



# ***PR 2004/72 - Income tax: Lakevista Abalone Aquaculture Project***

 This cover sheet is provided for information only. It does not form part of *PR 2004/72 - Income tax: Lakevista Abalone Aquaculture Project*

 This document has changed over time. This is a consolidated version of the ruling which was published on *28 July 2004*



## Product Ruling

### Income tax: Lakevista Abalone Aquaculture Project

|  |            |
|--|------------|
| Contents                                 | Para       |
| <b>What this Product Ruling is about</b> | <b>1</b>   |
| <b>Date of effect</b>                    | <b>11</b>  |
| <b>Withdrawal</b>                        | <b>13</b>  |
| <b>Arrangement</b>                       | <b>14</b>  |
| <b>Ruling</b>                            | <b>68</b>  |
| <b>Explanation</b>                       | <b>89</b>  |
| <b>Example</b>                           | <b>125</b> |
| <b>Detailed contents list</b>            | <b>126</b> |

#### **Preamble**

*The number, subject heading, **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

*[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]*

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

Potential participants may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

The Australian Taxation Office (ATO) **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, how the investment fits an existing portfolio, etc. 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 below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement 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 person(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.

# PR Error! Reference source not found.2004/72

## What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the 'Lakevista Abalone Aquaculture Project' or simply as 'the Project'.

### Tax law(s)

2. The tax laws 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;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 70 of the ITAA 1997;
- Division 328 of the ITAA 1997;
- Section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Section 82KZL of the ITAA 1936;
- Sections 82KZME and 82KZMF of the ITAA 1936; and
- Part IVA of the ITAA 1936.

### 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. Taxpayers 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.

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 3 of 31

## Note to promoters and advisers

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for participants in projects 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 persons

7. The class of persons to whom this Ruling applies is the persons who are more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (that is being a party to the relevant Agreements until their term expires) and deriving assessable income from this involvement. In this Ruling, each of these persons, referred to as 'Growers', will be wholesale clients for the purpose of the *Corporations Act 2001* or will have accepted an offer which qualifies as a small scale offer for the purpose of the *Corporations Act 2001*. This Ruling only applies to Growers who have been granted a current Exemption from the operation of Part 8 of the *Fish Resources Management Act 1994*.

8. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

## Qualifications

9. The Commissioner rules on the precise arrangement identified in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

10. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no Product Ruling may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration  
Intellectual Property Branch  
Department of Communications, Information Technology and  
the Arts  
GPO Box 2154  
Canberra ACT 2601

or by email to: [commonwealth.copyright@dcita.gov.au](mailto:commonwealth.copyright@dcita.gov.au)

# PR Error! Reference source not found.2004/72

---

## Date of effect

---

11. This Ruling applies prospectively from 9 June 2004, 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 (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not commenced and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

---

## Withdrawal

---

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2007. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

---

## Arrangement

---

14. The arrangement that is the subject of this Ruling is specified below. This arrangement incorporates the following documents:

- Application for a Product Ruling, dated 6 November 2003 as constituted by documents provided on 18 December 2003, 21 January 2004, 29 April 2004, 12 May 2004 and correspondence received on 8 January 2004, 12 January 2004, 20 January 2004 and 22 January 2004 and 16 July 2004;
- Draft Information Memorandum for the offer of Units in the Lakevista Abalone Aquaculture Project and shares in Lakevista Enterprises Ltd received on 12 May 2004;
- **Draft copy of Licence and Management Agreement between the Grower and Lakevista Enterprises Ltd ('Manager') received on 29 April 2004;**

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 5 of 31

- Draft copy of the Lease Agreement between Augusta Marine Resources Limited as trustee for AMR Unit Trust ('Lessor') and Lakevista Enterprises Ltd ('Lessee') received on 6 November 2003;
- Draft copy of the Abalone Stocking Agreement between Lakevista Enterprises Ltd and Great Southern Marine Hatcheries Pty Ltd received on 21 January 2004; and
- The Exemption issued under subsection 7(2) of the *Fishing Resources Management Act 1994*, by the Minister for Fisheries, dated 15 December 2003.

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

15. The documents highlighted are those that Growers may enter into. For the purposes of describing the arrangement 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 arrangement.

16. In accordance with the above documents, a Grower who participates in the arrangement must be a wholesale client or have accepted an offer that is a small scale offering. **This Ruling does not apply unless:**

- the Grower is a wholesale client as defined in section 761G of the *Corporations Act 2001*; or
- not being a retail client, the Grower has accepted a 'personal offer' of a small scale offering for the purpose of the *Corporations Act 2001*.

17. Each of these categories is explained in paragraphs 89 to 95 in the Explanation area of this Product Ruling.

18. 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.

# PR Error! Reference source not found.2004/72

## Overview

19. The Project is called the Lakevista Abalone Aquaculture Project and the arrangement is summarised as follows:

|   |  |
|---|--|
| Location  | Augusta, Western Australia   |
| Type of business to be carried on by each participant | Aquaculture of Abalone   |
| Number of interests offered                           | 50 Units   |
| Minimum allocation                                    | 1 Unit   |
| Minimum subscription                                  | 45 Units   |
| Term of the Project                                   | Approximately 10 years   |
| Initial cost  | \$34,023   |
| Initial subscription of shares                        | \$30,000 (20,000 fully paid shares at \$1.50 per share)                          |
| Ongoing costs   | Equipment Licence Fee<br>Management Fee<br>Abalone Stocking Fee<br>Incentive Fee |

20. The Manager for the Project is Lakevista Enterprises Ltd. The Project involves the aquaculture of Abalone and is for a period of approximately ten years. The Project Land is situated in Augusta, Western Australia.

