


FTR 2012/D3 - Fuel tax: fuel tax credits for taxable fuel acquired or manufactured in, or imported into, Australia for use in carrying on an enterprise involving 'fishing operations' as defined in section 43-70 of the Fuel Tax Act 2006

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This document has been finalised by FTR 2012/3.



Draft Fuel Tax Ruling

Fuel tax: fuel tax credits for taxable fuel acquired or manufactured in, or imported into, Australia for use in carrying on an enterprise involving ‘fishing operations’ as defined in section 43-70 of the *Fuel Tax Act 2006*

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What this Ruling is about

1. This Draft Ruling (Ruling) explains an entity’s¹ entitlement to a fuel tax credit with a nil carbon reduction amount under the *Fuel Tax Act 2006* (FT Act) for taxable fuel it acquires or manufactures in, or imports into, Australia to the extent that it does so for use in carrying on an enterprise which involves activities that are within the meaning of ‘fishing operations’ in section 43-70 of the FT Act.

2. The Ruling also explains:

- the fuel tax credit system² under the FT Act; and
- the meaning of ‘fishing operations’ and related terms in section 43-70 of the FT Act. In particular, the Ruling discusses:
 - the definition of ‘fish’ in subsection 43-70(2);

¹ Section 110-5 of the FT Act states that entity has the meaning given by section 184-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

² In this Ruling the Commissioner refers to the scheme established under the FT Act as the fuel tax credit system.

- ‘farming of fish’ in paragraph 43-70(1)(b);
- ‘construction of ponds, tanks or other structures to contain fish’ in paragraph 43-70(1)(c);
- ‘pearling operations’ in paragraph 43-70(1)(e); and
- the operation of the exclusions contained in paragraphs 43-70(1)(h) and 43-70(1)(i).

3. Unless otherwise stated, all legislative references in this Ruling are to the FT Act.

Definitions

4. In this Ruling, unless otherwise stated:

- a reference to:
 - ‘acquire taxable fuel’ or ‘taxable fuel acquired’ is a reference to ‘taxable fuel that you acquire or manufacture in, or import into, Australia’;
 - ‘diesel fuel rebate scheme’ is a reference to the diesel fuel rebate scheme as provided for in section 164 of the *Customs Act 1901* and section 78A of the *Excise Act 1901*;
 - ‘eligible activity or activities’ is a reference to a use that qualifies for the purposes of section 43-70;
 - ‘Energy Grants Act’ is a reference to the *Energy Grants (Credits Scheme) Act 2003*;
 - ‘fuel tax credit scheme’ is a reference to the fuel tax credit scheme as provided for under the FT Act;
 - ‘fishing operations’ is a reference to the activities within the meaning of ‘fishing operations’ in section 43-70 of the FT Act;
 - ‘GST’ is a reference to the goods and services tax;
 - ‘GST Act’ is a reference to the *A New Tax System (Goods and Services Tax) Act 1999*;
 - ‘taxable fuel’ is a reference to taxable fuel as defined in section 110-5 of;
 - ‘Transitional Act’ is a reference to the *Fuel Tax (Consequential and Transitional Provisions) Act 2006*; and

- ‘transitional provisions’ is a reference to the relevant provisions in Schedule 3 of the Transitional Act; and
- ‘you’ in relation to provisions of the FT Act and the Transitional Act applies to entities generally, unless its application is expressly limited.³
- it is assumed:
 - that if you are entitled to a fuel tax credit you meet the requirements that entitle you to the credit and are not disentitled by the disentanglement rules⁴ in the FT Act;
 - that if an entity is carrying on an enterprise of fishing operations it is carrying on an enterprise in the form of a business⁵ which involves the activities that are within the meaning of fishing operations in section 43-70; and
 - that if an entity is not undertaking eligible activities in fishing, that their use of taxable fuel does not satisfy any of the other circumstances giving rise to a nil carbon reduction amount.⁶

5. In this Ruling, a reference to you being entitled to a fuel tax credit and having a nil carbon reduction amount assumes that the requirements of the FT Act (where relevant) are met.

Class of entities

6. This Ruling applies to the class of entities who acquire or manufacture in, or import into, Australia, taxable fuel for use in carrying on an enterprise which involves activities that are within the meaning of ‘fishing operations’ in section 43-70 of the FT Act.

³ See the meaning of ‘you’ in section 110-5 of the FT Act.

⁴ The disentanglement rules are set out in Subdivision 41-B of the FT Act.

⁵ An enterprise includes an activity, or a series of activities, done in the form of a ‘business’ – see Fuel Tax Determination FTD 2006/3 *Fuel tax: what is an ‘enterprise’ for the purposes of the Fuel Tax Act 2006?*

⁶ The other circumstances that give rise to a nil carbon reduction amount are set out in subsection 43-8(4).

How to read this Ruling

7. The Ruling section sets out the Commissioner's view on entitlement to fuel tax credits with a nil carbon reduction amount for taxable fuel acquired or manufactured in, or imported into, Australia for use in carrying on an enterprise that involves activities within the meaning of 'fishing operations'. As the references to fishing activities in section 43-70 are similar to those that were eligible for diesel fuel rebate under the diesel fuel rebate scheme and the energy grants credit scheme, the Commissioner considers that the views expressed in Fuel Tax Ruling FTR 2006/4 *Fuel tax: fuel tax credits for taxable fuel acquired or manufactured in, or imported into, Australia for use in carrying on an enterprise involving 'fishing operation' as defined in section 34 of the Energy Grants (Credit) Scheme Act 2003* apply equally to the meaning of fishing operations in section 43-70. Accordingly the views and explanation which appeared in FTR 2006/4 which was withdrawn from 1 July 2012 have been deliberately reproduced in this ruling.

8. For a more detailed analysis and explanation of the issues covered in the Rulings section, you should refer to the Explanation section in Appendix 1 of this Ruling.

