

PR 1998/1 - Income tax and fringe benefits tax: Product Rulings system

⚠ This cover sheet is provided for information only. It does not form part of *PR 1998/1 - Income tax and fringe benefits tax: Product Rulings system*

⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *23 September 1998*



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Preamble

This Product Ruling is not a 'public ruling' in terms of Part IVAAA of the Taxation Administration Act 1953. Product Ruling PR 98/1 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.

What this Product Ruling is about

1. This Ruling outlines the system of Product Rulings, which are binding public rulings under the *Taxation Administration Act 1953* (TAA), in relation to the income tax and fringe benefits tax law. This Ruling considers:

- (i) the date of effect of product rulings;
- (ii) what constitutes a product ruling;
- (iii) applying for a product ruling; and
- (iv) when we will not rule.

2. The term 'investors' is used throughout this Ruling to describe persons who purchase or otherwise obtain participation in a 'product' (as defined below at paragraph 14). The terms 'invest', 'investing', 'investment' and 'investor' are used in the same context.

Date of effect

This Ruling

3. This Product Ruling applies from 23 September 1998.

Later Rulings

4. Product Rulings have prospective effect only. Therefore, a Product Ruling applies only to arrangements entered into after the

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date the Ruling is made. Persons investing in the product before the Ruling is made are not be able to rely on it as a public ruling.

5. A Product Ruling also specifies the date on which it will be withdrawn and cease to have effect. A Product Ruling applies to all persons within the specified class who enter into the specified arrangement (usually identified by the particular product name, applicant and year) during the term of the Ruling. Thus, a Product Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

6. The Commissioner will not give a Product Ruling for a period exceeding three years from the end of the income year in which it is made, unless exceptional circumstances exist.

Ruling

What constitutes a Product Ruling

7. Product Rulings have been introduced to enable the Commissioner to rule publicly on the availability of claimed tax benefits from 'products' (as defined below at paragraph 14).

8. Product Rulings protect investors provided the arrangements are carried out in accordance with details provided by the applicant and described in the Product Ruling. The highest levels of disclosure are expected of the applicant. If the arrangement described in the Product Ruling is materially different from the arrangement that is actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangement entered into is not the arrangement ruled upon; and
- the Ruling will be withdrawn or modified.

This is likely to occur when there is a material omission or misrepresentation in the application for the Ruling.

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Class of person/arrangement

9. Part IVAAA of the TAA contains the public ruling provisions and sets out what is necessary for a published opinion of the Commissioner to be a public ruling. A Product Ruling sets out the Commissioner's opinion as to the way in which a 'tax law' applies to a class of persons in relation to an arrangement (section 14ZAAF of the TAA).

10. The class of persons subject to a Product Ruling is defined in the Product Ruling. For example, where Australian residency is a factor in the tax consequences, the class of persons is described accordingly. The class is investors. These investors need not seek a private ruling on the tax consequences of their investment in the product. The Product Ruling is legally binding on the Commissioner and investors can rely on the statements it contains.

11. However, the tax consequences for the Product Ruling applicant are not addressed in the Ruling. When in doubt, applicants may request a private ruling on the matter.

'Tax law'

12. A 'tax law' to which the public ruling provisions apply is a provision of an Act or a regulation under which the extent of liability to income tax, withholding taxes, franking deficit tax, Medicare levy, or fringe benefits tax is worked out (see definition of 'tax law' in section 14ZAAA of the TAA).

13. A public ruling on the way in which a tax law applies may be a ruling on the way in which a discretion of the Commissioner under that law would be exercised (section 14ZAAD of the TAA).

Product

14. A Product Ruling fully describes the relevant details of the particular product. A 'product' refers to an arrangement in which a number of taxpayers individually enter into substantially the same transactions with a common entity or a group of entities. For example, they may all enter into substantially the same management agreements with a manager connected with the promoter. The product may be described as an investment arrangement, a tax effective arrangement, a financial arrangement or an insurance arrangement. Often, it is offered to the general public by way of an offering memorandum or prospectus, but it may be put forward to individuals on an invitation basis. The Commissioner rules on the precise arrangement identified in the Ruling.

