



Tax

Alert

9 September 2021

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Denial of diesel refunds in respect of specific activities by a vendor

In brief

In the *Commissioner for the South African Revenue Service v Glencore Operations SA (Pty) Ltd (462/2020) [2021] ZASCA 111*, the Supreme Court of Appeal ('SCA') overturned the decision of the Pretoria High Court by ruling in favour of SARS' initial decision to disallow diesel refunds claimed by the vendor in respect of specific activities.

In detail

General

On 10 August 2021, the SCA overturned the decision of the Tax Court in *Glencore Operations (Pty) Ltd v Commissioner for the South African Revenue Service (11696/18)*. The SCA ruled that SARS was correct in determining that *Glencore Operations SA (Pty) Ltd's* ('Glencore') mining activities did not constitute 'own primary production activities in mining', as prescribed in Note 6(f)(iii), Part 3 of Schedule 6 of the Customs and Excise Act 91 of 1964 ("the Act").

Glencore applied to SARS for diesel refunds in respect of diesel purchased for the period August 2011 to December 2013.

SARS disallowed the diesel refund request on the basis that the diesel purchased was used for secondary production activities (i.e. activities that entail, for example, the transportation of coal from the primary stockpile to a secondary stockpile or processing plant) and not for 'primary production activities in mining'.

Glencore contended that the diesel refunds related to various 'own primary production activities' listed under Note 6(f)(iii) of the Act, including the recovery of minerals, the maintenance of private access roads, coal stockpiling, the removal of waste products, the disposal thereof and the transportation of minerals.

In the alternative, Glencore argued that on a proper interpretation of the word 'include' in Note 6(f)(iii) of the Act the list therein set out is not exhaustive; that is, the listed activities do not constitute a closed list.

SCA judgment

The crucial issue before the SCA was whether the list of activities set out in Note 6(f)(iii) of the Act, which qualify as 'own primary production activities in mining', is exhaustive or not.

The Tax Court found that the list of activities are non-exhaustive activities forming part of or included in 'own primary production activities in mining'. Based on this, it was found that where activities conducted do not fit exactly within any of the activities referred to in Note 6(f)(iii) but are part and parcel of the kind of operations which the legislature intended to include in the concept of primary activities in mining, such activities are permitted and also subject to the diesel refund. Based on this interpretation, 'primary production activities' in mining is a wide or open-ended concept and on a case-by-case basis.

In considering the matter, the SCA confirmed that whilst the phrase 'own primary production activities' has not been defined, there can be no doubt that the list covers activities that are inextricably linked to primary mining, that is, the extraction of minerals from the ground.

It further had to consider whether the list of 'own primary mining activities' set out in Note 6(f)(iii) is exhaustive, having regard to the use of the word "include" in the said Note.

The SCA considered this aspect in detail and with reference to previous case law and found that an interpretation that favours a non-exhaustive list would hinder the principal purpose sought by Government in imposing fuel levies on diesel, namely to act as a 'significant source of Government revenue'. In addition, it was concluded that there would have been no reason for listing specific activities that constitute 'own primary production activities' if the list is nevertheless meant to be regarded as non-exhaustive.

In a separate judgment by Rogers AJA agreeing to the above outcome, the conclusion was further explained as follows:

- "[t]he lawmaker was at pains to circumscribe the activities which were entitled to benefit from the scheme ... and that an open-ended interpretation which allows for the inclusion of items not plainly covered by the language of Note 6 is unlikely to give effect to the legislation's intention."
- "[t]he lawmaker did not intend all mining activities to benefit from the scheme, only 'own primary production activities..'"
- "'primary production activities' means mining activities associated with extracting minerals from the ground, which is different from activities which occur after minerals have been extracted from the ground, with such latter activities being regarded as 'secondary production activities'."

Take away

Claiming of diesel refunds is currently a contentious issue. It is imperative for mining operators to have a deep understanding of their mining operations and how to differentiate between 'primary' and 'secondary' production activities. The failure to do so may result in unnecessary penalties and administration.

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