Ruling

General entitlement rules for a fuel tax credit

9. You are entitled to a fuel tax credit for taxable fuel that you acquire or manufacture in, or import into, Australia⁷ to the extent that you do so for use in carrying on your enterprise.⁸

10. However, you are only entitled to the fuel tax credit if, at the time you acquire the taxable fuel, you are registered for GST, or required to be registered for GST.⁹ This is regardless of your turnover.¹⁰

11. The fuel tax credit to which you are entitled is taken into account in calculating your net fuel amount. The net fuel amount must be calculated for each tax period. If your net fuel amount is a positive figure, you must pay this amount to the Commissioner. If the net fuel amount is a negative figure, the Commissioner must pay this amount to you.

⁷ For the purposes of the FT Act, Australia has the meaning given by section 195-1 of the GST Act.

⁸ Subsection 41-5(1) of the FT Act, subject to other provisions affecting your entitlement to the credit (see Subdivisions 41-B and 45-A of the FT Act).

⁹ Subsection 41-5(2) of the FT Act. Division 23 of the GST Act provides who must be registered and who may be registered for GST.

¹⁰ Under the GST Act, entities with a low annual turnover (less than \$75,000 for a business entity and less than \$150,000 for a non-profit body) may choose whether or not to register for GST.

12. Taxable fuel means fuel on which customs or excise duty is payable.¹¹

13. You must be 'carrying on an enterprise' within the meaning of section 9-20 of the GST Act to be entitled to a fuel tax credit. The expression 'carrying on an enterprise' includes doing anything in the course of the commencement or termination of the enterprise.¹²

14. The words 'to the extent that' in subsection 41-5(1) allows for apportionment between a use that entitles you to a fuel tax credit and one that does not. You can use any fair and reasonable basis for working out the amount of taxable fuel in respect of which you are entitled to a fuel tax credit.

15. The Commissioner's view is that the 'fair and reasonable' principle also applies in determining the extent of your entitlement to a fuel tax credit if the fuel is acquired for a number of uses, some of which qualify for a fuel tax credit and some of which do not.¹³

Entitlement to fuel tax credits with a nil carbon reduction amount for taxable fuel acquired from 1 July 2012 for use in 'fishing operations'

16. If you carry on an enterprise involving fishing operations and you acquire taxable fuel for use in an activity that is within the meaning of 'fishing operations', in paragraphs 43-70(1)(a) to 43-70(1)(g) and the activity is not excluded from being a qualifying use by paragraphs 43-70(1)(h) and 43-70(1)(i), you are entitled to a fuel tax credit under section 41-5 in respect of diesel fuel that you acquire.

17. The amount of your fuel tax credit entitlement for taxable fuel acquired, from 1 July 2012, for use in fishing will have a nil carbon reduction amount applicable to it.

The form of the definition of 'fishing operations': means, does not include

18. The use of the expressions 'means' and 'does not include' in the definition of 'fishing operations' in section 43-70 means that the definition is an exhaustive definition. Activities that are not within any one of paragraphs 43-70(1)(a) to 43-70(1)(g) are not activities in fishing operations.

¹¹ Section 110-5 of the FT Act.

¹² The definition of carrying on an enterprise in section 110-5 of the FT Act has the meaning given by section 195-1 of the GST Act. For a detailed discussion on the meaning of 'enterprise' see Miscellaneous Taxation Ruling MT 2006/1 *The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number*. See also FTD 2006/3.

¹³ For further discussion on apportionment for the purposes of the FT Act, refer to Fuel Tax Determination FTD 2010/1 *Fuel Tax: is apportionment used when determining total fuel tax credits in a calculating the net fuel amount under section 6-5 of the Fuel Tax Act 2006?* and PSLA 2010/3 *Practice Statement Law Administration Apportionment for the purposes of the Fuel Tax Act 2006*.

19. The application of the exclusions contained in paragraphs 43-70(1)(h) and 43-70(1)(i) means that an activity that is within paragraphs 43-70(1)(a) to 43-70(1)(g) is in fishing operations only if it is conducted for the purposes of a business and is not for business purposes connected with recreation, sport or tourism.

The meaning of 'fish'

20. The Commissioner considers that the definition of 'fish' in subsection 43-70(2) includes all living organisms of the sea, the sea-bed or of freshwater or the bed below freshwater, which can be utilised as a resource. The inclusion of 'any living resources, whether of the sea or sea-bed or of freshwater or the bed below freshwater' in the definition means that both marine animal and plant life are within the meaning of 'fish' for the purposes of the fuel tax credit scheme.

Farming of fish

21. In paragraph 43-70(1)(b), the phrase 'farming of fish' means the propagating or raising of stocks of fish for the purpose of a business otherwise than for business purposes connected with recreation, sport or tourism.

Construction of ponds, tanks or other structures to contain fish that are to be farmed

22. For the purposes of paragraph 43-70(1)(c), the construction of 'ponds, tanks or other structures' qualifies as fishing operations only if the construction is of structures to contain fish for the purpose of their farming.

Pearling operations

23. An activity that is undertaken in the taking or farming of pearl oysters may be within paragraph 43-70(1)(e) as well as one or more of paragraphs 43-70(1)(a) to 43-70(1)(d).

24. The Commissioner takes the view that these activities are to be considered for eligibility firstly under paragraph 43-70(1)(e). If the activity is not an eligible activity under that paragraph, it can be considered for eligibility under any one or more of paragraphs 43-70(1)(a) to 43-70(1)(d).

Activities excluded from fishing operations

25. A nil carbon reduction amount will be applicable if you acquire taxable fuel for use in an activity that is excluded from the definition of 'fishing operations' by paragraphs 43-70(1)(h) and 43-70(1)(i).

26. The exclusion contained in paragraph 43-70(1)(h) means that an activity mentioned in paragraphs 43-70(1)(a) to 43-70(1)(g) is in fishing operations only if the activity is conducted or carried out for the purposes of a business.