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15. A Product Ruling provides investors with a binding ruling as to the tax consequences of the particular product, but can provide no guarantee as to the commercial viability of the product. A financial (or other) adviser should be consulted for such information. The Commissioner accepts no responsibility in relation to the commercial viability of a product.

Numbering of Product Rulings

16. Product Rulings will:

- be grouped as the 'PR' series;
- have a prefix for the particular calendar year in which they issue; and
- be numbered in issue order.

Publication

17. As a Product Ruling is a public ruling in terms of the TAA, the making and withdrawal of the Ruling must be published and a notice published in the *Gazette*. Because a Product Ruling applies for a set term, the *Gazette* notice gives notice of both the making of the Ruling and the date on which the Ruling is withdrawn.

Copyright

18. Each Product Ruling is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth, available from AusInfo. Requests and inquiries concerning reproduction and rights should be addressed to the Manager, Legislative Services, AusInfo, GPO Box 1920, Canberra ACT 2601.

Applying for a Product Ruling

19. A written application is required for a Product Ruling. All aspects of the information specified in the **Attachments** below must be addressed in the application. An application will not be considered if insufficient information is provided. The applicant will be

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contacted and asked to provide further and better particulars if the information is deficient in any way.

20. Promoters, or the persons involved as principals in the carrying out of the arrangement (but not participants or intermediaries), may apply for a Product Ruling.

Information requirements

21. The information that must be addressed in an application is detailed in **Attachment A**.

22. A draft of the proposed Product Ruling must be provided. The format this should follow is outlined in **Attachment B**.

23. All applications for Product Rulings are to be directed to:

Assistant Commissioner
Office of the Chief Tax Counsel
Australian Taxation Office
PO Box 900
Civic Square ACT 2608.

24. Applications and all supporting documents **should be provided in triplicate**.

25. Applicants are encouraged to lodge applications early in the financial year to which the proposed Product Ruling relates. This should ensure sufficient time to finalise the Ruling.

26. Before a Product Ruling is issued, applicants are required to acknowledge that the Commissioner will reveal in the Ruling the name and address of the persons involved as principals in the carrying out of the arrangement, the name and description of the product, and a description of the agreements, deeds and transactions to which the investors are parties. A Product Ruling will not be issued if the applicant does not consent to this.

27. The quality of information supplied (including that contained in the draft Product Ruling) and the need to research, analyse and resolve issues that arise are factors in the time taken to provide a Product Ruling.

28. As soon as it becomes apparent that the product contains features requiring detailed research and analysis, the applicant will be contacted to discuss the matter.

29. If a Product Ruling is no longer sought on an arrangement (i.e., the application is withdrawn), the Commissioner may still provide to

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the applicant unpublished written confirmation of his conclusion in relation to the product.

Obligations after the issue of a Product Ruling

30. The Corporations Law requires a company, a registered managed investment scheme and other prescribed entities to lodge with the Australian Securities and Investments Commission (ASIC) a directors' report. The report must (among other requirements):

- give details of any significant changes in the entity's state of affairs during the financial year;
- state the entity's principal activities during the financial year and any significant changes in the nature of those activities during the financial year; and
- give details of any matter or circumstance that has arisen since the end of the financial year that has significantly affected, or may significantly affect:
 - the entity's operations in future financial years;
 - the results of those operations in future financial years; or
 - the entity's state of affairs in future financial years.

The entity reported on is the company, registered managed investment scheme or other prescribed entity.

31. If such a report is required to be lodged, the applicant is required to provide this information to the Commissioner within the time for lodgment of the report with the ASIC. The Commissioner must receive this information after the end of each financial year for the duration of the Product Ruling. If the information is not provided, the Ruling may be withdrawn.

32. Any material variations from the arrangement ruled upon in the Product Ruling means that, at least from the date of the material variation, the Product Ruling was not, and is not, binding on the Commissioner.

Testing our views

33. Where we are unable to rule favourably, we will, if the applicant wishes to test our views, agree to issue a private ruling in response to

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a valid application by a proposed investor, enabling the relevant review processes.

