



PR 2006/32 - Income tax: Australian Bight Abalone Project 2006 - Wholesale Offer

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 This document has changed over time. This is a consolidated version of the ruling which was published on *29 March 2006*



Product Ruling

Income tax: Australian Bight Abalone Project 2006 – Wholesale Offer

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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.

Relevant taxation provision(s)

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

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 17-5 of the ITAA 1997;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 40 of the ITAA 1997;
- Subdivision 61-J of the ITAA 1997;
- Division 70 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 schemes such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

Class of entities

7. The class of entities to which this Ruling applies is those entities who enter into the scheme described 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 agreement until its term expires), and deriving assessable income from this involvement as set out in the description of the scheme. In this Ruling, each of these persons, referred to as a 'Grower', will be a 'wholesale client' within the meaning of section 761G of the *Corporations Act 2001*.

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 who otherwise do not intend to derive assessable income from it;
- elect to harvest, market and sell their Abalone Produce;
- choose to prepay fees payable under the scheme; or
- are accepted to participate in the scheme prior to the date of this Ruling or after 15 June 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 59.

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 29 March 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 (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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

Withdrawal

14. This Product Ruling is withdrawn and ceases to have effect after 30 June 2008. 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, who 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 received by the Tax Office on 11 January 2006 as constituted by documents provided on 11 January 2006, 17, 24 February 2006, 3 March 2006 and additional correspondence including emails received on 17, 23, 24 February 2006, 2, 3 and 21 March 2006;
- Correspondence from the Tax Office to the Applicant dated 24 January 2006, 6 February 2006 and 20 March 2006;
- Draft undated Information Memorandum received by the Tax Office on 17 February 2006;
- Draft undated **Application Form** received by the Tax Office on 17 February 2006;
- Draft undated Constitution received by the Tax Office on 3 March 2006;
- Draft undated **Aquaculture and Cage Rental Agreement** between Australian Bight Infrastructure Pty Ltd (Marine Lease Owner), Australian Bight Abalone Limited (Responsible Entity) and the Grower received by the Tax Office on 3 March 2006;
- Draft undated **Management Agreement** between Australian Bight Abalone Management Pty Limited (Manager), the Responsible Entity and the Grower received by the Tax Office on 3 March 2006;
- Draft undated Compliance Plan received by the Tax Office on 24 February 2006; and
- Independent Biologists Report dated February 2006 and received by the Tax Office on 3 March 2006.

Note: Certain information received from the applicant has been provided on a commercial-in-confidence basis and will not be disclosed or released under the 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. In this Ruling the term 'associate' has the meaning given by section 318 of the ITAA 1936.

17. In accordance with the above documents, a Grower who participates in the scheme must be a wholesale client. **This Ruling does not apply unless the Investor is a wholesale client for the purposes of section 761G of the *Corporations Act 2001*.** The meaning of wholesale client is explained in the Information Memorandum for this Project.

18. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

Overview

19. The salient features of the Australian Bight Abalone Project 2006 – Wholesale Offer are as follows:

| | |
|--|---|
| Location | Waldegrave Island, near Elliston on the Eyre Peninsula, South Australia |
| Type of business each participant is carrying on | Commercial Aquaculture of Greenlip Abalone |
| Maximum number of Interests offered | 400 subject to oversubscriptions |
| Minimum Subscription | 15 Interests |
| Size of a minimum allocation | One Interest (which is the equivalent of 20 Abalone Baskets) |
| The term of the Project | 7 years from the date of commencement |
| Initial cost per Interest | \$27,863 |
| Ongoing costs | RE Fee Cage Rental Fee Annual Management Fee Harvest Fee Subsequent Cycle Settling Fee Sales Incentive Fee |

20. The abalone is grown in Abalone Baskets that are located inside an in-sea cage. Each in-sea cage can hold up to 540 Abalone Baskets. A Grower will acquire 20 Abalone Baskets and 4,400 Abalone Spat per each Interest they are allocated in the Project. The Project will not proceed until the minimum subscription level of 15 Interests is achieved. Once the minimum subscription is achieved, further Interests will only be allocated to ensure that each in-sea cage has at least 300 Baskets (15 Interests). No applications for Interests in the Project will be accepted after 15 June 2006.

21. A Grower will be involved in the Project for a term of 7 years which allows for three growth cycles of 2-3 years each plus a 12 month sales period. There will be an initial and final harvest for each of the three growth cycles. Initial harvests are forecast to occur in the income years ending 30 June 2008, 30 June 2010 and 30 June 2012 for growth cycles 1, 2 and 3 respectively. Final harvests are forecast to occur in the income years ending 30 June 2009, 30 June 2011 and 30 June 2013 for growth cycles 1, 2 and 3 respectively. An initial harvest will be a harvest of faster growing stock to ensure correct stocking density is not exceeded.