21. Under the Information Memorandum, the Manager will offer 50 Units, with a minimum subscription of 45 Units which must be reached by 30 September 2004. Growers applying under the Information Memorandum enter into a Licence and Management Agreement with Lakevista Enterprises Ltd. Each Grower may apply for a minimum of one Unit.

22. The Licence and Management Agreement grants the Grower an Equipment Licence to use the plant and equipment, including Tanks, for the purpose of the aquaculture of Abalone. The Grower appoints the Manager to provide the services necessary to stock, grow, cultivate, harvest, market and sell Abalone. The Manager will purchase the Abalone and stock the Tanks, on the Grower's behalf.

23. Each Grower must subscribe for 20,000 fully paid shares in Lakevista Enterprises Ltd at \$1.50 per share (\$30,000).

24. Upon achieving the minimum subscription, the Manager will enter into a Lease with Augusta Marine Resources Limited, as trustee for AMR Unit Trust, for the Project Land. The Lease will be for an area of 2.8 hectares and will commence on 1 December 2004 for a period of 20 years.

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 7 of 31

25. Upon reaching minimum subscription, the Manager will enter into an Abalone Stocking Agreement with Great Southern Marine Hatcheries Pty Ltd (GSMH). The Manager will purchase juvenile Abalone, on behalf of the Grower, for the purpose of stocking and re-stocking the Grower's Tanks. The Manager is not required to exclusively purchase from GSMH and may elect to purchase from other sources. The term of the Abalone Stocking Agreement ends on 30 June 2006 and thereafter will continue on a year to year basis, subject to agreement between the parties.

## **Aquaculture Licence Exemption**

26. Lakevista Enterprises Ltd holds a current Aquaculture Licence which authorises the entity to engage in aquaculture of Abalone on the Augusta site. A Grower who enters into the Licence and Management Agreement with Lakevista Enterprises Ltd will be granted an Exemption under subsection 7(2) of the *Fish Resources Management Act 1994* from the operation of Part 8 of that Act. Part 8 would otherwise prevent the Grower from lawfully engaging in Abalone aquaculture without an Aquaculture Licence.

27. The Exemption ceases to apply to Growers on the occurrence of any of the following events:

- the completion date specified in the Licence and Management Agreement;
- a person ceases to be a 'Grower' under the Licence and Management Agreement;
- the Aquaculture Licence is cancelled or not renewed; or
- the Aquaculture licence is transferred in circumstances where the transferee does not assume the obligations of the Manager under the Licence and Management Agreement.

28. The Exemption is subject to the following conditions:

- Growers shall not engage in aquaculture except in accordance with the terms and conditions of the Licence and Management Agreement;
- Growers shall lodge an executed copy of the Licence and Management Agreement with the Executive Director of the Department of Fisheries;
- Growers shall not vary the terms of the Licence and Management Agreement without written approval of the Minister of Fisheries;
- Growers shall cause the Manager to notify the Executive director if the Licence and Management Agreement is terminated; and

# PR Error! Reference source not found.2004/72

- Growers shall not engage in aquaculture during any period the Aquaculture licence is suspended or not effective.

## **Licence and Management Agreement**

29. Each Grower enters into a Licence and Management Agreement with the Manager. The Licence and Management Agreement sets out the roles and obligations of the parties to the Agreement. Subject to the minimum subscription being reached, the Licence and Management Agreement will be executed by 1 December 2004. The initial period of the Agreement is from 1 December 2004 to 30 June 2005.

30. Under the Licence and Management Agreement, the Manager agrees to:

- establish the Project;
- maintain and keep current all applicable licences and exemptions, in particular the Aquaculture licence and the Exemption from the Aquaculture licence granted to Growers in the Project;
- keep a public risk insurance policy in respect of the Abalone farm and obtain a standard plant and equipment insurance policy;
- obtain an insurance policy on behalf of the Grower for approximately 50% of the Grower's Abalone;
- grant the Grower an Equipment Licence for Tanks and Other Plant and Equipment for the purpose of Abalone farming;
- stock and re-stock the Grower's Tanks with Abalone spats;
- provide the management and harvesting services usual or necessary to the carrying on of a business of Abalone farming;
- undertake the selling and marketing of the Abalone;
- provide training to employees and contractors to ensure the services are provided adequately;
- provide to the Grower on a half yearly basis a report containing a review of the Abalone Farming operations; and
- provide sufficient information to enable the Grower to determine the value of the Abalone on hand at the end of the relevant income year.

# PR Error! Reference source not found.2004/72

---

FOI status: **may be released**

Page 9 of 31

31. Under the Licence and Management Agreement, the Grower agrees to:

- appoint the Manager to provide management, harvesting, selling and marketing services;
- appoint the Manager as sole and exclusive agent of the Grower for the purposes of marketing and selling the Abalone;
- appoint the Manager as power of attorney for the purpose of complying with any obligation or duty imposed on the Grower by this Agreement;
- pay the Manager an Equipment Licence Fee for the grant of the Equipment Licence;
- pay the Abalone Stocking Fee in consideration for the Manager purchasing Abalone spats to stock the Tanks on the Grower's behalf;
- pay the Management Fee in consideration for the Management Services; and
- pay an Incentive Fee to the Manager on the sale of the Abalone.

32. The Licence and Management Agreement expires on 31 December 2014, unless terminated earlier by the Manager or the Grower pursuant to the provisions of the Agreement.

33. The Manager will be appointed for the term of the Agreement. At completion of the term the Manager will purchase all the Abalone in the Grower's Tanks at an agreed value or at a value determined by an independent valuer.

34. The Licence and Management Agreement may be partially or fully terminated by the Grower, pursuant to the conditions in clauses 15.2 and 15.3.

