DRAFT

South African Revenue Service

DRAFT INTERPRETATION NOTE

DATE:

ACT	**:**	**INCOME TAX ACT 58 OF 1962**
SECTION	**:**	**SECTIONS 37A, 10(1)(*c*P) and 64F(1)(*c*)**
SUBJECT	**:**	**MINING REHABILITATION COMPANY OR TRUST: DEDUCTIBILITY OF AMOUNTS PAID AND COMPLIANCE WITH SECTION 37A**

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Preamble

In this Note unless the context indicates otherwise –

- **"DMR"** means the Department of Mineral Resources;
- **"Financial Provision Regulations"** means "Regulations pertaining to the financial provision for prospecting, exploration, mining or production operations", published in the Government Gazette 39425 dated 20 November 2015;
- **"mining rehabilitation company or trust"** means a mining rehabilitation company or trust as contemplated in section 37A;
- **"mining right holder"** means any person who is engaged in or holds a permit, right, reservation or permission in prospecting, exploration, mining or production activities;[1]
- **"MPRDA"** means the Mineral and Petroleum Resources Development Act 28 of 2002;
- **"NEMA"** means the National Environmental Management Act 107 of 1998;
- **"property"** means all assets of the mining rehabilitation company or trust;
- **"section"** means a section of the Act;
- **"TA Act"** means the Tax Administration Act 28 of 2011;
- **"the Act"** means the Income Tax Act 58 of 1962;
- **"the Minister"** means the Minister of Minerals and Energy; and
- any other word or expression bears the meaning ascribed to it in the Act.

[1] Section 37A(1)(*d*)(i)(*aa*).

1. Purpose

This Note provides guidance on the interpretation and application of section 37A which deals with payments made by persons to a mining rehabilitation company or trust where that company or trust has been established for the purposes of conducting rehabilitation upon the closure of a mine and the cessation of mining activities. This rehabilitation is to also cover any latent and residual environmental impacts of the mining activities.

The Note also discusses the special tax relief provided for persons contributing cash to a mining rehabilitation company or trust, as well as specific anti-avoidance rules designed to prevent misuse or abuse of those provisions.

2. Background

Financial provision for environmental rehabilitation is regulated by NEMA and administered by the DMR. NEMA provides that in the event that a mining right holder fails to rehabilitate or to manage any impact on the environment, or is unable to undertake such rehabilitation, the Minister may use all or part of the financial provision (funds and assets) of a mining rehabilitation company or trust to rehabilitate the affected areas.[2]

The aim of section 37A is to align tax policy with environmental regulation. Section 37A regulates mining rehabilitation companies or trusts for income tax by requiring that the funds or assets of the rehabilitation company or trust be applied solely for a purpose stated in section 37A(1)(*a*) before a deduction of contributions made to the mining rehabilitation company or trust during a year of assessment may be considered. Section 37A contains strict rules for the distribution of the assets and funds of a mining rehabilitation company or trust and imposes harsh penalties under circumstances where such funds are used for purposes other than those provided for under section 37A(1)(*a*).

3. The law

The relevant sections of the Act and the MPRDA are quoted in the **Annexure.**

4 Definitions

4.1 Closure certificate

The holder of a mining right, prospecting right, retention permit, mining permit, or previous holder of an old order right or previous owner of works must apply for a closure certificate within a prescribed period.[3] This application must be submitted after –

- the lapsing, abandonment or cancellation of the relevant right or permit;
- the operations have ceased;
- the relinquishment of any portion of the prospecting of the land to which a right, permit or permission has been granted; or

[2] Section 24P(5) of NEMA.
[3] Section 43(4) of the MPRDA.

- the closure plan has been completed.[4]

The DMR issues a closure certificate as contemplated under section 43 of the MPRDA once the required documents, including a closure plan and an environmental risk report, are furnished and the environment has been satisfactorily rehabilitated.

4.2 Rehabilitation

The word "rehabilitation" is not defined in NEMA, the MPRDA or the Act and should be interpreted according to its ordinary meaning as applied to the subject matter in relation to which it is used. The word "rehabilitation" is defined in the *Lexico Dictionaries* as –

> "[1.2] the action of restoring something that has been damaged to its former condition".[5]

The Chamber of Mines of South Africa define "rehabilitation" as follows:[6]

> "Rehabilitation, from the mining industry perspective, means putting the land impacted by the mining activity back to a sustainable usable condition. It recognises that the restoration of what was previously there is simply impossible with current best practice. This definition (and implied intention) includes the concepts of minimisation of loss of land use capability and of net benefit to society."

The above definition of rehabilitation is confirmed by the now repealed section 38(1)(*d*) of the MPRDA which defined rehabilitation obligations as the obligation on rights holders to as far as reasonably practicable rehabilitate the land affected by the mining operation to its natural or predetermined state, or to a land use which conforms to the generally accepted principle of sustainable development.

4.3 Sustainable development

The term "sustainable development" is defined in section 1 of NEMA as –

> "the integration of social, economic and environmental factors into planning, implementing and decision-making so as to ensure that the development serves present and future generations".

The MPRDA[7] defines the term "sustainable development" as –

> "the integration of social, economic and environmental factors into planning, implementing and decision making as to ensure that the mineral and petroleum resources development serves present and future generations;"

It is evident from the above definitions that sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs, for example, the restoring of an area for agricultural purposes.

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4 Section 43(3) of the MPRDA.

5 **www.lexico.com/definition/rehabilitation** [Accessed 21 February 2022].

6 The Chamber of Mines of South Africa/Coaltech: *Guidelines for the Rehabilitation of Mined Land*, November 2007.

7 Section 1 of the MPRDA.

5. Requirements under NEMA and the MPRDA

Mining right holders conducting mining activities are required to comply with prescribed rules and regulations under NEMA and the MPRDA pertaining to a mining rehabilitation company or trust.

The MPRDA governs the acquisition, use and disposal of mineral rights. One of the fundamental principles of the MPRDA is to give effect to section 24 of the Constitution of the Republic of South Africa by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner.[8] Section 19(2)(*e*) of the MPRDA requires the mineral right holder to comply with the requirements of the approved environmental management programme.[9]

NEMA aims to prevent the degradation, destruction and removal of natural resources caused by, amongst others, mining activities that affect the health and well-being of people living within the vicinity of mines.

A brief overview of the relevant requirements are discussed below.

5.1 Statutory obligation to undertake environmental rehabilitation

Environmental rehabilitation forms the basis of sustainable development under sections 2(4) and 28 of NEMA. Section 2 of NEMA sets out all the principles for sustainable development.

Section 28(1) of NEMA deals with the duty of care and remediation of environmental damage and provides as follows:

> "Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot be reasonably avoided or stopped, to minimise and rectify such pollution or degradation of the environment."

