


TR 2006/D2 - Income tax: ascertaining the effective life of a mining, quarrying or prospecting right mentioned in item 11 of the table in subsection 40-95(7) of the Income Tax Assessment Act 1997

 This cover sheet is provided for information only. It does not form part of *TR 2006/D2 - Income tax: ascertaining the effective life of a mining, quarrying or prospecting right mentioned in item 11 of the table in subsection 40-95(7) of the Income Tax Assessment Act 1997*

This document has been Withdrawn.

There is a [Withdrawal notice](#) for this document.



Draft Taxation Ruling

Income tax: ascertaining the effective life of a mining, quarrying or prospecting right mentioned in item 11 of the table in subsection 40-95(7) of the *Income Tax Assessment Act 1997*

Contents Para

PROPOSED BINDING SECTION:

What this Ruling is about 1

Ruling 14

Examples 45

Date of effect 67

NON BINDING SECTION:

Appendix 1:

Explanation 68

Appendix 2:

Alternative views 206

Appendix 3:

Definitions and legislative history 232

Appendix 4:

Your comments 242

Appendix 5:

Detailed contents list 243

ⓘ This Ruling provides you with the following level of protection:

This publication is a draft for industry and professional comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

You can rely on this publication (excluding appendices) to provide you with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and you under-pay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the under-payment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

What this Ruling is about

1. This Ruling identifies and provides guidance to taxpayers on matters relevant to ascertaining the effective life of a mining, quarrying or prospecting right mentioned in item 11 of the table in subsection 40-95(7) of the *Income Tax Assessment Act 1997* (ITAA 1997).

2. All legislative references in this Ruling are to the ITAA 1997 unless otherwise stated.

3. For ease of reference, this Ruling refers to the depreciating asset mentioned in item 11 of the table in subsection 40-95(7) as an 'item 11 right'.

4. This Ruling specifically considers:

- what is an item 11 right; and
- how do you work out the effective life of an item 11 right.

Class of person/arrangement

5. This Ruling applies to those mining, quarrying or prospecting rights to which item 11 of the table in subsection 40-95(7) applies.¹

Legislative background

6. Subdivision 40-B provides a deduction for the decline in value of depreciating assets including mining, quarrying or prospecting rights. Division 40 generally allows a deduction for the cost of a depreciating asset based on its effective life. For most depreciating assets, taxpayers have a choice either to work out the effective life of the asset themselves or to use an effective life determined by the Commissioner. However, that choice is not available to taxpayers for those intangible depreciating assets that are listed in the table in subsection 40-95(7). For each of those assets, the effective life is the period applicable to that asset in column three of the table in subsection 40-95(7).

7. As originally enacted, Division 40 provided taxpayers with the choice to either work out the effective life of a mining, quarrying or prospecting right themselves or use an effective life determined by the Commissioner. This is because these rights were not listed in column two of the table in subsection 40-95(7).

8. However, as no determination of the effective life of a mining, quarrying or prospecting right had been made by the Commissioner under section 40-100, the effective life of these rights was required to be worked out by the taxpayer under section 40-105.

9. In working out the effective life of these rights, it was necessary for the taxpayer to apply subsection 40-95(8). The effect of that subsection in relation to a mining, quarrying or prospecting right was that such a right's effective life could not be longer than the term of the right as extended by any reasonably assured extension or renewal of that term.

10. Division 40 was amended by *Taxation Laws Amendment Act (No. 4) 2003*.² A consequence of these amendments was a change in the way in which the effective life of these rights is to be worked out. This change was effected by inserting these rights into the table in subsection 40-95(7).

11. As a result of inserting these rights into the table in subsection 40-95(7), taxpayers could no longer work out the effective life of these rights themselves so the reference to a mining, quarrying or prospecting right in subsection 40-95(8) was removed.

¹ See section 40-77 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997) and the application clause to the *New Business Tax System (Capital Allowances) Act 2001*: section 3 and Schedule 1 Item 2.

² The amendments to subsections 40-95(7) & (8) are applicable to assessments for the income year in which 1 July 2001 occurred and later income years.

12. For a mining, quarrying or prospecting right, the effective life is the period applicable to that asset in column three of the table in subsection 40-95(7). Relevantly, item 11 of that table provides that the effective life of 'a mining, quarrying or prospecting right relating to mining operations (except obtaining petroleum or quarry materials)' is 'the life of the mine or proposed mine or, if there is more than one, the life of the mine that has the longest estimated life.'

Other aspects

13. The definitions and, where relevant, the legislative history of key terms in this Ruling are contained in paragraphs 232 to 241 of this Ruling. For ease of identification, those terms are italicised the first time they appear below in this Ruling.

Ruling

What is an item 11 right?

Mining, quarrying or prospecting right

14. The relevant part of the definition of '*mining, quarrying or prospecting right*' in subsection 995-1(1) with which an item 11 right is concerned is:

- (a) an authority, licence, permit or right under an Australian law to mine, quarry or prospect for minerals; or
- (b) a lease of land that allows the lessee to mine, quarry or prospect for minerals on the land; or
- (c) an interest in such an authority, licence, permit, right or lease; or
- (d) any rights that:
 - (i) are in respect of buildings or other improvements (including anything covered by the definition of housing and welfare) that are on the land concerned or are used in connection with operations on it; and
 - (ii) are acquired with such an authority, licence, permit, right, lease or interest.

Relating to mining operations

15. The relevant part of the definition of 'mining operations' in subsection 40-730(7) with which an item 11 right is concerned is paragraph 40-730(7)(a). 'Mining operations' in paragraph 40-730(7)(a) means mining operations on a mining property for extracting minerals (except petroleum) from their natural site for the purpose of producing assessable income.

16. The term ‘mining operations’ as it appears in the opening words in paragraph 40-730(7)(a) covers the actual extractive mining operations only. It does not extend to activities preliminary, ancillary, or subsequent, to the extractive process.

17. In that context, an item 11 right is a mining, quarrying or prospecting right (as described in paragraph 14 of this Ruling) relating to actual extractive mining operations, whether being carried on or proposed to be carried on, on a mining property for extracting minerals (except petroleum) from their natural site for the purpose of producing assessable income.

How do you work out the effective life of an item 11 right?

18. Expressions such as ‘mine’ and ‘the life of the mine’ are used in item 11 of the table in subsection 40-95(7) in their ordinary and natural meanings in that context and not as terms of art or in any technical sense.

Mine

19. The determination of the existence of a mine will be a question of fact and degree which can only be determined in the light of all of the circumstances of the particular case.

20. The following points are relevant to determining whether a mine exists in a particular case for the purposes of item 11 of the table in subsection 40-95(7):

- the existence of an ore body does not necessarily equate to the existence of a mine;
- more than one ore body can be mined as a single mine; and
- the extraction of an ore body by means of its own extraction facilities that are separate and distinct from any other extraction facilities indicates the existence of a separate mine.

Those points are not, however, necessarily comprehensive or conclusive.

More than one mine

21. The following factors are relevant in determining whether more than one mine exists in a particular case for the purposes of item 11 of the table in subsection 40-95(7):

- whether there are separate and distinct workings, equipment and machinery, capable of producing ore;

- whether there is clear contemplation by management at an early date of the possibility of developing the ore bodies concurrently;
- whether the ore bodies were developed at the same time;
- whether there is a structural connection between the ore bodies;
- whether the ore bodies have similar geological characteristics;
- whether there is separation in time between mining operations;
- whether there are common facilities for the treatment of ore from the mining operations; and
- whether there is an integration of the economic aspects of the mining operations.

22. Those factors are not necessarily comprehensive. No one of those factors is necessarily conclusive and the relative importance of each will vary depending on the circumstances of each particular case.

Proposed mine

23. There will be a *proposed mine* for the purposes of item 11 of the table in subsection 40-95(7) where there is an ore body and work preparatory to the actual extractive mining operations in respect of that ore body has started, but the actual extractive mining operations have not commenced. Examples of work preparatory to the actual extractive mining operations include:

- clearing the site on which the extractive mining operations are proposed to be carried on;
- installing water, light and power for that site;
- erecting housing and welfare facilities in relation to those operations; and
- locating equipment or machinery at the site.

Life of the mine or the proposed mine

24. The reference to the life of the proposed mine in item 11 of the table in subsection 40-95(7) means the life of the mine that is proposed.

Which mine or mines are relevant?

25. It is the actual or proposed mine or mines to which the particular item 11 right relates that are relevant for working out the effective life of that right.

26. Therefore, if at a particular point in time there is a mine to which the item 11 right relates, then the effective life of that right at that time is the life of that mine. If at a particular point in time there is only a proposed mine to which the item 11 right relates, then the effective life of that right at that time is the life of the mine that is proposed. If at a particular point in time there are a number of mines, proposed mines or a combination of both, to which the item 11 right relates, then the effective life of that right at that time is the life of whichever of those mines has the longest life.

27. A mine or proposed mine to which a particular item 11 right relates is:

- a mine or proposed mine to which the relevant authority, licence, permit or right under an Australian law to mine for minerals relates; or
- a mine or proposed mine which is located on the area of land that is the subject of the relevant lease that allows the lessee to mine for minerals on that land.

Estimating the life of a mine

28. For the purposes of estimating the life of a mine in the context of item 11 of the table in subsection 40-95(7), the life of a mine is not limited to the period a particular taxpayer intends to operate the mine to which the item 11 right relates. Indeed, the life of a mine is not solely related to any particular taxpayer intending to use an item 11 right but may span across a number of holders of such a right (including the current, former and subsequent holders of that right) and holders of predecessor and successor rights.

29. Accordingly, for a taxpayer who acquires an item 11 right from a former holder of the right, the life of a mine to which the right relates will include the period the mine has operated prior to the taxpayer's acquisition of the item 11 right. Similarly, for a taxpayer who acquires an item 11 right after a previous right has expired, the life of a mine to which the right relates will include the period the mine has operated under previous rights before the new right was granted.

Yearly estimate of the life of a mine

30. The effective life of the item 11 right and, as a result, the life of a mine to which that right relates, is required to be estimated by the taxpayer on a yearly basis.

31. Thus, at the time when a taxpayer is working out the decline in value for an income year of an item 11 right, they will estimate 'the life of the mine or proposed mine or, if there is more than one, the life of the mine that has the longest estimated life' based on their state of knowledge at that time. That estimate is the effective life of the item 11 right which the taxpayer will use for the purposes of the formula for that income year for whichever of the diminishing value method or prime cost method the taxpayer has chosen to use to work out the decline in value of the item 11 right.

Working out the estimated life of a mine

32. For the purposes of item 11 of the table in subsection 40-95(7), the life of a mine is the period from when the mine starts until the mine ends.

Start of a mine

33. For the purposes of item 11 of the table in subsection 40-95(7), the event that signifies the start of a mine is the commencement of actual extractive mining operations.

End of a mine

34. For the purposes of item 11 of the table in subsection 40-95(7), there are two possible events which signify the end of a mine. A mine ends at the point in time when:

- the resource is fully exhausted; or
- the mine is permanently abandoned prior to the resource being fully exhausted.

The resource is fully exhausted

35. The period of time from commencement of actual extractive mining operations to the full exhaustion of the mine's resource ('mineral extraction phase of the mine') is worked out by the taxpayer estimating the quantity of the resource and the anticipated production programme for that mine.

36. The taxpayer's yearly estimate of the life of a mine will involve a consideration of the length of the mineral extraction phase of the mine, based on the taxpayer's state of knowledge at the time of making the estimate.

37. The quantity of the mine's resource considered in the yearly estimate will include:

- the ore reserves for that mine; and
- a reasonable estimate of the proportion of the mineral resources for that mine that are reasonably likely to become economically mineable in the foreseeable future based on the taxpayer's state of knowledge at the time of making the estimate.

38. Where the taxpayer publicly reports ore reserves and mineral resources in accordance with the JORC Code³ to a stock exchange, the mine's ore reserve and mineral resource figures in the taxpayer's most recent⁴ public report prepared in accordance with the JORC Code to a relevant⁵ stock exchange should be used by the taxpayer in making their yearly estimate of the quantity of the mine's resource.

39. Where the taxpayer publicly reports ore reserves and mineral resources in accordance with the JORC Code, but does not do so to a stock exchange, the mine's ore reserve and mineral resource figures in the taxpayer's most recent public report prepared in accordance with the JORC Code should be used by the taxpayer in making their yearly estimate of the quantity of the mine's resource.

40. Where a taxpayer to which one of the previous two paragraphs applies has not, at the time of making their first yearly estimate of the quantity of the mine's resource, publicly reported the mine's ore reserves and mineral resources in accordance with the JORC Code:

- in the case of a taxpayer to which paragraph 38 of this Ruling applies – to a relevant stock exchange; or
- in the case of a taxpayer to which paragraph 39 of this Ruling applies – at all,

the mine's ore reserve and mineral resource figures on which the taxpayer based their decision to acquire their interest in the mine should be used by the taxpayer in making that first yearly estimate.

41. Where the taxpayer does not publicly report ore reserves and mineral resources in accordance with the JORC Code, it is expected that the taxpayer's yearly consideration of the length of the mineral extraction phase of a mine would be based on the same, or substantially similar, concepts and definitions as used in the JORC Code.

³ The 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves', as amended or replaced over time. The 2004 edition of that code is the current version at the time of issuing this Ruling.

⁴ Hereinafter meaning most recent at the time of making the relevant yearly estimate of the quantity of the mine's resource.

⁵ Hereinafter meaning: (a) If the taxpayer is listed on the Australian Stock Exchange – that stock exchange; (b) Otherwise – a stock exchange on which the taxpayer is listed.

Mine is permanently abandoned

42. A mine that has been permanently abandoned is considered to have lost the character of a mine and therefore such an event signifies the end of the mine for the purposes of item 11 of the table in subsection 40-95(7). A mine that has been placed in care and maintenance has not been permanently abandoned and so such an event will not signify the end of a mine.

43. Where a mine has been permanently abandoned by a taxpayer, the estimated life of the mine and consequently, the effective life of the item 11 right to which that mine relates, is worked out by measuring the period of time that has elapsed between the commencement of actual extractive mining operations and when the mine is permanently abandoned by the taxpayer.

44. Until such time as a taxpayer makes a decision to permanently abandon the mine, the taxpayer will be required to work out the life of the mine in accordance with paragraphs 35 to 41 of this Ruling.

