UNDERSTANDING SOLID MINERALS LAW AND TAXATION

CITN TAX PRACTICE
SERIES NO. 36

Understanding Solid Minerals Law and Taxation

ISBN: 978- 978-57878-4-9

Published by:
The Chartered Institute of Taxation of Nigeria
Tax Professionals' House
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Block 26 (27), Abidjan Street, Wuse Zone 3,
Abuja, FCT, Nigeria
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Printed and bounded in Nigeria by:
Diamond Print & Design
No 8, Rufai Street Off Shipeolu Street
Shomolu, Lagos, Nigeria
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08037271767

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PUBLISHED BY:
THE CHARTERED INSTITUTE OF TAXATION OF NIGERIA

FOREWORD

The publication,**"Understanding Solid Minerals Law and Taxation"** is essential to the current and prevailing economic situation in Nigeria, with the growing emphasis on the development of the solid minerals sector of the Nigerian economy. The increased economic activities prompted by the reforms introduced by the Federal Government through the Ministry of Solid Minerals has made it imperative for stakeholders to understand the tax laws applicable to these activities with the view to driving effective compliance. The responsibility of enlightening relevant stakeholders is a duty the Institute will not fail to bequeath to the industry.

This book is an effort to explain in details, the mines and solid minerals industry in Nigeria as a major segment of the extractive sector of the Nigerian economy. The conceptualization behind this is to fully understand the analysis of mines and solid minerals industry, the legal framework of mines and solid minerals, the role of institutional and regulatory bodies on mines and solid minerals, Nigeria's fiscal regime in mines and solid minerals and lessons from the fiscal regime in mines and solid minerals in selected economies in Africa.

This publication is timely and useful to guide members of the Institute in rendering valued services to the industry. It will serve as reference material for scholars and students of taxation at undergraduate, postgraduate and professional levels.

I believe that this material will provide insight to tax professionals, administrators and the general public who are interested in understanding the solid minerals law and taxation. Therefore, I recommend it for students and members of the Institute, legislators at federal and state level particularly committees saddled with the responsibility of making laws for this sector.

Dame Gladys Olajumoke Simplice, FCTI
14th President and Chairman of Council
Chartered Institute of Taxation of Nigeria
Lagos

July 2020

PREFACE

Extractive Industry Taxation is the tax assessment of solid minerals, oil and gas-related transactions in Nigeria. The revenue generation in the extractive industries over the years has contributed immensely to the economic growth (Gross Domestic Product) of Nigeria.

It is necessary to assess the various laws in the extractive industry, areas of strengths, weaknesses and opportunities for the use and exploitation of solid minerals in Nigeria. Therefore, **Understanding Solid Minerals Laws and Taxation** examines the overview of Nigeria's mines and solid minerals industry, the legal framework of mines and solid minerals, the role of institutional and regulatory bodies on mines and solid minerals, Nigeria's fiscal regime in mines and solid minerals and fiscal Regimes lessons from selected economies in Africa.

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ABOUT THE INSTITUTE

The Chartered Institute of Taxation of Nigeria started on February 4, 1982, as Association of Tax Administrators and Practitioners (ATP). Thereafter, it transformed into Nigerian Institute of Taxation, which was formally launched on February 21, 1982, and statutorily recognized on May 6, 1987, as a Company Limited by Guarantee.

The Institute was chartered by the Federal Government of Nigeria by the enabling Act No. 76 of 1992 (now CITN Act, CAP C10, Vol. 2, Laws of the Federation of Nigeria, 2004) and charged with the responsibility, among others, of regulating and controlling the practice of the tax profession in its entire ramifications and determining standards of knowledge and skills required to be attained by persons seeking to become professional Tax Practitioners or Administrators in Nigeria.

THE CHARTER OF THE INSTITUTE

The aims and objectives of the Institute as laid down in its charter (Act No. 76 of 1992), among others, are:-

- ➢ To determine what standards of knowledge and skill are to be attained by persons seeking to become registered members of the taxation profession;
- ➢ To raise, maintain and regulate the standard of taxation practice amongst its members;
- ➢ To promote professional ethics and efficiency in tax administration and practice; and
- ➢ To encourage, promote and coordinate research for the advancement of taxation practice and administration in Nigeria.

Under the Act, the Institute is the only professional body empowered to regulate tax practise and administration in Nigeria and only its members can practise Taxation. The Act sets out the rules as regards membership, composition and officers of Council, etc.

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ABOUT THE TAXATION FACULTIES OF THE CHARTERED INSTITUTE OF TAXATION OF NIGERIA

The Taxation Faculties of the Institute were established as specialist faculties to offer guidance, support and the best advice on tax legislation to members of the Institute as well as to facilitate tax education and training to tax practitioners, tax administrators, accountants, legal practitioners and company secretaries through seminars, symposiums, online webinars and conferences. The Taxation Faculties serve as the think tank to the Council of the Institute on tax policy matters and help to raise the profile of the taxation profession in Nigeria, by providing a platform for stronger advocacy and engagement with regulators, policymakers and tax men. It also provides avenues for further development of high-quality tax services under the Institute.

The Faculties drive the technical, advocacy and liaison functions of the Institute. They are coordinated by the Committee of Deans of Faculties, headed by a Coordinating Dean. Membership of the Faculties is drawn from experienced tax administrators and practitioners, legal practitioners and other distinguished professionals as determined by the Governing Council of the Institute.

The five Faculties that have been established are:

1. Direct Taxation Faculty
2. Indirect Taxation Faculty
3. Tax Policy and Administration Faculty
4. Extractive Industry Taxation Faculty
5. International Taxation Faculty

The terms of reference of the Extractive Industry Taxation Faculty (EITF) of the Chartered Institute of Taxation of Nigeria concerning solid minerals oil and gas taxation in Nigeria are as follows:

i. Identifying all types and areas of lapses in operations; areas of strengths; weaknesses and opportunities for the use and exploitation of solid minerals; the impact of present provisions of the tax laws; and other areas applicable in other countries but not in Nigeria
ii. Assessing the relevant/applicable laws and make relevant suggestions for economic re-engineering

iii. Determining the impact of information technology and fiscal policy regime on the maximization of the sector's potential.

The text, Understanding Solid Minerals Law and Taxation is one of the productions of the Extractive Industry Taxation Faculty in the 2020/2021 Presidential Year of the Institute.

The members of Extractive Taxation Faculty (ETF) who contributed to the successful writing of this transfer pricing handbook are given below:

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CHAPTER 1

OVERVIEW OF NIGERIA'S MINES AND SOLID MINERALS INDUSTRY

1.1 INTRODUCTION

The solid minerals industry is a major segment in the extractive sector of the Nigerian economy.

The following are the statistical data and analysis obtained from the National Bureau of Statistics on the sector:

- As of 2014, the contribution of the solid mineral sector to the Nigerian economy was one per cent (1%).
- It has the potential to increase to at least five per cent (5%) by the year 2017 and ten per cent (10%) by the year 2020.
- It is also capable of creating three million jobs - direct and indirect by the year 2017.

Precisely, forty-four (44) solid minerals are found in commercial quantity and are spread across the 36 States and FCT Abuja. Out of these, seven (7) strategic solid minerals are being prioritized and promoted for private sector participation and investment by the Federal Government of Nigeria. The selected solid minerals are gold, coal, bitumen, limestone, iron ore, lead/zinc and barites.

This chapter deals with the introduction to the development of solid minerals, ownership, the framework of administration, and mining taxation in Nigeria.

1.2 DEVELOPMENT OF SOLID MINERALS IN NIGERIA

Despite being more than a century in operations, much of the mineral potentials of Nigeria are yet to be defined by exploration or fully developed largely due to lack of investment.

Historically, in 1904, the British started tin mining operations in Nigeria and were mining gold deposits by 1906. Also, in 1906, coal was discovered. The Minerals Act was enacted in 1946 and the Coal Ordinance in 1950 to regulate the growing mining sector. The Gold and Diamond Trading Act and the Explosive Acts were both enacted in 1964. The Tin Act was enacted in 1967 and the Quarries Act and Allied Regulations were enacted in 1969.

After independence in 1960, even though there were a couple of activities in the sector, the Nigerian government no longer pay attention to mining further to the discovery of oil in massive commercial quantity. It got worsen with the Indigenisation Decree of 1977 and the poor manpower capabilities due to relaxation as a result of cheap oil money. Bureaucracy to get approval was on the high side and all these pave ways for illegal miners with the government being the greatest looser. Incidentally, due to dwindling revenues from oil exports and been in need to diversify the country's revenues' base, the government from the late 1980s started repositioning Nigeria as a mining country.

In 1995, the government materially reconnected with the industry by the creation of the Ministry of Solid Minerals Development and commissioning of a phased investigation and appraisal of Nigeria's solid mineral potential.

In 1999, the government enacted the Minerals and Mining Act 1999. The Ministry of Solid Minerals Development also published an inventory of the mineral potential of Nigeria, which specified the occurrence of 34 mineral commodities at about 450 locations spread in almost all the states of the Federation.

In 2002, the government developed a seven years strategic plan for the industry and set up the Nigerian Geological Survey Agency. The Nigerian Geological Survey Agency (NGSA) noted that it has identified the occurrence of additional 42 mineral resources across the country in addition to the existing 34 minerals that have been identified and are being promoted for commercial exploration and production, putting the total number to 76 minerals. It is important to note that Section 4, item 39 of the Exclusive Legislative List, 1999 Constitution of the Federal Republic of Nigeria confers upon the National Assembly the exclusive power to make laws in respect of mining in Nigeria.

In 2007, the National Assembly enacted the Nigerian Minerals and Mining Act, 2007 (which repeals the 1999 Minerals and Mining Act). Presently, it is the primary legislation that regulates all mining activities in Nigeria. It replaced the Minerals Act, 1946 and the Minerals and Mining Act, 1999. Before the passage of the 1999 Act, a new Minerals Policy which favours a private sector-led development of the mining industry was published by the Federal Government to replace the 1971 policy which favoured a government-led development of the mining sector that led to the 1977 Indigenisation Decree. The industry is now open to any private investor.

1.3 OWNERSHIP OF MINERALS

The 1999 Constitution under section 44(3) vests *"the entire property in and control of all minerals in, under or upon any land in Nigeria upon the Federal Government."* This provision puts to rest any question as to the private ownership of minerals in Nigeria.

The Nigerian Minerals and Mining Act, 2007 in Section 1(1) re-emphasises that the control of and property in minerals in Nigeria is vested in the Federal Government. Except for a few exceptions, land, by the Land Use Act, 1978 is vested in the Governors of each of the respective federating states of the country. The Nigerian Minerals & Mining Act, 2007 in Section 1(2) gives the federal government the power to acquire the land in which minerals have been found in commercial quantity and such lands may be designated as security lands. The acquisition of the land is usually accompanied by payment of compensation to the "owner".

1.4 MINERAL TITLES ADMINISTRATION

The Ministry of Solid Minerals Development (MSMD) established in 1995 is the primary government agency responsible for the administration of the mining laws and regulations. The Department of Mines of the MSMD supervises the administration of mineral titles in Nigeria. The relevant steps to follow are:

- **Pre-requirement of company registration in Nigeria**

The Nigerian Minerals & Mining Act, 2007 in Section 23 provides that only a body corporate duly incorporated under the Companies & Allied Matters Act 1990 shall be qualified for a grant of any mining title under the Act.

- **Proof of technical & financial competence**

Also, the Act requires applicants for a mining title to show proof of sufficient working capital and technical competence to carry on the proposed prospecting or mining operation.

- **Grant of Titles on First Come First Serve Basis:**

There is no distinction between a local or a foreign investor and application is treated on a first come first serve basis. In consideration of the long-term nature of mining, the law allows a reasonable period of 21 years for a mining lease, renewable for 10 years.

