



PR 2006/49 - Income tax: Australian South Sea Pearl Project 2006 (Retail)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *12 April 2006*



Product Ruling

Income tax: Australian South Sea Pearl Project 2006 (Retail)

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ⓘ This Ruling provides you with the following level of protection:
 This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.
 A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.
 If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

The Tax Office **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 and how the product fits an existing portfolio. 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 in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document.

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

Potential participants should be aware that the Tax Office will be undertaking review activities to confirm the scheme has been implemented as described below and to ensure that the participants in the scheme 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 entity(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.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant taxation provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Ruling this scheme is referred to as the 'Australian South Sea Pearl Project 2006 (Retail)' or simply as 'the Project'.

Relevant taxation provision(s)

2. The taxation provisions dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - section 8-1 of the ITAA 1997;
 - section 17-5 of the ITAA 1997;
 - section 25-5 of the ITAA 1997;
 - Division 27 of the ITAA 1997;
 - Division 35 of the ITAA 1997;
 - Subdivision 61-J of the ITAA 1997;
 - section 70-35 of the ITAA 1997;
 - section 70-45 of the ITAA 1997;
 - Division 328 of the ITAA 1997;
 - Division 328 of the *Income Tax (Transitional Provisions) Act 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.

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

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.

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 potential participants are fully informed of any legislative changes after the Ruling is issued.

Class of entities

7. The class of entities to whom this Ruling applies is the entities more specifically identified in the Ruling part of this Product Ruling and who enter into the scheme specified below on or after the date this Ruling is made. They will have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the scheme. In this Ruling, these entities are referred to as 'Growers'.

8. The class of entities to whom this Ruling applies does not include:

- entities who intend to terminate their involvement in the scheme prior to its completion or otherwise do not intend to derive assessable income from it;
- entities who have not been granted a Special Permit under paragraph 17(1)(e) of the *Fisheries Act 1988* (NT) ('the Fisheries Act') by 21 May 2006;
- entities who make the election to collect and market their own pearls;
- entities who participate in the Project through offers made other than through the Product Disclosure Statement ('PDS');
- entities who finance their participation in the Project through loans with entities associated with the Responsible Entity other than those described at paragraphs 57 to 59; or
- entities who are accepted to participate in the Project prior to the date this Ruling is made or after 29 April 2006.

Qualifications

9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 15 to 63.

10. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

12. This Ruling applies prospectively from 12 April 2006, 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.

13. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)). If a private ruling is inconsistent with a later Product Ruling, the earlier private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

14. This Product Ruling is withdrawn and ceases to have effect after 30 June 2009. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, which entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entities' involvement in the scheme.

Scheme

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

- Application for a Product Ruling as constituted by documents received on 17 January 2006 and additional correspondence received on 22 February 2006, 2 March 2006, 7 March 2006, 13 March 2006, 15 March 2006, 21 March 2006, 23 March 2006 and 24 March 2006;
- Draft Product Disclosure Statement for the Australian South Sea Pearl Project 2006 (Retail) received 23 March 2006;
- Draft Constitution for the Australian South Sea Pearl Project 2006 (Retail) received 1 March 2006;
- Draft Compliance Plan for the Australian South Sea Pearl Project 2006 (Retail) received 22 February 2006;
- **Draft Management Agreement** between Arafura Pearls Holdings Ltd ('Arafura') and the Grower received 23 March 2006;
- Site Agreement granting Arafura Pearls Pty Ltd the use of the Elizabeth Bay site for Pearling Operations dated 11 September 1997;
- Deed of Assignment of Lease between The Arnhem Land Aboriginal Trust and Arafura Pearls Holdings Ltd and the Northern Land Council for the use of the Pearl Farm site dated 30 June 2005; and
- **Finance Application and Terms of Loan** between Allco Managed Investments Limited as trustee of the Gateway Momentum Funding Trust No 1 ('Momentum Finance') and each Grower received 22 February 2006 and 2 March 2006.

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

16. The documents highlighted are those that Growers may enter into. For the purposes of describing the scheme 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 scheme. The effect of these agreements is summarised as follows.