Examples

Example 1

45. On 1 July 2004 Global Resources Limited ('Global') acquired the Delta metal mine (including the mining lease in respect of the land on which the mine is located) from an unassociated entity ('the vendor'), who was the first entity to operate the mine.

46. The vendor had been extracting ore from the mine since July 1990. A mining lease with a period of 21 years was granted to the vendor in January 1988. The lease can be expected to be renewed in 2009.

47. For the income year ended 30 June 2005 Global estimated the life of the Delta mine to be 39 years. That was based on the following data for the mine which was estimated in accordance with the JORC Code at the time of making that life of mine estimate:

Ore reserves (tonnes)		Mineral resources (additional to Ore reserves)	
Proved	75,000,000	Measured	100,000,000
Probable	95,000,000	Indicated	150,000,000
Total	170,000,000	Total	250,000,000

48. Global estimated at that time that 80% of measured and 60% of indicated mineral resources are reasonably likely to become economically mineable in the foreseeable future based on its state of knowledge at the time of making the estimate. Thus, the estimated quantity of the mine's resource at that time is:

$$170,000,000 + (80\% \text{ of } 100,000,000) + (60\% \text{ of } 150,000,000) = 340,000,000 \text{ tonnes}$$

49. The Delta mine was producing at 10 million tonne per annum (mtpa) upon acquisition by Global. Global's board of directors had decided to increase production to 15 mtpa from the beginning of Global's sixth year of ownership of the mine and set about on an expansion program soon after the acquisition. Based on Global's plans the mine will produce 40 million tonnes in years two to five of Global's ownership and the remaining 300 million tonnes will be exhausted over the following 20 years.

50. Since ore had been extracted from the mine for 14 years prior to Global's acquisition and 1 year since that acquisition and since ore is estimated to be extracted for a further 24 years, the life of the mine is estimated to be 39 years for the income year ended 30 June 2005.

51. Since Global chose the prime cost method to work out the decline in value of the item 11 right, the prime cost method formula is adjusted in accordance with subsection 40-75(6) to ensure that instead of using the effective life of the item 11 right for the income year ended 30 June 2005 (that is the life of the mine estimated to be 39 years for that income year), Global will use the number of years remaining in that effective life as at the start of the income year in which they acquired the mining right (that is 25 years).

Example 2

52. This example follows on from Example 1.

53. In July 2011, seven years after Global Resources Limited acquired the Delta mine, an underground explosion renders access to material portions of the ore body unviable. Global is forced to revise both its anticipated production programme and its ore reserve and mineral resource estimates.

54. The Delta mine is now only capable of producing 12 mtpa. The ore reserves and mineral resources for the mine estimated in accordance with the JORC Code at the time of making the life of mine estimate for the income year ended 30 June 2011 are as follows:

Ore reserves (tonnes)		Mineral resources (additional to Ore reserves)	
Proved	30,000,000	Measured	25,000,000
Probable	40,000,000	Indicated	50,000,000
Total	70,000,000	Total	75,000,000

55. Global estimates that 80% of measured and 60% of indicated mineral resources are reasonably likely to become economically mineable in the foreseeable future based on its state of knowledge at the time of making the estimate. Thus, the estimated quantity of the mine's resource at that time is:

$$70,000,000 + (80\% \text{ of } 25,000,000) + (60\% \text{ of } 50,000,000) = 120,000,000 \text{ tonnes}$$

56. Based on Global's revised production programme of 12 mtpa, Global estimates that as at July 2011 there are 10 years of production remaining.

57. Since ore had been extracted from the mine for 14 years prior to Global's acquisition and 7 years since that acquisition and since ore is estimated to be extracted for a further 10 years, the life of the mine is estimated to be 31 years for the income year ended 30 June 2011.

58. Since Global chose the prime cost method to work out the decline in value of the item 11 right, the prime cost method formula is adjusted in accordance with subsection 40-75(6) to ensure that instead of using the effective life of the item 11 right for the income year ended 30 June 2011 (that is the life of the mine estimated to be 31 years for that income year), Global will use the number of years remaining in that effective life as at the start of the income year in which they acquired the mining right (that is 17 years).

Example 3

59. On 1 July 2005 Au Resources Limited ('Au Resources') acquired the Gamma gold mine (including the mining lease in respect of the land on which the mine is located) from an unassociated entity ('the vendor'), who was the first entity to operate the mine.

60. The vendor had been extracting ore from the mine since July 1999. A mining lease with a period of 21 years was granted to the vendor in January 1997. The lease can be expected to be renewed in 2018.

61. Au Resources estimated a life of mine of 15 years for the year ended 30 June 2006 based on ore reserves and mineral resources estimated in accordance with the JORC Code and its anticipated production programme at the time of making that life of mine estimate.

62. During the income year ended 30 June 2007 Au Resources embarked on an extensive exploration and prospecting programme. This was highly successful and resulted in significant increases in the estimates of the ore reserves and mineral resources of the mine.

TR 2006/D2

63. For the income year ended 30 June 2007 Au Resources estimated the life of the Gamma mine to be 23 years. That was based on the following data for the mine which was estimated in accordance with the JORC Code at the time of making that life of mine estimate:

Ore reserves (tonnes)		Mineral resources (additional to Ore reserves)	
Proved	85,000,000	Measured	120,000,000
Probable	20,000,000	Indicated	50,000,000
Total	105,000,000	Total	170,000,000

64. Au Resources estimated at that time that 75% of measured and 60% of indicated mineral resources are reasonably likely to become economically mineable in the foreseeable future based on its state of knowledge at the time of making the estimate. Thus, the estimated quantity of the mine's resource at that time is:

$$105,000,000 + (75\% \text{ of } 120,000,000) + (60\% \text{ of } 50,000,000) = 225,000,000 \text{ tonnes}$$

65. Based on Au Resources' anticipated production programme of 15 mtpa, Au Resources estimates that as at July 2007 there are 15 years of production remaining.

66. Since ore had been extracted from the mine for 6 years prior to Au Resources' acquisition and 2 years since that acquisition and since ore is estimated to be extracted for a further 15 years, the life of the mine is estimated to be 23 years for the income year ended 30 June 2007.

Date of effect

67. It is proposed that when the final Ruling is issued, it will apply both before and after its date of issue. However, the final Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the final Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Commissioner of Taxation

1 February 2006

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

What is an item 11 right?

68. An item 11 right is a 'mining, quarrying or prospecting right relating to mining operations (except obtaining petroleum or quarry materials)'.

Mining, quarrying or prospecting right

69. In order to come within item 11 of the table in subsection 40-95(7), the asset must firstly be a 'mining, quarrying or prospecting right'. A 'mining, quarrying or prospecting right' is defined in subsection 995-1(1).⁶

70. An item 11 right is a right relating to mining operations (except obtaining petroleum or quarry materials). Mining operations for the purpose of obtaining petroleum or quarry materials are excluded from item 11 because a mining, quarrying or prospecting right relating to those types of mining operations are mentioned specifically in items 12 and 13, respectively, of the table in subsection 40-95(7).

71. It follows, therefore, that the relevant part of the definition of mining, quarrying or prospecting right in subsection 995-1(1) with which an item 11 right is concerned is:

- (a) an authority, licence, permit or right under an Australian law to mine, quarry or prospect for **minerals** (emphasis added); or
- (b) a lease of land that allows the lessee to mine, quarry or prospect for **minerals** on the land (emphasis added); or
- (c) an interest in such an authority, licence, permit, right or lease; or
- (d) any rights that:
 - (i) are in respect of buildings or other improvements (including anything covered by the definition of housing and welfare) that are on the land concerned or are used in connection with operations on it; and
 - (ii) are acquired with such an authority, licence, permit, right, lease or interest.

⁶ See paragraph 233 of this Ruling.

Mining operations

72. For the purposes of the ITAA 1997, 'mining operations' has the meaning given by section 40-730.⁷ Pursuant to subsection 40-730(7) 'mining operations' means:

- (a) mining operations on a mining property for extracting minerals (except petroleum) from their natural site; or
- (b) mining operations for the purpose of obtaining of petroleum; or
- (c) quarrying operations on a quarrying property for extracting quarry materials from their natural site;

for the purpose of producing assessable income.

73. For the purpose of describing an item 11 right, paragraph 40-730(7)(a) is the relevant part of the definition of 'mining operations' with which this Ruling is concerned. This is because an item 11 right does not relate to mining operations for the purpose of obtaining petroleum or extracting quarry materials.

74. Whilst subsection 40-730(7) provides an exhaustive definition of 'mining operations', for the purposes of considering the relevant part of that definition in paragraph 40-730(7)(a), it is necessary to consider the meaning of the term 'mining operations' as it appears in the opening words of that paragraph – 'mining operations on a mining property for extracting minerals (except petroleum) from their natural site'.

75. For the purpose of considering the meaning of the term 'mining operations', it is relevant to consider whether there are any explicit statements in the legislation or in the extrinsic material that accompanied it which might provide assistance in establishing the meaning of the term. It is also relevant to have regard to the context in which the definition of 'mining operations' arose in prior statutory provisions dealing with the same subject matter as the courts may have regard to the history of the legislative scheme in order to enable them to work out what the legislation was intended to achieve.⁸

76. The Explanatory Memorandum to the New Business Tax System (Capital Allowances) Bill 2001, which introduced Division 40, states that the expression 'mining operations' has the same meaning as the current law definition of eligible mining or quarrying operations.⁹

⁷ See subsection 995-1(1).

⁸ Pearce, DC and Geddes, RS 2001, *Statutory Interpretation in Australia*, 5th edn, Butterworths, Australia, p. 73.

⁹ See paragraph 7.26 of the Explanatory Memorandum to the New Business Tax System (Capital Allowances) Bill 2001.

77. The meaning of 'eligible mining or quarrying operations' in former subsection 330-30(1) of Division 330 provided that 'eligible mining or quarrying operations' means 'eligible mining operations' or 'eligible quarrying operations'. The definition of 'eligible mining operations'¹⁰ in paragraph 330-30(2)(a) is the same as the definition of 'mining operations' in paragraph 40-730(7)(a).

78. The Explanatory Memorandum to the Income Tax Assessment Bill 1996 which introduced Division 330 does not provide any assistance in terms of explaining the meaning of 'mining operations'. The predecessor to the Mining and quarrying provisions in Division 330 were the Mining and Quarrying provisions in Division 10 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936).

79. Prior to amendments made to Division 10 of Part III of the ITAA 1936 in 1968, former subsection 122(1) of the ITAA 1936 allowed a deduction where a person, in connexion with the carrying on by that person of mining operations upon a mining property in Australia or the Territory of New Guinea for the purpose of gaining or producing assessable income, incurred certain capital expenditure.

80. In the context of that provision, the concept of 'mining operations'¹¹ was originally understood in broad terms. In *Broken Hill Proprietary Co Ltd v. Federal Commissioner of Taxation (BHP)*¹² in considering the subsection Kitto J said:

Mining operations. This expression is wider than 'the working of a mining property'. It embraces not only the extraction of mineral from the soil, but also all operations pertaining to mining: *Parker v. Federal Commissioner of Taxation* (1953) 90 CLR 489, at p. 494. Thus it comprehends more than mining in the narrow sense which imports the detaching of lumps of material from the position in which in a state of nature they form part of the soil. It extends to any work done on a mineral-bearing property in preparation for or as ancillary to the actual winning of the mineral (as distinguished from work for the purpose of ascertaining whether it is worthwhile to undertake mining at all): *Federal Commissioner of Taxation v. Broken Hill South Ltd.* (1941) 65 CLR 150, at pp. 153, 156, 159, 161. Likewise it extends to any work done on the property subsequently to the winning of the mineral (for example, transporting, crushing, sluicing and screening) for the purpose of completing the recovery of the desired end product of the whole activity: *Federal Commissioner of Taxation v. Henderson* (1943) 68 CLR 29, at pp. 45, 50. In each case it is the close association of the work with the mining proper that gives it the character of operations pertaining to mining.¹³

¹⁰ See paragraph 237 of this Ruling.

¹¹ See paragraph 235 of this Ruling.

¹² (1968) 120 CLR 240.

¹³ (1968) 120 CLR 240 at 244-245.

81. This broad description of ‘mining operations’ adopted by Kitto J in BHP was restricted by the majority of the Full High Court on appeal in that case.¹⁴ In that case, the Full Court agreed with Kitto J that ‘mining operations’ covered ‘work done on a mineral-bearing property in preparation for, or as ancillary to, the actual winning of the mineral’.¹⁵ However, the Full Court took a more restrictive view than Kitto J in relation to work done subsequent to the winning of the mineral concluding that ‘the treatment of the mineral recovered for the purpose of the better utilisation of that mineral’¹⁶ was not part of mining operations.

82. The concept of ‘mining operations’ was changed to ‘prescribed mining operations’¹⁷ with the insertion of a new Division 10 of Part III of the ITAA 1936 by *Income Tax Assessment Act (No. 2) 1968*. In explaining the definition of ‘prescribed mining operations’ in the new subsection 122(1), the Explanatory Memorandum stated:

This term is defined as mining operations on a mining property in Australia or the Territory of Papua and New Guinea for the extraction of minerals, other than petroleum, from their natural site. The operations must be carried on for the purpose of gaining or producing assessable income. **It is the intention of this definition to cover the actual extractive mining operations only.**¹⁸
(Emphasis added)

83. The new Division 10 of Part III of the ITAA 1936 inserted by *Income Tax Assessment Act (No. 2) 1968* contained a definition of ‘allowable capital expenditure’ in section 122A of the ITAA 1936. Included in the definition of what was to be allowable capital expenditure was expenditure in carrying on prescribed mining operations¹⁹ including expenditure in preparing a site for such operations.²⁰ In explaining these concepts, the Explanatory Memorandum to the Bill stated:

Paragraph (a) includes capital expenditure of a general kind incurred by a mine-owner in carrying on ‘prescribed mining operations’. As already explained, this term covers the process of extracting a mineral from its natural site by mining operations for the purpose of earning assessable income. Expenditure on opening up the ore body or on the construction of drives in removing the ore and other expenditure of a like nature will qualify under this paragraph. In addition, the paragraph specifically provides for the inclusion in allowable capital expenditure of expenditure:

- (i) in preparing a site for such operations, eg., the clearing of a site, removal of over-burden, etc.²¹

¹⁴ (1969) 120 CLR 240; 69 ATC 4028; 1 ATR 40.