Four departments are saddled with the responsibility of grants, inspection, regulation and dealing with the artisans. The departments and their responsibilities are:

- **List of relevant departments**

1. The Mining Cadastre Office (MCO)

The Mining Cadastre Office is the department within MMSD with the exclusive responsibility to:

i. receive and dispose of applications for the transfer, renewal, modification, relinquishment of mineral titles or extension of areas; and
ii. Maintain a chronological record of all applications for mineral titles.

MCO will address the issues of transparency in the grant/access to titles as well as deal with matters of overlapping titles. MCO began the processing of applications online from 2006.

2. The Mines Inspectorate Department (MID)

The Mines Inspectorate Department is the technical department of MMSD. The responsibilities of MID include:

i. supervision of all reconnaissance, exploration and mining operations;
ii. enforcement of all health and safety regulations as approved by law at Mines sites; and
iii. Conducting inspections and investigations necessary for ensuring compliance with applicable regulations.

3. The Mines Environment & Compliance Department

The Mines Environment & Compliance Department is responsible for:

i. reviewing all plans, studies and reports required from holders of mineral titles in respect of their environmental obligations;
ii. monitoring and enforcing compliance by holders of mineral titles with all applicable environmental requirements and obligations; and
iii. Performing periodic environmental audits to ascertain that all regulations and obligations are being met by mineral title holders.

4. Artisanal & Small Scale Mining Department

The Artisanal & Small Scale Mining Department (ASM) monitors and oversees small scale mining activities in the country.

"Artisanal mining" is defined (MMSD 2002) as *"informal mining activities undertaken by individuals or groups, which rely heavily on manual labour, using simple implements and methods without prior exploration activities"*. Many of such unskilled activities are illegal operations since they do not operate under licenses.

Over 95% of mining activities in Nigeria are artisanal and another 95% of these are illegal (this includes minerals such as tourmaline, carbon, Limestone, Feldspar, Tantalite, Coal, etc). Illegal mining is a major drawback to the sector.

1.5 TYPES OF MINING LICENSES

There are various types of mining Licenses/leases, which are issued under the Nigerian Minerals and Mining Act by the Minister based on the recommendation of the Mining Cadastre Office. Entry Permit, Exclusive Prospecting Licenses {EPLs), Special Exclusive Prospective Licenses (SEPLs), Mining Leases (MLs), Quarry Licenses (QLCs) and Quarry Leases (QLSs). Specifically, these are grouped into:

i. **Reconnaissance Permit:** a non-exclusive permission to search for Mineral Resources; no area limits.

ii. **Exploration License:** the right to explore [discover, determine characteristics and evaluate the economic value of Mineral Resources] on an exclusive basis for all Mineral Resources within the title area. This has a typical duration of 3 years, renewable for 2 further periods of 2 years each.

iii**.** **Small-Scale Mining Lease:** right to exclusively carry out small-scale mining operations [Mining Operations involving low-level technology or methods not requiring substantial expenditure] within the title area. A five-year lease period is applicable for all alluvial/artisanal leases, renewable for further periods of 5 years each; for other small-scale mining operations; the lease period is 10 years, renewable for further periods of 10 yeas.

iv. **Mining Lease:** an exclusive right to carry out all Mining Operations within the Mining Lease area. All Mining leases are for 25 years, renewable every 20 years.

v. **Quarry Lease:** an exclusive right to carry out quarry operations within the Quarry Lease area. Quarry leases are for a duration of 10 years.

vi. **Water Use Permit:** an exclusive right to obtain and convey water; occupy the land for the conveyance of water.

1.6 PROFILE OF SOLID MINERALS DEPOSITS IN NIGERIA

Ministry of Solid Minerals Development is currently running a strategic brand marketing initiative tagged "34 minerals" to promote the 34 types of solid minerals located in Nigeria while effort is on to package another model for the newly discovered 42 solid minerals.

1.6a TYPES OF SOLID MINERALS

- **TALC**

An estimated reserve of over 100 million tones of talc has been obtained in Niger, Osun, Kogi, Kwara, Ogun, Taraba and Kaduna States. There are only two medium size talc processing plants currently operating in Nigeria and both are located in Niger State. The colour of the Nigerian talc varies from white through milky-white to grey. The talc industry represents one of the most versatile sectors of the industrial minerals of the world. The exploitation of the vast talc deposits in Nigeria would therefore satisfy not only local demands but also that of the international markets as well.

- **IRON ORE**

There are over 3 billion tonnes of iron ore found in Kogi, Enugu, Niger, Zamfara and Kaduna States. Iron is currently being mined at Itakpe (Kogi State), which is more or less at the centre of the region of crystalline iron deposits. The large deposit of oolitic iron ores of Kogi and Enugu States are yet to be fully explored. Itakpe iron ore is being beneficiated to 67% to feed Aladja and Ajaokuta Steel complexes. Besides, there are three inland rolling mills at Oshogbo, Jos and Katsina in addition to some privately owned rolling mills in Lagos and Kano.

- **GOLD**

There are proven reserves of both alluvial and primary deposits of gold with proven reserves in the shiest belt covering the western half of Nigeria. At present exploitation of alluvial deposits is being carried out mostly by artisan miners in a few places in the country. Several primary deposits, which are sufficiently big for large scale mechanized mining, have been identified in the northwest and southwest parts of the county. Private investors are invited to stake concessions on these primary deposits. It is interesting to note that the primary deposits are of relatively high grade and at shallow depth. thus, production costs will very low.

- **BITUMEN**

The occurrence of bitumen deposits in Nigeria is indicated at about 42 billion tones almost as twice the amount of existing reserves of crude petroleum. When fully developed, the industry will no doubt meet local requirements for road construction and also become a foreign exchange earner for the country.

- **ROCK SALT**

The national demand for table salt, caustic soda, chlorine, sodium bicarbonate, sodium hydrochloric acid and hydrogen peroxide exceeds one million tonnes. A colossal amount of money is expended annually to import these chemicals by various companies including tanneries, food beverages, paper and pulp, bottling and other industries including the oil companies. A total reserve of 1.5 billion tones has been indicated, and further investigations are now being carried out by the government to ascertain the quantum of reserves.

- **GYPSUM**

Gypsum is an important input for the production of cement. It is used for the production of Plaster of Paris (P.O.P) and classroom chalk, etc. A strategy for large-scale mining of gypsum used in the cement industries is urgently required to sustain existing plants and meet future expansion. Current cement production is put at 8 million tonnes per annum while the national requirement is 9.6 million tonnes. About one billion tonnes of gypsum deposits are spread over many states in Nigeria.

- **LEAD/ZINC**

An estimated 10 million tons of lead/zinc veins are spread over eight states in Nigeria. Joint venture partners are encouraged to develop and exploit the various lead/zinc deposits all over the country.

- **BENTONITE AND BARITE**

These are the main constituents of the mud used in the drilling of all types of oil wells. The Nigerian barite had a specific gravity of about 4.3. Over 7.5 million tons of barite have been identified in Taraba and Bauchi States. Large bentonite reserves of 700 million tonnes are available in many states of the Federation ready for massive development and exploitation.

- **COAL**

Nigerian Coal is one the most bituminous in the world owing to its low sulphur and ash content and therefore the most environmentally friendly. There are nearly 3.00 billion tonnes of indicated reserves in 17 identified coalfields and over 600 million tonnes of proven reserves.

- **LIMESTONE**

Limestone occurrences are reported in almost all the 36 States of the Federation with extensive deposits in Sokoto, Gombe, Benue, Kogi, Edo, Oyo, Ogun and Cross River States These deposits are supporting active lime and cement plants in the country. The resource base of the known limestone deposits is about 2.3 trillion metric tonnes with 568 million tonnes of proven reserves.

As at the year 2014, the cement production capacity of the country was between an estimated 26 million tonnes and 28 million tonnes per annum, given that all the cement plants are operating at their full capacities. The domestic demand totals between an estimated 18.3 million metric tonnes and 20 million metric tonnes per year.

The massive infrastructural development is capable of increasing the demand for cement to 25 million metric tonnes (MMT) annually over the next five years. Investors have a very lucrative opportunity by taking advantage of these deposits to set up cement factories in different parts of the country to meet domestic demand and export to the sub-region.

GEMSTONES

Gemstone mining has boomed in various parts of Plateau, Kaduna and Bauchi States for years. Some of these gemstones include Sapphire, Ruby, Aquamarine, Emerald, Tourmaline, Topaz, Garnet, Amethyst, Zircon and Fluorspar which are among the world best. Good prospects exist in this area for viable investments.

- **KAOLIN**

An estimated reserve of 3 billion tonnes of good kaolinitic clays has been identified.

- **TANTALITE**

Large deposits of Tantalite are known to occur in Nasarawa, Gombe and Kogi states as well as the Federal Capital Territory. The deposits at both alluvial and primary in the numerous pegmatite bodies that infest these areas. Grades of well over 50% Ta_2O_5 are found. Private investors are invited to stake concessions for the development and exploitation of tantalite in these areas.

1.6b1 PALLETISATION OF COAL FOR DOMESTIC USE

Given the large deposits of brown coal in the tertiary sediments east and west of River Niger; Nigeria can cash in on foreign investors technology to produce coal pellets for industrial use, coal briquettes for domestic use; that is, to replace firewood.

Nigeria is richly endowed with a variety of solid minerals of various categories ranging from precious metals to various precious stones and industrial minerals. The Nigerian Extractive Industries and Transparency Initiative (NEITI) reported that there are about 40 different kinds of solid minerals and precious metals buried in Nigerian soil waiting to be exploited.

The sector offers a viable alternative to petroleum for foreign exchange earnings. Globally, the mining industry has been a close rival to the petroleum industry, while Nigeria earns a paltry $89 million per annum from it. The commercial value of Nigeria's solid minerals has been estimated to run into hundreds of trillions of dollars, with 70 per cent of these buried in the bowels of Northern Nigeria.

1.7 BENEFICIATION OF MINERALS:

It is a common knowledge that most of the minerals are sold in raw form without any value addition. To derive more revenue from the products and create more employment opportunities, virtually every mineral should be beneficiated. Beneficiation is a process of increasing the ore concentrate of a mineral through mechanical means. For instance, the concentration of tin ore of 5% can be increased to 50% through mechanical means. The same scenario applies to other minerals that can be beneficiated or processed to manufacture iron, steel and marble etc.

CHAPTER TWO

LEGAL FRAMEWORK OF MINES AND SOLID MINERALS

2.1 INTRODUCTION

The development of the mining industry through private investment has been identified by the federal government of Nigeria as a key ingredient in economic diversification away from oil resources. It offers excellent opportunities for growth and poverty reduction.

In 2004, the government received a credit from the International Development Association to execute the Sustainable Management of Mineral Resources Project. One of the key initiatives was the enactment of new mining law in 2007 which established the Mining Cadastre Office (MCO). The MCO is the sole agency responsible for the administration of mineral titles and the maintenance of cadastral registers.

The establishment of the MCO has centralized the administration of mineral titles, reduced red-tape initially encountered by applicants at the Federal Ministry of Mines, and improved turnaround time for registration and transfer of mining titles.

2.2 LEGAL FRAMEWORK

1. Regulations

The Regulation of the mining industry is exclusively reserved by the

Nigerian Constitution for the Federal Government of Nigeria. The legal system is based on English common law.

The regulations touch all aspects of mining, including but not limited to the acquisition of licences or leases, transportation and logistics, taxes, production sharing, land rehabilitation, host community relations, corporate social responsibility, etc.

The laws and institutional framework regulating the mining industry include:

a) Nigerian Minerals and Mining Act 2007 ("The Mining Act")
b) Minerals and Mining Regulations 2011
c) Nigerian Coal Corporation Act
d) National Steel Raw Materials Exploration Agency Act
e) Nigerian Mining Corporation Act
f) National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007
g) Environmental Impact Assessment Act
h) Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007
i) Nuclear Safety and Radiation Protection Act
j) Explosives Act
k) Land Use Act

This law is administered by the Ministry of Mines and Steel Development (MMSD) comprising the Mines Inspectorate Department (MID), the Mines Environmental Compliance Department (MECD), the Mining Cadastre Office (MCO) and the Artisanal and Small-scale Mining Department.

