SOUTH AFRICAN REVENUE SERVICE

DRAFT GUIDE ON THE MINERAL AND PETROLEUM RESOURCES ROYALTY ACT

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South African Revenue Service

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Draft Guide on the Mineral and Petroleum Resources Royalty Act

Preface

This guide provides a general overview of the application of the Mineral and Petroleum Resources Royalty Act 28 of 2008, and administration of the royalty under the Royalty Administration Act 29 of 2008.

This guide is not an "official publication" as defined in section 1 of the Tax Administration Act 28 of 2011 (the TA Act) and accordingly does not create a practice generally prevailing under section 5 of that Act. It does not consider the technical and legal detail that is often associated with taxation and should, therefore, not be used as a legal reference.

It is also not a binding general ruling (BGR) under section 89 of the TA Act. Taxpayers requiring an advance tax ruling,[1] should visit the SARS website at **www.sars.gov.za** for details of the application procedure.

This guide reflects the law as at the date of issue.

For more information, assistance and guidance you may –

- visit the SARS website at **www.sars.gov.za**;
- contact the SARS National Service Centre –
  - if calling locally, on 0800 00 7277; or
  - if calling from abroad, on +27 11 602 2093 (only between 8am and 4pm South African time);
- have a virtual consultation with a SARS consultant by making an appointment via the **SARS website**;
- visit your nearest SARS service centre after making an appointment via the **SARS website**; or
- contact your own tax advisor or tax practitioner.

Comments on this guide may be e-mailed to **policycomments@sars.gov.za**.

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[1] For further commentary, see the *Comprehensive Guide to Advance Tax Rulings*.

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Glossary

In this guide unless the context indicates otherwise –

- **"EBIT"** means earnings before interest and taxes as determined under section 5;
- **"Income Tax Act"** means the Income Tax Act 58 of 1962;
- **"MPRDA"** means the Mineral and Petroleum Resources Development Act 28 of 2002;
- **"Royalty Act"** means the Mineral and Petroleum Resources Royalty Act 28 of 2008;
- **"Royalty Administration Act"** means the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008;
- **"Schedule"** means a Schedule to the Royalty Act;
- **"section"** means a section of the Royalty Act;
- **"TA Act"** means the Tax Administration Act 28 of 2011; and
- any other word or expression bears the meaning ascribed to it in the Royalty Act.

All interpretation notes referred to in this guide are the latest versions available on the SARS website at **www.sars.gov.za**, unless the context indicates otherwise.

1. Background

Under the MPRDA the State, as the custodian of the nation's mineral and petroleum resources, exercises sovereignty over all the mineral and petroleum resources within the Republic. The object of the MPRDA is, amongst others, to give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner and to ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.[2]

Section 3 of the MPRDA provides that as the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister of Mineral and Petroleum Resources, may grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right. The State royalty must also be determined and levied by the Minister of Finance under an Act of Parliament.[3] The Royalty Act was thus introduced[4] to impose a royalty on the transfer of mineral resources and to provide for matters connected therewith.

2. Basic operation of the Royalty Act

Section 2 of the Royalty Act provides for the imposition of royalty as follows:

> "A person must pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of a mineral resource extracted from within the Republic."

2 Section 2 of the MPRDA.
3 Section 3(4) of the MPRDA.
4 The Royalty Act commenced on 1 November 2009.

It is thus irrelevant whether the mineral is extracted on private or state-owned land. The term "Republic" is defined in section 1(1) to mean the Republic of South Africa and includes the "sea" as defined in section 1 of the MPRDA.

The meaning of relevant terms and definitions for the application of the Royalty Act are considered below.

2.1 Extractor

The term "extractor" appears throughout the Royalty Act. It is defined in section 1(1) and means a person referred to in section 2. Section 1(1) defines "person" as including an insolvent estate, the estate of a deceased person and a trust. The definition is not, however, meant to be a complete definition as it uses the word "including" and is meant to extend the definition of "person". The Interpretation Act 33 of 1957 defines "person" to include –

- any divisional council, municipal council, village management board, or like authority;
- any company incorporated or registered as such under any law; and
- any body of persons corporate or unincorporated.

This is a broad definition but is also not meant to be a complete definition since it does not include a natural person. One can thus also consider the dictionary meaning of "person". The *Shorter Oxford English Dictionary on Historical Principles* describes "person" as amongst others:[5]

> "2 An individual human being; spec. a human being as opp. to a thing or an animal.
>
> 5 *LAW*. An individual (also natural person) or a group of individuals as a corporation (also artificial person), regarded as having rights and duties recognized by the law."

Thus, besides specifically including an insolvent estate, deceased estate and a trust, the definition of "person" includes a natural person and a juristic person such as a company or close corporation.

A partnership is, however, not a separate legal entity[6] and is not a person. It is therefore the individual partners who must bear the consequences of the royalty.

2.2 "Extracted"

The word "extracted" is not defined in the Royalty Act. The word should therefore be interpreted according to its ordinary meaning as applied to the subject matter relating to which it is used[7] unless the ordinary meaning creates an absurdity or ambiguity. The context in which words or expressions are contained must be considered when affording such words and expressions their ordinary meaning.

"Extract" is defined in Dictionary.com as –[8]

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5 Stevenson, A. (2007). *Shorter Oxford English Dictionary on Historical Principle* (6 ed. Vol 1. Oxford University Press.

6 *Michalow NO v Premier Milling Co Ltd* 1960 (2) SA 59 (W).

7 See EA Kellaway, E. A. (1995). *Principles of Legal Interpretation of Statutes, Contracts and Wills* at 224. Butterworths. See also *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

8 **www.dictionary.com/browse/extract [Accessed** 1 August 2024].

"1 to get, pull, or draw out, usually with special effort skill. or force",

The Essential English Dictionary defines "extract" as –[9]

"to extract a raw material means to get it from the ground".

The concept "extracted" as it appears in the Royalty Act is often confused with the concept "winning a mineral" as referred to in the Income Tax Act or the MPRDA. In *Minister of Defence and Military Veterans v Thomas* the Constitutional Court[10] held that, as a general rule, it is not permissible to use the meanings attributed to words in other statutes to determine what is meant by the words of a different statute. Parliament having defined a word used in a statute, 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 "winning a mineral" cannot therefore be used to give effect to the meaning of the word "extracted" for purposes of the Royalty Act.

The definition of "mineral" as contained in the MPRDA is further qualified in the Royalty Act by the use of the phrase "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 is payable upon transfer of that substance.

Mineral resources subject to the royalty are transferred in either a refined[11] (Schedule 1) or an unrefined[12] (Schedule 2) condition. Schedules 1 and 2 contain a list of mineral resources with either a specific condition or a range for a particular mineral resource. The condition specified represents the point at which the mineral is considered to be in an acceptable condition for transfer and is important in determining the royalty payable under the Royalty Act.

2.3 Mineral resource

A "mineral resource" is defined in section 1(1) as a "mineral" or "petroleum" as defined in section 1 of the MPRDA, regardless of whether that mineral or petroleum undergoes processing or manufacturing.

Section 1 of the MPRDA defines "mineral" as –

> "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".

9 Cambridge University Press, 10 February 2011.
10 2016 (1) SA 103 (CC).
11 Section 1.
12 Section 1.

Section 1 of the MPRDA defines "petroleum" –

> "any liquid, solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust and includes any such liquid or solid hydrocarbon or combustible gas, which gas has in any manner been returned to such natural condition, but does not include coal, bituminous shale or other stratified deposits from which oil can be obtained by destructive distillation or gas arising from a marsh or other surface deposit."

A royalty may therefore be imposed on any mineral and petroleum extracted from within the Republic and transferred, regardless of whether such mineral or petroleum has undergone processing or beneficiation.

The Royalty Act distinguishes between "refined" and "unrefined" mineral resources. A "refined mineral resource" means a mineral resource –[13]

(a) listed solely in Schedule 1; or

(b) listed in Schedule 1 and Schedule 2 that has been refined to or beyond the condition specified in Schedule 1 for that mineral resource.

