


# ***FGRR 2002/D1 - Off Road Scheme - Application to Mining Operations***

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## **Draft Fuel Grant and Rebate Ruling: Off-Road Scheme - Application to Mining Operations**

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### ***Preamble***

*This document is an expression of the Commissioner's opinion on the operation of the Diesel Fuel Rebate (Off-Road) Scheme. This document is not legally or administratively binding on the Commissioner and is not a 'public ruling' for the purposes of Part IVAAA or Section 37 of the Taxation Administration Act 1953.*

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## **What this Ruling is about**

1. This Ruling explains the application of the Diesel Fuel Rebate Scheme (or 'off-road scheme') to mining operations.

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## **Date of effect**

2. This Ruling applies both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling. The off-road scheme is presently due to cease on 1 July 2003.

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## **Background**

3. Customs duty is collected on imported diesel fuel and excise duty is collected on locally produced diesel fuel. Duty is refunded on fuel that is used in certain eligible, off-road activities through the Diesel Fuel Rebate Scheme (Off-Road Scheme).

4. The legislation enabling payment of rebate is contained in the *Excise Act 1901* (Excise Act) and the *Customs Act 1901* (Customs Act). The provisions are contained in the two Acts to enable rebate to be paid on both locally produced and imported diesel fuels. The rates of duty and rebate paid under both Acts are identical.

5. All references in this document will be to the rebate provisions in the Excise Act unless it is necessary to specifically refer to the Customs Act.

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6. The Off-Road Scheme provides for a rebate of duty paid on diesel fuel that is purchased and used for certain specified off-road uses. Broadly, rebate is payable under the following categories:

- mining;
- agriculture;
- forestry;
- fishing;
- rail transport;
- marine transport;
- electricity generation for residential premises; and
- the operation of hospitals, nursing and aged care homes and other medical institutions.

7. The Off-Road Scheme is a self-assessment scheme that requires claimants to provide to the ATO information sufficient enough for their claim to be paid. If a claim is paid for diesel fuel purchased for use in an activity that is not eligible, the ATO will recover the rebate and may impose a penalty.<sup>1</sup>

8. The ATO may also undertake an audit to verify information provided by a claimant in relation to a claim for rebate.<sup>2</sup>

9. This Ruling addresses mining operations.

## **General Requirements of the Diesel Fuel Rebate Scheme**

10. For a rebate to be payable on diesel fuel:

- the threshold provision must apply and at least one of the eligibility provisions must be satisfied; and
- the activity/operation must not be excluded by either the general or specific provisions of the legislation.

### ***The threshold and eligibility provisions***

11. Under subsection 78A(1), a person satisfies the threshold and eligibility provisions when they purchase diesel fuel, on which duty or excise has been paid, with the intention of using it in an eligible activity. The question of whether diesel fuel has been purchased for use in an eligible activity is to be determined at the time the diesel fuel is purchased. Actual use may be evidence of its intended use, but does

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<sup>1</sup> *Excise Act 1901* subsection 78AA(1) and section 78AB; *Customs Act 1901* subsection 164A(1) and section 164AA.

<sup>2</sup> *Excise Act 1901* section 78AD; *Customs Act 1901* section 164AC.

not necessarily override clear evidence of contrary intention at the time of purchase. Nevertheless, rebate would still be payable if diesel fuel was purchased for use in an ineligible activity, and then subsequently shown to be used in an eligible activity.

12. If a rebate is paid on the basis of intended use, but the diesel fuel is subsequently used in an ineligible manner, the legislation provides for recovery of the rebate that has been paid.<sup>3</sup>

13. In some cases, bulk quantities of diesel fuel may be paid for but only delivered as needed. This is referred to as 'prepayment'. Prepaid diesel fuel is deemed to have been purchased (and thus a claim can be made) when it is *ascertained*. In practical terms, this is generally when the diesel fuel is delivered, collected, or stored separately by the seller in such a manner that it can be clearly identified as belonging to the purchaser.

#### ***Activities/operations excluded by the general provisions***

14. Regardless of whether the threshold and eligibility provisions have been met, rebate is not payable if:

- the fuel is used for the purpose of propelling any vehicle on a public road; or
- the fuel is sold or otherwise disposed of; or
- the fuel is lost (whether because of accident, theft or any other reason).

15. Accordingly, rebate paid on fuel that is sold or otherwise disposed of will be recovered. If a rebate is paid on diesel fuel that is subsequently used in a manner other than that indicated at the time an application was made, or is sold or otherwise disposed of, or is lost, the claimant must advise the ATO of this in writing within 21 days.<sup>4</sup> A person is not entitled to retain the rebate in these circumstances. The rebate will be recovered by the ATO following an amendment to the assessment of the rebate payable.<sup>5</sup>

16. Rebate will not be paid on diesel fuel that was purchased three or more years prior to an application for rebate being received by the ATO.

17. Apart from the activities excluded by the general exclusions, each category of the Diesel Fuel Rebate Scheme has its own specific exclusions. These specific activities will be dealt with in the section entitled 'Ruling with explanations'.

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<sup>3</sup> *Excise Act 1901* subsection 78A(2); *Customs Act 1901* subsection 164(2).

<sup>4</sup> *Excise Act 1901* subsection 78AA(1); *Customs Act 1901* subsection 164A(1).

<sup>5</sup> *Excise Act 1901* subsections 78AE(1) and (2); *Customs Act 1901* subsections 164AD(1) and (2).

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## *Apportionment of fuel*

18. Where some of fuel is used in eligible activities and some not, claims can only be made in relation to that portion of the fuel that is used to carry out eligible activities. This is referred to as apportionment. An apportionment will be necessary to ensure that a claim for a rebate is made only in respect of the amount of diesel fuel that is purchased for use in eligible activities.

19. This will, for example, be the case when a certain piece of equipment is used in some activities that are eligible and some that are not. Rebate can only be paid on the diesel fuel that is purchased for use in the eligible activities. As a result, the total diesel fuel purchased will need to be apportioned between the activities that are eligible and those that are not.

20. A number of the paragraphs in the definition of ‘mining operations’ in subsection 164(7) of the Customs Act require a particular activity to be ‘solely’ for a particular purpose for it to qualify as an eligible activity. For a discussion of the term ‘solely’, refer to paragraph 85 of this Ruling.

## **Ruling and Explanations**

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21. Before considering the meaning of the term ‘mining operations’, it is necessary to look at the provision that allows for the payment of a diesel fuel rebate under the Off-Road Scheme, as well as the meaning of the term ‘minerals’.

### **Rebate payable for fuel for use ‘in mining operations’**

22. Subsection 78A(1) of the Excise Act contains the provision under which the Diesel Fuel Rebate is paid. It states in part:

A rebate is ... payable to a person who purchases diesel fuel for use by the person:

- (a) in mining operations (otherwise than for the purpose of propelling any vehicle on a public road)

23. The term ‘mining operations’ is subsequently defined in subsection 78A(7) of the Excise Act and, in turn, subsection 164(7) of the Customs Act.

24. In the context of the phrase ‘in mining operations’, the preposition ‘in’ means ‘in the course of’ or ‘in the process or act of’<sup>6</sup>. Therefore, if an activity can be said to have taken place ‘in the course of’ mining, it can be concluded that it also takes place ‘in’ mining.

25. We consider that all of the following three essential criteria need to be met for an activity to take place ‘in the course of’ a certain endeavour.<sup>7</sup> These are:

- a **causal** link must exist - in other words, a certain action must be *functionally integrated* with the greater activity as a whole, thereby forming an essential part of it;
- a **spatial** link must exist - meaning that an action take place in an area set aside or occupied for the activity as a whole. The action, therefore, should be *relatively proximate* to the activity;
- a **temporal** link must exist - the action must take place in a timely fashion, not prior to, or after the completion of, the activity as a whole.

26. Accordingly, the meaning of ‘in mining operations’ is not restricted to merely the physical act of mining itself. In determining whether an activity takes place ‘in the course of’ mining, the three criteria above should therefore always be applied. A critical element of the definition of ‘mining operations’ is the recovery of minerals, being mining for minerals and the beneficiation of those minerals. It is, therefore, relevant to look at the definition of ‘mineral’.

### **What is a mineral?**

27. Subsection 164(7) of the Customs Act 1901 defines ‘minerals’ as meaning:

minerals in any form, whether solid, liquid or gaseous and whether organic or inorganic, except:

- (a) sand, sandstone, soil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel or water; or

<sup>6</sup> *CEO of Customs v WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 158 ALR 241 at 259 per Nicholson J. “The word “in” as it appears in par (a) of the definition of “mining operations” is to be understood in this context as “inclusion within, or occurrence during the course of...””; see also *Wandoo Alliance Pty Ltd v CEO of Customs* No. 1997/270 AATA 801.

<sup>7</sup> In *FC of T v Payne* 2001 (2001) HCA 3 46 ATR 228 2001 ATC 4027; *CEO of Customs v WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 158 ALR 241; *Wandoo Alliance Pty Ltd v CEO of Customs* No. 1997/270 AATA 801, amongst others, it was deemed pertinent to consider one or all of these factors when determining whether an activity or activities were undertaken ‘in the course of’ something..

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(b) limestone (other than agricultural use limestone).

28. The Macquarie Dictionary defines ‘mineral’ as ‘a substance obtained by mining’. Therefore, a factor to be considered in determining if a substance is a mineral is whether the extraction or recovery process would correspond to the normal understanding of the term ‘mining’.

29. The definition provided by subsection 164(7), therefore, adopts the ordinary meaning of the noun ‘minerals’. It then clarifies the meaning in respect of form and chemical qualities – that is, a mineral can be solid, liquid or gaseous and organic or inorganic – and restricts it by excluding the substances (other than bentonite, kaolin and agricultural use limestone) listed in paragraphs (a) and (b) of the definition of ‘minerals’ in subsection 164(7).

30. The Courts have taken the view that the term ‘minerals’ has in its ordinary meaning the denotation of substances which can be won by mining.<sup>8</sup> This denotation is reinforced by the definition of ‘mining operations’ contained in subsection 164(7) of the Customs Act, with its concentration on ‘mining for minerals’ and the ‘recovery’ of minerals, of which mining is an essential part.