Under section 37(1) of the MPRDA, the principles set out in section 2 of NEMA apply to all prospecting and mining operations and any matter or activity relating to such operations and serves as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA.

Mining right holders remain responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of polluted or extraneous water, the management and sustainable closure thereof notwithstanding the issuing of a closure certificate by the DMR under section 43(1) of the MPRDA, to the holder or owner.[10]

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[8] Section 2(*h*) of the MPRDA.

[9] Financial Regulation Provisions issued by the Minister under section 44 of NEMA.

[10] Section 24R(1) of NEMA.

5.2 Persons liable for rehabilitation

Section 43(1) of the MPRDA provides that the holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right or previous owner of works that have ceased to exist, remains responsible for any environmental liability. Once the above provisions have been complied with, the Minister issues a closure certificate under section 43(1) of the MPRDA to the holder or the owner concerned.

That holder may contractually arrange with a third party to undertake the rehabilitation activities on its behalf. The Minister will, however, still hold the mining right holder liable to rehabilitate the affected area if the third-party defaults. Under section 43(6) of the MPRDA, the Minister may retain any amount of financial provision in a mining rehabilitation company or trust for latent, health and any environmental impact which may only become known in the future.

Under section 46 of the MPRDA, the state is responsible for environmental rehabilitation of an abandoned mine if the owner is deceased, untraceable, or in the case of a juristic person has ceased to exist or has been liquidated.

5.3 Methods of financial provision

Section 44 of NEMA provides for the Minister to make regulations pertaining to financial provision for environmental rehabilitation. Under the Financial Provision Regulations administered by NEMA, a mining rehabilitation company or trust may only apply its funds and assets for purposes stated in section 37A(1)(*a*).

The method of financial provision under the Financial Provision Regulations includes one or a combination of the following:[11]

- A financial guarantee from a bank registered under the Banks Act, 94 of 1990, or from a financial institution registered by the Financial Services Board.[12]
- A deposit into a specified account administered by the Minister.[13]
- Contribution in the form a cash payment to a mining rehabilitation company or trust as contemplated under section 37A.[14]

5.4 Reporting requirements under NEMA

Section 24N of NEMA provides for the submission of an environmental management programme by the holder of a mining right or permit before the Minister considers an application for an environmental authorisation.[15] An environmental authorisation is required by a person conducting prospecting or mining operations.[16]

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[11] Financial vehicles used for financial provision, Regulation 8 of the Financial Provision Regulations.
[12] Regulation 8(1)(*a*).
[13] Regulation 8(1)(*b*).
[14] Regulation 8(1)(*c*).
[15] An "environmental authorisation" is defined in section 1 of NEMA and means "the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authority contemplated in a specific Environmental Management Act."
[16] Section 38A of the MPRDA.

Regulation 12 of the Financial Regulation Provisions read with section 44 of NEMA provides for the submission of plans and reports relating to –

- annual rehabilitation;
- final rehabilitation, decommissioning and mine closure; and
- remediation of latent or residual environmental impacts that may become known in future.

Reporting requirements under the MPRDA includes the following:

- Information and data in respect of reconnaissance and prospecting.[17]
- Information and data in respect of mining or processing of minerals.[18]
- Minister's power to direct submission of specified information or data.[19]

6 Interpretation and application of the law

6.1 Deductibility of contributions made to a mining rehabilitation company or trust [section 37A(1)]

Section 37A(1) provides for a tax deduction of contributions made to a mining rehabilitation company or trust in the form of cash paid during any year of assessment commencing on or after 2 November 2006, by any person carrying on a trade provided that person meets certain requirements. The transfer of an asset, other than cash, does not fall within the ambit of section 37A. A financial guarantee does not constitute an amount paid in cash to a mining rehabilitation company or trust and will therefore not qualify for deduction under section 37A(1).

The deductibility of the contribution is subject to the fulfilment of certain requirements contained in section 37A(1)(*a*) to (*d*) which are discussed in **6.1.1** to **6.1.5**.

6.1.1 Sole object to effect rehabilitation [section 37A(1)(*a*)]

Under section 37(1)(*a*), the sole object of the mining rehabilitation company or trust must be to apply its property for rehabilitation upon premature closure, decommissioning and final closure, and post closure coverage of any latent and residual environmental impacts on the area or areas mined by a mining right holder as defined in section 37A(1)(*d*)(i)(*aa*) (see **6.1.5**).

The purpose of the environmental rehabilitation under section 37A(1)(*a*) is to restore the affected areas to their natural and predetermined state, or to a land use which conforms to the generally accepted principle of sustainable development (see **4.3**).

The word "apply" is not defined in the Act. *Lexico Dictionaries* defines the word "apply" as follows:

> "[2.1] bring or put into operation or use."[20]

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[17] Section 21 of the MPRDA.
[18] Section 28 of the MPRDA.
[19] Section 29 of the MPRDA.
[20] **www.lexico.com/definition/apply** [Accessed 21 February 2022].

In close proximity to the word "apply" in section 37A(1)(*a*) is the word "sole", referring to exclusivity and entirety, "not involving anyone or anything else, only" [21], which strengthens the diligence and close proximity of the action required. The exclusive and only purpose of a mining rehabilitation company or trust must be to devote its property exclusively for rehabilitation purposes as described above (see **4.2**).

Read within the context of the applicable mining legislation (see **2**) and rehabilitation for purposes of section 37A, includes not only restoring the area or areas to their former state but that such land use must conform to the generally accepted principle of sustainable development (see **4.3**).

It is the prerogative of the DMR to decide whether a person complies with the basic principles of sustainable development. The facts and circumstances of each case may vary significantly and it is therefore not possible to lay down uniform rules to enable taxpayers to determine whether they comply with generally accepted principles of "sustainable development" (see **4.3**).

Once an area or areas have reached the state of final closure, the DMR provides the mining right holder with a final closure certificate,[22] the mining lease can be relinquished and the responsibility for the land can be taken over by the next land user.

Responsible environmental management over the life of a mining operation is essential for successful rehabilitation. Rehabilitation is undertaken not only at the end of a mine's life, but progressively during the mining process.[23] These constant rehabilitation actions enable companies to meet rehabilitation obligations and minimise risk over the life of the mining operation.

The funds of a mining rehabilitation company or trust must be applied solely for the purposes of rehabilitation as discussed above.

6.1.2 Rehabilitation expenditure provided for under section 37A

Mining rehabilitation expenditure can be categorised as –

- ongoing rehabilitation expenditure;
- premature mine closure;
- decommissioning and final closure; and
- post closure coverage of any latent and residual environmental impacts.

Ongoing rehabilitation expenditure

Ongoing rehabilitation expenditure involves expenses incurred on an ongoing basis during the production life of a mine or part of a mine. These costs are recognised as an expense when incurred.[24]

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21 **www.lexico.com/definition/solely** [Accessed 21 February 2022].