An "unrefined mineral resource" means a mineral resource –[14]

(i) listed solely in Schedule 2; or

(ii) 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.

The condition specified represents the point at which the mineral is considered to be in an acceptable condition for transfer, and is important in determining the royalty payable under the Royalty Act. The gross sales for a particular mineral resource will therefore be determined when the mineral has reached the condition specified in the respective Schedules. An example of a refined mineral resource is gold (processed to at least 99% purity), and an unrefined mineral resource being 80% uranium oxide in the uranium concentrate sold.

Win, recover and develop a mineral resource

Mineral resources are won, recovered or developed[15] in various ways, for example, from the mine mouth or residue stockpiles. Although the words "win", "recover" and "develop" have not been defined in the Royalty Act, there are various authorities that provide guidance in this regard.

Win or recover

The winning or recovering of a mineral consists of more than the mere extraction of materials from the earth. The mineral is only won once it has been extracted from the earth and separated from the substance in which it was embedded (for example, soil or rock).

In *English Clays Lovering Pochin & Co Ltd v Plymouth Corporation*, Russell LJ stated that –[16]

> "to 'win' a mineral is to make it available or accessible to be removed from the land".

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13 Definition in section 1(1).
14 Definition in section 1(1).
15 Section 5.
16 1974 (2) All ER 239 (CA) at 243.

In *Union Government v Nourse Mines Ltd*, Wessels J stated the following:[17]

> "The ordinary meaning of the words 'to win gold' is to obtain or get the gold in the form of metal. To win gold includes all the operations necessary, not only to reach and extract the ore, but also to convert it into metal."

Recover

A mineral is regarded as recovered only after the appropriate beneficiation process has been completed, and the mineral resource has been separated from all the other minerals (see below, "*Beneficiation of a mineral resource*").

In the Australian case of *Western Mining Corporation Ltd v Collector of Customs (WA)*[18] Davies P explained "recovery" as follows: –

> "We should add that the word 'recovery' is well-known in mining metallurgy. Although this word is often used to describe the recovery of ore from the ground, it is more commonly used in a technical sense to refer to the percentage of each valuable mineral retained at the end of each dressing or beneficiation process."

Develop

Development occurs after prospecting activities have been finalised but before extraction of the minerals from the earth.

In *FCT v Broken Hill Pty Co Ltd*,[19] Kitto J commented on the meaning of the phrase "development of the mining property" as follows:

> "It covers, I think, any preparation, adaptation or equipment of the property for the exploitation of an inherent potentiality which cannot be exploited, or fully exploited, without some such preliminary treatment."

In *Douglas v Baynes*, Innes CJ explained "development" as follows:[20]

> "As ordinarily used in mining matters, 'development' denotes that stage of work on mineralised ground which intervenes between prospecting and mining proper. First the ground is prospected in order to ascertain whether there are minerals in paying quantities. Then it is developed in order to test whether the minerals which have been found are such as to warrant the working of the property as a mining proposition. When that has been established the property is actually worked and the minerals extracted."

Beneficiation of a mineral resource

The purpose of the royalty is not to be a tax on beneficiation, but to compensate the State on a mineral resource extracted from the Republic[21] and subsequently transferred.

Under most circumstances, a mineral resource will undergo some degree of beneficiation. "Beneficiation" in relation to a mineral resource is defined as follows:[22]

(a) Primary stage, which includes any process of the winning, recovering, extracting, concentrating, refining, calcining, classifying, crushing, screening, washing, reduction, smelting or gasification of the mineral resource.

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17 1912 TPD 924 at 930.
18 (1985) 9 ALN N148.
19 (1969) 120 CLR 240, [1968] HCA 16 at 248.
20 1907 TS 508 at 513.
21 See Interpretation Note 100 "Meaning of Extracted".
22 Section 1 of the MPRDA.

(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.

(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.

The ideal situation would be to impose a royalty on mineral resources at the mouth of the mine. The principle is therefore to establish "the value" at the "first saleable point", which will naturally have an element of beneficiation.[23]

2.4 Transfer

The "transfer" of a mineral resource extracted from the Republic is the trigger for the imposition of the royalty. Section 1(1) defines "transfer" as follows:

> " **'[T]ransfer'** means—
>
> (*a*) the disposal of a mineral resource; or
>
> (*b*) . . . . . .
>
> (*c*) the consumption, theft, destruction or loss of a mineral resource, other than by way of flaring or other liberation into the atmosphere during exploration or production,
>
> if that mineral resource has not previously been disposed of, consumed, stolen, destroyed or lost;"

The royalty is imposed on the first transfer of a mineral resource. Subsequent transfers of that mineral resource are not subject to the imposition of the royalty. A mineral resource must therefore be in a saleable condition before a "transfer" can take place for purposes of the Royalty Act.

Neither the MPRDA nor the Royalty Act defines "disposal". The ordinary meaning of "disposal" is described as follows:[24]

> "2 a disposing of or getting rid of something:"

Flaring[25] or other liberation into the atmosphere during exploration is excluded from the definition of "transfer". The exclusion results from the fact that a certain percentage of the mineral is invariably lost during recovery and beneficiation, and will therefore not constitute a "transfer" for purposes of the Royalty Act.

A mineral resource which is transferred on a temporary basis to another extractor will not be regarded as a disposal of that mineral resource as envisaged under the definition of "transfer" in section 1.

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23 Paragraph 6.9 of the *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2013*.

24 **www.dictionary.com/browse/disposal** [Accessed 1 August 2024].

25 Flaring typically involves discharging and burning excess gas at a well or refinery.

Example 1 – Temporary transfer of a mineral resource

Facts:

Company A extracts platinum bearing ore in the Republic. Company B owns a platinum smelter and refinery. The platinum bearing ore is temporarily transferred to Company B for further processing at an agreed fee. After processing, the refined platinum is returned to Company A which it then sells to potential buyers.

Result:

Company A is an extractor for purposes of the Royalty Act. Section 2 of the Royalty Act requires that the royalty be imposed on the transfer of a mineral resource extracted from a source within the Republic. Section 1 of the Royalty Act defines "transfer" and includes, amongst others, the disposal of a mineral resource. The mineral resource (platinum bearing ore) that is transferred to Company B for processing is transferred on a temporary basis for the specific purpose of smelting and refining. Therefore, this does not constitute a disposal of a mineral resource as envisaged under the Royalty Act. Consequently, the royalty is not required to be imposed on the transfer of the mineral resource to Company B.

Example 2 – Imposition of royalty on first transfer

Facts:

A extracts and stockpiles an unrefined mineral resource before further beneficiation takes place to enhance the value of the mineral resource. Unexpected heavy torrential rains caused flooding in the vicinity of A's mining operations, which caused one of the sludge dam's walls to burst. This catastrophic event resulted in part of the stockpiled unrefined mineral resource being washed away into a nearby river, thus becoming unrecoverable.

Result:

Paragraph (*c*) of the definition of "transfer" refers to "consumption, theft, destruction or loss of a mineral resource", therefore, an extractor is deemed to have transferred the mineral resource if any one of these events are present. The loss of A's mineral resource due to the catastrophic event constitutes a transfer of a mineral resource for purposes of the Royalty Act. A is therefore liable for the royalty on the mineral resource lost due to flooding since the royalty is imposed on the first transfer of the mineral resource.

3. Determination of the royalty

The royalty is imposed at the point of transfer, and not at the point of extraction. The royalty is calculated as follows:

Royalty = Gross sales × Royalty percentage[26]

[26] Section 3.

Under section 16, transitional credits are allowed as a deduction against the royalty. Amounts deductible from the royalty payable on a mineral resource comprise –

(a) any lease;[27]

(b) royalty; or

(c) similar payment,

to the State in respect of that mineral resource under any conditions imposed pursuant to the laws applicable to an old order right or OP26 right mentioned in Schedule II of the MPRDA, as consideration for the removal or disposal of a mineral or petroleum.

