# Certain Transactions involving Mining Tenements

This Commissioner's practice outlines the Commissioner's treatment of certain issues when assessing and determining the dutiable value of a dutiable transaction that involves mining tenements or the unencumbered value of mining tenements held by a landholder.

## Background

### *Transfer duty*

Under section 26 of the *Duties Act 2008* (Duties Act), transfer duty is charged on the *dutiable value* of a *dutiable transaction*.[1] Section 27 of the Duties Act provides that the *dutiable value* of a dutiable transaction is:[2]

- the *consideration* for the dutiable transaction or
- the *unencumbered value* of the dutiable property the subject of the transaction if –
  - there is no consideration for the transaction or
  - the consideration cannot be ascertained when liability for duty on the transaction arises or
  - the unencumbered value is greater than the consideration for the transaction.

### *Landholder duty*

Section 186 of the Duties Act provides that the value of a *landholder*[3] is the sum of:

- the *unencumbered value* of the Western Australian land assets,[4] chattels, or land assets and chattels (whichever is relevant) to which the landholder is entitled and
- the same percentage of the unencumbered value of the Western Australian land assets, chattels, or land assets and chattels to which any linked entity of the landholder is entitled as the percentage of the landholder's interest in the linked entity.

Under section 148 of the Duties Act, *unencumbered value* has the meaning given in section 36 as applied by section 150. Section 150 of the Duties Act states that sections 36 and 36A apply, with any appropriate modifications, where it is necessary to determine the unencumbered value of land assets or chattels for the purposes of sections 155(5)(a), 157(2) or 186.

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1 *Dutiable transaction* is defined in section 11 of the Duties Act. Transfer duty is charged on the dutiable value of a dutiable transaction unless otherwise provided: Duties Act s 26.

2 Unless otherwise provided.

3 A *landholder* is a corporation or unit trust scheme that is entitled, either directly or through a linked entity, to land assets in Western Australia valued at $2 million or more: Duties Act s 155.

4 *Land assets* include land, a fixed infrastructure control right, a derivative mining right and subject to s204A, a fixed infrastructure access right: Duties Act s 148.

### *Consideration*

*Consideration* means the amount of monetary consideration or the value of non-monetary consideration.[5] Consideration includes:[6]

- the amount of any liabilities assumed under the transaction, including an obligation, whether contingent or otherwise, to pay any unpaid purchase money payable under an agreement for the transfer of dutiable property and
- the amount or value of any debt to the extent it is released or extinguished under the transaction.

If the consideration consists of an amount payable periodically and the total amount to be paid can be ascertained, the consideration is the total amount.[7] It does not matter whether consideration for a transaction is paid or given or required to be paid or given.[8]

Subject to certain conditions, duty will be reassessed when any contingent consideration under an agreement for transfer has not been paid.[9]

### *Unencumbered value*

The *unencumbered value* of property is the value of the property determined without regard to any encumbrance to which the property is subject, whether contingently or otherwise.[10]

When determining the unencumbered value of property:[11]

- the ordinary principles of valuation apply except where modified by the subsection
- it is to be assumed that a hypothetical purchaser would, when negotiating the price of property, have knowledge of all existing information relating to the property and
- information relating to property (including the right to and use of the information) will be regarded as an attribute of the property and not something to which an independent value can be ascribed.

When determining the unencumbered value of land, the value is to be determined having regard to:[12]

- the use of the land that would best enhance its commercial value and
- commercial advantages (such as goodwill) that attach to the location or other aspects of the land and which would affect the price that a reasonable purchaser would be willing to pay for the land.

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5 Duties Act s 3.

6 Duties Act s 30.

7 Duties Act s 30.

8 Duties Act s 30.

9 Duties Act s 32.

10 Duties Act s 36(1).

11 Duties Act s 36(4).

12 Duties Act s 36(5).

Section 36A sets out how fixtures and *mining tenements fixtures* will be treated when determining the unencumbered value of dutiable property that is land or mining tenements.

A *mining tenement fixture* means a thing that:[13]

- under the authority of the mining tenement, is fixed to the land that is the subject of the mining tenement and
- would be part of the land as a fixture if the mining tenement were a freehold estate in land.

