


TD 2013/D6 - Minerals resource rent tax: can an amount of expenditure incurred by an entity to identify or protect Aboriginal cultural heritage be included in the entity's pre-mining expenditure for a pre-mining project interest for an MRRT year under section 70-35 of the Minerals Resource Rent Tax Act 2012?

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Draft Taxation Determination

Minerals resource rent tax: can an amount of expenditure incurred by an entity to identify or protect Aboriginal cultural heritage be included in the entity's pre-mining expenditure for a pre-mining project interest for an MRRT year under section 70-35 of the *Minerals Resource Rent Tax Act 2012*?

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This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

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Ruling

1. Yes, an amount of expenditure incurred by an entity to identify or protect Aboriginal cultural heritage can be included in an entity's pre-mining expenditure for a pre-mining project interest for an MRRT year under section 70-35 of the *Minerals Resource Rent Tax Act 2012*,¹ provided that:

- the entity necessarily incurred the amount of expenditure in that MRRT year in carrying on an activity or operation of the pre-mining project interest which, were the pre-mining project interest a mining project interest, would be an upstream mining operation in relation to such a mining project interest,
- subsection 70-35(4) (about an amount of expenditure that is, or would be, excluded expenditure) does not apply to the amount of expenditure; and

¹ All legislative references in this draft Taxation Determination are to the *Minerals Resource Rent Tax Act 2012* unless otherwise indicated.

- the amount of expenditure is not included, by another provision of the *Minerals Resource Rent Tax Act 2012*, in the entity's mining expenditure for that MRRT year or a different MRRT year and that inclusion of the amount of expenditure in the entity's mining expenditure for that MRRT year or a different MRRT year by that other provision was more appropriate.

2. In this draft Taxation Determination, 'Aboriginal' has the meaning given by subsection 3(1) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* which relevantly states that:

Aboriginal means a member of the Aboriginal race of Australia, and includes a descendant of the indigenous inhabitants of the Torres Strait Islands.

Example: Amounts of expenditure incurred to identify or protect Aboriginal cultural heritage

3. AB Co has a pre-mining project interest for the 2013 MRRT year.

4. In the 2013 MRRT year, before commencing exploration drilling in the project area for its pre-mining project interest, AB Co carries out a heritage survey of the area to identify Aboriginal cultural heritage. The survey enables AB Co to reduce the risk of disturbing Aboriginal cultural heritage during its exploration activities and is preliminary to extracting or producing taxable resources from the project area for the mining project interest.

5. An Aboriginal sacred site of cultural significance is identified as a result of the survey and that site is located in close proximity to a particular area where AB Co intends to conduct its exploration activities.

6. In carrying out the survey, AB Co incurs amounts of expenditure being the payment for the services of an archaeologist to conduct the survey, payment to the relevant Aboriginal representatives to be involved in the survey and the payment of transport, meal and accommodation allowances to the archaeologist and to the relevant Aboriginal parties. Subsection 70-35(4) does not apply to these amounts of expenditure and this amount of expenditure has not been included in the entity's mining expenditure for the 2013 MRRT year.

7. As a result of the survey, AB Co also incurs an amount of expenditure to construct a fence around the identified Aboriginal sacred site to protect the site from disturbance or damage from AB Co's exploration activities. Subsection 70-35(4) also does not apply to this amount of expenditure and this amount of expenditure has not been included in the entity's mining expenditure for the 2013 MRRT year.

8. Each of these amounts of expenditure can reasonably be seen as desirable or appropriate from the point of view of the pursuit of AB Co's pre-mining project operations of the pre-mining project interest. As such, AB Co has necessarily incurred amounts of expenditure in the 2013 MRRT year in carrying on pre-mining project operations of the pre-mining project interest (being the carrying out of the survey and constructing the fence).

9. Were the pre-mining project interest a mining project interest, the carrying out of the survey and constructing the fence would be upstream mining operations in relation to such a mining project interest. This is because they are preliminary to extracting or producing taxable resources from the project area for the pre-mining project interest and do not involve doing anything with the taxable resources extracted from the project area for the mining project interest after those taxable resources reach their valuation point.

10. *Therefore, as subsection 70-35(4) also does not apply to these amounts of expenditure and these amounts of expenditure have not been included in the entity's mining expenditure for the 2013 MRRT year, these amounts of expenditure incurred by AB Co to identify or protect Aboriginal cultural heritage can be included in AB Co's pre-mining expenditure for a pre-mining project interest for the 2013 MRRT year under section 70-35.*

Date of effect

11. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation31 July 2013

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.