Section 16(2) provides that no deduction is allowed under section 16(1) on a lease mentioned in item 9(7) of Schedule 2 to the MPRDA, which provides as follows:

> "(7) Any lease of the State's interest in a mine in terms of section 74 of the Precious Stones Act, 1964 (Act 73 of 1964), which was in force immediately before this Act took effect in terms of section 47(1)(*a*)(iii) of the Minerals Act continues in force subject to the terms and conditions contained in the document under which it was granted or entered into."

Section 16(3) limits the deduction allowable under section 16 to the amount of the royalty payable.

The amount to be paid as a royalty on any mineral extracted from within the Republic and transferred by the taxpayer differs depending on the mineral concerned, as well as the condition in which the mineral is transferred. The calculation of the royalty is based on the following:

(i) The royalty percentage

(ii) Determination of gross sales[28]

(iii) Determination of EBIT[29]

(iv) Determination of the royalty[30]

3.1 The royalty percentage (section 4)

The royalty percentage formula is as follows:

Refined mineral resource other than oil and gas [section 4(1)]
0.5 + [EBIT / (gross sales on refined mineral resources × 12.5)] × 100

Refined mineral resource – oil and gas [section 4(1A)]
2 + [EBIT / (gross sales on refined mineral resources × 12.5)] × 100

[27] Section 16(2) provides that no deduction is allowed under subsection (1) on any lease mentioned in item 9(7) of Schedule II to the MPRDA. Item 9(7) of the MPRDA deals with the continuation of reservations, permissions and certain rights and provides that "any lease of the State's interest in a mine in terms of section 74 of the Precious Stones Act, 1964 (Act 73 of 1964), which was in force immediately before this Act took effect in terms of section 47(1)(*a*)(iii) of the Minerals Act continues in force subject to the terms and conditions contained in the document under which it was granted or entered into." (Emphasis added)

[28] Section 6.

[29] Section 5.

[30] Section 3.

Unrefined mineral resource [section 4(2)]
0.5 + [EBIT / (gross sales on unrefined mineral resources × 9)] × 100

Note: The percentage determined under section 4(1) (refined mineral resource other than oil and gas) and section 4(1A)[31] (refined mineral resource – oil and gas) must not exceed 5%,[32] and the percentage determined in section 4(2) (unrefined mineral resource) must not exceed 7%.[33]

Refined mineral resources are listed in Schedule 1 and includes oil and gas. With effect from 1 January 2024 a separate royalty percentage formula has been introduced to determine the royalty percentage for oil and gas. The new royalty percentage formula for oil and gas will be applicable to years of assessment commencing on or after 1 January 2024.

3.2 Determination of gross sales (section 6)

The gross sales amount plays a triple role in the royalty calculation. It acts as a denominator in the royalty formulae,[34] is used in the calculation to determine EBIT, and forms the royalty tax base, since the rates as per the royalty formula are multiplied by the gross sales amount to determine the royalty liability.[35]

Gross sales on the transfer of a mineral resource for purposes of the royalty is determined under section 6(1) for a refined, and section 6(2) for an unrefined mineral resource. A mineral resource may be transferred in the condition specified or in a condition other than the condition specified for that mineral resource in Schedule 1 or 2, respectively.

Gross sales under section 6 is, therefore, dependent on whether –

(a) the mineral resource is transferred by way of a disposal, other than through consumption, theft, destruction or loss;

(b) the mineral resource is disposed of in the condition specified in Schedule 1 or Schedule 2;

(c) the mineral resource is disposed of in a condition other than that specified in Schedule 1 (refined condition) or Schedule 2 (unrefined condition); and

(d) the mineral resource is consumed, stolen, destroyed or lost.

Refined mineral resource

Gross sales in respect of a refined mineral resource transferred –

(i) if the disposal of the mineral resource is in the condition specified for that mineral resource in Schedule 1 is the amount received or accrued during the year of assessment in respect of the transfer of that mineral resource;

(ii) if the disposal of the mineral resource is in a condition other than that specified for that mineral resource in Schedule 1 is the amount that would have been received

[31] Revenue Laws Amendment Bill 39, effective from 1 January 2024 and applies in respect of years of assessment commencing on or after that date.
[32] Section 4(3)(*a*).
[33] Section 4(3)(*b*).
[34] Section 4.
[35] *Explanatory Memorandum for the Mineral and Petroleum Resources Royalty Bill, 2008.*

or accrued during the year of assessment in respect of the transfer of that mineral resource had that mineral resource been transferred in the condition specified in Schedule 1 for that mineral resource in terms of a transaction entered into at arm's length; and

(iii) the consumption, theft, destruction or loss of a mineral resource, other than by way of flaring or other liberation into the atmosphere during exploration or production is the amount that would have been received or accrued during the year of assessment in respect of the transfer of that mineral resource had that mineral resource been transferred in the condition specified in Schedule 1 for that mineral resource in terms of a transaction entered into at arm's length.

Example 3 - Determination of royalty on transfer of the refined mineral resource silicon in the condition specified

Facts:

Silicon is extracted at a value of 95% Si and transferred at a value of 98.5% Si. The condition specified for silicon in Schedule 1 is 98,5% Si. Gross sales on transfer of silicon amount to R60 000 as determined under section 6(1). EBIT, after taking into account all allowable expenditure under section 5(1) amounts to R30 000.

Result:

Since the mineral is transferred at the condition specified (that is, at 98,5% Si), the gross sales comprise the amount received or accrued during the year of assessment of R60 000 under section 6(1)(*a*). The same applies to the EBIT value.

The royalty rate is calculated as follows:

Royalty rate = 0.5 + [EBIT / (gross sales × 12,5)] × 100

= 0.5 + [R30 000 / (R60 000 × 12,5)] × 100

= 0.5 + [R30 000/ (R750 000)] × 100

= 0.5 + [0,04000 × 100][36]

= 0.5 + 4,00000

= 4,5%

Under section 4(1), the above percentage is multiplied by the gross sales in order to determine the amount of the royalty to be paid. The rate determined under section 4(1) may not exceed 5%.[37]

Royalty payable = Royalty rate × Gross sales

= 4,5% × R60 000

= R2 700

[36] Multiplication takes precedence over addition.

[37] Section 4(3)(*a*).

Unrefined mineral resource

Gross sales in respect of an unrefined mineral resource transferred –

(a) if the disposal of the mineral resource is in the condition specified in Schedule 2 for that mineral resource is the amount received or accrued during the year of assessment in respect of the transfer of that mineral resource;

(b) if the disposal of the mineral resource is in a condition other than that specified for that mineral resource in Schedule 2 is the amount that would have been received or accrued during the year of assessment in respect of the transfer of that mineral resource had that mineral resource been transferred in the condition specified in Schedule 2 for that mineral resource in terms of a transaction entered into at arm's length; and

(c) the consumption, theft, destruction or loss of a mineral resource, other than by way of flaring or other liberation into the atmosphere during exploration or production is the amount that would have been received or accrued during the year of assessment in respect of the transfer of that mineral resource had that mineral resource been transferred in the condition specified in Schedule 2 for that mineral resource in terms of a transaction entered into at arm's length.

Section 11(2) provides for the adjustment of gross sales when a mineral resource is transferred as a result of a transaction that was not concluded at arm's length. The section allows the Commissioner to make an adjustment to the gross sales amounts to the extent that such amounts taken into account by the extractor are not reflective of the amounts that an extractor would have taken into account if those earnings or gross sales had been derived from transactions entered into at arm's length.

The phrase "acting at arm's length" was considered in *Hicklin v SIR* in which Trollip JA stated the following:[38]

> "It connotes that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself."

Example 4 – Determination of royalty on transfer of the unrefined mineral resource coal in the condition specified

Facts:

Coal is extracted at a calorific value of 17MJ/kg and after crushing, washing and screening transferred at a value of 19MJ/kg. The condition specified for coal in Schedule 2 is the range of 19MJ/kg to 27MJ/kg. Gross sales on transfer of the coal amount to R75 000 as determined under section 6(2)(*a*), read with section 6A. EBIT after taking into account all allowable expenditure under section 5(2) is R25 000.

Result:

Since the mineral is transferred in the condition specified (that is, within the range 19MJ/kg to 27MJ/kg), the gross sales comprise the amount received or accrued during the year of assessment of R75 000 under section 6(2)(*a*). The same applies to EBIT.

