TR 98/3 - Income tax: treatment of receipts for dealing with or disclosing mining, quarrying or prospecting information

Taxation Ruling
Income tax: treatment of receipts for dealing with or disclosing mining, quarrying or prospecting information

other Rulings on this topic

IT 2378

*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 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.*

*[**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

Class of person/arrangement

1. This Ruling applies to resident taxpayers who carry on, or propose to carry on, eligible mining or quarrying operations as defined in section 330-30 of the *Income Tax Assessment Act 1997* ('the new law'). It also applies to resident taxpayers who carry on a business of, or a business that includes, exploration or prospecting for minerals, quarry materials or petroleum.

2. The Ruling deals with the taxation treatment under the income provisions and the capital gains provisions of amounts received for dealing with or disclosing mining, quarrying or prospecting information. The type of information involved is geological, geophysical or technical information that:

(a) relates to the presence, absence or extent of deposits of minerals or quarry materials in an area; or

(b) is likely to be of assistance in determining the presence, absence or extent of such a deposit in an area;

and has been obtained from exploration or prospecting, or eligible mining or quarrying operations.

Cross reference of provisions

3. This Ruling deals with Division 330 of the new law. The sections within this Division are restructured, renumbered and rewritten sections of the *Income Tax Assessment Act 1936* ('the old law') and express the same ideas as those sections of the old law. The following table cross references the sections of the new law to the corresponding sections of the old law.

New law	**Old law**
section 6-5	subsection 25(1)
section 41-20	sections 122JAA, 122JG and 124AMAA
section 330-15	sections 122J, 122JF and 124AH
section 330-20	subsections 122J(6), 122JF(12) and 124AH(7)
section 330-30	subsections 122(1), 122JB(1) and 124(1)
subsection 330-240(2)	subsections 6(1), 122(1) and 122JB(1)
section 330-480	sections 122K and 124AM
subsection 330-520(4)	subsections 122R(2), 122R(2A) and 124AO

Ruling

4. Mining, quarrying or prospecting information itself is not property. It lacks the characteristics, of being able to be transferred, that are found in property. It cannot be sold outright, it can only be dealt with or disclosed.

5. Mining, quarrying or prospecting information may be dealt with separately from a mining, prospecting or quarrying right.

6. The balancing adjustment provisions in Subdivision 330-J of the new law do not apply to any consideration received for dealing with or disclosing information itself. This is because information is not property. Likewise, the roll-over relief provisions in section 41-20 do not apply to mining, quarrying or prospecting information.

7. Consideration received for dealing with or disclosing mining, quarrying or prospecting information is assessable income under section 6-5 of the new law where:

- the information is obtained for the purpose of profit-making; or
- the information is dealt with or disclosed under an agreement for the provision of a service that involves

sharing the information with another person and has no adverse effect on the profit-yielding structure of the business.

8. As far as the capital gains provisions are concerned:

- Mining, quarrying or prospecting information itself is not an 'asset' as defined in section 160A of the old law.
- Strictly speaking, the medium in which information is contained, e.g., paper, computer memory, floppy disk, etc., is an asset for capital gains purposes; however, the value of the medium is usually negligible.
- Where mining, quarrying or prospecting information is dealt with or disclosed for its market value, the amount received does not give rise to a capital gain pursuant to the application of subsection 160M(6). The amount is received for the information itself rather than for the creation of any rights for the disclosure of, or dealing with or use of, the information.
- Dealing with or disclosing mining, quarrying or prospecting information is an act, transaction or event that relates to, or affects, the information itself. However, as information is not an 'asset' for the purposes of section 160A, subsection 160M(7) does not apply to any amount received for dealing with or disclosing the information.
- Exploration or prospecting expenditure does not form part of the cost base of a mining, quarrying or prospecting right. To the extent that exploration or prospecting expenditure is incurred in obtaining information, it is not reflected in the state or nature of a mining, quarrying or prospecting right when the right is disposed of.
- Costs incurred in acquiring mining, quarrying or prospecting information (e.g., relevant exploration or prospecting expenditure) do not form part of the cost base of goodwill for the purposes of calculating a capital gain on the disposal of goodwill.

Date of effect

9. This Ruling applies to years commencing both before and after its date of effect. However, because the Ruling now recognises that the mining, quarrying or prospecting information and the mining, quarrying or prospecting right, i.e., the tenement, are two separate things, it differs from the previous approach adopted in Taxation

Ruling IT 2378: 'Capital Gains: Disposal of Prospecting or Mining Right: Disposal of Right to Receive Income: Farm-Out Arrangements'.

10. The previous approach adopted in IT 2378 was to treat exploration or prospecting expenditure as being capital expenditure in respect of a particular mining or exploration tenement (the property) and upon the disposal, loss, destruction or termination of that tenement, any exploration or prospecting expenditure was taken into account for the purposes of applying the balancing adjustment provisions of sections 122K and/or 124AM of the old law, the capital gains provisions of Part IIIA and the roll-over relief provisions of sections 122JAA, 122JG and 124AMAA.

