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Meaning of “bulk” for mineral royalty tax purposes

The aggregates industry will welcome the declaratory judgment handed down by the High Court of South Africa (Gauteng Provincial Divisions, Pretoria) in the matter between ASPASA NPC (ASPASA) as the first applicant and a further ten more applicants (members of **ASPASA**) (collectively referred to as **the applicants**) and the Commissioner for the South African Revenue Service (**CSARS**).

“Bulk” as condition for aggregates

The applicants approached the High Court to grant relief, declaring that “bulk” as used for aggregates in Schedule 2 of the Mineral and Petroleum Resources Royalty Act, 28 of 2008 (**the Royalty Act**) means “the condition in which shot rock (i.e. blasted rock) exists at the quarry face prior to processing (i.e. crushing or other form of beneficiation)”.

The question is whether “bulk” in Schedule 2 refers to the aggregates at the time of extraction (i.e. at the muck pile) or whether it refers to the beneficiated state of the aggregates at the time of transfer. This will have a significant impact on the value of gross sales for royalty tax purposes. If “bulk” means the beneficiated state of the aggregates, the value of gross sales will be the actual sales value (section 6(2)(a) of the Royalty Act). Whereas, if “bulk” means the aggregates at the muck pile, section 6(2)(b) of the Royalty Act will apply and the value of the aggregates will be determined at the muck pile.

The court states that SARS loses sight of the benefits (increase in value and price) of beneficiation. It will result in absurd consequences in the following respects:

- Section 6(2)(b) of the Royalty Act becomes redundant for aggregates, even though the beneficiated aggregates are significantly more valuable than the muck pile. This is discriminatory and contradictory to the purpose of the Royalty Act which is to promote beneficiation and not to penalise it.

- It will result in variable base rates depending on which bulk stockpile results in the sale.

The court states that SARS’ interpretation “*does not withstand a proper interpretation exercise of the term with reference to text, context and purpose*”.

Based on careful consideration, the High Court issued a declarator that ’bulk’ for purposes of Schedule 2

to the Royalty Act "**means the condition in which shot rock (i.e. blasted rock) exists at the muck pile prior to processing (i.e. crushing or other form of beneficiation**)".

Jurisdiction of the High Court to adjudicate this application

In addition, SARS contended that the matter should be heard in the Tax Court, that the applicants have not put forward a case for declaratory relief and that the High Court does not have jurisdiction by virtue of section 105 of the Tax Administration Act, 28 of 2011 (the TAA).

In terms of section 105 "decisions" or "an assessment" must be dealt with by the Tax Court unless the High Court directs otherwise. The High Court will only 'direct otherwise' where it finds there are exceptional or rare circumstances present. The following was stated to be rare / exceptional circumstances which meant the High Court could hear the application:

- SARS requested special allocation of the hearing in its need to get clarity as there was another taxpayer in the appeal stage that was pended, pending the finalisation of this application.
- The interpretation of "bulk" is a pure legal issue, and it affects the entire industry. If the matter needed to be decided in the Tax Court on a case-by-case basis, it would not be binding on the industry. There will only be certainty after further appeal processes when the High Court and Supreme Court of Appeal rules on the issue.
- The Tax Court cannot grant declaratory relief.
- SARS and industry were at loggerheads on the legal interpretation of "bulk".

The High Court was satisfied that the requirements (presence of interest to the applicants and conditions are met to exercise discretion) for it to provide declaratory relief were met.

It will be interesting to see if SARS takes this order on appeal.

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