



## Certain Transactions involving Mining Tenements

This Commissioner's practice outlines the Commissioner's treatment of certain issues when determining the dutiable value of a dutiable transaction that involves mining tenements or the unencumbered value of mining tenements held by a landholder.

### Background

#### *Transfer Duty*

Under section 26 of the *Duties Act 2008* ('Duties Act'), transfer duty is charged on the *dutiable value* of a *dutiable transaction*.<sup>1</sup> Section 27 of the Duties Act provides that the *dutiable value* of a dutiable transaction is:<sup>2</sup>

- the *consideration* for the dutiable transaction; or
- the *unencumbered value* of the dutiable property the subject of the transaction if –
  - there is no consideration for the transaction; or
  - the consideration cannot be ascertained when liability for duty on the transaction arises; or
  - the unencumbered value is greater than the consideration for the transaction.

#### *Landholder Duty*

Section 186 of the Duties Act provides that the value of a *landholder*<sup>3</sup> is the sum of:

- the *unencumbered value* of the Western Australian land assets,<sup>4</sup> chattels, or land assets and chattels (whichever is relevant) to which the landholder is entitled; and
- the same percentage of the unencumbered value of the Western Australian land assets, chattels, or land assets and chattels to which any linked entity of the landholder is entitled as the percentage of the landholder's interest in the linked entity.

Under section 148 of the Duties Act, *unencumbered value* has the meaning given in section 36 as applied by section 150. Section 150 of the Duties Act states that sections 36 and 36A apply, with any appropriate modifications, where it is necessary to determine the unencumbered value of land assets or chattels for the purposes of sections 155(5)(a), 157(2) or 186.

<sup>1</sup> *Dutiable transaction* is defined in section 11 of the Duties Act. Transfer duty is charged on the dutiable value of a dutiable transaction unless otherwise provided: Duties Act s 26.

<sup>2</sup> Unless otherwise provided.

<sup>3</sup> A *landholder* is a corporation or unit trust scheme that is entitled, either directly or through a linked entity, to land assets in Western Australia valued at \$2 million or more: Duties Act s 155.

<sup>4</sup> Land assets include land, a fixed infrastructure control right, a derivative mining right and subject to s204A, a fixed infrastructure access right: Duties Act s 148.

## **Consideration**

*Consideration* means the amount of monetary consideration or the value of non-monetary consideration.<sup>5</sup> Consideration includes:<sup>6</sup>

- the amount of any liabilities assumed under the transaction, including an obligation whether contingent or otherwise to pay any unpaid purchase money payable under an agreement for the transfer of dutiable property; and
- the amount or value of any debt to the extent it is released or extinguished under the transaction.

If the consideration consists of an amount payable periodically and the total amount to be paid can be ascertained, the consideration is the total amount.<sup>7</sup> It does not matter whether consideration for a transaction is paid or given or required to be paid or given.<sup>8</sup>

Subject to certain conditions, duty will be reassessed when any contingent consideration under an agreement for transfer has not been paid.<sup>9</sup>

## **Unencumbered value**

Section 36(1) of the Duties Act provides that the *unencumbered value* of property is the value of the property determined without regard to any encumbrance to which the property is subject, whether contingently or otherwise.

Section 36(4) of the Duties Act provides that when determining the unencumbered value of property:

- the ordinary principles of valuation apply except where modified by the subsection;
- it is to be assumed that a hypothetical purchaser would, when negotiating the price of property, have knowledge of all existing information relating to the property; and
- information relating to property (including the right to and use of the information) will be regarded as an attribute of the property and not something to which an independent value can be ascribed.

Section 36(5) of the Duties Act provides that when determining the unencumbered value of land, the value is to be determined having regard to:

- the use of the land that would best enhance its commercial value; and
- commercial advantages (such as goodwill) that attach to the location or other aspects of the land and which would affect the price that a reasonable purchaser would be willing to pay for the land.

Section 36A sets out how fixtures and *mining tenements fixtures* will be treated when determining the unencumbered value of dutiable property that is land or mining tenements.

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<sup>5</sup> Duties Act s 3.

<sup>6</sup> Duties Act s 30.

<sup>7</sup> Duties Act s 30.

