8 August 2016

The National Treasury

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The South African Revenue Service

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RE: 2016 DRAFT TAXATION LAWS AMENDMENT BILL (TLAB) AND DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL (TALAB): COMMENTS PERTAINING TO KEY MINING TAX RELATED ISSUES

We have attached the comments from the SAIT Mining Tax Technical Work Group on the 2016 draft Taxation Laws Amendment Bill and draft Tax Administration Laws Amendment Bill pertaining to key mining tax issues. We appreciate the opportunity to participate in the process and would welcome further dialogue.

Please do not hesitate to contact us should you need further information.

Yours sincerely

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COMMENTS PERTAINING TO KEY MINING TAX ISSUES

1. PROVIDING TAX RELIEF FOR MINING COMPANIES SPENDING ON INFRASTRUCTURE FOR THE BENEFIT OF MINING COMMUNITIES

A. Preferred approach

Mining companies are required to meaningfully contribute towards community development under the Social and Labour Plan requirements of the Mineral and Petroleum Resources Development Act, 2002. These Social and Labour Plans require that the mining companies incur expenditure on community development on an ongoing basis (amongst other expenditures). Mining companies generally do not acquire ownership in the community developmental infrastructure. Therefore, mining companies do not obtain an enduring benefit from the expenditure. Given that the mining companies do not acquire ownership of the community infrastructure, the expenditure does not give rise to an asset in their hands. It is accordingly widely accepted that the cost is a straight-forward expense under IFRS and other accounting standards.

Given the ordinary revenue nature of the expense, mining companies have historically claimed their expenditure under their Social and Labour Plans in terms of section 11(a). When section 36(11)(e) was inserted into the Income Tax Act in 2008, the exclusion of expenditure in respect of infrastructure from "capital expenditure" gave rise to uncertainty. Therefore, instead of facilitating relief as Government intended, section 36(11)(e) has become a barrier, leaving taxpayers worse off. We recommend that this uncertainty would be best addressed by removing the exclusion of expenditure in respect of infrastructure from section 36(11)(e). This change would restore the proper matching of book and tax in terms of the loss and restore the pre-2008 order. The proposed section 36(11)(eA) could then be dropped altogether.

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Note: The current exclusion of mining rehabilitation within section 36(11)(e) is far too broad. While the explanatory memorandum suggests the exclusion is only for those rehabilitation expenses covered in section 37A, section 36(11)(e) literally excludes all mining rehabilitation expenses. The exclusion should be limited solely to mining rehabilitation contemplated in section 37A, namely cash contributions to a rehabilitation trust or company. The other expenses attendant upon the mining rehabilitation that mining companies are required to performed in terms of the Mineral and Petroleum Resources Development Act and the National Environmental Management Act should be allowed under section 36(11), especially mining rehabilitation that occurs during the life of mine (which is preferred from an environmental policy perspective).

B. Secondary approach

The proposed amendment recognises the difficulties experienced in differentiating between whether employees or members of the wider community are using developmental infrastructure. However, spreading the expenditure incurred in a particular year over ten years (or the life of the mine if it will be shorter) effectively means that most of the tax relief will be deferred and could even mean that the mining company will never be able to benefit from the tax relief if the expenditure incurred happens during the last years of the life of the mine.

We recommend that the proposal be amended to remove the spreading over the shorter of ten years and the life of mine. This relief would be an improvement over the straight and unwarranted denial under section 36(11)(e).

Holder requirement

The proposal refers to expenditure incurred in respect of a Social and Labour Plan for the purposes of the contributions by holders of mining rights towards the socio-economic development of the areas in which those holders are operating.

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A number of mining companies that have to comply with these requirements are not the holders of the mining rights even though these companies are performing the mining operations. For example there are a number of unincorporated joint ventures between mining companies where the unincorporated joint ventures are the holders of the mining rights and not the underlying joint venture parties i.e. the mining companies. We recommend that these references to the holders of the mining rights be removed so that mining companies obligated to perform under a Social and Labour plan receive the full benefit of the relief. The holding of rights and the obligations under the Social and Labour Plan do not neatly correspond.