Project Entities

22. Australian Bight Abalone Limited is the Responsible Entity for the Project and holder of Australian Financial Securities Licence Number 282113. The Responsible Entity is the holding company of both the Marine Lease Owner and the Manager and will enter into the Aquaculture & Cage Rental Agreement and the Management Agreement on behalf of each Grower.

23. Australian Bight Infrastructure Pty Ltd (Marine Lease Owner) is the holder of a Marine Lease and attached aquaculture licence issued by the department of Primary Industries and Resources of South Australia. The aquaculture licence enables the aquaculture licence holder to carry out aquaculture activities on the leased site. The Marine Lease Owner is the owner of the in-sea cages. Under the Aquaculture & Cage Rental Agreement each Grower will be granted aquaculture rights which include the right to use the in-sea cages.

24. Australian Bight Abalone Management Pty Ltd will be the Manager for the Project and will provide aquaculture services for each Grower under the terms of the Management Agreement. A Grower will purchase the Abalone Baskets and Abalone Spat from the Manager.

Aquaculture Licence

25. In South Australia under the *Aquaculture Act 2001*, a person must not carry on aquaculture except as authorised by an aquaculture licence. The Department of Primary Industries and Resources South Australia (PIRSA) has advised the Tax Office that Growers participating in the Australian Bight Abalone Project 2006 are not required to hold an aquaculture licence under the terms of the Aquaculture Act. In this particular case, the responsibility to hold a licence rests with Australian Bight Infrastructure Pty Ltd, being the person(s) actually carrying on aquaculture.

Application for Interests

26. To participate in the Project an applicant needs to complete and sign the Application Form attached to the Information Memorandum. A signed Application Form gives the Responsible Entity a Limited Power of Attorney to execute the Aquaculture & Cage Rental Agreement and Management Agreement on behalf of a Grower.

27. The Application Form, along with the Application Fee of \$27,863 per Interest applied for, needs to be received by the Responsible Entity. The Responsible Entity will not execute the Aquaculture & Cage Rental Agreement or the Management Agreement until the Application Fee has been cleared. The latest date this can occur is 15 June 2006 (clauses 3.7 of the Constitution).

28. Applications will not be accepted before the minimum subscription level of 15 Interests has been achieved or where there are insufficient Abalone Baskets, Abalone Spat and/or in-sea cages available. Applications will not be accepted after 15 June 2006.

29. Each in-sea cage and Abalone Basket used in the Project will be numbered. The in-sea cages will have a four digit number identifying the lease site and the in-sea cage number. Each Abalone Basket will have a seven digit number identifying the lease site, in-sea cage and basket number. The Responsible Entity will record each Grower's Abalone Basket numbers in the Growers register as per clause 17.1 of the Constitution.

30. All Growers who acquire an Interest in the Project will pool their Abalone Produce (Pooled Growers) unless they make an election in writing on application that they wish to personally harvest, market and sell their Abalone Produce. This Product Ruling has no application to Growers who elect to harvest, market and sell their Abalone Produce.

Constitution

31. Under clause 1.1 the Responsible Entity is appointed to act as agent, attorney and/or trustee in relation to the Project. The Responsible Entity will establish a bank account into which Application Fees and harvest proceeds from the sale of Abalone will be deposited (clauses 2.5 and 8.1).

32. All amounts payable by a Grower under the Aquaculture & Cage Rental Agreement, the Management Agreement and the Constitution must be paid to the Responsible Entity (clause 6.1). The Responsible Entity will make payments of amounts owing by a Grower under the Aquaculture & Cage Rental Agreement and Management Agreement and the Constitution from the bank account prior to distribution of harvest proceeds to a Grower (clause 8.2 of the Constitution and clause 8.6 of the Management Agreement)). Harvest proceeds are to be paid to a Grower no later than 30 days from the receipt of funds from the sale of a Grower's Abalone (clause 8.2.1).

33. Under clause 23.1 the Responsible Entity is entitled to a fee of \$110 per Interest per annum plus CPI from 30 June 2006 (RE Fee) for services provided under the Constitution. The RE Fee from the date of acceptance to 30 June 2006 is \$110 per Interest and is incorporated into the Application Fee (refer to the table at paragraph 46). The RE Fee for later years is only payable after invoicing. Invoicing will occur following the sale of abalone from each harvest. Harvests are forecast to occur each year from 2008 until 2013 (refer to paragraph 21).

