, the payment will relate to the cessation of the business or part of the business operations.

48. As the Surrender Payment is in relation to the surrender of part of the profit-earning structure of the Licence Holder, it will not be a bounty or subsidy received in relation to carrying on a business for the purposes of section 15-10.

### **Capital gains tax**

49. A fishing licence is a CGT asset under section 108-5. When the licence is surrendered, CGT event C2 happens under section 104-25. This CGT event happens when ownership of an intangible CGT asset ends by surrender. The time of the CGT event is the date the Surrender Deed is executed.

50. A capital gain is made if the capital proceeds exceed the cost base of the fishing licence, and a capital loss is made if the capital proceeds are less than the reduced cost base (subsection 104-25(3)).

51. The capital proceeds under subsection 116-20(1) for the surrender of a fishing licence is the amount of the Surrender Payment (as set out in paragraph 8 of this Ruling).

52. The cost base and reduced cost base of the licence is calculated under Divisions 110 and 112. It includes the costs of electing to surrender the fishing licence. The cost base or reduced cost base is reduced by any amount that is a deductible expense in accordance with subsections 110-45(1B), 110-45(2) or 110-55(4). In accordance with subsection 110-40(2), if the licence was acquired before 7.30pm (ACST) on 13 May 1997, any expenditure relating to the asset cannot form part of the second and third elements of the cost base if it is deductible.

53. For the 2005–06 and earlier income years, CGT rollover for statutory licences, such as a fishing licence, was provided by section 124-140 (or former section 160ZZPE of the *Income Tax Assessment Act 1936* (ITAA 1936) for income years prior to 1997-98). Under former section 124-140 (or former section 160ZZPE), a replacement asset rollover was available when the terms and conditions of the fresh licence were not substantially different to the original licence and the underlying activity authorised by the original licence had not changed. Under section 124-160 (or former paragraph 160ZZPE(2)(a)), if the original licence was acquired prior to 20 September 1985, the fresh licence is also taken to be acquired before 20 September 1985.<sup>4</sup>

54. A fishing licence issued under the repealed *Fisheries Act 1982* is taken to be a fishing licence issued under the Fisheries Act. As a consequence of this transition, a fishing licence may have originated prior to 20 September 1985, when the capital gains tax regime commenced.

55. It is for individual Licence Holders to determine, based on their individual circumstances, whether the terms and conditions of, and the activity authorised by, their current fishing licence meet the statutory licence rollover provisions in Subdivision 124-C.

56. If the current fishing licence was issued to the Licence Holder as a result of the transition from a fishing licence acquired before 20 September 1985, provided the terms and conditions of the current fishing licence are not substantially different to the original fishing licence and the underlying activity authorised by the current fishing licence have not changed from the original licence (as determined by the individual licence holder based on

<sup>4</sup> The relevant rollover consequences for a fresh licence where the original licence was acquired after 20 September 1985 are found in section 124-155.



their circumstances) the current fishing licence may be taken to have been acquired before 20 September 1985.

57. Any capital gain or capital loss which results from the surrender of a licence taken to be acquired before 20 September 1985, as described in paragraph 56 of this Ruling, is disregarded under paragraph 104-25(5)(a).

58. If a fishing licence is taken to be 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 licence. The capital gain or capital loss on the surrender of the new licence is to be worked out separately.

59. 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. Section 115-10 states that a discount capital gain can only be made by an individual, complying superannuation entity, trust or life insurance company.

60. A capital gain can also be reduced or deferred by the small business CGT concessions if the fishing licence is an active asset and the other requirements of Division 152 are met. The concessions potentially available are:

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

### **Primary production income**

61. Division 392 contains provisions for adjusting the tax liability of primary producers through applying an 'averaging adjustment' to specific types of taxable income.

62. 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.

63. 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.

64. A payment received for the surrender of a fishing licence is not 'assessable primary production income' for the purposes of subsection 392-80(2) because it is capital in nature and any amount included in assessable income as a net capital gain is excluded under subsection 392-45(2). Accordingly, such payment is not included in calculating the 'averaging adjustment' available under Division 392.