27. The exclusion contained in paragraph 43-70(1)(i) means that an activity mentioned in paragraphs 43-70(1)(a) to 43-70(1)(g) is not a qualifying use if it is conducted wholly or in part for business purposes connected with recreation, sport or tourism.

28. The Commissioner considers that, the expression *in whole or in part*, in the exclusion in subsection 43-70(1), is to be interpreted having regard to the purpose of the provisions of the FT Act.

29. Under this purposive interpretation approach, where a person conducts activities that are for the purposes of a business as well as for other purposes (for example, private purposes) the Commissioner takes the view that the person conducts separate activities, being those that are for business purposes and those that are not. To the extent to which they are for business purposes they are eligible activities. To the extent to which activities are otherwise than for business purposes, they are separate activities that are excluded from being in fishing operations by paragraph 43-70(1)(h).

30. The Commissioner takes a similar approach to the exclusion contained in paragraph 43-70(1)(i). Where a person conducts activities mentioned in paragraphs 43-70(1)(a) to 43-70(1)(g) for business purposes not connected with recreation or tourism as well as for business purposes that have that connection, the person conducts separate activities. To the extent that the activities are not so connected they are eligible activities. To the extent to which the activities are for business purposes connected with recreation, sport or tourism, they are separate activities that are excluded from being in fishing operations by paragraph 43-70(1)(i).

31. In the context of the exclusion contained in paragraph 43-70(1)(i), a business purpose is connected with recreation, sport or tourism if there is a substantial and discernible association between the purpose and any one of recreation, sport or tourism.

Example 1 – a fish farming business engaged in the propagation of fish for commercial sale and conducts activities for business purposes connected with recreation, sport or tourism

32. *Trout About Pty Ltd (Trout About) operates a trout farm as a business. They propagate and raise trout. Mature trout are processed and sold as fresh or smoked trout. They also sell immature trout as live fingerlings.*

33. *Trout About also provides, for a set fee, facilities for recreational anglers and tourists to catch trout from the farm dams.*

34. *Trout About carries on activities on its farm that are partly in carrying on a business of farming of fish and partly for business purposes connected with recreation and tourism.*

35. *Trout About needs to distinguish between activities conducted in the farming of fish and activities conducted for business purposes connected with recreational fishing and tourism.*

36. *These activities, mentioned in paragraph 43-70(1)(c) are not excluded from being in fishing operations by paragraph 43-70(1)(i). Trout About is entitled to a fuel tax credit with a nil carbon reduction amount for diesel fuel that it acquires for use in these eligible activities.*

37. *However, Trout About will have to subtract the carbon reduction amount from their fuel tax credit entitlement amount for diesel fuel acquired for use in providing and maintaining facilities for recreational angling and tourists. These activities are conducted for business purposes connected with recreation or tourism and are excluded from being in fishing operations by paragraph 43-70(1)(i).*

38. *Trout About is therefore required to subtract the reduction amount for diesel fuel acquired for use in these activities.*

Date of effect

39. This Ruling applies from 1 July 2012.

40. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of *Taxation Ruling TR 2006/10 Income tax, fringe benefits tax and product grants and benefits: Public Rulings*).

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.*

General entitlement rules for a fuel tax credit

41. You are entitled to a fuel tax credit¹⁴ for taxable fuel that you acquire or manufacture in, or import into, Australia to the extent that you do so for use in carrying on your enterprise.¹⁵

42. However, you are only entitled to the fuel tax credit if, at the time you acquire the taxable fuel, you are registered for GST, or required to be registered for GST.¹⁶ This is regardless of your turnover.

43. You must be 'carrying on an enterprise' within the meaning of section 9-20 of the GST Act to be able to claim a fuel tax credit. The expression 'carrying on an enterprise' includes doing anything in the course of the commencement or termination of the enterprise.

44. Fuel tax¹⁷ means duty that is payable on fuel under the *Excise Act 1901* or the *Customs Act 1901* and the respective Tariff Acts,¹⁸ other than any duty that is expressed as a percentage of the value of fuel for the purposes of section 9 of the *Customs Tariff Act 1995*.

45. Taxable fuel means fuel on which customs or excise duty is payable.¹⁹

46. You will not be considered to have used the taxable fuel if you sell the taxable fuel to another entity.²⁰

¹⁴ The amount of your fuel tax credit is worked out under Division 43 of the FT Act.

¹⁵ Subsection 41-5(1) of the FT Act. Subject to other provisions affecting your entitlement to the credit (see Subdivisions 41-B and 45-A of the FT Act).

¹⁶ Subsection 41-5(2) of the FT Act.

¹⁷ See section 110-5 of the FT Act and note the exceptions – that is, fuels specifically excluded from the definition of taxable fuel in section 110-5.

¹⁸ *Excise Tariff Act 1921* and *Customs Tariff Act 1995*.

¹⁹ Section 110-5 of the FT Act.

²⁰ The meaning of the term 'use' is explained in paragraphs 2.33 to 2.37 of the Revised Explanatory Memorandum to the Fuel Tax Bill 2006 and Fuel Tax (Consequential and Transitional Provisions) Bill 2006. For further discussion on the meaning of use for the purposes of the FT Act, see Fuel Tax Determination FTD 2009/1 *Fuel tax: what is the meaning of use for the purposes of section 41-5 of the Fuel Tax Act 2006?*

47. You only need to acquire taxable fuel with the intention of using it for an eligible purpose to be entitled to a fuel tax credit. It is not necessary for the taxable fuel to have been actually used by you for an eligible purpose at the time you make the claim for your fuel tax credit. However, if you acquire the taxable fuel with the intention of using it for a particular purpose but subsequently use the taxable fuel for a different purpose and the amount of your fuel tax credit, worked out on the basis of the intended use is different from the amount to which you are actually entitled to work out on the basis of actual use you will have a fuel tax adjustment.²¹