¹⁵ (1969) 120 CLR 240 at 272; 69 ATC 4028 at 4031; 1 ATR 40 at 44.

¹⁶ (1969) 120 CLR 240 at 273; 69 ATC 4028 at 4031; 1 ATR 40 at 44.

¹⁷ See paragraph 236 of this Ruling.

¹⁸ Explanatory Memorandum to Income Tax Assessment Bill (No. 2) 1968, p. 26.

¹⁹ See paragraph 122A(1)(a) of the ITAA 1936.

²⁰ See paragraph 122A(1)(a)(i) of the ITAA 1936.

²¹ Explanatory Memorandum to Income Tax Assessment Bill (No. 2) 1968, p. 28.

84. The application of section 122A of the ITAA 1936 and the meaning of ‘prescribed mining operations’ in subsection 122(1) of the ITAA 1936 have been considered in a number of Australian court decisions. In *Federal Commissioner of Taxation v. Mount Isa Mines Ltd (MIM)*,²² the Full Federal Court held that ‘prescribed mining operations’ did not include treatment and matters ancillary thereto, but was confined to operations for the extraction of minerals from their natural site. In expressing some general views about the language of the provisions, Pincus and Ryan JJ²³ stated:

There was much debate before us as to the scope of the words in the definition ‘mining operations ... for the extraction of minerals ... from their natural site’. On the face of it, these expressions are not apt to include the treatment of minerals after they have been mined. That understanding of the definition is held with more confidence once the structure of s122A(1) has been examined. Of its four paragraphs, only one uses the defined expression ‘prescribed mining operations’ – that is, only para (a) does so. Paragraphs (b) and (c) are categories of expenditure relating to treatment of minerals. It seems plain that the reference in the definition of ‘prescribed mining operations’ to ‘extraction of minerals ... from their natural site’ was intended to have what one would, at first sight, have thought to be its obvious meaning, namely performance of the mining function itself.²⁴

85. In reaching this view, Pincus and Ryan JJ did not consider that the view taken by the Full High Court in *BHP* on the meaning of the expression ‘mining operations’ in the then relevant provisions helped in ascertaining the effect of section 122A of the ITAA 1936. In discussing whether one should start with the presumption that the words ‘mining operations’ in the definition of ‘prescribed mining operations’ meant what it did in the repealed corresponding provisions, Pincus and Ryan JJ said:

The better view is that one should be loath to complicate the analysis of a new legislative treatment of a particular topic by basing such analysis upon what was decided under the very different set of provisions it replaced. The problem discussed by the High Court in the *BHP* case ... was whether the expression ‘mining operations’, unaccompanied (in the then provisions) by any reference to extraction of minerals from their natural site, included or did not include certain kinds of treatment after extraction of minerals. It would seem almost perverse to apply what the High Court said on that topic to the language of the definition of ‘prescribed mining operations’. The court’s construction must necessarily have been different if the provisions before it had included the present definition of ‘prescribed mining operations’. From time to time, the legislature abandons one structure and builds another. The task of ascertaining the meaning of the latter is not necessarily assisted if one

²² (1991) 28 FCR 269; 91 ATC 4154; (1991) 21 ATR 1294.

²³ Sheppard J agreed with the joint judgment of Pincus and Ryan JJ except in one respect which is not relevant to the present context.

²⁴ (1991) 28 FCR 269 at 277; 91 ATC 4154 at 4160-4161; (1991) 21 ATR 1294 at 1300-1301.

approaches it encumbered by a desire to preserve the value of accretions to the previous provisions of judicial exposition.²⁵

86. In *Federal Commissioner of Taxation v. Pine Creek Goldfields Ltd (Pine Creek Goldfields)*,²⁶ the Full Federal Court considered an appeal by the Commissioner against the decision of Hill J in the first instance.²⁷ In considering the operation of paragraph 122A(1)(a) of ITAA 1936 and the definition of 'prescribed mining operations' in subsection 122(1) of the ITAA 1936, Gyles J (with Lindgren J concurring) said:

Notwithstanding some changes to the section, I consider that the judgment of the High Court in *FCT v. Broken Hill Pty Co Ltd* (1969) 120 CLR 240; 1 ATR 40 remains a good guide to the meaning of certain of the present provisions. In this respect, I respectfully disagree with the contrary view expressed by Pincus and Ryan JJ in *Mount Isa Mines ... although that disagreement does not affect the substance of the matter*.²⁸ (Emphasis added)

87. Given the history of the legislative scheme, it is the Commissioner's view that for the purposes of Division 40, the meaning of the term 'mining operations' as it appears in the opening words in paragraph 40-730(7)(a) has not changed since the introduction of the definition of 'prescribed mining operations' in subsection 122(1) of the ITAA 1936.

88. MIM and Pine Creek Goldfields and the statement explaining the definition of 'prescribed mining operations' in the Explanatory Memorandum to Income Tax Assessment Bill (No. 2) 1968 make it clear that the meaning of 'mining operations' in the context of 'prescribed mining operations' was more restrictive than the general expression 'mining operations' which existed prior to the insertion of the new Division 10 (and subsection 122(1)) of the ITAA 1936 in 1968 which was the subject of interpretation in BHP. Those sources make it clear that 'mining operations' in the context of 'prescribed mining operations' covers the actual extractive mining operations only.²⁹

89. Accordingly, it is the Commissioner's view that for the purposes of Division 40, the term 'mining operations' as it appears in the opening words in paragraph 40-730(7)(a) covers the actual extractive mining operations only. It does not extend to activities preliminary, ancillary, or subsequent, to the extractive process.

²⁵ (1991) 28 FCR 269 at 278-279; 91 ATC 4154 at 4161-4162; (1991) 21 ATR 1294 at 1302.

²⁶ (1999) 91 FCR 263; 99 ATC 4904; (1999) 42 ATR 758.

²⁷ *Pine Creek Goldfields Ltd v. Federal Commissioner of Taxation* 99 ATC 4382; (1999) 41 ATR 471.

²⁸ (1999) 91 FCR 263 at 287; 99 ATC 4904 at 4924; (1999) 42 ATR 758 at 779.

²⁹ Various activities preliminary, ancillary, or subsequent, to the extractive process are, however, expressly included in the extended definition of 'allowable capital expenditure' in section 122A in the new Division 10 of Part III of the ITAA 1936 inserted in 1968.

90. The terms of Division 40, particularly those included in the definition of ‘ancillary mining activities’ in section 40-740 and the definition of ‘mining capital expenditure’ in section 40-860, strongly support this view. Such references as ‘preparing a site for you to carry on mining operations’, ‘providing water, light or power for, access to, or communications with, a site on which you carry on, or will carry on, mining operations’, ‘minerals treatment of minerals ... obtained by you in carrying on mining operations’ clearly establish that such activities are preliminary, ancillary or subsequent to mining operations, not part of ‘mining operations’.

Use of the expression ‘relating to’

91. Since the expression ‘relating to’ is not defined for the purposes of Division 40, it takes its ordinary meaning shaped by the context in which it is found.

92. In *Tooheys Limited v. Commissioner of Stamp Duties (NSW)*³⁰ Taylor J said:

There can be no doubt that the expression ‘relating to’ is extremely wide but it is also vague and indefinite. Clearly enough it predicates the existence of some kind of relationship but it leaves unspecified the plane upon which the relationship is to be sought and identified. That being so all that a court can do is to endeavour to seek some precision in the context in which the expression is used.³¹

93. In *Oceanic Life Limited & Anor v. Chief Commissioner of Stamp Duties*³² Fitzgerald JA summarised the cases that have considered the meaning of the expression ‘relating to’ and said:

The width of the phrase ‘relating to’ is undoubted. Lord Macnaughten stated that ‘[t]here is no expression more general or far-reaching’³³ ... Overall, the position judicially adopted has been that the operation of the phrase ‘relating to’ is determined by the statutory context and purpose.³⁴

94. These passages demonstrate that the expression ‘relating to’ is extremely wide but it is also vague and indefinite and must be applied with careful consideration of the particular context in which it has been used.

³⁰ (1961) 105 CLR 602.

³¹ (1961) 105 CLR 602 at 620.

³² (1999) 168 ALR 211 at 224-225.

³³ *IRC v. Maple & Co (Paris) Ltd* (1908) AC 22 at 26.

³⁴ *Oceanic Life Ltd & Anor v. Chief Commissioner of Stamp Duties* (1999) 168 ALR 211 at 224-225.

95. The use of the expression 'relating to' in the context of an item 11 right therefore predicates the existence of a relationship between a mining, quarrying or prospecting right as described in paragraph 71 of this Ruling and mining operations as described in paragraph 89 of this Ruling. That does not mean, however, that the actual extractive mining operations must have commenced. The fact that the effective life of an item 11 right can be the life of a proposed mine strongly supports that conclusion. It is enough that there is a relationship between the relevant mining, quarrying or prospecting right and actual extractive mining operations that are being carried on or are proposed to be carried on.

96. In that context, the item 11 right is a mining, quarrying or prospecting right (as described in paragraph 71 of this Ruling) relating to actual extractive mining operations, whether being carried on or proposed to be carried on, on a mining property for extracting minerals (except petroleum) from their natural site for the purpose of producing assessable income.

How do you work out the effective life of an item 11 right?

97. The effective life of the item 11 right is 'the life of the mine or proposed mine or, if there is more than one, the life of the mine that has the longest estimated life'. This expression, including the phrase 'life of the mine', is not defined in the legislation or the extrinsic material which accompanied it.

98. Passages from leading cases³⁵ on the interpretation of the former mining provisions in Division 10 of Part III of the ITAA 1936, which have made reference to the 'estimated life of the mine' since 1947, make it clear that expressions such as 'mining', 'mining operations', 'mining property' and 'mine' were used in that context in their ordinary and natural meanings and not as terms of art or in any technical sense.

99. In light of that, the Commissioner considers that expressions such as 'mine' and 'the life of the mine' are used in item 11 of the table in subsection 40-95(7) in their ordinary and natural meanings in that context and not as terms of art or in any technical sense.

Mine

100. The *Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne, relevantly defines a mine as:

1. an excavation in the earth for extracting metal, coal, salt, precious stones, etc.

³⁵ *Federal Commissioner of Taxation v. Broken Hill South Ltd* (1941) 65 CLR 150 at 155; *North Australian Cement Limited v. Federal Commissioner of Taxation* 89 ATC 4765; (1989) 20 ATR 1058; *Federal Commissioner of Taxation v. ICI (Australia) Ltd* (1972) 127 CLR 529; 72 ATC 4213; (1972) 3 ATR 321.

101. Similarly, *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW, relevantly defines a mine as:

1. an excavation made in the earth for the purpose of getting out ores, precious stones, coal, etc. 2. a place where such minerals may be obtained, either by excavation or by washing the soil. 3. a deposit of such minerals, either under the ground or at its surface.

102. These dictionary meanings indicate that in respect of the word 'mine', a deposit of minerals (ores, precious stones, coal, etc.) and an excavation made in the earth for the purpose of extracting those minerals is contemplated.

103. There have been Australian court decisions that have considered the meaning of the word 'mine' in the context of interpreting the word 'mining'. These decisions distinguished between mining and quarrying, for which the capital allowance deductions differed under Division 10 of Part III of the ITAA 1936.³⁶

104. However, this judicial consideration is of little modern significance given that the importance of the distinction between mining operations and quarrying operations has largely been eliminated for the purposes of capital allowance deductions under Division 40.

105. Further, in light of Spender J's views in *North Australian Cement*,³⁷ the distinctions made in those earlier cases appear to have been largely overcome. Spender J concluded that 'mining' referred to the extraction of useful minerals generally, whereas 'quarrying' more specifically referred to the extraction of materials for building or civil engineering purposes. Thus, Spender J held that in the relevant tax years open pit extraction of limestone for the manufacture of cement (where the suitability of the limestone for that purpose depends upon the chemical composition of the deposit) was 'mining' rather than 'quarrying'.

106. The following passage from *Australian Mining & Petroleum Laws*, 2nd edition, by JRS Forbes and AG Lang, is illustrative of the difficulties that arise in ascribing a meaning to the word 'mine':

The meaning of [mine] at common law is not fixed and may be limited or expanded according to the intention with which it is used in a particular instrument: *Glasgow Corp v. Farie* (1988) 13 App Cas 657, being controlled by the context and subject matter of that instrument: *NSW Associated Blue Metal Quarries Ltd v. Federal Commissioner of Taxation* (1955) 94 CLR 509 at 522. In various contexts 'mine' may mean the place where minerals are worked, or the underground excavations made to obtain the minerals, or where a mine is unopened the stratum of minerals, or after minerals have been extracted the space left following their removal.³⁸

³⁶ *NSW Associated Blue-Metal Quarries Ltd v. Federal Commissioner of Taxation* (1955) 94 CLR 509; *Wade v. New South Wales Rutile Mining Co. Pty Ltd* (1969) 121 CLR 177.

³⁷ 89 ATC 4765; (1989) 20 ATR 1058.

³⁸ Forbes, JRS & Lang, AG 1987, *Australian Mining & Petroleum Laws*, 2nd edn, Butterworths, Sydney, p. 55.

107. In the mining legislation of the various Australian States and Territories, the word ‘mine’ is given a very wide meaning under various statutory definitions. In some definitions it includes any land used for mining purposes or where mining operations are carried on.³⁹

108. In *ICF*⁴⁰ the mining legislation of various States was considered to provide a sense in which the terms ‘mine’, ‘mining’ and ‘mining operation’ were used. In this regard, Gibbs J said:

State legislation cannot control the interpretation of a Commonwealth statute, but the fact that the obtaining of salt in this way is treated as a mining operation by the State legislation that applies to the case is relevant in considering whether it is also a mining operation within the meaning of the Act.⁴¹

109. Similarly, in *North Australian Cement*⁴² Spender J said:

It seems to me that usage earlier or later to the relevant period may lend some assistance, as may overseas usage, but it is the meaning of the words in Australia at the time of the expenditure that has to be determined. In approaching that question, the effect of state mining legislation is relevant but not decisive.⁴³

110. Thus, in the context of considering the meaning of the word ‘mine’ for the purposes of item 11 of the table in subsection 40-95(7), these sources indicate that the definitions of ‘mine’ under the mining legislation of the States and Territories may be relevant but they will not be decisive and regard must still be had to other sources such as the common law.