[38] 1980 (1) SA 481 (A), 41 SATC 179 at 195.

The royalty rate is calculated as follows:

Royalty rate = 0,5 + [EBIT / (gross sales × 9)] × 100

= 0,5 + [R25 000 / (R75 000 × 9)] × 100

= 0,5 + [R25 000 / (R675 000)] × 100

= 0,5 + 0,03703 × 100[39]

= 0,5 + 3,70303

= 4,20303%

Under section 4(2), the percentage determined above is multiplied by the gross sales in order to determine the amount of the royalty to be paid. The rate determined under section 4(2) may not exceed 7%.[40]

Royalty payable = Royalty rate × Gross sales

= 4,20303% × R75 000

= R3 152,27

Unrefined mineral resource transferred either beyond or below the specified condition

Section 6A(1) provides for the determination of gross sales when an unrefined mineral resource with a specified condition is transferred either beyond[41] or below[42] the condition specified in Schedule 2 for that mineral resource. Where the mineral resource is transferred below the condition specified it must be treated as having been brought to the condition specified for that mineral resource.[43] The effect of this adjustment means that the gross sales amount must be treated as having been brought to the condition specified (also known as "deeming up" or "upwards" adjustment) when transfer occurs below the condition specified in Schedule 2.

When a mineral resource is transferred in a condition beyond the condition specified in Schedule 2, section 6A(1)(*b*) deems the mineral to be transferred at the higher of –[44]

(i) the condition specified for that mineral resource; or

(ii) the condition in which it was extracted.

The effect of this adjustment means that the gross sales amount must be treated as having been brought to the condition specified (also known as "deeming down" or "downwards" adjustment) when transfer occurs beyond the condition specified in Schedule 2.

39 Multiplication takes precedence over addition.
40 Section 4(3)(*b*).
41 Section 6A(1)(*b*).
42 Section 6A(1)(*a*).
43 Section 6A(1A)(*a*).
44 Section 6A(1)(*b*).

Unrefined mineral resource with a range of specified conditions

Section 6A(1A) deals with determination of gross sales when an unrefined mineral resource with range of specified conditions is transferred in a condition either below the minimum of the range of conditions, at or within the range of conditions or above the maximum range of the condition for the mineral resource specified in Schedule 2.

The treatment of the mineral resource for purposes of the royalty is as follows:

(a) If the unrefined mineral resource is transferred in a condition below the minimum of the range of the condition specified in Schedule 2, that mineral resource must be treated as having been brought to the minimum of the range of condition specified for that mineral resource.[45]

(b) If the unrefined mineral resource is transferred at or within the range of the condition specified in Schedule, that mineral resource must be treated as having been transferred at that condition.[46]

(c) If the unrefined mineral resource is transferred in a condition above the maximum of the range of condition specified in Schedule 2, that mineral resource must be treated as having been transferred at the maximum of the range specified for that mineral resource.[47]

Example 5 - Determination of royalty on coal transferred on or after 1 March 2014 at a condition beyond the condition specified in Schedule 2

Facts:

Coal is extracted at a calorific value of 26MJ/kg and transferred at a value of 29MJ/kg after undergoing washing and crushing to be in a saleable condition. The condition specified for coal in Schedule 2 to the Royalty Act is 19MJ/kg to 27MJ/kg. Gross sales on transfer of the mineral amount to R75 000 as determined under section 6(2)(*a*), read with section 6A(1A)(*c*). EBIT after taking into account all allowable expenditure under section 5(2) is R25 000.

Result:

Since the mineral is transferred beyond the condition specified (that is, beyond the range of 19MJ/kg to 27MJ/kg), section 6(2)(*b*) applies for the purposes of adjusting the gross sales. The same applies to EBIT which will be adjusted in accordance with section 5(2).

Adjustment of gross sales:

Section 6(2)(*b*) read with section 6A(1A)(*c*) requires that an adjustment be made to the amount of gross sales when the mineral resource is transferred beyond the condition specified. Section 5(2), which accounts for the EBIT calculation, limits the amount of expenditure incurred in bringing the mineral to the condition specified. Any expenditure incurred beyond that point is disregarded.

[45] Section 6A(1A)(*a*).
[46] Section 6A(1A)(*b*).
[47] Section 6A(1A)(*c*).

Calculation of royalty post-1 March 2014:

The gross sales are deemed down to the condition specified as follows:
(R75 000 / 29) × 27 = R69 828

The EBIT amount will be deemed down as follows:
(R25 000 / 29) × 27 =R23 276

The royalty rate is calculated as follows:

Royalty rate = 0,5 + [EBIT / (gross sales × 9)] × 100

= 0,5 + [R23 276 / (R69 828 × 9)] × 100

= 0,5 + [R23 276/R628 452] × 100

= 0,5 + [0,03703 × 100]

= 0,5 + 3,70370

= 4,20370%

The rate determined above represents a percentage of actual gross sales. The deemed-down amount of gross sales is used only for purposes of calculating the royalty rate which is then multiplied by the gross sales to determine the amount of the royalty payable. The rate determined under section 4(2) may not exceed 7%.[48]

Royalty payable = Royalty rate × Gross sales

= 4,20370% × R75 000

= R3 152,78

Section 6A(1A)(2) applies when an unrefined mineral resource consists of a concentrate listed in Schedule 2 and the price of the concentrate when disposed is determined solely on that concentrate. In such an instance the specified condition for the other minerals in the concentrate must not be taken into account for purposes of applying Schedule 2.[49] Section 6A is silent on how the upward or downward adjustment of gross sales must be made, however, the adjustment must be justifiable.

Example 6 - Determination of royalty on transfer of more than one mineral resource

Facts:

Company A extracts coal, copper and lead bearing ore at its mining operations. Gross sales on transfer of coal is R32 200 000, copper R10 000 000 and lead R12 000 000 as determined under section 6(2)(*a*) read with section 6A. EBIT after taking into account all allowable expenditure under section 5(2) is as follows: coal R20 600 000, copper R3 900 000 and lead R4 680 000. All 3 mineral resources are transferred in the condition specified under Schedule 2 (that is, within the range of 19MJ/kg to 27MJ/kg for coal, 20% to 30% for copper and a concentrate of 50% Pb for lead).

48 Section 4(3)(*b*).
49 Section 6A(1A)(2)(*b*).

Result:

Company A must pay a royalty on the transfer of a mineral resource extracted from the Republic (coal, copper and lead).[50] Since all the minerals are transferred in the condition specified, the gross sales comprise the amount received or accrued for purposes of section 6(2)(*a*) and EBIT represents the amount for purposes of section 5(2).

Section 3 determines the royalty payable and refers to "**that** mineral resource". Section 6(2) which deals with the determination of "gross sales" for unrefined mineral resources, for purposes of the royalty also refers to "**that**" mineral resource. Accordingly, a royalty rate provided for under section 4(2) must be determined for each mineral resource that is transferred.

Calculation of royalty

1) The royalty rate for coal is calculated as follows:[51]

Royalty rate = 0,5 + [EBIT / (gross sales × 9)] × 100
= 0,5 + [R20 600 000 / (R32 200 000 × 9)] × 100
= 0,5 + [R20 600 000/R289 800 000] × 100
= 0,5 + [0,07108 × 100]
= 0,5 + 7,10835
= 7,60835%

Under section 4(2), the percentage determined above is multiplied by the gross sales in order to determine the amount of the royalty to be paid. The rate determined under section 4(2) may not exceed 7%.[52]

Royalty payable = Royalty rate × Gross sales
= 7,00% × R32 200 000
= R2 254 000.00

2) The royalty rate for copper is calculated as follows:

Royalty rate = 0,5 + [EBIT / (gross sales × 9)] × 100
= 0,5 + [R3 900 000 / (R10 000 000 × 9)] × 100
= 0,5 + [R3 900 000/R90 000 000] × 100
= 0,5 + [0,04333 × 100]
= 0,5 + 4,33333
= 4,83333%

The rate determined above represents a percentage of actual gross sales. The rate determined under section 4(2) may not exceed 7%.[53]

[50] Section 2 which deals with the imposition of a royalty refers to the "transfer of a mineral resource extracted".
[51] Section 4(2).
[52] Section 4(3)(*b*).
[53] Section 4(3)(*b*).