35. Where the Agreement is partially terminated by the Grower, the Equipment Licence will remain in force and only the obligations regarding the provision of services by the Manager will be terminated. The Grower can appoint a new Manager to provide services and request the transfer of the Aquaculture Licence to the new Manager, where a resolution to that effect is carried by more than 75% of the votes cast at a Growers meeting. A Growers meeting can be called at the request of the Grower or at the Manager's discretion, pursuant to clause 16.3.

36. Where the Grower terminates the Licence and Management Agreement in full, the Grower can request that the Abalone in the Grower's Tanks be made available in a condition suitable for transport.

# PR Error! Reference source not found.2004/72

37. Where the agreement is lawfully terminated by the Manager, the Grower can negotiate the sale of the Grower's Abalone to the Manager for a fair price, or where agreement on the sale cannot be reached, the Grower can request the Abalone be made available (at the Grower's cost) in a condition suitable for transport.

## ***Equipment Licence***

38. In Part 1 of the Licence and Management Agreement, the Manager grants the Grower an Equipment Licence comprising of two components:

- the Tanks; and
- the Other Plant and Equipment.

39. The Equipment Licence enables the Grower to exclusively use certain Tanks to grow and cultivate the Abalone. The Tanks are the vessels used to house the Abalone during the time when they are grown from the juvenile stage to adults of marketable size.

40. The Grower is entitled to use up to eight Tanks which will be installed on the Project site progressively. In the initial period, from 1 December 2004 to 30 June 2005, one Tank will be available for use by each Grower. In the year ending 30 June 2006, three more tanks will become available for use and in the following year the remaining four Tanks will become available for the Grower's use. The number of Tanks in use by the Grower, at any time, will depend on the growth of the Abalone.

41. The Other Plant and Equipment referred to in the Equipment Licence is the plant and equipment acquired and installed by the Manager, on the Project site, to enable the Grower to operate an Abalone farm (excluding the Tanks).

42. In consideration for the Equipment Licence, the Grower will pay an Equipment Licence Fee.

## ***Abalone Stocking Services***

43. The Manager will purchase juvenile Abalone, on behalf of the Grower, for the stocking of the Grower's Tanks. In consideration for the purchasing of the juvenile Abalone, the Grower will pay an annual Abalone Stocking Fee which is the cost incurred by the Manager in purchasing the Abalone under the Abalone Stocking Agreement.

44. The Manager will stock and restock the Tanks with numbers of Abalone to achieve and maintain the Annual Required Quota of 2.4 metric tonnes of sized Abalone per year from the year ending 30 June 2008. The Manager will introduce 32,000 new Abalone into the Grower's Tanks in each financial year of the Project, including in the initial period. The Manager will assess the survival of the Abalone on an ongoing basis and replace any dead or harvested Abalone as necessary to produce the Annual Required Quota.

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 11 of 31

## ***Management Services***

45. The Grower will pay a Management Fee on application and thereafter an annual Management Fee for the Management Services listed in Item 4.1 of the Schedule of the Licence and Management Agreement.

46. The Manager will provide the following services during the initial period:

- preparing the Equipment and the Tanks for the placing of Abalone;
- monitoring and tend to the Tanks and Abalone to promote growth and yields of the Abalone;
- keeping the Tanks in good condition;
- ensuring the Abalone is fed at a rate to maximise the growth rate of the Abalone and minimise mortality;
- maintaining a clean environment in the Tanks to maximise the growth rate of the Abalone and minimise mortality;
- measuring and monitoring the growth rate of the Abalone on a weekly basis;
- ensuring accurate monitoring of the mortality of the Abalone to determine accurate stock losses in the Tanks;
- grading of the stocks of Abalone to ensure they are maintained at correct densities;
- sending samples of Abalone periodically to a fish health unit for disease testing to ensure the stock is free of disease;
- ensuring an adequate supply of water is maintained in the Tanks;
- maintaining detailed records of pump maintenance procedures;
- regular testing of pump failure alarms in the Tanks;
- regular servicing of water inlet screens in the Tanks;
- regular testing and maintenance of backup power generator in the Tanks;
- daily recording of ambient water temperatures in the Tanks;
- regular inspection of supply lines to the Tanks to ensure no leaks;

# PR Error! Reference source not found.2004/72

- regular cleaning of supply lines to the Tanks to remove internal marine growth;
- regular cleaning of drains within the Abalone Farm; and
- ensuring drum filter used for solid removal from the Tanks is maintained in good working order.

47. The Manager will carry out the following ongoing services under the agreement:

- monitoring and tend to the Tanks and Abalone to promote growth and yields of the Abalone;
- keeping the Tanks in good condition;
- ensuring the Abalone is fed at a rate to maximise the growth rate of the Abalone and minimise mortality;
- maintaining a clean environment in the Tanks to maximise the growth rate of the Abalone and minimise mortality;
- measuring and monitoring the growth rate of the Abalone on a weekly basis;
- ensuring accurate monitoring of the mortality of the Abalone to determine accurate stock losses in the Tanks;
- annual grading of the stocks of Abalone to ensure they are maintained at correct densities;
- sending samples of Abalone periodically to a fish health unit for disease testing to ensure the stock is free of disease;
- harvesting of Abalone for sale in accordance with quality standards applicable to Abalone;
- ensuring an adequate supply of water is maintained in the Tanks;
- maintaining detailed records of pump maintenance procedures;
- regular testing of pump failure alarms in the Tanks;
- regular servicing of water inlet screens in the Tanks;
- regular testing and maintenance of backup power generator in the Tanks;
- daily recording of ambient water temperatures in the Tanks;
- regular inspection of supply lines to the Tanks to ensure no leaks;

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 13 of 31

- regular cleaning of supply lines to the Tanks to remove internal marine growth;
- regular cleaning of drains within the Abalone Farm; and
- ensuring drum filter used for solid removal from the Tanks is maintained in good working order.