31. A discussion of the meaning of the term ‘mining for minerals’ can be found at paragraphs 58 to 67 of this Ruling.

32. The definition of ‘minerals’ in subsection 164(7) of the Customs Act excludes limestone other than ‘agriculture use limestone’. The term ‘agriculture use limestone’ is defined in subsection 164(7) of the Customs Act as limestone for use in the deacidification of soil in any agricultural activity, other than in soil of water conservation.

## **The form of the definition of ‘mining operations’: means, includes, does not include**

33. Subsection 78A(7) of the Excise Act defines the term ‘mining operations’ as having the ‘same respective meanings as in Section 164 of the *Customs Act 1901*’.

34. The definition of ‘mining operations’ is therefore found in subsection 164(7) of the Customs Act, and consists of three parts:

- **Paragraphs (a) and (b):** ‘mining operations’ means exploration or prospecting, site preparation, mining for minerals, or the beneficiation of those minerals;

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<sup>8</sup> *David Mitchell v CEO of Customs* (2001) FCA 294; 46 ATR 433 at paragraph 39, in which Spender J refers to the observations of Barwick CJ in *FCT v ICI Australia Ltd* (1972) [127 CLR 529](#) at 567; [3 ATR 321](#) at 326; [72 ATC 4213](#) at 4219.

- **Paragraphs (c) to (w):** ‘mining operations’ includes a number of specific operations detailed in these paragraphs;
- **Paragraphs (x) to (z):** ‘mining operations’ does **not** include the specific operations detailed in these paragraphs.

35. In discussing the meaning of ‘mining operations’ in the remainder of this Ruling, a reference to a paragraph without reference to a particular section or subsection is a reference to a paragraph of the definition of ‘mining operations’ in subsection 164(7) of the Customs Act.

36. The use of the form ‘means ... includes ... does not include’ means that paragraphs (a) and (b) of the definition contain the central features of ‘mining operations’, which is then expanded by the specific activities outlined in paragraphs (c) to (w). All activities contained in paragraphs (a) to (w) are subject to the specific exclusions contained in paragraphs (x) to (z). Unless an activity is within the scope of the definition, it will not be eligible for rebate.

37. In a number of decisions, the courts and the Administrative Appeals Tribunal have indicated that the provisions of paragraphs (c) to (w) do not limit paragraphs (a) and (b).<sup>9</sup> Paragraphs (c) to (w) do not provide an exhaustive list of eligible activities, and an activity is not necessarily precluded from the rebate if it is not specifically listed in them. An activity that does not meet the specific requirements of any of paragraphs (c) to (w) may still be an activity that satisfies the requirements of either paragraph (a) or (b) of the definition of ‘mining operations’ and, if not excluded by paragraphs (x) to (z), be eligible for the rebate.

38. Similarly, an activity does not have to be mentioned in paragraphs (x) to (z) to be excluded from the definition of ‘mining operations’. These paragraphs serve merely to point out specific exclusions, while other activities will be excluded because they simply do not fall within the meaning of ‘mining operations’.

39. In practical terms, in determining whether a certain activity is ‘in mining operations’ and therefore eligible for a rebate, we take the view that it is appropriate to consider the following.

- Firstly, whether the activity falls within one of the paragraphs (c) to (w). If it does and the activity is not excluded by any of paragraphs (x) to (z), it will be eligible for a rebate;

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<sup>9</sup> *Goodyear Australia Ltd and Others v CEO of Customs* AAT No 13035 [1998] AATA 488 (1 July 1998) at paragraph 5; *Esso Australia Ltd v CEO of Customs* V96/1393 V96/1394 AAT No 12919 at paragraph 5, amongst others.

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- Secondly, if the provisions of paragraphs (c) to (w) are not met, whether the activity otherwise comes within paragraphs (a) or (b) of the definition of ‘mining operations’.<sup>10</sup> If it does and the activity is not excluded by any of paragraphs (x) to (z), it will be eligible for a rebate.

40. This approach ensures that appropriate consideration is given to the specific activities in paragraphs (c) to (w) in determining whether a particular activity is eligible for rebate under the Off-Road rebate.

41. Paragraphs (c) to (z) of the definition of ‘mining operations’ are to be construed in their own terms and not by reference to paragraphs (a) and (b) of the definition.<sup>11</sup> Thus, the operation of paragraphs (c) to (z) is not expanded by cross-referencing with the provisions of paragraphs (a) and (b). Paragraphs (c) to (w) should be considered self-contained compartments of specific eligible activities which are eligible for the diesel fuel rebate.<sup>12</sup>

## **Activities essential to ‘mining operations’**

42. As discussed at paragraphs 43 to 67 of this Ruling, paragraphs (a) and (b) of the definition contain the essential meaning of ‘mining operations’. These paragraphs are dealt with below.

## **‘Exploration or Prospecting’**

43. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** means:

- (a) exploration or prospecting for minerals ...

44. The expressions ‘exploration’ and ‘prospecting’ are not defined in the Customs Act and thus take on their ordinary meaning.<sup>13</sup> The phrase ‘exploration or prospecting’ means the systematic search for mineral deposits, and the subsequent determination of the extent of those deposits as part of establishing the commercial viability of mining.

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<sup>10</sup> *Goodyear Australia Ltd and Others v. CEO of Customs* AAT No 13035 [1998] AATA 488 (1 July 1998) at paragraph 5.

<sup>11</sup> *Customs Act 1901* subsection 164(9)(b).

<sup>12</sup> Explanatory Memorandum relating to the *Customs and Excise Legislation Amendment Bill (No 2) 1996* Item 24.

<sup>13</sup> *Re BHP Petroleum Pty Ltd v Collector of Customs* (1986) 11 ALD 413 at 420-423.

45. When considering what activities should be included as ‘exploration or prospecting’, the same criteria mentioned above – causal, spatial and temporal – must be met. That is, the activity in question should be functionally integrated, relatively proximate and take place at a time relevant to the operation as a whole. This will be a case of fact and degree that will vary between activities.

46. Activities that would be considered exploration or prospecting include:

- geological, geophysical and geochemical mapping and surveys;
- systematic search for minerals by drives, shafts, cross-cuts, winzes and drilling;
- magnetometry;
- construction and maintenance of trial pits, surface headings, underground headings, drifts or tunnels;
- construction and maintenance of access roads used in exploration or prospecting;
- construction and maintenance of infrastructure integral to the undertaking of exploration or prospecting;
- repositioning or relocation of equipment engaged in a systematic search at a designated exploration site or area. The transportation of equipment between exploration sites would not be regarded as activities in exploration or prospecting.<sup>14</sup>

**‘Removal of overburden’ and ‘other activities undertaken in the preparation of a site’**

47. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** means:

- (a) ... the removal of overburden and other activities undertaken in the preparation of a site to enable mining for minerals to commence.

48. This phrase ‘removal of overburden’ means land clearing, removal of vegetation, and the removal and stockpiling of top soil. It extends to the removal of surface waste or worthless rock overlying a flat or moderately inclined mineral deposit, thin enough to warrant its

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<sup>14</sup> *Re BHP Petroleum Pty Ltd v Collector of Customs* (1986) 11 ALD 413 at 425, in which the Tribunal determined that the relocation of rigs between places of exploration was not an eligible activity.

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removal to expose and mine the deposit.<sup>15</sup> We consider that these processes are completed at the first point at which the material removed is stockpiled.

49. The phrase ‘other activities undertaken in the preparation of a site to enable mining for minerals to commence’ is not restricted in meaning to activities similar in nature to the removal of overburden. It is taken to mean any activity that is undertaken in preparing a site to enable mining for minerals to commence.

50. Activities considered eligible under this category are not restricted to those undertaken at the point of mineral extraction, or the area immediately surrounding that point. Instead, the term ‘site’ is not taken to have a restricted meaning, and thus refers to an area or location utilised for the mining of minerals. In addition, acts of preparation of a site are not restricted to acts on the site.<sup>16</sup>

51. Whether an activity has taken place in the course of preparation of a site to enable mining for minerals to commence is a question of fact, determined having regard to the facts and circumstances of each case.

52. Preparation of a site that will be involved in **beneficiation activities only** will **not** be eligible under paragraph (a). It is considered that such activities are not undertaken in the preparation of a site to enable **mining for minerals** to commence. Rather, they are undertaken in the preparation of a site to allow **beneficiation of those minerals** to take place. In these cases, it is likely that the provisions of one of the paragraphs (c) to (w) will cover the majority of preparatory activities (such as construction and maintenance).

53. Activities that would be considered ‘other activities undertaken in the preparation of a site to enable mining for minerals to commence’ include the following.

- Operations undertaken in the physical act of preparation of a site to allow mining for minerals to commence;
- Activities undertaken in the dewatering of a site, including drilling bore holes and monitoring holes;
- Construction and maintenance of infrastructure of sufficient causal, temporal and spatial proximity. This infrastructure may include plant, buildings, access roads and other equipment necessary for preparation

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<sup>15</sup> Taxation Ruling TR 95/36.

<sup>16</sup> *WMC Resources Ltd v CEO of Customs and CEO of Customs v McDermott Industries (Aust) Pty Ltd and WMC Resources Ltd* (Unreported, Federal Court of Australia, Lee J, 15 December 1997) Matter Nos. WAG 79 and WAG 80 of 1997, in which Lee J determined that preparatory activities should not be restricted to the site.

and the subsequent mining to take place. Diesel fuel purchased for use in the transportation of materials used in this construction, however, is not considered eligible.<sup>17</sup>

*Example 1: Pipelines used in natural gas extraction*

54. ABC Pty Ltd intends to mine natural gas on the North West Shelf. Before mining can take place, wellheads at the point of extraction and a processing and control facility on a nearby island need to be constructed. In addition to these elements of infrastructure, pipelines are required to transport the raw gas fifty kilometres from the well head to the processing and control facility.

55. As activities undertaken in the preparation of a site to allow mining for minerals to commence are not restricted to those undertaken at the point of mineral extraction, or the area immediately surrounding that point, diesel fuel purchased for use in the construction of the pipeline will be eligible for a rebate. The transport of any construction materials will not be eligible, as this transport takes place prior to the preparation activities.

*Example 2: The movement of vessels for subsequent use in site preparation activities*

56. DEF Pty Ltd is contracted by a mining company to transport a concrete gravity structure (CGS) from Hobart to Bass Strait. The CGS is to be used in the drilling for oil. For this to happen, DEF Pty Ltd needs to move their vessels from Townsville to Hobart.