11. Subject to a request by a taxpayer or other relevant consideration, we will not take action to disturb past arrangements that have treated the disposal of mining information in accordance with the approach adopted in IT 2378. However, to the extent that this Ruling conflicts with IT 2378, it overrides IT 2378.

12. In addition, this 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).

Explanations

Mining, quarrying or prospecting information

13. The term 'mining, quarrying or prospecting information' is defined in subsection 330-240(2) of the new law to mean 'geological, geophysical or technical information that:

(a) relates to the presence, absence or extent of deposits of minerals or quarry materials in an area; or

(b) in likely to help in determining the presence, absence or extent of such deposits in an area;

and has been obtained from exploration or prospecting, or eligible mining or quarrying operations'.

Exploration or prospecting expenditure

14. Section 330-15 allows a deduction for expenditure (whether of a capital nature or not) incurred on exploration or prospecting. The term 'exploration or prospecting' is defined in subsection 330-20(1) as including:

'(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'.

15. However, subsection 330-20(2) provides that the term 'exploration or prospecting' does not include:

'(a) development drilling for petroleum; or

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

Nature of mining, quarrying or prospecting information

16. Mining, quarrying or prospecting information is not property. Of course, such information can ripen into a form of property such as copyright, trademarks, designs and patents, and, if it does, its taxation treatment is dealt with in Part III, Division 10B of the old law.

17. This Ruling deals with information transactions whose essential character is not the transfer of a 'literary work' under copyright law (analogous to the sale of copyrighted works such as books or computer programs). Rather, the transaction's essential character is the passing across of information about existing or potential mining or quarrying business. To pass across this information it may be necessary to transfer ownership in reports, maps, computer tapes, etc, but the transfer of the recording medium is merely incidental to the character of the transaction.

18. In *Pancontinental Mining Ltd v. Commissioner of Stamp Duties (Qld)* 88 ATC 4190; (1988) 19 ATR 948, the Full Court of the Supreme Court of Queensland considered the dutiability of an agreement for the sale of an interest under a mining joint venture including information arising from feasibility studies and exploration

work. The court rejected an argument by the Commissioner that the information comprised tangible property on the basis that it related to documents and records. The court said at ATC 4193; ATR 950:

> 'I am not persuaded that the information referred to in cl. 2.2(c) is necessarily to be found in those documents. But if some of the information does appear in them, the communication of that information in clearly not for that reason converted into a transfer of property. It would be quite wrong to confuse the information with the physical record: cf. *Rolls Royce*, *supra,* at p. 431. The information itself remains intangible.'

19. In determining the dutiability of a transaction or instrument the first step taken by the court in *Pancontinental* was to characterise the transaction or instrument having regard to all relevant factors. The mere fact that title to property (e.g., the physical medium recording information) passed did not determine the outcome of the characterisation. The court decided that the passing of title to property was merely ancillary or incidental to what it regarded as the provision of a service. Therefore, no liability to *ad valorem* conveyance duty was imposed on that element involving the transfer of property.

20. In circumstances analogous to those in *Pancontinental*, it is accepted that the transfer of exploration or prospecting information involves the provision of a service, and the transfer of title to any documents and chattels comprising the media upon which the information is stored is incidental and subservient to the passing across of the information. Exploration or prospecting information is akin to 'know-how', i.e., technical knowledge that is peculiar and unique to a specific business operation.

21. The term 'know-how' is difficult to define with precision. One leading description was given by Lord Radcliffe in *Rolls-Royce Ltd v. Jeffrey (Inspector of Taxes)* (1962) 40 TC 443; [1962] 1 All ER 801. This description has been summarised in *Strouds Judicial Dictionary of Words and Phrases*, 5th Edition, Sweet and Maxwell, at 1.395, as follows:

> ' "Know-how" is the fund of technical knowledge and experience acquired by a highly specialised production organisation; although it may be, and usually is, noted down in documents, drawings etc., it is itself an intangible entity whose category may vary according to, and may even be determined by, its use. Like office or factory buildings, patents and trademarks, and goodwill, it may be described as a "capital asset" while it is retained by a manufacturer for his own purposes, but, unlike these, its supply to another is not a transfer

> of a fixed capital asset because it is not lost to the supplying manufacturer.'

22. Know-how is therefore an intangible asset and, from a practical perspective in relation to exploration or prospecting information, can be viewed as undivulged knowledge or information residing with the supplier that enables, or may enable, a mining or quarrying business to be carried on e.g., knowledge about the presence of mineral bearing ore or quarry materials needed to facilitate extraction. In supplying know-how, the seller is passing to the buyer the seller's special knowledge or information that remains unknown to the public.

