

Public advice and guidance compendium – TD 2019/1

This is a compendium of responses to the issues raised by external parties to draft TD 2018/D2 *Income tax: what constitutes ‘use’ (and potentially first use) of a mining, quarrying or prospecting right, that is a depreciating asset, for the purposes of subsection 40-80(1) of the Income Tax Assessment Act 1997?*

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

Summary of issues raised and responses

Issue No.	Issue raised	ATO response / action taken
1	<p>Paragraph 25 of the draft Determination says that it sets an appropriate test for determining when the cost of a MQPR is deductible under section 40-80. However, it is not clear how this conclusion is reached as it:</p> <ul style="list-style-type: none"> • does not discuss the interaction between section 40-80 and subsection 40-730(4) • does not canvass alternative meanings of ‘use’ • does not provide detailed legal analysis, such as a discussion of the Mitsui cases (<i>Mitsui & Co (Australia) Ltd v. Federal Commissioner of Taxation</i> [2011] FCA 1423; 2011 ATC 20-296; (2011) 86 ATR 258 and <i>Mitsui & Co (Australia) Ltd v. Federal Commissioner of Taxation</i> 2012 205 FCR 523; 2012 ATC 20-341; (2012) 90 ATR 171. 	<p>The reference to setting an appropriate test has been removed in the final Determination.</p> <p>The ATO considers the following contextual features of subsection 40-80(1) of the <i>Income Tax Assessment Act 1997</i>¹ inform the meaning to be ascribed to ‘use’:</p> <ul style="list-style-type: none"> • The first ‘use’ of the depreciating asset is the fulcrum for determining under section 40-80 whether the asset’s decline in value is the asset’s cost. • The concept of ‘use’ should apply consistently to any depreciating asset (whether tangible or intangible). • The ‘first use’ of the relevant depreciating asset must be capable of being identified and tested against the requirements in subsection 40-80(1). <p>An MQPR, by its very nature, cannot be separated from the area over which the MQPR is granted. An MQPR authorises or permits the holder to carry on certain activities within the relevant area that the holder would not otherwise be entitled to</p>

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		<p>carry on.</p> <p>Having regard to the nature of an MQPR and the context of section 40-80, the ATO considers a taxpayer who holds an MQPR will 'use' it for the purposes of subsection 40-80(1) if they carry on, or carry out, an activity on the area (over which the MQPR is granted) that the MQPR permits or authorises and that the taxpayer would not be entitled to carry on but for the MQPR.</p> <p>¹ All legislative references in this Compendium are to the <i>Income Tax Assessment Act 1997</i>.</p>
2	<p>The natural reading of section 40-80(1) is for the phrase 'first use the asset for exploration' to mean 'first use the asset for exploration as defined in subsection 40-730(4)'. The ATO view of 'use' in the draft Determination requires a restatement of this phrase to 'first use the asset for exploration as defined in mining or petroleum legislation governing the MQPR'.</p>	<p>The ATO considers the meaning of 'use' in the Determination is more consistent with the discernible purpose and objective of subsection 40-80(1).</p>
3	<p>The final Determination should acknowledge there are several meanings of 'use' that, to an extent, have been discussed since consultation began in 2014. It should explain why these alternatives do not constitute a 'use' of an MQPR for the purposes of section 40-80.</p> <p>These alternative meanings of 'use' include:</p> <ul style="list-style-type: none"> • 'capacity use' canvassed in <i>Mitsui</i>. Holding the license precludes others to enjoy the bundle of rights conferred by the permit/license • held in reserve 	<p>The ATO considers the meaning of 'use' in the Determination is more consistent with the discernible purpose and objective of subsection 40-80(1).</p> <p>In addition, the alternative meanings of 'use' based solely on the rights conferred could not sensibly be applied to tangible depreciating assets. Further, an MQPR that grants a miner the right to carry on mining operations could never qualify for a deduction under subsection 40-80(1) due to the exclusion in subsection 40-80(2).</p>

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	<ul style="list-style-type: none"> • physical use • use when holder undertakes an activity to satisfy the obligations imposed by the MQPR. This is similar to the capacity 'use', but requires an activity to evidence enjoyment of the right or satisfaction of an obligation within the scope of the MQPR. 	
4	<p>The draft Determination does not address the reasoning that ultimately decided <i>Mitsui</i> at first instance and on appeal. That is, there is a dividing line between exploration and development/production. The reasoning in both cases was that Parliament contemplated expenditure on acquiring a production license would fall on the wrong side of the 'dividing line' (FCA 1423 at 140 and FCFCA 109 at 65).</p> <p>Therefore, the activities by the taxpayer in the permit area were not considered relevant. Neither was a finding made as to whether the taxpayer's activities constituted operations in the course of working a petroleum field.</p>	<p>The ATO considers <i>Mitsui</i> as precedent for the proposition that the petroleum licence itself is the relevant asset for Division 40 purposes, rather than the bundle of underlying rights comprising the licence, being separate depreciating assets.</p>
5	<p>Tangible and intangible assets are not sufficiently similar, commercially or legally to justify favouring a view of 'use' that ensures consistency.</p>	<p>There is no basis in the text of the legislation for distinguishing intangible assets from tangible assets.</p>
6	<p>MQPRs not only confer rights to prospect or extract minerals from the land, but they also carry obligations to perform certain minimum activities and to rehabilitate the land. These rights as well as these obligations should be taken into account when determining first</p>	<p>Satisfying an obligation by doing something that is authorised or permitted by a MQPR can constitute a 'use' of an MQPR for the purposes of section 40-80.</p> <p>However, the ATO considers satisfying an obligation without doing something that is permitted or authorised by the MQPR,</p>

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Page status: **not legally binding**

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	<p>'use' for section 40-80.</p> <p>It is common for MPQRs of intangible assets to be subject to obligations attaching to those assets, such as obligations. Actions taken by the owner to satisfy these obligations is no less a 'use' of these assets as action taken to enjoy or exploit these rights.</p>	<p>does not constitute a 'use' for the purposes of section 40-80.</p>
7	<p>Will the ATO's ruling on 'use' in the context of section 40-80 address assets that are installed ready for use?</p>	<p>No change as this is beyond the intended scope of this Determination.</p>