TR 2016/D3 - Income tax: application of section 6CA of the Income Tax Assessment Act 1936 and Australia's tax treaties and the payer's withholding obligations

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Draft Taxation Ruling

Income tax: application of section 6CA of the *Income Tax Assessment Act 1936* and Australia's tax treaties and the payer's withholding obligations

Contents Para

PROPOSED LEGALLY BINDING SECTION:

What this ruling is about 1

Ruling 4

Date of effect 18

NOT LEGALLY BINDING SECTION:

Appendix 1:

Explanation 19

Appendix 2:

Alternative views 52

Appendix 3:

Your comments 56

Detailed contents list 58

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What this Ruling is about

1. This Ruling applies to payments, typically made by the holder of a mining right to an entity that does not have an interest in the right, based upon the value of natural resources produced and/or sold. Such payments are commonly known as 'override royalties'. For convenience, this Ruling refers to such payments as 'override royalties'.

2. The Ruling sets out:

- when a payment is calculated, in whole or in part, by reference to the value or quantity of natural resources produced[1] in Australia for the purpose of the definition of 'natural resource income' in subsection 6CA(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) (see Part A)

[1] For convenience, unless the context requires otherwise, the phrase 'produced, recovered or produced and recovered' in paragraph (b) of the definition of 'natural resource income' in subsection 6CA(1) is abbreviated to 'produced' or 'production'.

- how the income from real property articles[2] in Australia's tax treaties apply to override royalties (see Part B), and
- the circumstances in which an Australian resident payer of override royalties is required to withhold an amount from an override royalty payment under section 12-325 of Schedule 1 to the *Taxation Administration Act 1953* (Schedule 1 to the TAA) (see Part C).

3. The Ruling does not address:

- the application of the business profits or other income articles
- the tax treatment of a transfer of the right to receive an override royalty payment
- whether override royalty payments constitute interest or non-share dividends, or
- the tax treatment of common law royalties.

Ruling

Part A – Override royalties and 'natural resource income'

Calculated, in whole or in part, by reference to the value or quantity of natural resources produced

4. Under paragraph (b) of the definition of 'natural resource income' in subsection 6CA(1) of the ITAA 1936, income is calculated, in whole or in part, by reference to the value or quantity of resources produced where the calculation is based on the level of production.

5. In working out whether the calculation of a payment is based on the level of production, it is appropriate to have regard to the contractual terms of the override royalty agreement and any related agreements, and the substance of the arrangement.

6. A direct causal connection between the amount of income and the level of production is not required. As a result, in some circumstances, income calculated by reference to a value or measure other than production (such as sales or shipping volume), may be natural resource income. Such circumstances include where it is reasonable to conclude:

- the income is calculated by reference to sales or shipping volume and the relevant agreement(s), in

[2] Australia's tax treaties refer to these articles by various names including 'income from immovable property' and 'income from land'. For ease of reference these articles will be collectively referred to as 'income from real property' articles.

calculating the income, treat all, or substantially all, of the relevant resources produced as having been sold or shipped (whether or not in the same income year)

- the difference between production and sales or shipping volumes arises from wastage of part of the resource between production and delivery to the customer, or
- due to the nature of the resource or the market, in practice, all, or substantially all, of the relevant resources produced are sold or shipped (whether or not in the same year).

7. Income is calculated 'in whole' by reference to the value or quantity of resources produced where the income is calculated solely by reference to the value or quantity of the resources produced. Income is calculated 'in part' by reference to the value or quantity of resources produced where the income is the sum of two or more amounts, one of which is calculated by reference to the value or quantity of resources produced, or the income is a single amount which is partly calculated by reference to the value or quantity of resources produced.

Natural resources 'produced' or 'recovered'

8. The meaning of 'natural resources produced, recovered or produced and recovered' depends on the nature of the resource and the processes required to bring the resource to its relevant state.

9. A natural resource may be produced or recovered, or produced and recovered by mere extraction, by separation following extraction, or by processes applied after separation.

10. An unrefined natural resource may be produced or recovered by mere extraction. A 'semi-refined' resource may be produced or recovered by physical separation from other substances following extraction. A 'fully refined' resource may be produced or recovered by a range of chemical processes applied following physical separation. A refined resource is not produced or recovered by extraction alone.

'In Australia'

11. Natural resources will be produced in Australia when all of the material processes of production occur in Australia.[3]

[3] Section 960-505 of the *Income Tax Assessment Act 1997* (ITAA 1997) defines 'Australia' (in a geographic sense).