111. Taxation Ruling TR 95/36 (Income tax: characterisation of expenditure incurred in establishing and extending a mine) provides limited guidance on the question of what constitutes a mine.⁴⁴ In particular, TR 95/36 considers a number of Canadian cases⁴⁵ that are relevant in determining the question of whether a mine exists and what constitutes one mine as opposed to separate mines.⁴⁶

112. Given the range of meanings referred to above, it is considered that in an Australian context, ‘mine’ is not a word readily capable of general definition. Accordingly, this Ruling does not set out to define the word ‘mine’. The determination as to the existence of a mine will be a question of fact and degree which can only be determined in the light of all of the circumstances of the particular case.

³⁹ See *Mineral Resources Act 1989* (Qld) section 6A; *Mining and Quarrying Safety and Health Act 1999* (Qld) section 9; *Mining Act 1992* (NSW) section 4; *Mining Act 1978* (WA) section 8; *Mining Act 1971* (SA) section 6; *Mineral Resources Development Act 1990* (Vic) section 4; *Mineral Resources Development Act 1995* (Tas) section 3; *Mining Act 1980* (NT) section 4.

⁴⁰ (1972) 127 CLR 529; 72 ATC 4213; (1972) 3 ATR 321.

⁴¹ (1972) 127 CLR 529 at 581; 72 ATC 4213 at 4227; (1972) 3 ATR 321 at 336.

⁴² 89 ATC 4765; (1989) 20 ATR 1058.

⁴³ 89 ATC 4765 at 4774; (1989) 20 ATR 1058 at 1066.

⁴⁴ See paragraph 13 of Taxation Ruling TR 95/36.

⁴⁵ *Minister of National Revenue v. Bethlehem Copper Corporation Ltd* 74 DTC 6520;

Minister of National Revenue v. MacLean Mining Company Limited 70 DTC 6199.

⁴⁶ See paragraphs 14-18 of Taxation Ruling TR 95/36.

113. However, as noted in paragraph 111 of this Ruling, the meaning of the word ‘mine’ has been extensively considered in a number of Canadian cases. Given that the discussion of the meaning of the word ‘mine’ in an Australian context has been exhausted in the sources detailed above, it is appropriate to consider whether the Canadian cases can usefully provide guidance as to some relevant matters to be considered in determining whether a mine exists in particular circumstances.

114. The leading case in Canada on the meaning of the word ‘mine’ is *North Bay Mica Company Limited v. Minister of National Revenue (North Bay Mica)*.⁴⁷ In *North Bay Mica*, the question before the Supreme Court of Canada was the meaning of the word ‘mine’ for the purposes of the *Income Tax Act 1948* (Can). Broadly speaking, the *Income Tax Act 1948* (Can) exempted a corporation from taxation in respect of the income derived from the operation of a new mine during the first three years of production.

115. Upon considering the meaning of the word ‘mine’, Cartwright J (with Martland J concurring) said:

The word ‘mine’ means not a portion of the earth containing mineral deposits, but rather, a mining concern taken as a whole, comprising mineral deposits, workings, equipment and machinery capable of producing ore.⁴⁸

116. The principle expressed by Cartwright J. in *North Bay Mica* has been applied and elaborated in subsequent Canadian authorities and the meaning of the word ‘mine’ as set out above is now well established in Canadian tax jurisprudence.

117. In *Minister of National Revenue v. MacLean Mining Company Limited (MacLean)*,⁴⁹ the Supreme Court of Canada decided there was only one mine; the opening up of a new ore body was an extension of an existing mine as use was made of existing extraction facilities to extract ore from the ground. Pigeon J said:

In order to reach a different conclusion one would have to interpret the word ‘mine’...as meaning a ‘portion of the earth containing mineral deposits’. This is not the usual meaning, the usual expression in that sense being ‘ore-body’. It is well known that mines often, if not generally, include several orebodies.⁵⁰

118. This passage from *MacLean* indicates that the existence of an ore body does not necessarily equate to the existence of a mine. Furthermore, more than one ore body may be mined in a single mine.

⁴⁷ 58 DTC 1151.

⁴⁸ 58 DTC 1151 at 1152.

⁴⁹ 70 DTC 6199.

⁵⁰ 70 DTC 6199 at 6201.

119. In *Minister of National Revenue v. Bethlehem Copper Corporation Ltd (Bethlehem)*,⁵¹ the Supreme Court of Canada decided that each ore body became a separate mine because each had its own separate and distinct extraction facilities that were used in the extraction of ore from the ground. When applying the principle in *North Bay Mica*, Martland J said:

The point which is being made in this passage is that the appellant did not acquire a mine merely because it had acquired a portion of the earth containing mineral deposits. It is also clear that the phrase 'capable of producing ore' means that the operation of a mine refers to the extraction of the ore from the ore body. It does not include the processing of the ore after production.⁵²

120. Later, in discussing the meaning of 'mine', Martland J said:

In my opinion there is 'a mine'... if there is a body of ore together with the workings, equipment and machinery capable of producing it. The Jersey was not a mine merely because of the existence of a body of ore, separate from the East Jersey ore body. It would not have become a separate mine if the Jersey ore had been extracted as a result of the further development of the East Jersey mine. But it became a mine when its separate body of ore commenced to be extracted by means of its separate and distinct extraction facilities.⁵³

121. These passages from the leading cases of *MacLean* and *Bethlehem* demonstrate the application of the principle in *North Bay Mica* by the Canadian courts in determining whether there is a mine in the circumstances of a particular case. The relevant points that arise from the application of that principle are as follows:

- the existence of an ore body does not necessarily equate to the existence of a mine;
- more than one ore body can be mined by a single mine; and
- the extraction of an ore body by means of its own extraction facilities that are separate and distinct from any other extraction facilities indicates the existence of a separate mine.

122. The Commissioner considers that that these points are relevant to determining whether a mine exists in a particular case for the purposes of item 11 of the table in subsection 40-95(7), but they are not necessarily comprehensive or conclusive.

⁵¹ 74 DTC 6520.

⁵² 74 DTC 6520 at 6524.

⁵³ 74 DTC 6520 at 6525.

More than one mine

123. Where there is more than one mine, the effective life of an item 11 right is the life of the mine that has the longest estimated life. Accordingly, for the purposes of working out the effective life of an item 11 right, an important issue is the circumstances that give rise to the existence of more than one mine.

124. The question of what constitutes one mine, as opposed to more than one mine, has not been considered by the courts in Australia. The issue has been extensively considered in Canadian cases, some of which are discussed in Taxation Ruling TR 95/36. Paragraph 18 of Taxation Ruling TR 95/36 explains that the question of the existence of separate mines is one that will depend upon the facts of each individual case. It is pointed out that varying degrees of physical separation or separation in the time and mode of operation need to be considered.

125. The Canadian cases have identified a number of factors that are relevant in determining whether more than one mine exists in a particular set of circumstances. The Commissioner considers that the factors that may be extrapolated from the Canadian cases are relevant in determining whether more than one mine exists for the purposes of item 11 of the table in subsection 40-95(7) in a particular set of circumstances and should be used by taxpayers when making this determination.

126. Paragraphs 127 to 138 of this Ruling discuss these factors. These factors are not necessarily comprehensive. No one of these factors is necessarily conclusive and the relative importance of each will vary depending on the circumstances of each particular case.

Whether there are separate and distinct workings, equipment and machinery, capable of producing ore⁵⁴

127. In *Bethlehem*,⁵⁵ the Supreme Court of Canada concluded that there were two distinct mines because none of the facilities or workings of the first ore body (East Jersey) were used in the workings of the second ore body (Jersey) except for a minor part of a surface road. On the facts of that case, the court decided that Jersey was not a mine merely because of the existence of a body of ore, separate from the East Jersey ore body. It would not have become a separate mine if the Jersey ore had been extracted as a result of the further development of the East Jersey mine. Jersey became a mine when its separate body of ore commenced to be extracted by means of its separate and distinct extraction facilities.

⁵⁴ See *Marbridge Mines Limited v. Minister of National Revenue* 71 DTC 5231; *Minister of National Revenue v. Bethlehem Copper Corporation Ltd* 74 DTC 6520; *Falconbridge Copper Limited v. Her Majesty the Queen* 79 DTC 5227; *Placer Dome Inc v. Her Majesty the Queen* 93 DTC 235.

⁵⁵ 74 DTC 6520.

*Whether there is clear contemplation by management at an early date of the possibility of developing the ore bodies concurrently*⁵⁶

128. In *Falconbridge Copper Limited v. Her Majesty The Queen*, when heard in the first instance by the Federal Court of Canada, Trial Division, (*Falconbridge at trial*),⁵⁷ Heald J made certain findings of fact which were considered indicative of the existence of only one mine, rather than separate mines. One of these findings was the fact that management clearly contemplated, at an early date, the possibility of developing the two ore bodies (Springer and Perry) concurrently and were quite conscious of the potential of the Perry ore body.

*Whether the ore bodies were developed at the same time*⁵⁸

129. In *Falconbridge at trial*,⁵⁹ Heald J found that the fact that the two areas (Perry and Springer) were, generally speaking, developed at the same time, was indicative of the existence of only one mine, rather than separate mines.

*Whether there is a structural connection between the ore bodies*⁶⁰

130. In *Bethlehem*,⁶¹ the Supreme Court of Canada held that while the two ore bodies (East Jersey and Jersey) were close together, they were not physically connected and the operation of extracting ore from one was physically quite independent of the operation of extracting ore from the other. The lack of a structural connection between the two ore bodies was a factor considered by the court in concluding that there were two separate mines.

*Whether the ore bodies have similar geological characteristics*⁶²

131. In *Bethlehem*,⁶³ the finding that the characteristics of the East Jersey and Jersey ore bodies were very different was a factor taken into account by the court in concluding that there were two separate mines. In *Falconbridge Copper Limited v. Her Majesty the Queen (Falconbridge)*,⁶⁴ the finding that the characteristics of the Perry and Springer ore bodies were similar was a factor taken into account by the court in concluding that there were not separate mines.

⁵⁶ See *Falconbridge Copper Limited v. Her Majesty The Queen* 75 DTC 5394 and *Placer Dome Inc v. Her Majesty the Queen* 93 DTC 235.

⁵⁷ *Falconbridge Copper Limited v. Her Majesty The Queen* 75 DTC 5394.

⁵⁸ See *Falconbridge Copper Limited v. Her Majesty The Queen* 75 DTC 5394.

⁵⁹ 75 DTC 5394.

⁶⁰ See *Minister of National Revenue v. Bethlehem Copper Corporation Ltd* 74 DTC 6520; *Falconbridge Copper Limited v. Her Majesty the Queen* 79 DTC 5227.

⁶¹ 74 DTC 6520.

⁶² See *Minister of National Revenue v. Bethlehem Copper Corporation Ltd* 74 DTC 6520; *Falconbridge Copper Limited v. Her Majesty the Queen* 79 DTC 5227.

⁶³ 74 DTC 6520.

⁶⁴ 79 DTC 5227.

Whether there is separation in time between mining operations⁶⁵

132. In *North Bay Mica*,⁶⁶ the taxpayer operated a mine until its cessation at which time the taxpayer gave up all thought of carrying on any further work and removed its buildings and machinery. For a period of five years, there was no activity of any kind on the taxpayer's mining property. After that interval of time had elapsed, a second taxpayer took over the mining property and discovered a new ore body.

133. The Supreme Court of Canada held that the second taxpayer's operations were a different mine from the mine operated by the first taxpayer. In the interval between the cessation of operations by the first taxpayer and the commencement of those of the second taxpayer, the property lost the character of a mine. What the second taxpayer acquired was not a mine but a derelict and abandoned property which it hoped to develop into a mine.

Whether there are common facilities for the treatment of ore from the mining operations⁶⁷

134. In *Marbridge Mines Limited v. Minister of National Revenue (Marbridge)*,⁶⁸ whilst the underground workings, equipment and machinery capable of producing ore were separate and distinct in both mines, common facilities were used for the treatment of ore from both operations. In concluding that there were two separate mines, the Exchequer Court of Canada considered that the method or manner of employment of facilities for the treatment, refining or smelting of the ore after the ore had been hoisted to the surface were irrelevant in the determination of whether in a given case there is or is not more than one mine.

135. Notwithstanding the decision in *Marbridge*, the Commissioner considers that it is relevant to consider whether there are common facilities for the treatment of ore from the mining operations as a factor in determining whether more than one mine exists in a particular set of circumstances.

⁶⁵ See *North Bay Mica Company Limited v. Minister of National Revenue* 58 DTC 1151; *Bermah Mines Limited v. Minister of National Revenue* 66 DTC 519.

⁶⁶ 58 DTC 1151.

⁶⁷ See *Marbridge Mines Limited v. Minister of National Revenue* 71 DTC 5231; *Minister of National Revenue v. Bethlehem Copper Corporation Ltd* 74 DTC 6520.

⁶⁸ 71 DTC 5231.

136. The Commissioner has reached this view on the basis that:

- the decision in *Marbridge* is a decision of a lower court within the Canadian court hierarchy which does not appear to have been subsequently cited by a superior court on that point;
- the decisions made by courts in other common law countries, such as Canada, are persuasive but not binding on Australian courts; and
- the Commissioner can conceive of circumstances where this factor would be highly relevant in the current context.

*Whether there is an integration of the economic aspects of the mining operations*⁶⁹

137. In *Marbridge*,⁷⁰ the Exchequer Court of Canada held that economic factors such as the integration of management, work force or financing were irrelevant to the determination of whether in a given case there are separate mines. In this case, there were held to be two separate mines even though there was only one mine manager, one geological staff, one work force and one contractor for both operations.

138. For the same reasons given in paragraph 136 of this Ruling, the Commissioner considers that it is relevant for taxpayers to consider whether there is an integration of the economic aspects of the mining operations as a factor in determining whether more than one mine exists in a particular set of circumstances.

Proposed mine

139. Item 11 of the table in subsection 40-95(7) refers to 'the life of the mine or proposed mine'. There is no definition of the term 'proposed mine' for the purposes of Division 40.

