CR 2005/9 - Income tax: research and development: membership funding for the Australian Coal Association Research Program

Class Ruling

Income tax: research and development: membership funding for the Australian Coal Association Research Program

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Preamble

*The number, subject heading, **What this Class 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**. CR 2001/1 explains Class 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.*

What this Class 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.

Tax law(s)

2. The tax laws dealt with in this Ruling are:

- subsection 73B(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 73B(9) of the ITAA 1936;
- subsection 73B(10) of the ITAA 1936; and
- subsection 73B(13) of the ITAA 1936.

Class of persons

3. The class of persons to which this Ruling applies are 'eligible companies', as defined by subsection 73B(1) of the ITAA 1936 who are liable for levy contributions under the Australian Coal Association Research Program (ACARP), and who are registered for each of the relevant years of income with the Industry Research and Development Board, in accordance with subsection 73B(10) of the ITAA 1936. In this Ruling such companies are referred to as 'contributing companies'.

Qualifications

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

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 10 to 40.

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

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- this Ruling may be withdrawn or modified.

Date of effect

8. This Ruling applies to the class of persons who participate in the arrangement during the income years ended 30 June 2006 through to 30 June 2010. This Ruling continues to apply, in respect of the tax laws ruled upon until 30 June 2010. However, this 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). Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by *Gazette*;
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 30 June 2010. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into and carried out the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into 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

Description of the Arrangement

10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- the application for a class ruling and accompanying attachments dated 30 April 2004;
- letter to the ATO from the applicant dated 23 June 2004 and accompanying attachments;
- letter to the ATO from the applicant dated 16 August 2004 and accompanying attachments;
- letter to the ATO from the applicant dated 11 November 2004 and accompanying attachments;
- letter to the ATO from the applicant dated 10 December 2004 and accompanying attachments;
- letter to the ATO from the applicant dated 30 December 2004;
- letter to the ATO from the applicant dated 11 February 2005;
- letter to the ATO from the applicant dated 23 February 2005;
- email from the applicant to the ATO dated 16 January 2005;
- revised Memorandum and Articles of Association of Australian Coal Research Limited dated 28 May 2001;
- letter to Australian Coal Research Limited from the Department of Industry, Technology and Regional Development dated 1 November 1993;

- letter to Australian Research Administration Pty Ltd from the Department of Industry Science and Tourism dated 10 May 2000; and
- letter to the Department of Industry, Science and Resources from Australian Research Administration Pty Ltd dated 14 April 2000.

Memorandum of Understanding

11. The Australian Coal Association Research Program (ACARP) was formed in accordance with a Memorandum of Understanding (MOU) between the Australian Coal Association (ACA) and the Commonwealth Government.

12. The Memorandum of Understanding (MOU) between the chairman of ACA and the Minister for Primary Industries and Energy was first signed on 22 January 1992. The arrangement set out in the MOU was subsequently extended until 30 June 2005. The Minister for Industry, Tourism and Resources has agreed to a further extension of the arrangement in the MOU from the income year ended 30 June 2006 to 30 June 2010.

13. The purpose of the MOU is to provide for the establishment of an industry research arrangement to replace the operations of the Coal Research Trust Account (CRTA). The arrangement is designed to provide for collective and integrated research on coal for the purpose of:

- providing strategic leadership to industry R&D and to act as a catalyst to stimulate R&D interest within the coal and associated industries;
- improving the management and application of coal research in Australia;
- ensuring the more effective use of Australia's black coal resources;
- increasing the economic, environmental, safety and social benefits to the industry and wider community; and
- promoting the competitiveness, sustainable use and management of Australia's coal resources.

14. In pursuit of the objectives in paragraph 13, the MOU explains that the ACA undertakes to allocate research funds so raised, including interest earned, exclusively for the administration and execution of coal research and development activities.

Australian Coal Research Limited

15. It was agreed that ACA would establish a legal entity, Australian Coal Research Limited (ACR) to carry out all ACARP Management (including financial and statutory responsibilities) on its behalf.

16. Annexure B of ACR's Memorandum and Articles of Association detail the main, amended, objects of the company, many of which mirror the purpose of the arrangement detailed in the MOU (see paragraph 13).

17. The board of ACR comprises senior industry personnel. Under the ACR constitution all coal industry nominated members of the ACA Executive are directors of ACR. In addition, ACR also has an executive director. All coal industry nominated members of the ACA Executive represent contributing companies.