Aquaculture & Cage Rental Agreement

34. Under clause 1 of this agreement the Marine Lease Owner grants a Grower the following aquaculture rights:

- (a) the right to enter the Marine Lease area subject to the terms of the Management Agreement;
- (b) the right to settle, maintain and harvest Abalone in the Marine Lease area subject to the terms of the Management Agreement;
- (c) the right to use such works and facilities provided to the Grower by the Marine Lease Owner as may be necessary or convenient to enable the Grower to settle, maintain and harvest Abalone in the Marine Lease area;
- (d) the right of use of the in-sea cage(s); and
- (e) the ownership of the Abalone Baskets.

35. In consideration for granting the above aquaculture rights the Marine Lease Owner will be entitled to a fee of \$1. This fee is included in the Application Fee (Initial Management Fee) paid to the Responsible Entity (clauses 3.1 and 3.1.1). The Marine Lease Owner will also be entitled to a Cage Rental Fee which will be calculated at \$2,035 per Interest per annum plus CPI from 30 June 2006. The Cage Rental Fee from the date of acceptance to 30 June 2006 is \$500 per Interest. A Cage Rental Fee of \$500 is incorporated into the Application Fee (refer to the table at paragraph 46). The Cage Rental Fee for later years is only payable after invoicing. Invoicing will occur annually (clauses 3.2 – 3.9).

36. Under clause 4 a Grower owns all of the Abalone in their Abalone Baskets and is entitled to all harvest proceeds from the sale of Abalone from their Abalone Baskets. Upon termination of this agreement or the Management Agreement the ownership of the Abalone Baskets will revert to the Marine Lease Owner on payment of \$1 per Abalone Basket (clause 8.1 and 8.1.1).

37. The Grower must promptly repair any damage caused directly by the Grower, or any of its employees, agents or contractors, to any in-sea cage on the Marine Lease (clause 6.4).

38. The Grower is entitled to re-establish Abalone in the Grower's Abalone Baskets following the first and second harvest, but not the final harvest (clause 9.4). Under the arrangement it is proposed to have a harvest in years 2 and 3 (year ending 30 June 2008 and 2009), a second harvest in years 4 and 5 in year ended 30 June 2010 and 2011 and a final harvest in years 6 and 7 (year ending 30 June 2012 and 2013) of the Project.

39. The agreement can be terminated where either party breaches any of its obligations under the agreement unless the breach has, in certain circumstances, been rectified. Either party may terminate the agreement if the other party undergoes a specified insolvency event. The Marine Lease Owner may terminate the agreement if the Manager terminates the Management Agreement (clause 10).

Management Agreement

40. Under clause 1.1 a Grower engages the Manager as an independent contractor to perform the aquaculture services. The aquaculture services to be provided by the Manager and the Annual Management Fees payable to the Manager are detailed in Schedules 3 and 4 of the agreement (refer paragraphs 46 to 57).

41. A Grower acknowledges that the Manager has the exclusive right to carry out all of the aquaculture rights set out in the Aquaculture & Cage Rental Agreement on the Grower's behalf (clause 2.4). A Grower has the right to give general direction to the Manager including dates of harvest of the Grower's Abalone Produce and the right to receive quarterly progress reports from the Manager (clauses 2.10 and 2.11).

42. A Grower is entitled to all proceeds from the sale of produce net of all costs owing by the Grower under the Management Agreement, the Aquaculture & Cage Rental Agreement and the Constitution (clause 6.12).

43. A Pooled Grower's entitlement to Abalone Produce from the Project as a whole will be calculated by reference to the weight of the Abalone harvested by the Grower compared with the overall weight of the Abalone harvested from all Pooled Growers in the Project (clause 6.7.3). A Pooled Grower's share of Project costs will be calculated pro rata by reference to the number of the Abalone Baskets they own compared with the overall number of Pooled Growers' Abalone Baskets for the Project (clause 6.12).

44. Under clause 1.3 a Grower is able to remove the Manager and, per clause 1.4, a Grower may appoint a new manager. To appoint a new manager the Grower needs to provide the Marine Lease Owner with evidence of a valid contractual relationship for the provision of aquaculture services to the Grower by a party suitably licensed by PIRSA. Australian Bight Abalone Management Pty Ltd as Manager is under the licence of the Marine Lease Owner. Should a new manager be appointed then the new manager would need to obtain a licence from PIRSA.