22 Section 43 of the MPRDA.

23 Minerals Council of Australia "Mine rehabilitation in the Australian minerals industry" (February 2016) available online at **www.minerals.org.au/file_upload/files/reports/Mine_rehabilitation_in_the_Australian_minerals_industry_FINAL.pdf** [Accessed 21 February 2022].

24 Researching Capital Markets and Financial Services: Financial Provisioning for Rehabilitation and Mine Closure, available online at **www.fulldisclosure.cer.org.za** [Accessed 21 February 2022].

Premature mine closure

Premature mine closure is a form of mine closure that occurs when closure is unexpectedly necessitated before the anticipated time of closure as outlined in a long-term mine plan. Reasons for this form of closure can include unforeseen technical difficulties in mining, sharp decreases in ore prices etc.[25]

Decommissioning and final closure

Decommissioning refers to the transitional period between cessation of mining operations and the final closure. It involves the permanent ending of the mine and mineral processing operations and removing all the equipment and facilities that are not destined to remain in place for future use.[26]

Final closure refers to the condition whereby the rehabilitated land has reached stability such that the regulators and the interested communities are satisfied that the land will not pose significant additional risk into the long-term future.[27]

Post or final closure coverage of any latent and residual environmental impacts

Post closure coverage on any latent environmental impacts refers to expenditure incurred on any environmental impact that may develop from natural events or disasters after a closure certificate has been issued.[28]

Contributions to a section 37A mining rehabilitation trust or company may only be applied for costs relating to premature closure, decommissioning and final closure, and post closure coverage of any latent and residual environmental impacts.

6.1.3 Qualifying assets of a mining rehabilitation company or trust [section 37A(1)(*b*)]

A mining rehabilitation company or trust may only hold assets solely for purposes as contemplated in section 37A(1)(*a*) (see **6.1.1**).

6.1.4 Distribution of property by a mining rehabilitation company or trust [section 37A(1)(*c*)]

Property of a mining rehabilitation company or trust shall first be applied for a purpose stated in section 37A(1)(*a*) (see **6.1.1**). Section 37A does not preclude a mining rehabilitation company or trust from having more than one beneficiary. As long as its sole object and purpose of the mining rehabilitation company or trust is to comply with the generally accepted principles of sustainable development.[29]

A mining rehabilitation company or trust who has more than one beneficiary must obtain the necessary approval from the DMR. It is also of paramount importance that the constitution or the deed of a mining rehabilitation company or trust' respectively makes provision to have more than one beneficiary, should it be the case. Where the assets of a mining rehabilitation company or trust are applied for a purpose other than for rehabilitation as stated in section 37A(1)(*c*) or the excess assets are distributed in

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[25] Independent Economic Researchers, University of Cape Town *Financial Provisions for Rehabilitation and Closure in South African Mining.*

[26] **www.mineclosure.gtk.fi/concepts-and-defenitions-of-mine-closure/** [Accessed 21 February 2022].

[27] Chamber of Mines South Africa *Guidelines for the Rehabilitation of Mined Land*, November 2007.

[28] Chamber of Mines South Africa *Guidelines for the Rehabilitation of Mined Land*, November 2007.

[29] Section 37A(1)(*a*).

a manner other than that provided for in sections 37A(3) or (4), then section 37A(7) becomes applicable. Section 37A(7) imposes a penalty on the impermissible distribution of an asset of a mining rehabilitation company or trust (see **6.4.2**).

The distribution of any excess assets of a mining rehabilitation company or trust available after such distribution may be dealt with in one of the following two ways.

(a) After the closure of the mine [section 37A(3)]

After the obligation to rehabilitate the affected areas covered under the mining permit, right, reservation or permission have been satisfied and there is no further obligation on the mining right holder, the mining rehabilitation company or trust may be liquidated or wound-up. This may occur only after the Minister has issued a closure certificate[30] for environmental rehabilitation undertaken on the mining area.

Under section 37A(3), the remaining assets, after all liabilities have been met, must be transferred in one of the following ways:

- to another mining rehabilitation company or trust as approved by the Commissioner[31] ;or
- if no other mining rehabilitation company or trust has been identified then to an account prescribed by the Minister and approved by the Commissioner.[32]

Example 1 – Transfer of surplus assets

Facts:

Company P, the holder of a mining right, established a mining rehabilitation trust for the purpose of environmental rehabilitation as envisaged under section 37A(1)(*a*). The mining rehabilitation trust received the necessary closure certificate from the DMR after it had rehabilitated all the areas affected by its mining permit. After the settlement of all of liabilities it has surplus funds of R5 million. The mining rehabilitation trust transfers the R5 million excess funds to another mining rehabilitation trust approved by the Commissioner.

Result:

Under section 37A(3) the mining rehabilitation trust must transfer its excess funds after the closure certificate has been issued by the DMR. The transfer is to another trust approved by the Commissioner, therefore the transfer will be permissible under section 37A(3)(*a*).

30 Section 43 of the MPRDA.
31 Section 37A(3)(*a*).
32 Section 37A(3)(*b*).

(b) Transfer of assets before final closure [section 37A(4)]

Under section 37A(4), a mining rehabilitation company or trust may under certain circumstances transfer its' assets to another mining rehabilitation company or trust before a closure certificate has been issued by the Minister.[33] This may occur if the Minister is satisfied that the mining rehabilitation company or trust will be able to satisfy all of its' liabilities[34] and it has sufficient assets to rehabilitate and restore all areas to which any permit, right, reservation or permission contemplated under section 37A(1)(d)(i)(aa) relates.[35] The excess assets may only be transferred to another mining rehabilitation company or trust that is approved by the Commissioner. Section 37A(4) facilitates the transfer of a mining rehabilitation company or trust's excess assets before receipt of the closure certificate by the Minister and the winding-up or liquidation of the fund.

A mining rehabilitation company or trust may therefore only deal with its assets as first prescribed in section 37A(1)(c) (see **6.1.4**) and thereafter the excess assets may be dealt with under section 37A(3) in the case where the fund is wound-up or liquidated (see **6.1.4**) or under section 37A(4) before the company or trust is wound-up or liquidated.

6.1.5 Persons who may be eligible for the deduction [section 37A(1)(*d*)]

Section 37A(1)(*d*) provides for the following category of persons that may be eligible to deduct from that person's income the contributions made in cash by it to a mining rehabilitation company or trust:

Mining right holders

Mining right holders are persons who hold a permit or a right in respect of prospecting, exploration, mining or production or an old order mineral right or OP26 right as defined in item 1 of Schedule II or any reservation or permission for the right to the use of the surface of land as contemplated in item 9 of Schedule II to the MPRDA.[36] The sole object of the mining rehabilitation company or trust must always be to comply with the requirements under section 37A, NEMA and the MPRDA.