17. 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 below.

Overview

18. The salient features of the Australian South Sea Pearl Project 2006 (Retail) are as follows:

Location	Elizabeth Bay, Northern Territory
Type of business to be carried on by each participant	Pearl Farming
Number of Minimum Interests Available	400
Minimum Interest	630 Oysters
Additional Interest	63 Oysters
Term of the Project	Approximately 6.5 years
Initial cost per Interest	\$15,400 (includes an amount for prepaid fees)
Ongoing costs	<ul style="list-style-type: none"> • Deferred Management Fees; • Sales and Marketing Fee; • Manager's Bonus; and • Insurance Premiums.

19. The Project is registered as a Managed Investment Scheme under the *Corporations Act 2001*. Arafura Pearls Holdings Ltd ('Arafura') has been issued with an Australian Financial Services Licence and will be the Responsible Entity for the Project.

20. An offer to participate in the scheme will be made through a PDS. The offer under the PDS is for 400 Minimum Interests. Growers must apply for a Minimum Interest before applying for Additional Interests.

21. There is no minimum subscription. The Responsible Entity may accept oversubscriptions subject to the availability of Oysters and Pearl Oyster Culture Licence Units and Pearl Oyster Fishery Licence Units.
22. The Project is to be conducted at Elizabeth Bay in the Northern Territory ('the site') and will be run in conjunction with the existing pearl farming operations on the site.
23. The Land Bases and Sea Areas used by the Pearl Farm are granted under a joint Site Agreement.
24. Growers entering into the Project will participate in the aquaculture industry as Growers of Oysters for the production and sale of South Sea Pearls.
25. Each Grower will enter into a Management Agreement with Arafura. Under the terms of the Management Agreement, the Grower appoints Arafura to provide access and services necessary for the cultivation, production and harvesting of Pearls.
26. Arafura holds the necessary Fishery Licences which authorise the entity to engage in the aquaculture of South Seas Pearl Oysters on the Elizabeth Bay site.

Fisheries Act and Fisheries Regulations

27. In accordance with the Fisheries Act, the Manager holds a Northern Territory Pearl Oyster Fishery Licence and a Pearl Oyster Culture Licence ('the Pearling Licences') which allows the Manager to aquaculture pearl oysters on the site.
28. Under the Fisheries Act the Manager holds a combination of 80 Permanent Oyster Culture/Fishery Licence Units and has access to 80 Temporary Oyster Culture/Fishery Licence Units. In accordance with the Fisheries Regulations 1992 (NT) the Manager can complete 1,000 first seeding operations for every Licence Unit held during the licensing year.
29. The Project will proceed on the basis that all Growers who enter into the Management Agreement will be granted a Special Permit under paragraph 17(1)(e) of the Fisheries Act by 21 May 2006. The Special Permit allows the Grower to do such things under the terms and conditions of the Management Agreement which would otherwise be unlawful without the Special Permit.
30. The Special Permit:
- expires on the 'Completion Date' specified in the Management Agreement;
 - does not apply to persons who have ceased to be a 'Grower' under the Management Agreement;
 - expires if the Pearling Licences held by Arafura Pearls Holdings Ltd are cancelled or not renewed;

- expires on the transfer of Arafura Pearls Holdings Ltd's Pearl Licensing Licences. Upon application a new permit may be issued provided that the prospective transferee has satisfied the Director of Fisheries that the operation of the Management Agreement with the Growers will continue in the same manner as the arrangement with Arafura Pearls Holdings Ltd; and
 - is suspended if at any time the Licences are suspended.
31. The Special Permit will impose the following conditions:
- a Grower shall only engage in aquaculture in accordance with the conditions specified in the Licences;
 - a Grower will only engage in pearl aquaculture in accordance with the terms and conditions of the Management Agreement;
 - a Grower shall not engage in fishing under the Licences;
 - a Grower requires Arafura Pearls Holdings Ltd to lodge an executed copy of the Management Agreement with the Director of Fisheries;
 - a Grower shall not vary the terms of the Management Agreement without the approval of the Director of Fisheries;
 - a Grower shall cause Arafura Pearls Holdings Ltd to notify the Director of Fisheries if the Management Agreement is terminated;
 - a Grower shall provide to the licensee pearling sales data for the completion of the Pearl Oyster Aquaculture Statistical Returns document; and
 - the permit may be varied or revoked by the Director of Fisheries.