Royalty payable = Royalty rate × Gross sales

= 4,83333% × R 10 000 000

= R483 333,00

3) The royalty rate for lead is calculated as follows:

Royalty rate = 0,5 + [EBIT / (gross sales × 9)] × 100

= 0,5 + [R4 680 000 / (R12 000 000 × 9)] × 100

= 0,5 + [R4 680 000/R108 000 000] × 100

= 0,5 + [0,04333 × 100]

= 0,5 + 4,33333

= 4,83333%

The rate determined above represents a percentage of actual gross sales. The rate determined under section 4(2) may not exceed 7%.[54]

Royalty payable = Royalty rate × Gross sales

= 4,83333% × R 12 000 000

= R579 999,60

Royalty liability:

Coal	R2 254 000.00
Copper	R 483 333,00
Lead	R 579 999,60
Total liability	R3 317 332,60

Company A's royalty liability for the minerals extracted and transferred amounts to R3 317 332.60.

Unrefined mineral resource with a specified condition as "bulk"

The condition specified for refined and unrefined mineral resources is generally represented by a numeric value contained in Schedules 1 and 2. However, the conditions specified for some unrefined mineral resources listed in Schedule 2 do not have a numeric value attached to them and merely refer to "bulk", for example, aggregates, clay used for bricks, slate, granite etc.

The gross sales amount of any unrefined mineral resource disposed that has "bulk" specified as its condition in Schedule 2 is equal to the amount received or accrued as set out in section 6(2)(*a*), that is, the amount received or accrued during the year of assessment in respect of the transfer of that mineral resource. Such amount is not subject to adjustment under section 6A. [55]

[54] Section 4(3)(*b*).

[55] See Interpretation Note 108 "Meaning of 'Bulk' in Schedule 2".

Deduction of transport, insurance and handling costs to determine gross sales

Section 6(3)(*a*) and (*b*) provides that the gross sales must be determined after deduction of expenditure actually incurred in respect of transport, insurance and handling costs for respectively a refined and unrefined mineral resource In the Supreme Court of Appeal judgment in *C:SARS v United Manganese of Kalahari (Pty) Ltd*[56]. Wallis JA explained the reason for the deduction in respect of the previous wording of section 6(3)(*b*) as follows:

> "The purpose of the Royalty Act is to secure the payment of royalties on the value of minerals extracted. Even if there are situations in which mineral extraction and transfer to a third party, which is the event attracting the royalty, occurs without incurring TIH costs, in very many if not the vast majority of cases, such costs are incurred in order to dispose of the minerals. The evident purpose of section 6(3)(b) was that the extractor would not be burdened by paying royalties on amounts expended on TIH costs and recovered as part of the price paid for the minerals."

Transport, insurance and handling costs actually incurred to effect the disposal of that mineral resource may also be deducted from gross sales.

Unquantified amounts

Section 6(4) provides for the instance in which the gross sales arising from the transfer of a mineral resource cannot be quantified. This may occur, for example, when an extractor transfers a mineral resource to a transferee with the price being dependent on a price obtained by the transferee. The value to be taken into account as gross sales under these circumstances is the arm's length value based on the condition specified in Schedule 1 (refined mineral resource)[57] or 2 (unrefined mineral resource),[58] whichever is applicable.

Amount accrued

Section 6(5) provides that the amount of gross sales must be adjusted if the amount received is more[59] than or less[60] than the amount accrued. There might be a difference between the amount accrued in respect of gross sales and the amount received when there is a drastic change in the economy that results in a fluctuation in prices between the time of sale and the time of payment. Differences could also occur when the gross sales cannot be precisely quantified at the time of determining the accrual under section 6(4). The difference between the amount received and the amount accrued on gross sales must be included in gross sales when the amount received is more than that accrued.[61] When the amount received is less than the amount accrued, the difference between those amounts must be subtracted from the amount to be taken as gross sales.[62]

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56 *C: SARS v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA); 82 SATC 444 at 454.
57 Section 6(4)(*a*).
58 Section 6(4)(*b*).
59 Section 6(5)(*a*).
60 Section 6(5)(*b*).
61 Section 6(5)(*a*).
62 Section 6(5)(*b*).

Example 7 – Amount accrued for purposes of gross sales and EBIT

Facts:

Company ABC concludes a purchase and sale agreement with a foreign entity, Company E for the supply of coal. The price is contracted in a dominated foreign currency, namely, the United States Dollar (dollar). The price for the coal was fixed in dollars per ton as per the global price index on a "free on board" (FOB) basis on 30 January 2022. The contract only stated the price due by Company E for the coal purchased and its delivery as per the FOB agreement. Company ABC actually incurred transport, insurance and handling costs after the mineral was refined to the condition specified in Schedule 2.

Result:

Coal is an unrefined mineral resource listed in Schedule 2. Gross sales for an unrefined mineral resource is determined under section 6(3)(*b*) and requires that any expenditure actually incurred in respect of transport, insurance or handling after the mineral resource brought to the condition specified in Schedule 2 or to effect disposal of that mineral resource must be deducted from gross sales.

3.3 Determination of earnings before interest and taxes (section 5)

Earnings before interest and taxes is a key component as the numerator of the rate formula. It is a measure of profit before interest and taxes and is determined under section 5(1) for refined mineral resources and under section 5(2) for unrefined mineral resources. The wording in both section 5(1) and section 5(2) is the same apart from the references to Schedule 1 (refined mineral resources) and Schedule 2 (unrefined mineral resources). The aim of section 5 is to identify the profit attributable to the winning and recovery of mineral resources up to the first point of transfer which also represents the first saleable point of that mineral resource. EBIT is the aggregate of –

(a) the gross sales of the extractor during that year for all refined and unrefined mineral resources (see **3.1.2**); and

(b) so much of the amount allowed to be deducted from income in terms of the Income Tax Act (whether in that year or a previous year of assessment) in respect of the use of assets, or expenditure incurred, in respect of mineral resources transferred on or after 1 March 2010 to win, recover and develop those mineral resources to the condition specified in Schedule 1, as is included in the income of the extractor during that year of assessment –

  (i) as a recoupment in terms of any provision of the Income Tax Act; or

  (ii) in terms of paragraph (*j*) of the definition of "gross income" in section 1(1) of the Income Tax Act,

(c) less any amount which in terms of the Income Tax Act –

  (i) is deductible from the income of the extractor during any year of assessment in respect of assets used or expenditure incurred to win, recover and develop those mineral resources to the condition specified in Schedule 1 or Schedule 2 for those mineral resources; or

  (ii) would have been deductible from the income of the extractor during any year of assessment in respect of assets used or expenditure incurred to win, recover and develop those mineral resources had those mineral

resources been developed to the condition specified in Schedule 1 or Schedule 2 for those mineral resources.

The deductions permissible under the EBIT calculation relate to costs associated with the winning, recovery and development of mineral resources to the condition specified in Schedule 1 or 2.

Both operating expenses and capital expenses that are deductible under the Act are to be taken into account in the determination of EBIT.

Permissible operating and capital expenses include both direct and indirect costs (for example, electricity and wages relating to the operation of the business as a whole). Deductions are, however, permitted only to the extent to which those expenses contribute towards bringing the mineral resource to its applicable Schedule 1 or 2 specified condition.

Capital expenditure largely includes depreciation allowances described under section 36 (fixed mining capital expenditure), as well as the Tenth Schedule (fixed oil and gas capital expenditure) and to a lesser extent section 11(*e*) (wear-and-tear or depreciation allowance) and section 12C (general equipment, plant and machinery used in a process of manufacture or a process similar to a process of manufacture) under the Income Tax Act.

Only deductions relating to expenditure incurred on or after 1 May 2009 (the implementation date of the royalty regime) are permitted.