"Contract miners"

This category of persons do not hold a mining right but are engaged in prospecting, exploration, mining or production in terms of any permit, reservation or permission as contemplated in section 37A(1)(*d*)(i)(*aa*) and may be referred to as contract miners.[37] The holder of the mining or prospecting right must consent to allow the contract miner to act in terms of the right the holder holds.[38] Such consent must first be approved by the DMR in order to commence mining or prospecting operations.[39]

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33 Section 37A(4)

34 Section 37A(4)(*a*)

35 Section 37A(4).

36 Section 37A(1)(*d*)(i)(*aa*).

37 Section 37A(1)(*d*)(i)(*bb*).

38 Paragraph 24 of the *Explanatory Memorandum on the Taxation Laws Amendment Bill*, 2006.

39 Section 11(1) of the MPRDA.

Other persons

Persons other than mining right holders and contract miners may be eligible for the deduction if the payment is not part of any transaction, operation or scheme to shift the deduction from another person in favour of the person seeking approval.[40] This provision caters for scenarios where a third party not involved in the mining activities itself and who does not own the mineral rights makes a cash payment to a mining rehabilitation company or trust on a voluntary basis. These voluntary contributions do not substitute the obligation of the mining right holder to contribute to such a fund.[41]

Example 2 – Eligible contributing parties – other persons

Facts:

Company Y, the holder of a mining right, established a mining rehabilitation trust for the purpose of environmental rehabilitation as envisaged under section 37A(1)(*a*). Company X, a manufacturing company, owns 100% of the shares in Company Y. Company Y was unable to make a contribution to the mining rehabilitation fund for the 2021 year of assessment due to having incurred an assessed loss as a result of a weakened rand. Company X being the holding company of Company Y submitted an application to the Commissioner for SARS under section 37A(1)(*d*)(ii) in which it undertakes to make a cash contribution for the 2021 year of assessment to the mining rehabilitation fund established by Company Y. The application submitted by Company X to contribute to the mining rehabilitation fund was approved by the Commissioner and thereafter payment was made to the mining rehabilitation fund.

Result:

Company X is not the holder of any mining rights or directly involved in any mining operations provided for under section 37A. Section 37A(1)(*d*)(ii) refers to persons who are not engaged in mining, but received approval from the Commissioner to contribute cash to a mining rehabilitation company or trust. A further requirement under section 37A(1)(*d*)(ii) is that the payment must not be part of any transaction, operation or scheme designed solely or mainly for purposes of shifting the deduction from another person to that person. The payment was necessitated as Company Y incurred an assessed loss and was unable to make the payment, therefore the payment by Company X was part of any transaction, operation or scheme as envisaged under section 37A(1)(*d*)(ii). The said approval was received by Company X before payment was made to the mining rehabilitation fund, therefore Company X may be eligible to the deduction under section 37A(1)(*a*) provided the other requirements of section 37A are fulfilled.

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40 Paragraph 24 of the *Explanatory Memorandum on the Revenue Laws Amendment Bill*, 2006.

41 Section 37A(1)(*d*)(ii).

Example 3 – Eligible contributing parties – contract miner

Facts:

Company B is the holder of a new order mining right that allows it to mine coal in a specific geographical area in which coal power generating stations owned by Company A are located. Company B enters into an agreement with Company A for the supply of coal to the mines owned by Company A. As part of the agreement, Company A is required to make an annual cash contribution to the mining rehabilitation trust established by Company B.

Result:

Company A is not the holder of any mining rights but undertakes mining through the mining rights held by Company B, therefore Company A may be categorised as a contract miner. Section 37A(1)(*d*)(i)(*bb*) refers to persons who are engaged in mining through the mining rights held by others, therefore Company A may be eligible to the deduction under section 37A(1)(*a*) provided the other requirements of section 37A are fulfilled.

6.2 Qualifying assets [section 37A(2)]

Section 37A(2) places a restriction on a mining rehabilitation company or trust as to the financial instruments that it may acquire or investments that it may hold. The acquisition of financial instruments is limited to financial instruments issued by regulated entities. The purpose of this restriction is to ensure that a mining rehabilitation company's or trust's investment portfolio of assets are relatively liquid and easy to value.[42]

A "financial instrument" is defined in section 1(1) as:

> **"financial instrument"** includes —
>
> (*a*) a loan, advance, debt, bond, debenture, bill, share, promissory note, bankers acceptance, negotiable certificate of deposit, deposit with a financial institution, a participatory interest in a portfolio of a collective investment scheme, or a similar instrument;
>
> (*b*) any repurchase or resale agreement, forward purchase agreement, forward sale agreement, futures contract, option contract or swap contract;
>
> (*c*) any other contractual right or obligation the value of which is determined directly or indirectly with reference to —
>
> (i) a debt security or equity
>
> (ii) any commodity as quoted on an exchange; or
>
> (iii) a rate index or a specific index;
>
> (*d*) any interest bearing arrangement;
>
> (*e*) any financial arrangement based on or determined with reference to the time value of money or cash flow or the exchange or transfer of an asset; and
>
> (*f*) any cryptocurrency;

42 Paragraph 24 *Explanatory Memorandum on the Revenue Laws Amendment Bill, 2006.*

A financial instrument for purposes of the Act is widely defined and the definition is not exhaustive. However, section 37A(2) restricts the investment in financial instruments to those issued by certain qualifying entities that are well regulated, subject to certain exceptions.

6.2.1 Qualifying entities

An investment in financial instruments by the mining rehabilitation company or trust is permitted if the financial instrument is issued by certain qualifying entities. These qualifying entities may broadly be categorised as –

- regulated financial service providers;[43]
- listed companies; and[44]
- a sphere of government in the Republic.[45]

Investments, which were held by the mining rehabilitation company or trust before 18 November 2003[46] which do not comply with the requirements under section 37A(2)(*a*) or (*b*) will nevertheless be allowable if acquired before this date.

Section 37A(2) lists the following types of entities through which a mining rehabilitation company or trust may hold financial instruments:

Financial service providers

Qualifying financial service providers listed in section 37A(2)(*a*) comprise certain designated entities which are regulated under the following legislation:[47]

- Collective investment scheme as regulated under the Collective Investment Schemes Control Act.[48]
- Long-term insurer as regulated under the Long-term Insurance Act.[49]
- Bank as regulated under the Banks Act.[50]
- Mutual bank as regulated under the Mutual Banks Act 124 of 1993.[51]

Listed companies

A listed company for purposes of the Act is defined in section 1(1) as:

> **"Listed company"** means a company where its shares or depository receipts in respect of its shares are listed on —
>
> (*a*) an exchange as defined in section 1 of the Financial Markets Act and licenced under section 9 of that Act; or
>
> (*b*) a stock exchange in a country other than the Republic which has been recognised by the Minister as contemplated in paragraph (*c*) of the definition of "recognised exchange" in paragraph 1 of the Eighth Schedule;

43 Section 37A(2)(*a*).
44 Section 37A(2)(*b*).
45 Section 37A(2)(*c*).
46 Section 37A(2)(*d*).
47 Section 37A(2)(*a*).
48 Section 37A(2)(*a*)(i).
49 Section 37A(2)(*a*)(ii).
50 Section 37A(2)(*a*)(iii).
51 Section 37A(2)(*a*)(iv).