Site Agreement

32. The Responsible Entity is a party to a joint site agreement for the lease of Land Bases and the grant of a licence to use specific Sea Areas at the Elizabeth Bay site for the purpose of carrying on Pearl Licensing Operations. The Site Agreement currently expires on 3 September 2018 with an option to renew for a further period of 10 years.

Management Agreement

33. Under the Management Agreement, the Responsible Entity agrees to provide access and services to the Grower for the purpose of cultivating and producing South Sea Pearls on the Grower's Pearl Farm. The Grower's Pearl Farm is defined as 'the Oysters, the Panels and that part of the Project Area that the Grower has the right to use for the purpose of cultivating Pearls under this Agreement'.

34. The Commencement Date of the Management Agreement is 29 April 2006. The Completion Date is the earlier of, the date of payment of the final distribution or proceeds from the final harvest, or 31 December 2012.

35. The Grower will be allocated the right to 630 Spat (juvenile hatchery-reared oysters) per Minimum Interest, and 63 Spat per Additional Interest at the Commencement Date. The Grower's Interest will be located on Panels, which will be identified by a reference number. The Grower has the right to access the Pearl Farm and utilise the Oysters and Panels for the purpose of cultivating, producing and harvesting Pearls.

36. Within 18 months of the Commencement Date, the Responsible Entity will replace any dead Spat with live Spat to ensure the Grower has at least 270 Spat for each Minimum Interest and 27 Spat for each Additional Interest.

Management Services

37. Under the Management Agreement, the Grower appoints the Responsible Entity to supervise and manage all commercial pearling activities on the Grower's Pearl Farm and to perform the Services listed in the Schedule.

38. Clause 3.1 of the Management Agreement states that Arafura will provide the Grower with exclusive access to the Panels which hold the Grower's Oysters and to clearly identify those Panels as those of the Grower. At the expiration or termination of the Project the Grower must yield up all surviving and dead Oysters, and the Panels over which they had exclusive use (Clause 6.3).

39. During the Initial Management Period, from 29 April 2006 to 30 June 2006, the Responsible Entity will provide Initial Management Services including:

- access for the Grower to the Grower's Pearl Farm;
- the right to utilise the benefit of the annual Quota;
- monitor Spat growth rates and health to determine the timing of selection and grading;
- transport Spat held on collectors on Long Lines from the ocean to the land based hatchery;
- establish selection criteria and supervise grading process;

- select, grade and clean the Spat;
- place the Spat and the Oysters in 48 pocket Panels;
- transport the Spat from the land based hatchery for placement on the Long Line System;
- establish and maintain management records and a specialised data base in respect of the Spat and the Oysters;
- operate and maintain vessels and sea based equipment;
- monitor the environment; and
- operate and maintain all land based equipment necessary for the operation of the Grower's Pearl Farm.

40. From 1 July 2006 until the Completion Date, the Responsible Entity will provide Ongoing Management Services, including:

- the right to utilise the benefit of the annual Quota;
- establish a marketing plan to enable the orderly marketing of the Pearls and co-ordinate the marketing process;
- co-ordinate production schedules;
- transfer Spat and Oysters into 15 and 8 pocket Panels;
- maintain management records in respect of the Spat and the Oysters;
- operate cleaning teams and cleaning vessels to assist with maintaining the Spat and the Oysters;
- clean the Spat and the Oysters by hand and by machine;
- assist with stock taking of the Spat and the Oysters;
- clean, maintain and position the Long Line System;
- clean and maintain the nets and the Panels;
- operate and maintain vessels and sea based equipment;
- operate and maintain all land based equipment necessary for the operation of the Pearl Farm;
- monitor the environment;
- attend to pre-seeding routines, seeding and post seeding routines including turning and x-raying;
- attend to Harvest of the Pearls;
- attend to the marketing of the Pearls;
- maintain records of production results;

- provide administration, management information and accounting services;
- provide management reports to the Grower on an annual basis;
- access for the Grower to the Pearl Farm;
- the right to access, grow out and otherwise utilize the Spat/Oysters;
- provide proper identification of the Grower's Oysters;
- provide access to equipment and infrastructure; and
- provide exclusive access to the Panels for the Growers.