Explanation

The amount of expenditure must meet the requirements under subsection 70-35(2)

12. Firstly, for an amount of expenditure incurred by an entity to identify or protect Aboriginal cultural heritage to be included in an entity's pre-mining expenditure for a pre-mining project interest for an MRRT year under section 70-35, the amount of expenditure must meet the requirements of subsection 70-35(2).

13. Relevantly, subsection 70-35(2) states that:

An amount of expenditure is included in an *entity's *pre-mining expenditure for a *pre-mining project interest for an *MRRT year to the extent that the entity necessarily incurred the amount in that year in carrying on *pre-mining project operations of the interest.

A pre-mining project interest

14. A pre-mining project interest is an interest in an exploration right.² An exploration right is an authority or right (however described) under an Australian law for a purpose (other than an incidental purpose) of exploration or prospecting for taxable resources in a particular area in Australia.³

Necessarily incurred

15. The entity must have necessarily incurred the amount of expenditure in the MRRT year in carrying on pre-mining project operations of the pre-mining project interest.

16. The words 'necessarily incurred in carrying on' are also integral to the general income tax test for the deductibility of a loss or outgoing under section 8-1 of *Income Tax Assessment Act 1997* (ITAA 1997). The Courts have developed a pragmatic approach to interpreting these words in this income tax context.

17. For example, when examining whether an outgoing was 'necessarily incurred in carrying on a business' (as used in subsection 51(1) of the *Income Tax Assessment Act 1936*, the predecessor to section 8-1 of the ITAA 1997), the High Court said in respect of the word 'necessarily' that 'probably it is intended to mean no more than 'clearly appropriate or adapted for.'"⁴

² See subsection 70-25(1) and also see subsection 70-25(2) if the exploration right relates to both iron ore and other taxable resources.

³ See subsection 70-25(3).

⁴ *Ronpibon Tin N.L. and Tongkah Compound NL v. Federal Commissioner of Taxation* (1949) 78 CLR 47 at 56.

18. Later, in the Federal Court, Deane and Fisher JJ went on to explain that:

The controlling factor is that, viewed objectively, the outgoing must, in the circumstances, be reasonably capable of being seen as desirable or appropriate from the point of view of the pursuit of the business ends of the business being carried on for the purpose of earning assessable income. Provided it comes within that wide ambit, it will, for the purposes of s.51(1) be necessarily incurred in carrying on that business if those responsible for carrying on the business so saw it.⁵

19. When used in the context of carrying on pre-mining project operations of the pre-mining project interest, these words connote that there must be a nexus between the amount of expenditure and the pre-mining project operations of the pre-mining project interest in order for the amount of expenditure to be pre-mining expenditure. However, consistent with the approach taken by the Courts in the income tax context, the requirement for the amount of expenditure to be necessarily incurred in carrying on pre-mining project operations of the pre-mining project interest does not impose a narrow test or a test of logical or inescapable necessity. Applying this approach, an amount of expenditure incurred by an entity to identify or protect Aboriginal cultural heritage is necessarily incurred in carrying on pre-mining project operations of the pre-mining project interest if it is reasonably capable of being seen as desirable or appropriate from the point of view of the pursuit of those pre-mining project operations of the pre-mining project interest.

Pre-mining project operations of the pre-mining project interest

20. Pre-mining project operations of the pre-mining project interest are operations or activities to the extent that, if the pre-mining project interest were a mining project interest, the operations or activities would be upstream mining operations in relation to such a mining project interest.⁶

21. Operations or activities are upstream mining operations for the mining project interest to the extent they are operations or activities of a kind mentioned in paragraph 35-20(1)(a)⁷ and do not involve doing anything to, or with, the taxable resources extracted from the project area for the mining project interest after those taxable resources reach their valuation point.⁸

22. The operations or activities of a kind mentioned in paragraph 35-20(1)(a) are operations or activities that are preliminary, integral to or consequential upon extracting or producing taxable resources from the project area for the mining project interest or producing something using those taxable resources. This includes things directly involved in production, as well as those things before and after those operations. Things done as matter of practical need to facilitate or enable that production are also included.⁹

⁵ *Magna Alloys & Research Pty Ltd v. FC of T* 80 ATC 4542 at 4559; 11 ATR 276 at 295.

⁶ See subsection 70-35(5).

⁷ See paragraph 35-15(a).

⁸ See paragraph 35-15(b).

⁹ See paragraph 5.29 of the Explanatory Memorandum to the Minerals Resource Rent Tax Bill 2011 (MRRT) Bill.