### **Goods and services tax**

65. Subsection 7-1(1) of the GST Act states that GST is payable on taxable supplies. Section 9-5 of the GST Act provides that you make a taxable supply if:

- you make a supply for consideration
- the supply is made in the course or furtherance of an enterprise you carry on

- the supply is connected with the indirect tax zone, and
- you are registered or required to be registered for GST.

66. The meaning of supply is set out in section 9-10 of the GST Act and includes 'any form of supply whatsoever'. Subsection 9-10(2) of the GST Act provides a non-exhaustive list of activities or occurrences that come within the meaning of 'supply', and relevantly includes 'a creation, grant, transfer, assignment or surrender of any right'.

67. Paragraphs 37 and 38 of Goods and Services Tax Ruling GSTR 2001/4 *Goods and Services Tax: GST consequences of court orders and out-of-court settlements* state:

For there to be a supply of a surrender of any right or entering into an obligation, such rights or obligations must be binding on the parties. The creation of expectations among the parties does not, in itself, necessarily establish a supply.

An agreement that does not bind the parties in some way would not be sufficient to establish a supply by one party to the other unless there is something else, such as goods or some other thing, passing between the parties.

68. A fishing licence gives a Licence Holder rights to engage in fishing activities in the Fishery and is a 'right' for the purposes of paragraph 9-10(2)(e) of the GST Act.

69. A Licence Holder will enter into a Surrender Deed to surrender their fishing licence. The Surrender Deed is a binding agreement between a Licence Holder and the Minister. As such, the surrender of the fishing licence will be a supply (surrender of a right) for the purposes of section 9-10 of the GST Act.

### **Supply for consideration**

70. As stated in paragraph 65 of this Ruling, for a supply to be a taxable supply, it must be made for consideration. 'Consideration' is defined in section 195-1 of the GST Act to mean '... any consideration, within the meaning given by sections 9-15 and 9-17, in connection with the supply...'. Relevantly, subsection 9-15(1) of the GST Act sets out:

**Consideration** includes:

- (a) any payment, or any act or forbearance, in connection with a supply of anything, and
- (b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.

71. A payment, act or forbearance will be consideration for a supply if there is sufficient nexus between the supply and the payment, act or forbearance.

72. GSTR 2001/4 states the following on the nexus required for a payment, act or forbearance to be consideration for a supply (footnotes omitted):

91. The references in the GST Act to 'supply for consideration and more commonly to 'consideration for a supply' underscore the close coupling between the supply and the consideration that is necessary before a payment will be consideration for a supply that will make the supply subject to GST.

92. In a similar fashion to the GST legislation in New Zealand, the nature of the nexus required between supply and consideration is specified in the definition of consideration. A payment will be consideration for a supply if the payment is 'in connection with', 'in response to' or 'for the inducement' of a supply.

93. In determining whether a payment satisfies the requirements of subsection 9-15(1), the test is whether there is a sufficient nexus between the supply and the payment made.

94. ... While caution needs to be exercised in applying decisions on connective terms in other contexts, the term 'in connection with' has been held to be broader in scope than 'for'.

95. ... In *Berry's Case*, Kitto J held that 'in connection with' was a broader test than 'for'. At page 659 he commented that consideration will be in connection with property where:

*'the receipt of the payment has a substantial relation, in a practical business sense, to that property'.*

96. In determining whether a sufficient nexus exists between supply and consideration, regard needs to be had to the true character of the transaction. An arrangement between parties will be characterised not merely by the description which parties give to the arrangement, but by looking at all of the transactions entered into and the circumstances in which the transactions are made.

73. Under the scheme, the Surrender Payment is made by the Minister to a Licence Holder in connection with the Licence Holder surrendering their fishing licence. There is sufficient connection between the supply (surrender of the licence) and the payment for the payment to be consideration for the supply.