48. Under the FT Act, you are required to calculate your net fuel amount²² for each tax period.²³ Your net fuel amount is worked out using the formula²⁴ set out in subsection 60-5(1). The net fuel amount is claimed on your Business Activity Statement (BAS). If the net fuel amount is positive, you must pay that amount to the Commissioner. If the net fuel amount is negative, the Commissioner must pay that amount to you. The attribution rules in Division 65 determine the tax period to which your fuel tax credit is attributed.²⁵

General principles of apportionment

49. The words 'to the extent that'²⁶ in subsection 41-5(1) allows for apportionment between a use that entitles you to a fuel tax credit and one that does not, and between uses that give rise to different rates of fuel tax credit. You can use any apportionment method that is fair and reasonable in your circumstances to determine the fuel tax credit that is available for the taxable fuel that you acquire.²⁷

Entitlement to fuel tax credits with a nil carbon reduction amount for taxable fuel acquired from 1 July 2012 for use in 'fishing operations'

50. You are entitled to a fuel tax credit and nil carbon reduction amount for taxable fuel you acquire for use or used 'in fishing'. The expression 'fishing operations' is defined in subsection 43-70(1).

²¹ Division 44 of the FT Act.

²² See Division 60 of the FT Act. The net fuel amount reflects how much you or the Commissioner must pay.

²³ See sections 61-15 and 61-20 of the FT Act.

²⁴ Under the formula, Net fuel amount = Total fuel tax – Total fuel tax credits + Total increasing fuel tax adjustments – Total decreasing fuel tax adjustments where the total fuel tax is zero.

²⁵ See subsections 65-5(1) to 65-5(3) of the FT Act for the primary attribution rules for fuel tax credits. In some circumstances, you can claim a fuel tax credit in the tax period in which the fuel is used - see subsection 65-5(4) of the FT Act.

²⁶ See GSTR 2006/3 and GSTR 2006/4 for a full discussion on meaning of the terms 'to the extent that' and 'fair and reasonable'.

²⁷ For further discussion on apportionment, see FTD 2010/1 and PSLA 2010/3.

51. In the context of the phrase ‘in fishing’ in section 43-70, the preposition ‘in’ means ‘in the course of’ or ‘in the process or act of’. Therefore, if an activity can be said to have taken place ‘in the course of’ fishing, it can be concluded that it takes place ‘in’ fishing. For your carbon reduction amount to be nil under paragraph 43-8(4)(b), your activities must take place ‘in’ fishing operations.

52. In *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)*,²⁸ Nicholson J, stated:

The word ‘in’ as it appears in para (a) of the definition of ‘mining operations’ is to be understood in this context as ‘inclusion within, or occurrence during the course of...’

53. The Commissioner considers that the following three criteria may be relevant in determining if an activity takes place ‘in the course of’ fishing operations.²⁹ These are:

- a **causal** link exists – in other words, a certain activity is *functionally integrated* with fishing operations, thereby forming an essential part of it;
- a **spatial** link exists – meaning that an activity takes place in an area set aside or utilised for fishing operations; and
- a **temporal** link exists – the activity takes place in a timely fashion, not prior to, or after the completion of, the fishing operations.

54. The relevance or weighting afforded to these criteria will vary depending on the facts in each case.

55. Accordingly, the meaning of ‘in fishing operations’ is not restricted to merely the physical acts of fishing. In determining whether an activity takes place ‘in the course of’ fishing operations, the three criteria above should be applied.

²⁸ *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 87 FCR 482 at 501; (1998) 158 ALR 241 at 259. See also *Re Wandoo Alliance Pty Ltd v. Chief Executive Officer of Customs* [2001] AATA 801 paragraph 9; (2001) 34 AAR 98 at 114.

²⁹ In *Federal Commissioner of Taxation v. Payne* (2001) HCA 3; 46 ATR 228; 2001 ATC 4027; (2001) 202 CLR 93; (2001) 177 ALR 270; (2001) 75 ALJR 442, *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 87 FCR 482; 158 ALR 241, *Re Wandoo Alliance Pty Ltd and Chief Executive Officer of Customs* (2001) 34 AAR 98; [2001] AATA 801, amongst others, it was deemed pertinent to consider one or all of these factors when determining whether an activity or activities were undertaken ‘in the course of’ something.

The form of the definition of ‘fishing operations’: means, does not include

56. The definition of ‘fishing operations’ in subsection 43-70(1) consists of two parts:

- paragraphs 43-70(1)(a) to 43-70(1)(g): ‘fishing operations’ means ...
- paragraphs 43-70(1)(h) and 43-70(1)(i): ‘fishing operations’ does not include ...

57. The use of the form ‘means ... does not include’, denotes that the definition of ‘fishing operations’ is exhaustive. Only those activities that fall within any one or more of paragraphs 43-70(1)(a) to 43-70(1)(g) and which are not excluded by paragraphs 43-70(1)(h) or 43-70(1)(i) are eligible activities under ‘fishing operations’.

58. Paragraphs 43-70(1)(h) and 43-70(1)(i) serve to further restrict the definition of fishing operations. Regardless of whether or not taxable fuel is acquired for use in an activity described in paragraphs 43-70(1)(a) to 43-70(1)(g), a nil carbon reduction amount will not be applicable to it if the activity is excluded from being in fishing operations by the operation of paragraph 43-70(1)(h) or 43-70(1)(i).

59. The manner in which the definition of fishing operations is structured means that the activities set out in paragraph 43-70(1)(a) to 43-70(1)(g) are ‘in fishing operations’. However, paragraph 43-70(1)(h) has the effect of excluding all the activities set out in paragraphs 43-70(1)(a) to 43-70(1)(g) from being within the definition of fishing operations unless those activities are carried out for the purposes of a business.

