

REPUBLIC OF SOUTH AFRICA

**DRAFT MINERAL AND PETROLEUM RESOURCES
ROYALTY BILL**

*(As introduced in the National Assembly (proposed money Bill))
(The English text is the official text of the Bill)*

(Minister of Finance of Finance)

06 December 2007

[B ?—2007]

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BILL

To impose a royalty on mineral resources and to provide for matters connected thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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Part I

Interpretation

Definitions

1. (1) In this Act, unless the context indicates otherwise—
 - “**aggregate gross sales**” means aggregate gross sales as described in section 4;
 - “**allowable deductions**” means aggregate expenditures as described in section 5;
 - “**extractor**” means a person that wins or recovers a mineral resource (or that has a mineral resource won or recovered on that person’s behalf) in respect of that person’s mineral resource right;
 - “**mineral resource**” means a mineral or petroleum as defined in section 1 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002), including any property wholly or partly recovered, derived, or consisting of that mineral or petroleum;
 - “**mineral resource right**” means a prospecting right or retention permit, exploration right, mining right or permit, or production right granted (or should have been granted) under the Mineral and Petroleum Resource Development Act, 2002 (Act No. 28 of 2002);
 - “**person**” includes an insolvent estate, the estate of a deceased person, and any trust;
 - “**Republic**” means the territory of the Republic of South Africa, including the territorial waters, the contiguous zone and the continental shelf referred to respectively in sections 4, 5, and 8 of the Maritime Zones Act, 1994 (Act No. 37 of 1994);
 - “**royalty**” means the royalty imposed under this Act;
 - “**Administration Act**” means the Mineral and Petroleum Resources Royalty Administration Act, 2007 (Act No. ? of 2007); and
 - “**transfer**”, in relation to an extractor, means the—
 - (a) initial disposal of beneficial ownership by that extractor of that extractor’s mineral resource; or
 - (b) theft or destruction of that extractor’s mineral resource.
- (2) Unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Administration Act bears the meaning so assigned for purposes of this Act.

Part II

Basic royalty regime

Charging provision

2. (1) An extractor must pay a royalty for the benefit of the National Revenue Fund as described in subsection (2).

(2) The royalty payable during an assessment period is determined by multiplying the royalty rate described in section 3 for that assessment period by the amount by which the aggregate gross sales for that assessment period exceeds the amount of allowable deductions for that assessment period.

Royalty rate

3. (1) The royalty rate equals—

$$\frac{\text{earnings before interest, taxes, depreciation and amortization}}{\text{aggregate gross sales for the assessment period}} \times 100 \times 12.5$$

(2) A negative rate under subsection (1) is deemed to be a rate of zero.

(3) For purposes of subsection (1), “**earnings before interest, taxes, depreciation and amortisation**” means the earnings of the extractor arising during an assessment period before taking into account interest, tax, depreciation, and amortisation in respect of those earnings as measured for financial reporting purposes, but only to the extent those earnings are attributable to mineral resources won or recovered by the extractor (or on behalf of the extractor).

Aggregate gross sales

4. (1) Aggregate gross sales equal the aggregate of amounts received by or accrued to the extractor for mineral resources transferred during an assessment period.

(2) For purposes of subsection (1), the aggregate amounts received or accrued include—

- (a) the face value reduction or discharge of an outstanding obligation;
- (b) the fair market value of property, financial assistance, service or other benefit;
- (c) an amount received by way of insurance, indemnity or guarantee; and
- (d) any premium paid in respect of an option on a mineral resource.

(3) To the extent an amount of aggregate gross sales received or accrued is not quantifiable, that amount is deemed received or accrued in the assessment period the amount becomes quantifiable.

Allowable deductions

5. (1) Allowable deductions equal the aggregate of expenditures incurred by the extractor during an assessment period in respect of—

- (a) the aggregate amount received by or accrued to the extractor for the extractor's mineral resources taken into account as aggregate gross sales during that assessment period;
- (b) processing a mineral resource which is transferred during that assessment period beyond its initial readily saleable condition as associated with beneficiation as prescribed by the Minister of Finance by way of regulation; and
- (c) the transportation (including throughput) of a mineral resource which is transferred during that assessment period to the extent the transportation expenditures arise after processing the mineral resource beyond its initial readily saleable condition as described in paragraph (b).

(2) Notwithstanding subsection (1), an extractor may not deduct—

- (a) stewardship costs;
- (b) management fees and management related service fees;
- (c) general overhead and administration costs;
- (d) marketing;
- (e) depreciation charges; and
- (f) interest charges.

(3) To the extent an amount of allowable deductions in respect of an expenditure incurred is not quantifiable, that amount is deemed incurred in the assessment period the amount becomes quantifiable.

(4) For purposes of this section, “**processing**” means all forms of screening, washing, sintering, sorting, smelting, and refining performed within the Republic for purposes of recovering or deriving (in whole or in part) any property consisting of that mineral resource.