A mining rehabilitation company or trust may invest in financial instruments of a listed company that is listed either locally or internationally. The listing requirement with regards to locally listed companies is that the listing complies with section 1 of the Financial Markets Act.[52] Under paragraph (*b*) of the definition of "listed company" a mining rehabilitation company or trust may invest in the financial instrument of a company that is listed on an exchange other than that of the Republic provided that such exchange is recognised by the Minister of Finance by notice in a Gazette.[53]

However, there are certain restrictions to investing in financial instruments of a listed company where the listed company is any one of the following persons –[54]

- mining right holder in relation to the mining rehabilitation company or trust;
- a contract miner in relation to the mining right holder; or
- any other person approved by the Commissioner to be eligible for the deduction of a contribution made to that mining rehabilitation company or trust; and
- a connected person in relation to either the mining right holder, the contract miner or the person approved by the Commissioner to be eligible for the deduction of a contribution to that mining rehabilitation company or trust.[55]

Section 37A(2)(*b*) does not prohibit the investment in financial instruments linked to an underlying commodity that is being mined by a person, for example, a mining rehabilitation company or trust established by a company that mines gold is not precluded from holding financial instruments, the value of which is determined with reference to the future gold price. The focus is rather on the issuer of the financial instrument or intermediary that holds the financial instrument on behalf of a mining rehabilitation company or trust.

A sphere of government of the Republic

A mining rehabilitation company or trust may invest in financial instruments issued by any sphere of Government in the Republic.[56] The government of the Republic is constituted as national, provincial and local spheres of government, which are distinctive, interdependent, and interrelated.[57]

Pre-18 November 2003 investments held by a mining rehabilitation company or trust

Any other investments, which were held by the mining rehabilitation company or trust before 18 November 2003[58] which do not comply with the requirements under section 37A(2)(*a*) or (*b*) will nevertheless be allowable if acquired before the effective date. Any further investment in any non-qualifying investment after the effective date will be in contravention of section 37A(2).

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52 Paragraph (a) of the definition of "listed company" in section 1(1).
53 See 4.1.5 of the Comprehensive Guide to Capital Gains Tax. *GG* 22723 of 2 October 2001 and *GG* 30484 of 16 November 2007.
54 Section 37A(2)(*b*)(i) refers to the persons contemplated in section 37A(1)(*d*).
55 Section 37A(2)(*b*)(ii).
56 Section 37A(2)(*c*).
57 Section 40(1) of the Constitution of the Republic of South Africa, 1996.
58 Section 37A(2)(*d*).

6.3 Tax treatment of a mining rehabilitation company or trust

6.3.1 Income received or accrued by a mining rehabilitation company or trust

Section 10(1)(*c*P) provides for the receipts and accruals of a mining rehabilitation fund to be exempt from income tax. This exemption will not be applicable for a year of assessment in which –

- the constitution or instrument establishing a mining rehabilitation company or trust does not comply with the requirements of section 37A(5)(*a*);[59] (see **6.5**) and
- the public officer or trustee of the mining rehabilitation company or trust did not furnish the Commissioner with a written undertaking that the mining rehabilitation company or trust will be administered in accordance to the requirements of section 37A and any amendments thereto.[60]

There is no penalty that is levied for the year of assessment in which the constitution or instrument establishing the mining rehabilitation company or trust does not comply with the requirements of section 37A or any amendments thereto. However, if the requirements are not met the company or trust will not meet the definition of a mining rehabilitation company or trust and any cash payments made to the company or trust will not meet the deductibility requirements of section 37A.

Capital gains tax

Capital gains tax exemption is provided for under paragraph 63 of the Eighth Schedule to the Act. Paragraph 63 provides that a person must disregard any capital gain or loss in respect of the disposal of an asset when any amount constituting gross income of whatever nature, would be exempt from tax under section 10, where it is received by or accrued to a person. The exclusion under paragraph 63 is applicable to amounts received by or accrued to a person that is wholly exempt from income tax.

Dividends tax

Exemption from dividends tax is provided for in section 64F and applies only to the extent that the dividend is not a dividend *in specie*. Both, a mining rehabilitation company and trust as contemplated in section 37A are exempt from dividends tax under section 64F(1)(*a*) and (*d*), respectively.

6.3.2 Expenditure incurred by a mining rehabilitation company or trust

Section 10(1)(*c*P) provides for the exemption from normal tax the receipts and accruals of a mining rehabilitation company or trust. The exemption from normal tax is subject to the mining rehabilitation company or trust fulfilling the criteria set out in section 37A. Instances when expenditure is not allowed as a deduction in the determination of taxable income is provided for in section 23. Section 23(*f*) deals with the deduction of expenditure incurred on amounts which do not constitute income, provides as follows:

> "any expenses incurred in respect of any amounts received or accrued which do not constitute income as defined under section *one*;"

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[59] Section 10(1)(*c*P)(*a*).

[60] Section 10(1)(*c*P)(*b*).

Expenditure incurred by a mining rehabilitation company or trust will not be allowed as a deduction if such expenditure has been incurred in relation to an amount that is exempt under section 10. Since the receipts and accruals of a mining rehabilitation company or trust are exempt from normal tax under section 10(1)(*c*P), it follows that any expenditure incurred under section 37A by a mining rehabilitation company or trust will not be allowed as a deduction. This principle will apply even when the property of such fund is utilized for a purpose other than that stipulated under section 37A.

Rehabilitation expenses that constitute premature closure, decommissioning and final closure and post closure coverage that is undertaken by a mining right holder and funded by the mining rehabilitation company or trust is not deductible by the mining right holder as it is not incurred by the mining right holder.

The provision for the incurral of expenditure on premature closure, decommissioning and final closure, and post closure coverage of any latent and residual environmental impacts is a condition to the acquisition by mining right holders of their mining rights.[61]

6.3.3 On-going rehabilitation expenditure

Section 37A does not provide for on-going rehabilitation expenditure, which takes place on a day-to-day basis during the life of an operating mine. Therefore, a mining rehabilitation company or trust that applies its funds for ongoing rehabilitation expenditure would contravene the requirements of section 37A(1)(*a*). These expenses do not relate to the premature closure, decommissioning and final closure, and post closure coverage of any latent and residual environmental impacts of the area covered by the mining permit and will therefore not qualify for a deduction under section 37A.