45. The agreement ends after the final harvest, marketing and sale of all Abalone Produce. The agreement must end within 10 years after its commencement (clause 3.1). The agreement can be terminated where either party breaches any of its obligations under the agreement unless the breach has, in certain circumstances, been rectified. Either party may terminate the agreement if the other party undergoes a specified insolvency event. The Manager or Responsible Entity may terminate the agreement if the scheme or the Aquaculture & Cage Rental Agreement is terminated by the Marine Lease Owner or Responsible Entity. The Manager may terminate the agreement where all, or substantially all, of the Abalone in the Abalone Baskets is destroyed (clause 12).

Initial Establishment Services and Initial Management Fee

46. The Initial Establishment Services are to be completed on or before 30 June 2006. The Initial Management Fee for the provision of the Initial Establishment Services is \$27,863 per Interest. This amount is the Application Fee which is payable on application for each Interest in the Project. A breakdown of the costs attributed to the Application Fee is detailed in the table below.

| Application Fee | Amount |
|---|-----------------|
| Provision of 4,400 Abalone Spat settled on hatchery tray | \$3,252 |
| Biologist controlled grading and removal of runts and transport to in-sea cage site. Biologist controlled transportation of Spat and tray to jetty site and vessel Transport of tray to in-sea cage site | \$2,741 |
| Provision of 20 Abalone Baskets per Interest (post algae growth state) | \$20,900 |
| Attachment of tray to Abalone Basket | \$120 |
| | |
| Insertion/attachment of Abalone Basket to in-sea cage. Re-insertion/re-attachment of Abalone Baskets as required | \$239 |
| Payment of \$1.00 to the Marine Lease Owner for the granting of rights under the Growers Aquaculture & Cage Rental Agreement | \$1 |
| RE Fee from acceptance to 30 June 2006 | \$110 |
| Cage Rental Fee from acceptance to 30 June 2006 | \$500 |
| Application Fee (Initial Management Fee) | \$27,863 |

Annual Aquaculture Services and Annual Management Fee

47. The Annual Aquaculture Services are the following services to be performed annually or monthly:

- Managing and maintaining the Abalone Baskets (monthly);
- Testing for disease (monthly) or as necessary;
- Quality control (monthly);
- Internal audit of operations (annual);
- Corporate services comprising: research, administration, investment relations, and projections (constant);
- Inventory assessment (annual); and
- Maintenance of related infrastructure (as necessary).

48. The Annual Management Fee for the Annual Aquaculture Services is \$2,583 per Interest. This amount is to be indexed by the CPI from 30 June 2006. The Annual Management Fee is payable from harvest proceeds and only after invoicing (deferred management fee). Invoicing will occur following the sale of abalone from each harvest. Harvests are forecast to occur each year from 2008 until 2013 (refer to paragraph 21).

49. In the case there is no harvest or harvest proceeds do not meet the deferred management fee plus the Harvest Fee, the Grower shall be liable for the higher of the harvest proceeds or a maximum contribution of \$6,500 in satisfaction for the full amount of deferred management fees and Harvest Fee (Schedule 4 clause 5.5 of the Management Agreement). However where a Grower receives a payment in relation to an insurance policy covering the Abalone Produce for any amount, the Grower will be liable to pay all deferred management fees and Harvest Fees and clause 5.5 will not apply to that Grower (Schedule 4 clause 5.6 of the Management Agreement).

Harvest Aquaculture Services and Harvest Fee

50. The Harvest Aquaculture Services occur three (3) times in the life of the Project (year 3, 5 and year 7) and are to be performed on harvest of the Abalone Produce as follows:

- In respect of Pooled Growers, arrange for the harvesting of Abalone Produce at first harvest, and final harvest. Harvesting preparation, supervision and all ancillary activities necessary for harvest will be performed to ensure that these operations extract Abalone and Abalone Produce with minimal damage to the Growers Abalone Baskets;

- Assistance to a Pooled Grower to secure markets for Abalone and Abalone Produce. There is no obligation on the Manager to purchase or guarantee the purchase or sale of the Abalone or Abalone Produce; and
- Rehabilitation of the Marine Lease after final harvest, comprising such that the sea bed is in a clean and tidy condition as required under the Marine Lease conditions imposed by terms of the Marine Lease.

51. The Harvest Fee for the provision of the Harvest Aquaculture Services is \$4,663 per Interest, indexed by CPI from 30 June 2006. For each of the three growth cycles 40% of the Harvest Fee is payable from the harvest proceeds of the initial harvest and the remaining 60% is payable from the harvest proceeds of the final harvest (refer to paragraph 21). Harvest proceeds will be applied toward the payment of the Subsequent Cycle Settling Fee, the deferred management fee, the RE Fee, the Harvest Fee and the Sales Incentive Fee (Schedule 4 clause 9 of the Management Agreement).