60. Paragraph 43-70(1)(i) has the effect of excluding any activity referred to in paragraphs 43-70(1)(a) to 43-70(1)(g) that is carried out for business purposes connected with recreation, sport or tourism. An activity mentioned in paragraphs 43-70(1)(a) to 43-70(1)(g) may be conducted for the purposes of a business (and, therefore, not excluded by paragraph 43-70(1)(h)), but would be excluded under paragraph 43-70(1)(i) if it is conducted for business purposes connected with recreation, sport or tourism.

61. An activity does not have to be mentioned in paragraphs 43-70(1)(h) or 43-70(1)(i) to be excluded from the definition of ‘fishing operations’. These paragraphs serve merely to exclude particular activities from the definition of ‘fishing operations’, while other activities will be excluded because they do not fall within the meaning of paragraphs 43-70(1)(a) to 43-70(1)(g).

62. The form of the definition of ‘fishing operations’: ***means, does not include*** is substantially the same form of the definition of fishing operations as existed in the diesel fuel rebate scheme. Decisions of the Courts and the AAT in relation to the diesel fuel rebate provisions are, in the Commissioner’s view, relevant to the interpretation of section 43-70.

Status of contractors and subcontractors

63. For the purposes of the fuel tax credit scheme, activity determines eligibility, rather than whether the entity's principal business is fishing operations.³⁰

64. The specific inclusion of contractors and subcontractors in paragraph 43-70(1)(c) is for clarification and in recognition that the construction of the kind mentioned in the paragraph is often carried out by contractors or subcontractors rather than by the entity who carries on a business of farming of fish. Unlike the other activities listed in subsection 43-70(1), it would not be immediately evident that a contractor or subcontractor engaged to build a tank or excavate a pond is engaged in an activity that is essential to the carrying on of a business involving the farming of fish. The specific inclusion of the construction by contractors and subcontractors of ponds, tanks or other structures to contain fish that are to be farmed as an eligible activity puts the issue beyond any doubt.

The meaning of 'fish'

65. A central concept of the meaning of 'fishing operations' is the definition of fish.

66. Subsection 43-70(2) defines 'fish' as meaning:

freshwater or salt-water fish, and includes crustacea, molluscs or any other living resources, whether of the sea or sea-bed or of freshwater or the bed below freshwater.

67. The noun 'fish' is defined by the *Macquarie Dictionary*³¹ as meaning:

1. any of various cold-blooded, completely aquatic vertebrates, having gills, fins, and typically an elongated body usually covered with scales', or '2. any of various other aquatic animals.

68. The definition provided by subsection 43-70(2), is an exhaustive definition that adopts the ordinary meaning of the noun 'fish' and extends that meaning by including crustacea, molluscs or any other living resources of the sea or sea-bed or of freshwater or the bed below freshwater.

69. The expression 'any other living resources' in the definition of fish extends the ordinary meaning of fish to cover all living things, including animal and plant life, of the sea or sea-bed or of freshwater or the bed below freshwater, that can be utilised as a resource.

³⁰ *Australian National Railways Commission v. Collector of Customs SA* (1985) 8 FCR 264; (1985) 69 ALR 367.

³¹ *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

70. The Commissioner considers that the *ejusdem generis* rule of statutory interpretation does not apply to the meaning of the expression ‘any other living resources’ in the definition of ‘fish’ in subsection 43-70(2). The application of this rule would have meant that the words ‘any other living resources’ are restricted to the same class of things as freshwater or salt-water fish, crustacea and molluscs. These specific things are all descriptions of marine or aquatic animal life. This would have meant that the term ‘fish’ is limited to animal life and does not include marine plant life.

71. The *ejusdem generis* rule of statutory interpretation was discussed in *Canwan Coals Pty Ltd v. Federal Commissioner of Taxation*³² in which the Court dealt with the scope of the words ‘a railway, road, pipe-line or other facility’. Sheppard J referred to the decision of Latham CJ in *R v. Regos*³³ in which, in relation to the *ejusdem generis* rule, he said:

The rule is that general words may be restricted to the same *genus* as the specific words that precede them ... Before the rule can be applied it is obviously necessary to identify some *genus* which comprehends the specific cases for which provision is made. ... where it is sought to apply the rule to a case where an enumeration of specific things is followed by general words it must appear that the specified things ‘possess some common and dominant feature’ so that they can be described as constituting a *genus* distinguished by that feature.³⁴

72. The Commissioner considers that the primary and natural significance of the words ‘any other living resources whether of the sea or sea-bed or of freshwater or the bed below freshwater’ clearly includes marine plants within the scope of that general expression.

73. The construction of the definition of fish using the terms ‘means’... and ‘includes’ indicates that the normal and ordinary meaning of ‘fish’ is expanded to ‘include’ other living things that are not normally or ordinarily considered to be fish. Those additional ‘included’ things are crustacea, molluscs or *any* other living resources whether of the sea or sea-bed or of freshwater or the bed below freshwater. The use of the word ‘*any*’ indicates a legislative intent that the expression ‘other living resources’ is not to be read restrictively, and that the natural and ordinary meaning of ‘fish’ is expanded to include living resources both plant and animal.

³² *Canwan Coals Pty Ltd v. Federal Commissioner of Taxation* (1974) 4 ALR 223 at 228; (1974) 1 NSWLR 728 at 734; (1974) 4 ATR 669 at 673; 74 ATC 4231 at 4235. See also *Attorney-General v. Brown* [1920] 1 K.B. 773 and *Re Latham (Dec)* [1962] Ch 616 for further discussion on the application of the *ejusdem generis* rule.

³³ *R v. Regos and Morgan* (1947) 74 CLR 613; (1947) 21 ALJ 110.

³⁴ *R v. Regos and Morgan* (1947) 74 CLR 613, Latham CJ, at 623-624; (1947) 21 ALJ 110 at 111-112.