2. Reporting Requirement

There is no specific requirement governing the reporting of mineral resources and mineral reserves in the mining industry, however, any operator in the industry has to comply with the provisions of IFRS 6-Exploration for and Evaluation of Mineral Resources in its financial reporting. An applicant for a mining lease is, however, required to prove that there exists a commercial quantity of mineral resources as a precondition to the grant of the mining lease. The Minerals and Mining Regulations, 2011 ("2011 Regulations") also specify that all mineral titleholders must submit a half-yearly technical report on every licence area held to the MID, the MECD and the MCO. The report should contain data on the topographical features and mineral deposits in the licence area.

Presentation and Disclosure Requirement under IFRS 6

An entity treats exploration and evaluation assets as a separate class of assets and makes the disclosures required by either IAS 16 Property, Plant and Equipment or IAS 38 Intangible Assets consistent with how the assets are classified. [IFRS 6.25]

IFRS 6 requires disclosure of information that identifies and explains the amounts recognised in its financial statements arising from the exploration for and evaluation of mineral resources, including [IFRS 6.23–24]

a. its accounting policies for exploration and evaluation expenditures including the recognition of exploration and evaluation assets
b. the amounts of assets, liabilities, income and expense and operating and investing cash flows arising from the exploration for and evaluation of mineral resources.

3. Mining rights and title

The Constitution of the Federal Republic of Nigeria and the Mining Act vests title to all mineral resources beneath or upon any land in Nigeria, including its continental shelf, territorial waters and exclusive economic zone in the Federal Government.

Mining titles are granted by the Federal Government to private parties to search for, carry out exploration and mine for minerals. The grant of a mining title does not confer title to the minerals in the ground on a private party. Title to minerals is transferred from the federal government to a private party upon the lawful extraction of such minerals by the private party. Also, Mining rights do not belong to the owner of the surface rights.

Private parties may acquire the right to search for or exploit metallic minerals through one of the following mining titles:

- a reconnaissance permit- This is a non-exclusive permit granted for a period of one year, renewable annually after complying with the provisions of the Act. It permits the holder to search for Mineral Resources and obtain and remove surface samples in small quantities over any land which is not already subject to an exploration lease, small scale mining lease, mining lease or water use permit:

- **an exploration licence-** This License is granted for the duration of three years, renewable for further two periods of two years each provided that the holder has complied with his minimum work obligation commitments and other relevant provisions of the Act. It is granted over a land area not exceeding 200 square kilometres which is not already subject to an existing exploration license, mining lease, small scale mining lease or quarry lease and provides an exclusive right to its holder to conduct exploration activities upon the land within the area of his license including but not limited to the right to explore for all mineral resources and to carry out the operations and work necessary for the achievement of this objective, to take specimens and samples within specified limits for analysis and conducting bulk sampling and trial processing for determining mining potential. The holder of an exploration license has the exclusive right to apply for, and to be granted subject to the Act, one or more Small Scale Mining Leases, Mining Leases or Quarry Leases in respect of any part (s) of the exploration area, upon due compliance with its Exploration obligations under the Act. The holder of an exploration license who sells any Mineral Resources as provided for in the Act shall be subject to the payment of royalty as if the Mineral Resources sold were obtained under a mining lease;

- **a mining lease-** This is an exclusive permit granted in respect of an area not exceeding fifty (50) square kilometres which are not within an Exploration License Area or a Small Scale Mining Area except to the holder of the Exploration License or Small Scale Mining Lease covering such area. It is granted for a period of twenty-five (25) years, renewable every twenty-four (24) years, provided the holder has complied with his minimum work obligation commitments and all other obligations and requirements of the Act. The Lease confers upon the holder the right to among other things, use, occupy and carry out Mineral Exploitation within the Mining Lease Area, and market, sell, export or otherwise dispose of the mineral products resulting from the Mining Operations. Subject to the provisions of the Act and any other enactment, the exclusivity of the Mining Lease does not derogate from the right of the lawful occupier of a licensed area to retain the right to graze livestock upon or to cultivate the surface of the land in so far as the grazing or cultivation does not interfere with the Mining Operations in such Area

- **a small-scale mining lease-** A Small Scale Mining Lease covers an area not exceeding 3 square kilometres and requires its holders to carry out effective rehabilitation of the mined-out areas to the satisfaction of the MECD and pay prescribed fees.

The Government through the Ministry shall provide certain extension services to duly registered and performing mining co-operatives of small scale artisanal miners to include amongst other services prospecting and exploration services to determine the geological setting, structure, nature of occurrence, quantity and quality of minerals being mined, provision of environmental impact assessment report and detailed guidelines on waste and tailing disposal and holding regular workshops to update miners knowledge on legal, marketing, business skills and infrastructural support

- **a quarry lease-**A Quarrying Lease is granted in respect of any area of land not exceeding 5 hectares and unless previously revoked or otherwise determined, remains in force for a period of five years or less from the date of the grant of the lease and shall then expire unless renewed. The holder is authorized to amongst other things, carry out quarry operations on the land within the area of the lease, remove and dispose of any quarriable minerals specified in the lease and do all such things as specified in the Act which may be necessary or convenient for the carrying out of its quarrying operations, and
- a water-use permit confers on its holder the right to obtain and use water for exploration and mining operations.

Mining titles are granted on a first-come, first-served basis and, in some cases, may be granted via competitive bid. The holder of an exploration licence has the exclusive right to apply for one or more mining leases or small-scale mining leases in respect of any part of its exploration area. However, reconnaissance permits do not confer a preferential right to acquire a mining lease.

Holders of mining titles are under an obligation to comply with all applicable legislation, regulations and conditions imposed on the title. In particular, they must:

- carry on exploration or mining operations safely and skillfully and take all due precautions concerning safety, environmental degradation and pollution;
- minimise and manage any environmental impact resulting from mining activities;
- rehabilitate and reclaim all disturbed land to its natural or predetermined state or such state as the Act or regulations may specify; and
- pay the rents and royalties that may become due.

The holder of a mining lease is also required to:

- submit and obtain approval for an environmental impact assessment (EIA) report and work programme in respect of proposed mining operations within three years from the date of issue of a mining lease, in the case of a mining lease for exploiting mineral resources, or within two years in the case of a mining lease for exploiting mineral water;
- commence mine development within 36 months of the date of obtaining approval to the EIA and the work programme in the case of a mining lease for exploiting mineral resources, or within 12 months in the case of a mining lease for exploiting mineral water;
- execute a community development agreement with its host community before the commencement of mine development or extraction; and
- keep in continuous employment a person who possesses adequate professional qualifications and experience in mining to supervise the mining operations.

The Regulations also prescribe that applicants of mineral titles must:

- provide evidence of technical competence. An applicant for an exploration licence, mining lease, water use permit or reconnaissance permit must employ a person or persons who possess adequate qualification and experience in mining and must be registered or registerable with the Council for Mining Engineers and Geoscientists and any other relevant professional body. An applicant for a quarry lease or small-scale mining lease must employ a person or persons who possess minimum qualifications in mining and quarrying-related fields and
- provide evidence of financial capability.

A holder of an exploration licence seeking conversion to a mining lease shall in his or her application demonstrate that a commercial quantity of mineral resources exists in the area for which the application is made. He or she must also show that he or she has fulfilled all the necessary conditions of the exploration licence. The applicant will complete the prescribed form and pay the conversion fees. The MCO will either grant or deny the application within 45 days from the date of the application.

4. Renewal and transfer of mineral title under the Mining Act and Mining Regulations

Renewal

- The holder of a mineral title may apply to the MCO for a renewal of the licence. Where an application for the renewal of a subsisting licence is made, the licence shall remain in force until a new date is issued or the renewal application is refused.
- Where a renewal application is to be denied, the Minister must give the applicant notice of intention to deny the

renewal, citing reasons and inviting the applicant to take appropriate remedial measures or to present a documented statement in defence of the default.

- A lease renewal applicant who is unsatisfied with the denial may appeal to the Minister in writing and if unsatisfied with the outcome of the appeal, approach the Federal High Court.

Transfer

- The transferability of titles is usually a consideration for prospective investors in determining the profitability of investing in a mining project. The transferability gives titleholder leverage to negotiate investments or raise capital. This could either be through a mortgage or outright transfer to the investor.
- An application to transfer or assign any mineral title (excluding a reconnaissance permit) is made to the MCO upon the payment of the processing fee.
- Where an application for a transfer is denied, the MCO shall, no later than 30 days from the date of the transfer application, notify the applicant of the denial in writing.
- An applicant may appeal at the Federal High Court within 60 days of the receipt of the denial.
- The law prohibits the transfer of reconnaissance permits.
- The consent of the Minister must be obtained to transfer a licence. This consent is obtained in the form of approval being given to an application for a transfer. However, consent is not required where the transfer is being made to an affiliate company and the parent company or assignor guarantees the performance of obligations under the title by the affiliate.

- An application for transfer including details of the assignment or transfer (instrument of transfer), terms and conditions of the transfer, acceptance of transfer or assignment attestation by the transferee, payment of mineral title transfer fees and any other information requested for by the MCO must be submitted in triplicate to obtain approval.

5. Foreign Participation in Mining Operations

Only Nigerian citizens, companies incorporated in Nigeria and mining cooperatives registered in Nigeria are eligible to hold mining titles. A foreign party that intends to acquire a title must incorporate a company in Nigeria for this purpose. Companies may be 100 per cent foreign-owned and there is no distinction in law or in practice between the mining titles that may be acquired by a 100 per cent foreign-owned company and the mining titles that may be acquired by a 100 per cent Nigerian-owned company.

6. Protection of mining rights

The Act provides clear rules and grounds for the suspension and revocation of mineral titles. Before suspension or revocation, the affected mineral titleholder must be notified of the impending suspension or revocation together with the grounds thereof and given a period of 30 days to remedy the breach or remove the grounds for suspension or revocation.

7. Principal community engagement / CSR policy

The Mining Act requires holders of mining titles to execute community development agreements (CDAs) with their host communities before the commencement of mine development and extraction. A CDA must contain undertakings for the social and economic contributions that the project will make to the sustainability of the community, such as educational scholarships, employment opportunities, contributions to infrastructural development, maintenance, monitoring and consultative frameworks. The Regulations also require titleholders to submit to the Ministry on an annual basis, a progress report on the Community Development Agreement with the host community, which should include a fair and honest assessment of the projects pursued in the community, the achievements recorded and the constraints.

The Mining Act recognises that it may be the custom of some communities to win salt, soda, potash or galena from certain areas. It preserves the right of such communities to continue to win these minerals where such custom existed before the commencement of the Mining Act. It further provides that where the right of such communities to win minerals is lost as a result of the grant of a mining lease to a third party, the holder of the mining lease must pay compensation to the members of the community for the loss of this right.

Besides, lawful occupiers of any land subject to a mining title are entitled to compensation for any disturbance to their surface rights and any damage done on the land, including damage to crops, economic trees and buildings. Failure to pay compensation may result in the suspension and eventual revocation of the mining title if the failure continues. Lawful occupiers are also entitled to payment of compensation where their land has been compulsorily acquired for mining purposes.

An applicant for a mining title may be required to provide security for the payment of compensation in the form of a deposit or to reimburse the federal government for any compensation paid to any state government or lawful occupier in respect of the acquisition of any land subject to a mining title.

The lawful occupier of any land within an area subject to a mining lease retains the right to graze livestock upon and to cultivate the surface of the land insofar as the grazing or cultivation does not interfere with mining operations in the area.

Nigeria is not a signatory to any treaty, convention or protocol relating to CSR. It is, however, a signatory to several treaties, conventions and protocols relating to human rights and environmental damage or degradation from which CSR issues may be inferred.