Deemed amounts and transfers

6. (1) If a mineral resource is transferred before the mineral resource is in its readily saleable condition as described in section 5(1)(b), the amount received or accrued in respect of the transfer must be deemed to be equal to the arm's length value of the mineral resource for purposes of section 4.

(2) If an extractor exports a mineral resource from the Republic without transfer, the mineral resource is deemed—

- (a) transferred on the date of export of the mineral resource; and

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- (b) transferred for an amount received or accrued equal to the arm's length value of the mineral resource on the date described in paragraph (a).
- (3) If an extractor uses a mineral resource in a process of manufacture as determined by the Minister of Finance by way of regulation, the mineral resource is deemed—
 - (a) transferred on the date immediately preceding the date on which the process of manufacture commences; and
 - (b) transferred for an amount received or accrued equal to the arm's length value of the mineral resource on the date described in paragraph (a).

Write off for bad debts

7. (1) An extractor must reduce the amount of royalty payable for an assessment period by an amount equal to so much of any royalty paid or payable in the assessment period or prior assessment period as is calculated with reference to aggregate gross sales that are written off as bad debts during that assessment period.

(2) If during an assessment period the amount of the reduction described in subsection (1) exceeds the royalty payable described in that subsection, the excess amount is deemed to arise; and reduce the amount of royalty payable, during the immediately succeeding assessment period.

(3) If an extractor writes off as a bad debt an amount of aggregate gross sales in relation to a mineral resource as described in this section and that mineral resource is subsequently reacquired by that extractor, the reacquired mineral resource is deemed not to have been initially transferred by the extractor.

Currency translation

8. An amount of—

- (a) aggregate gross sales received by or accrued to; or
- (b) allowable deductions in respect of an expenditure incurred by,

an extractor during an assessment period in a currency other than the currency of the Republic must be translated to the currency of the Republic by applying the spot rate on the date on which the amount was received or accrued or the expenditure was incurred.

Part III

Reliefs

Small mining business relief

- 9.** (1) An extractor is not liable for the royalty otherwise imposed during an assessment period if—
- (a) the extractor does not have aggregate gross sales that exceed R5 million during the assessment period;
 - (b) the royalty that would otherwise be imposed on the extractor for the assessment period would not exceed R50 000;
 - (c) the extractor is a resident as defined in section 1 of the Income Tax Act (Act No. 58 of 1962) throughout the assessment period; and
 - (d) the extractor is duly registered with the Commissioner as described in section 2 of the Administration Act throughout the assessment period.
- (2) Notwithstanding subsection (1), an extractor is liable to pay the royalty during an assessment period if—
- (a) the extractor, at any time during the assessment period, is entitled to participate (directly or indirectly) in more than 50 per cent of the profits of any other extractor;
 - (b) any other extractor is entitled, at any time during the assessment period, to participate (directly or indirectly) in more than 50 per cent of the profits of the extractor; or
 - (c) any other person is entitled, at any time during the assessment period, to participate (directly or indirectly) in more than 50 per cent of the profits of the extractor and more than 50 per cent of the profits of any other extractor.

Exemption for sampling

- 10.** An extractor that transfers mineral resources that are won or recovered for sampling purposes pursuant to a prospecting right as defined in section 1 of the Mineral and Petroleum Resources Development Act is not liable for the royalty otherwise imposed in respect of the transfer of the mineral resources if the aggregate gross sales of the mineral resources do not exceed R20 000.

Part IV

Anti-avoidance rules

Arm's length value

11. (1) To the extent earnings taken into account by an extractor under section 3 differ from earnings that the extractor should have taken into account had those earnings been determined at arm's length values, the Commissioner may adjust the earnings to reflect their arm's length value for purposes of section 3.

(2) If an amount of aggregate gross sales received or accrued in respect of a mineral resource is less than the arm's length value of the mineral resource on the date of its transfer, the Commissioner may adjust the amount received or accrued to reflect the arm's length value of the mineral resource for purposes of section 4.

(3) If an amount of allowable deductions in respect of an expenditure incurred by an extractor exceeds the amount that would have been the arm's length value of the expenditure, the Commissioner may adjust the expenditure to reflect the arm's length value of the expenditure for purposes of section 5.

(4) For purposes of this Act, "**arm's length value**" means the open market value at which two or more independent persons acting in good faith (without regard to the royalty) would freely agree to transact in the ordinary course of business so that no conflict of interest exists in the transaction and the transaction occurs without any special favour, concession or advantage to any person.

General anti-avoidance rule

12. (1) Notwithstanding anything in this Act, if the Commissioner is satisfied that a transfer, operation, scheme or understanding (whether enforceable or not and even if entered into or carried out before the commencement of this Act), including any steps thereto—

- (a) has been entered into or carried out in manner that is not normally employed for bona fide businesses purposes other than the obtaining of a royalty benefit;
- (b) has created rights or obligations that are not normally created between persons dealing at arm's length; or
- (c) has been entered into or carried out solely or mainly for purposes of obtaining a royalty benefit,

the Commissioner may determine the royalty, penalties, and interest imposed by this Act and the Administration Act (and the amount thereof) as if the transfer, operation, scheme, or understanding had not been entered into or carried out, or in a manner that the Commissioner in the circumstances deems appropriate for the prevention or diminution of the State royalty benefit.