Mining right holders, on the other hand, are required by law to make provision for and undertake ongoing rehabilitation of the affected mining areas covered by its permit in order to have a legal right to continue to mine.[62]

On-going rehabilitation expenditure relates to the general day-to-day working expenditure of a person carrying on mining operations and is deductible under the general deduction formula under section 11(*a*) read with section 23(*g*).

6.4 Penalties for non-compliance

6.4.1 Penalty imposed on the holding of non-qualifying investments [section 37A(6)]

The type of investments or financial instruments a mining rehabilitation company or trust may acquire are listed in section 37A(2) and discussed in **6.2**. If a mining rehabilitation company or trust contravenes the requirements of section 37A(2) by investing in non-qualifying assets, a penalty under section 37A(6) is triggered.

The penalty is imposed whether or not the mining rehabilitation company or trust acquires and disposes of a non-qualifying investment or financial instrument in the same year of assessment or acquires and still holds the financial instruments at the end of the year. It is not a requirement for the imposition of the penalty that a mining rehabilitation company or trust hold a non-qualifying investment or financial instrument at the end of the year of assessment for the penalty to be triggered.

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61 Financial Provision Regulations.

62 Regulation 6 of the Financial Provision Regulations.

Section 37A(6) refers to "… to the extent that the financial instrument is directly or indirectly derived from any amount of cash… ", therefore the penalty will be imposed on non-qualifying investments that have been acquired both, directly and indirectly from any amount of cash paid to a mining rehabilitation company or trust. This may arise, for example, where interest is received from qualifying financial instruments and thereafter invested in investments or financial instruments which do not conform with the requirements of section 37A(2). The quantum of the "penalty" is determined to be 50 per cent of the highest market value of the non-qualifying investment or financial instrument during that year of assessment (prior to 18 December 2017 the quantum of the "penalty" was 100%). The "penalty" is deemed to be an amount of normal tax payable by the qualifying person (see **5.1.4**).

In the event that the tax liability is not recoverable from the person contemplated under section 37A(1)(*d*), the unpaid tax liability that arises as a result of the application of section 37A(6) is recoverable from the mining rehabilitation company or trust.[63]

Example 4 – Non-qualifying investments

Facts:

Company Z is the holder of a mining right and has established a mining rehabilitation trust for the purpose of environmental rehabilitation as envisaged under section 37A(1)(*a*). Company Z is the only contributor to the mining rehabilitation trust. The mining rehabilitation trust acquired 2 000 ordinary shares in Company S, a company listed on the Johannesburg Stock Exchange on 18 December 2017. The shares were acquired at a cost of R 1000 000 which also represented its market value at the date of acquisition. Companies, Z and S are connected persons as per the definition of "connected persons" in section 1(1).

Result:

Section 37A(2)(*b*) permits a mining rehabilitation trust to invest in the financial instruments of a listed company. However, Companies Z and S are connected persons for purposes of the Act, therefore the investment in Company S would be classified as a non-qualifying investment under section 37A(2)(*b*)(ii).

The non-qualifying investment attracts the "penalty" under section 37A(6)(*a*). The quantum of the penalty is determined as follows:

"Penalty" = Highest market value of non-qualifying investment × 50%

= R1 000 000 × 50%

= R500 000

The amount of R500 000 is deemed to be an amount of normal tax and attributed to the person contemplated in section 37A(1)(*d*). Company Z is the holder of the mining right and the only contributor to the mining rehabilitation trust the total amount would be attributed to it. The amount must be included in normal tax in the year of assessment during which the contravention occurred.

[63] Section 37A(8).

6.4.2 Penalties imposed on impermissible distributions by a by a mining rehabilitation company or trust [section 37A(7)]

Section 37A(7)(a) provides for the imposition of a penalty when the assets of a mining rehabilitation company or trust are distributed for a purpose other than –

- rehabilitation upon premature closure;
- rehabilitation upon decommissioning and final closure; or
- post closure coverage of any latent or residual environmental impact; or
- transfer to another mining rehabilitation company or trust.

Section 37A(7)(*b*) applies if a mining rehabilitation company or trust pledges as security for any debt the property of such company or trust for purposes other than rehabilitation upon premature closure or decommissioning and final closure.[64] The *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017* provides an explanation for the insertion of section 37A(7)(*b*) as follows:[65]

> "It has come to Government's attention that the funds from the mining rehabilitation fund are either still used to fund or guarantee activities not related to the rehabilitation or closure of the mine despite the current penalties contained in section 37A of the Act."

The *Lexico Dictionaries* defines the word "security" as follows:

> "[2] A thing deposited or pledged as a guarantee of the fulfilment of an undertaking or the repayment of a loan, to be forfeited in case of default." [66]

Based on the dictionary meaning of the word "security" an amount that is either paid in the form of a deposit or pledged in respect of any debt other than for the purpose of rehabilitation upon premature closure or decommissioning and final closure will constitute a contravention under section 37A(7)(*b*). The purpose of the penalty is to ensure that the funds and assets of a mining rehabilitation company or trust are utilised in every manner for the sole object of the mining rehabilitation company or trust as stated in section 37A(1)(*a*).

Similar to section 37A(6) (see **6.4.1**), a "penalty" is levied if section 37A(7)(*a*) or (*b*) is contravened. The penalty is determined to be an amount that is equal to 50 per cent of the highest market value of the property distributed or used as security. The penalty constitutes an amount deemed to be normal tax which is payable by the right holder or any another person contributing to the mining rehabilitation company or trust.[67] In the event that the mining right holder or the person contributing to the mining rehabilitation company or trust is unable to settle the full "penalty" liability, the outstanding amount relating to the "penalty" may be recoverable from the mining rehabilitation company or trust in which the contravention took place (see **6.4**).[68]

[64] Section 37A(1)(*a*)(i) or (ii).

[65] Paragraph 4.4 of the *Explanatory Memorandum on the Taxation Laws Amendment Bill,* 2017.

[66] **www.lexico.com/definition/security** [Accessed 21 February 2022].

[67] Section 37A(1)(*d*)(ii).

[68] Section 37A(8).

Example 5 – Security for debt

Facts:

Company X, a holder of a new order mining right is engaged in mining operations and makes a cash contribution on an annual basis to a mining rehabilitation company established for the purpose of mine rehabilitation as envisaged in section 37A(1)(*a*). The mining rehabilitation company used its property to provide security for a loan of R10 million obtained by Company X on 18 December 2021 for purposes of funding its working capital requirements.

Result:

The security provided by the mining rehabilitation company to Company X is not allowed under section 37A(7)(*b*). Under section 37A(7)(*b*) a mining rehabilitation company or trust may only provide security for purposes of rehabilitation upon premature closure or decommissioning and final closure. Since the purpose of the security does not meet this requirement a penalty will be levied under section 37A(7)(*a*).