<sup>8</sup> Duties Act s 30.

<sup>9</sup> Duties Act s 32.

A *mining tenement fixture* means a thing that:<sup>10</sup>

- under the authority of the mining tenement, is fixed to the land that is the subject of the mining tenement; and
- would be part of the land as a fixture if the mining tenement were a freehold estate in land.

Anything that is part of land as a fixture, or is a mining tenement fixture, is to be taken into account even if the transaction does not, or purports not to, apply to the fixture as well as the land.<sup>11</sup> These rules apply only if the value of the fixture would not be taken into account separately.<sup>12</sup> In this section, 'land' means the physical land.<sup>13</sup>

### ***Valuation of property***

Under section 21 of the *Taxation Administration Act 2003* ('TAA'), the Commissioner may require a taxpayer to provide a written valuation by a *qualified valuer*<sup>14</sup> of any property, consideration or benefit, together with any documents or other records in the taxpayer's possession or control relevant to determining the value.

Section 22 of the TAA provides that, regardless of whether the Commissioner has required the taxpayer to provide a valuation or whether the taxpayer has complied with such a requirement, the Commissioner may:

- have a valuation made of any property, consideration or benefit; or
- adopt any available valuation of the property, consideration or benefit that the Commissioner considers appropriate.

Section 23A(1)(b) of the TAA provides that the Commissioner may recover valuation costs from a taxpayer if the Commissioner is not satisfied with a valuation provided by the taxpayer and the value on which the taxpayer's liability is assessed exceeds the designated valuation provided by the taxpayer by 15 per cent or more. If the Commissioner decides to recover valuation costs, section 27A(2) of the TAA provides the taxpayer is also liable to pay penalty tax for undervaluation.

Commissioner's Practice [TAA 23 'Circumstances When a Taxpayer Will Be Required to Provide a Written Valuation'](#) ('CP TAA 23') outlines when the Commissioner will require a taxpayer to provide a written valuation for transfer duty or landholder duty purposes.

Commissioner's Practice [TAA 24 'Penalty Tax and Recovery of Costs for Written Valuations'](#) sets out when the Commissioner will recover costs and impose penalty tax for undervaluation.

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<sup>10</sup> Duties Act s 36A(1).

<sup>11</sup> Duties Act s 36A(2) and (4)

<sup>12</sup> Duties Act s 36A(3) and (5).

<sup>13</sup> Duties Act s 36A(6).

<sup>14</sup> A *qualified valuer* is defined in the TAA as meaning a person licensed or registered under the *Land Valuers Licensing Act 1978* or a corresponding Act in another State or Territory, or a person who the Commissioner is satisfied is suitably qualified or experienced to provide a valuation.

## **Goods and Services Tax**

Section 5 of the Duties Act provides that, in ascertaining the value or consideration of anything, there is to be no discount for the amount of Goods and Services Tax ('GST') (if any) payable on the supply of that thing. Commissioner's Practice [DA 36 'Treatment of Amounts of Goods and Services Tax'](#) sets out the Commissioner's treatment of GST for the purposes of assessing duty.

### **Commissioner's Practice**

#### **Value of property**

1. In *Spencer's Case*,<sup>15</sup> the Court held that the value of property is required to be determined by reference to the price at which a willing but not anxious vendor would sell the property to a willing but not anxious purchaser on the assumption that both parties have all relevant information pertaining to the property.
2. When the parties to a dutiable transaction or a relevant acquisition are dealing at arm's length and the other requirements in *Spencer's Case* are satisfied, the Commissioner will use the purchase price as the initial reference point for the purpose of determining the dutiable value of the dutiable transaction or the unencumbered value of land assets and chattels for the relevant acquisition.

#### **Goods and Services Tax**

3. If a transaction is subject to GST, the amount of GST should be embedded in the market value of the property and be included in the purchase price.<sup>16</sup> Therefore, the amount of GST should be included in the value provided for transfer duty purposes.
4. Any adjustments to a market valuation to add or subtract GST amounts will either overstate or understate the market value. This is because any liability of a vendor to remit GST to the Australian Taxation Office should have already been factored into the market value.
5. The Commissioner may determine it is not appropriate to adopt a taxpayer valuation for assessment purposes where any artificial adjustments to GST are made to a market value or to the data relied on in determining the market value of property, for example, comparable sales or exploration expenditure.