8. Dispute Resolution

The rights granted to a mineral titleholder under the Act are protected by the judicial system, which is independent of the executive and the legislature. The Federal High Court of Nigeria has the exclusive jurisdiction in respect of all matters relating to mines and minerals, although investment disputes between a mineral titleholder and the government may be referred to arbitration under the United Nation Commission on International Trade Law (UNCITRAL) Arbitration Rules. All other disputes may be referred to the Federal High Court.

Also, investment disputes between a mineral titleholder and a lender may be referred to the State High Court where the subject matter of the dispute is limited to the contract between parties.

Nigeria is a signatory to the Multilateral Investment Guarantee Agency Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Treaty on the International Centre for the Settlement of Investment Disputes, which confer an obligation on domestic courts to recognise and enforce foreign arbitral awards.

9. Acquisition of surface rights

Mining titles in Nigeria confer both mineral and surface rights on their holders.

The Land Use Act vests all land within the territory of a state in the state governor. Private parties may only acquire a right of occupancy (which is akin to a leasehold interest). The consent of the landowner must be obtained before a mining title can be granted over an area of land that is occupied under a right of occupancy. If consent is not obtained, the mining title area will exclude the land in question.

A requirement of land for mining purposes is regarded as a priority land use and a matter of overriding public interest. A governor may therefore revoke an existing right of occupancy where any land within the state is required for mining purposes. The governor's power of revocation is required to be exercised within 60 days after the grant of a mining lease.

Subject to the payment of compensation and surface rent, a mining lessee enjoys the following surface rights: the right to obtain access to and enter the mining lease area; to exclusively use, occupy and carry out mineral exploitation on the land; to use water and wood and other construction materials as may be necessary, and to grow plants or keep animals for use by its employees.

The holder of an exploration licence can enter the licence area to carry out exploration activities and erect such plants and machinery as may be necessary. However, where any land within the area is subject to a right of occupancy, he or she must give prior notice to the lawful occupier and the local government chairman of the area where the land is located and pay compensation for damages caused.

10. Closure and Remediation process for a mining project

Every person embarking on a mining project must submit an EIA report to the Ministry of Environment for approval. The minimum content of the report and the factors to be considered are specified in the EIA Act, the Sectoral Guidelines for Mining of Solid Minerals and the Minerals and Mining Regulations. After the report has been submitted, the Ministry must invite comments from interested persons. Where it is found that the project is likely to have a significant adverse effect on the environment and this adverse effect cannot be mitigated, or where public concern about the environment warrants it, the project may be referred to mediation or a review panel. Thereafter a decision shall be taken as to whether or not the project will be permitted, either in part or in whole, or with or without conditions.

The approved EIA report and an environmental protection and rehabilitation programme (EPRP) must be submitted to the MECD before the commencement of operations or upon an application for extension of the term of a mineral title or upon its conversion.

The EPRP to be submitted to the MECD should provide for specific reclamation and rehabilitation actions, the estimated cost of rehabilitation and a timetable for rehabilitation. The EPRP must be approved by the MECD.

A titleholder that intends to abandon or permanently cease production from a lease area must give three months' notice in writing of its intention to the MID, MECD and MCO. The notification shall be accompanied by a report outlining details of the intended abandonment and the reasons thereof together with a plan showing the workings of the mine up to the time of the notice.

Upon receipt of the notice, the relevant department shall make recommendations to the Minister about the abandonment plan and the Minister shall, within 10 days of receiving the notice, cause the matter to be investigated. If the Minister is satisfied with the findings of the investigation, the abandonment will be approved and the titleholder shall be required to:

- securely seal, fence or cover every mine shaft and undertake a safety audit;
- make safe all tailings and water retention areas; and
- demolish, fence or lock potentially hazardous buildings, structures, plants and equipment.

The Act requires the Minister to establish an Environmental Protection and Rehabilitation Fund (EPRF) to guarantee the environmental obligations of mineral title holders including obligations concerning mine closure and remediation. Every mineral titleholder is required to contribute to this fund following the amounts specified in its EPRP.

11. Nigerian Mining Corporation

The Federal Government engages in mining projects through the Nigerian Mining Corporation, a corporation established by law to engage in the mining, refining and trading of various minerals, apart from coal and petrol.

12. Nigerian Coal Corporation

This corporation was founded to win coal in the mines transferred to the corporation, win coal in mines under licences issued by the Minister to the Corporation and to engage in the mining, refining and trading of coal.

13. Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007

Nigeria adopted international best practices regarding disclosure of payments by resource companies to government entities per the Extractive Industries Transparency Initiative (EITI) Standard by the enactment of the Nigeria Extractive Industries Transparency Initiative Act (NEITI) 2007 which established the NEITI agency. The Agency is responsible for the development of a framework for transparency and accountability in the reporting and disclosure by all extractive industry companies of revenues due to or paid to the Government of Nigeria.

The Agency has adopted the global standards set by the Extractive Industries Transparency Initiative (EITI) through its annual audit report in compliance with the requirement of the EITI Rules.

The report which covers the oil, gas and solid minerals sectors, includes disclosure on production figures, revenue sharing arrangement between tiers of governments, as well as the process of awards of contracts in the oil, gas and mining industry. The revised standards, which equally encourage contract transparency in companies and government, also focus on expenditures incurred by the oil and gas companies on the provision of social services, public infrastructure and fuel subsidy payments.

14. Duties, royalties and taxes

- Companies engaged in mining activities are liable to pay a companies income tax of 30 per cent on their taxable profit and an education tax of 2 per cent of their assessable profits. A value-added tax of 7.5 per cent is payable in respect of Vatable goods and services. Sale of minerals locally will attract VAT. Non-oil exports are zero-rated. The effects of this are similar to where the goods are exempted due to the limitation on what qualifies for claim as input VAT. As the Miner does not buy the resources, it cannot claim any input VAT.
- Minerals obtained in the course of mining or exploration are subject to the payment of royalty at 3 to 5 per cent of the value of the minerals. The Minister may waive payment of royalty for any mineral exported solely for analysis or experiment or

as a scientific specimen. Also, the Minister may, upon the approval of the Federal Executive Council, defer payment of any royalty on any mineral for a specified period.

- There is an import duty exemption for plants, machinery, equipment and accessories imported for mining operations. To claim the import duty exemption in practice, the importer of record will need to hold a mining title and obtain an import duty exemption certificate from the Ministry of Finance.

- Stamp duties are payable on all dutiable transactions and documents. Stamp duties may also apply to registrable agreements.

- Annual service fees are payable in respect of all mineral titles on the anniversary of the issuance of the mining title. In addition to this, the holder of a mining lease is required to pay surface rent at a yearly rate to be determined by the Minister concerning lands used by it for mining operations.

15. Incentives available to private parties carrying on mining activities

The holder of a mineral title enjoys the following incentives based on the Mining Act. These incentives are not exhaustive as other incentives in the tax law could interact with the Mining Act:

- a tax holiday for the first three years of operation, which period may be extended for another two years by the Minister;
- capital allowance of 95 per cent of qualifying capital expenditure incurred on exploration, development and processing in the year in which the investment was made;
- annual indexation of the unclaimed balance of capital expenditure by 5 per cent (only applicable to mines that

commence production within five years of enactment of the Act);

- deduction of losses as far as is possible from the assessable profits of the first year of assessment after the year in which the loss was incurred;
- exemption from customs and import duties on approved plants and machinery, equipment and accessories imported specifically and exclusively for mining operations;
- expatriate quota and resident permit in respect of the approved expatriate personnel;
- tax-free personal remittance quota for expatriate personnel for the transfer of external currency out of Nigeria;
- free transferability of dividends or profits, payments in respect of servicing a foreign loan and remittance of foreign capital in the event of sale or liquidation of mining operations in any convertible currency;
- freedom from expropriation, nationalisation or acquisition by any government of the Federation unless the act is in the national interest or for a public purpose and under a law that makes provision for payment of fair and adequate compensation and a right of access to the courts for the determination of the investors' interest or right and the amount of compensation to which he or she is entitled; and
- right to a dispute settlement procedure under UNCITRAL Rules.

16. International treaties

Nigeria is a member of the Economic Community of West African States, which issued the Harmonisation of Guiding Principles and Policies for the Mining Sector Directive. The directive was issued to precede the introduction of a common mining policy and mining code for the West African sub-region by the end of 2012. The purpose is to provide guiding principles and policies for the mining sector of member states to ensure that high standards are achieved in terms of sustainability, accountability, promotion of human rights, transparency, social equity and environmental protection The directive also seeks to strike a balance between the need to attract investors with fiscal incentives and to maintain the industry and its resources as a viable source of revenue for the government.

Nigeria is also a party to several treaties and international agreements that aim to protect foreign investment. These include the Multilateral Investment Guarantee Agency Convention; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; the Treaty on the International Centre for the Settlement of Investment Disputes; and bilateral investment agreements with China, Egypt, Finland, France, Germany, Korea, the Netherlands, Spain, Switzerland, Taiwan, Turkey, Uganda and the United Kingdom.

CHAPTER 3

ROLE OF INSTITUTIONAL AND REGULATORY BODIES ON MINES AND SOLID MINERALS

3.1 INTRODUCTION

Nigeria as a nation is greatly endowed with various natural/ mineral resources.

However, the country is yet to benefit from this immense gift of nature; largely due to lack of consistent and robust policy and regulatory framework capable of regulating the exploitation and exploration of the huge deposit of various available mineral resources. Aside from crude oil (Black Gold) and perhaps Coal in the 1960s which remain the sole FOREX earnings of the Nation and which is well regulated through various, robust policies; other available minerals have been sidelined despite the huge potentials of solid minerals of earning FOREX if well exploited and regulated.

3.2 REGULATORS:

The various regulators charged with the coordination of activities in Nigeria mining sector are as follows:

1. Nigerian Mining Corporation (NMC)

This was established in 1973 to facilitate the development of the mining industry in Nigeria. Its responsibilities are:

- Exploring, prospecting, acquiring and disposing of minerals of various kinds within Nigeria other than petroleum and coal

- Smelting, roasting, amalgamating, refining and treating solid minerals in a manner which renders products and by-products of solid minerals marketable

- Purchasing and marketing of ores, products and by-products of solid minerals

- NMC did not achieve its target which led to the establishment of the Ministry of Solid Minerals Development.

2. Ministry of Mines and Steel Development (MMSD)

This establishment was founded in 1995 as the Ministry of Solid Mineral Development. There was a major review of its activities in the year 2007. The Ministry is charged with the responsibility of administration of mining in Nigeria which supposed to be an improvement over the activities of the earlier established Nigerian Mining Corporation. However, its activities could not make a significant impact given the little or no interest of the then military government to diversify the economy with non-crude resources.

3. Mines Inspectrate Department (MID)

This is an agency/ department in the Ministry of Mines and Steel Development.

The MID has overall responsibility for operations in exploration, evaluation, mine development and production. Some of the functions include:

- Develop appropriate mining regulations to guide field activities.
- Establish safe mining practices by operators.
- Ensure illegal mining and speculations in mineral titles are eliminated.

- Ensure that benefits from mineral resources are maximized in a sustainable manner
- Production of records of all mineral production nationwide.

4. National Geological Survey Agency (NGSA)

NGSA provides geosciences information and knowledge for wealth creation, infrastructure and sustainable development in the Nigerian mining sector. Its major responsibilities are:

- Conduct an investigation and render specialized geological services to the public and private institutions
- Compilation of comprehensive data and information on geology and geophysics of various solid minerals

5. Mines Environmental and Compliance Department (MEC)

The main function of the MEC is to ensure that companies adopt and maintain procedures that are environmentally friendly in their operations. It performs the following other functions:

- Establish environmental procedures and requirements
- Review all plans, studies and reports required to be prepared by holders of mineral titles in respect of their environmental obligations under the Act.
- Monitor and enforce compliance by holders of mineral titles with all environmental requirements and obligations as required by law.
- Maintain regular environmental audits to ensure the adoption of environmentally sound practices in all mining operations.