57. Diesel fuel purchased for use in the movement of the vessels from Townsville to Hobart will not be eligible for a rebate, as this activity takes place prior to site preparation. If the CGS is purpose-built and will form an integral part of the recovery of minerals, diesel fuel purchased for use in its towing will be eligible for rebate. This is because the CGS is specific to that site only and without its presence recovery of minerals cannot take place. Therefore its transport to the site is site preparation.

### **Mining for Minerals**

58. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** means: ...

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<sup>17</sup> *CEO of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)* 1271 FCA (9 October 1998) at 17-24; WAG 10 of 1998.

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- (b) operations for the recovery of minerals, being: ...
  - (i) mining for those minerals including the recovery of salts by evaporation.

59. 'Mining' is not defined by the Customs Act, and must take its ordinary meaning. Therefore, mining is the action, process or industry of extracting minerals or ores bearing minerals from a mine or mines.

60. A 'mine' means an excavation made in the earth for the purposes of getting out minerals, ores, precious stones, coal etc, or a deposit of such minerals etc, either below the ground or at its surface.

61. Therefore, it will be self-evident in most cases whether an activity is mining for minerals. The facts determining whether an activity is mining for minerals will vary, and these will need to be considered on a case-by-case basis.

62. In addition to this, in determining what constitutes mining for minerals, the Courts have had regard to the informed general usage of the term.<sup>18</sup> Factors taken into account in making that determination include:

- the way in which the deposits of the material occur;
- the character of the material to be recovered; and
- the use to which it may be reasonably put.

63. Certain activities are sometimes undertaken to synthetically produce or manufacture substances which would come under the definition of 'minerals', by means other than that which would normally be considered mining. As stated in paragraphs 27 to 30 a factor to be considered in determining if a substance is a mineral is whether the extraction or recovery process for the substance would correspond to the normal understanding of the term 'mining'.

64. We do not consider synthetic production or manufacturing operations of this kind to be within the normal understanding of the term 'mining'. Such processes will not be 'mining operations'. Nor do we consider the creation of an artificial environment in which minerals are generated by a natural process to be mining. For instance, the burying of waste in a landfill site in order to facilitate the natural production of methane for later extraction is not considered to be 'mining for minerals'. Nor is it considered to be 'other activities undertaken in the preparation of a site'.

65. The point at which 'operations for the recovery of minerals' cease depends upon whether any processes of beneficiation are undertaken. If no beneficiation process is undertaken, 'operations for the recovery of minerals' cease when 'mining for minerals' is

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<sup>18</sup> *North Australian Cement Ltd v. FCT* (1969) 119 CLR 353.

completed. This circumstance is dealt with in subsection 164(7A)(b) of the Customs Act, which states:

For the purposes of **mining operations**, operations for the recovery of a mineral cease:...

- (b) in the absence of a beneficiation process – when the mineral, or ores bearing the mineral:
  - (i) are first stockpiled or otherwise stored at the place at which the mining operation is carried on; or
  - (ii) if subparagraph (i) does not apply – are removed from the ore body deposit.

66. Practically, in the majority of cases not involving any process of beneficiation, ‘mining operations’ will cease at the first point of stockpile or safe storage of the minerals, or the ores bearing minerals.

67. Activities that are considered to be ‘mining for minerals’ include:

- operations undertaken in the physical recovery of minerals or ores bearing minerals; and
- construction and operation of facilities and infrastructure used directly in the recovery of minerals or ore bearing minerals.

*Example 3: Generation of electricity for support facilities*

68. ABC Pty Ltd operates a mine site in remote Western Australia and constructs its own power station to provide power for its mining operations. In addition to power provided to equipment used in the extraction of ore, the station also provides power to a small camp housing mine staff, administration offices and other amenities located on the mining lease.

69. Diesel fuel purchased for use in the generation of the power is eligible for a rebate under subparagraph (b)(i) as it is purchased for use in the operation for the recovery of minerals.

**Beneficiation**

70. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

“**mining operations**” means: ...

- (b) operations for the recovery of minerals, being: ...

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- (ii) the beneficiation of those minerals, or of ores bearing those minerals.

71. Beneficiation is not a term in ordinary English usage. Instead, it is a technical term applicable to a range of processes undertaken in the mining or metallurgical industries. It is generally used to describe a treatment to improve, upgrade or concentrate the quality of mineral bearing ore up to, but not including, the refining or final pyrometallurgical or hydrometallurgical process whereby metal is produced.

72. Amendments made to the Customs Act in 1997 inserted subsections 164(7B), 164(7C) and 164(10), all of which deal with beneficiation.

73. Subsection 164(7B) of the Customs Act specifies when the beneficiation of ores bearing manganese minerals cease. It states that the beneficiation of these ores ceases when manganese-mineral concentrates are last deposited in a holding bin, or in a stockpile, at the place where the concentration is carried on, before transportation of those concentrates.

74. Subsection 164(7C) of the Customs Act states that in determining whether a particular process constitutes beneficiation, regard is to be had to the nature of the technical process involved but no regard is to be had to any market considerations. That is, if market forces dictate that a mineral must undergo a certain process to result in a saleable product, this is no guarantee that the process will be considered beneficiation. Beneficiation, therefore, should be seen as a technical concept rather than an economic concept.

75. Subsection 164(10) of the Customs Act states that the *Customs Regulations 1927* (the Customs Regulations) may provide a list of specific processes that are considered beneficiation for the purpose of the Act. It should be noted that any processes detailed in the Regulations will not affect the ordinary meaning of beneficiation, and cannot be used to broaden its scope.

76. Activities eligible as beneficiation begin after the last point of stockpile or safe storage of the minerals or ores after 'mining for minerals' has taken place.

77. We consider that if beneficiation occurs at a different place to that at which the mining for minerals was conducted, beneficiation is considered to begin at the last point of stockpile or safe storage of the minerals or ores after transport.

78. Whether or not a mineral or an ore is beneficiated is a question of fact, and may need to be resolved on a case-by-case basis in light of technical evidence in the relevant mining industry. It is, however, clear that 'beneficiation' is distinct from refining to produce metal, or

the process of manufacturing, or a process which results in the destruction of a recovered mineral.

79. The point at which beneficiation is deemed to have been completed differs depending upon the mineral in question and the precise process utilised. Some of the more common minerals, and examples of the processes involved in beneficiation and the points at which beneficiation ceases, are as follows:

- **Coal** – after it has been washed in a preparation plant and dewatered at a product stockpile at the mine site. Rebate is extended to pushing-in and pushing-out operations at the load-outs, if undertaken with a view to dewatering.<sup>19</sup> Blending of coal is not considered beneficiation, nor is the magnetic removal of foreign contaminants from the coal;<sup>20</sup>
- **Gold** – beneficiation continues until the carbon in pulp (CIP) stage. This is prior to the smelting process;
- **Silver** – the first concentrate stage. Silver is generally a by-product of lead, copper or zinc extraction, and the first concentrate may be obtained by the ‘flotation’ method through the processing of the ore known as ‘Galena’. However, when extracted through the production of lead/zinc, the silver is left behind in the furnace when smelting occurs. This process is not regarded as beneficiation;
- **Copper** – beneficiation continues until the matte stage is reached. Matte is an impure sulfide mixture produced by smelting the sulfide ores of copper;
- **Uranium** – beneficiation includes grinding, crushing and flotation, and continues up to the calcining process. Calcining is the heating of ores, precipitates, concentrates or residues so that hydrates, carbonates or other compounds are decomposed and the volatile material is expelled;
- **Bauxite** – the production of alumina by the Bayer process;
- **Crude oil** – any process that separates oil from the other constituents of crude oil so as to yield the product known as stock tank oil;

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<sup>19</sup> *Collector of Customs v. BHP Coal Ltd Q91/446*, AAT Case 9266; 32 ALD 773; (1994) 53 FCR 499.

<sup>20</sup> See the Tribunal’s decision in *Freight Rail Corporation v Chief Executive Officer of Customs* [2000] AATA 175, N98/1352 & 1353; the decision was affirmed by Hill J in *Freight Rail Corporation v Chief Executive Officer of Customs* [2000] FCA 1796 at para 53.

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- **Natural gas** – the preparation of the gas to be liquefied, stored or introduced into a pipeline. Beneficiation is not considered to include the actual liquefaction, storage or introduction into a pipeline, as **relevant**, but ceases at the point immediately prior. The liquefaction of natural gas is instead eligible under paragraph (e) of the definition of ‘mining operations’, and is dealt with in detail at paragraphs 127 to 132 of this Ruling;
- **Common salt** – the crushing, screening, grinding or other like processes, or the initial washing process, are all considered part of the **beneficiation** process. The beneficiation of salt should be regarded as ended, and the salt fully recovered, after the initial washing process;
- **Iron or lead ore** – any flotation and sintering processes until the point at which the ore is put in the top of a blast furnace, are considered to be beneficiation;
- **Nickel** – beneficiation is completed when nickel matte is produced.<sup>21</sup> Diesel fuel purchased for use in processes leading up to this stage, such as crushing, grinding, flotation and smelting, is therefore eligible.

80. As mentioned at paragraph 65 of this Ruling, the point at which ‘operations for the recovery of minerals’ cease is dependant upon whether a process of beneficiation is carried out.

Section 164(7A) of the Customs Act states in part:

For the purposes of the definition of **mining operations**, operations for the recovery of a mineral cease:

- (a) when the process of beneficiation ceases.

81. Rebate is thus payable on diesel fuel purchased for use until the first point of stockpile or safe storage after beneficiation (for example, after the points detailed above). Alternatively, in the absence of a point of stockpile or safe storage after beneficiation, rebate is payable for diesel fuel purchased for use until the final process of beneficiation has been completed, prior to the commencement of further processing.

82. The eligibility of activities in beneficiation for the diesel fuel rebate is not limited to beneficiation of minerals or ores that are mined in Australia. The rebate is also available for diesel fuel purchased for use in the beneficiation of imported minerals or of imported ores bearing minerals.

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<sup>21</sup> *Western Mining Corporation Ltd v Collector of Customs* [1984] AAT W83/13 (Unreported, 30 March 1984).