140. As noted in paragraph 75 of this Ruling it is relevant to have regard to the context in which the definition of 'proposed mine' arose in prior statutory provisions dealing with the same subject matter in order to interpret the meaning of that term in a current statute.⁷¹

⁶⁹ *Marbridge Mines Limited v. Minister of National Revenue* 71 DTC 5231.

⁷⁰ 71 DTC 5231.

⁷¹ Pearce, DC & Geddes, RS 2001, *Statutory Interpretation in Australia*, 5th edn, Butterworths, Australia at p. 73.

141. The concept of ‘proposed mine’ was first introduced into the ITAA 1936 with the new Division 10 inserted by *Income Tax Assessment Act (No. 2) 1968*. In the new General Mining provisions, the operative provision was paragraph 122D(2)(a) of the ITAA 1936 which included a reference to ‘a number equal to the number of whole years in the estimated life of the mine **or proposed mine**.’ (Emphasis added). The Explanatory Memorandum to the Income Tax Assessment Bill (No. 2) 1968 states:

Provision is also made to meet the situation where a taxpayer has undertaken preparatory work such as clearing the mine site and installing light and power but has not commenced the actual extractive mining operations. In such a case, the deduction is determined by relating the expenditure to the estimated life of the proposed mine.⁷²

142. In the context of Division 10 of Part III of the ITAA 1936, this passage of the Explanatory Memorandum indicates that the term ‘proposed mine’ was incorporated into the legislation to take into account allowable capital expenditure that had been incurred by a taxpayer in respect of an area where it was intended to mine and in respect of which some preparatory work such as clearing the site, installing light and power had already been undertaken.

143. The law on mining and quarrying in the ITAA 1936 was rewritten in 1997 as Division 330. The operative provision was section 330-100 which spread the deduction for allowable capital expenditure that had been incurred by the taxpayer over the ‘number of whole years in the estimated life of the mine, or proposed mine’.

144. The Explanatory Memorandum which accompanied the Income Tax Assessment Bill 1996 states that a proposed mine is:

One where work preparatory to the extractive operations has started but not actual extractive operations.⁷³

145. Given the history of the legislative scheme, it is evident that the term ‘proposed mine’ has had a consistent meaning since it was first mentioned with the introduction of section 122D of the ITAA 1936 in 1968. The Commissioner has no reason to believe that the meaning of that term would be any different for the purposes of Division 40.

146. Therefore, there will be a proposed mine for the purposes of item 11 of the table in subsection 40-95(7) where there is an ore body and work preparatory to the actual extractive mining operations in respect of that ore body has started, but the actual extractive mining operations have not commenced. Examples of work preparatory to the actual extractive mining operations include:

- clearing the site on which the extractive mining operations are proposed to be carried on;

⁷² Explanatory Memorandum to the Income Tax Assessment Bill (No. 2) 1968 at p. 37.

⁷³ Explanatory Memorandum to the Income Tax Assessment Bill 1996 at p. 88.

- installing water, light and power for that site;
- erecting housing and welfare facilities in relation to those operations; and
- locating equipment or machinery at the site.

Life of the mine or the proposed mine

147. The first step in construing the expression ‘the life of the mine or proposed mine or, if there is more than one, the life of the mine that has the longest estimated life’ in item 11 of the table in subsection 40-95(7) is to identify all relevant mines or proposed mines.

148. The next step is to understand the concept of the ‘life’ of the mine or ‘life’ of the proposed mine in the context of item 11 of the table in subsection 40-95(7). The Commissioner considers that the reference to the life of the proposed mine in item 11 means the life of the mine that is proposed.

Which mine or mines are relevant?

149. The Commissioner considers that it is the actual or proposed mine or mines to which the item 11 right relates that are relevant for working out the effective life of that right. This is supported by paragraph 2.10 of the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 4) 2003, which inserted item 11 into the table in subsection 40-95(7), which relevantly states about item 11:

For a mining, quarrying or prospecting right that relates to a mine (excluding petroleum fields or quarries), the effective life of that right is the life of the mine, proposed mine, or if there is more than one mine, the life of the mine that has the longest estimated life **to which the right relates**. (Emphasis added)

150. Therefore if at a particular point in time there is a mine to which the item 11 right relates, then the effective life of that right at that time is the life of that mine. If at a particular point in time there is a proposed mine to which the item 11 right relates, then the effective life of that right at that time is the life of the mine that is proposed. If at a particular point in time there are a number of mines, proposed mines or a combination of both to which the item 11 right relates, then the effective life of that right at that time is the life of whichever of those mines has the longest life.

151. As noted in paragraph 71 of this Ruling, the relevant part of the definition of mining, quarrying or prospecting right in subsection 995-1(1) with which an item 11 right is concerned is:

- (a) an authority, licence, permit or right under an Australian law to mine, quarry or prospect for minerals; or
- (b) a lease of land that allows the lessee to mine, quarry or prospect for minerals on the land; or

- (c) an interest in such an authority, licence, permit, right or lease; or
- (d) any rights that:
 - (i) are in respect of buildings or other improvements (including anything covered by the definition of housing and welfare) that are on the land concerned or are used in connection with operations on it; and
 - (ii) are acquired with such an authority, licence, permit, right, lease or interest.

152. A mine or proposed mine to which a particular item 11 right relates is therefore:

- a mine or proposed mine to which the relevant authority, licence, permit or right under an Australian law to mine for minerals relates; or
- a mine or proposed mine which is located on the area of land that is the subject of the relevant lease that allows the lessee to mine for minerals on that land.

Estimating the life of a mine

153. For the purposes of estimating the life of a mine in the context of item 11 of the table in subsection 40-95(7), the Commissioner considers that the life of a mine, like the effective life of a depreciating asset worked out under sections 40-100 or 40-105, is not limited to the period a particular taxpayer intends to operate the mine to which the item 11 right relates. Indeed, it is the Commissioner's view that the life of a mine is not solely related to any particular taxpayer intending to use an item 11 right but may span across a number of holders of such a right (including the current, former and subsequent holders of that right) and holders of predecessor and successor rights.

154. Accordingly, for a taxpayer who acquires an item 11 right from a former holder of the right, the life of a mine to which the right relates will include the period the mine has operated prior to the taxpayer's acquisition of the item 11 right. Similarly, for a taxpayer who acquires an item 11 right after a previous right has expired, the life of a mine to which the right relates will include the period the mine has operated under previous rights before the new right was granted.

155. This view is supported by the legislation and the extrinsic material that accompanied it. As noted in paragraph 7 of this Ruling, as originally enacted Division 40 provided taxpayers with the choice either to work out the effective life of a mining, quarrying or prospecting right themselves under section 40-105 or to use an effective life determined by the Commissioner under section 40-100. This is because mining, quarrying or prospecting rights were not then included in the table in subsection 40-95(7).

156. However, as no determination of the effective life of a mining, quarrying or prospecting right had been made by the Commissioner under section 40-100, the effective life of these rights was required to be worked out by the taxpayer under section 40-105, subject to the requirements of subsection 40-95(8).

157. In working out the effective life of these rights, it was necessary for the taxpayer to estimate the period that the mining, quarrying or prospecting right could be used by any entity for a taxable purpose or for the purpose of producing exempt income or non-assessable non-exempt income. Thus, the estimate was not just in respect of the period that that particular taxpayer intended to use that right.

158. The Explanatory Memorandum to the New Business Tax System (Capital Allowances) Bill 2001, which introduced Division 40, includes Example 1.14 which relevantly provides:

Global Resources Limited obtains a right to extract a mineral for an initial term of 21 years. The right can be renewed or extended indefinitely on a 21 year basis while mining continues. Global estimates that, based on its anticipated level of production, the resource will be fully exhausted after 30 years. It could be concluded that the right, together with any reasonably assured extensions or renewals, will exist for 42 years. **However, based on Global's plans, Global or any other person is likely to use the right for 30 years only.** Accordingly, Global could reasonably adopt an effective life of 30 years for the right. (Emphasis added)

159. The statement '*based on Global's plans, Global or any other person is likely to use the right for 30 years only*' in Example 1.14 is consistent with the estimate of effective life of a mining, quarrying or prospecting right not being limited to the period over which the particular taxpayer intends to use the right.

160. As noted in paragraph 10 of this Ruling, Division 40 was amended by *Taxation Laws Amendment Act (No. 4) 2003*. A consequence of these amendments was a change in the way in which the effective life of these rights was to be worked out. This change was effected by including these rights in the table in subsection 40-95(7) which meant, among other things, that taxpayers could no longer work out the effective life of these rights themselves under section 40-105. This is because subsection 40-105(4) provides that section 40-105 does not apply to an intangible depreciating asset mentioned in the table in subsection 40-95(7).

161. The Explanatory Memorandum which accompanied this legislation included Example 2.1, which is in the same terms as the earlier Example 1.14. Example 2.1 also indicates that the life of a mine is not limited to the period over which the particular taxpayer intends to operate the mine to which the right relates.

162. There is a view that for a taxpayer who acquires an item 11 right from a former holder of the right, the life of the mine to which the right relates does not include the period the mine has operated prior to the taxpayer's acquisition of the right. This alternative view and why the Commissioner does not accept it is explained more fully under 'Alternative views' later in Appendix 2 of this Ruling.

163. Paragraphs 164 to 166 explain why the Commissioner considers the terms of the legislation and the ordinary meaning of the 'life' of something strongly support the view that the life of the mine includes the period the mine has operated prior to the taxpayer's acquisition of the item 11 right.

164. Pursuant to subsection 40-75(5) the prime cost method formula must be adjusted for an intangible depreciating asset that is mentioned in the table in subsection 40-95(7) (except item 5, 7 or 8) and which the taxpayer acquired from a former holder of the asset. The adjustment, which applies for the income year in which the taxpayer acquires the asset and later years, is set out in subsection 40-75(6). Pursuant to that subsection, instead of the asset's effective life under the table in subsection 40-95(7), the taxpayer uses 'the number of years remaining in that effective life as at the start of the income year in which [the taxpayer acquires] the asset'.

165. The Commissioner considers that the terms of subsection 40-75(6), with its reference to 'the number of years remaining in that effective life as at the start of the income year in which you acquire the asset', strongly support the view that the life of the mine, which is the effective life of the item 11 right, includes the period the mine has operated prior to the taxpayer's acquisition of the item 11 right. The role of subsection 40-75(6) is to exclude a period from effective life that would otherwise form part of that effective life. 'This ensures that those intangible assets [mentioned in the table in subsection 40-95(7) other than items 5, 7, and 8] are written-off in accordance with the statutory period.'⁷⁴

166. Further, the ordinary meaning of the 'life' of something is the period or term of its existence or effectiveness.⁷⁵ This also supports the view that the 'life' of the mine includes the period the mine has operated prior to the taxpayer's acquisition of the item 11 right.

⁷⁴ Paragraph 1.112 of the Explanatory Memorandum to the New Business Tax System (Capital Allowances) Bill 2001, which introduced Division 40.

⁷⁵ *The Macquarie Dictionary*, 2001 rev 3rd edn, The Macquarie Library Pty Ltd, NSW, relevantly defines 'life' as 'a period of existence from birth to death' and 'the term of existence, activity, or effectiveness of something inanimate, as a machine or a lease'.

Yearly estimate of the life of a mine

167. Since mining, quarrying or prospecting rights are included in the table in subsection 40-95(7), the choice which would ordinarily be available under subsection 40-95(1) to use either an effective life determined by the Commissioner or to work out the effective life of the right is not available to the taxpayer who is the holder of an item 11 right.

168. That there is normally such a choice is an important element of the general framework of Subdivision 40-B whereby the effective life of a depreciating asset remains the same while held by a particular taxpayer unless there is a recalculation of effective life under section 40-110. That general framework results from the application of section 40-130 to that choice.

169. Intangible depreciating assets, including item 11 rights, in the table in subsection 40-95(7) are clearly marked as an exception to that general framework. This view is reinforced by the exclusion of intangible depreciating assets mentioned in the table in subsection 40-95(7) from self-assessment of effective life under section 40-105⁷⁶ and recalculation of effective life under section 40-110.⁷⁷

170. Accordingly, each year when a taxpayer applies the formula for whichever of the diminishing value method⁷⁸ or prime cost method⁷⁹ the taxpayer has chosen to use to work out the decline in value of an intangible depreciating asset mentioned in the table in subsection 40-95(7), that table is consulted to obtain the effective life of the relevant intangible depreciating asset. There is no need for recalculation of the intangible depreciating asset's effective life under section 40-110 because the table in subsection 40-95(7) is consulted on a yearly basis.

171. Thus, at the time when a taxpayer is working out the decline in value for an income year of an item 11 right, the table in 40-95(7) is consulted and the taxpayer estimates 'the life of the mine or proposed mine or, if there is more than one, the life of the mine that has the longest estimated life' based on their state of knowledge at that time. That estimate is the effective life of the item 11 right which the taxpayer will use for the purposes of the formula for that income year for whichever of the diminishing value method or prime cost method the taxpayer has chosen to use to work out the decline in value of the item 11 right.

⁷⁶ See subsection 40-105(4).

⁷⁷ See section 40-110(5).

⁷⁸ Section 40-70.

⁷⁹ Section 40-75.

172. In circumstances where subsection 40-75(5) applies, the estimate of ‘the life of the mine or proposed mine or, if there is more than one, the life of the mine that has the longest estimated life’ is conducted yearly and the effect of the subsection 40-75(6) adjustment is that the prime cost method formula instead uses that estimate less the period from when the mine started until the start of the income year in which the taxpayer acquired the item 11 right.

173. There is a view that the effective life of item 11 rights mentioned in the table in subsection 40-95(7) are fixed on acquisition. This alternative view and why the Commissioner does not accept it is explained more fully under ‘Alternative views’ in Appendix 2 of this Ruling.

Working out the estimated life of a mine

174. There is no prescribed formula in the legislation indicating how the estimated life of a mine is to be worked out, nor has a view been expressed by the courts.

175. In the context of working out the ‘life of a mine’, it is necessary to consider when the mine starts and when the mine ends. It necessarily follows that the period of time in between will be the life of that mine.