6. Mining Cadastre Office (MCO)

The functions of the MCO include, but not limited to, the following:
Consider applications for mining titles and permits.

- The issue, suspend and may revoke mining titles, subject to government's rules and regulations.
- Receive and dispose of applications for transfer, renewal, modification and relinquishment of mineral titles.

- Maintain a chronological record of all applications for mineral titles in priority order.
- Maintain a register and a general registry book.

7. Artisanal and Small-scale Mining Department (ASM)

The ASM carries out the following functions, amongst others:

- Organize, support and assist small scale mining operations.
- Provide extension services to mining cooperatives on exploration, exploitation, mineral processing, entrepreneurial training, environmental management, etc.
- Improve sustainable livelihood in ASM communities.

Other General regulatory bodies are:

These are as follows;

- Nigerian Investment Promotion Commission (NIPC)
- Nigerian Export Promotion Council (NEPC)
- Corporate Affairs Commission (CAC)
- The Federal Inland Revenue Service (FIRS)

Mining industry regulations

The principal regulation modulating the activities of the mining sector is the Nigeria Minerals Mining Act.

Nigeria Minerals Mining Act, 2007

The Nigeria Minerals and Mining Act 2007 ('the Act") was passed into law on 16 March 2007 to repeal the Mineral and Mining Act, No. 34 of 1999 to regulate the exploration of solid materials in Nigeria. The Act vests the control, regulation and ownership of all mineral resources in the Federal Government of Nigeria; and prohibits unauthorized exploration of minerals. All lands in which minerals have been found in commercial quantities shall from the commencement of the Act be acquired by the Federal Government under the Land Use Act. Property in mineral resources shall pass from the Government to the person by whom the mineral resources are lawfully won, upon their recovery under the provision of the Act.

The Act further provides that the use of land for mining operations shall have a priority over land uses and be considered as constituting overriding public interest within the meaning of the Land Use Act.

Other regulations of importance whose provisions also regulate the sector include:

- ***National Minerals and Metals Policy***
- ***Minerals and Mining Regulations:*** The Mining Regulations contain specific provisions concerning royalties, fees and compensation payable by holders of mining rights.
- ***Companies Income Tax Act:*** The income Tax Act also provided for taxation of solid minerals with appropriate waivers or sanctions to streamline the operations of the sector.

3.3 MAJOR CHALLENGES INHERENT IN REGULATORY FRAMEWORK.

Despite the establishment of various regulation guiding the operations in the solid minerals sector, it is unpleasant to record the abysmal performance of the sector.

The challenges inherent are due to lack of consistent policy thrust, disjointed approach in managing the rules of engaging in mining and explorations; focus on petroleum products at the expense of other valuable minerals and over-centralization of the approval process at the centre.

It is therefore pertinent to encourage regional control of solid minerals as we have them spread all over the country, some within hamlets not easily accessible to federal might. The Federal government should maintain a consistent policy that will drive the solid minerals sector economically viable.

CHAPTER 4

NIGERIA'S FISCAL REGIME IN MINES AND SOLID MINERALS

4.1 INTRODUCTION

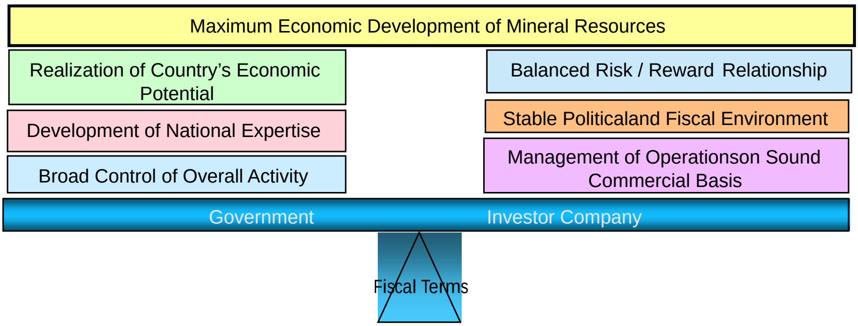
Nigeria is a country rich in numerous natural resources and reserves of solid minerals which include, but are not limited to, precious stones, metals and industrial minerals. Prior to the discovery of crude oil in Nigeria, the country was a major exporter of columbite, tin and coal. However, the discovery of crude oil and the prevalence of the Dutch disease phenomenon made activities in the solid minerals sector nose-dive and become almost negligible.

Over the years, the Black Gold has proven to be an unstable source of revenue with extremely high levels of volatility. It, therefore, became apparent to the Government of Nigeria to diversify the resource base of the country and revitalize the solid minerals sector. The key to unlocking the potential of this sector is in the nature and structure of the fiscal regime. On this premise, a new national focus and strategy were developed such that in 2007, the Nigerian Minerals and Mining Act was passed with the aim of revitalizing the Nigerian Solid Minerals Resource Sector to its glorious days.

The Resource Sector has a number of features that make its taxation not only important for many countries but also particularly challenging – though in some respects, as will be seen, it is more straightforward to tax than many others. Some of the unique characteristics of this sector are;

- High sunk cost and long production periods
- Uncertainty
- International considerations
- Exhaustibility
- Asymmetric information

Given these unique features, the design of the fiscal regime is key to the success of the Resource Sector. Investors must be attracted by the design of the fiscal regime and at the same time, the country as Resource Owner must be able to obtain maximum benefits (at both micro and macro levels of the economy) from the exploitation of its resource.



4.2 TAXATION LEGISLATIVE PROVISIONS

The taxation of the industry is as old as the development of the industry itself and it follows the trend of the taxation of profits under the applicable Income Tax Ordinance and Acts at any particular time since 1904 in Nigeria. Since this chapter is not dedicated to income tax in Nigeria broadly, it will deal only with the current legislative provisions applicable to the industry.

Legally, the legislative provisions with respect to taxes collectable by the Federal, State and local government under Taxes and Levies

(Approved List for Collection) Cap T2, Laws of Federation of Nigeria, 2004 (as amended in 2015) is applicable to the industry subject to the incentives granted under the respective laws.

Broadly, there are two categories of taxes applicable. These are the direct tax instrument and the indirect tax instrument. The direct tax instruments comprise of withholding tax and companies income tax. Withholding tax is actually an advance payment of income tax and an integral part of it. Indirect tax instrument includes royalties, import duties and value-added tax.

At the Federal level in Nigeria, like any other extractive product taxation, the government collects both royalties and companies' income tax. It has been debated a number of times in the context of global practices as to whether the government should drop royalty and collect only income tax. The argument here is that for a sector that the Government desires to incentivise and open up, royalty as a first-line charge collectable regardless of investors' profitability may not encourage or drive investments as expected. The general consensus seems to favour the collection of both royalty and income tax, in which case royalties may be on a sliding scale, based on cumulative production.

On direct taxes, Solid Minerals is subject to income tax under the Companies Income Tax Act, Cap C21 Laws of the Federation of Nigeria, 2004 (as amended). The Federal Inland Revenue Service established under the Federal Inland Revenue Service Act, 2007 administers the income tax and the tertiary education tax collectable from the operators in the industry.

Special provisions for incentives are embedded in the taxation of the industry to attract both the local and foreign investors. The incentives include exemption from companies' income tax for the early three years of operations and grant of initial capital allowance up to 95% in the first year of operation. There are also rural investment allowances depending on the location of the quarry.

Royalty is either 3% or 5% depending on the type of mineral. Royalty is administered by the Ministry under the supervision of the Minister in line with Section 33 of the Nigerian Minerals and Mining Act, 2007. The Companies Income Tax rate is 30%. In addition, is Tertiary Education Tax at the rate of 2% of assessable profits.

a) Fiscal regimes and types of Taxes

A fiscal regime is a principal system for splitting resource wealth between the host government and investors. It is designed principally to acquire for the state in whose legal territory the resources are found, a reasonable share of the wealth accruing from the extraction of that resource. An ideal fiscal system should:

- Ensure a stable business environment and minimise risk
- Discourage undue speculations
- Provide potential for a fair return to both the state and to companies, balancing risk and reward
- Avoid complexity and limit administrative burden (on both the state and companies)
- Allow enough flexibility to accommodate changes in economic conditions
- Promote healthy competition and market efficiency. (Daniel Johnston; international Exploration Economics, Risk, and Contract Analysis) this is based on the assumption that the government has faith in the Ministry and contractor has existing systems in place to negotiate contract terms and grant exploration contracts.

Both government and investors aim to secure a fair share of the natural resource proceeds (economic rent). Hence, the fiscal system is formed as a legal agreement between both parties.

A good fiscal system should only tax economic rent. In reality, the fiscal system, if designed properly can tax all of the economic rent and still be favourable to investors. Economic rent is the amount by which the payment received in return for an action- bringing to market an ounce of gold, for instance- exceeds the minimum required for it to be undertaken. It is the difference between the payments received by a resource owner and the opportunity cost of the resource. In other words, the payment received by a resource owner over and above the minimum needed to produce the goods. It is this rent that should be taxed by the government. Any fiscal system that taxes more than the economic rent would be unfavourable and discouraging to investors as it would force them to operate at loss levels.

A tax design is de facto a matter of negotiation between government and investor (and/or of frequent changes to the general regime). The fiscal regime must seek to achieve a sustainable balance between host government take and investors interest, some sort of win-win feeling for all stakeholders to forge a harmonious relationship that promotes economic and business activities for the long haul. The major challenge, however, is in determining the ratio that would be fair to both parties.

The 2007 Nigerian Minerals and Mining Act provides for the governance framework regarding taxes and fiscal incentives for mining companies involved in the exploration, development and production of mineral resources. The Act defines: "minerals" or "mineral resources" as "any substance whether in solid, liquid or gaseous form occurring in or on the earth, formed by or subjected to geological processes including occurrences or deposits of rocks, coal, coal bed gases, bituminous shales, tar sands, any substances that may be extracted from coal, shale or tar sands, mineral water, and mineral components in tailings and waste piles, but with the exclusion of petroleum and waters without mineral content."

Tax considerations as applicable in the 2007 Nigerian Minerals and Mining act.	
Tax Name	**Tax rate (%)**
Corporate income tax	20/30
Capital Allowance deductions	95% deductible in the year incurred
Education tax	2
Value-added tax	5
Custom duties on plants and accessories	Waived
Custom duties on other products	Varies
WHT on dividend and rent	5 or 10/7.5
WHT on qualifying vendor transactions	5 or 10, depending on the nature of the transactions
WHT on royalty paid to the government	0

Corporate Income Tax (20/30%)

Solid Minerals companies, like all other companies in Nigeria (excluding upstream petroleum operations) are subject to tax under CITA. The tax rate under CITA is 30%. A provision of a 20% tax rate is; however, available for small companies in the first five years of their operations. Special Reliefs for Solid Minerals Companies are available in the Nigerian Minerals and Mining Act 2007 as amended. This tax is applicable to the profits of the company after consideration of non-tax-deductible items and capital allowance/tax depreciation.

Tax Relief/ Holiday Period

The tax relief period of a company granted mineral title under the Minerals and Mining Act shall be three years, which may be extended by the Minister for one further period of two years, subject to the Minister's satisfaction with certain conditions (mainly rate of expansion and development of the company, implementation of agreed conditions under which the lease was granted, training and development of Nigerian nationals in the operations of the minerals concerned).

Tax Deductibility of Reserve for Environmental Protection, mine Rehabilitation, reclamation and mine closure costs

Subject to conditions stipulated under the Act, and provided the reserve is cash-backed and invested in a dedicated account or trust fund managed by independent trustees, funds reserved for environment protection, rehabilitation and reclamation shall be tax-deductible.

This incentive provides guarantees for the restoration of mines at final closure, and incentivises mining companies to set aside required fund in a timely manner and when there is still sufficient profits to deduct those (future) costs.

Education Tax

Companies engaging in mining activities in Nigeria are obligated to pay an education tax of 2% of their assessable profit.