*Example 4: Beneficiation of imported ore*

83. ABC Pty Ltd is engaged in the mining and beneficiation of ores bearing zinc at various locations throughout Australia. In addition to these activities, they also source zinc from a number of overseas locations for importation and subsequent beneficiation.

84. It is not a prerequisite that minerals or ores bearing minerals be mined in Australia for them to attract a rebate for beneficiation if the latter process takes place in Australia. Therefore, diesel fuel purchased for rebate in the beneficiation of the imported zinc is eligible for a rebate. The off-road travel from the port to the place of beneficiation, however, is not.

**‘Solely’**

85. The word ‘solely’ appears in paragraphs (j), (l), (m), (n), (r), (v) and (va). It takes on its ordinary meaning of ‘only’ or ‘exclusively’, and therefore requires a particular activity to be ‘exclusively’ for a particular purpose for it to qualify as an eligible activity. Where a particular activity is required to be solely for a particular purpose, an activity that is for a dual purpose will not qualify as an eligible activity. However, where fuel is purchased for a number of activities, an apportionment can be made as to its intended use in the different activities. A rebate will only be payable in respect of the portion of diesel fuel that is intended for use solely in an activity that qualifies as a mining operation.

86. If an activity fails to meet the provisions of one of the paragraphs where the ‘solely’ requirement is present, its eligibility as a mining operation under paragraphs (a) and (b) can be considered.

*Example 5: Generation of electricity to a mining town*

87. ABC Pty Ltd operates a mine and associated mining town. They use their own power station to produce electricity which is transmitted by different feeder lines to the mine site, the mining town, and a small nearby community that has negotiated with ABC for a portion of their power. Fuel is purchased for use in these three activities.

88. Paragraph (j) allows a rebate for fuel purchased for use in the ‘generation of electricity solely for, or the provision of electricity solely to, a mining town’.

89. At the time of purchase of the diesel fuel for use in the power station, ABC is able to apportion its use as being:

- 65% to general mining operations;
- 30% to the mining town; and

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- 5% to the local community.

30% of the fuel is therefore purchased for use in the generation of electricity solely to a mining town.

90. ABC would be able to claim a rebate for 95% of the diesel fuel, being:

- 65% in respect of an activity that is a mining operation under paragraph (b); and
- 30% in respect of an activity that is a mining operation under paragraph (j).

## **‘The place where the mining operation is carried on’**

91. The phrase ‘the place where the mining operation is carried on’ is used in paragraphs (i), (k), (ka), (l), (m), (n), (o), (p), (pa), (q), (r), (s), (t), (u), (w) and (z) of the definition of ‘mining operations’. The reference to ‘the mining operation’ in the phrase is a reference to the mining operations as referred to in paragraphs (a) and (b).

92. Thus, the ‘place’ at which those operations are carried on is taken to include the whole of the land legally occupied for the exploration or prospecting, site preparation, mining of minerals and the beneficiation of those minerals. This includes any land that is legally occupied for the purposes of private roads that connect a mine site to the place of beneficiation of minerals from the mine, or to connect those areas to a public road.<sup>22</sup>

93. The legal entitlement to conduct mining operations on a specified area of land may flow from a variety of legal agreements. Generally the entitlement to legally occupy land for the purposes of a mining operation referred to in paragraphs (a) or (b) will be in the form of an Exploration or Prospecting licence, lease or permit, a Mining licence, lease or permit, or a Miscellaneous licence, lease or permit that is issued for a purpose directly associated with the mining operations. These licences, leases or permits are issued by State or Territory Authorities under the relevant Mining Acts and provide the holders with the legal entitlement to undertake specific activities in relation to exploration and prospecting, site preparation and the recovery of minerals.

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<sup>22</sup> *Hampton Transport Services Pty Ltd & CEO of Customs* W2000/374 AAT Case No 893 (2001); W2000/400 AAT Case No 894 (2001).

*Example 6: Mine site and beneficiation plant connected by private road*

94. A mining company runs an integrated mining operation that consists of three pits, a camp and administrative base, which are all located on one mining lease. The operation also includes a beneficiation plant that, for reasons of geographic practicality, is located on a non-adjointing lease. An access road links the pits and the camp to the beneficiation plant. The road runs across a series of adjoining miscellaneous leases held by the company. These miscellaneous leases are issued under a State mining act, and are granted to the mining company for the purpose of activities directly connected to mining operations.

95. The pits, beneficiation plant, camp and access road are all on land legally occupied for the purpose of carrying on mining. They are therefore ‘at the place’ at which a mining operation under paragraph (b) is carried on.

**‘A place adjacent to the place where the mining operation is carried on’**

96. In the phrase ‘a place adjacent to the place where the mining operations is carried on’, the word ‘adjointing’ takes its ordinary meaning of lying near, close or contiguous.<sup>23</sup>

97. A place is adjointing if it is abutting, close or near, and is not distant or remote from the place at which the mining operation is carried on. It is not possible to give precise measurements or distances between places to determine their adjointing. It is a question of fact and impression in each case as to whether a place is adjointing to the place where the relevant mining operation is carried on.

**Status of contractors and sub-contractors**

98. A contractor is entitled to claim rebate, provided they purchase fuel and subsequently use it in an eligible activity under the definition of ‘mining operations’. The activity determines eligibility, rather than whether the claimant’s principal business is mining.<sup>24</sup>

99. Subsection 164(9)(a) of the Customs Act states that a sub-contractor is afforded that same status as a contractor for the purposes of paragraphs (i), (k), (ka), (l), (m), (n), (o), (p), (pa), (q), (r), (u), (v) and (va) of the definition of ‘mining operations’. A sub-

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<sup>23</sup> This was discussed by the Tribunal in *BHP Petroleum and Collector of Customs* (1986) 11 ALD 413 at 424-425. See also *FCT v BHP Minerals Ltd* (1983) 51 ALR 166 at 172.

<sup>24</sup> *Australian National Railways v. Collector of Customs* (1985) 8 FCR 264

contractor is therefore able to claim rebate if they purchase fuel and use it in the eligible activities detailed in these paragraphs.

## **Activities included as ‘mining operations’**

100. As discussed at paragraph 34 of this Ruling, certain activities are included as ‘mining operations’ by the provisions of paragraphs (c) to (w) of the definition. These paragraphs are dealt with below.

### ***Journeys involving the transportation of minerals or mineral bearing ore for beneficiation***

101. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (c) if minerals, or ores bearing minerals, are beneficiated at a place other than the mining site as an integral part of operations for their recovery:
  - (i) the journey undertaken for the purpose of transporting the minerals or ores from the mining site to that place except to the extent (if any) that the journey involves transportation by sea; and
  - (ii) the return journey of a vehicle, a locomotive or other equipment from that place to the mining site or any part of that journey if it is undertaken for the purpose of repeating a journey referred to in subparagraph (i) or for the backloading of raw materials or consumables for use in a mining operation referred to in paragraph (a) or (b)

102. If the beneficiation of minerals or ores bearing minerals occurs at a place other than the mining site, the off-public road transportation of minerals or ores bearing minerals from the mine site to the place of beneficiation (other than any portion of the journey that is carried out by sea) is a mining operation. Diesel fuel purchased for use in such transportation is eligible for the rebate. However, the transportation must not involve the use of a vehicle that is covered by paragraph (y).

103. Paragraph (y) precludes the use of vehicles not exceeding 3.5 tonnes gross vehicle weight other than fork-lifts, front-end loaders, tractors, and vehicles that have been extensively modified for use underground.

104. Under subparagraph (c)(ii), rebate is payable on diesel fuel purchased for use in journeys returning to the mine site from the place of beneficiation, except for any portion of the journey that is carried out by sea. The return journey or a part of that journey must be for the purpose of repeating a journey to transport minerals or ore from the mine site to the place of beneficiation, or for the purpose of backloading raw materials or consumables for use in exploration or prospecting, removal of overburden, other activities in the preparation of a site to enable mining for minerals to commence, or for mining of minerals or the beneficiation of those minerals.

105. We consider that 'closed loop' return journeys are also eligible for rebate where the forward journeys are carried out by vehicles or equipment servicing several mines but these vehicles or equipment do not always return to the same mine site.

106. Rivers, harbours and estuaries are not considered sea. Therefore, rebate remains payable if the transport is carried out by vessels on these waterways. There is no requirement that the transport must be done in one continuous operation.

107. Rebate for diesel fuel purchased for use in travel by sea can be claimed under the marine Transport category as from 1 July 2000.

108. We consider that, under paragraph (c), the journey must be between a mine site situated in Australia and a place of beneficiation that is also situated within Australia.<sup>25</sup> The beneficiation must also be an integral part of operations for the recovery of minerals.

109. If beneficiation is to take place overseas, the transportation of minerals or ores to a port for export will not be a 'mining operation' as defined in paragraph (c). However, the extraction of the mineral or ore by mining will be a mining operation under subparagraph (b)(i).

110. The entitlement to rebate does not arise where the transportation of imported minerals or ores is from a port to a place in Australia for beneficiation. Such transportation does not constitute 'mining operations' under paragraph (c), as there is no journey 'from the mining site' in Australia to a place of beneficiation within Australia. The beneficiation of imported ore itself, however, is eligible under subparagraph (b)(ii).

111. For a discussion on the term 'beneficiation', see paragraphs 70 to 71 of this Ruling.

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<sup>25</sup> Subsection 21(b) of the *Acts Interpretation Act 1901* states: 'references to localities, jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth'. See also *State Rail Authority (NSW) v. The Collector of Customs (1991)* 33 FCR 211 in relation to former subsection 164(7)(d) at 213-216.

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*Example 7: Transport of minerals for overseas beneficiation*

112. ABC Pty Ltd mine ore bearing nickel and cobalt from a site in Western Australia. All beneficiation of the ore takes place in the Philippines. After extraction, the ores are transported via rail to a nearby port for exportation.

113. The journey of the ore for exportation and subsequent beneficiation is not eligible for a rebate under the Mining category of the Off-Road Scheme. It will, however, be eligible under the Rail Transport Scheme.

*Example 8: Closed loop journeys involving several mine sites*

114. XYZ Pty Ltd operate a number of mine sites on adjoining leases, as well as a beneficiation plant located some 35 kilometres away on a separate lease. Minerals for beneficiation travel via rail from one of the mine sites to the beneficiation plant. Raw materials and consumables for use in mining are then loaded at the beneficiation plant, and are transported to each of the sites as part of one journey.