The quantum of the penalty is determined as follows:

“Penalty” = Highest market value of property used as security x 50%

= R10 million × 50%

= R5 million

The “penalty” is deemed to be an amount of normal tax payable by Company X for the year of assessment during which the distribution which is not allowed took place. The imposition of the “penalty” is triggered when the impermissible act occurs and must be accounted for by the mining rehabilitation company in the earlier of its latest estimation of provisional tax or the annual return of income. Failure to account for the “penalty” on the impermissible distribution may result in the imposition of understatement penalties of provisional tax and interest.[69]

6.4.3 The recovery of penalty and the levy of additional penalties on a right holder or a mining rehabilitation company or trust [section 37A(8)]

Section 152 of the TA Act states that a person chargeable to tax is a person upon whom the liability for tax due under a tax Act is imposed and who is personally liable for the tax. Under sections 37A(6) and (7) the penalty is imposed on the person contemplated under section 37A(1)(*d*).

Section 37A(8) was substituted by Taxation Laws Amendment Act 17 of 2017 and now deals with the circumstances under which the unpaid “penalty” imposed under sections 37A(6) and (7) may be recovered from the mining rehabilitation company or trust. In essence, the “penalty” will first be recovered from the person or persons contemplated under section 37A(1)(*d*) and if any portion of the “penalty” is unrecoverable from such person or persons, it may be recovered from the mining rehabilitation company or trust. This will assist in the recovery of the “penalty” where the persons contemplated under section 37A(1)(*d*) are either factually or technically insolvent.

[69] Section 222 of the TA Act.

A "taxpayer" is defined in section 1 of the TA Act and makes reference to the definition in section 151. Section 151 lists the various persons who may be regarded as a "taxpayer" for purposes of the TA Act. Under section 151(*d*) one such person is a "responsible third party" who is defined in section 1 in reference to section 158.

A "responsible third party" is a person who, for example a mining rehabilitation company or trust, becomes otherwise liable for the tax liability of another person, i.e. the mining right holder or the person contributing to the mining rehabilitation company or trust,[70] and is not a representative taxpayer or a withholding agent. In accordance with section 159, such a person is personally liable for tax to the extent described in Part D of Chapter 11 of the TA Act. Accordingly, all the debt collection mechanisms under sections 179 to 184 are available to SARS in relation to such a person.

6.5 Amendment of the constitutional documents of a mining rehabilitation company or trust [section 37A(5)]

The constitutional documents of a mining rehabilitation company or trust must incorporate the provisions of section 37A and any amendments thereto.[71] The Commissioner must be notified if a mining rehabilitation company or trust wishes to change its objects as in some instances the change may render it to be in contravention with section 37A. A change in the objects of the constitutional documents of a mining rehabilitation company or trust may invoke a penalty under section 37A(6) or (7) (see **6.4**).

To the extent that a mining rehabilitation company or trust has constitutional documents which do not comply with the provisions of section 37A, a grace period of two years within which the non-compliance occurred will be condoned subject to the proviso that a person responsible in a fiduciary capacity for the funds and assets of that mining rehabilitation company or trust furnished the Commissioner with an undertaking confirming compliance with the provisions of section 37A.[72]

6.6 Reporting requirements

The purpose of the reporting requirements under section 37A(10)[73] is to ensure that a mining rehabilitation company or trust achieves its sole object as contained in section 37A(1)(*a*). It also serves as a mechanism to ensure that the funds of a mining rehabilitation company or trust are not misused. A mining rehabilitation company or trust is therefore required to submit to the Director-General of National Treasury, within three months after the end of its year of assessment information regarding the –

- total amount of contributions to the mining rehabilitation company or trust;[74]
- total amount of withdrawals from the mining rehabilitation company or trust;[75] and
- purpose for which any amount of those withdrawals were applied.[76]

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70 Section 37A(8).

71 Section 37A(5)(*a*).

72 Section 37A(5)(*b*).

73 Section 37A(10) was introduced into the Act by the Taxation Laws Amendment Act 17 of 2017, effective 18 December 2017.

74 Section 37A(10)(*a*)(i).

75 Section 37A(10)(*a*)(ii).

76 Section 37A(10)(*a*)(iii).

The mining rehabilitation company or trust must, within 7 days after receiving a request from the Director-General of the National Treasury provide any information as the Director General may require.[77] In addition, environmental law, i.e. NEMA and the MPRDA also requires right holders to submit various reporting documents (see **5.4**).

7. Conclusion

Mining companies in South Africa are required to make financial provision under the MPRDA read with NEMA for the rehabilitation of mining areas covered by its mining permit. Persons making a cash contribution to a mining rehabilitation company or trust as contemplated in section 37A may qualify for a deduction in determining taxable income for any year of assessment commencing on or after 2 November 2006. The deduction is subject to a mining rehabilitation company or trust complying with the following requirements:

- The sole object of the mining rehabilitation company or trust must be to apply its property solely for rehabilitation purposes provided for under section 37A(1)(*a*).
- The mining rehabilitation company or trust holds assets solely for purposes of rehabilitation as contemplated in section 37A(1)(*a*).
- Under section 37A(2) mining rehabilitation company or trust may only invest in financial instruments issued by certain qualifying entities or any sphere of government in the Republic. Investments held before 18 November 2003 are not subject to this requirement.

Where the mining rehabilitation company or trust contravenes any of the above requirements a penalty is imposed.

Section 37A deals with the treatment of excess property or funds of a mining rehabilitation company or trust arising either before or after the issue of a closure certificate.

A mining rehabilitation company or trust must comply with the reporting requirements contained in section 37A(10).

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[77] Section 37A(10)(*b*).

Annexure – The law

Section 10

10. Exemptions.—(1) There shall be exempt from normal tax —

(*a*) – (*c*O) …

(*c*P) the receipts and accruals of a company or trust contemplated in section 37A; …

Section 37A

37A. Closure rehabilitation company or trust.—(1) For purposes of determining the taxable income derived by a person from carrying on any trade, any cash paid during any year of assessment commencing on or after 2 November 2006 by that person to a company or trust shall be deducted from that person's income if—

(*a*) the sole object of that company or trust is to apply its property solely for rehabilitation upon premature closure, decommissioning and final closure, and post closure coverage of any latent and residual environmental impacts on the area covered in terms of any permit, right, reservation or permission contemplated in paragraph (*d*)(i)(*aa*) to restore one or more areas to their natural or predetermined state, or to a land use which conforms to the generally accepted principle of sustainable development;

(*b*) that company or trust holds assets solely for purposes contemplated in paragraph (a);

(*c*) that company or trust makes distributions solely for purposes contemplated in paragraph (a), or subsection (3) or (4); and

(*d*) that person—

(i) (*aa*) holds a permit or right in respect of prospecting, exploration, mining or production, an old order right or OP26 right as defined in item 1 of Schedule II or any reservation or permission for or right to the use of the surface of land as contemplated in item 9 of Schedule II to the Mineral and Petroleum Resources Development Act; or

(*bb*) is engaged in prospecting, exploration, mining or production in terms of any permit, right, reservation or permission as contemplated in item (aa); or

(ii) after approval by the Commissioner, paid any cash to that company or trust and that payment was not part of any transaction, operation or scheme designed solely or mainly for purposes of shifting the deduction contemplated in this subsection from another person to that person.