176. It is therefore necessary to consider the events that signify the start of a mine and the end of a mine.

Start of a mine

177. The process of determining the event that signifies the start of a mine involves a consideration of the factors that are relevant in determining the question of whether a mine exists for the purposes of item 11 of the table in subsection 40-95(7). It is considered that the common theme expressed by these factors is represented by the statement by Cartwright J in *North Bay Mica* that:

The word ‘mine’ means not a portion of the earth containing mineral deposits, but rather, a mining concern taken as a whole, comprising mineral deposits, workings, equipment and machinery capable of producing ore.⁸⁰

178. That passage in *North Bay Mica* was considered in Bethlehem where Martland J (for the Court) said:

The point which is being made in this passage is that the appellant did not acquire a mine merely because it had acquired a portion of the earth containing mineral deposits. It is also clear that the phrase ‘capable of producing ore’ means that the operation of a mine refers to the extraction of ore from the ore body.⁸¹

⁸⁰ 58 DTC 1151 at 1152.

⁸¹ 74 DTC 5394 at 6524.

179. These statements indicate that the event that will signify the start of a mine is when extractive operations commence.

180. This view is supported by the statements in the Explanatory Memoranda accompanying the reference to 'proposed mine' in Division 10 of Part III of the ITAA 1936 and Division 330 of the ITAA 1997. The Explanatory Memoranda provide that a proposed mine is one where work preparatory to the extractive operations has been undertaken, but actual extractive mining operations have not started. This indicates that the commencement of actual extractive mining operations will signify the start of a mine for the purposes of item 11 of the table in subsection 40-95(7).

End of a mine

181. The following discussion evidences that there are two possible events which signify the end of a mine for the purposes of item 11 of the table in subsection 40-95(7). It is considered that a mine ends at the point in time when:

- the resource is fully exhausted; or
- the mine is permanently abandoned prior to the resource being fully exhausted.

The resource is fully exhausted

182. The Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 4) 2003 included Example 2.1 which relevantly provides:

Global Resources Limited obtains a right to extract a mineral for an initial term of 21 years. The right can be renewed, extended indefinitely on a 21 year basis while mining continues. **Global estimates that, based on its anticipated level of production, the resource will be fully exhausted after 30 years.** It could be concluded that the right, together with any reasonably assured extensions or renewals, will exist for 42 years. However, **based on Global's plans, Global or any other person is likely to use the right for 30 years only.** Accordingly, Global could reasonably adopt an effective life of 30 years for the right. (Emphasis added)

183. The statements emphasised above support the view that one of the events that signifies the end of a mine for the purposes of item 11 of the table in subsection 40-95(7) is when the resource is fully exhausted.

184. It is considered that the period of time from commencement of actual extractive mining operations to the full exhaustion of the mine's resource is worked out by estimating the quantity of the mine's resource and the anticipated production programme for that mine. For ease of reference, this Ruling refers to this period of time as the *mineral extraction phase of the mine*.

185. As noted in paragraphs 167 to 172 of this Ruling, when a taxpayer is working out the decline in value for an income year of an item 11 right, they will make a yearly estimate of the life of the mine. The taxpayer's yearly estimate of the life of the mine will involve a consideration of the length of the mineral extraction phase of the mine, based on the taxpayer's state of knowledge at the time of making the estimate.

Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (the JORC Code)

186. The JORC Code⁸² sets out minimum standards, recommendations and guidelines for public reporting in Australasia of exploration results, mineral resources and ore reserves.⁸³ The JORC Code has been adopted by and included in the listing rules of the Australian Stock Exchange (ASX) and the New Zealand Stock Exchange (NZX). The incorporation of the JORC Code in the ASX and NZX listing rules imposes certain specific requirements on mining or exploration companies reporting to the ASX and NZX, including that public reports must be prepared in accordance with the JORC Code if it includes a statement on exploration results, mineral resources or ore reserves.⁸⁴ Under the JORC Code and therefore under the listing rules of the ASX and NZX, companies must review and publicly report on their ore reserves and mineral resources at least annually⁸⁵ and must also promptly report any material changes in their ore reserves or mineral resources.⁸⁶

187. It is considered that information reported under the JORC Code provides useful guidance in estimating the quantity of a mine's resource and the anticipated production programme and thereby in determining when the mine's resource will be fully exhausted.

188. A public report concerning a company's exploration results, mineral resources or ore reserves is the responsibility of the company acting through its Board of Directors.⁸⁷ Any such report must be based on, and fairly reflect, the information and supporting documentation prepared by a competent person or persons.⁸⁸

⁸² References in this Ruling to clauses of the JORC Code are to clauses of the 2004 edition of the JORC Code.

⁸³ Clause 1 of the JORC Code.

⁸⁴ Clause 3 of the JORC Code.

⁸⁵ Clause 14 of the JORC Code.

⁸⁶ Clause 13 of the JORC Code.

⁸⁷ Clause 8 of the JORC Code.

⁸⁸ Clause 8 of the JORC Code.

189. The JORC Code requires a competent person⁸⁹ to classify mineral resources and ore reserves. An ore body is classified as a 'mineral resource' when it meets the criteria set out in the definition of that term in the JORC Code.⁹⁰ Measured mineral resources may be converted by the competent person to either proved ore reserves or probable ore reserves by fully applying the 'modifying factors'. Similarly, indicated mineral resources may be converted by the competent person to probable ore reserves by fully applying the 'modifying factors'. The term 'modifying factors' is defined to include 'mining, metallurgical, economic, marketing, legal, environmental, social and governmental considerations'.⁹¹

190. The following definitions of 'Mineral Resource' and 'Ore Reserve' are contained in the JORC Code:

A '**Mineral Resource**' is a concentration or occurrence of material of intrinsic economic interest in or on the Earth's crust in such form, quality and quantity that there are **reasonable prospects for eventual economic extraction**. The location, quantity, grade, geological characteristics and continuity of a Mineral Resource are known, estimated or interpreted from specific geological evidence and knowledge. Mineral Resources are sub-divided, in order of increasing geological confidence, into Inferred, Indicated and Measured categories (Emphasis added).⁹²

An '**Ore Reserve**' is the **economically mineable part of a Measured and/or Indicated Mineral Resource**. It includes diluting materials and allowances for losses, which may occur when the material is mined. Appropriate assessments and studies have been carried out, and include consideration of and modification by realistically assumed mining, metallurgical, economic, marketing, legal, environmental, social and governmental factors. **These assessments demonstrate at the time of reporting that extraction could reasonably be justified**. Ore Reserves are sub-divided in order of increasing confidence into Probable Ore Reserves and Proved Ore Reserves (Emphasis added).⁹³

191. The phrase 'economically mineable' used in the definition of ore reserves in the JORC Code refers to assessments that demonstrate at the time of reporting that extraction of the ore reserve could reasonably be justified. This requirement can be contrasted with the one contained in the JORC Code definition of 'mineral resource' that there should be reasonable prospects for eventual economic extraction.

⁸⁹ Clause 10 of the JORC Code specifies who is a competent person.

⁹⁰ Clause 19 of the JORC Code and see paragraph 190 of this Ruling.

⁹¹ Clause 11 of the JORC Code.

⁹² Clause 19 of the JORC Code.

⁹³ Clause 28 of the JORC Code.

192. The guidelines accompanying clause 19 of the JORC Code provide that:

The term ‘reasonable prospects for eventual economic extraction’ implies a judgement (albeit preliminary) by the Competent Person in respect of the technical and economic factors likely to influence the prospect of economic extraction ... In other words, a Mineral Resource is not an inventory of all mineralisation drilled or sampled, regardless of cut-off grade, likely mining dimensions, location or continuity. It is a realistic inventory of mineralisation which, under assumed and justifiable technical and economic conditions, might, in whole or in part, become economically extractable.

193. Thus, it is evident that mineral resources are classified by the competent person with a preliminary consideration of the modifying factors likely to influence the prospect of eventual economic extraction. Whilst their economic viability has yet to be established to the standards required by the JORC Code for ore reserves, the requirement that there should be reasonable prospects for economic extraction means that there is a reasonable expectation that a proportion of mineral resources will become economically mineable and converted into ore reserves.

194. It is considered that a taxpayer’s yearly estimate of the quantity of the mine’s resource will therefore include:

- the quantity of ore reserves for that mine; and
- a reasonable estimate of the proportion of the mineral resources for that mine that are reasonably likely to become economically mineable in the foreseeable future based on the taxpayer’s state of knowledge at the time of making the estimate.

195. Not only has the JORC Code been adopted by and included in the listing rules of the ASX and NZX, it has also been adopted by The Australasian Institute of Mining and Metallurgy and the Australian Institute of Geoscientists and is therefore binding on members of those organisations. Further, the JORC Code has been endorsed by such bodies as the Minerals Council of Australia and the Securities Institute of Australia as a contribution to good practice.⁹⁴

196. In light of all that, the Commissioner considers that the best evidence of a mine’s ore reserves and mineral resources for the purposes of a taxpayer’s yearly estimate of the quantity of a mine’s resource is the figures for those ore reserves and mineral resources contained in the most recent⁹⁵ public report prepared in accordance with the JORC Code, particularly the most recent public report to the ASX or NZX.

⁹⁴ Clause 3 of the JORC Code.

⁹⁵ Hereinafter meaning the most recent at the time of making the relevant yearly estimate of the quantity of the mine’s resource.

197. It is, however, recognised that such a public report may not exist for various reasons, including that the taxpayer is listed on some other stock exchange, does not publicly report ore reserves and mineral resources in accordance with the JORC Code to any stock exchange, or does not publicly report ore reserves and mineral resources in accordance with the JORC Code at all. With that in mind, the following framework is set out.

198. Where the taxpayer publicly reports ore reserves and mineral resources in accordance with the JORC Code to a stock exchange, the mine's ore reserve and mineral resource figures in the taxpayer's most recent public report prepared in accordance with the JORC Code to a relevant⁹⁶ stock exchange should be used by the taxpayer in making their yearly estimate of the quantity of the mine's resource.

199. Where the taxpayer publicly reports ore reserves and mineral resources in accordance with the JORC Code, but does not do so to a stock exchange, the mine's ore reserve and mineral resource figures in the taxpayer's most recent public report prepared in accordance with the JORC Code should be used by the taxpayer in making their yearly estimate of the quantity of the mine's resource.

200. Where a taxpayer to which one of the previous two paragraphs applies has not, at the time of making their first yearly estimate of the quantity of the mine's resource, publicly reported the mine's ore reserves and mineral resources in accordance with the JORC Code:

- in the case of a taxpayer to which paragraph 198 of this Ruling applies – to a relevant stock exchange; or
- in the case of a taxpayer to which paragraph 199 of this Ruling applies – at all,

the mine's ore reserve and mineral resource figures on which the taxpayer based their decision to acquire their interest in the mine should be used by the taxpayer in making that first yearly estimate.

201. Where the taxpayer does not publicly report ore reserves and mineral resources in accordance with the JORC Code, it is expected that the taxpayer's yearly consideration of the length of the mineral extraction phase of a mine would be based on the same, or substantially similar, concepts and definitions as are used in the JORC Code.

⁹⁶ Hereinafter meaning: (a) If the taxpayer is listed on the Australian Stock Exchange – that stock exchange; (b) Otherwise – a stock exchange on which the taxpayer is listed.

Mine is permanently abandoned

202. In certain circumstances, a taxpayer will permanently abandon a mine even though the resource may not be fully exhausted. A mine that has been permanently abandoned is considered to have lost the character of a mine and therefore such an event signifies the end of the mine for the purposes of item 11 of the table in subsection 40-95(7). A mine that has been permanently abandoned is to be contrasted with a mine that has been placed in care and maintenance. It is considered that a mine that has been placed in care and maintenance has not been permanently abandoned and accordingly such an event that will not signify the end of a mine for the purposes of item 11 of the table in subsection 40-95(7).

203. In *North Bay Mica*, the Supreme Court of Canada held that the following factors were relevant in considering whether a mine had been permanently abandoned:

- the taxpayer had ceased mining operations, given up all thought of carrying on any further mining operations and had removed its buildings and machinery; and
- a substantial interval of time had elapsed (in this case, 5 years) between the cessation of mining operations by the taxpayer and the commencement of mining operations by another taxpayer.

204. Where a mine has been permanently abandoned by a taxpayer, the estimated life of the mine and consequently the effective life of the item 11 right to which that mine relates, is worked out by measuring the period of time that has elapsed between the commencement of actual extractive mining operations and when the mine is permanently abandoned by the taxpayer.

205. However, a taxpayer will be unable to measure the period of time that has elapsed between the commencement of actual extractive mining operations and when the mine is permanently abandoned until the taxpayer actually makes the decision to permanently abandon the mine. Until such time as the taxpayer makes a decision to permanently abandon the mine, the taxpayer will be required to work out the life of the mine for an income year in accordance with paragraphs 182 to 201 of this Ruling which outline the method for estimating the length of the mineral extraction phase of the mine.

Appendix 2 – Alternative views

❶ *This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.*

Alternative view – Life of mine excludes period prior to acquisition of an item 11 right from another taxpayer

206. There is a view that for a taxpayer who acquires an item 11 right from a former holder of the right, the life of the mine to which the right relates does not include the period the mine has operated prior to the taxpayer's acquisition of the right. Paragraphs 207 to 219 of this Ruling explain this view and why the Commissioner does not accept it.

207. First, it is said that the general scheme of Subdivision 40-B focuses on the entity (addressed as 'you') and its asset (addressed as 'your' depreciating assets), and does not generally focus on an entity that may have previously held and used the depreciating asset. Thus, it is said, the life of the mine to which the right relates should not include the period the mine has operated prior to the taxpayer's acquisition of the item 11 right because that period can have nothing to do with working out the current holder's cost of the item 11 right and with ascertaining when the current holder may begin to claim decline in value deductions in respect of the item 11 right.

208. The Commissioner does not accept that argument because it confuses issues relating to the cost of the item 11 right and when it begins to decline in value for the current holder with the estimation of the life of mine which is used to work out the decline in value of the item 11 right. It is true that the general framework of Subdivision 40-B is to base a holder's decline in value deduction for a depreciating asset on the period (from the start time of the depreciating asset⁹⁷) that the depreciating asset can be used by any entity for a taxable purpose or for the purpose of producing exempt income or non-assessable non-exempt income having regard to the wear and tear reasonably expected from the expected circumstances of use and assuming that the depreciating asset will be maintained in reasonably good order and condition.⁹⁸ However, Parliament has clearly chosen not to base the working out of the decline in value of intangible depreciating assets mentioned in the table in subsection 40-95(7), including item 11 rights, on that general framework. Instead, those intangible depreciating assets are clearly marked as exceptions to that general framework.⁹⁹

⁹⁷ The start time of the depreciating asset is generally when that holder first uses the depreciating asset, or has it installed ready for use, for any purpose: subsection 40-60(2).