115. This is considered to be a ‘closed loop’ journey, and thus eligible for rebate.

*Example 9: Journeys undertaken partially by sea*

116. A mining company extracts mineral sands from a coastal island. The sands are transported by barge across the sea to the coast, and then up a nearby river to a beneficiation plant, where they are unloaded and beneficiation takes place.

117. The journey across sea from the island to the coast is not an eligible activity and rebate is not payable under the Mining category in respect of diesel fuel purchased for use in that journey. It may, however, be eligible for a rebate under the Marine Transport provisions.

118. As the journey up the river to the beneficiation plant is not by sea, the journey is an eligible activity. A rebate is payable in respect of the diesel fuel purchased for use in that journey. Where diesel fuel is purchased for use in making both journeys, an apportionment must be made to determine the amount of fuel purchased for use in making the journey that is an eligible activity.

## **Refitting or repairing of ships involved in Northern Mining Activities**

119. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (d) the undertaking:
  - (i) of voyages to or from an Australian port by ship that is proposed to be, or that is, used wholly or primarily in carrying out northern mining activities for the purposes of refitting or repairing the ship or its equipment for, or as a result of, carrying out those activities; or
  - (ii) of trials in connection with such refit or repair of the ship or its equipment.

120. ‘Northern mining activities’ are defined in subsection 164(7) of the Customs Act as meaning ‘activities associated with or incidental to, the exploration for, or exploitation of, oil or natural gas in waters within the geographical boundaries of 100 degrees east longitude to 140 degrees east longitude and the equator to 30 degrees south latitude’. These areas include the North West Shelf and the Timor Gap areas.

121. The ships concerned are those engaged in the servicing of the oil and gas operations in these areas. For fuel used in the refitting or repairing of the ships to be eligible for rebate, the refit or repair must be for, or as a result of, carrying out ‘northern mining activities’.

122. Repairing or refitting of the ships must be the reason for the journeys back to a port. The changing of crews, or the taking on board of provisions for resupplying does not constitute repair or refit.

123. Note, however, that resupply of water may be eligible under paragraph (n), and activities such as those mentioned in the preceding paragraph will be eligible under the category of Marine Transport which came into effect on 1 July 2000.

124. The undertaking of trials resulting from a refit or repair of the ship or its equipment would also qualify as a mining operation.

125. Resupply of water may be eligible under paragraph (n).

### ***Liquefaction and Transport of Natural Gas***

126. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (e) the liquefying of natural gas; or
- (f) if natural gas is liquefied at a place other than the mining site – the transporting of the natural gas from the mining site to that place.

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127. The expression ‘natural gas’ in paragraphs (e) and (f) of the definition of ‘mining operations’ covers all naturally occurring gases. The chief component of natural gas is methane, which usually makes up between 80% to 95% of the gas, with the remaining components comprising varying amounts of ethane, propane, butane, and other natural occurring compounds such as nitrogen, oxygen, and carbon dioxide.

128. Liquefaction is not synonymous with ‘beneficiation’. It is a separate process, involving the use of high pressure and/or refrigeration, carried out after the gas has been beneficiated. In essence, liquefied natural gas is produced by refrigerating natural gas to minus 260 degrees Fahrenheit. The process of liquefaction occurs after beneficiation. In relation to natural gas, as operations for the recovery of minerals cease when the process of beneficiation ceases, we consider that other activities that are associated with but are not liquefying of natural gas are not activities that are ‘mining operations’ under paragraphs (a) and (b).

129. For example, diesel fuel purchased for use in the construction of a liquefaction plant is not eligible because that activity would be considered to have occurred after ‘mining activities’ have ceased. Nor would the construction be considered eligible under paragraph (a) as an activity undertaken in site preparation. However, the construction of pipelines to the liquefaction plant will be eligible for rebate because the transportation is mentioned specifically in paragraph (f).

130. Unlike the transport referred to in paragraph (c), rebate is payable on all modes of transporting natural gas from the mine site to the liquefaction plant, including transport by sea.

131. The operation of paragraph (f) is not affected by the exclusion contained in paragraph (z). Paragraph (z) excludes from the definition of ‘mining operations’ the transport by any means of people, equipment or *goods* to or from a place where a mining operation referred to in any of paragraphs (a) to (w) (other than the activities referred to in paragraphs (c), (n) or (s)) is or is to be carried on, or to and from a place that is adjacent to that place. At first glance, it would seem that the operation of paragraph (f) is affected by paragraph (z). Given the concessionary nature of the specific provision in paragraph (f), we consider that the exclusion in paragraph (z) was not intended to and does not apply to the transportation activity specifically mentioned in paragraph (f).<sup>26</sup>

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<sup>26</sup> This interpretation is supported by section 15AA of the *Acts Interpretation Act 1901*, which states: ‘In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.’

***Reactivation of carbon for use in the beneficiation process***

132. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (h) the reactivation of carbon for use in the beneficiation of ores bearing gold if the reactivation occurs at the place where the recovery operation referred to in paragraph (b) is carried on.

133. Reactivation is a process to restore the adsorption capacity of Granular Activated Carbon (GAC) using a special furnace operating at over 800 degrees Celsius. Generally, reactivated carbon is used to adsorb the gold directly from a cyanided pulp in a series of large adsorption tanks. This is known as the carbon-in-pulp process.

134. Reactivation of GAC can be carried out on-site, though in most cases it is more efficient to utilise a Reactivation Centre. However, under paragraph (h) rebate is only payable on diesel fuel purchased for use in order to reactive the carbon ‘at the place’ where the recovery operation referred to in paragraph (b) is carried on. As paragraph (h) specifically refers to the reactivation of carbon for use *in the beneficiation of ores bearing gold*, the reference to ‘at the place where the recovery operation is carried on is to a place where beneficiation of ores that bear gold takes place.

***Coal stockpile management***

135. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (i) coal stockpile management for the prevention of the spontaneous combustion of coal if the management is carried out:
  - i) by a person who carries on a mining operation referred to in paragraph (a) or (b); or
  - ii) by a person contracted by that person to carry out the management;

at the place where the mining operation is carried on

136. Stockpile management for the prevention of spontaneous combustion of coal usually involves the use of bulldozers to compact the coal on a stockpile. Rebate can be claimed on diesel fuel purchased for use in coal temperature monitoring, the cutting in and cutting out of coal to spread, cool and compact it, and other activities

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involved in the compacting of coal.<sup>27</sup> Each of these operations must be undertaken for the prevention of spontaneous combustion for the fuel purchased to be eligible for the rebate.

137. To claim the rebate for the use in this activity, the claimant must be able to prove the reason for the activity is to prevent the spontaneous combustion of coal ‘at the place’ where the mining operations referred to in paragraph (a) or (b) occurs. There are no limits as to how many stockpiles would be allowed for this purpose.

138. Stockpile management for any other purpose is not eligible for the rebate under this sub-section.

## *Generation of electricity to a mining town*

139. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

“**mining operations**” ... includes:

- (j) the generation of electricity solely for, or the provision of electricity solely to, a mining town if:
  - (i) the existence of the town is necessary to enable a mining operation referred to in paragraph (a) or (b) to be undertaken; and
  - (ii) the generation or provision is carried out by the person who carries on the mining operation.

140. As explained at paragraph 85 of this Ruling, the expression ‘solely’ in this paragraph takes on its ordinary meaning of ‘only’ or ‘exclusively’. To be eligible for rebate, the diesel fuel must be purchased to generate and provide electricity ‘solely’ for or to a mining town as defined in subsection 164(7).

141. A ‘mining town’ is defined in subsection 164(7) of the Customs Act as meaning:

a town constructed by or on behalf of a person engaged in mining operations, in an area where immediately prior to its construction there was no town, principally to house employees of the person, but does not include a town administered by:

- (a) a council that is constituted under local government legislation of a state or Territory; or
- (b) an organisation taken to be a council under such legislation.

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<sup>27</sup> *Collector of Customs v BHP Coal Ltd* Q91/446 AATA No. 9266; 32 ALD 773 paragraphs 10-47.

142. A mining town must therefore be a purpose-built settlement, constructed by the person undertaking a mining operation (or a contractor engaged by them). For the town to be a mining town it must be constructed mainly to house employees of the person that carries on the relevant mining operation and it must be constructed in an area where no town previously existed. However, it does not include a town that is administered by a local council or similar body, even if the town is constructed by the person engaged in mining operations for the purpose of enabling the relevant mining operations be carried on.<sup>28</sup>

143. Paragraph (j) does not require that the electricity be generated at the place where the relevant mining operation is carried on or that it be provided from that place or from a place that is adjacent to that place. However, the existence of the mining town must be necessary to enable a mining operation in paragraph (a) or (b) to be undertaken. For the purposes of this paragraph, it is not necessary that the mining town be located at the place where the mining operation is carried on or at a place adjacent to that place. However, from a practical point of view, the mining town would be expected to be located reasonably close to the place where the relevant mining operation is being undertaken.<sup>29</sup>

144. For the purposes of paragraph (j), generation or provision of the electricity must be carried out by the person that carries on the mining operation. Rebate in respect of an activity under this paragraph is not available to a contractor.

### ***Rehabilitation before and after 1 July 1995***

145. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (k) the rehabilitation before 1 July 1995 of a place at which a mining operation referred to in paragraph (a) or (b)

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<sup>28</sup> *Energy Resources of Australia v CEO of Customs* (1998) 81 FCR 139. The issue was also discussed in *Collector of Customs v Cliffs Robe River Iron Associates* (1985) 7 FCR 271 in the context of the definition of ‘mining operations’ as it then existed. In that case, the Tribunal had come to the view that diesel fuel purchased by the respondent for use in the generation of electricity for the town of Pannawonica was not part of the operation of mining for minerals, but that the fuel was purchased for use in an operation connected with mining for minerals. The decision was affirmed by the full Federal Court.

<sup>29</sup> In the case of *Collector of Customs v. Cliffs Robe River Iron Associates* (1985) 7 FCR 271, the town of Pannawonica was located some five kilometres from the place where mining was being carried on, and this was not deemed excessive for a mining town.

