TR 98/23 - Income tax: mining exploration and prospecting expenditure

This ruling is being reviewed as a result of a recent court/tribunal decision. Refer to Decision Impact Statement: ZZGN and Commissioner of Taxation (Published 12 June 2013).

This document has changed over time. This is a consolidated version of the ruling which was published on *16 December 1998*

Australian Taxation Office

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Preamble

*The number, subject heading, and the **Class of person/arrangement**, **Ruling** and **Date of effect** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Ruling is about

1. This Ruling rewrites and replaces Taxation Ruling IT 2642, which deals with mining exploration and prospecting expenditure. It contains the Commissioner's opinion on the way in which a tax law or tax laws apply to the class of persons and class of arrangements described below.

Class of person/arrangement

2. The class of persons to which this Ruling applies is taxpayers who incur expenditure (whether of a capital nature or not) on exploration or prospecting for minerals or quarry materials obtainable by eligible mining or quarrying operations. The class of arrangements to which this Ruling applies is arrangements by which these taxpayers seek deductions for exploration or prospecting expenditure under section 330-15 of the *Income Tax Assessment Act 1997* (the 1997 Act).

3. The Ruling also applies to taxpayers who incur exploration or prospecting expenditure outside Australia that qualifies as a foreign income deduction to be offset against assessable foreign income. The quarantining rules in sections 79D and 160AFD of the *Income Tax Assessment Act 1936* (the 1936 Act) apply to this expenditure.

Previous Rulings

4. Taxation Ruling IT 2642 is now withdrawn.

Ruling

5. Deductions for exploration or prospecting expenditure are allowable under section 330-15 of the 1997 Act where a taxpayer carries on, or it is reasonable to conclude a taxpayer proposes to carry on, eligible mining or quarrying operations or a taxpayer carries on an exploration or prospecting business.

6. Where a taxpayer seeks to claim excess deductions under Subdivision 330-F, subsection 330-310(2) also requires the activity tests in section 330-15 to be satisfied in any year of income in which an excess deduction is claimed.

7. Expenditure incurred on regional exploration or prospecting over large areas of land or sea before the acquisition of any mining, quarrying or exploration rights is within the meaning of 'exploration or prospecting' in section 330-20.

8. Expenditure incurred on or in relation to the acquisition of rights to enter upon an area with a view to exploration or prospecting is not expenditure incurred **on** exploration or prospecting and is not deductible under subsection 330-15(1).

9. An exempt government body that carries on a mining or exploration business and incurs exploration or prospecting type expenditure cannot effectively transfer 'undeducted' exploration or prospecting expenditure to a taxpayer under a Subdivision 330-E agreement.

10. The exploration stage of a mining or quarrying project continues until a decision to undertake the development stage is made. It is a question of fact, having regard to the nature and purpose of the expenditure being incurred, whether a taxpayer is in the exploration or development stage. However, expenditure on exploration or prospecting can continue after a decision to mine or quarry has been made.

11. Expenditure incurred on feasibility studies to evaluate the economic feasibility of mining minerals or quarry materials once they have been discovered, is expenditure within the meaning of 'exploration or prospecting' in section 330-20.

12. Expenditure incurred on exploration or prospecting outside Australia that can result in the derivation of exempt income, is not an allowable deduction under section 330-15.

13. Exploration or prospecting expenditure incurred outside Australia qualifies as a foreign income deduction where it is incurred for the purpose of deriving a class of assessable foreign income. Under section 79D of the 1936 Act, such expenditure is only

deductible against assessable foreign income of that class and section 160AFD ensures any losses that may be carried forward are quarantined to be offset against the same class of assessable foreign income derived in a subsequent year.

Date of effect

14. To the extent this Ruling reflects changes made by amendments to the law or by the Tax Law Improvement Project, it has a commencement date as provided for in those amendments and the 1997-98 income year, respectively. However, in all other respects the Ruling applies to years commencing both before and after its date of issue subject to the proviso that it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

15. To the extent this Ruling prohibits a government body from being a party to an effective agreement under Subdivision 330-E, it applies prospectively from the date of issue of this Ruling.

Explanations

Background

16. This Ruling rewrites and replaces Taxation Ruling IT 2642, which deals with the deductibility of exploration and prospecting expenditure.