23. There is a view expressed by Gummow J in the Federal Court's decision in *Hepples v. FC of T* 90 ATC 4497; (1990) 21 ATR 42 that confidential information has a proprietary character. His Honour said at ATC 4520; ATR 69:

> '... that the degree of legal protection afforded by the legal system (especially in equity) to confidential information (and this would be true particularly of trade secrets) makes it appropriate to describe such confidential information as having a proprietary character, not because this is the basis on which that protection is given, but because this is the effect of that protection.'

24. However, the views of Gummow J were not followed when the matter was considered on appeal to the Full High Court. Moreover, they are in direct conflict with the decisions of the High Court in such cases as *Victoria Park Racing and Recreation Grounds Company Limited v. Taylor and Ors* (1937) 58 CLR 479 and *FC of T v. United Aircraft Corporation* (1943) 68 CLR 525 where information was held not to be property.

25. In the *United Aircraft Corporation* case Latham CJ said, at CLR 534:

> 'Knowledge is valuable, but knowledge is neither real nor personal property. A man with a richly stored mind is not for that reason a man of property. Authorities which relate to property in compositions, &c., belong to the law of copyright and have no bearing upon the question whether knowledge or information, as such, is property. It is only in a loose metaphorical sense that any knowledge as such can be said to be property.'

26. The decision in the *United Aircraft* case that information is not property has been confirmed in other cases such as: *Brent v. FC of T* (1971) 125 CLR 418; 71 ATC 4195; (1971) 2 ATR 563; *Rolls-Royce Ltd v. Jeffrey (Inspector of Taxes)* ; *Pancontinental Mining Ltd v. Commissioner of Stamp Duties (Qld)*; *Nischu Pty Ltd v. Commissioner of State Taxation (WA)* 90 ATC 4391; (1990) 21 ATR

391 and its subsequent appeal to the Full Supreme Court of Western Australia reported as *Commissioner of State Taxation (WA) v. Nischu Pty Ltd* 91 ATC 4371; (1991) 21 ATR 1557. Unless and until the courts decide otherwise, the better view is that information is not property.

27. Information can be and is dealt with independently from any mining, quarrying or prospecting right. In a situation where the mining information was unavailable, for example, as a result of destruction of technical records by fire, the mining right would remain entirely unaffected. The right would still be in existence and capable of being dealt with and exploited in exactly the same manner. Prospectively, it would still yield the same profit. It is only its value to a potential purchaser that would be diminished without the information.

28. The separateness of 'mining information' from the 'mining right' to which it relates is highlighted and confirmed in the stamp duty cases of *Pancontinental* and *Nischu*.

29. Mining, quarrying or prospecting information is not goodwill. It is separate and distinct from the goodwill of a mining business. It might be a source of the goodwill of the business but it is separate from the goodwill. Goodwill does not attach to mining, quarrying or prospecting information. Rather it attaches to the mining business which uses the information.

30. As the High Court explained in *FC of T v. Murry* 98 ATC 4585; (1998) 39 ATR 129, it is the legal definition of goodwill, rather than its accounting and business definitions, that applies for capital gains tax purposes. Goodwill has the meaning attributed to it by the High Court in that case. Unlike goodwill (which cannot be dealt with separately from the business with which it is associated) mining, quarrying or prospecting information can be and is often disclosed or dealt with independently of the mining tenement or any other asset of the mining business.

Balancing adjustment provisions

31. Section 330-15 of the new law allows deductions for 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.

32. Where a taxpayer discloses mining, quarrying or petroleum information for consideration, the balancing adjustment provisions contained in Subdivision 330-J need to be considered. These provisions apply where taxpayers sell property and they can operate to recapture deductions that have been allowed or are allowable in

respect of expenditure of a capital nature in respect of any property that is being disposed of.

33. Because mining, quarrying or prospecting information is not property, any consideration received for the disclosure of the information itself does not cause the balancing adjustment provisions in Subdivision 330-J to apply. However, in any transaction involving the disclosure of mining, quarrying or prospecting information it is necessary to examine the facts to see if any of the consideration relates to items of property.

34. Plant and equipment used in exploration or prospecting are clearly items of property as are, say, core samples recovered during the course of diamond drilling of a tenement. If these items of property are sold, the balancing adjustment provisions in Subdivision 330-J apply.

35. On the other hand, information embodied in a seismic map would not be property. Likewise, the information contained in drilling logs; assay and analytical reports; metallurgical test results; maps; geological plans; reports and geological analyses of the primary geological data; working papers for calculation of the ore reserves; and the resource model would not be property and Subdivision 330-J would not apply to any consideration received on the disclosure of such information.

36. Of course, the information discussed in the previous paragraph is usually stored on some medium, such as paper, computer memory, floppy disk, etc., and this medium is an item of property in its own right. However, unless the facts indicate otherwise, it is accepted that the medium containing the information has negligible value such that, in practical terms, no amount has to be accounted for under Subdivision 330-J in respect of the medium.

