

DRAFT INTERPRETATION NOTE

DATE:

**ACT : MINERAL AND PETROLEUM RESOURCES ROYALTY ACT 28 OF 2008
MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT 28 OF 2002**

SECTION : SECTION 1, and 6A(1)(b) OF THE ACT

SUBJECT : MEANING OF “EXTRACTED”

Preamble

In this Note unless the context indicates otherwise –

- “**EBIT**” means earnings before interest and taxes as determined under section 5;
- “**gross sales**” means gross sales as mentioned in section 6;
- “**levy**” means royalty levy imposed under the Act;
- “**MPRDA**” means the Mineral and Petroleum Resources Development Act 28 of 2002;
- “**the Act**” means the Mineral and Petroleum Resources Royalty Act 28 of 2008;
- “**transfer**” means transfer as defined in section 1;
- “**Schedule**” means a schedule to the Act;
- “**section**” means a section of the Act; and
- any other word or expression bears the meaning ascribed to it in the Act.

1. Purpose

This Note provides clarity on the interpretation of the term “extracted” referred to in section 6A(1)(b).

2. Background

The purpose of the Act is to impose a levy on all mineral resources that are removed from the earth within the Republic and transferred to a third party for a profit. The Act distinguishes between refined mineral resources (Schedule 1) and unrefined mineral resources (Schedule 2) and the amount of levy will differ depending on whether the mineral is transferred in a refined or unrefined condition.

The transfer of a mineral resource triggers the imposition of a levy payable to the National Revenue Fund.

An “unrefined mineral resource” is defined in section 1 as any mineral resource listed –

- solely in Schedule 2; or
- in Schedule 1 or 2 which has not been refined to the condition specified to or beyond the condition stated in Schedule 1.

The condition specified for mineral resources is important to determine the gross sales and EBIT for purposes of calculating the levy payable under the Act. An unrefined mineral resource transferred beyond the condition specified in Schedule 2 requires a determination to be made under section 6A(1)(b) which deems the transfer to take place at the higher of the condition specified and the condition in which such mineral is extracted.

The point of extraction of an unrefined mineral resource creates uncertainty and it is necessary to determine at which point a mineral is considered to be extracted. Differing views exist on what the point of extraction is. This Note sets out what SARS’s view is.

3. The law

The relevant sections of the Acts are quoted in the **Annexure**.

4. Application of the law

4.1 Introduction

A “mineral” for purposes of the Act is defined as any substance that occurs naturally within or on the earth irrespective of whether the mineral has undergone processing as defined in the MPDRA, or manufacturing.¹

Processing² includes amongst others, winning, extracting, concentrating, refining of a mineral. “Beneficiation” is defined in the MPRDA³ and comprises four stages, namely –

- the primary stage, which includes activities such as winning, recovering, extracting, concentrating, refining, crushing, washing, screening, reduction, smelting and gasification;
- the secondary stage, which includes the conversion of a concentrate into an intermediate product;
- the tertiary stage, which includes the conversion of the intermediate product into a refined product that is suitable for purchase; and
- the final stage, which consists of any action of production

Processing therefore falls within the first stage of beneficiation.

¹ Section 1(1).

² Section 1 of the MPRDA.

³ Section 1 of the MPRDA.

A mineral resource that is transferred beyond the condition specified in Schedule 2, will be deemed to be transferred at the higher of the condition –

- specified for that mineral resource; or
- at which the mineral resource was extracted.

The meaning of the word “extracted” is important in determining which value should be attached to the mineral resource where such mineral resource is transferred at a condition beyond that which is specified in the Schedule 2 (see the Example).

4.2 The meaning of “extracted”

The word “extracted” is not defined in the Act and unless the ordinary meaning of the term creates an absurdity or ambiguity, the word must be given its ordinary dictionary meaning. This principle was established in *Johannesburg Municipality v Cohen Trustees*⁴ and in *Natal Joint Municipality Pension Fund v Endumeni Municipality*⁵ wherein the courts confirmed the general rule that the words and expressions should be construed in the ordinary sense unless it creates ambiguity or produces an absurd result if given its ordinary meaning. The courts also noted that it is important when giving words and expressions its ordinary meaning, to consider the context in which such words or expressions are contained. It is incorrect to simply apply a purposive interpretation if the ordinary meaning does not give rise to an absurd or ambiguous result.

In light of the above if one looks at the ordinary dictionary meaning, “extract” means —

- “to remove, take out – especially by effort or force”;⁶ or
- “to extract a raw material means to get it from the ground”.⁷

In order to give effect to the ordinary meaning of the words contained in legislation, cognisance must be had of the context in which the words are contained. In this case the word “extract” is contained in section 6A(1)(b) which applies to unrefined mineral resources that are transferred in a condition beyond the condition specified in Schedule 2.

The context in which the word “extracted” is contained is important to give effect to the ordinary meaning and in determining whether such ordinary meaning will create an absurdity or anomaly. Once the ordinary meaning is given to “extracted”, the context in which it is contained needs to be considered in order to determine whether such ordinary meaning creates an absurd or ambiguous result. Only if an absurdity or ambiguity is created can a purposive interpretation be applied to give effect to the purpose of the legislation.