18. ACR is an income tax exempt entity.

19. ACR is a registered research agency in relation to the categories of research and development activities that are carried out.

20. ACR is not an 'associate' as defined in section 26AAB of the ITAA 1936 of any contributing companies.

Deed of Agreement between ACR and each operator of coal producing assets (Deed of Agreement)

21. Agency clauses are present in the agreement, which demonstrate that in some circumstances, the operator of coal producing assets is entering into the Deed of Agreement on behalf of each of the mine owners/owners of the coal producing assets (contributing companies).

22. In consideration for the promise by ACR that the contributions shall be applied exclusively in respect of research and development as defined in the agreement, that the results of the research and development will be made available to the operator to the extent possible and other covenants by ACR, the operator agrees to pay the contributions to ACR.

23. Contributions are calculated at the rate of $0.05 per tonne of coal produced (sold) by the operator during the term of the agreement, on a monthly basis. All contributions paid to ACR become property of ACR.

24. The Deed of Agreement defines 'research and development' to mean scientific, technical or economic research in connection with the exploration, mining and beneficiation of coal or products derived from coal, including the demonstration and development thereof, and includes:

(a) the training of persons for the purpose of any such research and development;

(b) the publication of reports, periodicals, books and papers in connection with such research and development;

(c) the dissemination of information and advice in connection with scientific, technical or economic matters related to exploration, mining and beneficiation of coal or products derived from coal;

(d) any matters incidental or relating to a matter referred to in this definition; and

(e) any matters incidental or relating to the obligations of ACR under this Deed of Agreement including costs incurred in collection of Contributions.

25. The Deed of Agreement and the manner in which the program is executed provide rights of coal producers in relation to the research and development to be undertaken, such that control of the research and development resides with the contributing companies.

26. All black coal producers in Australia have agreed to make contributions to ACR for the period 1 July 2005 to 30 June 2010.

ACARP's funding and operations

27. Levies paid to ACR by contributing companies that are directed towards research and development activities, as defined in subsection 73B(1) of the ITAA 1936, constitute 'expenditure incurred' for the purposes of the definition of 'contracted expenditure' in subsection 73B(1) of the ITAA 1936.

28. All levy contributions are used for research and development activities, as defined in subsection 73B(1) of the ITAA 1936. Levies fund projects carried out under Fundamental, Applied and Commissioned Study Research Agreements and projects carried out under agreements for collaborative Cooperative Research Centre (CRC) and a Centre arrangement in which ACR is a party. Other activities are funded by interest earned on funds held for future commitments and royalties.

29. It is rare that any projects are completely funded by ACARP. These projects are carried out on a collaborative basis with cash and in kind contributions made by other parties (including researchers and other CRC participants).

30. Benefits received by contributing companies and parties to these agreements from research and development projects and hence their interest in the results of the projects concerned are commensurate with the contributions made.

31. A report was prepared by ACIL Tasman in 2003 addressing the question raised by ACARP:

> …is it possible to conclude and demonstrate with confidence that ACARP's performance since 1992 has delivered to the Australian

> Coal Industry benefits in excess of its costs – and if so can we conclude that the benefits are in fact well in excess of costs.

32. ACIL Tasman determined in its analysis that ACARP's performance since 1992 has delivered benefits to the Australian Coal Industry from 1992-2003 well in excess of its costs. In making this determination, ACIL Tasman calculated (in present value terms) that industry investment in ACARP was $227 million compared to benefits (net of non-ACARP industry costs), of 243 million from eight projects out of almost 700 ACARP funded projects since 1992.

33. Where income is derived from these agreements from commercialisation of the resultant intellectual property, that portion which is funded by ACARP is derived by ACR. In the past, there has been negligible income derived by ACR from this source and the expectation is that this will continue in the income years that this Class Ruling relates to.

34. Given the limited income derived by ACR from its R&D agreements, it is clear that the significant net benefits which ACIL Tasman identified as accruing to coal industry members were derived as a result of the knowledge benefit passed to ACARP members by ACR. Thus the dominant benefit which has been gained in the past and is expected to continue to be gained in the income years this Ruling relates to is the acquisition of knowledge by the contributing companies.