⁹⁸ See subsection 40-105(1).

⁹⁹ See subsection 40-95(7) itself and subsection 40-105(4).

209. Second, reference is made to the objects of Division 40 stated in section 40-15 which include:

- (a) to allow you to deduct the cost of a depreciating asset; and
- (b) to spread the deduction over a period that reflects the time for which the asset can be used to obtain benefits.

It is said that the objects are framed around an entity's cost and current holding of an asset, with that cost to be spread over the period of time that the asset can be used to obtain benefits. Thus, it is said, it would be against those objects to require the deduction to be spread over a period that includes a period of time that precedes the current holding of an item 11 right.

210. The Commissioner does not accept that argument. It is, in essence, another way of putting the first argument. Having said that, the Commissioner considers that there is a mechanism in Subdivision 40-B by which the period the mine has operated prior to the taxpayer's acquisition of the item 11 right from a former holder is excluded from the effective life of the item 11 right, but that mechanism is in subsections 40-75(5) and (6) rather than in the meaning of the life of the mine.

211. Pursuant to subsection 40-75(5) the prime cost method formula must be adjusted for an intangible depreciating asset that is mentioned in the table in subsection 40-95(7) (except item 5, 7 or 8) and which the taxpayer acquired from a former holder of the asset. The adjustment, which applies for the income year in which the taxpayer acquires the asset and later years, is set out in subsection 40-75(6). Pursuant to that subsection, instead of the asset's effective life under the table in subsection 40-95(7), the taxpayer uses 'the number of years remaining in that effective life as at the start of the income year in which [the taxpayer acquires] the asset.'

212. The Commissioner considers that the terms of subsection 40-75(6), with its reference to 'the number of years remaining in that effective life as at the start of the income year in which you acquire the asset', strongly supports the view that the life of the mine, which is the effective life of the item 11 right, includes the period the mine has operated prior to the taxpayer's acquisition of the item 11 right. The role of subsection 40-75(6) is to exclude a period from effective life that would otherwise form part of that effective life. 'This ensures that those intangible assets [mentioned in the table in subsection 40-95(7) other than items 5, 7, and 8] are written-off in accordance with the statutory period.'¹⁰⁰

¹⁰⁰ Paragraph 1.112 of the Explanatory Memorandum to the New Business Tax System (Capital Allowances) Bill 2001, which introduced Division 40.

213. Third, it is said that the life of the mine should be interpreted to exclude the period the mine operated prior to the taxpayer's acquisition of the item 11 right because that prospective view of the meaning of the life of the mine would be consistent with the wording of other items of the table in subsection 40-95(7) such as items 5 and 7.

214. Item 5 of the table in subsection 40-95(7) provides that the effective life of copyright (except copyright in a film) is '[t]he shorter of (a) 25 years from when you acquire the copyright; or (b) the period until the copyright ends'. Item 7 of that table provides that the effective life of a licence relating to copyright (except copyright in a film) is '[t]he shorter of (a) 25 years from when you become the licensee; or (b) the period until the licence ends'.

215. The Commissioner agrees that the language of items 5 and 7 requires a determination of a period of time from when the particular taxpayer:

- (a) acquires the copyright until the copyright ends (item 5); or
- (b) becomes the licensee until the licence ends (item 7),

and then that period is compared with 25 years, with the shorter of the two periods becoming the effective life of the relevant asset for that taxpayer.

216. However, the Commissioner does not agree that the prospective nature of the operation of items 5 and 7 should influence determination of the meaning of 'the life of the mine' in item 11. Unlike item 11, items 5 and 7 are specifically excluded from the operation of subsections 40-75(5) and (6). 'This exclusion ensures taxpayers are required to write-off [copyright and licences over copyright] over the statutory effective life **from the time they acquire the asset.**'¹⁰¹ (Emphasis added)

217. Fourth, it is said that comments by Barwick CJ (with McTiernan J concurring) in ICI in relation to the former subsection 122(2) of the ITAA 1936 support the view that the life of the mine to which the right relates does not include the period the mine has operated prior to the taxpayer's acquisition of the right. In that case Barwick CJ stated:

What, then, is the appropriate deduction? This question involves a consideration of what is meant by s. 122(2), when it speaks of the 'estimated life of the mine as at the end of the year of income' ... The respondent claimed a deduction which was calculated on fourteen years as the estimated total life of the mine or a remaining estimated life of thirteen years. That view of the life of the mine was supported by the respondent, and contested by the appellant, by evidence given at first instance. This was on the footing that the estimated life of the mine whether in total or as at the end of the year of income was a fact to be objectively decided by the Commissioner when making his assessment and on appeal by the Court...It seems to me that the true meaning of the provision is that it is for the taxpayer each year to put forward his estimate of the remaining life

¹⁰¹ Paragraph 1.112 of the Explanatory Memorandum to the New Business Tax System (Capital Allowances) Bill 2001, which introduced Division 40.

of the mine. That figure, in my opinion, will not necessarily be the same figure in each successive tax return nor will it necessarily reflect a constant estimate of the total life of the mine.¹⁰²

218. The Commissioner does not accept that Barwick CJ's comments provide support for the suggested view. The Commissioner considers that there are a number of references in that passage that indicate that Barwick CJ was making a distinction between the estimated 'total' life of the mine and the 'remaining' life of the mine in the context of the former subsection 122(2) of the ITAA 1936 because that subsection referred to the estimated life of the mine 'as at the end of the year of income'. In other words, Barwick CJ's comments suggest that his Honour considered that in the absence of the words 'as at the end of the year of income' the 'life of the mine' meant the 'total' life of the mine, but the addition of those words changed the meaning in that context to the life of the mine remaining as at the end of the year of income.

219. In the context of item 11 of the table in subsection 40-95(7), which uses the expression 'life of the mine' without the addition of the words 'as at the end of the year of income', the comments of Barwick CJ add support for the Commissioner's view that the life of the mine means the total life of the mine.

Alternative view – Life of mine is not estimated yearly

220. There is a view that the effective life of item 11 rights are fixed on acquisition. It is said that this follows from the combined effect of (1) an entity having no choice but to use the effective life stated for that intangible depreciating asset in the table in subsection 40-95(7); (2) that effective life not being able to be recalculated under section 40-110; and (3) the effective life being fixed for all the other assets mentioned in the table in subsection 40-95(7).

221. The Commissioner does not accept that the effective life is fixed for all the other intangible depreciating assets mentioned in the table in subsection 40-95(7) that are not item 11 rights. Therefore, the Commissioner does not accept that the effective life for item 11 must be fixed from the outset.

222. Items 1 to 4, 8 and 10 in that table certainly provide a fixed number of years as the effective life. The relevant number of years would not change if the table were consulted yearly.

¹⁰² (1972) 127 CLR 529 at 565-566; 72 ATC 4213 at 4218; (1972) 3 ATR 321 at 325-326.

223. Further, as stated earlier in paragraph 215 of this Ruling, item 5 requires a determination of the period of time from when the particular taxpayer acquires the copyright until the copyright ends and then that period is compared with 25 years, with the shorter of the two periods becoming the effective life of the relevant asset for that taxpayer. That determined period would also not change if the table were consulted yearly.

224. However, it is possible for the periods relating to the licences referred to in items 6 and 7 to change if such a licence were renewed or extended. This is because the effect of subsection 40-30(5) is to treat a renewal or extension of a depreciating asset that is a right as if the renewal or extension were a continuation of the original right.

225. For item 6 the effective life is 'the term of the licence'. The renewal or extension of a licence to which item 6 applies would increase the term of the licence, with a resultant increase in the effective life of that licence.

226. As stated earlier in paragraph 215 of this Ruling, item 7 requires a determination of the period of time from when the particular taxpayer becomes the licensee until the licence ends and then that period is compared with 25 years, with the shorter of the two periods becoming the effective life of the relevant asset for that taxpayer. The renewal or extension of a licence to which item 7 applies would increase the period from when the particular taxpayer became the licensee until the licence ends, with a resultant increase in the effective life of that licence.

227. For a spectrum licence referred to in item 9 the effective life is 'the term of the licence'. The effect of subsection 40-30(5) would be that the renewal or extension of such a licence would increase the term of the licence, with a resultant increase in the effective life of that licence.

228. Similarly, for a telecommunications site access right referred to in item 14 the effective life is 'the term of the right'. The effect of subsection 40-30(5) would be that the renewal or extension of such a right would increase the term of the right, with a resultant increase in the effective life of that right.

229. It is also said that there is some conceptual commonality between the treatment of an IRU¹⁰³ (which is separately dealt with under subsection 40-95(9)) and an item 11 right in that the effective life of an IRU is based on the effective life of the tangible asset to which the right relates – the telecommunications cable over which the IRU is granted – and the effective life of the item 11 right is based on the life of a physical thing – the mine to which the right relates.

¹⁰³ Defined in subsection 995-1(1) as 'an indefeasible right to use a telecommunications cable system'.

230. Since the effective life of an IRU is the effective life of the telecommunications cable over which the IRU is granted, the effective life of the IRU remains the same while held by a particular taxpayer unless there is a recalculation of effective life under section 40-110. Thus, it is said because of the conceptual commonality between the treatment of an IRU and an item 11 right, the effective life of an item 11 right (and so the life of the mine to which the right relates) should also be similarly 'fixed'.

231. The Commissioner does not accept that argument because it ignores the fundamental differences between the treatment of IRUs under subsection 40-95(9) and of the intangible depreciating assets listed in the table in subsection 40-95(7). The general framework of Subdivision 40-B applies to the effective life of an IRU because that effective life is based on the effective life of a depreciating asset to which that general framework applies. However, as already discussed, the intangible depreciating assets mentioned in the table in subsection 40-95(7) are clearly exceptions to that general framework. As such, it is reasonable to expect that there would be a difference, rather than a similarity, between the approach in relation to the effective life of IRUs and the approach in relation to the effective life of an item 11 right.

Appendix 3 – Definitions and legislative history

232. For the purposes of this Ruling, the definitions and where relevant the legislative history of key terms are detailed below.¹⁰⁴

Definition of ‘mining, quarrying or prospecting right’

233. Subsection 995-1(1) provides that a ‘mining, quarrying or prospecting right’ is:

- (a) an authority, licence, permit or right under an Australian law to mine, quarry or prospect for minerals, petroleum or quarry materials; or
- (b) a lease of land that allows the lessee to mine, quarry or prospect for minerals, petroleum or quarry materials on the land; or
- (c) an interest in such an authority, licence, permit, right or lease; or
- (d) any rights that:
 - (i) are in respect of buildings or other improvements (including anything covered by the definition of housing and welfare) that are on the land concerned or are used in connection with operations on it; and
 - (ii) are acquired with such an authority, licence, permit, right, lease or interest.

However, a right in respect of anything covered by the definition of housing and welfare in relation to a quarrying site is not a mining, quarrying or prospecting right.

Legislative history of ‘mining operations’

‘Mining operations’ in ITAA 1936 as amended by Income Tax Assessment Act 1947

234. This Act inserted a new section 122 in Division 10 of Part III of the ITAA 1936 in which the term ‘**mining operations**’ was referred to as follows:

- (1) Where a person, who is carrying on mining operations (other than coal mining) in Australia for the purpose of gaining or producing assessable income, incurs expenditure of a capital nature on necessary plant and development of the mining property, an amount ascertained in accordance with the provisions of this section shall be an allowable deduction.

¹⁰⁴ It should be noted that the text of legislative provisions detailed in this paragraph have not, in all cases, been produced in full. Only those subsections relevant for the purposes of the explanation contained in this Ruling have been produced.

- (2) Subject to the next succeeding subsection, the deduction allowable under this section shall be the amount ascertained by dividing the residual capital expenditure, as at the end of the year of income, by the number of years in the estimated life of the mine as at the end of the year of income.

‘Mining operations’ in ITAA 1936 as amended by Income Tax and Social Services Contribution Assessment Act 1951

235. This Act repealed section 122 of Division 10 of Part III of the ITAA 1936 (as detailed above) and inserted a new section 122. The relevant reference to ‘**mining operations**’ in the new section 122 is as follows:

- (1) Where a person, in connexion with the carrying on by him of mining operations upon a mining property in Australia or the Territory of New Guinea for the purpose of gaining or producing assessable income, has incurred expenditure of a capital nature on necessary plant, development of the mining property or housing and welfare, an amount ascertained in accordance with this section shall be an allowable deduction in respect of that expenditure.
- (2) Subject to the next succeeding sub-section, the deduction allowable is the amount ascertained by dividing the residual capital expenditure, as at the end of the year of income, ascertained in accordance with the succeeding provisions of this section, by:
- (a) a number equal to the number of whole years in the estimated life of the mine as at the end of the year of income; or
- (b) twenty-five,
- whichever number is the less.

‘Prescribed mining operations’ in ITAA 1936, inserted by Income Tax Assessment Act (No. 2) 1968

236. This Act repealed Division 10 of Part III of the ITAA 1936 and inserted a new Division 10. Section 122 of the new Division 10 replaced the reference to ‘**mining operations**’ with a definition for ‘**prescribed mining operations**’. The definition of ‘**prescribed mining operations**’ in the new section 122 of the ITAA 1936 is as follows:

- (1) In this Division ...
- ‘**prescribed mining operations**’ means mining operations on a mining property in Australia for the extraction of minerals, other than petroleum, from their natural site, being operations carried on for the purpose of gaining or producing assessable income.

‘Eligible mining operations’ in Division 330 of the ITAA 1997

237. Division 330 was introduced as part of the Tax Law Improvement Project. Division 330 contained the provisions dealing with deductions for mining, quarrying and petroleum mining expenditure. The meaning of **‘eligible mining operations’** is contained in subsection 330-30(2).

- (2) **Eligible mining operations** means:
- (a) mining operations on a mining property for extracting minerals (other than petroleum) from their natural site for the purpose of producing assessable income; or
 - (b) mining operations for the purpose of obtaining petroleum for the purpose of producing assessable income.