Seeding

41. The Responsible Entity shall determine when to seed the Oysters. The timing of seeding is subject to Oyster health and seasonal conditions. However, seeding of the Oysters over the Term of the Project is expected to take place as follows:

- the First Seeding Operation approximately two years after the Commencement Date;
- subject to legislative requirements and operational capability, the seeding of Vomit Oysters within 12 months of the First Seeding Operation; and
- the Second Seeding Operation of those Oysters which were harvested and produced a commercially saleable pearl, at approximately four years after the Commencement Date.

42. When seeding, the Responsible Entity must comply with the Oyster Quota which allows the Responsible Entity to seed 200 Oysters per Minimum Interest held by the Grower per year, plus 20 Oysters per Additional Interest.

43. If the number of Oysters available to be seeded at the First Seeding Operation for all Growers in the Project exceeds the Quota limit, then the Responsible Entity must, in order to comply with the Quota limit, reduce the number of Oysters to be seeded on behalf of each Grower on a pro rata basis (Clause 16.3).

Harvesting and Sale

44. The Responsible Entity shall determine the times to harvest the Pearls in accordance with Good Industry Practice. The two main harvests will take place approximately four and six years after the Commencement Date. The harvest of the Vomit Oysters will take place approximately five years after the Commencement Date.

45. The Grower's Pearls will be pooled with the Pearls of other Growers who do not choose to market and sell their own Pearls (Non-Electing Growers). The Responsible Entity is appointed as the agent for marketing and selling of the Non-Electing Growers' Pearls.

46. The Grower's Harvest Interest is the number of Pearls that are produced and harvested from the Grower's Pearl Farm. The Proportional Interest in the Gross Pearl Sales is the proportion of the Grower's Harvest Interest bears to the Non-Electing Interest. The Non-Electing Interest means the aggregate of the number of Pearls produced and harvested on behalf of the Non-Electing Growers.

Fees

47. In consideration for the services performed and the rights granted under the terms of the Management Agreement, the following fees will be payable by the Grower:

- the Subscription Sum;
- Sales and Marketing Fee;
- Deferred Management Fees;
- Bonus; and
- Insurance Premiums.

Subscription Sum

48. The Subscription Sum of \$15,400 for each Minimum Interest and \$1,540 for each Additional Interest is payable by the Grower to Arafura pursuant to the PDS, on or before 15 June 2006. The Subscription Sum is consideration for Services in the following years:

Income Year	Amounts per Minimum Interest	Amounts per Additional Interest
2005-06 (Year 0)	\$11,550	\$1,155
2006-07 (Year 1)	\$1,540	\$154
2007-08 (Year 2)	\$2,310	\$231
Total	\$15,400	\$1,540

Deferred Management Fees

49. Deferred Management Fees are payable in consideration for the Responsible Entity performing Ongoing Management Services. This is additional to the prepaid amounts for Years 1 and 2, included in the Subscription Sum. The Deferred Management Fee is 26% of the Gross Pearl Sales. 'Gross Pearl Sales' means the gross amount received by the Responsible Entity from the sale of the Non-Electing Growers' Pearls.

50. The Deferred Management Fee is payable from the Grower's share of the Gross Pearl Sales at the conclusion of each Harvest (clause 17).

51. If, at the conclusion of the Project, there is a Deferred Management Fee Shortfall, the Responsible Entity will invoice the Grower for the amount of the shortfall. Growers may direct the Responsible Entity, in writing, to deduct the Deferred Management Fee Shortfall from the Grower's share of the Gross Pearl Sales in the Proceeds Fund.