Value Added Tax

A mineral titleholder is expected to charge VAT at the rate of 5% on all minerals sold locally. Minerals exported from Nigeria are, however, zero-rated based on the provision of the VAT Act.

Capital Gains Tax (CGT)

The Capital Gains Tax Act (CGTA), LFN 2007 (as amended) regulates payment of CGT in Nigeria. The rate of tax is currently 10%

and is levied on capital gains accruing on the disposal of chargeable assets, irrespective of whether the asset is situated in Nigeria or not. Capital gains accruing outside Nigeria to a non-resident company or individual are subject to CGT only on the amount received or brought into Nigeria.

Withholding Tax (WHT)

Dividends, interest, rent, royalty and other qualifying payments to shareholders, vendors and lenders are liable to WHT deduction at the appropriate rate which varies between 5% and 10%, depending on the nature of the transaction and the beneficiary of the payment.

The WHT rate on dividend, interest, rent and royalty, when the beneficiary is resident in a country with which Nigeria has a double tax treaty (DTT) is 7.5%, compared to 10% that is generally applicable on such payments.

Nigeria currently has DTTs with United Kingdom, Netherlands, Belgium, Pakistan, Romania, Philippines, Czech Republic, Canada, South Africa, China and France. The DTTs with South Korea, Spain, Sweden and Russia are yet to be completely ratified.

Other Incentives and Waivers

Foreign Exchange Movement: The Act further provides for some additional fiscal incentives relating to free transferability of funds by and through the Central Bank of Nigeria as it relates to payment in respect of foreign loan servicing, as well as remittance of foreign capital in the event of sale or liquidation of the mining operations.

Withholding Tax Exemptions for Interest on Foreign Loans: The provisions under the Third Schedule of the Companies Income Tax Act (CITA) regarding withholding tax exemptions for qualifying foreign loans, subject to meeting required grace period and moratorium period, are also applicable.

Loss relief: The Mining Act provides for carrying forward of losses for a maximum of four years, after which it would lapse if not fully recovered. However, the 2007 amendment to CITA has removed the four-year restriction (except for Insurance companies), consequently, losses incurred may now be carried forward indefinitely until fully recovered.

Statutory Requirements

- Monthly filing of VAT and WHT returns
- Annual filing of CIT returns
- Submission of reports periodically to the mines inspectorate and cadastral office as prescribed in the regulations.

4.3 OTHER PROVISIONS IN THE 2007 MINERALS AND MINING ACT

The Act provides that "All operators in the mining industry shall be granted the following benefits-

(a) exemption from payment of customs and import duties in respect of plant, machinery, equipment and accessories imported specifically and exclusively for mining operations;

(b) expatriate quota and resident permit in respect of the approved expatriate personnel; and

(c) personal remittance quota for expatriate personnel, free from any tax imposed by any enactment for the transfer of external currency out of Nigeria".

The Act further provides that "all lands containing mineral resources belong to the Federal Government in line with the provisions of the Land Use Act of 1978". In order to participate in the mining of solid minerals, prospective mineral titleholders must apply and obtain the following licenses:

a) A Reconnaissance Licence;

b) An Exploration Licence under this Act in respect of the area covered by the interim right or licence;

(c) A Small-scale Mining Lease;
(d) A Mining Lease;
(e) A Quarry Lease

As part of the strategies to reform the sector, the Ministry of Mines and Steel Development has identified 7 strategic minerals, namely: Coal, bitumen, limestone, iron ore, Barites Gold and lead/zinc for priority development.

4.3.1 Mining Royalty Instruments

A royalty is any tax type which exhibits any of the following attributes;

1. The law which creates the tax calls it a royalty
2. The purpose of the tax is to make a payment to the owner of the mineral as compensation for transferring to the taxpayer the ownership of the right to sell that mineral.
3. The intent of the tax is to charge the producer of the mineral for the right to mine minerals produced
4. The tax is special to mines and is not imposed on other industries.

The structure and rates of mineral royalties vary widely internationally, most are collected for the same reason, that is, payment to the owner of the mineral resource in return for the removal of the minerals from the land. A royalty is an instrument used for compensation to the government by the mining company. A mining royalty carries two major functions; first, it gives the mining company permission to access the minerals of the country (which possesses sovereign national ownership) and second, it gives the company the right to develop the resource for its own benefit.

Furthermore, a mineral royalty is symbolic of the willingness to pay for risk reduction. The concept of risk is important because the structure and rate of the royalty instrument represent the trade-off between the risks the investor ready to accept and that of the government. Generally, the collection of mining royalties provides the government with a flexible fiscal policy tool.

The major types of mining royalty instruments are;
1. Unit-based royalty
2. Value-based royalty (ad valorem)
3. Profit and income-based royalty

4.3.2 Unit-Based Royalty
This is the oldest form of royalty and it is charged based on a fee levied per unit volume. It is called unit-based or specific royalty. For example, the royalty may be calculated based on $5.00 per cubic meter or $2.50 per tonne. Although volume-based unit royalties used to be applied in some nations, primarily to industrial minerals and crude oil, they have largely been replaced by weight-based unit royalty that is easier to monitor and assess.

The most common form of unit-based royalty is based on making the measurement (weight or volume) at the mine mouth before any form of processing takes place.

Generally, the unit-based royalty system is straightforward as parameters subject to dispute such as price, value and costs are not considered in determining the value.

4.3.3 Value-Based Royalty (Ad-Valorem)
The most common way in which governments assess a royalty is to calculate the product of a royalty rate times the value of the mineral. Such value-based royalty is sometimes referred to as ad valorem royalty—a term used throughout this study. The royalty rate may be uniform for all sales of that mineral or may vary according to a sliding scale based on the volume or cumulative value of material sold.

Value can be determined in many ways, with the most common being the value of the mineral in the following circumstances:

- Contained in the ore at the mine mouth
- Contained in the first product sold (such as a concentrate) Recoverable
- Determined by the gross revenues derived from sales
- Determined by the gross revenues derived from sales less certain allowable costs, such as transportation, insurance, and handling
- As reflected in a net smelter return (adjusted for smelter and refining charges)

Value-based royalty is payable irrespective of whether the mine is making a profit or not. However, value-based royalty fluctuates with commodity prices. Thus, when prices are high, the government will enjoy more revenue than when prices are low. The complexity in the calculation of value-based royalty is dependent on what is classified as value.

4.3.4 Profit and Income-Based Royalty

This form of taxation is based on ability to pay. Hence it is favourable to investors. Profit based royalty is dependent on profitability or adjusted income.

Many nations have applied to royalty assessment the concept of taxation based on the ability to pay. The approaches vary but are grounded in the concept that both the value of the mineral produced and certain allowable costs (such as capital costs, production costs, marketing costs, transportation costs, handling costs, insurance costs) should be taken into account.

The profit-based royalty system focuses on taxation on economic rent.

4.3.5 Royalty as Applicable in Nigeria (Value-Based Royalty)

According to section 33 of the 2007 Minerals and Mining Act ..."

(1) Any mineral obtained in the course of exploration or mining operations shall be liable to pay royalty as prescribed in the regulations made under this Act.

(2) The Minister may reduce or waive royalty on any mineral which the Minister is satisfied is being exported solely for the purpose of analysis or experiment or as a scientific specimen, not being in greater quantity than is reasonably necessary for that purpose.

(3) The Minister may defer payment of royalty on any minerals for a specific period, on the approval of the Federal Executive Council"

An annual capital cost indexation, whereby the unclaimed balance of capital costs is increased yearly by five per cent, shall apply to mines starting production within five years from the date of enactment of this Act.

Royalty is payable by companies engaged in mining activities in Nigeria. It is calculated on an ad valorem basis. The applicable royalty rates range from 3% to 5% depending on the type of mineral. However, the Minister may grant a concession to a mineral titleholder to defer payment of royalty on any mineral for a specific period, subject to the approval of the Federal Executive Council.

4.4 IMPACT OF TAXES ON SOLID MINERAL EXPLORATION PRIOR TO 1999

As mentioned earlier, in developing a fiscal system it is important to strike a balance. If fiscal systems do not have an in-built structural monitoring and regulatory system for assurance of equitable participation in resource benefits, government returns may be perceived as inadequate at some point which could have negative effects on the long run as governments become hostile towards investors. On the other hand, if the terms are two tough, the incentive for investment in exploration activity is significantly diminished. Investors, therefore, move investments to other areas with more favourable regimes. Importantly, an unstable fiscal policy can be more dangerous than a tight/free fiscal policy.

Prior to 1999, the fiscal system in operation created an unstable/unattractive climate for investment. In the hands of military dictators, policies and legislations were not conducive to private sector-led development in solid mineral exploration. Furthermore, the mining license & registration system was opaque, disorganised and often times discretionary. Government parastatals dominated mineral exploration with minimal results.

The result was a complete failure of the mining policy put in place and investors lost interest in partaking in solid mineral exploration within Nigeria. It also led to the development of an illegal mining sector. It is estimated that about 95% of current mining activities in Nigeria is via artisanal and small scale mining. Hence the contribution of the solid mineral sector to GDP is insignificant.

The decades of neglect of this sector resulted in Nigeria losing out on the mining investment funds that poured into Africa in the 1990s. The fiscal regime was unstable and investors were wary of putting money into a terrain they were not sure of recouping their investments due to poor fiscal policies. However, it is expected that the current dispensation, having witnessed an economic recession and come face to face with the danger of over-reliance on crude oil, will make deliberate efforts to attract investments into the solid mineral sector which is capable of providing multiplier benefits and significant growth to the nation's economy.

CHAPTER FIVE

LESSONS FROM FISCAL REGIMES IN MINES AND SOLID MINERALS IN SELECTED ECONOMIES IN AFRICA

5.1 INTRODUCTION

This chapter looks into mines and solid minerals in selected African Countries

5.2 ANGOLA FISCAL REGIME

The taxes levied on mining activities for each mining title (exploitation concession rights contract) are as follows:

Industrial Tax - A Tax on Income

The industrial tax is imposed on all entities, whether local or foreign, engaged in mineral resources exploration and production.

Tax incentives may be granted if mining activities carried out in Angola use local market resources, contribute to the economic development of remote areas, support the training of local employees, and encourage research and development (R&D) in cooperation with academic and scientific institutes.

Entities subject to the surcharge levied on mining activity are exempt from industrial tax.

Taxable profit is the difference between revenues and costs (deemed indispensable for the business activity), although some adjustments are required for tax purposes. For example, some costs are not allowed in full but in part, such as depreciation, provisions, penalties, donations, entertainment expenses etc.

The following cost items are tax-deductible: prospecting, research and recognition costs, and contributions to the environmental fund.

Specific depreciation rates, under the straight-line method, also apply to fixed assets used in the mining activity:

- Fixed mining equipment: 20%
- Movable mining equipment: 25%
- Tools: 33.3%
- Camp and office equipment: 20%
- Intangibles: 25%

Entities that perform a mining exploitation activity are required to establish a provision for environmental and landscape recovery rehabilitation. The amount should be fixed by the relevant authorities and used until the end of the concession or contract. A bank guarantee should be presented in the last year of exploration for an amount equivalent to the provision or its remaining balance.

Tax losses of up to 50% of the annual revenues may be carried forward for a period of five to seven years.

The Industrial tax rate is 25%, with 5% being distributed to the regional authority responsible for the area where the mining area is located.

Surface Fee

This is an annual fee and rate is dependent on types of minerals as follows:

- Diamonds: US$ 7 to US$ 40 per km
- Remaining strategic minerals: US$ 5 to US$ 35 per km
- Precious stones and metals:

- Semi-precious stones:
- Non – precious metallic minerals:
- Construction materials of mineral origin and other minerals:

Others levies:
(i) Royalty - a tax on the extracted mineral resources and
(ii) Artisanal surcharge
(iii) Environmental fund (to be created by the Angolan Executive), Artisanal mining activities are exempted.