17. Taxation Ruling IT 2642 issued on 27 June 1991 and since then, amendments to the income tax law have been enacted that have changed the way the law now applies. This rewritten Ruling identifies and explains those changes.

Who can claim deductions

18. Subsection 330-15(1) provides for the deductibility of expenditure (whether of a capital nature or not) incurred on exploration or prospecting for minerals or quarry materials, obtainable by eligible mining or quarrying operations. However, to be deductible a taxpayer must satisfy one or more of the tests in subsection 330-15(2).

19. The tests in subsection 330-15(2) require a taxpayer to be actually carrying on certain operations or that it be reasonable to

conclude the taxpayer proposes to carry on such operations. The relevant operations are eligible mining operations, eligible quarrying operations or eligible mining operations in the course of petroleum mining. Alternatively, the deduction is available where a taxpayer carries on a business of, or a business that includes, exploration or prospecting for minerals (including petroleum) or quarry materials, and the expenditure is necessarily incurred in carrying on that business.

20. Where the whole or part of the deduction is not claimed until a later year or years, because a taxpayer has an excess amount carried forward under section 330-310, the taxpayer must satisfy the activity tests contained in section 330-15 (as discussed in the previous paragraph) in both the year in which the expenditure is actually incurred and the year or years in which the deduction is claimed. This requirement is found in subsections 330-15(2) and 330-310(2).

The new definition

21. Section 330-15 is the operative section that allows deductions for expenditure incurred on 'exploration or prospecting'. However, 'exploration or prospecting' is defined as having the meaning given by section 330-20, which states:

> '(1) "Exploration or prospecting" includes:
>
> (a) in the case of mining in general and quarrying:
>
> (i) geological mapping, geophysical surveys, systematic search for areas containing minerals (other than petroleum) or quarry materials, and search by drilling or other means for such minerals or materials within those areas; and
>
> (ii) search for ore within, or in the vicinity of, an ore-body or search for quarry materials by drives, shafts, cross-cuts, winzes, rises and drilling; and
>
> (b) in the case of petroleum mining:
>
> (i) geological, geophysical and geochemical surveys; and
>
> (ii) exploration drilling and appraisal drilling; and
>
> (c) feasibility studies to evaluate the economic feasibility of mining minerals or quarry materials once they have been discovered.
>
> (2) The following are not "exploration or prospecting":

(a) development drilling for petroleum;

(b) operations in the course of working a mining property, quarrying property or petroleum field.'

22. The 1997 Act has introduced an open-ended inclusive definition of exploration or prospecting rather than the closed definition contained in the general mining and quarrying provisions of the previous law. The new definition represents a more flexible approach, as the meaning of 'exploration or prospecting' is no longer exhaustively defined but now has the ability to take in, over time, comparable activities that evolve from technological and other changes.

23. The term 'exploration or prospecting' would cover aerial photo geological and magnetometer surveys, seismic surveys, ore body or petroleum field evaluation projects and environmental impact studies incurred prior to any decision to commence mining or quarrying. It also covers marking out an area with posts (pegging) and rent paid to a government on claims.

24. Other costs such as transport, materials, labour and plant required to carry on exploration or prospecting also qualify for deduction under section 330-15. Plant in this context includes necessary vehicles and drilling equipment used both on and offshore. Offshore equipment includes sea-going drilling rigs, work boats, tugs, barges and helicopters as well as shore facilities used to service the offshore operations. Caravans and other accommodation such as exploration camps provided for exploration or prospecting crews are also included.

25. Interest and finance charges on moneys borrowed to finance exploration and prospecting are not deductible under section 330-15 as the amounts do not represent expenditure incurred on exploration or prospecting. The use of the phrase 'expenditure (whether of a capital nature or not) you incur ... **on** exploration or prospecting' in section 330-15 suggests there must be a direct relationship between the expenditure and the operations before the expenditure is deductible under those provisions.

26. This view is consistent with the decision of the Federal Court in *Robe River Mining Co Pty Ltd v. FC of T* 89 ATC 4606; (1989) 20 ATR 768 where it was held that exchange losses made on borrowed funds used to finance the company's mining operations were not allowable capital expenditure. The exchange losses were not incurred in carrying on prescribed mining operations, but in connection with the capital structure of the business itself.