52. In the case there is no harvest per growth cycle or the harvest proceeds per growth cycle do not meet the deferred management fees, the RE Fee plus the Harvest Fee, the Grower shall be liable in total for a contribution of \$6,500 in satisfaction for the full amount of deferred management fees, the RE Fee and Harvest Fee (Schedule 4 clause 6.3 of the Management Agreement). However where a Grower receives a payment in relation to an insurance policy covering the Abalone Produce for any amount, the Grower will be liable to pay all deferred management fees, the RE Fee and Harvest Fees and clause 6.3 will not apply to that Grower (Schedule 4 clause 6.4 of the Management Agreement).

Re-Seeding Aquaculture Services and Subsequent Cycle Settling Fees

53. Re-Seeding Aquaculture Services occur twice in the life of the Project immediately following the early harvest of Abalone Produce and include the following:

- Provision of 4,400 Abalone Spat settled on hatchery tray;
- Biologist controlled grading and removal of runts;
- Biologist controlled transportation of Spat and tray to jetty site and vessel;
- Cleaning and re-preparation of 20 Abalone Baskets per Interest (post algae growth state);
- Attachment of tray to Abalone Basket;
- Transport of tray to in-sea cage site;
- Insertion/attachment of Abalone Basket to in-sea cage; and
- Re-insertion/re-attachment of Abalone Baskets as required.

54. The Subsequent Cycle Settling Fee for the provision of the Re-Seeding Aquaculture Services is \$4,816 per Interest and is subject to CPI indexation from 30 June 2006. This fee is payable from the harvest proceeds of the initial harvest of the first two growth cycles (refer to paragraph 21). Where the initial harvest proceeds are insufficient to cover the deferred management fees and the RE Fee the Grower will not be liable for payment of the Subsequent Cycle & Settling Fee (clause 7.3 of Schedule 4 of the Management Agreement).

Sales Incentive Fee and other costs

55. A Sales Incentive Fee is payable when the harvest proceeds exceed \$37,500 per Interest. The Sales Incentive Fee equates to 50% of the proceeds in excess of \$37,500 per Interest for each harvest.

56. The Manager may charge a fee where it is required to do any work of an emergency or other necessary nature not otherwise covered by the Management Agreement (clause 4.5). The Manager and Growers may agree from time to time for the Manager to provide services in addition to the aquaculture services listed above (clause 4.8). For Pooled Growers the fees for emergency and additional services will be calculated by reference to the number of Abalone Baskets owned by a Pooled Grower compared with the overall number of Abalone Baskets of all Pooled Growers.

57. The Manager and the Responsible Entity have a lien on the Abalone Produce and harvest proceeds in respect of all amounts payable to the Manager, the Responsible Entity or the Marine Lease Owner by a Grower which are due and unpaid. The Manager or the Responsible Entity may sell any property on which they have a lien (clauses 8.8 to 8.12 of the Management Agreement).

Finance

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

59. 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

60. This Ruling only applies to Growers who:

- are accepted to participate in the Project and their Application Fee of \$27,863 per Interest applied for has been received, accepted and funds cleared on or before 15 June 2006;
- have executed an Aquaculture & Cage Rental Agreement and a Management Agreement by 15 June 2006;
- do not elect to harvest, market and sell their own Abalone Produce; and
- are a wholesale client (section 761G of the *Corporations Act 2001*).

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

Minimum Subscription

61. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the Constitution a Grower's application will not be accepted and the Project will not proceed unless the minimum subscription of 15 Interests is reached on or before 15 June 2006.

The Simplified Tax System (STS)***Division 328***

62. 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*.

63. For such Growers, a reference in this Ruling to an amount being deductible when 'incurred' will mean that 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.

Qualification

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

25% entrepreneurs tax offset***Subdivision 61-J***

65. 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

66. That part of the gross sales proceeds from the Project attributable to the Grower's Abalone and Abalone Produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5 in the income year in which that income is derived.

Deductions for Initial Management Fee, RE Fee, Cage Rental Fee, Annual Management Fee, Harvest Fee and Subsequent Cycle Settling Fee – section 8-1, Division 70 and Division 328

