



***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?***

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This document has been finalised by TD 2013/2.

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



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## Draft 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*?

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### 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).

### Date of effect

2. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will 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 Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

## Appendix 1 – Explanation

**①** *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed 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 entities that would be approached by and 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 draft 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.

## Appendix 2 – Your comments

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17. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

18. 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](http://www.ato.gov.au)

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10; TR 2001/14

*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)

*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) 75 ATR 224; 2010 ATC 20-167; [2010] FCAFC 17

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ATO references

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