Anything that is part of land as a fixture, or is a mining tenement fixture, is to be taken into account even if the transaction does not, or purports not to, apply to the fixture as well as the land.[14] These rules apply only if the value of the fixture would not be taken into account separately.[15] In this section, 'land' means the physical land.[16]

### *Valuation of property*

Under section 21 of the *Taxation Administration Act 2003* (TAA), the Commissioner may require a taxpayer to provide a written valuation by a *qualified valuer*[17] of any property, consideration or benefit, together with any documents or other records in the taxpayer's possession or control relevant to determining the value.

Regardless of whether the Commissioner has required the taxpayer to provide a valuation or whether the taxpayer has complied with such a requirement, the Commissioner may:[18]

- have a valuation made of any property, consideration or benefit or
- adopt any available valuation of the property, consideration or benefit that the Commissioner considers appropriate.

The Commissioner may recover valuation costs from a taxpayer if not satisfied with a valuation provided by the taxpayer and the value on which the taxpayer's liability is assessed exceeds the taxpayer's designated valuation by 15 per cent or more.[19] If the Commissioner decides to recover valuation costs, the taxpayer is also liable to pay penalty tax for undervaluation.[20]

Commissioner's Practice TAA 23 'Circumstances When a Taxpayer Will Be Required to Provide a Written Valuation' (CP TAA 23) outlines when the Commissioner will require a taxpayer to provide a written valuation for transfer duty or landholder duty purposes.

Commissioner's Practice TAA 24 'Penalty Tax and Recovery of Costs for Written Valuations' sets out when the Commissioner will recover costs and impose penalty tax for undervaluation.

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13 Duties Act s 36A(1).

14 Duties Act s 36A(2) and (4)

15 Duties Act s 36A(3) and (5).

16 Duties Act s 36A(6).

17 A *qualified valuer* is defined in the TAA as meaning a person licensed or registered under the *Land Valuers Licensing Act 1978* or a corresponding Act in another State or Territory, or a person who the Commissioner is satisfied is suitably qualified or experienced to provide a valuation.

18 TAA s 22.

19 TAA s 23A(1)(b).

20 TAA s 27A(2).

### *Goods and services tax*

Section 5 of the Duties Act provides that, in ascertaining the value or consideration of anything, there is to be no discount for the amount of Goods and Services Tax (GST) (if any) payable on the supply of that thing. Commissioner's Practice DA 36 'Treatment of Amounts of Goods and Services Tax' sets out the Commissioner's treatment of GST for the purposes of assessing duty.

### *Derivative mining rights*

A *derivative mining right* is an authorisation of a kind described in section 118A of the *Mining Act 1978* under which the holder of a mining tenement authorises another person to explore for and mine specific minerals on the holder's tenement.[21]

In *Commissioner of State Revenue v Abbotts Exploration Pty Ltd*,[22] the Court of Appeal held that a contractual derivative mining right does not confer a legal or equitable estate or interest in the mining tenement (that is, a proprietary interest in the mining lease itself). The result was that these rights were not land for the purposes of the Duties Act.

Therefore, it was taken that the grant of a contractual mining right was not a dutiable transaction, and the dutiable value of transactions involving mining tenements was determined without regard to the value of any derivative mining rights.

The Duties Act was amended and, from 13 June 2019,[23] a derivative mining right is dutiable property that is a right[24] and certain transactions involving derivative mining rights are dutiable transactions. A derivative mining right is also a land asset for landholder duty purposes.[25]

Sections 91F, 91G, 91H and 204E of the Duties Act contain special rules for determining the dutiable value of a mining tenement when it is transferred subject to a derivative mining right. Sections 91F and 91H of the Duties Act ensure double duty does not apply to the re-grant of a derivative mining right in certain circumstances. Each of these sections requires the prior acquisition of the derivative mining right, on its grant, (derivative mining right acquisition) to be duty endorsed.

### *Prospecting licences*

A transaction involving prospecting licences (or associated rights such as a derivative mining right) and no other dutiable property that occurs on or after 1 July 2022 is not a dutiable transaction.[26] This includes agreements to transfer, transfers and farm-in agreements. These transactions do not generally need to be lodged with RevenueWA.