5.3 BOTSWANA FISCAL REGIME

Fiscal Regime in Botswana that applies to mining and metals industry is as follows:

Corporate Tax
Mining companies that derive or are deemed to derive income from a source within Botswana (other than diamond mining companies) are subject to income tax on this income at a rate determined by the following formula:

- 70% - (1500%/X%) where "X" is the profitability ratio

There are no circumstances where the corporate tax rate will fall below 22%. "X" is the profitability ratio and is calculated as taxable income as a percentage of gross income.

The tax rate should not be less than the corporate rate, which is currently 22%. Based on a company's maximum profitability ratio of 100%, the maximum tax rate is therefore 55%.

Diamond mining companies can negotiate with the government of Botswana to agree on a tax rate to be used in taxing profits derived from diamond mining operations.

The gross income of mining companies includes the following:

- Amounts accruing from mining and prospecting operations

- Amounts accruing from processing, marketing, servicing, financial or administrative operations that are carried on in or outside Botswana to the extent that the Mining Commissioner is of the opinion that the amounts are related to the mining operations
- Royalties, premiums or other considerations for the right to extract minerals from land situated in Botswana
- Amounts accruing in relation to the disposal of any share or interest in the capital or income of a company holding mineral rights over land situated in Botswana
- Amounts accruing in relation to the disposal of an interest in mineral rights or any mining or prospecting information or any mining or prospecting rights over land situated in Botswana
- The excess of disposal value of assets sold during the year on which mining capital allowances have been allowed

Corporate income tax is levied on taxable income. Taxable income or assessable income is calculated by deducting allowable deductions from income (i.e., gross income less exempt income). Expenses are allowed to the extent to which they are wholly, exclusively and necessarily incurred in the production of assessable income. However, an expenditure of a capital nature is not tax-deductible unless it falls under the definition of a mining capital expenditure, which is allowed in the full-on acquisition of assets used in mining operations in place of depreciation for accounting purposes (see below). Exploration costs incurred before the company commences mining operations are allowed in the year in which the expenses are incurred.

Profits from mining activities undertaken by a Botswana resident company in a foreign country are generally not taxable in Botswana except where:

- The profits from the mining operations carried on outside Botswana are repatriated into Botswana
- The income is from processing, marketing, servicing, financial or administrative operations carried on outside Botswana to the extent that the Mining Commissioner is of the opinion that the amounts are related to the mining operations

Losses from independent and distinct mining operations carried on in mines that are not contiguous are ring-fenced (i.e., the loss from one mine cannot be offset against the profit of the other except if the loss is as a result of expenditure on a license or lease that has been relinquished by the mining company).

Capital Gains

Gains derived by resident and non-resident mining companies from the disposal of immovable property are generally subject to capital gains tax at 22%. However, if the immovable property falls within the definition of mining capital expenditure (see the definition under capital allowances below), the disposal gains are exempt from capital gains tax. However, they are still subject to corporate tax at the tax rate determined by the corporate tax formula (see corporate tax above) for other companies and at the agreed rate for diamond mining companies.

Gains from the disposal of shares or interest in the capital of a company holding mineral rights over land situated in Botswana are exempt from capital gains tax but are subject to corporate tax as stated above.

Gains on the disposal of any interest in mineral rights or prospecting rights (i.e. mining or prospecting licenses) over land situated in Botswana, are exempt from capital gains tax but are subject to corporate tax.

Capital gains or losses on the disposal of immovable property are determined by deducting the following:

- The cost of acquiring the property, including any expenditure incurred in the acquisition or construction of the property
- The cost of any improvements to the property
- Any expenditure wholly, exclusively and necessarily incurred for the disposal
- The indexed inflation amount on the cost of the property and any improvements

The gains on the disposal of shares (other than shares of a company holding mineral rights) and other property that is not immovable property are subject to capital gains tax at 22%, and only 75% of the gain is taxable. The effective tax rate for capital gains tax on shares (other than shares of a company holding mineral rights) is therefore 16.50%.

Capital losses can be offset only against other capital gains and not against other business taxable income. The capital loss can be carried forward for one year.

Functional Currency - Taxpayers are required to calculate their taxable income in Botswana Pula (BWP) for tax purposes.

Transfer Pricing (TP)

Botswana's tax law has no specific TP provision, but the revenue authorities will apply the general anti-avoidance rules to challenge non-arm's-length transactions. There is a limitation to the deductibility of head office expenses and interest incurred by mining entities.

Head office expenses allowed as a deduction are limited to 1.5% of the gross income, and any excess of such expenses above the limit will be treated as a dividend.

Where a foreign-based company grants a loan to an affiliated mining company resident in Botswana at an interest rate the Mining Commissioner considers to be in excess of the market rate (i.e., the rate at which a borrower dealing at arm's length with a lender would pay for that type and currency of loan), that part of the interest payment that exceeds the market rate shall be disallowed as a deduction and the amount of interest so disallowed shall be treated and taxed as a dividend.

Dividends

Withholding tax is payable on dividends payable to both resident and non-resident shareholders at 7.5%. The withholding tax rate may vary where there is a Double Taxation Avoidance Agreement (DTAA) between the shareholder's country of residence and Botswana. The withholding tax is a final tax and does not form part of assessable income.

Tax Year

The tax year runs from 1 July to 30 June of each year. It is, however, possible to apply for a different accounting period for financial reporting purposes. The accounting period is then aligned to the tax year.

Royalty Regimes

Mineral Royalties

The holder of a mineral concession is liable to pay royalties to the government of Botswana on any mineral obtained in the course of exercising the rights. The royalties are calculated on the gross market value as follows:

Precious stone	10%
Precious metals	5%
Other minerals and mineral products	3%

Gross market value is the sale value receivable at the mine gate in an arms-length transaction without discounts, commissions or deductions for the mineral or mineral product on disposal. The royalty is payable on receipt of payment or other consideration for such mineral or mineral product.

The minister responsible for mines and minerals may, on the application, defer payment of any royalty for such period and subject to such conditions as he or she may determine.

Petroleum Royalties

The holder of a development license is liable to pay a royalty in accordance with the conditions of the license.

The minister responsible for mines and minerals may, on the application, defer payment of any royalty for such period and subject to such conditions as he or she may determine.

The mineral and petroleum royalties are tax-deductible. The royalties are still deductible even if they have been deferred.

Capital Allowances

In ascertaining the assessable income of any mining company for any tax year, the company is allowed a deduction of 100% of the mining capital expenditure incurred during the tax year with an unlimited carry forward of losses.

Mining capital expenditure is defined to include not only ongoing mining capital expenditures once mining commences but also any pre-production expenditure incurred on development, general administration and management (including interest and other charges) prior to the commencement of production (i.e. during the exploration stage). These pre-production expenses are accumulated and may be carried forward indefinitely to be used against mining income.

Mining capital expenditure includes the following expenditures:

- The acquisition of mineral, mining or prospecting rights or mining or prospecting information from another person
- The preparation of a site for mining operations
- Buildings, structures or works of a permanent nature, such as plant and equipment
- Providing or contributing to the cost of providing water, light or power for use on the site of mining operations
- Residential accommodation and welfare facilities for employees
- General administration and management. This includes any interest payable on any loan for the time being utilized to finance such mining operations, incurred prior to the commencement of carrying on a business of mining or during any period when such business of mining is not being carried on

Incentives

Exploration - Expenditure on exploration is deductible for income tax purposes in the tax year in which the expenditure is incurred.

Tax losses - Income tax losses can be carried forward indefinitely. Tax losses may not be carried back.

Research and Development - Expenditure on research incurred during the tax year will be allowed as a deduction on the following:

- Scientific research was undertaken by the company for the development of the company's business
- Contributions to any association, institution or university by the company, where the contribution will be used in scientific research relating to the company's business

Withholding Taxes

Dividends - Dividends paid to residents and non-residents are subject to 7.5% withholding tax. The withholding tax is a final tax.

Interest - Interest paid to non-residents is subject to a final withholding tax of 15%, and interest paid to residents is subject to a 10% provisional tax. The provisional tax is credited against tax payable on assessment.

Thin Capitalization - Where a foreign-based company grants a loan to a Botswana resident mining company, the deduction of interest is restricted to a three-to-one debt-to-equity ratio.

• Any interest charged in excess of the three-to-one ratio will be disallowed as a deduction from income of the Botswana mining company. The disallowable interest will constitute a deemed dividend for withholding tax purposes, and the rate of 15% will be payable on the quantum of the adjustment passed.

Indirect Taxes

Value-Added Tax (VAT)

VAT was introduced in Botswana on 1 July 2002 and it is levied on:

- The taxable supplies of goods and services
- Importation of goods
- Importation of services by a non-registered person or by a registered person for the purposes of making exempt or non-taxable supplies

The registration threshold for VAT is an annual taxable turnover of BWP500,000 (US$73,000). The VAT rates are 12% and 0%.

Both resident and non-resident entities engaged in the mining and metals industries are subject to VAT on the goods and services supplied. All taxable supplies within Botswana are subject to VAT at

12%, and export sales from Botswana are subject to VAT at 0%. Almost all commercial transactions have a VAT impact, and this should be considered before entering into any negotiation or arrangement.

The importation of mining equipment into Botswana is subject to VAT at 12%. The VAT is payable at the point of entry into Botswana at the time of importation and in a similar manner to the payment of customs duty (see below). Customs may not release goods until such a time as the VAT has been paid.

To alleviate the cash flow impact that may arise, entities may apply for a VAT deferral account. VAT on a deferral account is only payable 25 days after the end of the month in which the goods were imported. The VAT paid is claimed as input tax. This scheme allows for the payment date of VAT on importation of goods to be deferred by a month to coincide with the VAT return filing for that month and possible recovery of the VAT on importation.

Import Duties

All goods that enter Botswana are subject to customs import duties, except goods imported from the Southern Africa Customs Union (SACU) area (i.e. South Africa, Namibia, Lesotho and Swaziland). The rates of customs duty on the importation of goods into Botswana are provided for in the customs and excise tariff schedules.

5.4 CAMEROON FISCAL REGIME

The fiscal regime that applies to Cameroon's mining and metals industry consists of a corporate income tax (CIT), value-added tax (VAT), fixed fees, surface fees and royalties.

- Corporate Income Tax 38.5%
- Value Added Tax 19.25%
- Fixed Fees **Authorization to open marketing offices for minerals**

	Granting: US$400 Renewal: US$400 Reconnaissance license Granting: US$1,000 Renewal: US$2,000 Assignment: US$50,000 Exploration permit Granting: US$4 per square kilometre Renewal: US$6 per square kilometre Assignment: US$10,000 Exploitation permit Granting: US$10,000 Renewal: US$20,000
• Surface fees	Exploration permit: US$2–US$6 per square kilometre, per year Exploitation permit: US$100 per square kilometre, per year
• Royalties	Precious stones (diamonds): 8% Precious metals (gold, platinum): 3% Basic metals and other minerals: 2.5%

The fiscal regime consists of a combination of corporate income tax, royalties, fixed fees and VAT.

However, Mining companies may not be subject to all the taxes provided in the Mining Code. A mining convention between the Government of Cameroon and a mining company sets out the legal, financial, accounting, tax and social conditions that govern operations during the agreement and is usually coupled with the exploration/exploitation title. Such conventions can exempt mining companies from some taxes.

To appreciate the tax regime applicable to mining companies operating in Cameroon, one should first rely on the terms of the mining convention signed instead of the common tax regime.

Here is a summary of the duties, taxes, fees and contributions applicable to the holders of mining exploitation permits and their direct subcontractors:

Name of taxes	Rate
Tax on dividend	16.5
VAT	19.25%
Social security contributions (CNPS)	4.2% by the employer and 2.8% by the employee
Withholdings taxes (special tax on income)	15%

*US$1 = Approximately XAF500 as of 23 May 2013

Corporate Tax

An annual corporate tax at a rate of 38.5% is payable by resident companies and holders of mining exploitation permits.

Up-front CIT equal to 1.1% of the turnover of the previous month is due not later than the 15th of the following month.