27. The meaning of 'exploration or prospecting' in section 330-20 extends to other administrative costs incurred by mining, quarrying or

exploration entities in the course of carrying out exploration or prospecting activities (e.g., the administration cost incurred in searching for minerals, the cost of renting and maintaining an office, salaries of office staff, etc.).

Preliminary expenditure

28. The type of expenditure considered under this heading consists of reconnaissance costs incurred before the acquisition of any mining or quarrying rights.

29. The 'grass roots' stage of an exploration program often involves what may be called regional exploration. In this stage expenditure is incurred on exploration or prospecting over very large areas. This occurs before any mining or quarrying rights are acquired and does not require the consent of the holders of any mining or quarrying rights within those areas.

30. The type of expenditure incurred on regional exploration is usually incurred by a taxpayer on surveys over broad areas. Such surveys are mainly aerial surveys including the use of satellites, regional aerial photographic and geophysical studies, and the study of heat flows.

31. This type of expenditure comes within the definition of 'exploration or prospecting' in section 330-20 of Subdivision 330-A of the 1997 Act and is deductible in the year incurred under section 330-15.

32. The view put in Taxation Ruling IT 2642 that this type of expenditure incurred by a general mining entity is not deductible is no longer the law. The legal requirement that mineral exploration or prospecting expenditure had to be incurred 'on any mining tenement' was removed by an amendment to the general mining law introduced by *Taxation Laws Amendment Act (No 3) 1991* effective from 1 July 1991.

33. The explanatory memorandum that accompanied the amendment explained the removal of the words 'on any mining tenement' from subsection 122J(1) and paragraph 122J(4D)(b)(i) of the 1936 Act would allow an immediate deduction for exploration and prospecting expenditure incurred on areas where no tenement has been acquired or where no access has otherwise been given.

Cost of acquiring exploration permits / rights

34. Expenditure on, or in relation to, the acquisition of rights to enter upon an area with a view to exploration or prospecting thereon

by a taxpayer who carries on, or proposes to carry on, eligible mining or quarrying operations, does not qualify for deduction under Subdivision 330-A of the 1997 Act. Neither is it deductible under Subdivision 330-C as allowable capital expenditure unless it qualifies as expenditure taken to have been incurred because of Subdivision 330-D (which is about cash bidding) or included in an agreement made under Subdivision 330-E.

35. Examples of expenditure in this category are:

(a) survey fees to check the mineral claim areas;

(b) advertising to comply with mining regulations;

(c) attending at court hearings to confirm rights;

(d) payments to holders of tenements for abortive options;

(e) lump sum buying-in and lump sum compensation payments to landlords or other interested parties for long term rights to enter the property;

(f) application fees for exploration licences;

(g) legal costs in connection with (e) and (f) above; and

(h) costs incurred in negotiating and effecting farm-out and farm-in arrangements.

36. It is considered expenses relating to the acquisition of exploration or prospecting rights by taxpayers carrying on, or proposing to carry on, eligible mining or quarrying operations, are not incurred '**on**' exploration or prospecting activities as required by section 330-15. Expenditure on acquiring exploration permits / rights, and any associated costs, is preparatory to, or a prerequisite of, being able to carry out the type of exploration activities covered by section 330-15.

37. Support for this view is found in *Utah Development Co. v. FC of T* 75 ATC 4103; (1975) 5 ATR 334. In that case, in order to obtain a mining lease over Crown land, the taxpayer was required to pay compensation to the holders of pastoral leases over the land as compensation for disturbance to the land. The court held the amounts were not spent in carrying **on** mining operations upon a mining property for the extraction of minerals from their natural site, but for the purpose of acquiring a mining property or for the purpose of acquiring the right to use a property as a mining property. The court categorised the payments as being merely preparatory to, or a prerequisite of, the carrying on of prescribed mining operations.

