PR 1999/95 - Income tax and fringe benefits tax: Product Rulings system

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Product Ruling
Income tax and fringe benefits tax: Product Rulings system

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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 1999/95 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:

- the date of effect of Product Rulings;
- what constitutes a Product Ruling;
- applying for a Product Ruling; and
- 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 16). The terms 'invest', 'investing', 'investment' and 'investor' are used in the same context.

Date of effect

This Ruling

3. This Product Ruling applies from 13 October 1999.

Later Rulings

4. Product Rulings have prospective effect only. Therefore, a Product Ruling applies only to arrangements entered into after the date the Ruling is made. Persons investing in the product before the Ruling is made are not 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 A Product Ruling also specifies the date on which it will be withdrawn and cease to have effect.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. Additionally, as a general rule, the Commissioner will not rule on the tax benefits available to investors beyond a period exceeding three years from the end of the income year in which the Product Ruling is made.

Previous Rulings

7. This Ruling replaces Product Ruling PR 98/1, which is now withdrawn.

Ruling

What constitutes a Product Ruling

8. 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 16). Being a type of public ruling, the Commissioner derives the power to issue Product Rulings under Part IVAAA of *the Taxation Administration Act 1953* (TAA). The Commissioner has an unfettered discretion as to whether or not to issue a Product Ruling in relation to any particular project.

9. A Product Ruling provides certainty to potential investors by confirming that the tax benefits set out in the **Ruling** part of the Product Ruling are available, provided that the arrangements are carried out in accordance with the information provided by the applicant and described in the **Arrangement** part of 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, investors lose the protection of the Product Ruling:

- 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.

10. Potential investors in a particular project may wish to seek assurances from the promoter of the project that the arrangement will be carried out as described in the Product Ruling relating to the project.

Class of person/arrangement

11. 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).

12. 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.

13. 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'

14. 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).

15. 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

16. 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.

17. A Product Ruling provides investors with a binding ruling as to the tax consequences of the particular product, but provides no assurance that the product is commercially viable, that charges are reasonable or represent industry norms, or that projected returns will be achieved or are reasonably based. Potential investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits into an existing portfolio, etc. A financial (or other) adviser should be consulted for such information.

Numbering of Product Rulings

18. 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

19. A Product Ruling is a public ruling in terms of the TAA. Accordingly, for a Product Ruling to be made, the Ruling must be published and notice of it must be published in the *Gazette*. Because a Product Ruling only applies for a set term, the *Gazette* notice giving notice of the making of the Ruling will also give notice of the future date on which the Ruling will be withdrawn. The Commissioner may, however, withdraw a Product Ruling at any stage by publishing notice of the withdrawal in the *Gazette*.

Copyright

20. 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. The relevant form that must be completed (entitled 'A Request to Reproduce Published Commonwealth of Australia Copyright Material') is available on AusInfo's Internet site at **http://www.ausinfo.gov.au/infoman/im_copyright.htm**.

Applying for a Product Ruling

21. 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.

22. A short time prior to submitting formally an application for a Product Ruling, applicants may forward to the Australian Taxation Office a completed 'Intention to Submit a Product Ruling Application' form. A copy of this form may be printed off the ATO's Internet site at **http://www.ato.gov.au** or obtained from the ATO. The completed form should be directed to:

Product Rulings Contact Officer
Rulings Unit
Office of the Chief Tax Counsel
Australian Taxation Office
PO Box 900
Civic Square ACT 2608.

23. Early notification of an intention to lodge a Product Ruling allows us to allocate resources in advance and thereby reduce likely processing times. In acknowledging receipt of the 'Intention to Submit a Product Ruling' form, the applicant will be given details of a contact officer and information about forwarding the finalised application. The application will not be considered lodged until the finalised application is received.

24. Alternatively, applicants may submit an application for a Product Ruling directly to the Product Rulings Contact Officer in the Rulings Unit at the address given above (see paragraph 22).

25. A written application is required for a Product Ruling. The information that must be addressed in an application is detailed in a checklist, which can be printed off the ATO's Internet site at **http://www.ato.gov.au** or obtained from the ATO. In particular, a draft of the proposed '**Arrangement**', '**Ruling**' and '**Explanations**' parts of the Product Ruling must be provided. The draft must be signed and include a declaration that all material contained in the draft is true and correct. Reference may be had to published Product Rulings for guidance as to the style in which the various parts of a

Product Ruling are drafted. Copies of published Product Rulings can be accessed on the ATO's Internet site at **http://www.ato.gov.au**.