67. A Grower may claim tax deductions for the following expenses per Interest in the Project:

| Fee Type | ITAA 1997 Section | Year ended 30 June 2006 | Year ended 30 June 2007 | Year ended 30 June 2008 |
|--|--------------------------|--|--|--|
| Initial Management Fee (excluding Abalone Spat & Abalone Baskets) | 8-1 | \$3,711 See Notes (i) & (ii) | Nil See Notes (i) & (ii) | Nil See Notes (i) & (ii) |
| Provision of 4,400 Abalone Spat | 8-1, 70-15 & 70-35 | Amount must be calculated See Notes (i) & (vi) | Nil See Notes (i) & (vi) | See Notes (i) & (vi) |
| RE Fee | 8-1 | Nil See Notes (i), (ii), (iii) & (vii) | Nil See Notes (i), (ii), (iii) & (vii) | Nil See Notes (i), (ii), (iii) & (vii) |
| Cage Rental Fee | 8-1 | Nil as \$500 included in Initial Management Fee See Notes (i), (ii), (iv) & (vii) | \$2,035 + CPI See Notes (i), (ii), (iv) & (vii) | \$2,035 + CPI See Notes (i), (ii), (iv) & (vii) |
| Annual Management Fee | 8-1 | Nil See Notes (i), (ii), (iii) & (vii) | Nil See Notes (i), (ii), (iii) & (vii) | Nil See Notes (i), (ii), (iii) & (vii) |
| Harvest Fee | 8-1 | Nil See Notes (i), (ii), (iii), (v) & (vii) | Nil See Notes (i), (ii), (iii), (v) & (vii) | Nil See Notes (i), (ii), (iii), (v) & (vii) |
| Subsequent Cycle Settling Fee | 8-1 | Nil See Notes (i), (ii), (iii), (vi) & (vii) | Nil See Notes (i), (ii), (iii), (vi) & (vii) | See Notes (i), (ii), (iii), (vi) & (vii) |
| Abalone Baskets | Div 40 & Subdiv 328-D | See paragraphs 68 to 75 | See paragraphs 68 to 75 | See paragraphs 68 to 75 |

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 Initial Management Fee (excluding the Abalone Spat & Abalone Baskets), RE Fee, Cage Rental Fee, Annual Management Fee, Harvest Fee and the Subsequent Cycle Settling Fee (excluding the Abalone Spat) shown in the Constitution, Aquaculture & Cage Rental Agreement and the Management Agreement are deductible under section 8-1, to the extent they are not capital in nature, in the year that they are incurred.
- (iii) The RE Fee and the Annual Management Fee are \$110 and \$2,583 per Interest per annum respectively. These fees are indexed by CPI from 30 June 2006. Although calculated annually, they are not incurred until they are invoiced following the sale of the Abalone by the Manager. The actual amount incurred and payable in respect to the RE Fee, Annual Management Fee and Harvest Fee will depend on the amount of harvest proceeds.
- (iv) The Cage Rental Fee is \$2,035 per Interest per annum indexed by CPI from 30 June 2006. This fee will be invoiced annually and is payable irrespective of harvest proceeds.
- (v) The Harvest Fee is \$4,663 per Interest indexed by CPI from 30 June 2006. For each of the three growth cycles 40% of the Harvest Fee is payable from the harvest proceeds of the initial harvest and the remaining 60% is payable from the harvest proceeds of the final harvest. The actual amount incurred and payable in respect of the Harvest Fee will depend on the amount of harvest proceeds (refer to paragraphs 21 and 52).
- (vi) The Subsequent Cycle Settling Fee is \$4,816 per Interest indexed by CPI from 30 June 2006. This fee will not be payable where harvest proceeds are insufficient to cover the deferred management fees and Harvest Fee. The Subsequent Cycle Settling Fee includes the provision of 4,400 Abalone Spat and \$3,252 of the Application Fee is for the supply of 4,400 Abalone Spat. The 4,400 Abalone Spat, acquired per Interest for each growth cycle, is the cost of acquiring juvenile Abalone which is the trading stock of the Grower. The timing of the deduction for the outgoing is the year the Abalone becomes part of the Grower's trading stock (section 70-15). Section 70-35 adjusts the amount of the deduction by comparison of the value of the trading stock at the start of the income year with the value of the

trading stock on hand at the end of the income year. A Grower who is an 'STS taxpayer' can choose not to account for differences in trading stock under section 70-35, if the conditions in subsection 328-285(1) are met (see paragraphs 104 to 107).

- (vii) This Ruling does not apply to Growers who choose to prepay the RE Fee, Cage Rental Fee, Annual Management Fee, Harvest Fee or Subsequent Cycle Settling Fee. Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in section 82KZME and section 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.

Deductions for Capital Expenditure (Non-STs taxpayers) – Division 40

68. A Grower who is not an 'STS taxpayer' will also be entitled to tax deductions relating to Abalone Baskets, determined under Division 40.