Part B – Tax treaties

Scope of the income from real property articles

12. The income from real property articles in Australia's tax treaties will not apply to override royalties in circumstances where subsection 6CA(1) of the ITAA 1936 would not otherwise apply to the override royalty. In relation to override royalties, the scope of the income from real property articles is no wider than section 6CA.

General position for tax treaties

13. The large majority of Australia's income tax treaties contain an 'Income from real property' article which treats as real property 'a right to receive variable or fixed payments either as consideration for or in respect of the exploitation of, or the right to explore for or exploit, mineral, oil or gas deposits, quarries or other places of extraction or exploitation of natural resources'.

14. Under that article, payments calculated by reference to the value or quantity of natural resources produced are 'in respect of' the exploitation of natural resources. This means that 'natural resource income' under subsection 6CA(1) of the ITAA 1936 will be income from real property under the majority of treaties.

US Treaty

15. The Australian treaty with the United States of America ('US treaty') is an exception to the above general position.[4] Under the US treaty, income from real property includes income from rights to exploit or to explore for natural resources. Recipients of override royalty payments who do not hold the right to exploit or explore for natural resources do not derive income from real property for the purposes of the US treaty.

Assessability of override royalty payments

16. An override royalty payment that has an Australian source, will be included in the recipient's assessable income under paragraph 6-5(3)(a) of the ITAA 1997.

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[4] The other exceptions are the German (1972), Irish, Korea and Maltese treaties. The formulations of the 'Income from real property" articles in the exceptions are different to the formulation in the majority of treaties extracted in paragraph 13. While this Ruling covers the US treaty, it does not cover the German (1972), Irish, Korean and Maltese treaties.

Part C – Withholding on natural resource income

17. Where subsection 6CA(1) of the ITAA 1936 applies to an override royalty payment, the conditions in subsection 12-325(1) of Schedule 1 to the TAA will be satisfied.

Date of effect

18. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the 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 Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
14 December 2016

Appendix 1 – Explanation

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.

Part A – Override royalties and 'natural resource income'

Calculated, in whole or in part, by reference to the value or quantity of natural resources produced

19. Australian courts have said the phrase 'by reference to' covers a wider range of connections than phrases such as 'by reason of', which are limited to connections of a causal nature.[5] Typically, however, a causal connection between the level of production of natural resources and the amount of the override royalty will be sufficient to satisfy the requirement that the payment be calculated by reference to the value or quantity of natural resources produced.

20. This is consistent with the Explanatory Memorandum to the Taxation Laws Amendment Bill (No.4) 1986 (the EM) which introduced section 6CA into the ITAA 1936, which states:

> The amendment will apply to payments of natural resource income made after 7 April 1986 and which are **based on** the level of production and recovery of natural resources after that date.
>
> (**emphasis** added)

21. In working out whether the calculation of a payment is based on the level of production the Commissioner will have regard to the relevant circumstances, including the conduct of the parties, the relevant agreement(s) and the substantive outcome (meaning its effects from a practical and business point of view). Therefore payments will be natural resource income where they are calculated by reference to a measure other than production but the payments are nonetheless **based on** the level of production.

22. This is consistent with the purposive approach to legislative interpretation[6], and ensures that the purpose for the introduction of section 6CA of the ITAA 1936, as outlined above in the EM, is achieved. Support for the purposive approach is found in *Attorney-General (WA) v. Marquet*[7] where in considering the construction of the provisions of the *Electoral Distribution Act 1947* (WA) the majority of the High Court commented that:

> 'The evident purpose of the provision should not be defeated by preferring form over substance.'

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[5] *Republic of Croatia v. Snedden* (2010) 241 CLR 461 at [25]; *Macedonian Teachers' Association of Victoria Inc v. Human Rights & Equal Opportunity Commission & Anor* (1998) 91 FCR 8; 160 ALR 489.
[6] As required by section 15AA of the *Acts Interpretation Act 1901.*
[7] [2003] HCA 67 at [52].

23. The purpose of section 6CA of the ITAA 1936, as expressed by the EM, is that payments made to non-residents which are **based on** the level of production of natural resources in Australia will be deemed to have an Australian source.