35. ACARP provides outcomes with general solutions to all aspects of concern to the Australian black coal industry as specified in the MOU, being the agreed purpose of the research program. All contributing companies are capable by virtue of the relationship between those anticipated results and the nature of their business, of utilising the results of the research and development activities associated with each project directly in connection with a business that the company carries on.

Fundamental, Applied and Commissioned Study Research Agreements

36. ACR enters into the following types of agreements with researchers:

- Fundamental Research Agreements;
- Applied Research Agreements; and
- Commissioned Study Research Agreements.

37. Between 1 July 2000 and the end of May 2004, ACARP commenced 261 projects under the above mentioned agreement types. Of these projects, 196 were undertaken by Fundamental Research Agreements, 40 under Applied Research Agreements and 10 under Commissioned Study Research Agreements. The remaining 15 projects were not agreed to under formal agreements, but rather

an exchange of letters or some other approach. There is no evidence to suggest that these proportions will materially change in the future.

38. Common to all three formal agreements are the following conditions:

- it is agreed by ACR and the researcher that a critical objective of the project is to make the results and outcomes of the research readily available to ACR on behalf of the Australian coal industry; and
- the researcher must submit a final report to ACR (describing all work done in connection with the project). The researcher agrees that ACR may publish the final report.

39. These agreements are entered into for the purpose of generating knowledge benefits for contributing companies, and therefore this is the dominant benefit arising out of these agreements.

ACARP's participation in Cooperative Research Centres and other Centres

40. In accordance with the MOU and the Deed of Agreement, ACR considers that it is appropriate to apply a minor proportion of its funds towards participation in two Commonwealth Cooperative Research Centres and a State Government centre. Contributing companies become entitled to receive reports and other publications as a result.

Ruling

41. For the years of income ended 30 June 2006 to 2010 inclusive (or equivalent substituted accounting periods):

(a) contributing companies can claim a deduction under subsection 73B(13) of the ITAA 1936 for levies/contributions paid to ACR and applied in return for the performance of research and development activities (as defined in subsection 73B(1) of the ITAA 1936), on their behalf; and

(b) subsection 73B(9) of the ITAA 1936 will not prevent this deduction from being allowable.

42. No deduction is allowable under subsection 73B(13) for any proportion of the levies/contributions applied to the performance of activities that do not come within the definition of 'research and development activities' (as defined in subsection 73B(1) of the ITAA 1936).

Explanation

Subsection 73B(13) of the ITAA 1936 – contracted expenditure

43. Subsection 73B(13) of the ITAA 1936 allows a deduction if an eligible company incurs contracted expenditure during a year of income (subject to any other relevant requirements in section 73B of the ITAA 1936 being satisfied). In accordance with subsection 73B(13), the deduction an eligible company can claim is calculated by multiplying the expenditure incurred by 1.25 in each year of income.

44. Hence, a deduction will be available in a year of income under subsection 73B(13) if:

- an eligible company;
- incurs 'contracted expenditure' (as defined in the ITAA 1936) during a year of income; and
- the deduction is not prevented by other provisions of section 73B of the ITAA 1936.

Eligible company

45. An eligible company means a body corporate incorporated under a law of the Commonwealth or a State or Territory (subsection 73B(1) of the ITAA 1936.

46. The class of persons to which this Ruling applies (contributing companies) are eligible companies within the meaning of subsection 73B(1) of the ITAA 1936. Therefore this requirement is satisfied for the class of persons to which this Ruling applies.

Incurs 'contracted expenditure'

47. In accordance with the Deed of Agreement, contributing companies incur expenditure, in the form of levies. For the purposes of subsection 73B(1) of the ITAA 1936, to be 'contracted expenditure' this expenditure must be:

incurred by an eligible company:

(a) on or after 1 July 1985 – to the Coal Research Trust Account;

(b) during the period commencing on 1 July 1985 and ending on 30 June 1988 – to an approved research institute; or

(c) on or after 20 November 1987 – to a body (not being an associate of the eligible company) that was, or is taken to have been, registered under section 39F of the *Industry Research and Development Act 1986* when the expenditure was incurred as a research agency in respect of the class of research and development activities on which the expenditure was incurred;

in consideration for that Trust Account funding the performance of, or that institute or agency performing, on or after the date concerned, or during the period concerned, as the case may be, research and development activities on behalf of the company.

