TD 96/D1 - Income tax: self assessment: can a person obtain a private ruling under Part IVAA of the Taxation Administration Act 1953 (TAA), on the question of whether that person is carrying on a business?

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This document has been finalised by TD 96/16.

Australian Taxation Office

Taxation Determination **TD 96/D1**

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

Draft Taxation Determination

Income tax: self assessment: can a person obtain a private ruling under Part IVAA of the *Taxation Administration Act 1953* (TAA), on the question of whether that person is carrying on a business?

1. No. The question of whether a person is carrying on a business does not identify any particular 'tax law'. Under section 14ZAF of the TAA a person can only apply for a ruling on how, in the Commissioner's opinion, a tax law applies to an 'arrangement' for a 'year of income'.

2. However, the application of a number of tax laws depends on whether a business is being carried on. For example, a deduction for a loss or outgoing will not be allowable under the second limb of subsection 51(1) of the *Income Tax Assessment Act 1936* (ITAA) unless it has been necessarily incurred by a taxpayer in carrying on a business for the purpose of producing assessable income.

3. The carrying on of a business is a pre-requisite for the application of this part of this particular tax law. In a private ruling about the application of this tax law the Commissioner would give his opinion on how the second limb of subsection 51(1) of the ITAA applies, or might apply, to a person in respect of a year of income, in relation to an arrangement. To form this opinion we would need to consider whether the activities described as the arrangement constituted the carrying on of a business by the person applying for the ruling. The arrangement would also need to describe how the deduction claimed under the second limb of subsection 51(1) of the ITAA arose, or is proposed to arise.

4. Only our answer on whether a deduction is allowable under the second limb of subsection 51(1) of the ITAA, in respect of the particular outgoing, will be contained in the notice of ruling. However, normally, this notice will be accompanied by an 'Explanation'. In the Explanation we would describe our reasons for the answer contained in the notice of ruling. An Explanation accompanying a notice of ruling about the application of the second limb of subsection 51(1) of the ITAA, would usually contain our reasons about whether the activities described in the application for the ruling constituted a business. The person who applied for the ruling would know therefore what the Commissioner's views were on this point, even if these reasons were not contained in the notice of ruling.

5. On a cautionary note, the question of whether a person is carrying on a business is usually a question of fact. An application for a private ruling about a tax law dependent on this point needs to be carefully put together because of this. Ideally, a person applying for such a ruling will have researched the factors considered relevant to whether a business is being carried on (see, e.g., the factors described in paragraph 87 of Taxation Ruling TR 95/6). As a result, their description of the arrangement in their application will contain sufficient information addressing all those factors. For example, we would expect that where research has been carried out on the viability of the

activity in question the results of that research would be included with the application for private ruling.

6. Similarly, under section 14ZAH of the TAA, a year of income to which an application can apply can be a 'future year of income'. Under section 14ZAI of the TAA, an arrangement to which an application can apply can be a 'proposed arrangement'. There is a real, practical risk though in applying for a private ruling in respect of a future year of income, in relation to a proposed arrangement. A person intending to do so must be prepared to accept that differences may arise between an arrangement dealt with by the Commissioner in a ruling and the arrangement actually carried out. Where these differences turn out to be material the ruling given will not apply to the actual arrangement.

7. In these circumstances it may be prudent, where possible, to apply again to the Commissioner for a ruling in respect of the arrangement that was actually carried out.

Example

David owns 10 acres on which he breeds pigs. He lodges an application for a private ruling in which he describes all the relevant details of his pig breeding activities, including information about his purchases, sales and natural increase. In his application he poses the question: 'Does the Commissioner consider that my pig breeding activities are a business of primary production?'

We contact David to explain that we cannot give a private ruling on this question. We suggest that he alter his application so that it now requests the Commissioner to give his opinion about the application of section 156 of the ITAA, for a year of income, in relation to the arrangement in which his pig breeding activities are described. This description is expanded to cover all the other relevant factual preconditions raised by section 156.

Section 156 of the ITAA is a tax law and its application depends on, amongst other things, whether David is deriving 'assessable primary production income'. This in turn depends on whether some portion of David's assessable income is derived from 'the carrying on of a business of primary production'.

We provide a notice of ruling giving our opinion on the application of section 156 to the arrangement. It is accompanied by an Explanation in which we set out our views on whether we consider David is carrying on a business of primary production.

Commissioner of Taxation
7 February 1996

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