74. The meaning of 'fish' encompasses a wide range of aquatic organisms, including (but not limited to):

- all species of bony fish, sharks and rays;
- octopuses, cuttlefish and squid;
- lobsters, crabs, prawns, scallops, abalone, mussels, and oysters;
- sponges, worms and living coral;
- all fresh-water fish, yabbies and marron;
- the eggs, spat or spawn, or the body, or part of the body (including the shell) of marine and fresh-water organisms; and
- seagrasses, kelp and fresh-water aquatic plants.

75. The sea-bed includes intertidal areas that are covered by the sea at high tide.

76. The meaning of fish is not restricted to fish ordinarily used for human consumption. For example, ornamental fish are also included in the definition.

Activities that are 'fishing operations'

77. The Commissioner considers that the meaning of each of the activities mentioned in paragraphs 43-70(1)(a), 43-70(1)(d), 43-70(1)(f) and 43-70(1)(g) are clear. This Ruling, therefore, does not discuss those paragraphs.

Farming of fish

78. The definition of 'fishing operations' in subsection 43-70(1) states in part:

The expression ***fishing operations*** means:

- (b) the farming of fish

79. The term 'farming of fish' is not defined in the FT Act. Therefore, the term takes its ordinary meaning.

80. The Macquarie Dictionary³⁵ defines 'farming' to mean:

1. the business of operating a farm'. It defines 'farm' to mean '**1.** a tract of land devoted to agriculture; or **2.** a tract of land or water devoted to some other industry, especially the raising of livestock, fish, etc: *a chicken farm; an oyster farm.*

³⁵ *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

81. The Commissioner takes the view that, in the context of the definition of 'fishing operations', farming of fish means the propagating, breeding or raising of stocks of fish for the purpose of a business.

82. The term 'farming of fish' within the definition of fishing operations was introduced in an amendment to the diesel fuel rebate scheme in 1989. The Explanatory Memorandum to that amendment stated:

...paragraph 5(1)(e) provides that outward voyages by dedicated mother ships, gear trials, voyages to and from a port and fish farming i.e. operations pertinent to the operation of fishing as a primary industry, are uses that attract rebate of customs duty under the DFRS.³⁶

83. In *Re City of Nunawading and Comptroller General of Customs*³⁷ the AAT stated:

Clearly, the activities must be for the purposes of a business if they are to be regarded as fishing operations. Apart from this, we do not wish to attempt a comprehensive interpretation of 'fishing operations' but it does seem to us that it is concerned with gathering a product. Broadly speaking, it is concerned with the gathering of pearls or with the gathering fish either by taking them from the water where they have bred naturally or by farming them.³⁸

84. Taxable fuel acquired for use in the farming of fish will not be eligible for the nil carbon reduction amount unless the activity is undertaken for the purpose of obtaining primary produce, that is, to obtain fish for sale or trade.

85. Where fish farming for research purposes is undertaken within a business involving the farming of fish to produce fish for sale or trade, a nil carbon reduction amount will be applicable to taxable fuel acquired for use in that research activity. The Commissioner considers that the research activity in this case is an activity conducted 'in the course of' the farming of fish. It is, therefore, 'in' fishing operations.

³⁶ Explanatory Memorandum to the Customs and Excise Legislation Amendment Bill (No. 3) 1989 page 2.

³⁷ *Re City of Nunawading and Comptroller General of Customs* No. V93/540 AAT No. 9758; (1994) 36 ALD 628.

³⁸ *Re City of Nunawading and Comptroller General of Customs* No. V93/540 AAT No. 9758 at paragraph 87; (1994) 36 ALD 628 at 643.

86. However, a carbon reduction amount will have to be subtracted in respect of taxable fuel acquired for use in fish farming undertaken within a research or educational institution, where the purpose of that activity is research or education rather than producing fish for sale or trade. The Commissioner considers that, as section 43-70 is intended to reflect the operation of the fishing provisions under the energy grants scheme where fishing was a subset of primary production, the fishing activities must be carried out for the purposes of a commercial undertaking to obtain primary produce for the purposes of Subdivision 43-B. In the case of fishing, the primary produce is fish. The Commissioner's view is that the activities mentioned in each of the paragraphs in section 43-70 describe the processes necessary, or that assist, in the obtaining of fish as primary produce. The undertaking of research activities at an educational institution is not within the meaning of 'fishing operations' in subsection 43-70(1). The research activity in this case is not in 'primary production'.

87. It is a question of fact whether the sale of fish is incidental to research, or a joint objective with research, or whether the research is merely part of the business of farming fish to obtain produce for sale.

88. Farming of fish includes the propagation, raising and harvesting of:

- fish eggs;
- spat of oyster or similar shellfish;
- oysters;
- prawns, marron or other crustaceans;
- tuna, kingfish or other edible species; or
- ornamental fish such as goldfish and carp,

for sale or trade.

89. The Commissioner takes the view that the catching and transporting of live fish (for example, tuna) from the wild for stocking fish farms is an activity that falls within paragraph 43-70(1)(a). A nil carbon reduction amount will be applicable in respect of taxable fuel acquired for use in carrying on this activity as part of your enterprise.

90. Activities that are considered to be 'farming of fish' include:

- cleaning, maintenance of, and repairs or modifications to ponds, tanks or other structures that contain fish;
- pumping and filtering of water; and
- aeration of ponds, tanks or other structures containing fish.

91. The transportation of personnel, equipment and other materials by vessel to or from fish farms located at sea is an eligible activity under paragraph 43-70(1)(b) if the personnel, equipment or other materials are for the purposes of carrying out the farming activities.

92. There is no requirement that a fish farm be located in a particular place. It can be located in the sea, a river, a lake, a dam, or comprise artificially constructed ponds, tanks or other structures containing fish.

93. The Commissioner considers that the farming of fish ceases when the fish are finally removed from the seawater or fresh water or the pond, tank or other structures containing fish at the farm for processing or sale. Therefore, further processing of fish³⁹ on a fish farm is not 'fishing operations' under paragraph 43-70(1)(b).