48. As this Class Ruling request relates to the income years ended 30 June 2006 to 30 June 2010, paragraph (c) is the relevant paragraph for consideration. Note that paragraph (a) is not relevant, despite the fact that the predecessor to the ACARP program involved payments to the Coal Research Trust Account.

49. ACR is registered as a research agency under section 39F of the *Industry Research and Development Act 1986* in relation to a number of identified areas. Levies are used to fund activities within those categories.

50. The definition of 'contracted expenditure in subsection 73B(1) of the ITAA 1936 requires that the agency is 'performing' research and development activities on behalf of the company. In this context 'performing' covers cases where the actual research and development activities are conducted, on a subcontract basis, by other persons, as is the case with ACARP. Hence, the issue remains, whether the activities are research and development activities that are carried out on behalf of the contributing companies.

51. In the Deed of Agreement ACR promises that contributions will be applied exclusively in respect of 'research and development'. It is noted that the definition of 'research and development' in the Deed of Agreement between ACR and the operator of coal producing assets is different to the definition of 'research and development activities' in subsection 73B(1) of the ITAA 1936. However, the applicant advises that levies are directed only to those activities meeting the requirements of the definition found in subsection 73B(1) of the ITAA 1936. Activities outside of this definition are supported by non-levy funds. This Class Ruling is made on the basis that levies are used to fund research and development activities as defined in subsection 73B(1).

52. Further, ACR is not an associate (as defined in section 26AAB of the ITAA 1936) of those eligible companies that will be paying levies.

53. Hence, the levies incurred by contributing companies will meet the requirements of paragraph (c) of the definition of contracted expenditure. However, the definition also requires that the relevant research and development activities are undertaken 'on behalf of' the company (in this case the 'company' refers to the contributing companies). Expenditure will not be 'contracted expenditure' unless this additional requirement is satisfied.

54. Whether research and development activities are undertaken 'on behalf of' the contributing companies is considered below (see discussion regarding 'on behalf of').

55. Given that there is no relevant relationship, partnership or joint receipt of income between contributing companies, subsections 73B(3A) and 73B(3B) of the ITAA 1936 do not apply.

Is the deduction otherwise precluded under section 73B of the ITAA 1936?

56. As mentioned in previous paragraphs, a deduction is only available under subsection 73B(13) of the ITAA 1936 if all other relevant requirements of section 73B of the ITAA 1936 are satisfied. Two subsections that must be considered are:

- subsection 73B(9) of the ITAA 1936; and
- subsection 73B(10) of the ITAA 1936.[1]

Subsection 73B(9) of the ITAA 1936 – 'on behalf of another'

57. Subsection 73B(9) of the ITAA 1936 provides that a deduction is not allowable under section 73B in respect of expenditure incurred by an eligible company for the purpose of carrying on research and development activities 'on behalf of any other person'. Expenditure of that kind is disregarded.

58. There is a link between subsection 73B(9) and the requirement set out in the definition of contracted expenditure in subsection 73B(1) of the ITAA 1936. Expenditure incurred by an eligible company will only qualify as 'contracted expenditure' as defined in subsection 73B(1) of the ITAA 1936 if research and development activities are 'on behalf of' the company.

59. Therefore, in accordance with these provisions, contributing companies paying levies to ACR will only be able to claim a deduction under section 73B of the ITAA 1936, if the expenditure is carried on behalf of that contributing company and not on behalf of any other person (subject to other requirements being satisfied).

[1] The class of persons to whom this Ruling applies only includes eligible companies who register in relation to specific research and development activities, in accordance with subsection 73B(10) of the ITAA 1936.

Purpose

60. The 'purpose' for which the expenditure was incurred needs to be determined at the time of incurring the expenditure (*Cuthbertson and Richards Sawmills Pty Ltd v. Thomas* (1999) 93 FCR 141.

61. Contributing companies pay levies in accordance with the Deed of Agreement. In this agreement, ACR agrees to apply contributions exclusively in respect of research and development (research in connection with the exploration, mining, beneficiation and use of coal or products derived from coal, including the demonstration and development) and supply the results of all research and development to the extent possible to those contributing companies.

62. Contributing companies are aware of the contents of the above mentioned agreement at the time the expenditure is incurred. Therefore, the purpose of the expenditure is to fund those above mentioned activities, which are relevant to contributing companies' activities.