In a recent judgment handed down in the Constitutional Court,⁸ the interpretation of legislation and specifically the meaning of “the State” used in legislation was considered. The Constitutional Court held that it is, as a general rule, not permissible

⁴ 1909 TS 811.

⁵ [2012] JOL 28621 (SCA).

⁶ <https://en.oxforddictionaries.com/definition/extract> [Accessed 23 February 2017].

⁷ The Essential English Dictionary, Cambridge University Press, 10 February 2011.

⁸ *Minister of Defence and Military Veterans v Liesl-Lenore Thomas* (judgement in CCT 168/14 delivered on 25 August 2015).

to use the meanings attributed to words in other statutes to determine what is meant by the words of a different statute. Where Parliament has defined a word used in a statute, it is taken as an indication that Parliament contemplated a special meaning assigned to the word and not an ordinary meaning. If the other statutes traverse the same terrain they might be relevant but whether that is the case depends on their respective subject matter.

The concept of winning a mineral in terms of the Income Tax Act⁹ cannot therefore be used to give effect to the meaning of the word extract for purposes of the Act. Section 1(2) affords any word contained in the Act the same meaning as contained in the MPRDA unless the Act specifically indicates otherwise.

The MPRDA does not define the term “extract” and therefore the ordinary meaning has to be considered.

If one attaches the ordinary meaning of the word “extracted” and has regard to the context in which it is contained then a conclusion can be reached that it is at the first point of extraction from the earth (in other words, at the mouth of mine) and not at the point when the mineral is won or recovered.

The definition of a “mineral” as contained in the MPRDA is qualified in the Act by the use of the words “regardless of whether that mineral or petroleum undergoes processing (as defined in section 1 of that Act) or manufacturing”.

This would mean that whether the process of beneficiation has commenced is not a determining factor to ascertain whether the substance extracted by the taxpayer is a mineral resource for which a royalty levy is payable upon transfer of that substance. There is therefore no anomaly that is created by affording the word its ordinary dictionary meaning.

Example – Iridium transferred in condition beyond the condition specified in Schedule 2

Facts:

Iridium is extracted from the earth at a calorific value of 140ppm and transferred at a value of 180ppm. At the end of the first phase of washing and screening the iridium has a calorific value of 160ppm. The condition specified for iridium in Schedule 2 is 150ppm.

Result:

Iridium is transferred beyond the condition specified in Schedule 2 (150ppm) and requires an adjustment to gross sales and EBIT. Section 6(2)(b) applies to determine which value will be used to calculate gross sales and EBIT.

The 140ppm will be regarded as the calorific value at point of extraction. Therefore, 150ppm will be used in the calculation of gross sales and EBIT.

⁹ 58 of 1962.

5. Conclusion

The ordinary meaning must be given to the word “extracted” for purposes of section 6A, unless such meaning creates ambiguity or absurdity. A purposive interpretation must be followed only if the latter applies.

Extraction therefore occurs when the mineral resource is removed from the earth before it undergoes a process of beneficiation. It is the calorific value at the mouth of mine that should be taken into account to determine whether the condition at extraction or the condition at point of transfer should be used to calculate the gross sales and EBIT for purposes of section 6A(1)(b).

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Annexure – The law

Section 1

“**mineral resource**” means a mineral or petroleum as defined in section 1 of the Mineral and Petroleum Resources Development Act, regardless of whether that mineral or petroleum undergoes processing (as defined in section 1 of that Act) or manufacturing;

“**unrefined mineral resource**” means a mineral resource –

- (a) listed solely in Schedule 2; or
- (b) listed in Schedule 1 and Schedule 2 that has not been refined to or beyond the condition specified in Schedule 1 for that mineral resource.

Section 6A(1)(b)

6A. Application of Schedule 2.—(1) If any unrefined mineral resource—

- (a);
- (b) is transferred at a condition beyond the condition specified in Schedule 2 for that mineral resource, the mineral resource must be treated as having been transferred at the higher of the condition specified for that mineral resource or the condition in which that mineral resource was extracted.

Section 1 of the MPRDA

“**beneficiation**”, in relation to any mineral resource, means the following—

- (a) primary stage, which includes any process of the winning, recovering, extracting, concentrating, refining, calcining, classifying, crushing, screening, washing, reduction, smelting or gasification thereof;
- (b) secondary stage, which includes any action of converting a concentrate or mineral resource into an intermediate product;
- (c) tertiary stage, which includes any action of further converting that product into a refined product suitable for purchase by minerals-based industries and enterprises; and
- (d) final stage, which is the action of producing properly processed, cut, polished or manufactured products or articles from minerals accepted in the industry and trade as fully and finally processed or manufactured and value added products or articles;

“**mineral**” means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes—

- (a) water, other than water taken from land or sea for the extraction of any mineral from such water;
- (b) petroleum; or
- (c) peat;

“**processing**” in relation to any mineral, means the winning, extracting, concentrating, refining, calcining, classifying, crushing, screening, washing, reduction, smelting or gasification thereof.