## ***Selling and Marketing Services***

48. The Manager will act as the Grower's sole and exclusive agent to market and sell the Abalone and to perform the Selling and Marketing Services set out in Item 4.3 of the Schedule in the Licence and Management Agreement. The Selling and Marketing services include:

- adequately store the sized Abalone removed from the Tanks for transportation to the relevant markets;
- negotiating and making sales of the Abalone produce;
- supervising and managing the marketing plan, including identifying current markets and strategies to best access those markets;
- contracting expert sales personnel to negotiate a sales agreement with major purchasers of Abalone;
- maintaining contact with potential buyers; and
- generating interest and demand in Abalone as an end product, including educating retailers about the quality of the product.

49. In consideration for acting as agent and performing the Selling and Marketing Services, the Manager will be entitled to the Incentive Fee, which is 3.3% of the Net Proceeds of Sale of the Grower.

## ***Harvesting and Sale of Abalone***

50. Harvesting services are part of the Management Services provided by the Manager. The Manager will decide, in accordance with sound Abalone farming and harvesting practice, when the harvesting of the Grower's Abalone will be undertaken.

51. Harvesting of sized Abalone is expected to commence in the year ending 30 June 2008. The Manager will pool and sell the sized Abalone of the Grower with sized Abalone from the Tanks of other Growers in the Project. The Gross Proceeds of Sale will be deposited in the Manager Bank Account.

52. Each Grower is entitled to their Proportional Share of the Net Proceeds of Sale. The Net Proceeds of Sale is the Gross Proceeds of Sale reduced by the Grower's Proportional Share of the transportation, distribution and other costs directly associated with the sale.

# PR Error! Reference source not found.2004/72

53. The Proportional Share of a Grower is the proportion which the number of Grower's Tanks bears to the total number of Growers Tanks. The Grower's Proportional Share will be reduced by the number of Tanks which have been affected by a Destruction Event.

54. A Destruction Event occurs where all the Abalone in a Grower's Tank are destroyed or, in the opinion of the Manager, are damaged so as to render them unsuitable for harvesting. Where a Destruction Event occurs the Manager will restock the Tank(s) affected, at the cost of the Grower, to ensure the Grower's Tanks reach the Annual Required Quota in the following financial year. The Manager will also ensure the Grower is able to make an insurance claim for the loss of the Abalone stock.

55. The Manager will pay the Collectible Proceeds of Sale to the Grower by the end of the financial year in which the sale is made. The Collectible Proceeds of Sale is the Grower's Proportional Share of the Net Proceeds of Sale less the Incentive Fee. The Collectible Proceeds of Sale may be offset against Fees payable by the Grower for the financial year.

## Fees

56. There are four fees payable by the Grower to the Manager under the Licence and Management Agreement:

- the Equipment Licence Fee;
- the Abalone Stocking Fee;
- the Management Fee; and
- the Incentive Fee.

All fees will be deposited in the Manager Bank Account.

57. The fees payable on application for the initial period are:

|  |                 |
|--|-----------------|
| Equipment Licence Fee                    | \$770           |
| Abalone Stocking Fee                     | \$10,824        |
| Management Fee                           | \$22,429        |
| <b>Total Fees payable on Application</b> | <b>\$34,023</b> |

58. In subsequent years of the Project, the Equipment Licence Fee, the Management Fee and the Abalone Stocking Fee will be invoiced annually by the Manager at least 14 days before the Annual Payment Date (1 August) of each financial year. The Manager will also provide the Grower with a Collection Notice stating whether the Fees are payable in full on the Annual Payment Date or in instalments over the financial year. Late payment of fees will attract interest on the balance of the relevant fee at 9% per annum.

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 15 of 31

59. The Equipment Licence Fee, the Management Fee and the Abalone Stocking Fee for the financial years ending 30 June 2006 and 2007 are set as follows:

| <b>Fees Payable</b>   | <b>2006</b> | <b>2007</b> |
|-----------------------|-------------|-------------|
| Equipment Licence Fee | \$3,740     | \$4,576     |
| Abalone Stocking Fee  | \$11,847    | \$12,078    |
| Management Fee        | \$35,948    | \$51,062    |

60. For the financial years following the financial year ending 30 June 2007, the Equipment Licence Fee and the Abalone Stocking Fee are charged as follows:

- the Equipment Licence Fee is based on the amount of \$4,576 indexed annually, in accordance with the percentage increase in the CPI from year to year; and
- the Abalone Stocking Fee will be equal to the price paid by the Manager for the purchase of Abalone set out in the Abalone Stocking Agreement with Great Southern Marine Hatcheries Pty Ltd or any other fees agreed with any other third party supplier of Abalone.

61. For the financial years following the income year ending 30 June 2007, the Management Fee will be based on the operating costs of providing services for the financial year plus a 16.5% mark-up. The Management Fees payable for the financial year will be calculated by varying the Budgeted Management Fee by the Adjustment Amount carried forward from the previous year.

62. The Budgeted Management Fee is an estimate of the relevant costs of providing services for the financial year made by the Manager at the beginning of the financial year (plus a 16.5% mark-up). The Adjustment Amount is the difference between the actual costs of providing services in the preceding year, and the sum of the Budgeted Management Fee and any additional Management Fees in the preceding year.

63. From 1 July 2007, the Manager may invoice the Grower during the financial year for additional Management Fees, provided the additional Management Fees do not exceed 50% of the Budgeted Management Fee for the financial year.