‘Mining operations’ in Division 40 of the ITAA 1997

238. The *New Business Tax System (Capital Allowances – Transitional and Consequential) Act 2001* repealed Division 330. Division 40 was inserted by *New Business Tax System (Capital Allowances) Act 2001*. The relevant reference to **‘mining operations’** in Division 40 was contained in subsection 40-730(7) and it now reads:

- (7) **Mining operations** means:
- (a) mining operations on a mining property for extracting minerals (except petroleum) from their natural site; or
 - (b) mining operations for the purpose of obtaining petroleum; or
 - (c) quarrying operations on a quarrying property for extracting quarry materials from their natural site;
- for the purpose of producing assessable income.

Legislative history of ‘proposed mine’***Reference to ‘proposed mine’ in ITAA 1936 as amended by Income Tax Assessment Act (No. 2) 1968***

239. The concept of ‘proposed mine’ was first introduced into the ‘General Mining’ provisions in Division 10 of Part III of the ITAA 1936 when Division 10 was amended by *Income Tax Assessment Act (No. 2) 1968*. The relevant reference to **‘proposed mine’** in paragraph 122D(2)(a) is as follows:

- (1) Where, as at the end of the year of income, there is, in relation to a taxpayer, an amount of residual capital expenditure, an amount ascertained in accordance with this section shall be an allowable deduction.

- (2) Subject to the next succeeding sub-section, the deduction allowable is the amount ascertained by dividing the amount of residual capital expenditure referred to in the last preceding sub-section by:
- (a) a number equal to the number of whole years in the estimated life of the mine or proposed mine on the mining property, or, if there is more than one such mine, of the mine that has the longer or longest estimated life, as at the end of the year of income; or
 - (b) twenty-five,
- whichever number is the less.

Reference to ‘proposed mine’ in the context of mining other than petroleum mining in Division 330 of the ITAA 1997

240. The reference to ‘**proposed mine**’ in Division 330 is contained in section 330-100 which provides the formula for working out the amount of allowable capital expenditure deductible under section 330-80 for a particular income year. The relevant reference is in subsection 330-100(2) and is as follows:

- (2) For expenditure incurred in carrying on eligible mining operations other than in the course of petroleum mining, years remaining means:
- (a) the number equal to the difference between 10 and the number of income years (which may be zero) before the current income year for which an amount in respect of the expenditure was deductible; or
 - (b) the number equal to the number of whole years in the estimated life of the mine, or proposed mine, on the mining property, or, if there is more than one such mine, of the mine that has the longest estimated life, as at the end of the current income year;
- whichever number is less.

Reference to ‘proposed mine’ in Division 40 of the ITAA 1997

241. The relevant reference to ‘**proposed mine**’ in Division 40 is contained in item 11 of subsection 40-95(7). Subsection 40-95(7) is as follows:

Exception: intangible depreciating assets

- (7) The effective life of an intangible depreciating asset mentioned in this table is the period applicable to that asset under the table.

TR 2006/D2

=====

Effective life of certain intangible depreciating assets

Item	For this asset:	The effective life is:
1	Standard patent	20 years
2	Innovation patent	8 years
3	Petty patent	6 years
4	Registered design	15 years
5	Copyright (except copyright in a film)	The shorter of: (a) 25 years from when you acquire the copyright; or (b) the period until the copyright ends
6	A licence (except one relating to a copyright or in-house software)	The term of the licence
7	A licence relating to a copyright (except copyright in a film)	The shorter of: (a) 25 years from when you become licensee; or (b) the period until the licence ends
8	In-house software	2 ¹ / ₂ years
9	Spectrum licence	The term of the licence
10	Datacasting transmitter licence	15 years
11	A mining, quarrying or prospecting right relating to mining operations (except obtaining petroleum or quarry materials)	The life of the mine or proposed mine or, if there is more than one, the life of the mine that has the longest estimated life
12	A mining, quarrying or prospecting right relating to mining operations to obtain petroleum	The life of the petroleum field or proposed petroleum field

13	A mining, quarrying or prospecting right relating to mining operations to obtain quarry materials	The life of the quarry or proposed quarry or, if there is more than one, the life of the quarry that has the longest estimated life
----	---	---

14	Telecommunications site access right	The term of the right
----	--------------------------------------	-----------------------

=====

Appendix 4 – Your comments

242. We invite you to comment on this draft Taxation Ruling. Please forward your comments to the contact officer by the due date. (Note: The Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

Due date: 17 March 2006

Contact officer: Chris Sheehan

E-mail address: chris.sheehan@ato.gov.au

Telephone: (07) 3213 5220

Facsimile: (07) 3213 5061

Address: Box 10284 Adelaide Street PO
Brisbane Qld 4001

Appendix 5 – Detailed contents list

243. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	1
Class of person/arrangement	5
Legislative background	6
Other aspects	13
Ruling	14
What is an item 11 right?	14
<i>Mining, quarrying or prospecting right</i>	14
<i>Relating to mining operations</i>	15
How do you work out the effective life of an item 11 right?	18
<i>Mine</i>	19
<i>More than one mine</i>	21
<i>Proposed mine</i>	23
<i>Life of the mine or the proposed mine</i>	24
<i>Which mine or mines are relevant?</i>	25
<i>Estimating the life of a mine</i>	28
<i>Yearly estimate of the life of a mine</i>	30
<i>Working out the estimated life of a mine</i>	32
<i>Start of a mine</i>	33
<i>End of a mine</i>	34
<i>The resource is fully exhausted</i>	35
<i>Mine is permanently abandoned</i>	42
Examples	45
Example 1	45
Example 2	52
Example 3	59
Date of effect	67
Appendix 1 – Explanation	68
What is an item 11 right?	68
<i>Mining, quarrying or prospecting right</i>	69
<i>Mining operations</i>	72
<i>Use of the expression ‘relating to’</i>	91

How do you work out the effective life of an item 11 right?	97
<i>Mine</i>	100
<i>More than one mine</i>	123
<i>Whether there are separate and distinct workings, equipment and machinery, capable of producing ore</i>	127
<i>Whether there is clear contemplation by management at an early date of the possibility of developing the ore bodies concurrently</i>	128
<i>Whether the ore bodies were developed at the same time</i>	129
<i>Whether there is a structural connection between the ore bodies</i>	130
<i>Whether the ore bodies have similar geological characteristics</i>	131
<i>Whether there is separation in time between mining operations</i>	132
<i>Whether there are common facilities for the treatment of ore from the mining operations</i>	134
<i>Whether there is an integration of the economic aspects of the mining operations</i>	137
<i>Proposed mine</i>	139
<i>Life of the mine or the proposed mine</i>	147
<i>Which mine or mines are relevant?</i>	149
<i>Estimating the life of a mine</i>	153
<i>Yearly estimate of the life of a mine</i>	167
<i>Working out the estimated life of a mine</i>	174
<i>Start of a mine</i>	177
<i>End of a mine</i>	181
<i>The resource is fully exhausted</i>	182
<i>Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (the JORC Code)</i>	186
<i>Mine is permanently abandoned</i>	202
Appendix 2 – Alternative views	206
Alternative view – Life of mine excludes period prior to acquisition of an item 11 right from another taxpayer	206
Alternative view – Life of mine is not estimated yearly	220
Appendix 3 – Definitions and legislative history	232
Definition of ‘mining, quarrying or prospecting right’	233
Legislative history of ‘mining operations’	234

<i>'Mining operations' in ITAA 1936 as amended by Income Tax Assessment Act 1947</i>	234
<i>'Mining operations' in ITAA 1936 as amended by Income Tax and Social Services Contribution Assessment Act 1951</i>	235
<i>'Prescribed mining operations' in ITAA 1936, inserted by Income Tax Assessment Act (No. 2) 1968</i>	236
<i>'Eligible mining operations' in Division 330 of the ITAA 1997</i>	237
<i>'Mining operations' in Division 40 of the ITAA 1997</i>	238
Legislative history of proposed mine	239
<i>Reference to 'proposed mine' in ITAA 1936 as amended by Income Tax Assessment Act (No. 2) 1968</i>	239
<i>Reference to 'proposed mine' in the context of mining other than petroleum mining in Division 330 of the ITAA 1997</i>	240
<i>Reference to 'proposed mine' in Division 40 of the ITAA 1997</i>	241
Appendix 4 – Your comments	242
Appendix 5 – Detailed contents list	243

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 92/20; TR 95/36

Subject references:

- depreciating asset
- effective life
- life of the mine
- mining, quarrying or prospecting right
- mining operations
- mine
- proposed mine

Legislative references:

- ITAA 1936 Pt III Div 10
- ITAA 1936 122
- ITAA 1936 122(1)
- ITAA 1936 122(2)
- ITAA 1936 122A
- ITAA 1936 122A(1)
- ITAA 1936 122A(1)(a)
- ITAA 1936 122A(1)(a)(i)
- ITAA 1936 122D
- ITAA 1936 122D(2)(a)
- ITAA 1997 Div 40
- ITAA 1997 40-15
- ITAA 1997 Subdiv 40-B
- ITAA 1997 40-30(5)
- ITAA 1997 40-60(2)
- ITAA 1997 40-70
- ITAA 1997 40-75
- ITAA 1997 40-75(5)
- ITAA 1997 40-75(6)
- ITAA 1997 40-95(7)
- ITAA 1997 40-95(8)
- ITAA 1997 40-95(9)
- ITAA 1997 40-100
- ITAA 1997 40-105
- ITAA 1997 40-105(1)
- ITAA 1997 40-105(4)
- ITAA 1997 40-110
- ITAA 1997 40-110(5)
- ITAA 1997 40-130
- ITAA 1997 40-730
- ITAA 1997 40-730(7)
- ITAA 1997 40-730(7)(a)
- ITAA 1997 40-740
- ITAA 1997 40-860
- ITAA 1997 Div 330

- ITAA 1997 330-30(1)
- ITAA 1997 330-30(2)
- ITAA 1997 330-30(2)(a)
- ITAA 1997 330-80
- ITAA 1997 330-100
- ITAA 1997 330-100(2)
- ITAA 1997 995-1(1)
- IT(TP)A 1997 40-77
- Income Tax Assessment Act 1947
- Income Tax Assessment Act (No. 2) 1968
- Income Tax and Social Services Contribution Assessment Act 1951
- New Business Tax System (Capital Allowances) Act 2001 3
- New Business Tax System (Capital Allowances) Act 2001 Sch 1 2
- New Business Tax System (Capital Allowances - Transitional and Consequential) Act 2001
- Taxation Laws Amendment Act (No. 4) 2003
- Mineral Resources Act 1989 (Qld) 6A
- Mineral Resources Development Act 1990 (Vic) 4
- Mineral Resources Development Act 1995 (Tas) 3
- Mining Act 1971 (SA) 6
- Mining Act 1978 (WA) 8
- Mining Act 1980 (NT) 4
- Mining Act 1992 (NSW) 4
- Mining and Quarrying Safety and Health Act 1999 (Qld) 9
- Income Tax Act 1948 (Can)

Case references:

- Bermah Mines Limited v. Minister of National Revenue 66 DTC 519
- Broken Hill Proprietary Co Ltd v. Federal Commissioner of Taxation (1968) 120 CLR 240
- Falconbridge Copper Limited v. Her Majesty the Queen 75 DTC 5394

-
- Falconbridge Copper Limited v. Her Majesty the Queen 79 DTC 5227
 - Federal Commissioner of Taxation v. Broken Hill Proprietary Co Ltd (1969) 120 CLR 240; 69 ATC 4028; (1969) 1 ATR 40
 - Federal Commissioner of Taxation v. Broken Hill South Ltd (1941) 65 CLR 150
 - Federal Commissioner of Taxation v. Henderson (1943) 68 CLR 29
 - Federal Commissioner of Taxation v. ICI (Australia) Ltd (1972) 127 CLR 529; 72 ATC 4213; (1972) 3 ATR 321
 - Federal Commissioner of Taxation v. Mount Isa Mines Ltd (1991) 28 FCR 269; 91 ATC 4154; (1991) 21 ATR 1294
 - Federal Commissioner of Taxation v. Pine Creek Goldfields Ltd (1999) 91 FCR 263; 99 ATC 4904; (1999) 42 ATR 758
 - Glasgow Corp v. Farie (1988) 13 App Cas 657
 - IRC v. Maple & Co (Paris) Ltd (1908) AC 22
 - Marbridge Mines Limited v. Minister of National Revenue 71 DTC 5231
 - Minister of National Revenue v. Bethlehem Copper Corporation Ltd 74 DTC 6520
 - Minister of National Revenue v. MacLean Mining Company Limited 70 DTC 6199
 - North Australian Cement Limited v. Federal Commissioner of Taxation 89 ATC 4765; (1989) 20 ATR 1058
 - North Bay Mica Company Limited v. Minister of National Revenue 58 DTC 1151
 - NSW Associated Blue-Metal Quarries Ltd v. Federal Commissioner of Taxation (1955) 94 CLR 509
 - Oceanic Life Limited & Anor v. Chief Commissioner of Stamp Duties (1999) 168 ALR 211
 - Parker v. Federal Commissioner of Taxation (1953) 90 CLR 489
 - Pine Creek Goldfields Ltd v. Federal Commissioner of Taxation 99 ATC 4382; (1999) 41 ATR 471
 - Placer Dome Inc v. Her Majesty the Queen 93 DTC 235
 - Tooheys Limited v. Commissioner of Stamp Duties (NSW) (1961) 105 CLR 602
 - Wade v. New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177
- Other references:*
- Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, 2004 Edition
 - Explanatory Memorandum to the Income Tax Assessment Bill (No. 2) 1968
 - Explanatory Memorandum to the Income Tax Assessment Bill 1996
 - Explanatory Memorandum to the New Business Tax System (Capital Allowances) Bill 2001
 - Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 4) 2003
 - Forbes, JRS & Lang, AG 1987, Australian Mining & Petroleum Laws, 2nd edn, Butterworths, Sydney
 - Pearce, DC & Geddes, RS 2001, Statutory Interpretation in Australia, 5th edn, Butterworths, Australia
 - The Australian Oxford Dictionary, 1999, Oxford University Press, Melbourne
 - The Macquarie Dictionary, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW
-

ATO references:

NO: 2005/16479

ISSN: 1039-0731

ATOLaw topic: Income Tax ~~ Capital allowances ~~ effective life of a depreciating asset

TR 2006/D2