Derivative Mining Rights

1 July 2022

Under the *Mining Act 1978* (Mining Act), the holder of a prospecting licence, exploration licence or mining lease may authorise another person to carry out mining activities on land the subject of that mining tenement. An authorisation of this kind is a *derivative mining right* under the *Duties Act 2008* (Duties Act). Derivative mining rights commonly relate to specific minerals in a tenement.

The grant, transfer or surrender of a derivative mining right is not generally a dutiable transaction if the right relates to prospecting licences and no other mining tenement. If the grant, transfer or surrender of a derivative mining right over prospecting licences forms substantially one arrangement with another dutiable transaction then it may be dutiable. For more information on transactions that form substantially one arrangement, see Revenue Ruling DA 25 'Substantially One Arrangement'.

Duty applies to grants and transfers of a derivative mining right whether or not there is consideration for the grant or transfer.[1] The surrender of a derivative mining right is only dutiable if there is consideration for the surrender.

There are special rules for:

- determining the dutiable value of a mining tenement when it is transferred subject to a derivative mining right and
- ensuring double duty does not apply to the re-grant of rights in certain circumstances.

A derivative mining right is dutiable property for the purposes of a partnership acquisition[2] and a land asset for landholder duty acquisitions.

Form of a derivative mining right

The grant of an authorisation for another person to carry out mining activities must be in writing. Examples of the types of documents that may be used to grant a derivative mining right include:

- a deed signed by a tenement holder and another party authorising specific mining activities on a particular tenement
- a letter agreement between a tenement holder and another party that grants that party rights to a particular mineral or
- a tenement sale agreement in which the purchaser allows the vendor to continue specific mining activities on the tenements after it is transferred.

1 The grant of a right before 13 June 2019 is only dutiable if it creates an estate or interest in a mining tenement.

2 See Duties Fact Sheet 'Partnership Acquisitions'.

Transactions involving derivative mining rights

Grant or transfer of a derivative mining right

The grant of a derivative mining right, or transfer of an existing right, is chargeable with duty on the greater of the consideration for the transaction or the value of the right at the time of the transaction.

Example 1

Australian Gold Ltd holds several exploration licences in Western Australia and is conducting exploration on those tenements. Early results suggest there may be a lithium deposit in the area.

Australian Gold and WA Lithium Pty Ltd (an unrelated party) enter into an agreement under which Australian Gold:

- grants WA Lithium a 100 per cent interest in rights to lithium on any of the exploration licences for an upfront payment of $100,000 and
- authorises WA Lithium to conduct their own exploration on the tenements.

Duty is chargeable on the grant of derivative mining rights on a dutiable value of $100,000.

Five years later, WA Lithium confirms there is a lithium ore body and agrees to sell the derivative mining rights to lithium to Global Investor Inc. for $2 million. Australian Gold consents to the sale.

Duty is chargeable on this transfer on a dutiable value of $2 million.

Surrender of a derivative mining right

Duty only applies to the surrender of a derivative mining right if there is consideration for the transaction.

Example 2

After acquiring the lithium rights for $2 million, Global Investor Inc. continues exploring the tenements. The company determines that, at current lithium prices, mining the ore body is unlikely to be economic for the foreseeable future.

Global Investor decides to focus on other projects and agrees with Australian Gold to surrender the lithium rights for no consideration.

As there is no consideration for the surrender, this is not a dutiable transaction. If Australian Gold had agreed to pay Global Investor for the surrender of the rights, duty would be charged on the greater of the consideration or the value of the rights.

Transactions over mining tenements with derivative mining rights

In certain cases, the unencumbered value of a mining tenement will be determined taking into account the effect a derivative mining right has on the value.

Agreements where derivative mining right is held by third party

An agreement for the sale of a mining tenement may provide that existing derivative rights will continue to be held by the same person after the transfer. However, the transfer of a mining tenement legally extinguishes any existing derivative rights. This means the purchaser must re-grant the rights to the person who held them before the transfer. In these circumstances, duty will be assessed as follows.

If there is an agreement for the transfer of a mining tenement and:

- at the time of the agreement a person has a derivative mining right in relation to the tenement and
- it is a condition of the agreement that the transferee will grant a similar right to that person,

the value of the tenement will be determined taking into account the effect of the derivative mining right.

In most cases there will not be a separate document relating to the derivative mining right. For duties purposes this means that the sale agreement will contain both an agreement for the transfer of a mining tenement and the re-grant of a derivative mining right.

The grant of the similar derivative mining right will not be chargeable with duty if the agreement for transfer and original grant of the derivative mining right are both duty endorsed.

Example 3

Mr White holds a bundle of exploration licences and has granted derivative mining rights to ABC Co to explore for gold on the tenements.

Mr White agrees to sell the tenements to XYZ Co for $5 million dollars. It is a condition of the agreement that ABC Co will continue to hold the gold rights after the transfer.

The tenements are valued for duty purposes taking into account the effect of the gold rights. The valuer determines that the consideration for the transaction reflects the value of the tenements with the gold rights in existence. Duty is assessed on a dutiable value of $5 million.

No duty applies to the grant of the gold rights to ABC Co.