64. The Manager is also entitled to an Incentive fee of 3.3% the Grower's Proportional Share of the Net Proceeds of Sale. The Net Proceeds of Sale will be reduced by the Incentive fee before disbursement of the Collectible Proceeds of Sale from the Manager Bank Account to the Grower. The Incentive Fee is not expected to be payable until the financial year ending 30 June 2008.

65. The Manager may apply some or all of the Collectible Proceeds of Sale of the Grower to offset Fees payable in the financial year.

# PR Error! Reference source not found.2004/72

## Finance

66. Growers can fund their investment in the Project themselves or borrow from an independent lender.

67. This Ruling does not apply if the finance arrangement entered into by the Grower 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 or the funding arrangements transform the Project into a 'scheme' to which Part IVA 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 are involved or become involved in the provision of finance to Growers for the Project.

## Ruling

---

### Application of this Ruling

68. This Ruling only applies to Growers who:

- are accepted to participate in the Project before 1 December 2004;
- have executed a Licence and Management Agreement by that date;

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 17 of 31

- are either a wholesale client (section 761G of the *Corporations Act 2001*) or have accepted a 'personal offer' of a small scale offering (section 1012E of the *Corporations Act 2001*); and
- have been granted a current Exemption from the operation of Part 8 of the *Fish Resources Management Act 1994*.

The Grower's participation in the Project must constitute the carrying on of a business of primary production.

## Minimum subscription

69. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the Information Memorandum, a Grower's application will not be accepted and the Project will not proceed unless the minimum subscription of 45 interests is reached by 30 September 2004.

## The Simplified Tax System ('STS')

### *Division 328*

70. For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower is an 'STS taxpayer'. To be an 'STS taxpayer' a Grower:

- must be eligible to be an 'STS taxpayer'; and
- must have elected to be an 'STS taxpayer'.

## Qualification

71. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is an 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

# PR Error! Reference source not found.2004/72

## **Assessable Income**

### ***Sections 6-5 and 328-105***

72. That part of the Net Proceeds of Sale 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.

73. The Grower who is not an 'STS taxpayer' recognises ordinary income from carrying on the business of aquaculture at the time that income is derived.

74. The Grower who is an 'STS taxpayer' recognises ordinary income from carrying on the business of aquaculture at the time the income is received (paragraph 328-105(1)(a)).

## ***Trading Stock***

### ***Sections 70-35 and 70-45***

75. During the term of the Project, a Grower will hold Abalone that will constitute trading stock on hand. Section 70-35 requires the Grower to include the value of the trading stock in working out assessable income and deductions.

76. Where, in an income year, the value of trading stock on hand at the *end* of an income year exceeds the value of trading stock on hand at the *start* of an income year a Grower must include the amount of that excess in assessable income.

77. Alternatively, where the value of trading stock on hand at the start of an income year exceeds the value of trading stock on hand at the end of an income year, a Grower may claim the amount of that excess as an allowable deduction.

78. Under section 70-45, the Grower can elect to value trading stock on hand at the end of the income year at cost, market selling value or replacement value. Where the Grower elects to value the trading stock at the end of the income year at cost, 'cost' would include only those expenses incurred until the Abalone became trading stock of the Grower.

79. During the term of the Project, the Manager will provide sufficient information to enable the Grower to determine the value of the trading stock on hand at the end of the relevant income year.

### ***Section 328-285***

80. Section 70-35 requires the Grower to include the value of the trading stock in working out assessable income and deductions, unless the Grower who is an 'STS taxpayer' is able to choose not to apply this section as the conditions in subsection 328-285(1) are met.

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 19 of 31

81. Subsection 328-285(1) provides if the difference between the value of all the Grower's trading stock at the start of an income year and a reasonable estimate of the trading stock at the end of the income year is less than \$5,000, an 'STS taxpayer' does not have to account for that difference under the ordinary trading stock rules in sections 70-35 and 70-45. The value of all the trading stock on hand at the end of the year will instead be considered equal to the trading stock on hand at the start of the year.

## Deductions for Equipment Licence Fees, Management Fees, and Abalone Stocking Fees

### Sections 8-1 and 328-105

82. A Grower may claim tax deductions for the following expenses:

| Fee Type                     | ITAA 1997 Section           | Year ended 30 June 2005                 | Year ended 30 June 2006                 | Year ended 30 June 2007                 |
|------------------------------|-----------------------------|---|---|---|
| <b>Equipment Licence Fee</b> | 8-1 & 328-105               | \$770<br>See Notes (i), (ii) & (iii)    | \$3,740<br>See Notes (i), (ii) & (iii)  | \$4,576<br>See Notes (i), (ii) & (iii)  |
| <b>Management Fee</b>        | 8-1 & 328-105               | \$22,429<br>See Notes (i), (ii) & (iii) | \$35,948<br>See Notes (i), (ii) & (iii) | \$51,062<br>See Notes (i), (ii) & (iii) |
| <b>Abalone Stocking Fee</b>  | 8-1, 70-15, 70-35 & 328-285 | \$10,824<br>See Notes (i) and (iv)      | \$11,847<br>See Notes (i) and (iv)      | \$12,078<br>See Notes (i) and (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 (for example input tax credits): Division 27. See Example at paragraph 125.
- (ii) The Management Fees and the Equipment Licence Fees shown in the Licence and Management Agreement are deductible under section 8-1 in full in the year that they are incurred, (where the Grower is not an 'STS taxpayer') or in the year in which they are paid (where the Grower is an 'STS taxpayer'). If an amount shown is not fully paid in the year in which it is incurred by a Grower who is an 'STS taxpayer' then the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower.