'On behalf of'

63. There has been no judicial interpretation of the phrase 'on behalf of' as used in the section 73B of the ITAA 1936. However, the phrase has been considered by the courts in relation to its usage in other statutory contexts.

64. In *R v. Portus: Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428, the High Court was asked to determine whether employees of Qantas were employed on behalf of the Crown and were therefore members of the Federation. The High Court stated that the phrase 'on behalf' did not have strict legal meaning and was used in a wider sense than the legal relation of principal and agent.

65. Ryan J considered the above cases in *FC of T v. Robinson* (1992) 92 ATC 4424; (1992) 23 ATR 364. The question of law under consideration was the proper construction of the phrase 'borne on his behalf' in Article 17(1) of the Australia US Double Tax Agreement. In this decision, the issue of whether a payment had been made on behalf of an entertainer was resolved by considering whether the payment had been made 'substantially in the interest of the entertainer' or some other person. This suggests it is relevant to consider the extent of the 'comparative benefit' conferred on the entertainer, or other person.

66. In *Cuthbertson & Richards Sawmills Pty Ltd v. Thomas* (1999) 93 FCR 141, the Full Federal Court confirmed that a determination of whether a payment or act is done 'on behalf of' a person must be made objectively on the evidence provided and the test should be applied at the time the payment or act is done.

67. Hence, the courts have stated that an examination needs to be made of whether a payment was made 'substantially in the interest of' the payer or another and the 'extent of the comparative benefit' it confers.[2] This examination needs to be made objectively and applied at the time the payment is made.[3] In order to make a determination of the extent to which the payments are made substantially in the interests of the members and the extent of the comparative benefits they receive in relation to the amount contributed, the factors discussed in the Commissioner's Rulings are also considered relevant.

68. Paragraph 6 of Taxation Ruling IT 2442 suggests that a levy imposed on industry members as a means of raising funds to support research and development activities will generally qualify for the concession to the extent that the levy payments are expended on qualifying research and development activities 'on behalf of' those industry members.

69. Paragraph 21 of Taxation Ruling IT 2451 says:

> Subsection 73B(9) precludes a company claiming a deduction under section 73B for expenditure for the purpose of carrying on R&D activities on behalf of any other person. It is not necessary that the company be acting as an agent of the other; the question is whether, in all the circumstances, the R&D is to be carried out in substance for the other. This will be a question of fact in each case, and a theoretical answer depending only on the formal legal relationship between the company and the other cannot be given.

70. Paragraph 4 of IT 2451 states:

> For R&D activities to be carried out by or on behalf of a company, there must be a close and direct link between the company and the work undertaken; the concept is that the work is being undertaken directly, either by the company itself or by another party on its behalf. It is implicit that the company effectively own its proper part of the result of those activities. It is also implicit that the company have proper control over the conduct of those activities. Arrangements which in substance abdicate either ownership or control could compel the conclusion that R&D activities were not being carried out by or on behalf of the company.

71. In addition, paragraph 44 of IT 2442 provides that entitlement to deductions is restricted to the company that bears the financial risk associated with an R&D project and who effectively owns the project results.

72. Hence, in order to determine if research and development activities are undertaken on behalf of the contributing companies paying levies to ACR, it is necessary to consider whether the eligible companies:

- control the conduct of the activities;[4]

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[2] *FC of T v. Robinson* (1992) 92 ATC 4424; (1992) 23 ATR 364.
[3] *Cuthbertson and Richards Sawmills Pty Ltd v. Thomas* (1999) 93 FCR 141.
[4] This can be control by a group as a whole, see paragraph 20, IT 2451.

- have effective ownership of the results of the activities; and
- bear the financial risk associated with the R&D activities.

Control

73. It is considered that the contributing companies, as a group, sufficiently control the research and development activities that they have contracted ACR to provide. The Deed of Agreement has set the parameters for the research and development to be undertaken and the underlying philosophies which ACR is bound to follow. The contributing companies have effective legal control, as they have the ability to compel ACR to perform in accordance with the Deed of Agreement. The manner in which the program is executed also supports the conclusion that the contributing companies have sufficient control over the research and development activities.

Effective ownership

74. Paragraph 6 of IT 2451 explains that a company generally effectively owns results where R&D activities are carried out by or on behalf of that company. However, it is recognised that this does not necessarily require that the company must be the proprietor of a piece of intellectual property, as formal regimes of intellectual property may not be available to protect the results. Further, it is possible that the formal owner of the intellectual property may hold it on such terms that the company has all advantages of ownership.