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has been carried on if the rehabilitation is carried out by:

- (i) the person who carried on the mining operation at the place; or
  - (ii) person contracted by that person to carry out the rehabilitation; or
- (ka) the rehabilitation of a place affected by a mining operation referred to in paragraph (a) or (b) if the rehabilitation is carried out by:
- (i) person who carried on the mining operation; or
  - (ii) a person contracted by that person to carry out the rehabilitation.

146. Paragraph (k) relates to fuel that was purchased for use or used before 1 July 1995, and is therefore now redundant. Paragraph (ka) relates to diesel fuel purchased for use or used after this date and states that rebate is payable for rehabilitation of any ‘place affected by a mining operation referred to in paragraph (a) or (b)’.

147. Rehabilitation means the act of restoring land affected by mining to a reasonable approximation of the condition it was in prior to mining operations taking place, and/or to an agreed or acceptable environmental standard. Rebate is not payable on activities that extend beyond this, such as preparatory work for building construction, the establishment of sports fields, or for converting a disused mine site to a garbage tip.

148. Whilst rehabilitation activities will generally be undertaken when the relevant mining operations have been completed, this is not a condition of eligibility. Diesel fuel purchased for use in rehabilitation that takes place whilst the mining operations referred to in paragraph (a) or (b) are continuing will also be eligible for rebate.

149. It should be noted that subparagraphs (k)(i) and (ii) and (ka)(i) and (ii) apply a clear identity test. Rebate is therefore payable to the entity that carried on the eligible mining operations immediately prior to their cessation. Rebate is also payable to any contractor(s) that entity may engage to undertake rehabilitation work.

150. Reference should also be made to the definition of ‘minerals’, as well as the terms of paragraph (x) of the definition of ‘mining operations’. Rebate is not payable if the fuel is used to rehabilitate a place where the material extracted is excluded in the definition of ‘minerals’, or is excluded by paragraph (x). Detail on what constitutes a mineral can be found at paragraphs 27 to 29.

***Searching for Ground Water***

151. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (l) searching for ground water solely for use in a mining operation referred to in paragraph (a) or (b), or the construction or maintenance of facilities for the extraction of such water, solely for that use, if the searching, construction or maintenance:
  - (i) occurs at the place where the mining operation is carried on; and
  - (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the searching, construction or maintenance.

152. As explained at paragraph 84 of this Bulletin, the expression ‘solely’ in this paragraph takes on its ordinary meaning of ‘only’ or ‘exclusively’. Therefore, the water which is the subject of the search must be intended exclusively for use in a mining operation under paragraph (a) or (b).

153. Unlike paragraphs (m) and (n) (discussed below), the search for ground water or the construction or maintenance of facilities for the extraction of the ground water is limited to the place where the relevant mining operation is carried on. Whilst paragraph (l) is limited to ground water, paragraphs (m) and (n) refer to the pumping or the supply of water generally.

154. ‘Ground water’ is water that lies beneath the surface of the ground, usually in aquifers. Searching for ground water includes the repositioning or relocation of equipment undertaking the search for ground water provided it is performed in a systematic manner. It does not include the relocation of equipment between sites, as such relocation is not ‘at the place’. The construction or maintenance of facilities must be for the extraction of such water and not for any other purpose. For the relevant activity to qualify as a ‘mining operation’ under this paragraph it must be carried on either by the person who carries on the relevant mining operation or by a contractor.

155. Rebate is payable on diesel fuel purchased for use in a mining operation under this paragraph even if the search does not result in any ground water being found.

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## *Pumping of Water*

156. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (m) pumping of water solely for use in a mining operation referred to in paragraph (a) or (b) if the pumping:
  - (i) occurs at the place where the mining operation is carried on or at a place adjacent to that place; and
  - (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the pumping.

157. To qualify as a ‘mining operation’ under this paragraph, the water being pumped must be exclusively or only for use in the relevant mining operations. The pumping of water must occur at the place where a mining operation within paragraph (a) or (b) is carried on or at a place that is adjacent to that place and must be carried out either by the person that carries on the relevant mining operation or by a contractor.

158. The activity that constitutes ‘mining operations’ under this paragraph is the pumping of water. Therefore, the construction or maintenance of facilities for the pumping or the maintenance of infrastructure, including the laying of supply pipes, does not qualify as a mining operation under this paragraph. Only the diesel fuel purchased for use in the actual pumping of water from above or below the ground is eligible for rebate. Diesel fuel purchased for use in the transportation or construction or maintenance of infrastructure is not eligible under this paragraph.

## **Supply of Water**

159. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (n) the supply of water solely for use in a mining operation referred to in paragraph (a) or (b) if:
  - (i) the supply is to the place where the mining operation is carried on; and
  - (ii) the water comes from that place or a place adjacent to that place; and
  - (iii) the supply is carried out by the person who carries on the mining operation or by a person

contracted by that person to carry out the supply.

160. For the supply of water to qualify as a ‘mining operation’ under this paragraph, the water must be exclusively for use in a mining operation in paragraph (a) or (b). The supply is not limited to the supply of ground water. The water must come from either the place where the relevant mining operation is carried on or from a place that is adjacent to that place. The supply must be to the place where the relevant mining operation is carried on.

161. The supply of water includes all off-road modes of supplying water. These can include off-public road transportation, subject to the exclusion in paragraph (y) (refer to paragraphs 227 to 233 of this Ruling for further details), supply through a pipeline system, and water carried as part of the cargo on a vessel.

162. Where the water is carried as part of the cargo on a vessel an apportionment may be necessary to ensure that the rebate is only allowed in respect of diesel fuel purchased for use in activities that constitute ‘mining operations’ under paragraph (n). For example, if a supply vessel transporting a mixture of cargo including water undertakes a direct journey from its home port to an offshore rig, an apportionment may be necessary to ensure that rebate is not allowed in relation to the transporting of cargo that is excluded from the definition of ‘mining operations’ by paragraph (z). A reasonable basis of apportionment must be used. For example, an apportionment could be made by reference to the weight of the water as a percentage of the total weight of the cargo. That percentage would then be applied to the diesel fuel purchased for use in that journey to calculate the amount of rebate payable. If a journey involves detours, a more complicated method of apportionment may need to be used.

163. An apportionment would not be necessary if the claim for the rebate was made under the category of Marine Transport effective from 1 July 2000.

164. We do not consider the concept of supply to extend to all of the steps necessary for the supply of water to take place. Diesel fuel purchased for use in the construction and maintenance of supply infrastructure, such as pipelines, would thus not be eligible for rebate under paragraph (n).

### ***Construction or Maintenance of Private Access Roads***

165. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ...includes:

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- (o) the construction or maintenance of private access roads for use in a mining operation referred to in paragraph (a) or (b) if the construction or maintenance:
  - (i) occurs at the place where the mining operation is carried on; and
  - (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the construction or maintenance.

166. Whilst there is no single factor that is conclusive in identifying a private access road the following may be indicative of a private access road:

- Permission is required from the land owner, permit holder or licensee to use the road;
- The road is not constructed for use by the public, and is not continuously or regularly used by the public;
- The road is unsealed;
- There is no thoroughfare to places, for example local communities, other than the relevant mining operations;
- The road is constructed 'at the place';
- The road is constructed for private use in a mining operation.

167. Factors that may be indicative of a road that is not a private access road include the following:

- The road has been dedicated or gazetted as a 'public road';
- The road is generally available for public use;
- The road is maintained by a State, Territory or Local Government authority;
- Vehicles must be registered to use the road and State or Territory traffic laws are applicable;
- The road is shown on official maps as a public road;
- Tourist signs and appropriately placed barbecues or picnic areas have been provided along the road.

168. The construction or maintenance of a private access road involves the grading, levelling, watering or compacting of the soil. The extraction, processing or transportation of road base materials for use in the construction or the maintenance of roads is not a mining operation under this paragraph as these activities occur prior to the act of construction and maintenance.

169. These activities of constructing and maintaining private access roads are restricted to ‘the place’ where the mining operation referred to in paragraph (a) or (b) is carried on. The construction of a private access road on land that is the subject of a miscellaneous licence granted to the person, linking a mining site to a public road will qualify as a mining operation under this paragraph, if the road is for the purpose of transporting mineral bearing ore from a mine site to the place where that ore is beneficiated.<sup>30</sup>

*Example 10: Private access road ‘at the place’*

170. ABC Pty Ltd engages in the mining of minerals at a site northwest of Kalgoorlie. In order to facilitate access to the site, a private road is required to link it to a public road. The public road is 60 kilometres away.

171. The mine itself is located on a mining lease. The private road is to be constructed partly on this lease, as well as on a series of adjoining miscellaneous leases held by ABC. These miscellaneous leases are issued under a State mining act, and are granted to ABC for the purpose of activities directly connected to mining operations.

172. As the access road is to be constructed on land legally occupied by the miner for the purposes of undertaking a mining operation, it is ‘at the place’. The construction and maintenance of the road is thus eligible for rebate. Discussion of the term ‘at the place’ can be found at paragraph 92 of this Ruling.

***Construction or Maintenance of tailings dams and dams which store contaminants***

173. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ...includes:

- (p) the construction or maintenance of:
  - (i) tailings dams for use in a mining operation referred to in paragraph (a) or (b); or
  - (iii) dams, or other works, to store or contain water that has been used in, or obtained in the course of conducting, a mining operation referred to in paragraph (a) or (b) and that contains

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<sup>30</sup> See the facts of the case in *Hampton Transport Services Pty Ltd & CEO of Customs* W2000/374 AAT Case No 893 (2001) at 10-12; W2000/400 AAT Case No 894 (2001).

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contaminants that preclude its release into the environment;

if the construction or maintenance:

- (i) occurs at the place where the mining operation is carried on or at a place adjacent to that place; and
- (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the construction or maintenance

174. Tailings are materials rejected from a mine after most of the recoverable valuable minerals have been extracted. A tailings dam is therefore an area set aside for the storage of these materials.<sup>31</sup>

175. We consider dams or other works used in the storage of contaminated water that has been used in a mining operation to consist of ponds, mudlakes, dykes and other similar works.

176. The construction or maintenance of dams to hold contaminated water involves the grading, levelling or compacting of the soil. Under paragraph (p), the extraction, processing or transportation of materials for use in the construction or the maintenance of these dams are excluded from the rebate as they involve activities that occur prior to the construction and maintenance functions.