26. Applicants should take particular care to ensure that any draft Product Ruling produced in the course of preparing an application is clearly distinguishable in format from a final Product Ruling as issued by the ATO. In particular, each page of any draft Product Ruling produced should carry a notation to the effect that it is a draft for application purposes only (this ensures potential investors are not inadvertently misled about the nature of the document).

27. The completed checklist must be attached to the front of the application. All aspects of the information specified in the checklist must be addressed in the application. An application cannot be fully considered if insufficient information is provided. The applicant will be contacted, advised that the ATO cannot rule, and asked to provide further and better particulars if the information is deficient in any way.

28. Applications and all supporting documents *should be provided in triplicate*. In addition, an electronic copy of the proposed parts of the draft Product Ruling, and other relevant documents, if available, should be provided on disc.

29. 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.

30. The issuing of a Product Ruling in relation to a particular Project is conditional on the applicant:

- acknowledging 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;
- obtaining express consent to be named from all parties named in the Ruling;
- verifying that the description of the Project contained in the proposed Ruling is accurate; and
- agreeing to abide by a number of terms of use, e.g., agreeing to provide each investor in the project shortly following the conclusion of each financial year with a statement of income derived by the investor in that financial year. A copy of the terms of use may be

printed from the ATO's Internet site at **http://www.ato.gov.au** or obtained from the ATO.

31. The quality and completeness 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.

32. As soon as it becomes apparent that the product has features requiring detailed research and analysis, the applicant will be contacted to discuss the matter. Applicants should note that any revision of arrangements or submission of additional material, whether requested by the ATO or not, will be treated as a fresh application made at the time the revised or additional information is received.

33. If a Product Ruling is no longer sought on an arrangement (i.e., the application is withdrawn), the Commissioner may still provide the applicant with unpublished written confirmation of his conclusion in relation to the product.

Obligations after the issue of a Product Ruling

34. 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.

35. 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.

Testing our views

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

When we will not rule

37. The Commissioner makes and withdraws Product Rulings at his discretion.

38. Without limiting the discretion to refuse to rule in relation to other instances, a Product Ruling will not be issued in the following circumstances:

(a) the class of persons to which the Ruling applies is so narrow that the anonymity of those persons cannot be guaranteed;

(b) 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;
- there is no realistic chance of implementing the arrangement; or
- an applicant continues to present 'shifting scenarios', indicating that there is, in fact, no settled arrangement on which the ATO may rule;

(c) the persons who may purchase the product are not an homogeneous group, such that the tax result is the same for all (for example, the arrangement includes options which, if exercised, would be likely to change the tax outcome for some investors), or the tax result is dependent on the outcome of an unresolved issue (for example, whether an investor is in business);

(d) the Ruling, or circumstances associated with the Ruling, could reasonably be misleading to potential

investors. Falling within this category are requests where:

- the ATO cannot give a positive clearance on general anti-avoidance provisions; or
- the material provided in support of the application cannot reasonably be relied upon;

(e) in the opinion of the Commissioner, insufficient information has been provided despite a request by the Commissioner for additional information. Falling within this category also are requests where material provided is inconsistent, inaccurate or contains errors such that the arrangement cannot be ascertained with particularity; and

(f) in the opinion of the Commissioner it is unreasonable to comply with the application given the extent of resources available or other relevant matters. For example, the Commissioner may refuse to issue a Product Ruling in the following circumstances:

- 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 1936);
- where the issues are sufficiently covered by a previously issued public ruling; or
- where statutory or other Government requirements (e.g., prospectuses, licences, approvals) have not been met and are not expected to be met, have expired, have been withdrawn, or are expected to expire or be withdrawn in the near future.

39. Product Rulings will generally be withdrawn where no longer needed. For example, a Product Ruling will be withdrawn where the arrangement in relation to which the Product Ruling issued is no longer to be implemented, the arrangement has been implemented but in a way materially different from that described in the Ruling, or where a replacement Ruling has issued. A Product Ruling, although withdrawn, will continue to bind the Commissioner in relation to those who entered into the arrangement as described in the Ruling during the currency of the Ruling.

Detailed contents list

40. Below is a detailed contents list for this Product Ruling:

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Commissioner of Taxation
13 October 1999

Previous draft:
Not previously released to the public in draft form

Related Rulings/Determinations:

Subject references:
- product rulings
- public rulings
- taxation administration

Legislative references:

Case references:

ATO references:
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