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Ruling Compendium – TD 2013/2

This is a compendium of responses to the issues raised by external parties to draft TD 2012/D9 – *Income tax: does ordinary income derived by an individual from allowing wind farming infrastructure to be constructed, operated and accessed on freehold land that they own and use in carrying on a primary production business constitute 'assessable primary production income' of that individual for the purposes of Division 392 of the Income Tax Assessment Act 1997?*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	The reference to the definition of 'primary production business' contained in subsection 995-1(1) of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997) in the draft Determination needs to be expanded. As the draft Determination currently stands, there is merely a brief reference to this definition in paragraph 5.	The definition of 'primary production business' in subsection 995-1(1) of the ITAA 1997 is not relevant to the question addressed by this Determination. Reference to the definition is included for explanation of that term in context of the substantive issue. The Determination looks at the income earning activity for which the taxpayer is receiving the payment for. It is not about the activity that is being conducted by someone else – wind farming.
2.	The current reasoning in paragraph 14 of the draft Determination is vague and, consequently, less convincing than it ought to be. For example, it is not clear what the relevance of 'the various entities' considered may be (one may guess, but this should not be a requirement). The brief discussion of the different sorts of activities conducted blurs the legal point that is being made.	Paragraph 14 has been amended.

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3.	If the taxpayer is an energy company that leases land from the farmer, the area leased provides a constant income for the farmer, but it takes the plot where the tower is located out of rural production, as well as access roads to the tower. The offset for the farmer is a constant income which he can use to offset the vagaries of drought and flood, and provide his farming operations with a constant stream of income which is a cushion against these stated risks. Obviously this income is a credit against the costs of the farming operation, enhancing the farming income, and so the enhanced income is taxed as a Primary Producer, or should be.	The matter raised is outside the scope of this Determination, and is a policy issue for the government.
4.	The energy producer has a harder time making a case for being classified as a Primary [producer] if he does not use the property for primary produce (agriculture or animal husbandry) – however, the energy producer should not be classified differently from that of the farmer if the energy producer uses a rural property for the wind farm usage and supports agriculture or animal husbandry as an associated use.	The matter raised is outside the scope of this Determination. The Determination relates to the primary producer who owns the land on which the wind farming infrastructure is constructed, operated and accessed, and not the energy producer.
5.	The name associated with this form of energy production is that of 'Wind Farm'. This is the world wide name given to this use. It is farming an air current while the other kind of farming is carried out below, but it is still a form of farming and should be treated equally as a Primary Producer.	The Determination is about the activities of the primary producer land owner that give rise to the payment. That is allowing the construction and operation of and access to wind farming infrastructure to an energy producer.

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6.	The Wind Farming business is an unreliable use in that it generates power typically by day, and only when the wind blows. Incentives are necessary to help the business become established. To assert a punitive position of higher taxes because it is farming a wind current is perverse. A classification as a Primary Producer makes more sense, and may assist the establishment of a green form of power production in rural areas.	The matter raised is outside the scope of this Determination, and is a policy issue for the government.
7.	If the ATO does not allow wind farming to be included as primary production income, there may be cases where hosting a wind farm will constitute too much 'off farm' income and result in the farmer being ineligible to access the Farm Management Deposits Scheme (FMDS).	The matter raised is outside the scope of this Determination, and is a policy issue for the government.
8.	There is a recommendation that the ATO consider the report from the current National Rural Advisory Council's (NRAC) Assessment of the Effectiveness of the FMDS before finalising its draft Determination. The assessment and final report was due to Minister for Agriculture, Fisheries and Forestry Senator the Honourable Joseph Ludwig by 31 October 2012. The terms of reference for the NRAC assessment include considering 'the appropriateness of including off-farm income generated from renewable energy as eligible deposits'.	The matter raised is outside the scope of this Determination, and is a policy issue for the government.