37. This Ruling departs from an earlier view expressed in IT 2378 that exploration and prospecting expenditure is capital expenditure incurred 'in respect of' the exploration or prospecting right or mining tenement. As explained in paragraphs 27 and 28 above, information obtained from exploration and prospecting is something separate from the exploration or prospecting right or mining tenement. In the context of a balancing adjustment provision, 'in respect of' means expenditure incurred to acquire or improve the property and because information may be **about** a certain right or tenement does not mean that it is **in respect of** that right or tenement.

38. We agree with the remarks of Peter Green in his article 'Practical Issues for Resource Companies Under the Income Tax Assessment Act' which appeared in the *1985 AMPLA Yearbook* where he said, at 150:

> 'In order for sections 122K or 124AM to apply in such a case, it would be necessary to characterise the exploration or prospecting expenditure of the resource company as expenditure "in respect of" the "property sold". The expression "in respect of" has been described as having "the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters". Notwithstanding this, it appears to be an abuse of language to suggest that expenditure incurred on exploration or prospecting is incurred "in respect of" the interest in the prospecting tenement sold. In this regard, it is important to note that the interest in the tenement sold is not a physical area of land but a congeries of legal rights. In what sense can it be said that expenditure upon a geochemical survey or an exploratory well is expenditure "in respect of" the rights to prospect constituting the prospecting tenement. It is submitted that, if such expenditure is incurred "in respect of" anything, it is incurred in respect of the information gathered from the survey or the drilling. Similarly, to the extent that the exploration or prospecting expenditure was incurred upon plant or equipment used in exploration activities, it should property be regarded as incurred "in respect of" that plant and equipment and not the prospecting tenement relating to the area explored. To the extent that exploration or prospecting expenditure can be said to have been incurred "in respect of" prospecting information, it is submitted that neither section 122K nor section 124AM will apply because, for the reasons previously given, information would not constitute "property" for the purposes of either section.'

39. The distinction between exploration or prospecting expenditure being incurred in respect of information which is not property, and being incurred in respect of items of property such as core samples, etc., is also relevant for the application of the balancing adjustment roll-over relief available under Subdivision 41-A of the new law.

40. Subdivision 41-A allows balancing adjustment roll-over relief where:

- there is a change in ownership in property due to a change of partnership interest; and
- the transferor and transferee jointly make an election for roll-over relief under subsection 330-520(4).

Broadly, the consequences of roll-over relief are that:

- no balancing adjustment is required for that disposal; and
- the transferee stands in the transferor's shoes with regard to the amount and timing of future deductions, and the

amount of potential balancing adjustment on subsequent disposal.

41. Section 41-20 balancing adjustment roll-over relief only applies to expenditure in respect of property. To the extent that the transferor has undeducted exploration or prospecting expenditure in respect of information which is not property, section 41-20 does not apply to allow roll-over relief in respect of such expenditure.

General income provisions

42. Consideration received for dealing with or disclosing mining, quarrying or prospecting information is assessable under section 6-5 of the new law where:

- the information is obtained for the purpose of profit-making; or
- the information is disclosed under an agreement for the provision of a service that involves sharing the information with another person and has no adverse effect on the profit-yielding structure of the business.

43. An example of mining, quarrying or prospecting information being obtained for the purpose of profit-making occurs where it is an integral part of an exploration or prospecting business. To be conducting an exploration or prospecting business, a taxpayer must have acquired mining, quarrying or prospecting rights with the intention of turning them to profitable account by transferring or selling those rights in the event of finding a suitable discovery. This is in direct contrast to a taxpayer who acquires such rights in the hope or expectation of developing a mine or quarry.

44. Where a taxpayer conducting an exploration or prospecting business receives consideration for disclosing mining, quarrying or prospecting information relating to those activities, the consideration is assessable income under section 6-5. Like the proceeds from the sale of the mining, quarrying or prospecting rights, any consideration received for disclosing information would be a gain made in the ordinary course of carrying on an exploration or prospecting business and have an income nature. Refer *Case M18* 80 ATC 103; 23 CTBR (NS) *Case 98*; *FC of T v. Ampol Exploration Limited* 86 ATC 4859; (1986) 18 ATR 102; *FC of T v. Myer Emporium Ltd* 87 ATC 4363; (1987) 18 ATR 693; *Case 21/93* 93 ATC 272; *AAT Case 8727* (1993) 26 ATR 1030; *Case 65/96* 96 ATC 586; *AAT Case 11,365* (1996) 34 ATR 1023.

45. Consideration received for disclosing mining, quarrying or prospecting information is also assessable income, under section 6-5, where it is disclosed pursuant to an agreement for the provision of a

service that involves sharing the information with another person and has no adverse effect on the profit-yielding structure of the business.

