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TAX ALERT

IN THIS ISSUE

VOLUNTARY DISCLOSURE RELIEF TO BE WIDENED

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DAVIS TAX COMMITTEE: FIRST INTERIM REPORT ON MINING

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CLIFFE DEKKER HOFMEYR

VOLUNTARY DISCLOSURE RELIEF TO BE WIDENED

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The Tax Administration Act, No 28 of 2011 (TAA) currently provides for various forms of relief in respect of disclosures made by qualifying taxpayers of their tax defaults under the Voluntary Disclosure Programme (VDP). The recently published Tax Administration Laws Amendment Bill 2015 (TALAB) makes a welcome proposal to widen the scope of available relief to qualifying taxpayers, to include any penalties relating to the late payment of tax.

The proposed amendment in the TALAB states that VDP relief will now be widened to include late payment penalties (interest still remains excluded), which essentially eliminates the 'secondary' process of attempting to obtain relief at SARS branch office level.

The VDP is a formal statutory process, provided for in Part B of Chapter 16 of the TAA, and in terms of which qualifying taxpayers can approach the South African Revenue Service (SARS) on a voluntary basis for purposes of disclosing their tax defaults. Upon a successful VDP application and conclusion of an agreement with SARS, the taxpayer will enjoy relief from understatement penalties (which could be up to 200% in severe cases) and administrative non-compliance penalties. Additionally, SARS will not pursue criminal proceedings against the taxpayer.

Currently, the VDP does not provide relief for late payment penalties or interest (for example, the 10% late payment penalty for Value-Added Tax or employees' tax). These are generally dealt with outside the VDP process at SARS branch office level, once the VDP process has been completed. In other words, the VDP process, as it currently stands, does not necessarily prevent a taxpayer from seeking relief from late payment penalties or interest. However, the process at SARS branch office level is less formal and, in some cases, open to subjective application of the law as it pertains to available remedies to remit penalties or interest, in whole or in part.

The proposed amendment in the TALAB states that VDP relief will now be widened to include late payment penalties (interest still remains excluded), which essentially eliminates the 'secondary' process of attempting to obtain relief at SARS branch office level. The proposed amendment, which becomes effective on the date of promulgation of the TALAB (likely January 2016), brings into play a potentially risky interim time period for prospective VDP applicants. The question now arises whether such applicants should wait for promulgation of the amendment?

The risk in waiting for promulgation is that VDP relief for understatement penalties tapers down where voluntary disclosure is made *after* SARS has issued a notification of audit or investigation. For example, VDP relief would in most cases result in no understatement penalties being levied, however, where SARS has issued notification of an audit or investigation, it will be entitled, depending on the severity of the case, to levy understatement penalties of up to 75%.

It may therefore be a dangerous (and unnecessary) gamble to wait for promulgation of the proposed amendment on the basis that SARS could, at any time, issue a notification to a taxpayer to conduct an audit or investigation.

Ruaan van Eeden

DAVIS TAX COMMITTEE: FIRST INTERIM REPORT ON MINING

The Report concentrates on traditional mining and does not deal with oil and gas extraction for which separate reports will be tendered at a later stage.

The Davis Tax Committee (Committee) was established by the Minister of Finance (Minister) to give effect to government's tax review and assessment of the tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability, as proposed in the 2013/14 National Budget.

The Committee submitted the First Interim Report on Mining (Report) to the Minister on 1 July 2015, and it was released for public comment on 13 August 2015. This Report is a provisional interim report and a useful point of departure for engaging with stakeholders before final and conclusive recommendations are made to the Minister, who will then determine any further steps to be taken with regard to the Report.

The Report concentrates on traditional mining and does not deal with oil and gas extraction for which separate reports will be tendered at a later stage. It is mainly concerned with income tax and the mineral royalty charge imposed in terms of the Mineral and Petroleum Resources Royalty Act, No 28 of 2008 (MPRRA).

The Committee was tasked with reviewing the existing mining taxes and has made, *inter alia*, the following recommendations:

- The Committee is broadly in favour of retaining the status quo of taxing mining taxpayers on taxable income at the same rate as non-mining taxpayers;
- The Committee is working toward aligning the mining corporate income tax regime to correlate with tax systems applicable to other taxpaying sectors generally, leaving the royalty system to respond to the non-renewable nature of mineral resources;
- It is recommended that the upfront capex write-off regime be discontinued and replaced with an accelerated capex depreciation regime, which is in parity with the write-off periods provided for in respect of the manufacturing (40/20/20/20) basis. This capital expenditure should be written off from the date of incurring of such expenditure. The cost base applicable to this write-off covers expenditure contained in s36(11)(a) and s36(11)(b) of the Income Tax Act, No 58 of 1962 (Income Tax Act), in so far as it relates to capex expenditure allowable in terms of the current tax regime. Effectively, this means that the partial allowances will retain their current write-off periods and will not be depreciated on a 40/20/20/20 basis (with a view toward seeking alignment of write-off periods between non-mining long term infrastructure expenditure);
- The removal of the upfront capex tax allowance regime allows for the removal of ring-fences aimed at preventing the set-off of capex expenditure against a non-mining tax base. The removal of these ring-fences should adequately compensate taxpayers for the removal of the upfront capex allowance. An immediate removal of ring-fences could trigger a rush of trapped losses and unredeemed capex set-offs

The Committee is working toward aligning the mining corporate income tax regime to correlate with tax systems applicable to other taxpaying sectors generally, leaving the royalty system to respond to the non-renewable nature of mineral resources.

With regard to the additional capital allowances available to gold mines, the Committee holds that such allowances should be phased out so as to bring the gold mining corporate income tax regime into parity with the tax system applicable to taxpayers as a whole.

The Committee would like to explore an amortisation write-off in respect of the various mineral rights accorded in terms of the MPRDA, in greater depth and will offer a last view on the matter in the final report.

against non-mining income and other previously ring fenced mining income, resulting in tax collections being compromised. As a result, the Committee will defer the timing for removal of the ring-fences to the National Treasury which is best able to determine what the country can afford;

- The Committee would prefer to bring the taxation of the gold mining industry in line with the tax regime applicable to non-gold mining taxpayers (in so far as possible). The Committee recommends that the mining formula be retained for existing gold mines. The retention of the gold formula should apply to existing gold mines only, as new gold mines are unlikely to be established in circumstances where profits are marginal or where gold mines are conducting mining of the type intended to be encouraged by provision of the gold formula. Accordingly, the Committee recommends that the gold formula should not apply to newly established gold mines. Given the retention of the gold formula for existing gold mines, it will be necessary to retain ring-fences in mines where the gold formula subsists. In light of the fact that these recommendations raise neutrality issues when comparing new gold mines with existing gold mines, an alternative recommendation is to phase out the gold formula for all mines over a reasonable period of time;
- With regard to the additional capital allowances available to gold mines, the Committee holds that such allowances should be phased out so as to bring the gold mining corporate income tax regime into parity with the tax system applicable to taxpayers as a whole. In doing so, restrictions on the deduction of interest expenditure (where applicable) should be lifted to accord with normal tax principles so that taxpayers are compensated for their finance costs;
- The Committee takes the view that new tax instruments are not necessary, particularly since the mineral royalty has been carefully designed to achieve a strong balance of ensuring that the royalty is responsive to different economic circumstances, capturing rents when profits are high and ensuring a measure of cover in the form of a minimum revenue stream during weak economic cycles and low commodity prices;
- The Committee recommends that the Department of Mineral Resources conduct an in-depth examination of the current regulatory framework applicable to greenfield investors (as prescribed by the Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA), following which, further tax incentives should be considered;
- The Committee would like to explore an amortisation write-off in respect of the various mineral rights accorded in terms of the MPRDA, in greater depth and will offer a last view on the matter in the final report;

DAVIS TAX COMMITTEE: FIRST INTERIM REPORT ON MINING

CONTINUED

It is likely that the current tax regime applicable to mining companies will be amended. As a result, it is important for mining companies to take cognisance of the recommendations made by the Committee so as to fully understand the impact of the proposals on their mining businesses.

- The Committee recommends that all infrastructure costs incurred in terms of a Social and Labour Plan (SLP) be allowed for tax purposes, even if such expenditure benefits the community at large and not just the direct employees. The Committee tentatively recommends that community expenditure incurred outside the SLP should be channelled through the Public Benefit organisation system;
- The Committee has articulated a recommended methodology for National Treasury to solve technical problems and disparities relating to pieces of legislation such as the MPRDA, MPRRA, the Income Tax Act and National Environment Management Act, No 107 of 1998. The Committee has assisted in identifying aspects of legislation which require remedy; and
- The Committee recommends the removal of s37 of the Income Tax Act, which deals with recoupments relating to mining assets, with a view to bringing mining asset recoupments in line with the law applicable to non-mining taxpayers.

Regarding the above, it is likely that the current tax regime applicable to mining companies will be amended. As a result, it is important for mining companies to take cognisance of the recommendations made by the Committee so as to fully understand the impact of the proposals on their mining businesses.

Comments on the Report are due on 31 October 2015.

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