If a transaction involving one or more prospecting licences forms substantially one arrangement with another dutiable transaction, or a landholder acquisition, the transaction involving prospecting licences will be a dutiable transaction, and must be lodged with RevenueWA. See Revenue Ruling DA 25 'Substantially One Arrangement' for guidance on the factors the Commissioner will consider when deciding whether two transactions, or a transaction and an acquisition, form substantially one arrangement.

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21 Duties Act s 3.

22 *Commissioner of State Revenue v Abbotts Exploration Pty Ltd* [2014] WASCA 211.

23 Date of commencement of Part 2 of the *Revenue Laws Amendment Act 2019*.

24 Duties Act ss 16(3)(aa), 17(1)(b)(iic), 18(gc).

25 Duties Act s 148.

26 Duties Act s 91H.

Acquiring an interest in a landholder that only holds prospecting licences or associated rights will not generally be chargeable with duty unless it forms substantially one arrangement with another transaction or acquisition. Even if it is not chargeable with duty, it must still be lodged with RevenueWA.

## Commissioner's Practice

### *Value of property*

1. In Spencer's Case,[27] the Court held that the value of property must be determined by reference to the price at which a willing but not anxious vendor would sell the property to a willing but not anxious purchaser if both parties have all relevant information about the property.

2. When the parties to a dutiable transaction or a relevant acquisition are dealing at arm's length and the other requirements in Spencer's Case are satisfied, the Commissioner will use the purchase price as the initial reference point for determining the dutiable value of the transaction or the unencumbered value of land assets and chattels for the relevant acquisition.

### *Goods and services tax*

3. If a transaction is subject to GST, the amount of GST should be embedded in the market value of the property and be included in the purchase price.[28] Therefore, the amount of GST should be included in the value provided for transfer duty purposes.

4. Any adjustments to a market valuation to add or subtract GST amounts will either overstate or understate the market value. This is because any liability of a vendor to remit GST to the Australian Taxation Office should have already been factored into the market value.

5. The Commissioner may determine it is not appropriate to adopt a taxpayer valuation for assessment purposes if any artificial adjustments to GST are made to a market value or to the data relied on in determining the market value of property, for example, comparable sales or exploration expenditure.

*Example 1*

Sam acquires several exploration licences from a related party for $5 million. Together these form a single project in its pre-feasibility stage. There is no going concern clause in the purchase agreement.

Sam provides a valuation report to the Commissioner which uses the comparable sales methodology. The valuation report states that the tenements together have an unencumbered value of $6.5 million, which has been determined on a GST-exclusive basis.

The Commissioner is unlikely to accept the valuation report because the value does not include a GST component.

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27 *Spencer v The Commonwealth of Australia* (1907) 5 CLR 418.

28 See, for example, *Tomago Aluminium Company Ltd v Valuer-General* [2010] NSW LEC 4; *Storage Equities Pty Ltd v Valuer-General* [2013] NSWLEC 137.

*Example 2*

Paul agrees to acquire all of the shares in Lithium Heights Pty Ltd (Lithium) from an unrelated party for $3 million. Lithium holds mining tenements which consist of exploration and prospecting licences.

Paul provides a valuation report to the Commissioner using the multiples of exploration expenditure methodology to provide that the tenements together have an unencumbered value of $910,000. Although the valuation report makes no reference to GST, the valuer reduced the exploration expenditure data used by 1/11$^{th}$ to account for GST.

The Commissioner is unlikely to accept the valuation report as the valuer has made artificial adjustments to the exploration expenditure data to account for GST. This adjustment has flowed through to arrive at a GST-exclusive unencumbered value, although no reference to GST has been made.

### *Valuation methodologies*

6. The top down method of valuation will be accepted for transfer duty or landholder duty purposes when all assets are located in Western Australia and the taxpayer does not submit that any value rests in non-dutiable items in the nature of goodwill[29] or synergies.

7. The Commissioner will consider accepting a top down valuation if no value is allocated to non-dutiable assets that the Commissioner considers may have some value. For example, the taxpayer may request the Commissioner to accept a valuation where the cost of directly valuing the non-dutiable assets will be greater than the potential difference in duty.

8. Examples of when the top down valuation method will not be suitable include when the consideration for a transaction is not ascertainable, there are assets in multiple jurisdictions, or there are multiple asset classes that are difficult to value directly.