46. Assistance in determining the proper taxation consequences arising from the disclosure of mining or prospecting information can be obtained from the many cases dealing with the sale of 'know-how'. The two main cases involving lump sums received for disclosing 'know-how' are *Evans Medical Supplies Ltd v. Moriarty (Inspector of Taxes)* (1957) 37 TC 540 where the amount was held to be a capital receipt and *Rolls-Royce Ltd v. Jeffrey (Inspector of Taxes)* where the amount was held to be income.

47. These two cases were considered in *John & E. Sturge Ltd v. Hessel (HM Inspector of Taxes)* (1975) 51 TC 183, a case involving the disclosure of technical 'know-how', for the manufacture of citric acid by a secret surface fermentation process, to a company in another country. The court found that the imparting of 'know-how' *per se* is not to be regarded as the disposal of a capital asset and Walton J explained the principles, in determining the distinction between a capital and revenue receipt, when he said, at 205:

> 'This kind of question is not untouched by authority, and, as is so often helpful in similar matters, I think it is best to go back to first principles. ... If a trader derives consideration from exploiting his trade, its assets or connections of any description, as the result of any transaction whatsoever, such consideration will *prima facie* be a receipt of his trade unless such consideration, on its true analysis, derives from an alienation of the capital assets employed by him therein, in which case such alienation, precisely because it is the alienation of a capital asset, produces correspondingly a capital asset in his hands.'

48. Further on, Walton J referred to a speech made by Lord Radcliffe in an earlier case and said, at 206:

> 'It appears to me that what Lord Radcliffe is there saying is that the mere imparting of "know-how" cannot be equated with the disposal of a capital asset. Just like the schoolmaster's knowledge, it remains the property of the person imparting it as well after as before another is told. Accordingly, there is no ground for treating it in any way differently from the rendering of any other service by the trader who imparts it: if imparted for consideration, the receipt is a trading receipt. However, the disposal is capable of wearing an entirely different aspect if it is found, not as a disclosure of "know-how" on its own, but combined with some other transaction of which it is a part, albeit an important part, which nevertheless does represent the disposal of some capital asset of the trader concerned. Thus, if "know-how" is imparted as part and parcel of the disposal of a

> branch of the trader's business, ... the moneys paid for the "know-how" may properly rank as a capital receipt.'

49. In applying these principles to any consideration received for the disclosure of mining, quarrying or prospecting information, it is necessary to make a close examination of the facts surrounding the disclosure.

50. Where the information relates to an operating mine or quarry, or one that is in the process of being developed, i.e., a decision to mine has been made or is likely to be made, the disclosure of that information for consideration to a person as part of the process of selling the entire mine or quarry, or an entire interest in the mine or quarry, to that person gives rise to a capital receipt. Refer *C of T for Western Australia v. Newman* (1921) 29 CLR 484; *Western Gold Mines NL v. The Commissioner of Taxation (Western Australia)* (1938) 59 CLR 729; *Mining Corporation Exploration NL v. FC of T* 78 ATC 4001; (1977) 8 ATR 341; *Mc Farlane & Keyte v. FC of T* 81 ATC 4364; (1981) 12 ATR 145.

51. If further support is needed for this conclusion, it can be found in the comments of Lord Donovan in *Musker (HM Inspector of Taxes) v. English Electric Co Ltd* (1964) 41 TC 556, another case involving the disclosure of manufacturing techniques and engineering data, where he said, at 588:

> 'Where a business is sold, or relinquished by degrees, and part of the consideration is a lump sum for the disclosure of secret processes which will enable the purchaser of the business to carry it on, it may well be that the lump sum should be regarded simply as part of the entire consideration for the sale, and thus as capital.'

52. Cases involving the sale of a mining or quarrying business are distinguishable from those where the mining, quarrying or prospecting information about a particular area is simply shared with another person. For example, an owner of a particular mining or prospecting right might agree to disclose mining or prospecting information about the area covered by the right to a person who owns mining or prospecting rights in an adjoining area. The disclosure might involve the taxpayer making copies of relevant information or allowing access to various documents. In these circumstances the taxpayer would still have all the information it had before the disclosure, only now the information has been shared. Any consideration received for sharing the information would be consideration for the performance of a service and be assessable income; see *Case W10* 89 ATC 182; *AAT Case 4809* (1988) 20 ATR 3098. Cases such as *Westfield Limited v. FC of T* 91 ATC 4234; (1991) 21 ATR 1398 and *FC of T v. Hyteco Hiring Pty Ltd* 92 ATC 4694; (1992) 24 ATR 218 can be

distinguished because, after the relevant transaction in both those cases, the taxpayer no longer possessed the item or items that generated the income.