### **In the course of an enterprise you carry on**

74. The meaning of 'enterprise' is set out in section 9-20 of the GST Act and relevantly includes an activity, or series of activities, done:

- in the form of a business
- in the form of an adventure or concern in the nature of trade, or
- on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property.

75. Section 195-1 of the GST Act defines 'carrying on' an enterprise to include '... doing anything in the course of the commencement or termination of the enterprise'.

76. It is for the individual Licence Holder to determine, based on their individual circumstances, whether they are carrying on an enterprise.

77. If a Licence Holder is carrying on an enterprise when they surrender their fishing licence, the surrender of the licence will be a supply made in the course or furtherance of an enterprise they carry on.

### **Connected with the indirect tax zone**

78. Section 195-1 of the GST Act relevantly provides that 'indirect tax zone' means Australia.

79. Subsection 9-25(5) of the GST Act sets out when a supply of anything other than goods of real property is connected with the indirect tax zone:

A supply of anything other than goods or real property is **connected with the indirect tax zone** if:

- (a) the thing is done in the indirect tax zone; or
- (b) the supplier makes the supply through an enterprise that the supplier carries on in the indirect tax zone; or
- (c) all of the following apply:
  - (i) neither paragraph (a) nor (b) applies in respect of the thing;
  - (ii) the thing is a right or option to acquire another thing;

(iii) the supply of the other thing would be connected with the indirect tax zone; or

(d) the recipient of the supply is an Australian consumer.

80. The Commissioner accepts that a Licence Holder who is carrying on an enterprise in South Australia will make a supply that is connected with the indirect tax zone when they surrender their fishing licence.

### **Registered or required to be registered for goods and services tax**

81. The GST Act provides that an entity<sup>5</sup> that is carrying on an enterprise and has a GST turnover of \$75,000 or higher (\$150,000 or higher if the entity is a not-for-profit body) is required to be registered for GST.<sup>6</sup>

### **Conclusion**

82. The surrender of a fishing licence is a supply for consideration and is connected with the indirect tax zone. Provided a Licence Holder is carrying on an enterprise and is registered or required to be registered for GST, the surrender of the fishing licence will be a taxable supply and GST will be payable on the Surrender Payment by a Licence Holder.

<sup>5</sup> Section 184-1 of the GST Act defines 'entity' to mean an individual, body corporate, corporation sole, body politic, partnership, other unincorporated association or body of persons, trust, or superannuation fund.

<sup>6</sup> Sections 23-5 and 23-15 of the GST Act.

**References***Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

GSTR 2001/4; TR 2006/3

*Legislative references:*

- ITAA 1936 160ZZPE (former)
- ITAA 1936 160ZZPE(2)(a) (former)
- ITAA 1997 6-5
- ITAA 1997 6-5(1)
- ITAA 1997 15-10
- ITAA 1997 Pt 3-1
- ITAA 1997 Div 102
- ITAA 1997 104-25
- ITAA 1997 104-25(3)
- ITAA 1997 104-25(5)(a)
- ITAA 1997 108-5
- ITAA 1997 Div 110
- ITAA 1997 110-40(2)
- ITAA 1997 110-45(1B)
- ITAA 1997 110-45(2)
- ITAA 1997 110-55(4)
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 Subdiv 115-B
- ITAA 1997 Subdiv 115-C
- ITAA 1997 115-10
- ITAA 1997 116-20(1)
- ITAA 1997 Pt 3-3
- ITAA 1997 Subdiv 124-C
- ITAA 1997 124-140
- ITAA 1997 124-155
- ITAA 1997 124-160
- ITAA 1997 Div 152
- ITAA 1997 Div 392
- ITAA 1997 392-45(2)
- ITAA 1997 392-80(2)
- ANTS(GST)A 1999 7-1(1)
- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-10
- ANTS(GST)A 1999 9-10(2)
- ANTS(GST)A 1999 9-10(2)(e)
- ANTS(GST)A 1999 9-15
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- ANTS(GST)A 1999 9-17
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## ATO references

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 Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events C1 to C3 – end of a CGT asset

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