Restriction against houses intended for sale

Both section 36(11)(d)(i) (employee related infrastructure) and the proposed section 36(11)(eA)(i) exclude housing for residential occupation housing intended for sale. Unfortunately, the nature of what is suitable accommodation in mining communities is evolving. There is a need for ultimate home ownership by employees and mining companies are trying to find ways of meeting this need. Moreover, it is often not possible to know upfront which houses erected in mining towns are eventually going to be sold to employees or other community members. It could be that an entire development could be built with one ambition but to find that subsequent events dictate a different result. Mining companies have little control over this outcome. We recommend that the exclusion be removed and that the tax relief claimed be recouped should the sale tax place.

The proposal does not contain a similar proviso to proviso (dd) to section 36(11)(d) which makes reference to section 12N (deductions in respect of improvements not owned by taxpayers). Given the variety of ways in which mining companies could potentially meet their Social and Labour Plan obligations, we would recommend that provision should be made for the possibility that section 12N may be relevant. For example, a mining company may agree to build and manage a school on government owned land for a management fee. This circumstance often occurs in terms of local municipal land.

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2. PERIOD FOR SUBMISSION OF FINAL MINING ROYALTY RETURN

It is proposed, in clause 35 of the Taxation Laws Amendment Administration Bill, that the deadline for the submission of a mining company's final royalty return be reduced from 12 months after the last day of the year of assessment to 6 months after the last day of the year of assessment. This proposal will result in the royalty return having to be submitted 6 months before the income tax return of the company is due for submission in terms of standard practice (as companies in practice have 12 months after the last day of the year of assessment to submit their income tax returns).

The move to a 6-month period for mineral royalties was previously attempted without success. Mining companies found it very difficult and impractical to submit the royalty return within 6 months as it effectively meant that they had to prepare both their royalty as well as their income tax returns within 6 months. It is well-known that the 12-month period is a more practical date for most companies, including mining companies.

Although income tax calculations and royalty calculations are not the same, the detailed work that needs to be done in preparing an income tax return also has to be done for the royalty return (and these are time-consuming processes). We recommend that the royalty return submission deadline should remain 12 months after year-end to give mining companies sufficient time to prepare their returns properly. To address the royalty collection requirement (presumably the main aim of the amendment), we recommend that mining companies should be allowed to make royalty top-up payments within 6 months after year-end in terms of the provisional payment system.

3. ADJUSTMENTS OF ESTIMATES OF INCOME TAX AND ROYALTY PAYABLE BY SARS

In terms of paragraph 19(3) of the Fourth Schedule to the Income Tax Act and the proposed section 5A of the Mineral and Petroleum Resources Royalty (Administration) Act, SARS may increase a provisional tax or royalty estimate made by the taxpayer.

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Such increased estimate is not subject to objection or appeal. The amount of the royalty has an impact on the income tax calculation of a mining company as the royalty is a deductible expense. We recommend that, should SARS adjust the estimate of the royalty by increasing the amount, SARS should be required to automatically adjust (downward) the taxable income and income tax liability of the mining company for provisional income tax purposes.

4. PENALTY FOR UNDERPAYMENT AS A RESULT OF UNDERESTIMATION OF ROYALTY PAYABLE

Estimating the royalty payable is not an exact science as the final amount of the royalty depends on variables that cannot always accurately be predicted. For example, the rate of the royalty depends on the EBIT of the company and any fluctuation in the EBIT calculation could have a significant impact on the rate and amount of the royalty. The proposed amendment to section 14(1) of the Mineral and Petroleum Resources Royalty (Administration) Act that prescribes that the Commissioner must impose a penalty if the section applies could give rise to punitive consequences. Taxpayers can easily make an honest and serious estimate where certain variables (for example exchange rates) change afterwards. We recommend that the penalty should remain subject to the Commissioner's discretion.