   In these cases, the Commissioner will accept valuation methodologies that are generally used to value that type of property, including:

   8.1 comparable transactions and derivatives

   8.2 multiples of exploration expenditure

   8.3 Kilburn Geoscience rating

   8.4 net present value of future cash flows.

9. Other valuation methodologies will be considered on a case-by-case basis. When deciding whether to accept a valuation that uses another methodology, the Commissioner will compare the resulting value with the consideration for the transaction.

10. If a transaction involves assets inside and outside Western Australia, the Commissioner will always consider the total purchase price when deciding whether to accept a valuation.

11. Although a valuation methodology may be appropriate for particular property, the Commissioner may not agree with the values that result from applying the method if they are unreasonable or not supported. The Commissioner may determine it is appropriate to adopt a valuation based on the methodology and to adjust the values allocated to particular items in the valuation.

[29] Goodwill is dutiable for transfer duty purposes but not for landholder duty.

12. Before an assessment is made, the taxpayer will be given the opportunity to comment on the Commissioner's view that a valuation should not be accepted or that values in a valuation should be reallocated.

*Example 3*

A Pty Ltd acquires all of the shares in Big Mining Pty Ltd from an unrelated party for $100 million. Big Mining Pty Ltd holds mining tenements, plant and equipment, and mineral stockpiles.

A Pty Ltd provides a valuation to the Commissioner using a top down methodology. The valuation allocates $20 million to the stockpiles and $80 million to the tenements and plant and equipment.

The Commissioner is likely to accept the valuation if the value allocated to the stockpiles is properly justified in the report.

If the valuation report does not adequately support this value, the Commissioner is unlikely to accept it. In this case, the Commissioner will either request more information to support the allocation of value or refer the matter to an expert valuer for adjudication or a new valuation.

*Example 4*

B Pty Ltd acquires all of the shares in Mining Co Pty Ltd from an unrelated party for $10 million. Mining Co Pty Ltd holds several exploration licences and no other substantial assets.

B Pty Ltd provides a valuation to the Commissioner based on multiples of exploration expenditure, with a preferred value for the tenements of $3 million. The valuation report does not justify why there is a significant difference between the consideration paid for the shares in Mining Co Pty Ltd and the value of assets held by the company.

The Commissioner is unlikely to accept the taxpayer's valuation in this case due to the large difference between the amount paid and the value determined.

*Example 5*

C Pty Ltd purchases a mining project that includes a number of mining leases from an unrelated party. The consideration for the transaction is $50 million subject to various adjustment clauses that cannot be calculated until after settlement is complete.

A top down valuation can't be used in this case because the exact amount of the consideration will not be determined until the transaction is completed. For this reason, C Pty Ltd provides a valuation report which values non-dutiable assets at $5 million and determines a preferred value of $42 million for the mining leases based on a discount cash flow analysis.

Provided the allocation of $5 million to non-dutiable assets is properly supported in the valuation report, the Commissioner is likely to accept this valuation because the value is reasonable having regard to the consideration for the transaction.

### *Valuation of mining tenements*

13. When a transaction involves mining tenements, the taxpayer may be required to provide a written valuation under CP TAA 23 or a duties valuation form under this practice to allow the Commissioner to obtain a valuation of the tenements. The Commissioner will determine which practice applies based on the details of the transaction.

14. Duties Information Requirement 'Mining Transactions' sets out the information a taxpayer must provide when the Commissioner proposes to obtain a valuation of the tenements. The Commissioner may require the taxpayer to provide further information.

15. A taxpayer must provide Form FDA32 'Duties Valuation – Mining Tenements' and the information referred to in paragraph 14 for a direct acquisition of mining tenements when:

    15.1 a valuation is required under another Commissioner's practice

    15.2 the parties are related or not otherwise dealing at arm's length or

    15.3 there is no consideration for the transaction or the consideration appears to be inadequate or is unascertainable.

16. The fact that a taxpayer provides a valuation form under this practice does not prevent the Commissioner from requiring the taxpayer to provide a written valuation by a qualified valuer under CP TAA 23.

### *Mining information*

17. The Commissioner will treat the value of any information relevant to mining tenements as part of the value of the tenements to which the mining information relates.[30] The Commissioner will not recognise any separate value for mining information.