177. The phrase 'construction or maintenance' is interpreted as including repairing and servicing.

178. The construction and maintenance of tailings dams or other dams to store or contain contaminated water can be either at the place where the relevant mining operation is carried out or at a place adjacent to it. See paragraphs 97 to 98 of this Ruling for a discussion of 'adjacent'.

## **Construction and maintenance of dams which store uncontaminated water**

179. The definition of 'mining operations' in subsection 164(7) of the Customs Act states in part:

**"mining operations"** ... includes:

- (pa) the construction or maintenance of dams for the storage of uncontaminated water for use in a mining operation referred to in paragraph (a) or (b) if the construction or maintenance:

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<sup>31</sup> Taxation Ruling TR 1999/2.

- (i) occurs at the place where the mining operation is carried on; and
- (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the construction or maintenance.

180. The construction or maintenance of dams to hold fresh water involves the grading, levelling or compacting of the soil. Under paragraph (pa), the extraction, processing or transportation of materials for use in the construction or the maintenance of these dams are excluded from the rebate as they involve activities that occur prior to the construction and maintenance functions.

181. The phrase ‘construction or maintenance’ is interpreted as including repairing and servicing.

182. The construction and maintenance of dams to store or contain fresh water must be at the place where the relevant mining operation is carried out for rebate to be payable. See paragraph 92 of this Ruling for a discussion of ‘at the place’.

### **Construction and maintenance of private airstrips, buildings and plant**

183. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (q) the construction or maintenance of private airstrips, buildings, plant or equipment for use in a mining operation referred to in paragraph (a) or (b) if the construction or maintenance:
  - (i) occurs at the place where the mining operation is carried on; and
  - (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the construction or maintenance.

184. Under this paragraph, the extraction, processing or transportation of materials used to construct or maintain private airstrips, buildings, plant or equipment integral to the mining operations are excluded from the rebate, as they involve activities that occur prior to the construction and maintenance functions.<sup>32</sup>

<sup>32</sup> See *CEO of Customs v. McDermott Industries* (7 July 1997) W96/238 AAT No. 12014.

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185. We consider that the phrase ‘construction or maintenance’ includes repairing and servicing.

186. The construction or maintenance of administration offices, mess halls, equipment sheds, workshops and storage facilities that are for use in the mining operation may be eligible for the rebate under this paragraph. The reference to buildings, plant or equipment is not limited to those that are associated with any airstrip that is constructed or maintained but applies to all buildings, plant and equipment for use in the relevant mining operation. However, the construction and maintenance of a mining town would not be a mining operation under this paragraph.

187. Diesel fuel purchased for use in the construction and maintenance of pipelines used in the supply of water may be considered for eligibility under this paragraph.

188. For the activity to be a mining operation under this paragraph it must occur at the place where the mining operation is carried on and must be carried out by the person who carries on the mining operation or by a contractor. See paragraph 92 of this Ruling for a discussion of ‘at the place’.

## ***Construction and Maintenance of Power Stations or Lines***

189. The definition of mining operations in subsection 164(7) of the Customs Act states in part:

**“mining operations”**...includes:

- (r) the construction or maintenance of power stations or lines solely for use in a mining operation referred to in paragraph (a) or (b) if the construction or maintenance:
  - (i) occurs at the place where the mining operation is carried on; and
  - ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the construction or maintenance.

190. For the construction or maintenance of power stations or power lines to be a ‘mining operation’ under this paragraph, they must be ‘solely’ for use in the relevant mining operation. The power station or power lines must not be constructed or maintained partly for use in the relevant mining operation and partly for some other purpose.

191. Under this paragraph, the extraction, processing or transportation of materials used to construct power stations or lines integral to the mining operations is excluded from the rebate as it

involves activities that occur prior to the construction and maintenance functions.

192. We consider that the phrase ‘construction or maintenance’ includes repairing and servicing.

*Example 11: Power lines for the provision of electricity to a mining town*

193. Continuing the example at paragraphs 86 – 89, only fuel purchased for use in the construction of the feeder line to the mine site would be eligible for the rebate.

### ***Removal and Disposal of Waste Products***

194. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**‘mining operations’** ... includes:

- (s) the removal of waste products of a mining operation referred to in paragraph (a) or (b) from the place where the mining operation is carried on; or
- (t) the disposal of waste products of a mining operation referred to in paragraph (a) or (b) at the place where the mining operation is carried on.

195. A waste product can be described as something that is an excess material, or is unproductive and superfluous.<sup>33</sup> It can include any matter, whether liquid, solid, gaseous or radioactive, with or without matter in suspension or solution in it, which is discharged, emitted or deposited in such volume, constituency or manner as to cause an alteration of the environment. The concept of waste embraces all unwanted and economically unusable or rejected by-products at any given place and time, and any other matter which may be discharged, accidentally or otherwise, to the environment. Waste is not restricted to naturally occurring materials such as tailings and gangue, and includes sewerage or garbage. For instance, waste includes used pipes or tubing from drilling operations. It also includes domestic and industrial waste from the mining operations.<sup>34</sup>

196. The fact that something may at some later time be reused does not necessarily preclude it from being waste.

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<sup>33</sup> See *Water Administration Ministerial Corporation v. CEO of Customs* (13 August 1997) N96/1212 AAT No 12111, in which the Tribunal considered that the term ‘waste’ could encompass these concepts.

<sup>34</sup> *Esso Australia Pty Ltd v. CEO of Customs* (22 May 1998) V96/1393 V96/1394 AAT No 12919 at paragraph 20.

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197. A claimant must be able to prove that the waste products have been rendered useless as a result of the relevant mining operation. The waste products must be a product of a mining operation referred to in paragraphs (a) or (b) and not of a mining operation under paragraphs (c) to (w) or of some other operation.

198. Removal in the context of paragraph (s) means the taking away of, or the movement of the waste product away from the place where the relevant mining operation is carried on. Thus, the requirements of the paragraph will not be met if there is a movement of waste products from one part of the place to another part of the same place. The paragraph does not encompass the disposal of waste products at the place where the relevant mining operation is carried on.

199. We consider that diesel fuel purchased for use in the transport of a waste product for disposal within a place at which a mining operation is carried on will be eligible under paragraphs (a) or (b).

200. It should be noted that, as discussed at paragraphs 234 to 236 of this Ruling, the transportation of waste products from the place where the relevant mining operation is carried on is not affected by the exclusion contained in paragraph (z).

201. Under paragraph (t), the disposal of waste products of the relevant mining operation must occur at the place where the relevant mining operation is carried on. The waste product must be the product of the particular mining operation. In the context of the paragraph, 'disposal' means the elimination, destruction or, in any other manner, getting rid of a waste product. This can include disposal by burying or incineration.

## ***The service, maintenance or repair of vehicles, plant and equipment used in activities outlined in paragraphs (a) and (b)***

202. The definition of 'mining operations' in subsection 164(7) of the Customs Act states in part:

**"mining operations"** ... includes:

- (u) the service, maintenance or repair of vehicles, plant or equipment for use in mining operations referred to in paragraph (a) or (b) if the service, maintenance or repair:
  - (i) occurs at the place where the mining operation is carried on; and
  - (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the service, maintenance or repair.

203. Subject to paragraph (y), rebate is payable on the service, maintenance or repair of vehicles used in exploration or prospecting, removal of overburden and other activities undertaken in the preparation of a site, mining for minerals, or the beneficiation of those minerals or of ores bearing minerals.

204. Paragraph (y) precludes the use of vehicles not exceeding 3.5 tonnes gross vehicle weight, other than fork-lifts, front-end loaders, tractors, and vehicles that have been extensively modified for use underground. Therefore, diesel fuel purchased for use in these kind of vehicles, and in the service, maintenance and repair of these kinds of vehicles, is not eligible for a rebate.

205. Plant can be described as the machinery and tools needed to carry on the relevant mining operations. Plant can include the pipeline constructed between a well head and a point of beneficiation. Service or maintenance can include sand blasting and/or repainting of the eligible vehicles, plant or equipment.

206. For the purposes of paragraph (u) the service, maintenance or repair must occur at the place where the mining operation is carried on.<sup>35</sup> The transportation of vehicles, plant or equipment away from the place for repair work to be carried out elsewhere would not be an activity that is within the paragraph.

***The service, maintenance or repair of vehicles and equipment used in activities outlined in paragraph (c)***

207. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (v) the service, maintenance or repair of vehicles or equipment solely for use in a mining operation referred to in paragraph (c) if the service, maintenance or repair is carried out by:
  - (i) the person who carries on the mining operation; or
  - (ii) a person contracted by that person to carry out the service, maintenance or repair.

208. Unlike paragraph (u), paragraph (v) refers to vehicles or equipment used in activities referred to in paragraph (c); that is, the transportation of minerals or ores for beneficiation at a place other than the mine site. Details regarding the provisions of paragraph (c)

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<sup>35</sup> See *Goodyear Australia Ltd and Others v. CEO of Customs* AAT No 13035 [1998] AATA 488 (1 July 1998) at paragraph 13.

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can be found at paragraphs 102 to 103 of this Ruling. Paragraph (v) does not apply to plant that is used in the relevant mining operation.

209. The vehicle or equipment must be for use exclusively in activities outlined in paragraph (c) for their service, maintenance or repair to be eligible under paragraph (v). Paragraph (v) does not require that the service, maintenance or repair be carried out either at the mining site or the place where the beneficiation takes place. However, paragraph (z) excludes the transportation of equipment, people and parts to or from the place where the relevant mining operation is carried on. In the context of the paragraph, service or maintenance of vehicles includes sand blasting and/or repainting of the relevant vehicles or equipment.

### *The service, maintenance or repair of transport networks*

210. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

“**mining operations**” ... includes:

- (va) the service, maintenance or repair of transport networks that are employed solely for use in a mining operation referred to in paragraph (c) to the extent that the service, maintenance or repair:
  - (i) is carried out on so much of the network as is located at the place where a mining operation referred to in paragraph (a) or (b) is carried out; and
  - (ii) is carried out by the person who carries on the mining operation referred to in paragraph (c) or by a person contracted by that person to carry out the service, maintenance or repair.

211. We consider a transport network to consist of a group or system of interconnected transport infrastructures utilised for the movement of minerals, or ores bearing minerals, from the mining site to the place of beneficiation. A transport network is intended to encompass railway and road networks,<sup>36</sup> and is defined to include conveyor belts, pipelines and railway lines.<sup>37</sup>

212. For diesel fuel purchased for use in the service, maintenance or repair of transport networks to be eligible for rebate under this paragraph:

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<sup>36</sup> Supplementary Explanatory Memorandum to the *Customs and Excise Legislation Amendment Bill 1995* Item 21.