52. The Deferred Management Fee Shortfall will be the difference between the sum of the Deferred Management Fees and the Sales and Marketing Fees paid from the Gross Pearl Sales and the sum of the following amounts:

Income Year	Amounts per Minimum Interest	Amounts per Additional Interest
2008-09 (Year 3)	\$2,695.00	\$269.50
2009-10 (Year 4)	\$3,190.00	\$319.00
2010-11 (Year 5)	\$1,815.00	\$181.50
2011-12 (Year 6)	\$1,595.00	\$159.50
Total	\$9,295.00	\$929.50

Sales and Marketing Fee

53. In consideration for sales and marketing services performed as part of the Ongoing Management Services the Grower will pay the Responsible Entity a Sales and Marketing Fee based on 7.5% of the Gross Pearl Sales. The Sales and Marketing Fee is payable at the conclusion of each Harvest from the Grower's share of the Gross Pearl Sales in the Proceeds Fund.

Bonus

54. At the end of the final harvest the Responsible Entity will be entitled to a Bonus equal to 14% of the total net return payable to each Grower where the internal rate of return exceeds 15% for each Interest (Clause 18). The Bonus is paid from the Grower's share of the Gross Pearl Sales in the Proceeds Fund.

Insurance Premiums

55. The Responsible Entity will seek to arrange insurance against the destruction or damage of the Oysters by cyclone or other natural disaster or environmental pollution. The Grower will bear the costs of any such insurance.

Finance

56. Growers can fund their investment in the Project themselves, borrow from Momentum Finance, or borrow from an independent lender.

57. Finance will be provided by Momentum Finance on a full recourse commercial basis under the following finance arrangements:

- Facility 1 – payment of the Subscription Sum, including GST, by instalments of principal and interest over 3 years payable monthly in arrears;
- Facility 2 – payment of the Subscription Sum, including GST, by 1 year interest only plus instalments of principal and interest for 4 years payable monthly in arrears; or
- Facility 3 – payment of the Subscription Sum, including GST, by instalments of principal and interest for 5 years payable monthly in arrears.

58. Facility 1 is subject to a 10.5% per annum interest rate and Facilities 2 and 3 are subject to an interest rate of 10.75% per annum, based on current interest rates. The maximum amount of finance that can be received by any Grower is \$250,000. Interest will accrue on the unpaid balance of the loan on the date each scheduled payment is due and is charged monthly in arrears. An Application Fee of \$250 plus 0.5% of the loan amount is payable on application for all three Facilities and this may be added to the loan amount.

59. The loans will be secured by a registered charge over the Grower's interest in the Project. Normal debt recovery procedures, including legal action will be taken in the case of defaulting borrowers.

60. This Ruling will not apply to Growers if the Responsible Entity accepts their Application subject to finance approval by Momentum Finance or any other lending institution and the full amount payable at the time of Application is not paid to the Responsible Entity by 30 June 2006. Where an application is accepted subject to finance approval by a lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by 30 June 2006.

61. Growers cannot rely on this Ruling if they enter into a finance arrangement with Momentum Finance that differs in terms from those outlined above.

62. 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 of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 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

63. Subject to paragraph 8, this Ruling only applies to a Grower who is accepted to participate in the Project on or after the date of this Ruling and on or before 29 April 2006 and who has executed a Management Agreement by this date.

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

65. A Grower is not entitled to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced.

The Simplified Tax System (STS)

Division 328

66. To be an 'STS' taxpayer a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328 of the ITAA 1997). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different under the STS where a Grower who was an 'STS taxpayer' prior to the 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

67. For such Growers only, a reference in this Ruling to an amount being deductible when 'incurred' will mean that the amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

25% entrepreneurs tax offset

Subdivision 61-J

68. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for a tax offset of up to 25% of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

Assessable income

Section 6-5

69. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on these proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

70. The Grower recognises ordinary income from carrying on the business of pearl farming at the time that income is derived.

Trading stock

Sections 70-35 and 70-45

71. A Grower who is not an 'STS taxpayer' may, in some years, hold harvested pearls that will constitute trading stock on hand. 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.