#### **Valuation methodologies**

6. The top down method of valuation will be accepted for transfer duty or landholder duty purposes when all assets are located in Western Australia and the taxpayer does not submit that any value rests in non-dutiable items in the nature of goodwill<sup>17</sup> or synergies.
7. The Commissioner will consider accepting a top down valuation where no value is allocated to non-dutiable assets that the Commissioner considers may have some

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<sup>15</sup> *Spencer v The Commonwealth of Australia* (1907) 5 CLR 418.

<sup>16</sup> See, for example, *Tomago Aluminium Company Ltd v Valuer-General* [2010] NSW LEC 4; *Storage Equities Pty Ltd v Valuer-General* [2013] NSWLEC 137.

<sup>17</sup> Goodwill is dutiable for transfer duty purposes but not for landholder duty.

value. For example, the taxpayer may request the Commissioner to accept a valuation where the cost of directly valuing the non-dutiable assets will be greater than the potential difference in duty.

8. Other valuation methodologies will be considered on a case-by-case basis. When deciding whether to accept a valuation that uses another methodology, the Commissioner will compare the resulting value with the consideration for the transaction.
9. Examples of when the top down valuation method will not be suitable include when the consideration for a transaction is not ascertainable, there are assets in multiple jurisdictions, or there are multiple asset classes that are difficult to value directly.
10. In these cases, the Commissioner will accept valuation methodologies that are generally used to value that type of property. This may include the following methods for transactions or acquisitions involving mining tenements, depending on the stage of development:
  - 10.1 comparable transactions and derivatives;
  - 10.2 multiples of exploration expenditure;
  - 10.3 Kilburn Geoscience rating;
  - 10.4 net present value of future cash flows.
11. Where a transaction involves assets inside and outside Western Australia, the Commissioner will always consider the total purchase price when deciding whether to accept a valuation.
12. Although the Commissioner may accept that a valuation methodology is appropriate for particular property, the Commissioner may not agree with the values that result from applying the method if they are unreasonable or not supported. The Commissioner may determine it is appropriate to adopt a valuation based on the methodology and to adjust the values allocated to particular items in the valuation.
13. Before an assessment is made, the taxpayer will be given the opportunity to comment on the Commissioner's view that a valuation should not be accepted or that values in a valuation should be reallocated.

*Example 1*

A Pty Ltd acquires all of the shares in Big Mining Pty Ltd from an unrelated party for \$100 million. Big Mining Pty Ltd holds mining tenements, plant and equipment, and mineral stockpiles.

A Pty Ltd provides a valuation to the Commissioner using a top down methodology. The valuation allocates \$20 million to the stockpiles and \$80 million to the tenements and plant and equipment.

The Commissioner is likely to accept the valuation if the value allocated to the stockpiles is properly justified in the report.

If the valuation report does not adequately support this value, the Commissioner is unlikely to accept it. In this case, the Commissioner will either request more information to support the allocation of value or refer the matter to an expert valuer for adjudication or a new valuation.

### *Example 2*

B Pty Ltd acquires all of the shares in Mining Co Pty Ltd from an unrelated party for \$10 million. Mining Co Pty Ltd holds several exploration licences in Western Australia and no other substantial assets.

B Pty Ltd provides a valuation to the Commissioner based on a multiple of the exploration expenditure, with a preferred value for the tenements of \$3 million. The valuation report does not justify why there is a significant difference between the consideration paid for the shares in Mining Co Pty Ltd and the value of assets held by the company.

The Commissioner is unlikely to accept the taxpayer's valuation in this case.

### *Example 3*

C Pty Ltd purchases a mining project that includes a number of mining leases in Western Australia from an unrelated party. The consideration for the transaction is \$50 million subject to various adjustment clauses that cannot be calculated until after settlement is complete.

A top down valuation cannot be used in this case because the exact amount of the consideration will not be determined until the transaction is completed. For this reason, C Pty Ltd provides a valuation report which values non-dutiable assets at \$5 million and determines a preferred value of \$42 million for the mining leases based on a discount cash flow analysis.