<sup>37</sup> *Customs Act 1901* section 164(7).

- the transport network must be employed exclusively for use in activities that constitute mining operations under paragraph (c);
- the service, maintenance or repair must be carried out on the transport network that is located at the place where a mining operation under paragraph (a) or (b) is carried out; and
- it must be carried out by the person who undertakes the journeys referred to in paragraph (c) or by a subcontractor of that person.

213. Where service, maintenance or repair is carried out on parts of the transport network that are located partly at the place where a mining operation referred to in paragraph (a) or (b) is carried on and partly outside that place, only the service, maintenance or repair carried out at that place qualifies as a mining operation. An apportionment of diesel fuel will need to be made to ensure that rebate is allowed only in relation to that portion that is for the eligible activities.

214. Under paragraph (va), rebate is payable only on service, maintenance or repair. Rebate is not payable on the construction or installation of a transport network under this paragraph, as these activities are said to occur prior to any service, maintenance or repair.

215. Paragraph (z) precludes from the definition of mining operations the transport of people, equipment or goods to or from the place at which a mining operation is carried on. Diesel fuel purchased for use in the transport of people, equipment or goods required for service and maintenance to or from the place is not eligible for a rebate.

### ***Residential premises***

216. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... includes:

- (w) the use of diesel fuel at residential premises in:
  - (i) providing food and drink for; or
  - (ii) providing lighting, heating, air-conditioning, hot water or similar amenities for; or
  - (iii) meeting other domestic requirements of;

residents of the premises if:

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- (iv) the use is by a person who carries on a mining operation referred to in paragraph (a) or (b); and
- (v) the residential premises are situated at the place where the mining operation is carried on, or at a place adjacent to that place.

217. To be eligible for rebate, diesel fuel purchased for use at residential premises must meet a dual locational test.

218. The first part of this test is to determine whether the diesel fuel is purchased for use 'at' residential premises. When considering this issue, the Courts have taken the view that the diesel fuel must be purchased for use at a place that may be reasonably identified with the premises.<sup>38</sup> The plant or generator in which the diesel fuel is purchased for use should thus be appurtenant to the premises and coherent with them, and it should be able to be said that it 'belongs' to the premises.

219. The second part of the locational test is to determine whether the premises themselves are 'at the place' at which the relevant mining operation is carried on, or at a place that is adjacent to that place. See paragraph 92 of this Ruling for a discussion of 'at the place' and paragraphs 97 to 98 for a discussion of 'adjacent'.

220. Therefore, for rebate to be payable under paragraph (w), the diesel fuel that is purchased must meet the following criteria:

- it is purchased for use 'at' the residential premises;
- it is purchased for use in the manner dictated by subparagraphs (w)(i), (ii) or (iii);
- it is purchased for use by a person carrying on a mining operation referred to in paragraphs (a) or (b) of the definition; and
- the residential premises are located 'at the place' or adjacent to the place where a mining operation under paragraph (a) or (b) is carried on.

## **Activities excluded from 'mining operations'**

221. As discussed at paragraph 34 of this Ruling, certain activities are excluded from 'mining operations' by the provisions of paragraphs (x) to (z) of the definition. These paragraphs are dealt with below.

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<sup>38</sup> *Collector of Customs v. Rottnest Island Authority* [1994] 119 ALR 406 at 421; 48 FCR 177.

***Quarrying or dredging***

222. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... does not include:

- (x) quarrying or dredging operations to the extent that the purpose of the operations is to obtain materials for use in building, road making, landscaping, construction or similar purposes.

223. We consider quarrying to be the removal of building stone, slate or similar products from an excavation or pit by cutting or blasting. We consider dredging to be the use of a machine to remove sand, silt and mud, usually from the bottom of a waterway.

224. Activities excluded as quarrying or dredging operations may encompass the excavation or extraction of sand, sandstone, soil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel, water or limestone. However, the quarrying of ‘agricultural use limestone’, as defined by subsection 164(7) of the Customs Act, may be eligible under the Agriculture category.

225. The exclusion of quarrying or dredging operations depends on the purpose for such operations. It is only when the purpose of the operation is to obtain materials for use in building, road making, landscaping, construction or other similar purpose, that it is excluded under paragraph (x).

**Use of vehicles**

226. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

**“mining operations”** ... does not include:

- (y) the use of a vehicle (other than a fork-lift, front-end loader, tractor or other similar prescribed vehicle) not exceeding 3.5 tonnes gross vehicle weight, other than such a vehicle that is extensively modified for use underground while it is so used.

227. There is no single factor that is conclusive in identifying a vehicle that has been ‘extensively modified for use underground’.

228. As a guide, factors that may be indicative of a vehicle that is extensively modified for underground use include the following:

- The vehicle is locked into low range gearing, that is, it can only operate in 1st, 2nd or 3rd gear;
- Significant alterations or modifications are made to the vehicle’s bodywork;

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- The vehicle is fitted with a speed limiting device;
- The vehicle is fitted with overhead protection;
- The vehicle is fitted with electronic system isolating switches;
- The vehicle is flame proof, has emission controls and is purpose built with electronic shutdown systems;
- The vehicle has been specifically approved for underground use by a State or Territory mining authority.

229. Vehicles that are under 3.5 tonnes gross vehicle weight and are not fork-lifts, front-end loaders or tractors or similar vehicles that are modified for use in an open cut mine are not excluded from the operation of paragraph (y). These vehicles are not modified for use underground *while they are so used* in an open cut mine.

230. If a vehicle is extensively modified for use underground and is used partially underground and partially overground, rebate is only payable on diesel fuel that is purchased for use whilst the vehicle operates underground.

231. Minor modifications, such as the removal or addition of certain lights, bumpers or doors, do not make a vehicle extensively modified for underground use, regardless of the fact that such modifications may make the vehicle unable to be registered for use on a public road.

232. Rebate is *not* payable on diesel fuel purchased for use in the service, maintenance or repair of vehicles that are excluded by paragraph (y). See paragraphs 204 to 205 of this Ruling for further detail.

## Transport exclusions

233. The definition of ‘mining operations’ in subsection 164(7) of the Customs Act states in part:

‘**mining operations**’ ... does not include:

- (z) the transport, by any means, of people, equipment or goods to or from a place where a mining operation referred to in any paragraphs (a) to (w) is, or is to be, carried on, or to or from a place adjacent to that place, other than such transport to the extent that it constitutes the activity described in paragraph (c), (n), or (s).

234. The above paragraph excludes the payment of rebate on diesel fuel purchased for use in the transportation of people, equipment or goods to or from ‘a place’, being a place where the relevant mining operation is being carried on or a place that is adjacent to that place.

However, paragraph (z) does not apply to transportation activities that are specifically covered by paragraph (c), (n) or (s). Moreover, paragraph (z) does not apply to the transportation of natural gas from the site where that gas is mined to the place where the liquefaction of the gas occurs, if the liquefaction takes place at a place other than the mine site.<sup>39</sup> However, the definition does not exclude operating eligible vehicles, vessels or other transport infrastructure for the transport of people, equipment or goods ‘within’ locations that are ‘at a place’ of a mining operation referred to in paragraph (a) or (b).

235. Diesel fuel purchased for use in activities covered by paragraph (z) are automatically excluded from the Diesel Fuel Rebate Scheme. The only exceptions to this are the activities covered in paragraphs (c) (refer to paragraph 102 of this Rulings for details), (n) (paragraph 160), or (s) (paragraph 195).

## **Detailed contents list**

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236. Below is a detailed contents list for this draft Fuel Grant and Rebate Ruling:

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<sup>39</sup> In the context of the paragraph (z), natural gas would come within the meaning of the term ‘goods’ However, although not expressly excluded from the application of paragraph (z), we consider that it would not accord with the intent of the legislation to interpret paragraph (z) in a manner that excluded the transportation activity specifically included in the definition of ‘mining operation’ under paragraph (f).

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## **Your comments**

237. We invite you to comment on this draft Fuel Grant and Rebate Ruling. We are allowing 6 weeks for comments before we finalise the Ruling. If you want your comments to be considered, please provide them to us within this period.

# FGRR 2002/D1

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## Commissioner of Taxation

12 June 2002

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### *Previous draft:*

Not previously released in draft form

### *Related Rulings/Determinations:*

TR 1999/2

### *Subject references:*

- Diesel Fuel Rebate Scheme
- Mining operations

### *Legislative references:*

- AIA 21(b)
- AIA 15AA
- TAA 1953 IVAAA
- TAA 1953 37
- Customs Act 164(2)
- Customs Act 164(7)
- Customs Act 164(7)(d)
- Customs Act 164(7A)
- Customs Act 164(7A)(b)
- Customs Act 164(7B)
- Customs Act 164(7C)
- Customs Act 164(10)
- Customs Act 164(9)(a)
- Customs Act 164(9)(b)
- Customs Act 164A(1)
- Excise Act 78A(1)
- Excise Act 78A(2)
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### *Case References:*

- Australian National Railways v. Collector of Customs (1985) 8 FCR 264
- CEO of Customs v. McDermott Industries (7 July 1997) W96/238 AAT No. 12014

- CEO of Customs v. WMC Resources Ltd (as agent for East Spar Alliance) 1271 FCA (9 October 1998)
- Collector of Customs v. BHP Coal Ltd Q91/446, AAT Case 9266; 32 ALD 773; (1994) 53 FCR 499
- Collector of Customs v. Cliffs Robe River Iron Associates (1985) 7 FCR 271
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- Customs and Excise Legislation Amendment Bill 1995 Item 21
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- David Mitchell v. CEO of Customs (2001) FCA 294; 46 ATR 433
- Esso Australia Pty Ltd v. CEO of Customs (22 May 1998) V96/1393 V96/1394 AAT No. 12919
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- Hampton Transport Services Pty Ltd & CEO of Customs W2000/374 AAT Case No. 893 (2001); W2000/400 AAT Case No 894 (2001)
- North Australian Cement Ltd v. FCT (1969) 119 CLR 353
- State Rail Authority (NSW) v. The Collector of Customs (1991) 33 FCR 211
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