Agreements where transferee grants derivative mining right to transferor

An agreement to transfer a mining tenement may include a condition that the purchaser is to grant a derivative mining right to the vendor after the tenement is transferred. In this case, the value of the tenement will be determined taking into account the effect of the derivative mining right that will be granted.

Duty will not be charged on the grant of the derivative mining right to the transferor.

Example 4

Mr Smith holds an exploration licence. He agrees to sell the licence to Ms Jones for a 1 per cent net smelter royalty if the tenement reaches production. As part of the agreement, Ms Jones also agrees to grant Mr Smith 100 per cent of the rights to iron ore on the tenement.

As the amount of consideration cannot be determined, the tenement is valued by an expert valuer. The valuer determines that the tenement is valued at $50,000, but this value is reduced to $40,000 when the iron ore rights are taken into account.

Duty is assessed on the agreement on a dutiable value of $40,000. No duty applies to the grant of the iron ore rights to Mr Smith.

Grant of derivative mining right after transfer

In both circumstances set out above, the purchaser must grant the derivative mining right within 90 days after the transfer or any longer period allowed by the Commissioner. An application for more time must be made by lodging form FDA48 'Derivative Mining Rights - Request for Longer Period to Grant' within 90 days after the transfer.

Derivative mining right surrendered or not granted after transfer

When a mining tenement was valued taking into account the effect of a derivative mining right, the Commissioner must be notified if the right is:

- not granted within the required period or
- surrendered for no consideration within 12 months after the transaction.

The transferee must notify the Commissioner within 2 months after the 90-day or longer period ends, or after the surrender (whichever applies) by lodging form FDA47 'Derivative Mining Rights – Notice of Failure to Grant or Surrender'.

In each case, the mining tenement will be revalued without regard to the derivative mining right. Duty will be reassessed if the value is increased.

Example 5

Small Mining Pty Ltd holds two exploration licences. The company grants Little Nickel Pty Ltd the right to all nickel on the tenements for $20,000. Duty is paid on this amount.

Three years later, Small Mining sells the licences to Big Mining Pty Ltd. Under the sale agreement, Big Mining pays $100,000 to Small Mining and agrees that Little Nickel will continue to hold the nickel rights. The transfer of the tenements extinguishes the existing nickel rights, which Big Mining re-grants to Little Nickel after becoming the tenement holder.

As Small Mining and Big Mining are unrelated, the Commissioner accepts that $100,000 represents the fair value of the tenements taking into account the nickel rights held by Little Nickel. Duty is assessed on the agreement on a dutiable value of $100,000.

Duty is not chargeable on the grant of nickel rights by Big Mining to Little Nickel as they are similar to the ones previously held by Little Nickel.

Agreements and transfers to holder of derivative mining right

If a person holds a derivative mining right in relation to a mining tenement and:

- the grant of the right is duty endorsed and
- there is a transfer, or agreement for the transfer, of the mining tenement to that person and
- the derivative mining right will be held until the tenement is transferred,

the value of the tenement will be determined taking into account the effect of the derivative mining right.

Example 6

Mrs White holds an exploration licence. She makes an agreement with Mr Black giving him rights to gold on the tenement for $1,000. Duty is assessed on a dutiable value of $1,000.

A year later, Mrs White transfers the tenement to Mr Black for no consideration. An expert valuer determines that the value of the exploration licence is $1,500 and that the right granted to Mr Black has no effect on this value.

Duty is assessed on the transfer on a dutiable value of $1,500.

Grant of equivalent right following conversion

The holder of a prospecting or an exploration licence may have granted a derivative mining right to another person before the tenement is converted to a mining lease. The right is extinguished when the tenement is converted and must be re-granted.

In this case, duty does not apply to the grant of a derivative mining right to a person if:

- the right relates to a mining lease and
- before the grant of the mining lease the holder of the lease held a prospecting or an exploration licence in relation to the land the subject of the mining lease and
- the person held a derivative mining right in relation to the prospecting or exploration licence that was substantially the same as the right in relation to the mining lease and
- the original grant of the derivative mining right is duty endorsed, or was not a dutiable transaction.

Landholder duty

Landholder duty applies to acquisitions of an interest in a corporation or unit trust where it, or a linked entity, is entitled to *land assets* in Western Australia valued at $2 million or more (a landholder). A land asset includes a mining tenement and a derivative mining right. See the 'Landholder Duty' fact sheet.

A derivative mining right will be taken into account when determining if the $2 million threshold is met and for the purposes of calculating duty on the value of the interest acquired.

Where a landholder is entitled to a mining tenement and there is a derivative mining right in relation to that tenement, the value of the mining tenement for the purposes of landholder duty will be determined taking the effect of the right into account.

If that derivative mining right is surrendered for no consideration within 12 months after the landholder acquisition date, the mining tenement will be revalued without regard to the derivative mining right. Duty will be reassessed if the value is increased.

Both the landholder and the acquirer must lodge form FDA47 'Derivative Mining Rights – Notice of Failure to Grant or Surrender' within two months after the derivative mining right is surrendered.

Contact RevenueWA

Web enquiry	www.osr.wa.gov.au/DutiesEnquiry	**Website**	WA.gov.au
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Note: This fact sheet provides guidance only. Refer to the *Duties Act 2008* for complete details.