Construction of ponds, tanks or other structures to contain fish that are to be farmed

94. The definition of 'fishing operations' in subsection 43-70(1) states in part:

- (c) the construction of ponds, tanks or other structures to contain fish that are to be farmed, where construction is carried out by:
 - (i) the person who will do the farming; or
 - (ii) a person contracted by that person to undertake the construction; or
 - (iii) a subcontractor of a person so contracted

95. The Commissioner takes the view that the words 'other structures to contain fish that are to be farmed' are restricted to the same class of the words as ponds or tanks.⁴⁰ It is considered that these specific words are all descriptions of the types of enclosures excavated or built to keep in fish for the purpose of propagating or rearing of fish. The type of enclosure used is dependent on the type of fish to be farmed, physical factors of the site and size of the operation.

³⁹ Subsection 43-70(4) defines the term 'processing' in relation to fish. Processing of fish on board vessels is a qualifying activity under paragraph 43-70(1)(d). From 1 July 2008, petrol acquired for use in the processing of fish on board a vessel is eligible for a full fuel tax credit.

⁴⁰ See paragraphs 70 to 72 of this Ruling for a discussion on the *ejusdem generis* rule.

96. Examples of 'other structures to contain fish that are to be farmed' include:

- sea cage pens for use in finfish (for example, tuna and kingfish) aquaculture;
- a permanent system of uprights and a net or nets stretched across a river, stream or creek to contain fish;
- intertidal racks and baskets; and
- intertidal long-lines and bags.

97. However, the expression 'other structures to contain fish that are to be farmed' does not include structures such as open racks and lines or predator control nets for sharks and seals. These structures are not constructed to contain fish that are to be farmed.

98. Where the farming of fish is to be carried out in ponds, tanks or other structures constructed on land, the construction of 'ponds, tanks or other structures' commences when any vegetation and soil are removed in order to provide a flat bench and root-free site at which:

- excavation can commence; and/or
- footings can be prepared,

for the construction of a structure to contain fish.

99. Where structures to contain fish are constructed or pre-fabricated at a site other than the place where the farming of fish is or will be carried on, taxable fuel acquired for use in that construction or pre-fabrication will be eligible for a nil carbon reduction amount.

100. The Commissioner takes the view that the term 'construction of ponds, tanks or other structures' does not include the transportation of the constructed structure. Construction ordinarily refers to the activities in building, erecting or putting together of the particular structure. The Commissioner considers the transport of such structures from a site where they are constructed or pre-fabricated to a site where they are to be used for the farming of fish is not an eligible activity under fishing operations.

101. The transportation of materials and equipment used in the construction of ponds, tanks or other structures to contain fish to the place where the farming of fish will be carried on, is also not an eligible activity under paragraph 43-70(1)(c).

Pearling operations

102. The definition of 'fishing operations' in subsection 43-70(1) states in part:

The expression ***fishing operations*** means:

- (e) pearling operations

103. The expression 'pearling operations' is defined in subsection 43-70(3) to mean:

- (a) the taking of pearl shell; or
- (b) the culture of pearls or pearl shell,

and includes the taking or capturing of trochus, beche-de-mer or green snails.

104. The use of the form 'means ... and includes', denotes that the definition of 'pearling operations' is exhaustive.

105. Pearl oysters are molluscs, and are within the definition of 'fish' in subsection 43-70(2). Activities undertaken in the taking or farming of pearl oysters, may be activities within fishing operations under paragraphs 43-70(1)(a) to 43-70(1)(d). This includes the gathering of pearl shell and the growing and maintaining of pearl oysters. Some of these activities are within the definition of 'pearling operations' in subsection 43-70(3) and may be eligible activities under paragraph 43-70(1)(e).

106. An activity undertaken in the course of taking or farming of pearl oysters is to be considered for eligibility, firstly, under the qualifying criteria for pearling operations under paragraph 43-70(1)(e). If the activity does not qualify as pearling operations under paragraph 43-70(1)(e), it can be considered for eligibility under paragraphs 43-70(1)(a) to 43-70(1)(d).

Activities excluded from 'fishing operations'

107. Certain activities are excluded from the definition of 'fishing operations' by paragraph 43-70(1)(h) or 43-70(1)(i).

108. The exclusions are for any activity referred to in paragraphs 43-70(1)(a) to 43-70(1)(g) that is conducted in whole or in part:

- (a) otherwise than for the purposes of a business (paragraph 43-70(1)(h)); or
- (b) for business purposes connected with recreation, sport or tourism (paragraph 43-70(1)(i)).

In whole or in part

109. The exclusion contained in subsection 43-70(1) states that fishing operations does not include any activity referred to in any of paragraphs 43-70(1)(a) to 43-70(1)(g) conducted, '*in whole or in part*' otherwise than for the purposes of a business or for business purposes connected with recreation, sport or tourism.

110. In some instances, an entity that carries on a business that involves activities in fishing operations may conduct some activities that are for the purposes of recreation or involve the provision of facilities for tourists. For example, an entity that carries on a business of farming of fish may permit, for a fee, tourists to visit the farm and, as part of that, allow them to undertake some recreational angling and to take their catch with them.

111. The words '*in whole or in part*' in the exclusion in subsection 43-70(1), if interpreted strictly would require an entity to subtract the carbon reduction amount for taxable fuel acquired for use in an activity mentioned in any one of paragraph 43-70(1)(a) to 43-70(1)(g) if the activity was conducted principally for the purposes of a business but also conducted for business purposes connected with recreation, sport or tourism.

112. The Commissioner considers that, the expression *in whole or in part*, in the exclusion in subsection 43-70(1), is to be interpreted having regard to the purpose of the provisions of the FT Act.