When we will not rule

34. A Product Ruling will not be issued in the following circumstances:

- (a) the application is frivolous or vexatious. Falling within this category are requests where the arrangement is only hypothetical, in that the arrangement to which the application relates is not being carried out and is not seriously contemplated by the applicant;
- (b) in the opinion of the Commissioner insufficient information has been provided despite a request by the Commissioner for additional information; or
- (c) in the opinion of the Commissioner it is unreasonable to comply with the application given the extent of resources available or other relevant matters. Usually, this provision would not apply except in the case of protracted and very time consuming matters to which the Commissioner cannot devote resources. An example may be the 'arm's length consideration' requirements in Division 13 of the *Income Tax Assessment Act 1936* (ITAA).

Commissioner of Taxation23 September 1998

ISSN 1441 - 1172

ATO references

NO 98/8893-4
 98/6626-4
 98/6300-1
 97/9159-1
 97/2803-1

subject references

- product rulings
- public rulings
- taxation administration

legislative references

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case references

Not previously released to the public in draft form

Price \$1.30

FOI index detail
reference number
 I 1017717

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ATTACHMENT A

INFORMATION REQUIREMENTS

Information requirements

1. All aspects of the following information must be addressed in an application.

Applicant/agent information

2. Applicant information must be provided: name, address, telephone, facsimile, other relevant contact information, ACN (or other relevant ID number) and TFN (not mandatory).
3. Agent/tax professional adviser information must also be provided: name, agent ID, address, telephone, facsimile, other relevant contact information (including specific information about who this application should be discussed with).

Existing action/Rulings

4. The following questions must be answered:
 - (i) Is the arrangement on which the Ruling is sought the subject of a taxpayer's objection, appeal or audit?
 - (ii) Is the arrangement on which the Ruling is sought subject to a double taxation agreement?
 - (iii) What, if any, existing Taxation Rulings relate to the arrangement on which the Ruling is sought?
 - (iv) What, if any, existing Product Rulings relate to the arrangement on which the Ruling is sought?
 - (v) What private rulings of which you are aware relate to the arrangement on which the Ruling is sought?

Disclosure/the case

5. The following information must be provided either in the draft Product Ruling or in supplementary material provided with the application:

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- (i) Identify the questions in relation to which an answer is sought.
- (ii) Identify the legal, policy, practical/commercial and other issues to be considered.
- (iii) Provide full disclosure of all relevant facts and documents (e.g., prospectus and draft/final loan, partnership, trust and management agreements, including marketing materials and any other agreements) relating to the arrangement on which the Ruling is sought.
- (iv) Discuss whether the characteristics of the persons who enter into the arrangement (with the applicant) are relevant to the content of the Ruling. Would those characteristics cause different answers to be given to the questions posed?
- (v) State the 'tax law(s)' on which the Ruling is sought.
- (vi) State the propositions of law (if any) relevant to the questions/issues raised in this application. Specifically:
 - (a) other legislative provisions relevant to the application - both Commonwealth and State;
 - (b) legal reasons and authoritative support for the interpretation of the provision(s) relevant to the questions/issues;
 - (c) possible arguments that are contrary to the interpretation adopted, and legal reasons and authoritative support; and
 - (d) all other material or relevant matters or sources of information the Commissioner should be made aware of to ensure access to all the necessary facts and law.
- (vii) Identify whether the product is currently being marketed by the applicant or by any other person of whom the applicant is aware. If so, please provide details.
- (viii) Identify whether the investor has an interest in specific property and the nature of any right to deal with the property.
- (ix) State the extent of each investor's personal participation in the activities of the arrangement. If there is no personal participation, how are the activities be carried out and by whom? Also, please explain the nature, size, scale,

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repetition and regularity, of the activities conducted on the investor's behalf.