# PR Error! Reference source not found.2004/72

- (iii) **This Ruling does not apply to Growers who choose to prepay** the Equipment Licence Fees, Management Fees or Abalone Stocking Fees. Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (iv) The Abalone Stocking Fee is the cost of acquiring juvenile Abalone which is the trading stock of the Grower. The timing of the deduction for the outgoing is the year the Abalone becomes part of the Grower's trading stock (section 70-15). Section 70-35 adjusts the amount of the deduction by comparison of the value of the trading stock at the start of the income year with the value of the trading stock on hand at the end of the income year. A Grower who is an 'STS taxpayer' can choose not to account for differences in trading stock under section 70-35, if the conditions in subsection 328-285(1) are met (see paragraph 81).

## ***Interest***

83. The deductibility or otherwise of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or other financier is outside the scope of this Ruling. However, all Growers who borrow funds in order to participate in the Project should read the discussion of the prepayment rules in paragraphs 114 to 118 as those rules may be applicable if interest is prepaid.

## **Shares**

84. The shares in Lakevista Enterprises Ltd are CGT assets (section 108-5 of the ITAA 1997) and the amount paid by a Grower to acquire those assets is an outgoing of capital and not allowable as a deduction.

85. The amounts paid for each share will represent the first element of the cost base of the share (subsection 110-25(2)). Any disposal of shares by a Grower will be a CGT event and will give rise to a capital gain or loss.

## ***Dividends relating to the shares***

86. Dividends paid out of profits by Lakevista Enterprises Ltd are included in the assessable income of shareholders under subsection 44(1) of the ITAA 1936.

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 21 of 31

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

### **Section 35-55 – Commissioner's discretion**

87. A Grower who is an individual accepted into the Project by 1 December 2004 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 these Growers for the income years ending **30 June 2005 to 30 June 2007**. 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, 82KL and Part IVA**

88. For a Grower who participates in the Project and incurs expenditure as required by the Licence and Management Agreement the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 114 to 118);
- 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.

## **Explanation**

---

### **Corporations Act 2001**

89. For this Ruling to apply, an offer for an interest in the Project must:

- have been made to, and accepted by a Grower, who qualifies as a wholesale client as defined in section 761G of the *Corporations Act 2001*; or
- be an offer which qualifies as a small scale offering as defined in section 1012E of the *Corporations Act 2001*.

Small scale offers and offers to wholesale clients do not require a prospectus or product disclosure statement.

# PR Error! Reference source not found.2004/72

90. A Grower in the Project may be a person who is a wholesale client within the definition in section 761G. A person will be a wholesale client where the persons satisfies one of the following tests:

- the 'product value test' (paragraph 761G(7)(a));
- the 'individual wealth test' (paragraph 761G(7)(c)); or
- the 'professional investor test' (paragraph 761G(7)(d)).

91. A participant in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will satisfy the 'product value test' where:

- the minimum amount payable for the interests in the project on acceptance of the offer by the person to whom the offer is made is at least \$500,000; or
- the amount payable for the interests in the project on acceptance by the person to whom the offer is made and the amounts previously paid by the person for interests in the project of the same class that are held by the person add up to at least \$500,000.

92. A participant in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will satisfy the 'individual wealth test' where, it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made, that the person to whom the offer is made:

- has net assets of at least \$2.5 million; or
- has a gross income for each of the last 2 financial years of at least \$250,000 a year.

93. A participant in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will satisfy the 'professional investor test' where:

- the person is a financial services licensee; or
- the person controls at least \$10 million for the purposes of investment in securities.

94. Alternatively, under section 1012E, a Grower may participate in the project by accepting a 'personal offer' for an interest in the project. Offers made under section 1012E cannot be accepted by more than 20 investors in any 12 month period and these investors, in aggregate, must not invest more than \$2 million dollars (subsection 1012E(2)).

95. An offer will be a 'personal offer' where it can only be accepted by the person to whom it is made, and it is made to a person who is likely to be interested in the offer because of previous contact, or professional or other connection with the person making the offer, or because they have indicated that they are interested in offers of that kind (subsection 1012E(5)).

# PR Error! Reference source not found.2004/72

---

FOI status: **may be released**

Page 23 of 31

---

## Is the Grower carrying on a business?

96. For the amounts set out in the Tables above to constitute allowable deductions, the Grower's aquaculture activities, as a participant in the Lakevista Abalone Aquaculture Project, must amount to the carrying on of a business of primary production.

97. Where there is a business, or a future business, the gross proceeds from the sale of the Abalone 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.

98. For schemes such as the Lakevista Abalone Aquaculture Project, 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 Taxation Ruling 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.

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

- the Grower has a licence to the exclusive use of identifiable Tanks in which Abalone owned by the Grower will be cultivated and grown;
- the Grower has the right to harvest and sell the Abalone from those Tanks;
- the aquaculture activities are carried out on the Grower's behalf;
- the aquaculture activities of the Grower are typical of those associated with an aquaculture business; and
- the weight and influence of general indicators point to the carrying on of a business.

100. In this Project, each Grower enters into a Licence and Management Agreement. Under the Licence and Management Agreement the Grower will have the right to exclusively use up to eight Tanks for the purpose of growing Abalone. The Tanks are specifically allocated and identifiable by reference to a diagram kept by the Manager. The Manager and third parties under the supervision of the Manager will be allowed full and free access to the Tanks to perform the services under the Agreement.

101. The Grower will own the Abalone in the Tanks and have the right to transport the Abalone on termination of the Agreement or sell the Abalone to the Manager on completion of the Project. The Grower is also granted the right to use the plant and equipment on the Project site necessary to the farming of Abalone.

# PR Error! Reference source not found.2004/72

102. The Manager is engaged by the Grower to prepare and maintain the equipment and Tanks licenced for use by the Grower on the Project land for the purpose of Abalone farming over the term of the Project. The Manager has provided evidence that it holds the appropriate professional skills and credentials to provide the management services, on the Grower's behalf, to prepare and maintain an aquaculture farm in the Tanks licenced for use by the Grower.