Example 1 – override royalty varies with changes in value of production

24. *For Co receives payments calculated as 1% of the wellhead value of petroleum produced by Aus Co. The wellhead value equals the sales proceeds less the cost of transportation downstream of the wellhead. As the payment varies with changes in the value of petroleum produced, it is calculated by reference to the value of natural resources produced.*

Example 2 – override royalty calculated by reference to all resources produced (whether or not sold)

25. *Under an arrangement For Co provided Aus Miner Co $50 million. In exchange, Aus Miner Co is required to pay an override royalty of 1.5% of the wellhead value of gas it recovers and sells. Further, the arrangement requires payment of the override royalty where the gas is recovered but not sold, based on an agreed formula for determining the recovery value. The override royalty applies to all gas recovered, whether or not sold. Therefore, the payment is calculated by reference to the value of natural resources produced.*

Example 3 – payment calculated by reference to a quantity of resources discharged at port

26. *For Co, a port operator, has a right to a payment calculated as a fixed amount per tonne of iron ore discharged at a specified port. The payment is not calculated by reference to the value or quantity of the iron ore produced.*

Natural resources produced or recovered

27. The phrase 'natural resources' is defined in subsection 995-1(1) of the ITAA 1997 to mean '*minerals or any other non-living resource of the land or sea-bed or sea'. Its meaning is affected by its context in paragraph (b) of the definition of 'natural resource income' in subsection 6CA(1) of the ITAA 1936, in particular, the wider phrase 'natural resources produced, recovered or produced and recovered.'

28. The terms 'produced' and 'recovered' are not defined in the ITAA 1936 or ITAA 1997. The Shorter Oxford Dictionary defines 'produce' to mean 'Of country, region, process, etc: yield or supply (a commodity etc)'. It defines 'recover' to mean 'Get, obtain, get hold of; collect, gather up'. Both terms have a wide meaning. Whether a particular resource has been produced or recovered depends on the nature of the resource and the processes required to bring the resource to its relevant state.

29. Generally, a natural resource is found in the earth's crust embedded in other substances. The resource, in this unrefined state, is typically produced or recovered by extraction, for example drilling and blasting. Once extracted, the unrefined resource can be described as 'produced or recovered'. This unrefined resource may then be separated from other substances by physical and chemical processes to produce or recover a refined resource. Once the refinement has occurred, this refined resource can be described as 'produced or recovered'. A refined resource is not produced or recovered by extraction alone. Processes which further refine a semi-refined resource can produce or recover a 'fully' refined resource.

'In Australia'

30. Natural resources will be produced or recovered in Australia when all of the material processes of production occur in Australia.

Example 4 – production and recovery not 'in Australia'

31. *Aus Co conducts mining operations in Australia producing bauxite which it ships off-shore to be refined into alumina and then aluminium under contract by For Co. An override royalty payment made by Aus Co based on the value or quantity of aluminium produced or recovered by Aus Co will not be a natural resource payment as the payment is not made by reference to a natural resource produced in Australia. This is because the final stage of the production of the natural resource, being aluminium, did not occur in Australia.*

32. *In contrast, an override royalty payment based on the value or quantity of bauxite recovered by Aus Co is a payment calculated by reference to the value or quantity of a natural resource (bauxite) produced in Australia.*

Part B – Tax Treaties

'Exploitation' of natural resources

33. All income from real property articles in Australia's tax treaties use the terms 'exploitation' or 'exploit' in the context of the exploitation of natural resources.[8] *The Shorter Oxford Dictionary* defines exploit:

> ***exploit*** - verb trans. Work (a mine); make use of (natural resources);

34. This meaning of 'exploit' aligns with the meaning of natural resources 'recovered' or 'produced' as those terms are used in sections 6CA of the ITAA 1936 and section 12-325 of Schedule 1 to the TAA.

35. In certain contexts, the 'exploitation' of resources may involve processes or activities that occur after a natural resource is produced. For example, it might include activities related to the marketing or distribution of the natural resource. In the context of the income from real property articles, it is appropriate to confine the word 'exploitation' to mean 'recovered' or 'produced'.

36. Therefore, in the context of override royalties, the 'exploitation' of natural resources has the same scope as the 'recovery' or 'production' of natural resources.

37. This interpretation is consistent with the EM which introduced section 6CA into the ITAA 1936 and the associated withholding provisions of former Division 3B of the ITAA 1936, which were replaced with section 12-325 of Schedule 1 to the TAA. The EM states that:

> The amendments proposed by this Bill will mean that … income that is directly related to the ***exploitation*** of Australia's natural resources and that is derived by a non-resident (referred to as 'natural resource income') will be subject to full Australian tax.[9]

General position for tax treaties

38. Article 6 of the Canadian treaty[10] is representative of the majority of income from real property articles.

39. Under Article 6(1), Australia may tax income from real property if the real property is situated in Australia. The definition of real property includes at paragraph 6(2)(b):

> … a right to receive variable or fixed payments either as consideration for or in respect of the exploitation of, or the right to

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[8] The word is undefined in the tax treaties and there is no Australian domestic statutory or common law guidance on the meaning of the word.
[9] Explanatory Memorandum to Taxation Laws Amendment Bill (No.4) 1986, p10 (emphasis added).
[10] *Convention between Canada and Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* [1981] ATS 14.