18. If the property the subject of a transaction or an acquisition is or includes mining tenements and the taxpayer submits that the Commissioner should allow an allocation of value to mining information, the Commissioner will require the taxpayer to provide a written valuation under section 21 of the TAA and CP TAA 23 to determine the unencumbered value of the property in accordance with section 36 (and section 36A where relevant) of the Duties Act.

19. If the taxpayer provides a written valuation of mining tenements in which an amount is allocated to mining information and the Commissioner is satisfied with the values allocated to other dutiable property, the Commissioner will add the amount allocated to mining information to the amount allocated to the mining tenements.

### *Mining goodwill and synergies*

20. In *Commissioner of State Revenue v Placer Dome Inc*,[31] the High Court held that, in the context of the duties legislation, legal goodwill does not extend to every positive advantage and whatever adds value to a business. It is derived from those sources which generate or add value (or earnings) to the business by attracting custom.[32] The Court rejected the contention that goodwill for legal purposes and going concern value were interchangeable.[33]

21. The Court also rejected the argument that personnel, technical capability, management and synergies were sources of goodwill in this case, as there was no evidence that these sources generated or added value to the business by attracting custom.[34]

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30 Information relevant to mining tenements includes geological information regarding the mineralisation of the tenement as well as life of mine plans or feasibility studies.

31 *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59.

32 *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 91.

33 *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 96 and 142.

34 *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 111.

22. The Court found that the synergies described by the taxpayer arose on or after amalgamation and were assets of the amalgamated entity, not of the landholder.[35] The synergies were not "construed as a positive attribute of the original business, or an aspect of its goodwill".[36]

23. Examples of synergies the Commissioner will not recognise as assets of a landholder include:[37]

    23.1 savings in general and administrative expenses coming from shared business practices, including eliminating duplication in offices and overheads.

    23.2 optimising and sharing infrastructure, reducing energy costs and inventory levels through joint infrastructure, and reducing operating costs by implementing combined best practices.

    23.3 debt consolidation, reduction of fees and costs, and tax planning.

    23.4 developing combined projects by transferring teams, equipment and a knowledge base from one project to another.

24. When a valuation of the assets of a landholder which holds mining tenements determines that:

    24.1 the value of land assets and chattels is substantially lower than the value that would be determined by a top down methodology and

    24.2 the difference is derived from sources such as goodwill or synergies,

    the Commissioner will not accept the valuation without evidence that the purported sources of goodwill or synergies exist. The evidence must show that any sources of goodwill add value or earnings by attracting custom to the business and that any synergies were assets of the landholder prior to the acquisition.[38]

### *Rehabilitation costs*

25. When a mining project is valued by a discounted cash flow methodology, the Commissioner will accept that future rehabilitation costs are intrinsically linked to the value of the mining tenement(s) and should be taken into account in the valuation.

26. The Commissioner will not add the value of an obligation to pay rehabilitation costs to the consideration for mining tenements if this liability or obligation passes by operation of statute.

27. The value of the liabilities will not be deducted from the consideration because the market value of the tenements will already reflect the costs of the rehabilitation.

### *Royalties*

28. An agreement to acquire mining tenements may require the purchaser to pay a royalty or to assume an existing third party royalty obligation.

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[35] *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 135.

[36] *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 137.

[37] *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 133.

[38] *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 141.

29. A royalty will either be:

    29.1 limited to a specified amount (capped royalty) or

    29.2 payable indefinitely or for a specified period of time based on the volume or value of minerals produced or the profit or economic performance of a project (uncapped royalty).

    In each case, the royalty payment is consideration for transfer duty purposes, but the transfer of an obligation or entitlement under a royalty agreement will not be a dutiable transaction.

30. To adopt the amount of consideration as the dutiable value, the Commissioner must:

    30.1 be able to ascertain that amount at the date liability arose on the transaction and

    30.2 be satisfied the consideration is equal to or greater than the unencumbered value of the dutiable property in the agreement.[39]

31. A capped royalty will be ascertainable if it is:

    31.1 agreed to be paid as part of the consideration for the transaction or

    31.2 being assumed and the remaining amount payable under the royalty can be ascertained at the date of the transaction.