113. Under this purposive interpretation approach, where a person conducts activities that are for the purposes of a business as well as for other purposes (for example, private purposes), the Commissioner takes the view that the person conducts separate activities, being those that are for business purposes and those that are not. To the extent to which they are for business purposes they are eligible activities. To the extent to which activities are otherwise than for business purposes, they are separate activities that are excluded from being in fishing operations by paragraph 43-70(1)(h).

114. The Commissioner takes a similar approach to the exclusion contained in paragraph 43-70(1)(i). Where an entity conducts activities mentioned in paragraphs 43-70(1)(a) to 43-70(1)(g) for business purposes not connected with recreation or tourism as well as for business purposes that have that connection, the entity conducts separate activities. The entity needs to determine the extent to which the activities have business purposes not connected with recreation, sport or tourism. To the extent that the activities are not so connected, they are eligible activities. To the extent to which the activities are for business purposes connected with recreation, sport or tourism, they are separate activities that are excluded from being in fishing operations by paragraph 43-70(1)(i).

Activities conducted otherwise than for the purposes of a business

115. The use of the word 'business' denotes a commercial concern carried on with the aim of making a profit.

116. In determining whether a business is carried on, no one factor is conclusive. Each case must turn on its own particular facts and be determined after weighing up of a combination of factors in the context of the facts of each case. Factors that may be taken into account include whether:

- the activity has a significant commercial purpose or character;
- the person has more than a mere intention to engage in business;
- there is an intention to make a profit from the activity or a genuine belief that profit will be made;
- the activity is planned, organised and carried on in a business-like manner;
- the activity is profitable or is likely to be profitable;
- the activity is repetitive and regular;
- the activity is carried on in a manner similar to others who engage in the same trade;
- the size and scale of the activity; or
- the activity is better described as a hobby, a form of recreation or a sporting activity.⁴¹

117. In some cases, it has been held that an entity's activities do not amount to carrying on a primary production business but are merely preparatory to engaging in such a business. For example, in *Dalton v. Deputy Federal Commissioner of Taxation*,⁴² steps taken by a person to clear weeds and put the land into a state of readiness were held to be no more than preparatory to establishing an orchard. On the other hand, in *Ferguson v. Federal Commissioner of Taxation* (Ferguson),⁴³ it was held that the person's preliminary activities in building up a herd of cattle through a leasing arrangement had sufficient commercial character to amount to a business.

118. In Ferguson, Fisher J said:

It is necessary to give consideration to the essential nature of the activity, and the question whether it has the characteristics of a business is primarily a matter of general impression and degree.⁴⁴

⁴¹ Taxation Ruling TR 97/11 and TR 97/11ER *Income tax: am I carrying on a business of primary production?*

⁴² *Dalton v. Deputy Federal Commissioner of Taxation* AAT Case 12,533; (1998) 98 ATC 2025; (1998) 37 ATR 1243.

⁴³ *Ferguson v. Federal Commissioner of Taxation* (1979) 79 ATC 4261; (1979) 9 ATR 873; (1979) 26 ALR 307.

⁴⁴ *Ferguson v. Federal Commissioner of Taxation* (1979) 79 ATC 4261 at 4271; (1979) 9 ATR 873 at 884; (1979) 26 ALR 307 at 320.

119. The principles mentioned in these cases are equally relevant to the determination of whether the activities mentioned in paragraphs 43-70(1)(a) to 43-70(1)(g) are carried out for the purposes of a business and, therefore, are eligible activities.

Activities conducted for business purposes connected with recreation, sport or tourism

120. The definition of ‘fishing operations’ in subsection 43-70(1) provides that the expression fishing operations does not include:

... any activity referred to in any of the preceding paragraphs that is conducted, in whole or in part:

- (i) for business purposes connected with recreation, sport or tourism.

121. Where an activity mentioned in paragraphs 43-70(1)(a) to 43-70(1)(g) is conducted wholly for business purposes connected with recreation, sport or tourism, the activity is not in fishing operations for the purposes of the fuel tax credit scheme.

122. The expression ‘connected with’⁴⁵ has a wide meaning and refers to any activity that has a real, substantial and discernible association or involvement with something else. In the context of the exclusion contained in paragraph 43-70(1)(i), a business purpose is connected with recreation, sport or tourism if there is a substantial and discernible association between the purpose and any one of recreation, sport or tourism.

⁴⁵ See *Collector of Customs v. Cliffs Robe River Iron Associates* (1985) 7 FCR 271; (1985) 7 ALN N269a, *Collector of Customs v. Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280; 115 ALR 1, *District Council of Coober Pedy and Cowell Electric Supply Company Ltd v. Collector of Customs* (1993) 42 FCR 127; (1993) 17 AAR 369, *Collector of Customs v. The Western Australian Government Railways Commission (Westrail)* (1995) 39 ALD 21, amongst others for the meaning of ‘connected with’. The Courts have found that to be ‘connected with’ an activity must be ‘bound up with and involved’ or ‘real and substantial and not tenuous and remote.’

Appendix 2 – Your comments

123. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

124. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au.

125. Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 10 August 2012
Contact officers: Anura Kuhan-Pilat
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Appendix 3 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

FTD 2006/3; FTD 2006/4;
FTD 2009/1; FTD 2010/1;
MT 2006/1; TR 97/11;
TR 97/11ER; TR 2006/10;
GSTR 2006/3; GSTR 2006/4

Subject references:

- acquire
- acquire, or manufacture in, or import into, Australia
- apportionment
- apportionment of fuel
- attribution
- BAS
- business
- business activity statement
- business purposes
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- net fuel amount
- off-road diesel fuel
- pearling operations
- primary production
- qualifying use
- recreation, sport or tourism
- tax period
- taxable fuel
- use

- use in fishing operations

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- FTA 2006 43-70(1)(a)
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- FTA 2006 43-70(1)(c)
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- FTA 2006 43-70(1)(f)
- FTA 2006 43-70(1)(g)
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