

# ***TR 93/33 - Income tax: gold mining: tailing dumps as trading stock of gold tailings processors and gold mining operators***

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! This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

! This document has changed over time. This is a consolidated version of the ruling which was published on *29 November 2006*



## Taxation Ruling

### Income tax: gold mining: tailing dumps as trading stock of gold tailings processors and gold mining operators

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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner*

*[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]*

## What this Ruling is about

1. This Ruling explains:
  - (a) when dealings in gold mining tailings
    - (i) constitute the granting/acquisition of a *profit à prendre*;
    - or
    - (ii) constitute the disposal/acquisition of trading stock;
  - (b) when gold mining tailings which have been abandoned become trading stock again;
    - and
  - (c) the extent to which it applies to other mineral tailings and abandoned low grade ores.
2. This Ruling deals with the taxation implications of the acquisition, disposal or reprocessing of gold mining tailings under sections 70-10 and 70-35 of the *Income Tax Assessment Act 1997* (ITAA), and does not deal with any other provisions of the ITAA.
3. Key terms in this Ruling are defined in paragraph 12.

## Ruling

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### **(a)(i) The granting/acquisition of a *profit à prendre* in relation to gold mining tailings**

4. Where gold mining tailings have been abandoned, it is not possible to deal in them as chattels, but only to grant a *profit à prendre*. The grant of a *profit à prendre* does not constitute a disposal of trading stock.
5. Correspondingly, the acquisition of a *profit à prendre* over gold mining tailings by a processor is not the acquisition of trading stock under section 70-35.

### **(a)(ii) The disposal/acquisition of gold mining tailings as trading stock**

6. Where gold mining tailings have not been abandoned, a disposal of the tailings is a disposal of chattels. The sale by a gold mining operator of gold tailings which have not been abandoned will usually be a disposal of trading stock by the operator.
7. The purchase of gold mining tailings, which have not been abandoned, by a gold tailings processor will be an acquisition of trading stock by the processor.

### **(b) When abandoned gold mining tailings become trading stock again**

8. If gold mining tailings have been abandoned, they will become trading stock again when they are severed from the ground for the purpose of reprocessing or sale, either by a gold mining operator or by a gold tailings processor.

### **(c) Application of Ruling to other mineral tailings and abandoned low grade ores**

9. The principles discussed in this Ruling will apply to other mineral tailings where operations are carried out in a similar way to the gold mining industry.
10. Similarly, the principles discussed in this Ruling will also apply to low grade ore of gold or other minerals. Such ore may be abandoned and later severed from the ground and reprocessed or sold, and may be trading stock of the mine operator or other processor.

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## Date of effect

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11. This Ruling applies to years commencing 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 (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

**Note:** The Addendum to this Ruling that issued on 20 August 1997 applies to the 1997-98 and later income years.

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## Definitions

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12. The following definitions of key terms apply for this Ruling :

### **abandonment**

-A miner or later holder of the tailings has abandoned tailings when, viewed objectively, they have left the tailings with no intention to treat, process or sell them.

The determination of whether tailings had been abandoned would be ascertained on the facts of each case. Relevant factors to be considered include -

- length of time tailings have been left undisturbed
- whether tailings are treated as trading stock in the miner's financial accounts
- the value put on the tailings by the miner
- whether there are any definite proposals to process or otherwise deal with the tailings
- continuation of mining of the site
- effect of relevant legislation, e.g. section 173 of the *Mining Act 1973* (NSW), section 20 of the *Mining Act 1929* (Tas.) or section 82 of the *Mines Act 1958* (Vic.).

### **gold mining operator**

- means a person who mines for gold by 'eligible mining operation' within the meaning of that phrase in section 330-30 of the new Act.

### **gold tailings processor**

-means a person who obtains or purchases gold tailings for processing.

### ***profit à prendre***

-means a right to enter onto the land of another and take some part of the soil and minerals.

**tailings**

-means part of the residue or materials rejected from a milling or extractive process after the minerals have been extracted.

**trading stock**

-has the same meaning as appears in section 70-10, i.e. anything produced, manufactured, or acquired for purposes of manufacture, sale or exchange.

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**Explanations**

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**(a)(i) When dealings in gold mining tailings constitute the granting/acquisition of a *profit à prendre***

13. The case of *Stow Bardolph Gravel Co Ltd v. Poole (Inspector of Taxes)* [1954] 3 All ER 637 involved an agreement to enter upon certain land to excavate sand and gravel. The English Court of Appeal held that the right to win and acquire the sand and gravel was a capital asset, the cost of which was not deductible. The right was the means by which the company supplied itself with the trading stock of its business, rather than an acquisition of the trading stock itself.