- (x) State the intended life of the arrangement and the minimum period for an investor's participation.
- (xi) Describe the consequences for an investor in the event of default in payment of management or other fees by that investor.
- (xii) Give details of all amounts and charges payable (such as licence, lease, application and/or management fees), the way in which they are funded, and whether they vary from the industry norm, i.e., in comparison with fees charged in the market place for the provision of similar services.
- (xiii) Specify the existence or non-existence of the following features, and state details:
 - (a) guaranteed returns for the investor;
 - (b) mechanisms to reduce risks of participating in the arrangement, such as ongoing maintenance costs being met by the manager during the life of the project and recoverable only from, and to the extent of, the gross sale proceeds from the arrangement (or the investor's share thereof);
 - (c) amounts payable by the investor that are financed under the arrangements. This would include amounts financed wholly, or in part, by a non-recourse or limited recourse loan effected by way of a round robin of payments. (Note: the term 'non-recourse' is used to describe a loan arrangement where a lender has no recourse beyond a specified security of the borrower. Usually, that security is the income proceeds from the arrangement); and
 - (d) an express or implied undertaking to reverse the transactions if tax deductions are not allowed.
- (xiv) Explain the basis on which the entities associated with the applicant bring fees to account as income.
- (xv) State the number of investors sought/expected for the product in the first year.
- (xvi) Provide flow chart(s) demonstrating the flow of funds (as amounts per investor) as between investor, financier,

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promoter, management company and producer, and any other entity in receipt of the investment funds. Common directorship and ownership of these entities, as well as their residency status, must also be shown.

- (xvii) Provide details of the after tax cash flow projection for investors on the top marginal tax rate, for the first 2 years of the product.
- (xviii) If Part IVA is sought to be ruled upon, fully address the 8 factors referred to in paragraph 177D(b) of the ITAA, based on the information and/or understanding that exists at the time of submitting the application.
- (xix) Where the answers to the above are contained in the supporting documentation, please indicate the exact location of the information.
- (xx) If you are unable to answer any of the above, or unable to answer fully, please advise why.

About the Ruling sought

6. Information must be provided on the following:

- (i) For what period is this Ruling sought? (Note that this must not exceed three years from the end of the income year in which the Ruling is made.)
- (ii) Has this application (or any similar application) been lodged by, or on behalf of, the applicant (or an associate of the applicant) at any other time or at any other office of the ATO?
- (iii) Where this application is made by an agent/tax professional adviser on behalf of the applicant, the applicant must have provided written consent. Is written consent held by the agent/tax professional adviser? (Note that written consent must be supplied on request.)
- (iv) It should be noted that the name of the applicant will be disclosed in the Ruling, which will be published to the Australian community at large. Does the applicant consent to this? (Note that in the absence of this agreement no Ruling will be given.)

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ATTACHMENT B

FORMAT OF DRAFT PRODUCT RULING

1. The format of the Product Ruling is as follows:

INTRODUCTORY MATERIAL

- Including: headers, preamble advising that this is a public ruling, statements as to the binding nature of the Product Ruling (limited to the exact arrangement as described in the Product Ruling), the fact that Product Rulings may only be reproduced in their entirety - extracts may not be reproduced, and that Product Rulings provide investors with a binding ruling as to the tax consequences of the particular product, but provide no guarantee as to the commercial viability of the product.

WHAT THIS RULING IS ABOUT

- Broadly sets out the issue(s) to be answered/addressed, and the 'tax law(s)' to be dealt with.

DATE OF EFFECT

- Includes reference to the date the Ruling comes into effect (is made), the date it is withdrawn, and the effect of withdrawal.

ARRANGEMENT

- All relevant details of the arrangement on which the Ruling is sought. (Note that in limited circumstances this may need to be altered to refer to discretions.)

CLASS OF TAXPAYER

- Normally this is the investors in a product, but may need to specify the characteristics of the purchasers and their involvement in the product arrangement.

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RULING

Limitations in operation of the Ruling

- Any necessary limits to the operation of the ruling (e.g., the Ruling may only properly relate to residents).

Conclusions on the operation of the law

- Operative part of the Ruling.
- Sets out the conclusions reached only (e.g., that the outgoing is deductible).
- No reasons to be included.

EXPLANATIONS

- Such non-binding additional information to be included only if it is considered necessary to explain the Ruling and/or its operation, or some aspects of the Ruling.

REFERENCE INFORMATION

- As for existing Taxation Rulings.
2. In preparing the draft Product Ruling, applicants should follow this layout to the greatest extent possible. As a minimum, we require the draft to address in a detailed way, the following:
 - what this ruling is about;
 - arrangement
 - class of taxpayer
 - ruling
 - explanations.
 3. The draft Product Ruling must be signed and include declarations that the material contained therein is true and correct.