38. This may be contrasted with the case of a taxpayer carrying on a business of exploration or prospecting that intends to derive income not by mining or quarrying but by assigning or selling its rights to

mine or quarry. Where such a business is being carried on, expenditure incurred on acquiring exploration or prospecting rights is part and parcel of the manner in which such a business is conducted and is deductible under section 8-1 of the 1997 Act. In *FC of T v. Ampol Exploration Limited* 86 ATC 4859; (1986) 18 ATR 102 the court found the whole of the taxpayer's expenditure was deductible under subsection 51(1) of the 1936 Act because it was necessarily incurred by the taxpayer in carrying on its business of petroleum exploration.

Obtaining 'mining, quarrying or prospecting information' from third parties

39. Where a taxpayer incurs expenditure in acquiring a mining, quarrying or prospecting right or mining, quarrying or prospecting information from another person (the seller), the taxpayer and the seller may agree to include a specified amount in the allowable capital expenditure of the taxpayer. The taxpayer must incur the expenditure for the purpose of carrying on eligible mining or quarrying operations or exploration or prospecting for minerals or quarry materials obtainable by such operations.

40. The amount specified in the agreement cannot exceed the lesser of:

- the amount paid by the taxpayer; and
- the sum of:
  - (a) the balance of allowable capital expenditure relating to the right or information, and exploration expenditure, that the seller has left to deduct; and
  - (b) any assessable balancing adjustment from the sale.

41. The requirements for the agreement are in Subdivision 330-E - 'Selling a right or information'. The mining, quarrying or prospecting information that can be disclosed is that which has been obtained from exploration or prospecting or eligible mining or quarrying operations. The reference to 'obtained from exploration or prospecting' is considered to relate to information that has been obtained from exploration or prospecting expenditure that qualifies as deductible under section 330-15.

42. This accords with the tenor of Subdivision 330-E that has, as far as is relevant, the practical effect of transferring deductions for exploration or prospecting expenditure. Paragraph 330-245(2)(b), which sets a limit on the amount that can be transferred, makes reference to 'exploration or prospecting', a term defined in section 330-20. Section 330-20 is a definition section for the purposes of the

application of section 330-15, the operative section that allows expenditure on 'exploration or prospecting' to be **deductible**. Section 330-15 adds something to the definition of 'exploration or prospecting' and that is a further requirement that the 'exploration or prospecting' expenditure must be **deductible**.

43. Further support that a Subdivision 330-E agreement only relates to **deductible** expenditure is found in subparagraph 330-245(2)(b)(i), which makes reference to exploration or prospecting expenditure the seller has deducted or can deduct for an income year and subsection 330-270(1), which provides that by specifying an amount in an agreement, the seller gives up the right to any further deductions in respect of the exploration or prospecting expenditure the amount is attributable to.

44. The requirement that a Subdivision 330-E agreement, as far as it is relevant, only relates to '**deductible**' exploration or prospecting expenditure, means a government body that carries on a business of mining or exploration and incurs exploration or prospecting type expenditure cannot transfer such expenditure under a Subdivision 330-E agreement.

Alternative view

45. Under section 122B of the 1936 Act (the equivalent to Subdivision 330-E in the 1997 Act) several private rulings issued from this Office stating it was open to a government body to give a notice in terms of the section in respect of 'undeducted' exploration or prospecting expenditure. It was considered the reference in section 122B to 'any expenditure of the vendor ... of a kind referred to in section 122J' included exploration or prospecting expenditure incurred by a government body because it was expenditure of a 'kind' which met the description of 'exploration or prospecting' as defined in subsection 122J(6).

46. We are now of the view the private rulings did not correctly state the law, and the reference to expenditure of a 'kind referred to in section 122J' is a reference to more than just expenditure that meets the definition of 'exploration or prospecting' in subsection 122J(6) but is a reference to expenditure of the kind that comes within the whole of section 122J. Such expenditure is exploration or prospecting that not only meets the definition in subsection 122J(6) but also has the attributes of expenditure with the potential to be deductible by the taxpayer incurring it. Section 122J is concerned with the allowance of deductions for exploration or prospecting expenditure.

47. On the other hand, taxpayers carrying on eligible mining or quarrying operations or a business of exploration or prospecting

sometimes purchase general support type of data from government bodies for use in an exploration or prospecting project. General support type data is data the government has obtained for general use and not as data relating to an actual exploration or prospecting project. Such data may be contained in written literature on water tables, maps, surveys, etc., the government has undertaken as a community service. It would not include, say, drill cores, etc., the government had gathered as part of a specific project. In any exploration or prospecting project there would be a range of data gathering points and expenditure incurred on obtaining this support data is expenditure incurred on exploration or prospecting that is deductible under section 330-15.