103. The Manager is also engaged to harvest and sell, on the Grower's behalf, the Abalone grown in the Grower's Tanks.

104. 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.

105. 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 Abalone 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.

106. The pooling of the Abalone grown in the Grower's Tanks with the Abalone from the Tanks of other Growers is consistent with general aquaculture practices. Each Grower's proportionate share of the Net Proceeds of Sale of the pooled Abalone will reflect the number of the Grower's Tanks in relation to the total number of Tanks licenced to all the Growers.

107. The Manager's services are also consistent with general aquaculture practices. They are of the type ordinarily found in aquaculture ventures that would commonly be said to be businesses. While the size of the Grower's Abalone farm is relatively small, it is of a size and scale to allow it to be commercially viable.

108. The Grower's degree of control over the Manager as evidenced by the Licence and Management Agreement is sufficient. During the term of the Project, the Manager will provide the Grower with regular progress reports on the Grower's Tanks and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Manager in certain instances, such as cases of default or neglect.

109. The aquaculture 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 Grower's aquaculture activities in the Lakevista Abalone Aquaculture Project will constitute the carrying on of a business.

# PR Error! Reference source not found.2004/72

---

FOI status: **may be released**

Page 25 of 31

---

## **The Simplified Tax System**

### ***Division 328***

110. 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.

111. 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'.

## **Deductions for Equipment Licence Fees, Management Fees and Abalone Stocking Fees**

### ***Section 8-1***

112. Consideration of whether the fees payable under the Licence and Management Agreement 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.

113. The Equipment Licence Fee, Abalone Stocking Fee and Management Fee associated with the aquaculture activities will relate to the gaining of income from the Grower's business of aquaculture (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of Abalone) 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 fees is identifiable from the arrangement. The fees appear to be reasonable. There is no capital component of the fees. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

# PR Error! Reference source not found.2004/72

## **Prepayment provisions**

### ***Sections 82KZL to 82KZMF***

114. 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 management services) 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.

115. For this Project, only section 82KZL (an interpretative provision) and sections 82KZME and 82KZMF are relevant. Where 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). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF.

### ***Application of prepayment provisions to this Project***

116. Under the Arrangement to which this Product Ruling applies the fees payable under the Licence and Management Agreement are incurred annually. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF have no application to this Arrangement. A Grower who is an 'STS taxpayer' can, therefore, claim an immediate deduction for each of the relevant amounts in the income year in which the amount is paid. A Grower who is not an 'STS taxpayer' can claim an immediate deduction for each of the relevant amounts in the income year in which the fee is incurred.

117. However, sections 82KZME and 82KZMF may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Licence and Management Agreement or prepays interest under a loan agreement. Where such a prepayment is made these prepayment provisions will apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF.

118. As noted in the Ruling section above, Growers who prepay the fees are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 27 of 31

## **Deferral of losses from non-commercial business activities**

### ***Division 35***

119. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2005 to 30 June 2007** 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 2005 up to and including 30 June 2007:

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

120. 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**

121. The operation of section 82KL 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.

### **Part IVA – general tax avoidance provisions**

122. For Part IVA 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).

# PR Error! Reference source not found.2004/72

123. The Lakevista Abalone Aquaculture Project 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 at paragraph 82 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.

124. 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 Abalone. 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) it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

## Example

### Entitlement to GST input tax credits

125. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her viticulture business. Her manager is registered for GST and charges her a management fee payable every six months in advance. On 1 December 2003, Susan receives a valid tax invoice from her manager requesting payment of a management fee in advance, and also requesting payment for an improvement in the connection of electricity for her vineyard that she contracted him to carry out. The tax invoice includes the following details:

|   |          |
|---|----------|
| Management fee for period 1/1/2004 to 30/6/2004                 | \$4,400* |
| Carrying out of upgrade of power for your vineyard as quoted    | \$2,200* |
| Total due and payable by 1 January 2004 (includes GST of \$600) | \$6,600  |

\*Taxable supply

Susan pays the invoice by the due date and calculates her input tax credit on the management fee (to be claimed through her Business Activity Statement) as:

$$\frac{1}{11} \times \$4,400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4,400 less \$400, or \$4,000.

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 29 of 31

Similarly, Susan calculates her input tax credit on the connection of electricity as:

$$\frac{1}{11} \times \$2,200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2,200 less \$200, or \$2,000.

In preparing her income tax return for the year ended 30 June 2004, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4,000 (not \$4,400).

Susan is aware that the electricity upgrade is deductible 10% per year over a 10 year period. She calculates her deduction for the power upgrade as \$200 (one tenth of \$2,000 only, not one tenth of \$2,200).

## Detailed contents list

126. Below is a detailed contents list for this Product Ruling:

|  | <b>Paragraph</b> |
|--|------------------|
| <b>What this Product Ruling is about</b> | <b>1</b>         |
| Tax law(s)                               | 2                |
| Goods and Services Tax                   | 3                |
| Changes in the Law                       | 4                |
| Note to promoters and advisers           | 6                |
| Class of persons                         | 7                |
| Qualifications                           | 9                |
| <b>Date of effect</b>                    | <b>11</b>        |
| <b>Withdrawal</b>                        | <b>13</b>        |
| <b>Arrangement</b>                       | <b>14</b>        |
| Overview                                 | 19               |
| Aquaculture Licence Exemption            | 26               |
| Licence and Management Agreement         | 29               |
| <i>Equipment Licence</i>                 | 38               |
| <i>Abalone Stocking Services</i>         | 43               |
| <i>Management Services</i>               | 45               |
| <i>Selling and Marketing Services</i>    | 48               |
| <i>Harvesting and sale of Abalone</i>    | 50               |
| Fees                                     | 56               |
| Finance                                  | 66               |
| <b>Ruling</b>                            | <b>68</b>        |