32. A capped royalty will be included in the ascertainable consideration for the transaction.

    32.1 When a capped royalty is agreed to be paid as part of the consideration for a transaction, the maximum amount payable under the royalty will be included in the ascertainable consideration.[40]

    32.2 When a royalty obligation is joint and several, the maximum amount payable by the party assuming the royalty will be included in the ascertainable consideration. There will be no reduction on the basis that the obligation is held jointly.

*Example 6*

Jim agrees to acquire a mining project for consideration of:

- $50 million in cash and
- once production reaches 10,000 tonnes, payment of a royalty of $0.50 per tonne up to a maximum of $10 million.

The capped royalty is ascertainable at the date of the agreement and the total amount of $10 million will be included in the dutiable value. Duty will be assessed on a dutiable value of $60 million if the Commissioner is satisfied the value of the project is not more than $60 million.

33. A taxpayer may apply for a reassessment of duty if some or all of a capped royalty is not paid and it is not possible for it to become payable in the future. This will generally require all tenements over which a royalty may be payable to be surrendered. An application for a reassessment must be made within five years after the original assessment is issued.[41]

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[39] If the consideration consists of some components that are ascertainable and some that are not ascertainable, the Commissioner may still assess on the ascertainable component. See Commissioner's Practice DA 53 for details.

[40] *Wildacre Metals Limited v Commissioner of State Revenue* [2011] WASAT 173, *Lionore Australia (Avalon) Pty Ltd v Commissioner of State Revenue* [2006] WASAT 250.

[41] TAA s 17(4).

34. A royalty will be unascertainable if:

   34.1 it is uncapped or

   34.2 a capped royalty is being assumed and the amount that remains payable under the royalty agreement cannot be determined at the date of the transaction. For example, the amount will not be known until the transaction is completed because the vendor continues to pay the royalty until that time.

35. If the amount of a royalty is unascertainable at the date of liability, the dutiable value of the transaction will be the higher of the ascertainable portion of the consideration or the unencumbered value of the dutiable property.

   35.1 The Commissioner may accept evidence of the value of the royalty obligation in place of a valuation of the tenements if the parties are at arm's length, the remainder of the consideration is ascertainable, and no value is allocated to non-dutiable assets.

   35.2 Otherwise, unless paragraph 36 applies, a valuation of the tenements will be required in accordance with either section 21 of the TAA and CP TAA 23 or section 22 of the TAA.

36. When consideration for a mining transaction includes a royalty that is unascertainable at the date of the transaction, the Commissioner will not usually obtain a valuation of the tenements if:

   36.1 all tenements the subject of the transaction are prospecting licences[42] or exploration licences

   36.2 there is other ascertainable consideration for the transaction, for example, cash or cash equivalents and

   36.3 the Commissioner is satisfied it is unlikely any royalty amount will be paid.

37. Examples of factors the Commissioner will take into account when considering if any royalty amount is likely to be paid include:

   37.1 the amount of money spent on exploration of the tenement before the transaction

   37.2 the amount or value of the ascertainable portion of the consideration and

   37.3 any public statements from the parties to the transaction regarding the tenement.

38. If a third party royalty is assumed as part of a dutiable transaction or a relevant acquisition, the value of the royalty is taken into account by the valuer when determining the unencumbered value of the mining tenements to which the royalty relates.

### *Free carry obligations*

39. Transactions involving a part interest in a mining tenement may include a requirement for the purchaser to conduct all of the exploration on the tenements after they obtain their interest (a *free carry obligation*).[43] This obligation will form part of the consideration for the transaction.

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[42] A transaction involving just prospecting licences is not a dutiable transaction.

[43] If the obligation is to spend money on exploration before they obtain their interest, the transaction may be a farm-in agreement. However, the farm-in concession does not apply when the purchaser is obliged to spend money on exploration after they obtain an interest.

40. The value of a free carry obligation will be ascertainable if the purchaser obtains a specific percentage interest in the tenement and is required to spend a specific dollar amount on exploration. The value of the obligation will be calculated on the amount they are obliged to spend, reduced by the percentage interest they have obtained.

> *Example 7*
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> D Pty Ltd agrees to acquire an 80 per cent share of an exploration licence from E Pty Ltd. Under the agreement, D must pay $100,000 in cash and shares to E, and must spend $250,000 on exploration within one year after settlement. E is not required to spend anything.
>
> The value of the free carry obligation will be $250,000, reduced by $200,000 (the 80 per cent interest held by D). The consideration for the transaction will be $150,000 (plus GST if applicable).