69. The Initial Management Fee of \$27,863 per Interest includes \$20,900 for the purchase of 20 Abalone Baskets. Each Abalone Basket is a 'depreciating asset'. The 'cost' of the asset is the amount paid by each Grower, which is \$1,045 GST inclusive (\$950 GST exclusive) per Abalone Basket. The decline in value of the asset is calculated using the formula in either subsection 40-70(1) ('diminishing value method'), subsection 40-75(1) ('prime cost method') or section 40-440 ('low value pool'). If the Grower is registered or required to be registered for GST, the amount of an outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.

70. Both the diminishing value method and prime cost method formulas rely on the 'effective life' of the Abalone Basket. As there has been no determination of the 'effective life' of an Abalone Basket by the Commissioner, Growers must self-assess an 'effective life' (section 40-105). The Abalone Baskets will be placed in an in-sea cage and first used during the year ended 30 June 2006. The Manager will advise Growers when that occurs to enable Growers to calculate the deduction for the decline in value.

71. Each Grower holds an interest in each of their Abalone Baskets which are a 'low-cost asset' and can be allocated to a 'low-value pool'. Once any 'low-cost asset' of a Grower is allocated to a 'low-value pool', all other 'low-cost assets' the Grower starts to 'hold' in that year or a later year must be allocated to that pool. If the Grower has already allocated an asset to a 'low-value pool', the Abalone Basket assets must also be allocated to that pool. Otherwise, the Grower must decide whether to create a 'low-value pool'. If the assets are allocated to a 'low-value pool', the capital expenditure on the Abalone Baskets will be deducted under the diminishing value methodology of the pool based on a rate of 18.75% in the year the Abalone Baskets are first used and a rate of 37.5% in subsequent years (section 40-440).

Deductions for Capital Expenditure (STS taxpayers) – Subdivision 328-D

72. A Grower who is an 'STS taxpayer' will also be entitled to tax deductions relating to Abalone Baskets. Deductions relating to the 'cost' of Abalone Baskets must be determined under Division 328.

73. Under Division 328, if the 'cost' of a 'depreciating asset' at the end of the income year is less than \$1,000 (a 'low-cost asset'), it can be claimed as an immediate deduction when first used or 'installed ready for use'. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. 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.

74. An Abalone basket is a 'depreciating asset'. Each Grower holds an interest in each of their Abalone Baskets which are a 'low-cost asset' as defined in subsection 40-525(2). It cannot be allocated to a 'general STS pool' (section 328-180). A deduction equal to the amount of the Grower's expenditure for the Abalone Baskets is available in the income year in which they are used or 'installed ready for use'. The Abalone Baskets will be placed in an in-sea cage and first used during the year ended 30 June 2006.

75. If the Grower is registered or required to be registered for GST, the amount of an outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.

Interest

76. The deductibility or otherwise of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or other financier is outside the scope of this Ruling. However, all Growers who borrow funds in order to participate in the Project should read the discussion of the prepayment rules in paragraphs 96 to 100 as those rules may be applicable if interest is prepaid.

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 by 15 June 2006 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for these Growers for the income years ending 30 June 2006 and 30 June 2007. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

Sections 82KZME, 82KZMF and 82KL and Part IVA

78. For a Grower who participates in the Project and incurs expenditure as required by the Constitution, Aquaculture & Cage Rental Agreement and Management Agreement the following provisions of the ITAA 1936 apply:

- expenditure by a Grower who participates in the Project does not fall within the scope of sections 82KZME and 82KZMF;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Commissioner of Taxation29 March 2006

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 Ruling section above to constitute allowable deductions, the Grower's aquaculture activities, as a participant in the Australian Bight Abalone Project, 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 Abalone will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

81. For schemes such as the Australian Bight Abalone Project, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As 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 purchases identifiable Abalone Baskets in which Abalone owned by the Grower will be cultivated and grown;
- the Grower has the right to harvest and sell the Abalone from those Abalone Baskets;
- the aquaculture activities are carried out on the Grower's behalf;
- the aquaculture activities of the Grower are typical of those associated with an aquaculture business; and
- the weight and influence of general indicators point to the carrying on of a business.

83. In this Project, each Grower enters into an Aquaculture & Cage Rental Agreement and a Management Agreement. Under the Management Agreement each individual Grower will have ownership over a specific and identifiable number of Abalone Baskets. The Management Agreement provides the Grower with an ongoing interest in the specific Abalone in the Abalone Baskets for the term of the Project. Under the Management Agreement the Grower must use the aquaculture lease and in-sea cage(s) for the purpose of carrying out aquaculture activities, and for no other purpose. The Management Agreement allows the Manager to utilise the Abalone Baskets to carry out its obligations under the Management Agreement.

84. Under the Management Agreement the Manager is engaged by the Grower to establish and maintain an Abalone farm in the Grower's identifiable area using the Growers Abalone Baskets during the term of the Project. The Manager has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the Abalone farm on the Grower's behalf.