> explore for or exploit, mineral, oil or gas deposits, quarries or other places of extraction or exploitation of natural resources.

'In respect of' the exploitation of natural resources

40. The phrase 'in respect of' has a very wide meaning[11] and must be construed in the context in which it appears.

41. The phrase connects two subject matters. There must be 'some discernible and rational link'[12] between the two subject matters, and the connection must be material and not merely coincidental or extraneous.[13] In the context of the relevant income from real property articles, the two subject matters are:

- a right to receive payment, and
- the exploitation of the relevant natural resource.

42. A right to receive payments under an override royalty agreement essentially arises from the exploitation of the natural resources and this aptly demonstrates the discernible and rational link to exploitation. The exploitation is the very thing that crystallises the foreign resident's right to receive the payment. The connection in this situation is material and is not merely coincidental or extraneous.

43. The task is to characterise the nature of the right and its link to exploitation. It is not to analyse the relationship between the parties, nor the reasons for, nor the transactions which gave rise to, the right to receive the payments.

44. For example, a right to receive income may be granted as consideration for the provision of finance, or in satisfaction of some other liability, however, the right to receive the payment is still 'in respect of' the exploitation of natural resources if the payment is calculated by reference to the value or quantity of natural resources produced.

45. This interpretation is consistent with the Explanatory Memorandum[14] to the bill which introduced the first amending protocol to the Malaysian treaty into Australian law. The Explanatory Memorandum explains that the income from real property article applies to payments which are natural resource income for Australian tax purposes:

> 2.25 The inclusion of the words 'or in respect of' in relation to natural resources are intended to ensure that Australia may tax payments which are 'natural resource income' for Australian tax purposes.

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[11] *Technical Products v. SGIO (Qld)* (1989) 167 CLR 45 (*Technical Products*) per Brennan, Deane and Gaudron JJ.
[12] *Technical Products* at 47 per Brennan, Deane and Gaudron JJ.
[13] *Technical Products* at 51 per Dawson J.
[14] Explanatory Memorandum to International Tax Agreements Amendment Bill 1999

> 2.26 Natural resource income includes payments which, unlike royalties, are based on a contractual arrangement and not on the holding of any proprietary right in the natural resources concerned. The inclusion of the words 'or in respect of' therefore ensures that the definition of land includes not only payments in consideration for the right to exploit or to explore for natural resources, but also payments in relation to those resources where there is no proprietary right to explore/exploit the resources concerned.[15]

46. There is no requirement, for the foreign resident recipient to have, or to have had, a proprietary interest in the underlying rights to explore for or exploit natural resources, nor to have or to have had any role in exploiting natural resources.

United States treaty

47. For present purposes, the US treaty[16] provides that income from real property includes income from '*rights to exploit or to explore for natural resources …* '.

48. Under the US treaty, an override royalty payment is not income from real property where the recipient does not hold the right to exploit or explore for natural resources.[17]

Example 5 – override royalty not derived from rights to exploit natural resources

49. *Aus Co owns a production licence issued by a State Government, entitling it to produce oil and gas from an onshore field. For monetary consideration, Aus Co enters into a deed granting US Co a right to 10% of the value of oil and gas produced from the field. US Co does not obtain any proprietary interest in the production licence. US Co's right to payment is not derived from the real property, being Aus Co's rights to exploit the oil and gas under the production licence. Therefore, the income received by US Co is not income from real property for the purposes of the United States treaty and is not taxable in Australia.*

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[15] Explanatory Memorandum to International Tax Agreements Amendment Bill 1999, paras 2.25 to 2.26.

[16] *Convention between the government of Australia and the government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income* [1983] ATS 16.

[17] If the recipient is the holder of the right, the payment may be a common law royalty.

Part C – Withholding on natural resource income

50. The words 'worked out wholly or partly by reference to the value or quantity of natural resources produced or recovered in Australia' in subsection 12-325(1) of Schedule 1 to the TAA have the same meaning as 'calculated, in whole or in part, by reference to the value or quantity of natural resources produced, recovered or produced and recovered, in Australia' in paragraph (b) of the definition of 'natural resource income' in subsection 6CA(1) of the ITAA 1936.

