

PR 2005/46WA1 - Addendum to Withdrawal - Income tax: Australian Bight Abalone Project

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Addendum to Withdrawal

Product Ruling

Income tax: Australian Bight Abalone Project

This addendum amends Product Ruling PR 2005/46W to provide information about the consequences of a material difference having occurred in relation to the Project.

PR 2005/46W is amended as follows:

1. Preamble

Omit the preamble.

2. Paragraph 1

Omit the paragraph; substitute:

1. Product Ruling PR 2005/46 sets out the Commissioner's opinion on the tax consequences for persons participating in the Australian Bight Abalone Project ('the Project') by entering into a 'Management Agreement' and 'Aquaculture and Cage Rental Agreement' for the purpose of carrying on a commercial project involving growing and harvesting abalone for sale.

2. This Product Ruling has been withdrawn in accordance with subsection 358-20(1) of Schedule 1 to the *Taxation Administration Act 1953*, which states the Commissioner may withdraw a public ruling either wholly or to an extent. Where the scheme described in the ruling is materially different from the scheme actually carried out, the ruling does not have, and never had any binding effect on the Commissioner, as the scheme entered into is not the scheme ruled upon.

3. Provided that up until 30 June 2009 the Project was carried out as described in PR 2005/46, the events described below do not disturb the tax treatment of the Grower's previous outgoings, up until 30 June 2009, as set out in PR 2005/46.

All references are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise stated.

Events since 30 June 2009

4. Administrators were appointed for the Australian Bight Abalone Ltd (the Responsible Entity), Australian Bight Infrastructure Pty Ltd (the Marine Lease Owner), and Australian Bight Abalone Management Pty Ltd (the Operations Manager), (referred to as the ABA Group) on 1 July 2009. In a report provided to the Project's investors in August 2009, the Administrator indicated that the Project had limited viability. In a document titled 'Report to Creditors' dated 13 October 2009, the Administrators stated that at the time of their appointment, the ABA Group was without sufficient funds to continue its operations and appropriately maintain the abalone farms. The Administrators indicated that operation issues, abalone mortality rates, deferral of cage rental and management fees, and cost structure were internal factors that had a bearing on contributing to the adverse cash positions that developed during the 2009 income year.

5. On 21 October 2009 a Deed of Company Arrangement (DOCA) received the support of creditors of the ABA Group. The DOCA was in place from 21 October 2009 to 28 July 2010. During this time, the Growers Group (a group formed by Growers wishing to continue the various Managed Investment Schemes operated by the ABA Group) formed a company called Abalone Investments Ltd (AIL) which became shareholders of Australian Bight Abalone Ltd. All Growers were given a minimum number of shares in AIL. Those Growers that paid an amount equal to the outstanding RE and cage rental fees (which were previously deferred) up to the end of the 2010 income year received further shares in AIL. There was also an option for Growers to contribute more than the outstanding deferred fees and subscribe for extra shares.

6. The Growers Group altered the operation of the ABA Group by:

- a. aggregating all old lease stock into six sea cages for future growth,
- b. having prepared up to twelve cages on the old lease for new spat, and
- c. requested that deferred fees be now paid prior to harvest.

7. Receivers and Managers were appointed for:

- d. Abalone Investment Ltd (in Liquidation) on 21 September 2012; and
- e. the ABA Group on 25 October 2012.

8. These events resulted in the Project being carried out in a materially different manner from the Project described in PR 2005/46. Consequently, PR 2005/46 has no binding effect on the Commissioner after 30 June 2009, and the Commissioner has withdrawn PR 2005/46 as per paragraph 9 of PR 2005/46.

Reference to STS taxpayers

9. Product Ruling PR 2005/46 referred to STS taxpayers. From the income year ending 30 June 2008, the reference to 'STS taxpayers' in Division 328 was replaced with the term 'small business entity'.

Deferral of losses from non-commercial business activities

10. Division 35 applies only to individuals, alone or in partnership, who are carrying on a business activity. Under paragraph 84 of PR 2005/46, the Commissioner conditionally undertook to exercise his discretion under paragraph 35-55(1) (b) to allow losses incurred by Growers that are individuals to be offset against other assessable income in the income year in which the losses arise for each income year ending 30 June 2005 to 30 June 2008, 30 June 2010 and 30 June 2011.

11. Due to a change in the operation of the scheme from 1 July 2009 as per paragraphs 5, 6 and 7, the Project is no longer implemented in accordance with PR 2005/46, and as such the Commissioner no longer exercises his discretion under subsection 35-55(1) for the income year ending 30 June 2010 and subsequent income years.