53. In the recent case of *Esso Australia Resources Ltd v. FC of T* 97 ATC 4371; (1997) 36 ATR 65, the Federal Court held that consideration received by the taxpayer, for sharing 'know-how' it possessed about the extraction of petroleum from deepwater environments with a co-joint venturer, was a revenue receipt. The Court concluded that the taxpayer was not relinquishing any part of its business structure, but was turning technology available to it to profitable account by sharing it with another in exchange for the payment of money. There was no parting with a capital asset; the taxpayer was free to use the technology itself in any other project.

54. The disclosure of mining, quarrying or prospecting information often involves information about unsuccessful exploration or prospecting projects. A particular area may have been explored and the decision made not to proceed to mine or conduct any further exploration, resulting in the prospecting rights being relinquished. Such rights may be subsequently reissued by the government to a new owner who is interested in purchasing any relevant information revealed by the earlier exploration activities.

55. In these cases, it is necessary to examine carefully how the information is dealt with, and this involves comparing what the taxpayer has in the way of information after the transaction with the position, as it existed, before the transaction. Where the information is disclosed by making copies of reports, down loading computer stored information, etc., such that the 'vendor' taxpayer does, in a practical sense, continue to possess the same information after the disclosure as it had before, the consideration is for the provision of a service and assessable income. Like the taxpayer in the *Esso Australia Resources* case, the taxpayer is not parting with the information but is entering into a commercial transaction to deal with or share the information.

56. There are often good reasons for a mining business wanting to retain information concerning earlier, albeit unsuccessful, exploration projects. Such information is often used to compare results arising from current exploration programs so as to assist in decision making on whether to proceed or abandon a particular exploration activity.

57. In some cases 'unwanted' mining, quarrying or prospecting information is disclosed in circumstances where, taking a practical view, the taxpayer no longer has the information after the disposal. It is one thing to say about 'know-how' that certain information or knowledge cannot be disposed of and that a person still has the information after the disclosure. However, mining or prospecting

information is often so voluminous, e.g., some $19.2m was spent on exploration in the *Nischu* case, that it is impossible for a taxpayer to retain it once the medium containing the information has been disposed of.

58. Where the disclosure of mining, quarrying or prospecting information involves the delivery of substantial documents and chattels containing the information such that, in a practical sense, the taxpayer no longer has the information once the documents and chattels have been disposed of, any consideration for dealing with or disclosing the information is a capital receipt. In these cases, involving as they do a mining business, the consideration received for disclosing the mining, quarrying or prospecting information should be afforded the same treatment as consideration received for the sale of the mining, quarrying or prospecting right, i.e., treated as a capital receipt.

59. The fact that the disclosure of mining, quarrying or prospecting information may not occur at the same time as the sale of the mining, quarrying or prospecting right does not change the capital nature of the receipt. The taxpayer is disposing of part of its profit-yielding structure, or what it intended to convert into its profit-yielding structure if the exploration had been favourable. A business may be sold or relinquished by degrees over a period of time. Refer *Musker (HM Inspector of Taxes) v. English Electric Co Ltd*.

Capital gains provisions

Old law

60. The paragraphs of this Ruling dealing with the capital gains provisions contain references to the old law, i.e., the *Income Tax Assessment Act 1936*. The Tax Law Improvement Project is restructuring, renumbering and rewriting the income tax law in plain language and the Parliament is amending the income tax law progressively to reflect these aims. However, amendments to the capital gains provisions have not, as yet, come into effect.

Overview

61. In any consideration of the application of the capital gains provisions it is necessary to consider:

- whether mining, quarrying or prospecting information is an asset;
- whether the medium containing mining, quarrying or prospecting information is an asset;

- whether rights in relation to the disclosure of mining, quarrying or prospecting information are assets;
- whether exploration or prospecting expenditure forms part of the cost base of a mining, quarrying or prospecting right; and
- whether exploration or prospecting expenditure forms part of the cost base of goodwill.

62. In addition, the application of subsection 160M(6) or 160M(7) needs to be considered. Another question in relation to Part IIIA is how subsection 160ZD(4) operates.

Is mining or prospecting information an asset?

63. For something to be an 'asset' within the definition of 'asset' in section 160A, it must be either a form of property or it must be a right which falls within the scope of paragraph (a) of that section. As mining, quarrying or prospecting information itself is not property (for the reasons outlined in paragraphs 16 to 26) and is not otherwise within the scope of paragraph 160A(a), it is not an 'asset' as defined in section 160A.

64. However, the sale of mining, quarrying or prospecting information is often accompanied by the sale of items of property such as core samples, plant and equipment, etc. Consideration received for the disposal of these items of property comes within Part IIIA.

Is the medium containing mining, quarrying or prospecting information an asset?

65. Strictly speaking, the medium in which mining, quarrying or prospecting information is contained (e.g., paper, computer memory, floppy disk, etc.) is an asset for the purposes of Part IIIA.