All deductible expenditure under the Income Tax Act (excluding the expenditure listed below) incurred by an extractor qualifies to the extent that the expenditure has been incurred or the assets are used to win, recover or develop a specific mineral to the condition specified (**see 2.1**).

Transport, insurance and handling expenditure

Expenditure incurred in respect of transport, insurance and handling after the mineral resource has been brought to the condition specified in Schedule 1 or 2 (whichever is applicable) or any expenditure incurred in respect of transport, insurance and handling to effect the disposal of that mineral resource must be disregarded in the determination of EBIT.[63]

Other deductions excluded under EBIT

Under section 5(3), EBIT expressly excludes –

(a) any deduction in respect of a “financial instrument” as defined in section 1(1) of the Income Tax Act (other than an instrument that is an option contract, forward contract or other instrument the value of which is derived directly or indirectly with reference to mineral resources);[64]

(b) any deduction allowed under section 11(*a*) of the Income Tax Act in respect of the royalty determined under the Royalty Act;[65]

[63] Sections 5(3).
[64] Section 5(3)(*a*).
[65] Section 5(3)(*b*).

(c) any balance of assessed loss mentioned in section 20(1)(*a*) of the Income Tax Act, unless it arises from capital expenditure falling under paragraph 5(1) of the Tenth Schedule to that Act;[66]

(d) any deduction allowed under section 24I of the Income Tax Act (gains and losses on foreign exchange transactions), excluding deductions on the adjustment referred to in section 6(5);[67] or

(e) any determination in respect of an impermissible tax avoidance arrangement contemplated in Part IIA of the Income Tax Act.[68]

Under section 5(4)(*a*) a method of reasonable apportionment must be applied when determining EBIT for a composite mineral resource comprising refined and unrefined portions.

If the value of the refined portion does not exceed 10% of a composite mineral resource, the composite mineral resource may be treated solely as an unrefined mineral resource. Similarly, if the value of the unrefined portion of a composite mineral resource does not exceed 10%, the composite mineral resource may be treated as a refined mineral resource.[69] This treatment may be exercised at the discretion of the extractor and is not compulsory but any decision must be justified. The Commissioner may exercise discretion in reviewing the extractor's determination.

Under section 5(5) EBIT is deemed to be nil if it is a negative amount.

4. Exclusions from the royalty

The Royalty Act provides for some limited exemptions from paying the royalty in respect of a year of assessment.

4.1 Small business exemption (section 7)

An extractor will qualify for the small business exemption under section 7 if –[70]

(a) the gross sales of that extractor on all mineral resources transferred do not exceed R10 million during that year;[71]

(b) the royalty on all mineral resources transferred that would be imposed on the extractor for that year does not exceed R100 000;[72] and

(c) the extractor is a "resident" as defined in section 1(1) of the Income Tax Act throughout the year.[73]

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66 Paragraph 5(1) of the Tenth Schedule provides that for the purposes of determining the taxable income of an oil and gas company during any year of assessment, there must be allowed as deductions from the oil and gas income of that company all expenditure and losses actually incurred [other than any expenditure or loss actually incurred in respect of the acquisition of any oil and gas right, except as allowed in paragraph 7(3)] in that year in respect of exploration or post exploration.

67 Section 5(3)(*e*).

68 Section 5(3)(*f*).

69 Section 5(4)(*b*).

70 See paragraph 5.14 of the *External Guide to Mineral and Petroleum Resources Royalties,* which deals with exemptions under sections 7 and 8 when completing the MPR3 on eFiling.

71 Section 7(1)(*a*).

72 Section 7(1)(*b*).

73 Section 7(1)(*c*).

The exemption will not apply if –[74]

(i) the extractor at any time during that year holds the right to participate (directly or indirectly) in more than 50% of the share capital, share premium, current or accumulated profits or reserves of, or is entitled to exercise more than 50% of the voting rights in, any other extractor;[75]

(ii) any other extractor at any time during that year holds the right to participate (directly or indirectly) in more than 50% of the current or accumulated profits of the extractor;[76]

(iii) any other person at any time during that year holds the right to participate (directly or indirectly) in more than 50% of the profits of the extractor and more than 50% of the current or accumulated profits of any other extractor;[77] or

(iv) the extractor is an unincorporated joint venture as envisaged in section 4 of the Royalty Administration Act.[78]

Taxpayers seeking to claim the exemption must –

(aa) register under section 2 of the Royalty Administration Act using the RAV01 form;

(bb) submit the first, second, and third royalty payments on an annual basis; and

(cc) submit the annual return (MPR3) in order to claim a refund of royalties paid.

SARS will after conducting a verification, and if satisfied that the exemption under section 7 applies, refund the royalty paid.

4.2 Exemption for sampling (section 8)

Section 8 provides for the exemption from the royalty of an extractor who wins or recovers mineral resources for the purposes of testing, identification, analysis and sampling mentioned in section 20 of the MPRDA. These processes must be undertaken pursuant to a prospecting right or an “exploration right” as defined in section 1 of the MPRDA. In order for the extractor referred to in this paragraph to qualify for the sampling exemption, the gross sales on those mineral resources must not exceed R100 000 during a year of assessment.

5. Roll-over relief for certain transfers and disposals

5.1 Roll-over relief for transfers between extractors (section 8A)

A transfer of a mineral resource by one extractor to another is exempt from the royalty if –

- the mineral resource is transferred between extractors that are registered under section 2 of the Royalty Administration Act; and
- both extractors agree in writing that section 8A applies to that transfer.

[74] Section 7(2).
[75] Section 7(2)(*a*).
[76] Section 7(2)(*b*).
[77] Section 7(2)(*c*).
[78] Section 7(2)(*d*).

The extractor to whom the mineral resource has been transferred must be treated as the person that wins, recovers or develops the mineral resource.[79] This exemption does not apply to the transfer of a mineral resource by an extractor that is registered under section 2(1)(*c*) of the Royalty Administration Act.[80] Section 2(1)(*c*) of the Royalty Administration Act provides for voluntary registration under that Act by an extractor.

Example 8 – Imposition of royalty on transfer of mineral resources between two extractors

Facts:

Company A extracts and stockpile gold ore. Company A subsequently sells the stockpiles to Company Y. Company Y extracts and refines gold from the stockpiles. Company Y eventually sells the mineral resources so extracted and refined. Company A and Y are both registered under the Royalty Administration Act and both agreed in writing that section 8A applies to this transaction.

Result:

Company A is exempt from the royalty under section 8A(2). However, Company Y steps into the shoes of Company A and is treated as the person that wins or recovers the mineral resource (gold), therefore Company Y will be liable for the royalty on the transfer of that mineral resource.

5.2 Roll-over relief for disposals involving going concerns (section 9)

Under section 9(1), the disposal by an extractor of a mineral resource that forms part of –

- the disposal of a going concern; or
- a part of a going concern which is capable of separate operation,

by that extractor to any other extractor is deemed not to be a disposal.

A disposal of a mineral resource by an extractor to any other extractor is also deemed not to be a disposal, if –[81]

(a) the mineral resource is disposed of to another extractor under –[82]

(i) an asset-for-share transaction mentioned in section 42 of the Income Tax Act;[83]

(ii) an amalgamation transaction mentioned in section 44 of the Income Tax Act;[84]

(iii) an intra-group transaction mentioned in section 45 of the Income Tax Act;[85]

(iv) a liquidation distribution mentioned in section 47 of the Income Tax Act;[86] or

79 Section 8A(2).
80 Section 8A(3).
81 Section 9(1A).
82 Section 9(1A)(*a*).
83 Section 9(1A)(*a*)(i).
84 Section 9(1A)(*a*)(ii).
85 Section 9(1A)(*a*)(iii).
86 Section 9(1A)(*a*)(iv).

(v) any transaction which would have been a transaction or distribution mentioned above, regardless of whether that extractor acquired that mineral resource as a capital asset or as trading stock;[87] and

(b) the extractor to whom the mineral resource is disposed of immediately after a transaction mentioned above, qualifies for registration under section 2(1)(*a*) of the Royalty Administration Act (see **3.2**).[88]

An extractor that acquires a mineral resource through a disposal made under Part III of the Income Act (so-called corporate rules) is deemed to be the extractor that won or recovered the mineral.[89] Payment of the royalty is thus deferred until such time that the second extractor transfers or disposes of the mineral resource.