Provided the allocation of \$5 million to non-dutiable assets is properly supported in the valuation report, the Commissioner is likely to accept this valuation because the value is reasonable having regard to the consideration for the transaction.

## ***Valuation of mining tenements***

14. When a transaction involves mining tenements, the taxpayer may be required to provide a written valuation under [CP TAA 23](#) or to provide a duties valuation form under this practice to allow the Commissioner to obtain a valuation of the tenements. The Commissioner will determine which practice applies based on the details of the transaction.
15. [Duties Information Requirement](#) 'Mining Tenements' sets out the information a taxpayer must provide when the Commissioner proposes to obtain a valuation of the tenements. The Commissioner may also require the taxpayer to provide further information.
16. Circumstances in which Form [FDA32 'Duties Valuation – Mining Tenements'](#) and the information referred to in paragraph 14 must be provided for a direct acquisition of mining tenements include where:
  - 16.1 a valuation is required under another Commissioner's practice;
  - 16.2 the parties are related or not otherwise dealing at arm's length; or
  - 16.3 there is no consideration for the transaction or the consideration appears to be inadequate or is unascertainable.

17. The fact that a taxpayer provides a valuation form under this practice does not prevent the Commissioner from determining it is more appropriate to require the taxpayer to provide a written valuation by a qualified valuer under [CP TAA 23](#).

### **Mining information**

18. Consistent with past practice, the Commissioner will treat the value of any information relevant to mining tenements as part of the value of the tenements to which the mining information relates.<sup>18</sup> The Commissioner will not recognise any separate value for mining information.
19. Where the property the subject of a transaction or an acquisition is or includes mining tenements and the taxpayer submits that the Commissioner should allow an allocation of value to mining information, the Commissioner will require the taxpayer to provide a written valuation under section 21 of the TAA and [CP TAA 23](#) to determine the unencumbered value of the property in accordance with section 36 (and section 36A where relevant) of the Duties Act.
20. If the taxpayer provides a written valuation of mining tenements in which an amount is allocated to mining information and the Commissioner is satisfied with the values allocated to other dutiable property, the Commissioner will add the amount allocated to mining information to the amount allocated to the mining tenements.

### **Mining goodwill and synergies**

21. In *Commissioner of State Revenue v Placer Dome Inc*,<sup>19</sup> the High Court held that in the context of the duties legislation, legal goodwill does not extend to every positive advantage and whatever adds value to a business, but is derived from those sources which generate or add value (or earnings) to the business by attracting custom.<sup>20</sup> The Court rejected the contention that goodwill for legal purposes and going concern value were interchangeable.<sup>21</sup>
22. The Court also rejected the argument that personnel, technical capability, management and synergies were sources of goodwill in this case, as there was no evidence that these sources generated or added value to the business by attracting custom.<sup>22</sup>
23. Where a valuation of the assets of a landholder which holds mining tenements determines that:
- 23.1 the value of land assets and chattels is substantially lower than the value that would be determined by a top down methodology; and
  - 23.2 the difference is derived from sources such as goodwill or synergies;

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<sup>18</sup> Information relevant to mining tenements includes geological information regarding the mineralisation of the tenement as well as life of mine plans or feasibility studies.

<sup>19</sup> *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59.

<sup>20</sup> *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 91.

<sup>21</sup> *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 96 and 142.

<sup>22</sup> *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 111.

the Commissioner will not accept the valuation without evidence that the purported sources of goodwill exist and that they add value or earnings by attracting custom to the business.<sup>23</sup>

### **Rehabilitation costs**

24. The Commissioner accepts that future rehabilitation costs are intrinsically linked to the value of a mining tenement and should be taken into account when valuing a mining tenement. Assumption of an obligation to pay these costs will not form part of the consideration for a transaction.

### **Royalties**

25. An agreement to acquire mining tenements may require the purchaser to pay a royalty or to assume an existing third party royalty obligation.
26. A royalty will either be:
- 26.1 limited to a specified amount (capped royalty); or
  - 26.2 payable indefinitely or for a specified period of time based on the volume or value of minerals produced or the profit or economic performance of a project (uncapped royalty).

