

Tax Alert

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Let's talk

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Mining Tax: Significant legislative changes proposed in draft legislation

In brief

On 31 July 2020, National Treasury published, for public comment, the 2020 Draft Taxation Laws Amendment Bill ('the Draft Bill'). The Draft Bill includes proposed amendments that, if enacted, will have a significant impact on the mining industry. The proposed amendments relate to the treatment of allowable mining capital expenditure ('capex') and the ring-fencing of capex per mine as contained in section 15 and 36 of the Income Tax Act, 1962 ('the Act').

More specifically, the draft amendments to section 15 propose that the accelerated capex allowable to taxpayers who conduct mining or mining operations provided for in section 15 is only available to a taxpayer who holds a mining right. Regarding the draft amendments to section 36, it is proposed that the discretion afforded to the Minister of Finance to lift the ring-fencing of capex per mine as envisaged in section 36 be removed. The draft amendments to section 36 also propose that a taxpayer carrying on mining operations on two or more mines be allowed to apply for a directive from the Commissioner for the South African Revenue Service ('the Commissioner') to deem such mines to be one mine.

In detail

Although the stated intention of Government is that the purpose of the draft amendments is merely to clarify the relevant provisions, they will, if enacted, have a significant impact on the mining industry. The draft amendments raise a number of difficult questions, which require answers.

The accelerated capital expenditure allowance

The *Benhaus* judgment, delivered last year, had a significant impact

on understanding of the meaning of 'mining' or 'mining operations'. The judgment confirmed that contract miners conduct mining operations as envisaged in section 1 of the Act. Contract miners are therefore, based on the *Benhaus* judgment, entitled to deduct allowable capex in terms of section 15 of the Act.

The draft amendments to section 15, as contained in the Draft Bill, will effectively put an end to contract miners benefiting from the accelerated capex allowance under

section 15, on the basis that it is now a requirement that, in order to so benefit, the taxpayer hold a mining right. Correspondingly, the draft amendments insert this mining right requirement throughout section 36.

Although the draft amendments appear to achieve the stated objective of National Treasury, they will have a ripple effect in section 15, giving rise to a number of questions, including the following:

- On the basis that it is proposed that the amendments to section 15 will come into operation on 1 January 2021 and will apply in respect of expenditure incurred on or after that date, will taxpayers who no longer qualify for the accelerated capex allowance be able to claim unredeemed capex already incurred or accumulated before 1 January 2021?
- It is proposed that section 15 requires taxpayers to have a mining right. How will prospecting companies envisaged in section 15(b) be impacted? What impact will this have on the exploration industry in South Africa? Has this impact been considered?
- How does this impact taxpayers that win minerals from run-of-mine ore or concentrate bought from a mining right holder?
- What impact will these proposed amendments have on surface mining operations where tailings or dumps are processed?
- In the case of unincorporated joint ventures where only one partner holds the mining right, what is the implication for the other partner regarding capex deductions?

The removal of the Minister's discretion to lift ring-fencing of capital expenditure per mine

Currently, section 36 of the Act empowers the Minister of Finance, after consultation with the Minister of Resources, to uplift the ring-fencing of capex per mine. The draft amendments propose that this discretion be removed.

Application for a 'one mine' directive from the Commissioner

The draft amendments propose an additional proviso to section 36(7F) of the Act, which will allow taxpayers who conduct mining operations on two or more mines to apply for a directive from the Commissioner to deem such mines to be 'one mine'.

The draft proviso requires the Commissioner, in considering the taxpayer's application for such a directive, to take into account a number of specific factors. These are mostly the same factors that have been applied by the industry when considering whether mining operations can be treated as 'one mine' as envisaged in section 36(10) of the Act.

The proviso also allows the Commissioner to take into account 'such other considerations which it deems to be relevant'.

Takeaway

Comments on the Draft Bill are due by 31 August 2020. It is imperative that the industry makes submissions to National Treasury to raise any concerns that it may have and that taxpayers understand the potential implications of the proposals on their tax positions.



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