48. Expenditure incurred by a taxpayer on engaging a contractor, including the government, to undertake exploration or prospecting type activities on its behalf is also deductible to the taxpayer under section 330-15. It is often beyond the commercial capacity of all but the largest taxpayers to undertake satellite surveys, etc., and contract expenditure of this nature qualifies for deduction.

Feasibility studies

49. The definition of exploration or prospecting in section 330-20 now includes 'feasibility studies to evaluate the economic feasibility of mining minerals or quarry materials once they have been discovered'. This reference was inserted to recognise the Commissioner's practice of allowing expenditure on certain feasibility studies as expenditure on exploration or prospecting as outlined in Taxation Ruling IT 2642 at paragraphs 25 to 27.

50. Mine feasibility studies, which can include preliminary feasibility studies involving related downstream infrastructure, undertaken before a decision to mine or quarry has been taken can qualify as expenditure on exploration or prospecting. In determining the economic viability of a project, it is necessary to weigh the market for the resource that is to be won and the price obtainable for it against all the costs that will be incurred in winning and marketing the commodity.

51. Clearly, one of the costs to be quantified in preparing a feasibility study is the cost of the project, with the taxpayer likely to determine a range within which the project remains viable. A feasibility study on the likelihood of obtaining the relevant finance, as well as preliminary costs associated with housing, water, power and transport, etc., falls into the exploration or prospecting stage of a mining or quarrying operation. After all, if no economically

acceptable arrangements can be made to get power on the site or keep a workforce there, the mine is not economically feasible.

52. However, once the decision to mine or quarry is taken, further expenditure on feasibility studies does not qualify as expenditure on exploration or prospecting. Where a taxpayer undertakes further feasibility studies, the purpose of which is essentially development in nature, e.g., an advanced design in connection with housing, water, power and transport, etc., the fact actual financial or government approval has not been received, or a formal commitment has not been documented, cannot alter the nature of the undertaking or its expense.

53. Expenditure on feasibility studies taken after the decision to mine or quarry has been made, into such aspects as the design and cost of housing and welfare infrastructure, or engineering studies into the cost of providing water, light or power, or into the construction of facilities to transport minerals, etc., are examples of expenses that are essentially development in nature. Expenditure on these activities is not deductible under section 330-15 but could qualify for deduction under another provision, e.g., Subdivision 330-C or 330-H.

Development expenditure

54. It is important to remember the various deductions provided by the special provisions relating to mining and quarrying depend not so much on the time when a particular stage commences or ceases as on whether the expenditure falls within one of the classes of expenditure specified for deduction. The purpose and nature of the expenditure are important factors in identifying the class of expenditure. To determine the class of expenditure specified for deduction, it is first necessary to have regard to the meaning of 'exploration or prospecting' in section 330-20 and 'allowable capital expenditure' in section 330-85.

55. It is understood that once an ore body, quarry materials or a petroleum field has been discovered and delineated, generally two types of expenditure are incurred. The first relates to project evaluation expenditure such as feasibility studies, pilot plant and environmental impact studies. The second relates to the establishment of access facilities and other infrastructure to carry out properly the mining or quarrying project. Often, the latter type of infrastructure put in place during this stage is of such a scale it is far in excess of that required to complete the project evaluation and essentially has an enduring benefit to the mine.

56. In these circumstances, it is important first to determine the predominant purpose of establishing the infrastructure. In doing so, regard could also be had to the scale of the operations undertaken. If the establishment of infrastructure is to such a degree as to be

commensurate with preparing the site for eligible mining or quarrying operations, or the work done is more concerned with establishing permanent extractive facilities for ore or quarry materials rather than with whether to mine or quarry, then the expenditure incurred would more properly be classified as allowable capital expenditure rather than exploration or prospecting expenditure.

57. There is no hiatus between the exploration and development stages of a mining or quarrying operation, but the exploration stage generally continues until a decision is taken to mine or quarry. This decision is usually closely followed by the incurring of capital expenditure that fits the description of what is allowable capital expenditure contained in section 330-85. As previously stated, the various deductions depend not so much on the time when a particular stage commences or ceases as on the purpose and nature of the capital expenditure incurred.