6. Transfer involving a body of unincorporated persons (section 10)

Under section 10, an unincorporated body, whose members made an election under section 4(1) of the Royalty Administration Act –

- is deemed to be a person while the election remains in effect;[90] and
- is subject to the royalty as if the body were an extractor separate from its members.[91]

Any member of the body of unincorporated persons acting in a capacity other than as a member of the body will be subject to the royalty as if that member were an extractor separate from that body on any mineral resources won, recovered or transferred by that unincorporated body after taking into account any EBIT associated with those minerals as well as the application of any other provisions of the Royalty Act bearing on the royalty determination on those mineral resources.[92]

On the date of the election made under section 4(1) of the Royalty Administration Act, the members of an unincorporated body mentioned in that section are deemed to have transferred the mineral resources to be disposed of by that body, which had been won or recovered by those members. In other words, the members may have extracted mineral resources before the election, which will be disposed of by the unincorporated body on their behalf. In these circumstances the royalty will be payable by the members on the deemed transfer, while the subsequent actual disposal of those resources by the unincorporated body will not again attract the royalty.[93]

The body of unincorporated persons is further deemed to have transferred the mineral resources won or recovered by it to its members on the date that the election made under section 4(1) of the Royalty Administration Act terminates.[94] An election by all the members to terminate the unincorporated body is made under section 4(6) of that Act with effect from the day after the last day of the year of assessment in which that election was made.

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87 Section 9(1A)(*a*)(v).
88 Section 9(1A)(*b*).
89 Section 9(2).
90 Section 10(1)(*a*).
91 Section 10(1)(*b*).
92 Section 10(2).
93 Section 10(3).
94 Section 10(4).

7. General anti-avoidance rules (section 12)

Section 12(1) provides for anti-avoidance rules and allows the Commissioner to determine the liability for the royalty when satisfied that a disposal, transfer, operation, scheme or understanding (transaction) has been entered into or carried out solely or mainly for the purposes of obtaining a royalty benefit.[95] The transaction must have the effect of postponing or avoiding liability for the royalty or of reducing the amount of the royalty.

The transaction must have little or no commercial rationale other than deriving a royalty benefit and creating rights or obligations, which would not normally be created between persons dealing at arm's length. The Commissioner must determine the royalty liability as if the transaction had never been entered into or carried out, or in such manner as the Commissioner in the circumstances deems appropriate for the prevention or diminution of avoidance, postponement or reduction.

The Commissioner's decision is subject to objection and appeal under Chapter 9 of the Tax Administration Act 28 of 2011. If in proceedings relating to the Commissioner's decision referred to above it is proven that the transaction entered into or carried out would result in the avoidance or postponement of the liability for the royalty, or in the reduction of the liability for the royalty, it is presumed until the contrary is proved that the transaction was entered into or carried out solely for the purpose of deriving a royalty benefit.

8. Fiscal stability agreements

8.1 Conclusion of fiscal stability agreements (section 13)

Section 13 allows the Minister of Finance to conclude a binding agreement with an extractor –[96]

(a) in respect of the extractor's mineral resource right; or

(b) in anticipation of the extractor acquiring a mineral resource right.

For purposes of section 13, "mineral resource right" means –[97]

(i) a prospecting right;

(ii) an exploration right;

(iii) a mining right; or

(iv) a production right.

These rights must have all been granted pursuant to the MPRDA. The rights also include a lease or sublease in respect of such rights mentioned in section 11 of the MPRDA.

The binding agreement concluded between the Minister and the extractor guarantees that the terms and conditions contemplated in section 14 (terms and conditions of fiscal stability agreements) apply to the mineral resource right for as long as the extractor holds the right. All participating interests subsequently held by the extractor in respect of this right, are included.

95 Section 12(3).
96 Section 13(1).
97 Section 13(8).

A binding agreement relating to an anticipated mineral resource right has no force and effect unless the mineral resource right is granted within one year after the date on which the Minister concludes the binding agreement.[98]

An extractor that disposes of a prospecting right or an exploration right granted under the MPRDA to another person, which is subject to a binding fiscal stability agreement on the date of the disposal, may assign all the rights held by the extractor under the agreement to the other person.[99]

When a mining or production right (instead of a prospecting or exploration right referred to above) is disposed of, and that right is subject to a binding agreement, all the rights in the agreement may be assigned by the extractor to another person on the date of disposal. The extractor and the person to whom the mining or production right is disposed of must, however, form part of the same "group of companies" as defined in section 1(1) of the Income Tax Act on the date of disposal.[100]

An extractor that concludes a binding agreement may unilaterally terminate it at any time with effect from the day after the last day of the year of assessment during which the extractor terminated the agreement.[101]

The following rights are to the extent that they all relate to the same geographical area, all deemed to be one and the same mineral resource right:[102]

(aa) A prospecting right, a renewal of the prospecting right and an initial mining right converted from a prospecting right or renewal of that right held by an extractor.

(bb) An exploration right, a renewal of the exploration right and an initial production right converted from an exploration right or the renewal of that right held by an extractor.

8.2 Terms and conditions of fiscal stability agreements (section 14)

An amendment to the royalty percentage formula in section 4 has no force and effect on an extractor that is a party to a fiscal stability agreement concluded under section 13.[103] This exemption applies only when the amendment to section 4 has the effect of making the extractor liable to pay a royalty which is greater than the royalty to which the extractor would have been subject.

If the State fails to comply with the terms of a fiscal stability agreement concluded under section 13, and that failure has –

- a material adverse economic impact on the determination of the royalty payable by an extractor that is a party to the agreement; or
- the royalty payable is increased because of the State's failure to comply,

the extractor is entitled to compensation or to an alternative remedy that eliminates the full impact of the failure.[104]

98 Section 13(2).
99 Section 13(3).
100 Section 13(4).
101 Section 13(5).
102 Section 13(6).
103 Section 14(1).
104 Section 14(2).

9. Foreign currency (section 15)

An amount received by or accrued to or expenditure or loss incurred in a currency other than the rand, must be translated to rand –[105]

- by an "oil and gas company" as defined in paragraph 1 of the Tenth Schedule to the Income Tax Act by applying the average exchange rate for the year in which that amount was so received or accrued or expenditure or loss was so incurred; or
- by an "extractor" as defined in section 1, by applying the "spot rate", as defined in section 1(1) of the Income Tax Act, on the date on which that amount was so received or accrued or expenditure or loss was so incurred.

The term "spot rate" is defined in section 1(1) of the Income Tax Act as the appropriate quoted exchange rate at a specific time by an authorised dealer in foreign exchange for the delivery of currency.

10. Administration of the royalty

The Commissioner is responsible for administering this Act and the Royalty Act, in accordance with the provisions of the Tax Administration Act.[106]

10.1 Registration

Under section 2(1)(*a*) of the Royalty Administration Act, a person must register as an extractor under that Act if that person holds –

- a prospecting right;
- a retention permit;
- an exploration right;
- a mining right;
- a mining permit; or
- production right,

granted pursuant to the MPRDA; or a lease or sublease as mentioned in section 11 of the MPRDA in respect of such a right. Under section 11 of the MPRDA a prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.

Under section 2(1)(*b*) of the same Act, a person that wins or recovers mineral resources extracted from within the Republic are also required to register for mineral royalties. This requirement caters for those situations in which a different person to the extractor wins minerals from extracted ore bodies. It also caters for the situation in which a mineral resource is being won, recovered or developed under an "old order" right. An old order right is classified as a right which is still to be converted under the MPRDA.

Under section 2(1)(*c*) a person may also elect to register under the Royalty Administration Act.

[105] Section 15.
[106] Section 17 of the Royalty Administration Act.

Persons that are required to register as extractors under the Royalty Administration Act, or that choose to register are required to complete the prescribed registration forms, which are available on the SARS website. A form is also required when effecting payment of the royalty. The following forms must be used in the circumstances indicated:

(a) **RAV01** (Royalty registration form).