In each case, the royalty payment is consideration for transfer duty purposes, but the transfer of an obligation or entitlement under a royalty agreement will not be a dutiable transaction.

27. To adopt the amount of consideration as the dutiable value for a dutiable transaction, the Commissioner must be able to ascertain that amount at the date liability arose on the transaction. This means the Commissioner must be able to ascertain the amount of a royalty at this date as well as all other parts of the consideration.
28. A royalty will be ascertainable where it is a capped royalty that is:
- 28.1 agreed to be paid as part of the consideration for the transaction; or
  - 28.2 being assumed and the remaining amount payable under the royalty can be ascertained at the date of the transaction.
29. Where a royalty is ascertainable, that amount will be included in the dutiable value for the dutiable transaction.
- 29.1 Where a capped royalty is agreed to be paid as part of the consideration for a transaction, the total royalty amount will be included for assessment purposes.<sup>24</sup>
  - 29.2 Where a royalty obligation is joint and several, the maximum amount payable by the party assuming the royalty will be included in the dutiable value. There will be no reduction on the basis that the obligation is held jointly.

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<sup>23</sup> *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 at 141.

<sup>24</sup> *Wildacre Metals Limited v Commissioner of State Revenue* [2011] WASAT 173, *Lionore Australia (Avalon) Pty Ltd v Commissioner of State Revenue* [2006] WASAT 250.

*Example 4*

A person agrees to acquire a mining project for consideration of:

- \$50 million in cash; and
- once production reaches 10,000 tonnes, payment of a royalty of \$0.50 per tonne up to a maximum of \$10 million.

The capped royalty is ascertainable at the date of the agreement and the total amount of \$10 million will be included in the dutiable value. Duty will be assessed on a dutiable value of \$60 million.

30. A taxpayer may apply for a reassessment of duty if some or all of a capped royalty is not paid and it is not possible for it to become payable in the future. This will generally require all tenements over which a royalty may be payable to be surrendered. An application for a reassessment must be made within five years after the original assessment is issued.<sup>25</sup>
31. A royalty will be unascertainable where:
- 31.1 it is uncapped; or
- 31.2 a capped royalty is being assumed and the amount that remains payable under the royalty agreement cannot be determined at the date of the transaction. For example, the amount will not be known until the transaction is completed because the vendor continues to pay the royalty until that time.
32. Where the amount of a royalty is unascertainable at the date of liability, the value of the mining tenements will be the dutiable value for the transaction.
- 32.1 The Commissioner may accept evidence of the value of the royalty obligation in place of a valuation of the tenements if the parties are at arm's length, the remainder of the consideration is ascertainable, and no value is allocated to non-dutiable assets.
- 32.2 Otherwise, unless paragraph 32 applies, a valuation of the tenements will be required in accordance with either section 21 of the TAA and [CP TAA 23](#) or section 22 of the TAA.
33. When consideration for a mining transaction includes a royalty that is unascertainable at the date of the transaction, the Commissioner will not usually obtain a valuation of the tenements if:
- 33.1 all tenements the subject of the transaction are prospecting licences or exploration licences;
- 33.2 there is other ascertainable consideration for the transaction, for example, cash or cash equivalents; and
- 33.3 the Commissioner is satisfied it is unlikely any royalty amount will be paid.
34. Examples of factors the Commissioner will take into account when considering if any royalty amount is likely to be paid include:
- 34.1 the amount of money spent on exploration of the tenement before the transaction;

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<sup>25</sup> TAA s 17(4).

- 34.2 the amount or value of the ascertainable portion of the consideration; and
  - 34.3 any public statements from the parties to the transaction regarding the tenement.
35. For completeness, it is noted that where a third party royalty is assumed as part of a dutiable transaction or a relevant acquisition, the value of the royalty is taken into account by the valuer when determining the unencumbered value of the mining tenements to which the royalty relates.

**Date of Effect**

This Commissioner’s practice takes effect from 24 July 2019.

Nicki Godecke  
 COMMISSIONER OF STATE REVENUE

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**Commissioner’s Practice History**

Document	Issued	Dates of effect	
		From	To
DA 42.0	24 July 2019	24 July 2019	2 December 2020