23. Exploring for taxable resources in the project area of a pre-mining project interest is preliminary to extracting or producing taxable resources from the project area for the pre-mining project interest and would, were the pre-mining project interest a mining project interest, be an upstream mining operation.¹⁰ Activities which are, from a practical and business point of view, directed at facilitating or enabling exploration to be carried on, provided they do not involve doing anything with the taxable resource after it reaches the valuation point, would also be upstream mining operations.¹¹

Activities carried on that identify or protect Aboriginal cultural heritage and whether they are pre-mining project operations of the pre-mining project interest

24. The extent, if any, to which activities carried on that identify or protect Aboriginal cultural heritage are pre-mining project operations of the pre-mining project interest will be a question of fact and circumstance.

25. The activities of exploring for taxable resources in the project area for a pre-mining project interest would, were the pre-mining project interest a mining project interest, be upstream mining operations in relation to such a mining project interest. As such, these activities are pre-mining project operations of the pre-mining project interest.

26. Consequently, activities carried on that identify or protect Aboriginal cultural heritage which, from a practical point of view, are directed at enabling the activities of exploring for taxable resources in the project area for a pre-mining project interest, will be pre-mining project operations of the pre-mining project interest. Such activities would, were the pre-mining project interest a mining project interest, be upstream mining operations in relation to the mining project interest.

27. However, activities that identify or protect Aboriginal cultural heritage which have only a remote or temporal connection to the activities of exploring for taxable resources in the project area for a pre-mining project interest, will not be pre-mining project operations of the pre-mining project interest. For example, a grant provided to a university to conduct a study into improved methods of protecting Aboriginal cultural heritage in Australia would not have a sufficient connection to the activities of exploring for taxable resources in the project area for a pre-mining project interest.

28. Further, activities that identify or protect Aboriginal cultural heritage which involve doing anything with the taxable resources extracted from the project area for the mining project interest after those taxable resources reach their valuation point will also not be pre-mining project operations of the pre-mining project interest. For example, the removal and storage of Aboriginal artefacts to allow for the construction of a temporary road to transport coal extracted under a bulk sampling program, from a run-of-mine stockpile to port, would not be pre-mining project operations of the pre-mining project interest.

Subsection 70-35(4) cannot apply to the amount of expenditure

29. Secondly, for an amount of expenditure incurred by an entity to identify or protect Aboriginal cultural heritage to be included in an entity's pre-mining expenditure for a pre-mining project interest for an MRRT year under section 70-35, subsection 70-35(4) cannot apply to the amount of expenditure.

¹⁰ See paragraph 35-15(a), paragraph 35-20(1)(a) and example (b) in section 35-15 which gives the example of exploring for taxable resources in the project area as an example of an operation or activity that might be upstream mining operations.

¹¹ See paragraph 35-15(b).

30. Subsection 70-35(4) will apply to the amount of expenditure incurred by an entity to identify or protect Aboriginal cultural heritage if it is excluded expenditure under Subdivision 35-B¹² or it would be excluded expenditure under that Subdivision if certain conditions were met.¹³

The effect of subsection 70-35(9) on the amount of expenditure

31. Thirdly, where the same amount of expenditure can be included in both pre-mining expenditure under section 70-35 and mining expenditure under another provision, it is only to be included under the provision that is most appropriate. To determine which is the most appropriate provision, it will be necessary to have regard to the facts and circumstances of the particular case including the character of the amount and its relationship to the mining project interest and the pre-mining project interest.¹⁴

¹² See paragraph 70-35(4)(a).

¹³ See paragraph 70-35(4)(b).

¹⁴ See subsection 70-35(9).

Appendix 2 – Your comments

32. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

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

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

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- Mining project interest
- Pre-mining expenditure
- Pre-mining project interest
- Pre-mining project operation
- Upstream mining operation

Legislative references:

- ITAA 1936 51(1)
- ITAA 1997 8-1
- MRRTA Subdiv 35-B
- MRRTA 35-20(1)(a)
- MRRTA 35-15
- MRRTA 35-15(a)
- MRRTA 35-15(b)
- MRRTA 70-25(1)
- MRRTA 70-25(2)

- MRRTA 70-25(3)
- MRRTA 70-35
- MRRTA 70-35(2)
- MRRTA 70-35(4)
- MRRTA 70-35(4)(a)
- MRRTA 70-35(4)(b)
- MRRTA 70-35(5)
- MRRTA 70-35(9)
- Aboriginal and Torres Strait Islander Heritage Protection Act 1984 subsection 3(1)

Case references:

- Magna Alloys & Research Pty Ltd v. FC of T 80 ATC 4542 11 ATR 276
- Ronpibon Tin N.L. and Tongkah Compound NL v. Federal Commissioner of Taxation (1949) 78 CLR 47

Other references:

- Explanatory Memorandum to the Minerals Resource Rent Tax Bill 2011 (MRRT) Bill

ATO references

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