72. 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.

73. 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 Pearls became trading stock of the Grower.

Section 328-285

74. A Grower who is an 'STS taxpayer' may, in some years, hold harvested pearls that will constitute trading stock on hand. Where, for such a Grower, for an income year, the difference between the value of all their trading stock at the start of an income year and a reasonable estimate of it at the end of the income year, is less than \$5,000, they do not have to account for that difference under the ordinary trading stock rules in Division 70 (subsection 328-285(1)).

75. Alternatively, a Grower who is an 'STS taxpayer' may instead choose to account for trading stock in an income year under the provisions of Division 70 (subsection 328-285(2)).

Deductions for Management Fees, Sales and Marketing Fees, Insurance Premiums, Interest and Borrowings**Sections 8-1 and 25-5**

76. A Grower may claim tax deductions per Minimum Interest under sections 8-1 and 25-25 for the revenue expenses as follows:

Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Management Fees	\$11,550 See Notes (i) and (ii)	\$1,925 See Notes (i) and (ii)	\$1,925 See Notes (i) and (ii)
Insurance premiums	As incurred See Notes (i) and (iv)	As incurred See Notes (i) and (iv)	As incurred See Notes (i) and (iv)
Interest payable to Momentum Finance	As incurred See Note (v)	As incurred See Note (v)	As incurred See Note (v)
Borrowing costs for loans with Momentum Finance	Must be calculated See Note (vi)	Must be calculated See Note (vi)	Must be calculated See Note (vi)

Deductions available for each Additional Interest held by a Grower are as follows:

Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Management Fees	\$1,155 See Notes (i) and (iii)	\$192.50 See Notes (i) and (iii)	\$192.50 See Notes (i) and (iii)
Insurance premiums	As incurred See Notes (i) and (iv)	As incurred. See Notes (i) and (iv)	As incurred. See Notes (i) and (iv)
Interest payable to Momentum Finance	As incurred See Note (v)	As incurred See Note (v)	As incurred See Note (v)
Borrowing costs for loans with Momentum Finance	Must be calculated See Note (vi)	Must be calculated See Note (vi)	Must be calculated See Note (vi)

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.
- (ii) The Subscription Sum of \$15,400 for a Minimum Interest consists of an Initial Management Fee totalling \$11,550 and a prepayment of the Management Fees for the income years ending 30 June 2007 and 2008 totalling \$3,850. The Subscription Sum must be paid by 15 June 2006. The Initial Management Fee of \$11,550 is for Initial Management Services to be provided in the Initial Management Period and is deductible in the income year ending 30 June 2006.

However, the amount of \$3,850 prepaid in respect of the Ongoing Management is **NOT** deductible in the year in which it is incurred. Deductions for this amount **must** be determined using the formula in subsection 82KZMF(1) of the ITAA 1936 (see paragraphs 100 to 110). This section operates to apportion expenditure over the eligible service period or ten years, whichever is the lesser. The 'eligible service period' commences on 1 July 2006 and ends on 30 June 2008. Accordingly, an amount of \$1,925 is deductible in each of the years ending 30 June 2007 and 30 June 2008.

- (iii) The Subscription Sum of \$1,540 for each Additional Interest consists of Initial Management Fees totalling \$1,155 and a prepayment of the Management Fees for the income years ending 30 June 2007 and 2008 totalling \$385. The Subscription Sum must be paid by 15 June 2006. The Initial Management Fees of \$1,155 are for Initial Management Services to be provided in the Initial Management Period and are deductible in the income year ending 30 June 2006.

However, the amount of \$385 prepaid in respect of the Ongoing Management Services is **NOT** deductible in the year in which it is incurred. Deductions for this amount must be determined using the formula in subsection 82KZMF(1) of the ITAA 1936 (see paragraphs 100 to 110). This section operates to apportion expenditure over the eligible service period or ten years, whichever is the lesser. The 'eligible service period' commences on 1 July 2006 and ends on 30 June 2008. Accordingly, an amount of \$192.50 is deductible in each of the years ending 30 June 2007 and 30 June 2008.