51. Accordingly, the views set out in Part A of this Ruling in relation to paragraph (b) of the definition of 'natural resource income' in subsection 6CA(1) of the ITAA 1936 also apply to the withholding rules in section 12-325 of Schedule 1 to the TAA.

Appendix 2 – Alternative views

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

Part B – Tax Treaties – meaning of 'in respect of'

52. There is an alternative view that the phrase 'in respect of' requires a connection between the foreign resident and the exploitation of natural resources, rather than between the right to receive payment and the exploitation.

53. It is argued that the connection will only be satisfied where the foreign resident has carried out, or had some role in, the exploitation of the natural resources.

54. The Commissioner considers that requiring some role in the exploitation seeks to read an activity test into the operation of the treaty article. This view is inconsistent with the meaning that has been given by the courts to the phrase 'in respect of'.

55. Proponents of the alternative view argue that rights which have been assigned would not be in respect of exploitation where the assignee has not had a role in the exploitation. In the Commissioner's view, the connection required by the phrase 'in respect of' is broad enough to include rights to payments that are in respect of the exploitation of natural resources regardless of whether the rights have been assigned.

Appendix 3 – Your comments

56. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

57. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: **10 February 2017**

Contact officer details have been removed following publication of the final ruling.

Appendix 4 – Detailed contents list

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

Paragraph

What this Ruling is about **1**

Ruling **4**

Part A – Override royalties and 'natural resource income' 4

Calculated, in whole or in part, by reference to the value or quantity of natural resources produced 4

Natural resources 'produced' or 'recovered' 8

'In Australia' 11

Part B – Tax treaties 12

Scope of the income from real property articles 12

General position for tax treaties 13

US Treaty 15

Assessability of override royalty payments 16

Part C – Withholding on natural resource income 17

Date of effect **18**

Appendix 1 – Explanation **19**

Part A – Override royalties and 'natural resource income' 19

Calculated, in whole or in part, by reference to the value or quantity of natural resources produced 19

Example 1 – override royalty varies with changes in value of production 24

Example 2 – override royalty calculated by reference to all resources produced (whether or not sold) 25

Example 3 – payment calculated by reference to a quantity of resources discharged at port 26

Natural resources produced or recovered 27

'In Australia' 30

Example 4 – production and recovery not 'in Australia' 31

Part B – Tax Treaties 33

'Exploitation' of natural resources 33

General position for tax treaties 38

'In respect of' the exploitation of natural resources 40

United States treaty 47

Example 5 – override royalty not derived from rights to exploit natural resources 49

Part C – Withholding on natural resource income 50
Appendix 2 – Alternative views **52**
Part B – Tax Treaties – meaning of 'in respect of' 52
Appendix 3 – Your comments **56**
Appendix 4 – Detailed contents list **58**

References

Previous draft:
Not previously issued as a draft

Related Rulings/Determinations:
TR 2006/10

Legislative references:
- ITAA 1936
- ITAA 1936 6CA
- ITAA 1936 6CA(1)
- ITAA 1936 Div 3B
- ITAA 1997
- ITAA 1997 6-5(3)(a)
- ITAA 1997 960-505
- ITAA 1997 995-1(1)
- TAA 1953
- TAA 1953 Sch1 12-325
- TAA 1953 Sch1 12-325(1)
- Acts Interpretation Act 1901 15AA
- Convention between Canada and Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income [1981] ATS 14
- Convention between the government of Australia and the government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income [1983] ATS 16

Cases relied on:
- Republic of Croatia v. Snedden [2010] HCA 14; (2010) 84 ALJR 334; (2010) 265 ALR 621; [2010] ALMD 4406; (2010) 241 CLR 461
- Technical Products v. SGIO (Qld) (1989) 167 CLR 45; (1989) 63 ALJR 392; (1989) 85 ALR 173; (1989) 8 MVR 385; (1989) 5 ANZ Insurance Cases 60-914; [1989] Aust Torts Reports 80-245; [1989] HCA 24
- Attorney-General (WA) v. Marquet [2003] HCA 67; (2003) 202 ALR 233; (2003) 78 ALJR 105; [2004] ALMD 498; [2004] ALMD 496; [2004] ALMD 55; [2004] ALMD 52; (2003) 217 CLR 545

Other references:
- Explanatory Memorandum to Taxation Laws Amendment Bill (No.4) 1986
- Explanatory Memorandum to International Tax Agreements Amendment Bill 1999
- The Shorter Oxford Dictionary

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