12. As the Commissioner has not exercised his discretion for the income year ending 30 June 2009 and subsequent income years any losses from the individual Grower's business activity will have to be deferred under subsection 35-10(2) unless for each income year ending 30 June 2009 and subsequent income years:

- the business activity meets at least one of the four business activity tests in Division 35, and for income years ending 30 June 2010 and later, the individual also meets the income requirement test in subsection 35-10(2E); or
- the individual comes within the exception in subsection 35-10(4).

13. Amounts deferred under subsection 35-10(2) as outlined in paragraph 13 will only be deductible in a subsequent income year if the business activity that gave rise to this amount or a business activity 'of a similar kind' is carried on in that subsequent income year. If the business activity, or a business activity that is 'of a similar kind', is never carried on again, the entitlement to deduct the amount will be lost. For more information regarding 'business activity of a similar kind' see paragraphs 49 to 54 of Taxation Ruling TR 2001/14 *Income tax: Division 35 - non-commercial business losses*.

Costs after business activities cease

14. Amounts incurred after the business activity ceases may still be deductible as such deductions are not subject to Division 35.

15. A Grower who incurs capital expenditure after the business ceases will be entitled to claim a deduction under section 40-880 so long as the expenditure is related to the aquaculture business activity, as the Commissioner has exercised his discretion in section 35-55 in relation to one or more income years prior to the cessation of business activity (subsection 35-10(2A)).

RE Fee and Annual Management Fee

16. From 1 July 2009 to the cessation of the business activities, the RE Fee and Annual Management Fee are deductible in the income year in which they are incurred. However, Growers who are individuals are subject to Division 35 which may affect the deductibility of these fees. See paragraphs 11 to 14 above for further information. This applies to all RE Fees and Annual Management Fees, whether payable on subscription of AIL shares or such fees charged thereafter.

Cage Rental Fees

17. From 1 July 2009 to the cessation of the business activities, the Cage Rental Fee is deductible in the income year that it was incurred. However, Growers who are individuals are subject to Division 35 which may affect the deductibility of the fees. See paragraphs 11 to 14 above for further information.

CGT events relating to shares in AIL

18. As per paragraph 6, each Grower acquired shares in AIL. For shares received without any payment, the cost base and reduced cost base on these shares will not include an amount for consideration as no consideration was paid.
19. For shares received after payment of an amount equal to the outstanding deferred fees, the cost base and reduced cost base on these shares excludes amounts that the Grower has deducted, or can deduct, under other provisions outside of the CGT provisions, as per sections 110-45 and 110-55.
20. For shares acquired with contributions that exceed the payment of an amount equal to the outstanding deferred fees, the cost base and reduced cost base on these shares will include the amount paid that exceeds the amount equal to the outstanding deferred fees as per sections 110-25 and 110-55.
21. Where AIL is being wound up and in the course of winding up, the Receivers and Managers announce, in writing, that they have reasonable grounds to believe that there is no likelihood that shareholders will receive any further distributions, CGT event G3 will occur on AIL shares held by the Grower.
22. Where the Grower's shares in AIL are cancelled, or where AIL is deregistered under the Corporations Law, CGT event C2 will occur. CGT Event C2 may occur in relation to the shares if AIL is deregistered as per Taxation Determination TD 2000/7 *Income tax: capital gains: when does a CGT event happen to shares in a company, for the purposes of Part 3-1 and Part 3-3 of the Income Tax Assessment Act 1997, if the company is deregistered under the Corporations Law?*
23. In calculating capital gains or losses from CGT Event C2 or G3, the cost base and reduced cost base excludes amounts that the Grower has deducted, or can deduct, under other provisions outside of the CGT provisions as per sections 110-45 and 110-55.
24. Deductions deferred under the non-commercial business activities provisions (Division 35) do not form part of the cost base or reduced cost base of shares in AIL and therefore are not taken into account when calculating any capital gains or losses on the shares when CGT event C2 or G3 occurs.

CGT event C2 – termination of Project interest

25. Upon termination of the Grower's interest in the Project, CGT event C2 will occur. The termination will need to be in accordance with the Project Constitution and the Corporations Law.

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26. Deductions deferred under the non-commercial business activities provisions (Division 35) do not form part of the cost base or reduced cost base, and therefore are not taken into account when calculating any capital gains or losses on the termination of the Grower's interest in the Project.

This Addendum applies on and from 1 July 2009.

Commissioner of Taxation

15 May 2013

ATO references

NO: 1-4LTROPJ

ISSN: 1441-1172

ATOlaw topic: Income tax ~~ Product ~~ Aquaculture