85. The Manager is also engaged to harvest, market and sell, on the Grower's behalf, the Abalone grown on the Grower's Abalone farm.

86. 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.

87. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of the Abalone that will return a before-tax profit, that is a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

88. A Pooled Grower's entitlement to Abalone Produce from the Project as a whole will be calculated by reference to the weight of the Abalone harvested by the Pooled Grower compared with the overall weight of the Abalone harvested from all Pooled Growers in the Project. A Pooled Grower's share of Project costs will be calculated pro rata by reference to the number of the Pooled Grower's Abalone Baskets compared with the overall number of Pooled Growers' Abalone Baskets for the Project. This pooling is consistent with general aquaculture practices.

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

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

91. 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 Bight Abalone Project will constitute the carrying on of a business.

The Simplified Tax System – Division 328

92. 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.

93. Changes to the STS rules apply from 1 July 2005. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductions for Initial Management Fee, RE Fee, Cage Rental Fee, Annual Management Fee, Harvest Fee and Subsequent Cycle Settling Fee – section 8-1

94. Consideration of whether the fees payable under the Constitution, Aquaculture & Cage Rental Agreement and Management Agreement are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

95. The Initial Management Fee, RE Fee, Cage Rental Fee, Annual Management Fee, Harvest Fee and Subsequent Cycle Settling Fee associated with the aquaculture activities will relate to the gaining of income from the Grower's business of aquaculture (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of Abalone) is to be gained from this business. They will thus be deductible under the first limb of section 8-1 (excluding that part of the Initial Management Fee and Seeding and Settling Fee which relates to the acquisition of Abalone Baskets and Abalone Spat) to the extent they are not capital in nature. Further, no 'non-income producing' purpose in incurring the fees is identifiable from the arrangement. The fees appear to be reasonable. There is however a capital component in the Initial Management Fee as the cost of acquiring the Abalone Baskets are costs of a capital nature that are not deductible under section 8-1.

Prepayment provisions

Sections 82KZL to 82KZMG

96. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example the performance of management services) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

97. For the Scheme that applies to this Product Ruling, only sections 82KZL (an interpretive provision) and 82KZMG of the ITAA 1936 are relevant (but see paragraphs 98 to 99 for comments on the possible application of sections 82KZME and 82KZMF of the ITAA 1936).

Application of prepayment provisions to this Project

98. Under the Scheme to which this Product Ruling applies the initial fees payable under the Constitution, Aquaculture & Cage Rental Agreement and Management Agreement are incurred on acceptance into the Project and following the sale of the Abalone Produce. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this Scheme.

99. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Constitution, Aquaculture & Cage Rental Agreement and Management Agreement or prepays interest under a loan agreement. Where such a prepayment is made these prepayment provisions will apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF.

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

Expenditure of a capital nature – Division 40 and Division 328

101. Any part of the expenditure of a Grower that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to the Abalone Baskets is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

102. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is an 'STS taxpayer'.

103. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 68 to 75.

Treatment of trading stock

Section 328-285

104. A Grower who is an 'STS taxpayer' may, in some years, hold Abalone Spat 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 and a reasonable estimate of it at the end, 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)).

105. 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)).

Section 70-35

106. A Grower who is not an 'STS taxpayer' may, in some years, hold Abalone Spat 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.

107. 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.

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

108. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years 30 June 2006 and 30 June 2007 the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended 30 June 2006 and 30 June 2007:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35;
- there is an objective expectation that within a period that is commercially viable for the aquaculture 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.

109. 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

110. 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.

Part IVA – general tax avoidance provisions

111. 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).

112. The Australian Bight Abalone Project 2006 – Wholesale Offer 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 67 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.

113. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the Abalone. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) 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.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 93/34; TR 92/20; TR 97/11;
TR 98/22; TR 2000/8;
TR 2001/14

Subject references:

- 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
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration
- trading stock

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 82KZMG
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)

- ITAA 1936 318
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 40
- ITAA 1997 40-70(1)
- ITAA 1997 40-75(1)
- ITAA 1997 40-105
- ITAA 1997 40-440
- ITAA 1997 40-525(2)
- ITAA 1997 Subdiv 61-J
- ITAA 1997 Div 70
- ITAA 1997 70-15
- ITAA 1997 70-35
- ITAA 1997 Div 328
- ITAA 1997 Subdiv 328-D
- ITAA 1997 328-180
- ITAA 1997 328-285
- ITAA 1997 328-285(1)
- ITAA 1997 328-285(2)
- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
- IT(TP)A 1997 Div 328
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