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(2) A decision of the Commissioner under subsection (1) is subject to objection and appeal as described in section 15(1)(d) of the Administration Act, and whenever in proceedings relating thereto it is proved that the relevant transfer, operation, scheme, or understanding results in (or would result in) a royalty benefit, it is presumed that the transfer, operation, scheme, or understanding was entered into or carried out solely or mainly for purposes of obtaining a royalty benefit until proof is provided to the contrary.

(3) For purposes of this section, “**royalty benefit**” means a reduction, avoidance or postponement of the royalty payable under section 2.

Part V

Fiscal guarantee

Duration

13. (1) The Minister of Finance may conclude a binding agreement with an extractor—
(a) in respect of the extractor’s mineral resource right; or
(b) in anticipation of the extractor acquiring a mineral resource right,
that guarantees the terms and conditions described in section 14 will apply in respect of the right for as long as the extractor holds the right.

(2) A binding agreement relating to the anticipated transfer of a mineral resource described in subsection (1)(b) has no force and effect if a mineral resource right is not granted in respect of that mineral within one year after the Minister of Finance concludes the agreement.

(3) If an extractor disposes of a prospecting or exploration right granted under the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) to another person, and that right is subject to a binding agreement described in subsection (1) on the date of the disposal, the extractor may assign all of the rights held by the extractor under the agreement to the other person.

(4) If an extractor disposes of a mining or production right granted under the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) to another person, and that right is subject to a binding agreement described in subsection (1) on the date of the disposal, the extractor may assign all of the rights held by the extractor under the agreement to the other person only if both the extractor and the other person fall within the same group of companies as defined in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962) on the date of the disposal.

(5) If an extractor is party to a binding agreement described in subsection (1), the terms and conditions described in section 14 will apply to all participating interests subsequently

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held by the extractor under the mineral resource right in respect of the agreement for as long as the extractor holds that mineral resource right in respect of that agreement.

(6) The extractor that concludes a binding agreement described in subsection (1) may unilaterally terminate the agreement at any time with effect from the day after the last day of the assessment period during which the extractor terminated the agreement.

(7) For purposes this Part,

(a) a prospecting right, a renewal of the prospecting right and an initial mining right converted from any prospecting right or renewal thereof held by an extractor are all deemed to be one and the same mineral resource right in the hands of the extractor to the extent those rights relate to the same geographical area; and

(b) an exploration right, a renewal of the exploration right and an initial production right converted from an exploration right or renewal thereof held by an extractor are all deemed to be one and the same mineral resource right in the hands of the extractor to the extent those rights relate to the same geographical area.

(8) For purposes of this Part—

(a) “**mineral resource right**” does not include a retention permit or a mining permit granted under the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002); and

(b) “**Minister of Finance**” means the Minister of Finance, the Director-General of the National Treasury (if so delegated by the Minister of Finance) or to any other person within the National Treasury (if so delegated by the Director-General after having been delegated by the Minister of Finance).

Terms and conditions

14. (1) Legislation amending Parts I, II and III of this Act will have no force and effect in respect of the transfer of a mineral resource by an extractor that is party to an agreement described in section 13(1) to the extent those amendments result in the extractor being liable to pay an amount in terms of this Act which is greater than an amount that would have been payable in the absence of the amendments.

(2) Legislation directly or indirectly imposing a charge on the transfer of mineral resources in addition to (or in lieu of) this Act will have no force and effect in respect of the transfer of a mineral resource by an extractor that is party to an agreement described in section 13(1), unless that charge is an export levy that can be avoided by beneficiating the mineral resource within the Republic.

(3) If non-observance by the State occurs after the conclusion of a binding agreement described in subsection (1) and the non-observance has a material adverse economic

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impact on the determination of the royalty payable by the extractor that is party to the agreement, the extractor is entitled to compensation for the loss of market value caused by that non-observance (and interest at the prescribed rate calculated on the compensation from the date of non-compliance) or to a remedy that otherwise eliminates the full impact of the non-observance to the same extent.

(4) Notwithstanding subsection (1), Parts I, II and III may be amended for purposes of preventing the avoidance of their principles and intent.

Part VI

Closing items

Act binding on State and application of other laws

15. This Act will bind the State, and a provision in any other law will not be construed as applying or referring to the royalty unless the royalty is specifically mentioned in the provision.

Short title and commencement

16. This Act will be titled the Mineral and Petroleum Resources Royalty Act, 2007, and will come into operation in respect of all mineral resources transferred on or after 1 May 2009.