58. Expenditure incurred in developing the site for eligible mining or quarrying operations, i.e., after a decision to mine or quarry has been made, is clearly not expenditure on exploration or prospecting. Development expenditure in general is deductible as 'allowable capital expenditure' under section 330-80. Development expenditure incurred in preparing a site for carrying on eligible mining or quarrying operations and the cost of providing water, light and power for use on the mining or quarrying site for future mining or quarrying operations are examples of allowable capital expenditure.

59. However, it is accepted there may be circumstances where exploration or prospecting continues after a decision to mine or quarry has been made. For example, where a mining right is granted and exploration is still proceeding in those areas covered by the mining right but which have not yet been explored, it would be possible that the taxpayer may continue to claim exploration or prospecting expenditure after the decision to mine has been made. In that situation, it is necessary for the taxpayer to separate the exploration expenditure from other mining expenditure.

Exploration or prospecting outside Australia

60. The *Taxation Laws Amendment Act 1991 (Act No 48 of 1991)* removed the restriction that exploration or prospecting expenditure had to be incurred on activities conducted 'in Australia' to qualify for deduction. As from 21 August 1990, deductions are allowable for exploration and prospecting expenditure carried on both inside and outside Australia as long as the activities are conducted for the purpose of generating assessable income.

61. However, not all income derived by a resident taxpayer is assessable income. An exemption under section 23AH of the 1936 Act is available for certain foreign income derived by an Australian company from a business conducted through a branch. From 1 July 1990 until 30 June 1997 income derived by a branch in a listed country was exempt under section 23AH unless the branch derived eligible designated concession income (EDCI). From 1 July 1997, the section 23AH exemption applies to branches in broad-exemption listed countries that do not derive EDCI and to branches in limited-exemption listed countries that pass the active income test. Where a limited-exemption listed country branch fails the active income test only certain types of income, referred to as adjusted tainted income, are not exempt. Where exploration or prospecting expenditure is incurred in deriving exempt income, no deduction is allowed for the expenditure under section 330-15 of the 1997 Act.

62. Exploration or prospecting expenditure incurred outside Australia qualifies as a foreign income deduction where the expenditure is incurred for the purpose of deriving a class of assessable foreign income. Income derived from a branch in an unlisted country is an example of assessable foreign income.

63. Under section 160AFD of the 1936 Act, a taxpayer can only deduct a loss incurred in relation to one class of assessable foreign income from assessable foreign income of the same class. Section 79D of the 1936 Act ensures such losses cannot be offset against Australian income. Where the foreign income deductions relating to a particular class of assessable foreign income exceed the income of that class derived in a year of income, the loss is quarantined and carried forward to be offset against income derived in a subsequent year, provided the income is in respect of the same class of income.

Last Ruling

This is the last Taxation Ruling for the 1998 calendar year. The next Ruling will be Taxation Ruling TR 1999/1.

Commissioner of Taxation

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- ITAA36 23AH
- ITAA36 51(1)
- ITAA36 79D
- ITAA36 122B
- ITAA36 122J
- ITAA36 122J(1)
- ITAA36 122J(4D)(b)(i)
- ITAA36 122J(6)
- ITAA36 160AFD
- ITAA97 8-1
- ITAA97 330-15
- ITAA97 330-15(1)
- ITAA97 330-15(2)
- ITAA97 330-20
- ITAA97 330-80
- ITAA97 330-85
- ITAA97 330-245(2)(b)
- ITAA97 330-245(2)(b)(i)
- ITAA97 330-270(1)
- ITAA97 330-310
- ITAA97 330-310(2)
- ITAA97 330-A
- ITAA97 330-C
- ITAA97 330-D
- ITAA97 330-E
- ITAA97 330-F
- ITAA97 330-H

case references
- FC of T v. Ampol Exploration Limited 86 ATC 4859; (1986) 18 ATR 102
- Robe River Mining Co Pty Ltd v. FC of T 89 ATC 4606; (1989) 20 ATR 768
- Utah Development Co. v. FC of T 75 ATC 4103; (1975) 5 ATR 334