14. This example would be most relevant where a tailings processor acquires, for instance, a mining right over a disused mine from the state government.

15. In *Mills v. Stokman* (1967) 116 CLR 61 the High Court had to consider an entitlement to slate which lay on the land, having been discarded as unwanted from quarrying operations that ended some thirty years earlier. The contract in question purported to be in respect of chattels. The High Court held that because the slate had become re-attached to the land ( even though it had quite clearly been severed from the land at one time) the contract was in fact the grant of a *profit à prendre* and could not be a contract dealing with the sale of chattels (per Barwick CJ at p. 71 and Kitto J at p. 76).

16. A contract dealing with abandoned tailings will therefore be a grant of a *profit à prendre*. Costs incurred in respect of tailings in these circumstances will not be deductible.

**(a)(ii) When dealings in gold mining tailings constitute the disposal/acquisition of trading stock**

17. Tailings which have not been abandoned are chattels. Gold mining tailings are usually trading stock of a gold mining operator, but there may be circumstances where they are not trading stock. For example, tailings may simply be treated as waste from a

manufacturing process by an operator, who may intend to transport them to a dump after operations are complete. The tailings have clearly not been abandoned in this case. If a person purchases them for reprocessing, they will be trading stock to the purchaser, but they will probably not be trading stock to the vendor. The sale will simply be a disposal of chattels for income.

18 As reprocessing of gold mining tailings is common in the gold mining industry, it will usually be the intention of the operator to reprocess or sell for processing gold mining tailings. Consequently, a sale by a gold mine operator of tailings produced from the mine which are not abandoned will in most cases be a disposal of trading stock of the operator.

**(b) When abandoned gold mining tailings become trading stock again**

19. Ore is to be treated as trading stock on hand as soon as it is severed from the land. It becomes part of the stock-in-trade of the gold mining operator when it has been won, excavated and taken into its possession : *Stow Bardolph Gravel Co. Ltd v. Poole (Inspector of Taxes)*.

20. However, ore and tailings may become part of the land again when they have been abandoned: *Mills v. Stokman*. Where ore and tailings have been abandoned and consequently have become re-attached to the land (even though they had been quite clearly severed from the land at one time) they cannot be trading stock.

21. Accordingly, ore and tailings which have ceased to be trading stock, because they were abandoned and consequently re-attached to the land, will be treated as new trading stock of the gold mining operator or gold tailings processor from the moment they are severed by the operator or processor.

## **Examples**

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22. X Co. acquires the right to enter upon land owned by Y and to excavate and remove soil and minerals from the property. The rights acquired under the agreement, being rights to enter upon, excavate and remove soil and minerals, constitute a *profit à prendre* and represent a capital asset. That asset is the means by which X Co. will supply itself with the trading stock of its business, rather than trading stock itself.

23. B Co. is a gold mining operator. On its mine is a considerable amount of tailings which has been stockpiled. B Co. enters into an

agreement with D Co., a gold tailings processor, whereby D Co. acquires the tailings for an agreed price. B Co. is considered to have disposed of the tailings as trading stock and D Co. is considered to have acquired the tailings as trading stock.

24. A Co. is a gold mining operator who has recently taken over a disused gold mine. On the mining property it finds a large quantity of previously mined ore and tailings which lay on the land, having been abandoned for some time by the previous operator. The ore and tailings, although once severed from the land, have become re-attached to the land and will not constitute the trading stock of A Co. until they have again been severed from the ground.

### **Cross reference of provisions**

25. Sections 70-10 and 70-35 and the definition of 'eligible mining operation' in section 330-30 of the ITAA, to which this Ruling refers, express the same ideas as subsection 6(1), section 28 and the definition of 'prescribed mining operations' in subsection 122(1), respectively, of the *Income Tax Assessment Act 1936*.

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## **Commissioner of Taxation**

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- ITAA 1936 6(1)
- ITAA 1936 28
- ITAA 1997 70-10
- ITAA 1997 70-35
- ITAA 1997 330-30

*case references*

- Stow Bardolph Gravel Co. Ltd v. Poole (Inspector of Taxes) [1954] All ER 637
- Mills v. Stokman (1967) 116 CLR 61