

MEMORANDUM

DATE: 7 November 2016

TO: ASPASA, Mr Nico Pienaar

FROM: Johan Kotze

MATTER #: AGGR24548.4

SUBJECT: SARS' Royalty Tax Challenge – Whether liable on bulk value at 'muck pile' or on gross sales – Status update

Dear Nico

1. Following my previous memorandum of 12 October 2016, I wish to update ASPASA and its members of the status of SARS' royalty tax challenge, i.e. rejecting the industry practice note's '*muck pile*' stage for calculation of the royalty.
2. The request for reasons in the matter of Blurock Quarries (Pty) Ltd (Blurock) was filed 28 October 2016 and requested SARS' reasons on the following:
 - why SARS' '*opinion*' should replace the '*intention of the legislation*',
 - why SARS' opinion is not aligned with the Explanatory Memoranda, in that SARS did not follow the principle which is to establish '*the value*' at the '*first saleable point*', which will naturally have an element of beneficiation', and
 - how SARS' opinion is sustainable if SARS does not dispute that the '*muck pile*' is indeed the '*first saleable point*'.
3. SARS' reply is due on or before 31 January 2017. Once SARS reply with reasons (all things equal) the objection has be filed within 30 days.

4. The general steps in a tax dispute are:
 - Step 1 – SARS' disputed assessment
 - Step 2 – Taxpayer's reason request (optional)
 - Step 3 – SARS' reasons
 - Step 4 – Taxpayer's objection
 - Step 5 – SARS' objection decision
 - Step 6 – Taxpayer's appeal (if objection was disallowed)
 - Step 7 – Appeal via the ADR (optional – mostly for settlement purposes)
 - Step 8 – Appeal to tax court
 - Step 9 – SARS' grounds of assessment and opposing appeal
 - Step 10 – Taxpayer's grounds of appeal
 - Step 11 – SARS' reply to taxpayer's grounds of appeal
 - Step 12 – Discovery
 - Step 13 – Pre-trial
 - Step 14 – Tax Court hearing
 - Step 15 – Tax Court judgment
 - Step 16 – Losing party appeals to full bench of the High Court or, with leave from the Tax Court's judge, directly to the Supreme Court of Appeal
 - Step 17 – Losing party, if appealed to the High Court, applies to appeal to the Supreme Court of Appeal, or petitions the Supreme Court of Appeal if the application has been declined by the High Court
 - Step 18 – Supreme Court of Appeal

Most tax cases used to go directly from the Tax Court to the Supreme Court of Appeal, because it is relatively quick compared to the appeal to the High Court and save costs if the losing party is in any event going to appeal to the Supreme Court of Appeal, but there seems to be a trend nowadays to appeal the High Court.

5. In the previous memorandum I advised that industry wide assessments will give rise to a test case scenario and that the ideal would be that the industry agrees with SARS that the other companies do not have to be assessed and have to raise objections, but have to agree to be subject to the test case's outcome, to prevent an enormous administrative burden and coordination.

6. We met with SARS Friday 4 November 2016, to discuss the above ideal scenario, but the problem that arose in the meeting was that the mineral royalty is a self-assessment tax. If SARS agrees to refrain from assessing until the test case has run its course (which is anything between 3 to 5 years) and does not assess the earlier periods, prescription will preclude SARS from assessing many periods of the other companies.
7. It would also not be possible to enter into a collective agreement whereby prescription is frozen until the test case has run its course.
8. The mineral royalty regime commenced on 1 March 2010, which, if the taxpayer has a February yearend, would have required a mineral royalty return for the Febr 2011 yearend within 12 months thereafter.
9. The return, being a self-assessment filing, has a 5 year period within which SARS can assess the return (except in the case of fraud, misrepresentation, or non-disclosure of material facts). The 5 years start on date of assessment, which will be on the date the return is submitted.
10. Assuming a taxpayer with a February yearend filed their mineral royalty return on the 29th of February 2012, the self-assessment will prescribe 28 February 2017.
11. It has been decided that a test-case scenario will therefore not be in everyone interest and a member should check whether SARS is assessing a prescribed period.
12. The objection which will be drafted for Blurock will, as a template, be made available to the members to use as their objection, but each member should check its own calculations and prescription.
13. The notice of appeal which will be drafted for Blurock, will also, as a template, be made available to the members to use as their notice appeal. Chances are that the members would only have to object for its matter to fall within the test-case scenario.

You are welcome to call me to discuss.

Regards

Johan Kotze