75. If a number of companies fund a research and development project together on their behalf, it is necessary that each must have a proper and effective interest in the R&D results. Further guidance is provided in paragraph 10 of IT 2451 in relation to industry associations:

> Co-owners who can, as a practical matter, make use of their results in their individual activities often do not make any specific agreements about their rights as between themselves. For instance, members of industry associations….are effectively co-owners of the R&D results obtained on their behalf. Free individual use of those results is practical for them. Co-ownership of this kind is consistent with the R&D having been carried out on behalf of the individual co-owners, each of whom has a proper and effective separate interest in the results. Where each such co-owner makes a contribution, even if the contributions vary somewhat, those contributions would not usually be regarded as having been made for the purpose of carrying out R&D activities on behalf of the other co-owners.

76. Further paragraph 11 of IT 2451 requires that where co-owners must effectively share results or their use, the question will be whether their individual share in those results is commensurate with their contribution, which is determined by a comparison of contributions of co-owners to the R&D activities.

77. In addition, paragraph 8 of IT 2451 also considers the importance of considering whether a company's interest in the overall results is appropriate to its contribution to overall research in circumstances where the research builds on existing research belonging to another person. The same principles apply when considering circumstances where the substance of a proposed arrangement shows the researcher is the holder of its own research results and their interest in the results of the research and development activities reflects their contribution.

78. ACR uses levies paid by contributing companies to fund projects carried out under Fundamental, Applied and Commissioned Study Research Agreements and to make contributions to certain CRCs and a Centre, which are directed towards research and development activities. Any intellectual property generated as a result of ACARP projects will not be legally owned by contributing companies. However, we are more concerned with effective ownership of the results of the research and development projects and whether the benefits obtained by contributing companies are such that they have an interest in the results of the projects that is commensurate to their contributions.

79. The Deed of Agreement between ACR and the operator of coal producing assets (on behalf of the mine owner) promises 'that the results of the research and development will be made available for the benefit of the operator to the extent possible under the terms of the agreement'.

80. In order to determine whether contributing companies' interest in the results of research and development activities funded by levies is commensurate with their contributions, it is necessary to consider the benefits that flow from the expenditure to contributing companies.

81. An examination of the benefits that contributing companies are expected to gain and their interest in the results of the research and development activities conducted in connection with the arrangement to which this Ruling applies, in comparison to their relevant expenditure, leads to the conclusion that that expenditure is commensurate with the benefits to be gained.

82. The fact that ACR may receive minimal commercialisation proceeds does not alter this conclusion.

Financial risk

83. In accordance with the Deed of Agreement, contributing companies pay contributions which are calculated at a rate of $0.05 per tonne of coal produced (sold) over the term of the agreement. Payments are required on a monthly basis. The Deed of Agreement makes it clear that these contributions become the property of ACR. These contributions cannot be refunded to contributing companies.

84. As contributing companies pay non-refundable levies, we consider that the contributing companies bear the financial risk associated with the research and development activities undertaken.

Summary

85. The levies/contributions are paid as consideration for ACR performing research and development activities 'on behalf' of the contributing companies and subsection 73B(9) of the ITAA will not preclude the deduction under subsection 73B(13) from being allowable.

Detailed contents list

86. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation
9 March 2005

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 92/20; TR 97/16; IT 2442; IT 2451

Subject references:

- contracted Expenditure
- on own Behalf
- research and development expenditure

Legislative references:

- Copyright Act 1968
- International Tax Agreements Act 1953 Sch 2
- Industry Research and Development Act 1986 39F
- TAA 1953 Pt IVAAA
- ITAA 1936 26AAB
- ITAA 1936 73B
- ITAA 1936 73B(1)
- ITAA 1936 73B(3A)
- ITAA 1936 73B(3B)
- ITAA 1936 73B(9)
- ITAA 1936 73B(10)
- ITAA 1936 73B(13)

Case references:

- Cuthbertson and Richards Sawmills Pty Ltd v. Thomas (1999) 93 FCR 141
- R v. Portus: Ex parte Federated Clerks Union of Australia (1949) 79 CLR 428
- FC of T v. Robinson (1992) 92 ATC 4424; (1992) 23 ATR 364

ATO references
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