



***TD 2013/2 - 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 cover sheet is provided for information only. It does not form part of *TD 2013/2 - 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?*

 There is a Compendium for this document: **TD 2013/2EC** .



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## Taxation Determination

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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*?

**❶ This publication 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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.

### Ruling

1. No. 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 does not constitute ‘assessable primary production income’ of that individual for the purposes of Division 392 of the *Income Tax Assessment Act 1997* (ITAA 1997).

# TD 2013/2

## **Date of effect**

2. This Determination applies to years of income commencing both before and after its date of issue. However, this Determination will 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 this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**

23 January 2013

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## Appendix 1 – Explanation

**①** *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.*

### Explanation

#### ***Wind Farming***

3. Wind farming is electricity generation from wind. It involves the construction of wind turbine generators, foundations, electrical plant, access ways and service roads, switchgear buildings, and other related infrastructure.
4. The activities of wind farming include the ongoing operation of and access to that infrastructure.
5. Wind farming activities are not included in the exhaustive list of activities that constitute the carrying on of a 'primary production business' within the definition of that term in subsection 995-1(1) of the ITAA 1997.
6. Large open tracts of land are necessary on which to establish the wind turbine generators. Contracts are entered into with the various land owners in a region in relation to the wind farming infrastructure being constructed, operated and accessed on their land.
7. Rural land is highly suitable for wind farming as wind turbine generators can operate without adverse impact on the primary production business being carried on by the land owner.
8. Where the land owner is an individual carrying on a primary production business, reference should be had to Division 392 of the ITAA 1997. Division 392 provides for the averaging of taxable income to even out long term income tax liability from year to year of certain individuals carrying on a primary production business. A concept underlying the application of the Division is that of 'assessable primary production income'.

#### ***Assessable primary production income***

9. Subsection 392-80(2) of the ITAA 1997 provides that, in determining 'assessable primary production income', regard is to be had to 'assessable income ... that was derived from, or resulted from, ... carrying on a primary production business'.
10. In *Watson v. Deputy Commissioner of Taxation* (2010) 182 FCR 104; [2010] FCAFC 17; 2010 ATC 20-167; (2010) 75 ATR 224 (*Watson*), the Full Federal Court considered the phrase 'assessable income from the business activity' for the purposes of subsection 35-10(2) of the ITAA 1997. The court noted that the primary question was the meaning of the word 'from' in the expression.<sup>1</sup> In that regard, the court referred to Beaumont J in *BHP Petroleum (Timor Sea) Pty Ltd v. Minister for Resources* (1994) 49 FCR 155 at 170-171 who stated:

In my opinion, ... 'from' is intended to have its dictionary meaning, that is to say, to indicate the starting point, source or origin ...

and held that a similar meaning should be given to the word 'from' for the purposes of subsection 35-10(2).<sup>2</sup>

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<sup>1</sup> Paragraph 28 of *Watson*.

<sup>2</sup> Paragraph 29 of *Watson*.

11. In considering the words before them, Dowsett, Stone and Bennett JJ noted in *Watson* that the taxpayer's 'income will be from his business activity... if it can be related in some way to the business which he has conducted ...'.<sup>3</sup>

12. The court also noted:

If the starting point or source of the assessable income must be the business activity carried on in that year, the extent and nature of that business activity must be identified before one can determine whether or not particular income is 'from' it... that such activity was the origin of that income.<sup>4</sup>

13. On this basis, it is only ordinary income derived from or resulting from the particular primary production business being carried on that can constitute 'assessable primary production income' for the purposes of subsection 392-80(2) of the ITAA 1997.

14. Having regard to the various land owners that would be approached by and would enter into contracts with the entity seeking to construct, operate and access wind farming infrastructure in a region, not all would be individuals and not all would be carrying on a primary production business. The activities of those individuals who do carry on a primary production business would vary depending on the particular business, for example whether the business is raising cattle or cultivating plants. Given the differences in the extent and nature of the primary production business activities of the individuals who derive the ordinary income, it can be seen that the source of the income dealt with in this Determination is not their particular primary production activities. Rather, the income is sourced in the individual's ownership of the land on which the wind farming infrastructure is constructed, operated and accessed.

15. There is no causative connection between the income derived and the particular primary production business being carried on.

16. As any income derived from allowing the construction and operation of and access to wind farming infrastructure is not from the primary production business being conducted on the land by the individual, such income is not 'assessable primary production income' for the purposes of Division 392 of the ITAA 1997.

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<sup>3</sup> Paragraph 30 of *Watson*.

<sup>4</sup> Paragraph 31 of *Watson*. Taxation Ruling TR 2001/14 *Income tax: Division 35 - non-commercial business losses* has been updated to reflect the *Watson* decision: refer paragraphs 92A to 92C.

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## References

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*Previous draft:*

Previously issued as TD 2012/D9

*Related Rulings/Determinations:*

TR 2001/14; TR 2006/10

*Subject references:*

- income averaging
- primary production
- primary production business
- primary production income
- wind farming

*Legislative references:*

- ITAA 1997

- ITAA 1997 35-10(2)
- ITAA 1997 Div 392
- ITAA 1997 392-80(2)
- ITAA 1997 995-1(1)
- TAA 1953

*Case references:*

- BHP Petroleum (Timor Sea) Pty Ltd v. Minister for Resources (1994) 49 FCR 155
- Watson v. Deputy Commissioner of Taxation (2010) 182 FCR 104; [2010] FCAFC 17; 2010 ATC 20-167; (2010) 75 ATR 224

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*ATO references*

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