- (iv) Where a Grower pays Insurance Premiums in accordance with the Management Agreement those fees are deductible in full in the year that they are incurred.
- (v) Growers who enter into a loan agreement with Momentum Finance (as described at paragraphs 57 to 59) will incur interest monthly in arrears. The interest is deductible in the year in which it is incurred. The deductibility or otherwise of interest arising from a loan agreement entered into with financiers other than Momentum Finance is outside the scope of this Ruling. Growers who borrow from lenders other than Momentum Finance may request a private ruling on the deductibility of the interest incurred. All Growers who finance their participation in the Project should read the discussion of the prepayment rules in paragraphs 100 to 110 as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

- (vi) The Loan Application fee payable to Momentum Finance is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing money that is used or is to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Momentum Finance is outside the scope of this Ruling.

Division 35 – deferral of losses from non-commercial business activities

Section 35-55 – Commissioner’s discretion

77. A Grower who is an individual accepted into the Project may have losses arising from their participation in the Project 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 the income years ending **30 June 2006 to 30 June 2010**. 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 and 82KL and Part IVA

78. For a Grower who participates in the Project and incurs expenditure as required by the 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;
- section 82KL of the does not apply to deny the deductions otherwise allowable; and
- relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Appendix 1 – Explanation

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

Is the Grower carrying on a business?

79. For the amounts set out in the Tables at paragraph 76 to constitute allowable deductions the Grower’s aquaculture activities as a participant in the Australian South Sea Pearl Project 2006 (Retail) must amount to the carrying on of a business of primary production.

80. Where there is a business, or a future business, the gross proceeds from the sale of the Pearls 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.

81. For schemes such as that of the Australian South Sea Pearl Project 2006 (Retail), 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 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.

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

- the Grower has the right to exclusively use the identifiable Panels on which allocated Oysters are cultivated and grown;
- the Grower has a right to harvest and sell the Pearls from those Oysters;
- the aquaculture activities are carried out on the Grower’s behalf;
- the aquaculture activities of the Grower are typical of those associated with a Pearl Farming business; and
- the weight and influence of general indicators point to the carrying on of a business.

83. In this Project, each Grower enters into a Management Agreement. Under the Management Agreement each individual Grower will have the right to access the Grower’s Pearl Farm and have exclusive use of the Panels on which the Oysters are grown for the Term of the Project. The Panels will be clearly identified as the Panels of the Grower. This right is granted subject to the requirement that the Grower complies with all relevant Licences, laws and regulations relating to the cultivation, production and harvesting of Pearls.

84. The Grower will own the Pearls produced by the Oysters on the Grower's Panels. The Grower has the right to transfer the Oysters or Spat to a new Manager where Arafura Pearls Holdings Ltd is removed in accordance with clause 27.2 of the Management Agreement. The transfer to a new Manager must be approved by the Director of Fisheries in accordance with Clause 8 of the *Pearl Oyster Culture Industry Management Plan*.

85. The Responsible Entity is engaged by the Grower to manage and administer the Grower's Pearl Farm. Arafura currently operates a Pearl Oyster Hatchery and Pearl Farm and has provided evidence that it holds the appropriate experience and necessary resources to provide the management services, on the Grower's behalf, to prepare and operate the Grower's Pearl Farm.

86. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the Pearls produced from the Oysters on the Grower's Panels.

87. 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.

88. 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 Pearls 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.

89. The pooling of Pearls from the Oysters grown on the Grower's Pearl Farm with the Pearls of other Non-Electing Growers is consistent with general aquaculture. Each Grower's Proportionate Interest of the sale proceeds of the pooled Pearls will reflect the proportion of the Pearls contributed from the Grower's Pearl Farm.

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

91. The Grower's degree of control over the Responsible Entity as evidenced by the Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, the Responsible Entity will provide the Grower with regular progress reports on the Grower's Pearl Farm and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Responsible Entity in certain instances, such as cases of default or neglect.

92. 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 Australian South Sea Pearl Project 2006 (Retail) will constitute the carrying on of a business.