(b) **MPR3** (Remittance advice form – payment form).

(c) **MPR3** (Annual return).

These forms must be sent to **mineralroyalty@sars.gov.za**. This e-mail address may also be used to submit any queries about these forms.

Registration takes effect from the beginning of the year of assessment during which the person qualifies for registration. Payment of the royalty is triggered by transfer of a mineral resource and not by mere registration as an extractor.

10.2 Submission of returns

The payment of the royalty and submission of the return is dealt with in sections 5 and 6 of the Royalty Administration Act.

In respect of a year of assessment, a registered person must –

(a) estimate the royalty payable;

(b) submit a return of that estimate; and

(c) make a first payment equal to one-half of the amount of the royalty so estimated,

not later than six months after the first day of that year of assessment.[107]

In respect of a year of assessment a registered person must also –

(i) estimate the royalty payable;

(ii) submit a return of that estimate; and

(iii) make a second payment equal to the amount of the royalty so estimated less the first amount paid,

by the last day of that year of assessment.[108]

Under section 5A(1) of the Royalty Administration Act, the Commissioner may require a registered person to justify any estimate of the royalty payable as mentioned in section 5(1) or (2), or to furnish particulars in respect of that estimate and, if the Commissioner is dissatisfied with the amount of that estimate, the Commissioner may increase the amount of the estimate to an amount that the Commissioner considers reasonable, which increase is not subject to objection and appeal.[109]

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[107] Section 5(1) of the Royalty Administration Act.

[108] Section 5(2) of the Royalty Administration Act.

[109] Section 17(2) of the Royalty Administration Act provides as follows: "Administrative requirements and procedures for purposes of the performance of any duty, power or obligation or the exercise of any right in terms of this Act are, to the extent not regulated in this Act, regulated by the Tax Administration Act." Therefore, if the extractor is dissatisfied with the increase in the estimate the only recourse would be to approach the High Court for a review of the estimate by the

If in respect of a year of assessment a registered person does not submit an estimate by the end of the period specified in section 5(1) or (2), the Commissioner may estimate the amount of the royalty payable in respect of that year of assessment.[110]

Any additional amount of royalty payable as a result of the increase or estimate referred to in subsection (1) or (2) must be paid within the period specified in a notice of assessment referred to in section 96 of the Tax Administration Act and issued in respect of that additional assessment.[111]

Subject to subsection 5A(2), if a registered person fails to submit an estimate of the royalty payable in respect of a year of assessment before the end of a period of four months after the last day of that year of assessment, that registered person is regarded as having submitted an estimate of an amount of nil royalty payable.[112]

If the amount of the royalty payable in respect of a year of assessment exceeds the sum of the payments made under sections 5(1) and (2) and 5A, the registered person must –

(aa) submit a return of that excess; and

(bb) pay the excess,

not later than six months after the last day of that year of assessment.[113]

A registered person must submit a final return for the royalty payable in respect of a year of assessment not later than 12 months after the last day of that year of assessment.[114]

10.3 Payment of penalty and interest

Penalty

If in respect of a year of assessment the royalty payable exceeds the amounts paid under sections 5(1) and (2) and 5A (see **10.2**) and that excess is greater than 20% of the royalty payable, the Commissioner must impose a penalty, which is regarded as a percentage-based penalty imposed under Chapter 15 of the Tax Administration Act that may not exceed 20% of that excess.[115] Such a penalty imposed is payable within 30 days from the date on which it was imposed.[116]

If the Commissioner is satisfied that the estimates of the royalty payable and the amounts paid as mentioned in section 5 were seriously calculated with due regard to the factors having a bearing on the estimates, and were not deliberately or negligently understated, or if the Commissioner is partly so satisfied, the Commissioner may remit the penalty or a part of the penalty.[117]

If a registered person is regarded under section 5A(4) as having submitted an estimate of an amount of nil royalty payable in respect of a year of assessment due to a failure to submit an estimate before the end of a period of four months after the last day of that year of assessment;

Commissioner.

110 Section 5A(2) of the Royalty Administration Act.

111 Section 5A(3) of the Royalty Administration Act.

112 Section 5A(4) of the Royalty Administration Act.

113 Section 6(2) of the Royalty Administration Act.

114 Section 6(3) of the Royalty Administration Act.

115 Section 14(1) of the Royalty Administration Act.

116 Section 14(2) of the Royalty Administration Act.

117 Section 14(3) of the Royalty Administration Act.

and the Commissioner is satisfied that the failure was not due to an intent to evade or postpone the payment of the royalty, the Commissioner may remit the whole or any part of a penalty imposed.[118]

Interest

A registered person must pay interest in accordance with the provisions contained in Chapter 12 of the Tax Administration Act –[119]

(*a*) in respect of so much of the amount that must be paid in terms of section 5(1) or (2), 5A or 6 as is not paid on the day by which that payment was required to be made under this Act;[120] and

(*b*) in respect of so much of the amount that must be paid under an additional assessment issued by the Commissioner, other than an additional assessment under section 5A, as is not paid on the day by which that payment was required to be made.[121]

Section 187 of the Tax Administration Act contains the general interest rules if a tax debt or refund payable by SARS is not paid in full by the effective date. In any such event, interest accrues and is payable on the amount of the outstanding balance of the tax debt or refund. Sections 189 and 188 provide for the rate and period, respectively, for the interest to be calculated and paid, whether by SARS or the taxpayer.

The rate at which interest is payable under section 187 of the Tax Administration Act is the prescribed rate.[122] The "prescribed rate" is defined in section 1(1) of the Income Tax Act and means –

> "[t]he rate contemplated in section 189(3) of the Tax Administration Act;".

The prescribed rate under section 189(3) of the Tax Administration Act is the interest rate that the Minister may from time to time fix by notice in the *Gazette* under section 80(1)(*b*) of the Public Finance Management Act No 1 of 1999.

10.4 Payment of refunds

If in respect of a year of assessment the amount of the royalty payable by a registered person is less than the sum of the payments made by that registered person under sections 5, 5A and 6, the excess must be refunded by the Commissioner to the registered person under Chapter 13 of the Tax Administration Act.[123]

The Commissioner must pay interest in accordance with the provisions contained in Chapter 12 of the Tax Administration Act in respect of overpayment of an amount paid to the extent that that amount exceeds –[124]

(a) in the case in which that amount was paid in respect of a notice of assessment, the amount so assessed; or

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118 Section 14(4) of the Royalty Administration Act.
119 Section 16(2) of the Royalty Administration Act.
120 Section 16(2)(*a*) of the Royalty Administration Act.
121 Section 16(2)(*b*) of the Royalty Administration Act.
122 Section 189(1) of the Tax Administration Act.
123 Section 6A of the Royalty Administration Act.
124 Section 16(1) of the Royalty Administration Act.

(b) in any other case, the amount of royalty properly chargeable under the Royalty Act.

10.5 Maintenance of records

In addition to the records required under the Tax Administration Act,[125] a registered person must retain the following records in respect of mineral resources extracted from within the Republic:

(a) Particulars of "earnings before interest and taxes" as mentioned in section 5 of the Royalty Act with sufficient detail to identify all the gross sales, income, and allowable deductions in respect of those earnings.

(b) Particulars of "gross sales" as mentioned in section 6 of the Royalty Act with sufficient detail to identify all transferred mineral resources in respect of those gross sales and the persons acquiring those transferred mineral resources.

(c) The quantity of mineral resources –

(i) extracted but not transferred; and

(ii) transferred,

by that registered person with sufficient detail to identify the mineral resources extracted but not transferred and the mineral resources transferred.

(d) The accounting income with sufficient detail to identify the "earnings before interest and taxes" as mentioned in section 5 of the Royalty Act that relate to that accounting income.

(e) Any ledger, cash book, journal, cheque book, bank statement, deposit slip, paid cheque, invoice, other book of account or financial statement.

(f) Any information specifically required by the Commissioner by public notice.[126]

[125] Section 29 of the Tax Administration Act.

[126] Section 8 of the Royalty Administration Act.