(2) The company or trust contemplated in subsection (1) may only hold—

(*a*) financial instruments issued by any—

(i) collective investment scheme as regulated in terms of the Collective Investment Schemes Control Act;

(ii) long-term insurer as regulated in terms of the Long-term Insurance Act;

(iii) bank as regulated in terms of the Banks Act; or

(iv) mutual bank as regulated in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993);

(*b*) financial instruments of a listed company unless—

(i) those financial instruments are issued by a person contemplated in subsection (1)(d); or

(ii) those financial instruments are issued by a person that is a connected person in relation to a person contemplated in subsection (1)(*d*);

(*c*) financial instruments issued by any sphere of government in the Republic; or

(*d*) any other investments which were held by that company or trust before 18 November 2003.

(3) To the extent that the Cabinet member responsible for mineral resources is satisfied that all of the areas in terms of any permit, right, reservation or permission contemplated in subsection (1)(*d*)(i)(*aa*) that have been rehabilitated as contemplated in subsection (1)(*a*), the company or trust in respect of those areas must be wound-up or liquidated and its assets remaining after the satisfaction of its liabilities must be transferred to—

(*a*) another company or trust as contemplated in this section as approved by the Commissioner; or

(*b*) if no such company or trust has been established, to an account or trust prescribed by the Cabinet member responsible for mineral resources as approved of by the Commissioner if the Commissioner is satisfied that such company or trust satisfies the objects of subsection (1)(*a*).

(4) If the Cabinet member responsible for mineral resources is satisfied that a company or trust as contemplated in subsection (1)(*a*)—

(*a*) will be able to satisfy all of the liabilities of that company or trust; and

(*b*) such company or trust has sufficient assets to rehabilitate and restore, as contemplated in subsection (1)(*a*), all areas to which any permit, right, reservation or permission contemplated in subsection (1)(*d*)(i)(*aa*) relates, as the case may be,

that company or trust may transfer assets not required for purposes of paragraphs (*a*) and (*b*) to another company or trust established in terms of this section as approved by the Commissioner.

(5) (*a*) The constitution of a company or the instrument establishing a trust contemplated in this section must incorporate the provisions of this section and any amendments thereto.

(*b*) Where the constitution of a company or the instrument establishing a trust contemplated in this section does not comply with this section, it shall be deemed to comply for a period not exceeding two years, if the person responsible in a fiduciary capacity for the funds and the assets of that company or trust, furnishes the Commissioner with a written undertaking that that company or trust will be administered in compliance with this section.

(6) If a company or trust holds a financial instrument or investment during any year of assessment—

(*a*) other than a financial instrument contemplated in subsection (2); or

(*b*) any investment other than an investment contemplated in subsection (2)(*d*),

an amount equal to 50 per cent of the highest market value of that other financial instrument or other investment during that year of assessment must be deemed to be an amount of normal tax payable by the person contemplated in subsection (1)(d), subject to subsection (8), to the extent that the financial instrument or investment is directly or indirectly derived from any amount in cash paid by that person to that company or that trust.

(7) If a company or trust contemplated in subsection (1) during any year of assessment—

(*a*) distributed property from that company or trust for a purpose other than—

(i) rehabilitation upon premature closure;

(ii) decommissioning and final closure;

(iii) post closure coverage of any latent or residual environmental impacts; or

(iv) transfer to another company, trust, or account established for the purposes contemplated in subsection (1)(*a*); or

(*b*) uses property from that company or trust as security for any debt for a purpose other than a purpose contemplated in paragraph (*a*) (i) or (ii),

an amount equal to 50 per cent of the highest market value during that year of assessment of the property so distributed or used as security must be deemed to be an amount of normal tax payable by the person contemplated in subsection (1)(*d*), subject to subsection (8), in respect of that year of assessment.

(8) Any amount deemed to be an amount of normal tax by the person contemplated in subsection (1)(*d*) in terms of subsection (6) or (7) must, to the extent that the amount cannot be recovered from that person, be recovered from the trust or company contemplated in this section.

(9) Subsection (7) does not reply in respect of any amount deemed to be an amount of normal tax that is paid to the Commissioner by a company or trust contemplated in this section.

(10) A company or trust contemplated in this section must—

(*a*) within three months after the end of any year of assessment submit a report to the Director-General of the National Treasury in respect of that year of assessment providing the Director-General of the national Treasury with information comprising—

(i) the total amount of contributions to the company or trust;

(ii) the total amount of withdrawals from the company or trust; and

(iii) the purposes for which any amount of those withdrawals were applied; and

(*b*) within seven days after receiving a request from the Director-General of the National Treasury provide such information as the Director may require.

Section 64F

64F. Exemption from tax in respect of dividends other than dividends comprising distribution of assets *in specie*.—(1) Any dividend is exempt from the dividends tax to the extent that it does not consist of a dividend that comprises a distribution of an asset *in specie* if the beneficial owner is—

(*a*) – (*c*)

(*d*) a trust contemplated in section 37A;

Section 41 of the MPRDA

41. Financial provision for rehabilitation of environmental damage

(1) An applicant for a prospecting right, mining right or mining permit must, before the Minister approves the environmental management plan or environmental program in terms of section 39(4), make the prescribed financial provision for the rehabilitation or management of negative environmental impacts.

(2) If the holder of a prospecting right, mining right or mining permit fails to rehabilitate or manage, or is unable to undertake such rehabilitation or to manage any negative impact on the environment, the Minister may, upon written notice to such holder, use all or part of the financial provision contemplated in subsection (1) to rehabilitate or manage the negative environmental impact in question.

(3) The holder of a prospecting right, mining right or mining permit must annually assess his or her environmental liability and increase his or her financial provision to the satisfaction of the Minister.

(4) If the Minister is not satisfied with the assessment and financial provision contemplated in this section, the Minister may appoint an independent assessor to conduct the assessment and determine the financial provision.

(5) The requirement to maintain and retain the financial provision remains in force until the Minister uses a certificate in terms of section 43 to such holder, but the Minister may retain such portion of the financial provision as may be required to rehabilitate the closed mining or prospecting operation in respect of latent or residual environmental impacts.

Section 43 of the MPRDA

43. Issuing of a closure certificate. –(1) The holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right or previous owner of works that has ceased to exist, remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorization and the management and sustainable closure thereof, until the Minister has issued a closure certificate in terms of this Act to the holder or owner concerned.