66. However, although the medium is an asset, it is not an asset that necessarily carries the value of the information. Generally, the value of the medium is negligible. Unless the facts indicate otherwise, it will be accepted that the medium containing the information has negligible value such that, in practical terms, no amount has to be allocated to the medium under subsection 160ZD(4) in transactions where information itself is being disclosed.

Are rights in relation to mining, quarrying or prospecting information an asset?

67. A taxpayer agreeing to disclose mining, quarrying or prospecting information brings into existence certain contractual rights by entering into a contract to disclose that information. The right to have information disclosed is a right for the provision of a service. Other rights could also be created, including rights to hold, use, enjoy, disclose or destroy mining, quarrying or prospecting information. These rights in relation to mining, quarrying or prospecting information, considered together, are an 'asset' in terms of Part IIIA.

Application of subsection 160M(6)

68. Subsections 160M(6) to 160M(6D) apply to an asset created by a person if:

- that asset is not a form of corporeal property; and
- on the creation of the asset, it is vested in another person.

69. The reference to an asset that is not a form of corporeal property is a reference to an asset of a non-physical or intangible nature (e.g., rights under a contract, patents, or goodwill).

70. In the explanatory memorandum to the Taxation Laws Amendment Bill (No 4) 1992, which introduced subsection 160M(6) in its present form, the Treasurer stated, at 66-67:

> 'The new provisions are intended to apply to a wide range of circumstances where a person receives consideration for creating incorporeal assets in another person. It is not practicable for the legislation to refer specifically to all those circumstances. Rather, the new subsection 160M(6) will provide the general criteria for the application of the new provisions; that a person creates an asset, the asset is not a form of corporeal property, and on its creation the asset is vested in another person. Hence it is to apply in much the same way as subsection 25(1) of the ITAA applies to include "gross income" in assessable income.'

71. The amendment made by the Taxation Laws Amendment Bill (No 4) 1992 first applied to any transactions where money or other consideration was received after 25 June 1992.

72. If a person, A, agrees to supply mining or prospecting information to another person, B, the transaction gives rise to a provision of a service by A to B. By entering into the agreement, it could be said that A has also created in B a right to require A to supply the mining or prospecting information to B. The agreement

might go on to restrict A from further disclosing the mining or prospecting information to other persons and could also confer on B rights to hold, use, enjoy, disclose or even destroy the mining or prospecting information.

73. However, the rights that are created are something separate from the information itself. In *FC of T v. Sherritt Gordon Mines Limited* 77 ATC 4365; (1977) 7 ATR 726, Jacobs J recognised rights under a contract as property but, at the same time, recognised 'know-how' as not being property when he said, at ATC 4374; ATR 736:

> 'A right to put to use "know-how" as it is defined in the present agreement is not a right in respect of property because the possessor of the know-how has no right in it against the world ... However, once he reveals and makes available know-how as defined to another in return for a payment rights are created between him and the payer, rights which are governed by the terms express or implied upon which that "know-how" is revealed.'

74. In *Pancontinental* the court recognised a distinction between the information itself and the rights under which it was obtained, and said, at ATC 4192; ATR 950:

> 'Now one readily accepts that the assignment of rights under a contract may amount to a transfer of property. See *Danubian Sugar Factories Ltd. v. I.R. Commrs* (1901) 1 Q.B. 245 at p. 257 and *Allgas Energy Ltd. v. Commr of Stamp Duties (Qld)* 80 ATC 4020 at p. 4024 [(1979) 10 ATR 593 at 596]. The information referred to in cl. 2.2(c) of this agreement may not however be characterised as rights under a contract, in this case the joint venture agreement. The information is likewise not to be regarded as part of the benefit of a contract being assigned. The fact that Isa may have acquired the information through exercising rights under the joint venture agreement obviously does not give the information itself the quality of a chose in action, or place it into the category of contractual rights being assigned: it remains mere information.'

75. Likewise, in Canada the Federal Court of Appeal has distinguished information, or 'know-how', from the rights to have that information disclosed. In *Rapistan Canada Limited v. Minister of National Revenue* [1974] CTC 495 at 499, the court said:

> 'The asset that the appellant acquired in this case was the knowledge of how to commence and carry on the particular manufacturing operation. That was, from the businessman's point of view, an "asset". It was not, however, "property".
>
> It is true that the appellant did, by the "Deed of Gift", acquire, by implication, a promise that the donor would do certain things

and that that promise is a "right" that falls within the definition of the word "property". That right is not, however, the "know-how" that is the subject matter of the claim for capital cost allowance.'

76. In the light of the above authority, it is accepted that where mining, quarrying or prospecting information is being disclosed for its market value, any consideration received by the 'vendor' for its disclosure is not for the creation of rights but rather for the information itself. In these circumstances, subsection 160M(6) does not apply to generate a capital gain as a result of the creation of the rights, because the consideration is received for the information itself and not the created rights.