The Simplified Tax System

Division 328

93. 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.

94. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). 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'.

Deductibility of Management Fees, Insurance Premiums and Interest

Section 8-1

95. Consideration of whether the Initial Management Fees and Insurance Premiums 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.

96. The Management Fees and Insurance Premiums associated with the aquaculture activities will relate to the gaining of income from the Grower's business of Pearl Farming (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of Pearls) 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 Management Fees or Insurance Premiums is identifiable from the scheme. There is no capital component of the Management Fee. The fee appears to be reasonable. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Interest deductibility

Section 8-1

(i) Growers who use Momentum Finance as the finance provider

97. Some Growers may finance their participation in the Project through a loan facility with Momentum Finance. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of management fees and insurance premiums.

98. The interest incurred for the year ended 30 June 2006 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation, production and harvesting of pearls – that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

(ii) Growers who DO NOT use Momentum Finance as the finance provider

99. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than Momentum Finance is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

Prepayment provisions

100. 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 or the leasing of land) 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.

101. For this Project, only section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 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) of the ITAA 1936. These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

Sections 82KZME and 82KZMF

102. Other than expenditure deductible under section 82KZMG of the ITAA 1936, if the requirements of subsections 82KZME(2) and (3) of the ITAA 1936 are met, the formula in subsection 82KZMF(1) of the ITAA 1936 (see below) will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

103. The requirements of subsection 82KZME(3) of the ITAA 1936 will be met where the agreement (or scheme) has the following characteristics:

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year;
- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the scheme are managed by someone other than the taxpayer; and
- either:
 - (a) there is more than one participant in the agreement in the same capacity as the taxpayer; or

- (b) the person who promotes, arranges or manages the agreement (or an associate of that person) promotes similar agreements for other taxpayers.

104. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) of the ITAA 1936 is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1) of the ITAA 1936. However, for the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the scheme that is less than \$1,000. Such expenditure is immediately deductible.

105. Where the requirements of section 82KZME of the ITAA 1936 are met, section 82KZMF of the ITAA 1936 applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

Expenditure × $\frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$

106. In the formula 'eligible service period' (defined in subsection 82KZL(1) of the ITAA 1936) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

Application of the prepayment provisions to this Project

107. The expenditure incurred by a Grower in the Project for the Management Fees meets the requirements of subsections 82KZME(1) and (2) of the ITAA 1936 and is incurred under an 'agreement' as described in subsection 82KZME(3). Therefore, unless one of the exceptions to section 82KZME applies, the amount and timing of tax deductions for those fees are determined under section 82KZMF of the ITAA 1936.

108. The prepaid Management Fees incurred by Growers do not fall within any of the 5 exceptions to section 82KZME of the ITAA 1936. Therefore, the deduction for each year is determined using the formula in subsection 82KZMF(1) of the ITAA 1936. Section 82KZMF will apportion the deduction for prepaid Management Fees over the period that the services for which the prepayment is made are provided.

109. Under the Scheme to which this Product Ruling applies interest payable to Momentum Finance is incurred and payable monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to Growers who enter into a loan agreement with Momentum Finance (as described in paragraphs 57 to 59).

110. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays interest under a loan agreement (including a loan agreement with lenders other than Momentum Finance). Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

Division 35 – deferral of losses from non-commercial business activities

Section 35-55 – exercise of Commissioner's discretion

111. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ending **30 June 2006 to 30 June 2010** 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 2006 up to and including 30 June 2010:

- 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 pearl farming 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.

112. 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

113. The operation of section 82KL of the ITAA 1936 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 of the ITAA 1997.

Part IVA – general tax avoidance provisions

114. For Part IVA of the ITAA 1936 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).

115. The Australian South Sea Pearl Project 2006 (Retail) 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 76 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.

116. 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 Pearls. 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) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/11; TR 98/22; TR 2000/8;
TR 2001/14; TR 2002/6;
TR 2002/11

Subject references:

- borrowing expenses
- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- tax avoidance
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZME
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- ITAA 1997 Div 35
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