41. The value of a free carry obligation will not be ascertainable if the vendor is not required to spend any money on exploration until the purchaser spends a particular amount, unless the purchaser is required under the agreement to spend at least that much on exploration.

> *Example 8*
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> F Pty Ltd agrees to purchase a 75 per cent interest in a group of exploration licences from Alex Prospector. Under the agreement:
>
> - F must pay $500,000 in cash to Alex at settlement.
> - F has full discretion on exploration of the tenements, including how much is spent.
> - Alex is not required to contribute any money to exploration until F has spent $20 million exploring the tenements.
> - If F spends $20 million on exploration then costs from that point onwards will be split in proportion to each party's ownership interest.
>
> The value of the free carry obligation is not ascertainable as there is no way to know how much F will spend while sole funding exploration. A valuation of the tenements will be required.

42. A free carry obligation may also apply to transactions involving the grant of a derivative mining right. This will be consideration, but will not be ascertainable as the derivative mining right does not give a particular percentage interest in the tenement.

### *Deferred tax assets*

43. An entity may have a deferred tax asset at the time an interest in the entity is acquired. This may arise from accrued losses by the entity that will offset future income when determining income tax payable by the entity, and result in a future tax benefit if the entity makes a profit after the acquisition. This is common for entities with mining assets but may also apply to other entities that have accumulated losses.

44. An acquirer may be willing to pay more for an entity than they would for directly acquiring the entity's assets if they anticipate a benefit from a deferred tax asset such as a reduction in future tax liabilities for the entity or consolidated group.

### *Top-down valuations*

45. When a landholder entity has a deferred tax asset, the Commissioner will generally allow a reasonable allocation of value to the asset in a top-down valuation if:

    45.1 the maximum benefit that can be realised from the asset and

    45.2 the likelihood that the benefit will be realised and

    45.3 the time after acquisition until the benefit will be realised

    are taken into account.

> *Example 9*
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> G Pty Ltd is taken over by a consortium of investors for $10 million. At the time of the acquisition, G owns a mine in Western Australia that is in care and maintenance. G also has deferred tax losses of $10 million.
>
> The acquirers of G provide a top-down valuation to the Commissioner. The valuation allocates a value of $1.5 million to the tax losses on the following basis:
>
> - The maximum tax benefit to G is $3 million (30 per cent of $10 million).
> - Based on internal documents and commodity price forecasts, the valuer estimates a 75 per cent chance the mine will resume operations in three to five years. If the mine resumes operation, the tax benefit is likely to be realised within two years of the resumption.
> - The value of the benefit is reduced by 25 per cent based on the chance the mine will resume operations.
> - A suitable discount rate is applied to take into account the benefit being realised between five and seven years after the acquisition.
>
> The Commissioner is likely to accept the allocation of $1.5 million value to the deferred tax asset provided the assumptions made by the valuer appear to be reasonable.

46. The Commissioner may request evidence regarding the factors in paragraph 45, including:

    46.1 whether the asset is included in audited financial statements and

    46.2 any relevant rulings from the Australian Taxation Office regarding continuity of business or available fraction.

47. The Commissioner will only accept an allocation of value to a deferred tax asset equal to the maximum benefit that can be realised if satisfied it is highly likely the benefit will be realised within 12 months after the acquisition.

48. The value of a deferred tax asset may be nominal if there is a low likelihood it will result in a benefit, or if the benefit will be realised at a distant time in the future.

### *Valuation based on future cash flows*

49. When valuing an asset based on an analysis of future cash flows from the asset, the Commissioner will accept a valuation that ignores the future tax benefit of a deferred tax asset. The benefit is associated with the entity itself and does not affect the amount a willing but not anxious purchaser would pay for the asset directly.

## Date of effect

This Commissioner's practice takes effect from 15 September 2023.

Chris McMahon
COMMISSIONER OF STATE REVENUE

15 September 2023

## Document history

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| DA 42.1 | 3 December 2020 | 3 December 2020 | 30 June 2022 |
| DA 42.2 | 1 July 2022 | 1 July 2022 | 14 September 2023 |
| DA 42.3 | 15 September 2023 | 15 September 2023 | Current |