# PR Error! Reference source not found.2004/72

|  |            |
|--|------------|
| Application of this Ruling   | 68         |
| Minimum subscription   | 69         |
| The Simplified Tax System ('STS')  | 70         |
| <i>Division 328</i>  | 70         |
| Qualification  | 71         |
| Assessable income  | 72         |
| <i>Sections 6-5 and 328-105</i>  | 72         |
| <i>Trading Stock</i>   | 75         |
| <i>Sections 70-35 and 70-45</i>  | 75         |
| <i>Section 328-285</i>   | 80         |
| Deductions for Equipment Licence Fees, Management Fees and Abalone Stocking Fees | 82         |
| <i>Sections 8-1 and 328-105</i>  | 82         |
| <i>Interest</i>  | 83         |
| Shares   | 84         |
| <i>Dividends relating to the shares</i>  | 86         |
| Division 35 – deferral of losses from non-commercial business activities         | 87         |
| <i>Section 35-55 – Commissioner's discretion</i>                                 | 87         |
| Sections 82KZME, 82KZMF, 82KL and Part IVA                                       | 88         |
| <b>Explanation</b>   | <b>89</b>  |
| Corporations Act 2001  | 89         |
| Is the Grower carrying on a business?  | 96         |
| The Simplified Tax System  | 110        |
| <i>Division 328</i>  | 110        |
| Deductions for Equipment Licence Fees, Management Fees and Abalone Stocking Fees | 112        |
| <i>Section 8-1</i>   | 112        |
| Prepayment provisions  | 114        |
| <i>Sections 82KZL to 82KZMF</i>  | 114        |
| <i>Application of the prepayment provisions to this Project</i>                  | 116        |
| Deferral of losses from non-commercial business activities                       | 119        |
| <i>Division 35</i>   | 119        |
| Section 82KL – recouped expenditure  | 121        |
| Part IVA – general tax avoidance provisions                                      | 122        |
| <b>Example</b>   | <b>125</b> |

# PR Error! Reference source not found.2004/72

FOI status: **may be released**

Page 31 of 31

|                                      |            |
|--------------------------------------|------------|
| Entitlement to GST input tax credits | 125        |
| <b>Detailed contents list</b>        | <b>126</b> |

---

## Commissioner of Taxation

9 June 2004

|  |   |
|--|---|
| <i>Previous draft:</i>                     | - ITAA 1997 17-5                          |
| Not previously issued as a draft           | - ITAA 1997 Div 27                        |
|  | - ITAA 1997 Div 35                        |
| <i>Related Rulings/Determinations:</i>     | - ITAA 1997 35-10                         |
| PR 1999/95; TD 93/34; TR 92/1;             | - ITAA 1997 35-10(2)                      |
| TR 92/20; TR 97/11; TR 97/16;              | - ITAA 1997 35-55                         |
| TR 98/22; TR 2000/8; TR 2001/14            | - ITAA 1997 35-55(1)(b)                   |
|  | - ITAA 1997 Div 70                        |
| <i>Subject references:</i>                 | - ITAA 1997 70-15                         |
| - carrying on a business                   | - ITAA 1997 70-35                         |
| - commencement of business                 | - ITAA 1997 70-45                         |
| - fee expenses                             | - ITAA 1997 Div 328                       |
| - interest expenses                        | - ITAA 1997 108-5                         |
| - management fees                          | - ITAA 1997 110-25(2)                     |
| - non commercial losses                    | - ITAA 1997 328-105                       |
| - producing assessable income              | - ITAA 1997 328-105(1)(a)                 |
| - product rulings                          | - ITAA 1997 328-285                       |
| - public rulings                           | - ITAA 1997 328-285(1)                    |
| - taxation administration                  | - ITAA 1997 Subdiv 328-F                  |
| - tax avoidance                            | - ITAA 1997 Subdiv 328-G                  |
| - tax benefits under tax avoidance schemes | - TAA 1953 Pt IVAAA                       |
|  | - Copyright Act 1968                      |
| - tax shelters                             | - Corporations Act 2001                   |
| - tax shelters project                     | - Corporations Act 2001 761G              |
| - trading stock                            | - Corporations Act 2001 761G(7)(a)        |
|  | - Corporations Act 2001 761G(7)(c)        |
|  | - Corporations Act 2001 761G(7)(d)        |
| <i>Legislative references:</i>             | - Corporations Act 2001 1012E             |
| - ITAA 1936 44(1)                          | - Corporations Act 2001 1012E(2)          |
| - ITAA 1936 82KL                           | - Corporations Act 2001 1012E(5)          |
| - ITAA 1936 Pt III Div 3 Subdiv H          | - Fish Resources Management Act 1994 7(2) |
| - ITAA 1936 82KZL                          | - Fish Resources Management Act 1994 Pt 8 |
| - ITAA 1936 82KZME                         |   |
| - ITAA 1936 82KZMF                         |   |
| - ITAA 1936 82KZMF(1)                      |   |
| - ITAA 1936 Pt IVA                         |   |
| - ITAA 1936 177A                           | <i>Case references:</i>                   |
| - ITAA 1936 177C                           | - Commissioner of Taxation v Lau          |
| - ITAA 1936 177D                           | (1984) 6 FCR 202; 84 ATC 4929;            |
| - ITAA 1936 177D(b)                        | (1984) 16 ATR 55                          |
| - ITAA 1997 6-5                            |   |
| - ITAA 1997 8-1                            |   |

---

### ATO References

NO: 2004/6015  
ISSN: 1441-1172