77. As a practical matter, the 'purchaser' pays for, and receives, the information itself. The right of the 'purchaser' to require the 'vendor' to supply the information on payment of the consideration is only a means to an end of actually getting the information. The consideration received by the 'vendor' is not, in terms of paragraph 160ZD(1)(a), consideration in respect of the disposal by the 'purchaser' of rights to receive the information.

78. The market value of mining, quarrying or prospecting information is a question of fact. As a general proposition, its value would represent the present day costs of reproducing the information, taking into consideration the losses that would result from the consequential delay in the development of mining, quarrying or prospecting right. From this value it would be appropriate to make deductions for all or some of the following factors:

(a) knowledge that some of the information was available from public records, such as reports available from State government authorities;

(b) general knowledge that certain work need not be duplicated, for example, a purchaser who had a knowledge of the mining information for the purposes of negotiating a price for the tenement would know that some exploration had revealed little or no evidence of mineralisation in particular areas and would know that this work would not need to be repeated; and

(c) more recent test results that affect the accuracy of the older information.

Application of subsection 160M(7)

79. For subsection 160M(7) to apply, the owner of an asset must have received money or other consideration by reason of an act or transaction taking place in relation to the asset (whether it affects the

asset or not), or an event affecting the asset has occurred. It does not matter whether the asset is affected adversely or beneficially or neither adversely nor beneficially.

80. When consideration is received for dealing with or disclosing mining, quarrying or prospecting information, it is difficult to regard it as an act or transaction that takes place in relation to another 'asset' or as an event that affects another 'asset'. It has already been explained in this Ruling that mining, quarrying or prospecting information is something separate from the mining, quarrying or prospecting right and also something separate from the goodwill of a business (see paragraphs 27 to 30).

81. The disclosure of mining, quarrying or prospecting information is an act, transaction or event that relates to, or affects, the information itself. By sharing the information with others, the number of people who have knowledge of the information is increased and thus the information is more widely circulated and its value may be affected. However, mining, quarrying or prospecting information itself is not an 'asset' as defined in section 160A and, therefore, it is not an 'asset' as that term is used in subsection 160M(7).

82. Accordingly, subsection 160M(7) does not apply to the consideration received for the disposal of mining, quarrying or prospecting information.

Does exploration or prospecting expenditure form part of the cost base of a mining, quarrying or prospecting right?

83. As explained in paragraphs 27 and 28, mining, quarrying or prospecting information is something separate from the mining, quarrying or prospecting right. Whatever light the information may throw on the value of the right, that information does not attach to, or form part of, the right.

84. To the extent that exploration or prospecting expenditure is incurred in obtaining mining, quarrying or prospecting information, it does not form part of the cost base of the mining, quarrying or prospecting right to which it relates for the purposes of the application of the capital gains provisions. Notwithstanding that information may enhance the value of a mining, quarrying or prospecting right, the expenditure incurred in obtaining that information is not reflected in the state or nature of the right when the right is disposed of. The rights are incorporeal property whose state or nature at the time of disposal is completely unaffected by any exploration or prospecting expenditure. Therefore, paragraph 160ZH(1)(c) does not apply to include the amount of the expenditure in the cost base of the mining, quarrying or prospecting right, i.e., the tenement.

Does exploration or prospecting expenditure form part of the cost base of goodwill?

85. A capital gain may accrue, or a capital loss may be incurred, on disposal of the assets of a mining business including its goodwill. The amount of the capital gain or loss on the goodwill depends on the relevant cost base of the goodwill and the consideration received in respect of the disposal of the goodwill.

86. Costs incurred in acquiring mining, quarrying or prospecting information (e.g., relevant exploration or prospecting expenditure) do not form part of the cost base of the goodwill for the purposes of calculating a capital gain on the disposal of the goodwill. Similarly, the consideration received in respect of the disposal of the goodwill of the business does not include any receipt for the mining, quarrying or prospecting information. Mining, quarrying or prospecting information and goodwill are two separate things (see paragraphs 29 and 30).

87. The parties to a transaction involving the sale of a business should allocate discrete parts of the sale proceeds to the goodwill of the business and to the mining, quarrying or prospecting information. If the parties merely sell assets of a mining business (this is, something less than a discrete business) and disclose mining, quarrying or prospecting information, goodwill is not disposed of.

88. If the parties attribute an unreasonably large proportion of the sale consideration to the goodwill, subsection 160ZD(4) enables the Commissioner to attribute reasonably an appropriate part of the consideration to the goodwill of the business.

89. If the parties have not apportioned the sale consideration between the goodwill, the information and any other business assets, subsection 160ZD(4) enables the Commissioner to attribute reasonably part of the consideration to goodwill and part to each of the other assets.

Detailed contents list

90. Below is a detailed contents list for this Ruling:

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