Profits realized in Cameroon by branches of foreign companies and paid to natural persons and corporate bodies domiciled out of Cameroon are subject to the branch remittance tax of 15%.

Capital Gains

Capital gains realized in the transfer of shares by both residents and non-residents are subject to the 16.5% tax on movable securities.

Transfer Pricing

Cameroon's tax law includes measures to ensure that the Cameroonian taxable income base associated with cross-border transactions with related parties is based on arm's-length prices.

For the assessment of the company tax payable by companies that are controlled by, or that control, an undertaking established outside Cameroon, the profits indirectly transferred to the latter by increasing or reducing the purchase or selling price, or by any other means, shall be incorporated in the results shown by their accounts.

The same shall apply to undertakings that are controlled by an undertaking or group likewise in control of undertakings established outside Cameroon.

In the absence of accurate information to assess the profits of this kind of undertaking or to make the adjustments, taxable profits shall be assessed by comparison with those of similar undertakings operating in Cameroon.

Transfer pricing documentation has to be filed and has to be delivered in case of a tax audit.

Where the tax administration has evidence during a tax audit to presume that a company has indirectly transferred profit, the latter could be requested to provide information and documents stipulating:

- The nature of relations between the said company and one or more companies or groups established out of Cameroon
- The pricing method for industrial, commercial or financial operations that it uses with the company, companies or groups outlined and the elements that justify this method as well as the agreed-upon considerations
- The activities carried out by the companies or groups
- Tax treatment relating to the operations outlined and carried out by the companies that it runs out of Cameroon

The above requests must be precise and clearly indicated according to the nature of operations or products: the country or territory concerned, the company or group referred to and the amounts considered.

The request must also state the response deadline granted to the company that is being assessed. The said deadline, which shall not be less than a month, maybe extended upon a motivated application.

Tax Year

The company's fiscal year generally matches the financial accounting year (12 months of activities). Therefore, the tax year is from 1 January to 31 December. A tax return must be filed by 15 March of the year following the fiscal year.

Mining Royalties

Mining companies are subject to three types of royalties and contributions: fixed fees, surface taxes and applicable common taxes.

Fixed Fees Royalty

A fixed fee is payable on mining titles or the authorization for the sale of mine substances. This fee is also payable on the renewal, extension, sale (marketing), transfer and sublease of such instruments. The fee payable is determined according to the nature of the mining title (such as reconnaissance license, exploration permit and exploitation permit) held by the company. The amount due depends on the type of permit (see page 1).

Surface Fees Royalty

An annual surface royalty is payable by mining companies that hold exploration and exploitation permits. The rate varies, depending on the type of mining license concerned, between US$2 and US$6 per square kilometre, per year, for exploration permits and US$100 per square kilometre, per year, for exploitation permits.

Capital Allowances

The General Tax Code sets out depreciation rates for assets.

The 2010 Law (General tax codes), which supplements the Mining Code, provides that the list of fixed assets eligible for depreciation and their accompanying rates shall be fixed by a joint order of the Minister in Charge of Mines and the Minister in Charge of Finance. In addition, specific fixed assets of the company eligible for the above-mentioned depreciation regime shall be specified in the mining convention.

Incentives

The Mining Code lightens the tax burden on mining companies by granting tax and customs incentives. These tax incentives are generally approved and registered in a mining convention. The incentives (which take the forms of exemptions) vary, depending on the phase of the project: exploration, construction and exploitation.

- **Exploration Phase**

Granting of temporary entry status of plant and equipment used for exploration as well as for professional equipment, machine apparatuses, site vehicles and spare parts. However, should the plant or equipment be sold or transferred as-is, customs duties and taxes shall be collected according to regulations in force.

Exemption from the following:

- Materials and spare parts necessary for the operation of the plant and professional equipment
- Specific lubricants required for the operation of exploration plant and equipment
- Registration fees on mining operations, with the exception of those on leases and property, let out as living premises
- The payment of business license tax for the first two years of operations
- The registration duties on corporate documents, capital increase and transfer of unbuilt land

- VAT on local purchase and on the importation of equipment directly linked to the mining operations on a list drawn by a joint ministerial order issued by the ministers of mines and finance, respectively
- Extension of the duration of carried forward losses from four years to five years.

Exemption from the following taxes:

- Company tax
- Tax on industrial and commercial profits
- Proportional tax on income from securities
- Special tax on remuneration paid abroad
- VAT
- Note that subcontractors shall also benefit from the above exemptions.

- **Construction Phase**

Same as discussed above.

- **Exploitation Phase**

Up to the date of the first commercial production established by the Minister in Charge of Mines and the Minister in Charge of Finance, the permit holder shall be exempt from VAT when the said products are subject to VAT on imported materials and equipment.

Exemption from the payment of certain taxes as discussed in the exploitation phase above.

Stabilization of Tax and Customs Regulations

A stabilization tax clause is provided for in the Mining Code (and usually in the mining convention) that guarantees constancy of the rates, the basis of tax assessment and taxes to all the holders of mining permits or to the beneficiaries of the mining convention or mining concession. The stabilization of the tax and customs regulations is effective from the issuance of the mining permit throughout the permit's validity period. However, more favourable provisions under a new ordinary law, tax and customs regime shall be extended, upon request, to holders of mining permits.

Financing Considerations

The state's free carry on pre-emption rights

In accordance with the 2010 Law (which modifies certain provisions of the 2001 Mining Code), the State is entitled to free shares representing 10%, at least, of a company's capital to be created by a mining title applicant. This 10% of shares are acquired as soon as the mining title is granted.

The State can also acquire 20% of a company's capital depending on the type of substance the mining company exploits (or produces). But the details of acquiring these additional shares (over the 10% minimum) are worked out with each investor/mining company within the scope of an agreement.

It should be pointed out that if any of the mining companies/investors involved in the venture mentioned above want to transfer/sell their shares, the government of Cameroon will exercise a pre-emption right to acquire the shares.

However, it shall have to transfer the said shares to private operators or a new strategic partner within five years.

VAT reimbursement

The Mining Code provides for reimbursement of VAT. However, since mining companies are exempted from the payment of VAT, in reality, they cannot ask for a reimbursement.

Temporary admission

During the exploration phase, holders of permits are granted a temporary status for their plant and equipment used for exploration as well as for professional equipment, machines, apparatuses, site vehicles and spare parts.

Admission for the construction and exploitation phases is not expressly provided for in the Mining Code. However, it can be negotiated in a mining convention with the Government.

Foreign exchange regulations

The freedom to transfer capital and income shall be guaranteed for foreign natural persons and corporate bodies involved in mining investments financed by hard currency.

Transfer guarantees

Foreign individuals/companies that have made mining investments or are working in a Cameroonian mining company shall have the right, subject to foreign exchange regulations, to transfer in the currency assigned at the time the investment was made, dividends, all types of proceeds, invested capital, proceeds from the liquidation or realization of their assets and wages, as well as social security contributions and pension funds.

Tax treaty

Cameroon currently has a double tax treaty only with France, Tunisia, Canada and CEMAC countries (The Central African Republic, Republic of the Congo, Chad, Equatorial Guinea and Gabon).

Local participation

There is an obligation for 40% local participation when the mine is small (petite mine). A small mine can be industrial, semi-industrial or artisanal, whose annual production is not more than a particular tonnage, which shall be fixed annually by state regulation.

In addition, there is the obligation of State participation as stated in Section F.

Special regime on structured projects

Structured projects have a special regime that provides a number of incentives. This regime targets the companies in certain industries, including, but not limited to, extractive industries. This regime provides the following incentives:

- Exemption from the payment business license tax for two years
- Exemption from the payment of registration duties on capital increase
- Exemption from VAT on the purchasing of locally made construction materials and on imports destined for the putting in place of the project
- Application of accelerated depreciation of 1.25% of the applicable rate on specific fixed assets acquired during the construction phase

It should be noted that to benefit from the special regime's incentives on structured projects the following conditions must be fulfilled:

- Be a pool of development
- Generate employment
- Give rise to a significant investment
- Be involved in a priority sector

5.5 REPUBLIC OF GUINEA FISCAL REGIME

The mining and metals industry in the Republic of Guinea is governed by the amended 2011 Mining Code (issued on 8 April 2013 by presidential decree and published on 17 April September 2013). This code includes regulations to implement a method of calculating tax according to the 2004 Guinean General Taxes Code (CGI). The fiscal regime consists of a combination of corporate income tax, royalties, and diverse rights and contributions.

Mining companies may not, however, be subject to all the Mining Code's taxes. A mining convention (or agreement) sets out the rights and obligations of the parties relating to the legal, technical, financial, fiscal, administrative, environmental and social conditions applicable to the mining concession. Such conventions (or agreements) can exempt mining companies from several taxes, in accordance with the Mining Code provisions.

Here is a summary of the duties, taxes, fees and contributions applicable to the holders of mining titles (i.e. mining companies) and their direct subcontractors:

Name of taxes	**Rate**
Fixed fees and duties	From US$15 to US$12,500 per square kilometre per year
Tax on mining activities (tax on mining substances or products)	From 0.075% to 5%, based on FOB value or London Metal Exchange (LME) or price of iron ore defined by Platts China Iron Fines, CFR, etc.
Surface royalties	From US$10 to US$250 per square kilometre per year
Export taxes on artisanal products	From 1.5% to 5% for precious stone (diamond, gold and other gemstones)
Tax on industrial and commercial benefits, BIC	30%
Tax on dividend (IRVM)	10%
VAT	18%
Lump-sum payment (VF)	6%

Contribution for professional training (CFPA) or apprenticeship tax	23% of the maximum salaries of approximately US$217 per year (equal to GNF1.5 million)*
Registration tax on imports	Has been removed from the Mining Code
Import tax	In addition to the several taxes (RTL, TE, PC, CE) whose global rate is 3.25% (applicable during all phases), a single tax of 5% or 6.5% (depending on the type of material/equipment concerned by the import) applies during the operating phase
Withholding tax on non-salary revenue	15%

* US$1 = approximately GNF 7,246.38 as of May 2015.

Corporate Tax

Guinean companies are taxed according to the territoriality principle, so those trading or operation outside Guinea are not taxed in Guinea on the related profits. Foreign companies with activities in Guinea are subject to Guinean corporate tax on Guinean-sourced profits only.

Taxable Profit

Corporate income tax is levied on the taxable profits, which consist of the company's net profits from all operations of any type during the tax year (from 1 January to 31 December). This includes asset disposals during or at the end of the activity.

Syscohada GAAP determines the taxable net benefit or profit. Net profits are the difference between the value of net assets at the closing and opening of the period, reduced by contribution supplements and increased by withdrawals of associates during this period.

Tax-deductible Expenses

These may be deducted when calculating a company's taxable net profits: operating expenses including fees, salaries and all costs attributable to employees and generally borne by employers; financing costs; deferred losses; depreciation; and other reserves, including one for restoring operation sites and for restoring deposits, rents, taxes, deductible duties and fees.

Foreign taxes on profits received in Guinea are not deductible unless a convention providing relief from double taxation exists.

Corporate Tax Rate

Resident companies, holders of operating titles for mine substances and legal persons who own quarry-operating licenses pay an annual tax of 30% on their industrial and commercial benefits (BIC).

Profits realized in Guinea by branches of foreign companies are deemed distributed and therefore are also subject to a branch withholding tax of 10% on after-tax income.

Capital Gains

General capital gains are taxed at the regular corporate rate of 30%. However, the tax may be deferred if the proceeds are used to acquire (i.e., reinvest in) new fixed assets in Guinea in the following three financial years.

The funds allocated to the reinvestment have to result from either previous benefit put in reserve or be benefits gained within the time limit for reinvestment.

Gains Resulting From Mergers and Acquisitions

Capital gains that result from merger and acquisition activity (in particular the transfer of shares) are exempt from corporate tax. To qualify for this exemption, the Guinean Tax Code sets out preconditions:

- The merger must include this commitment: the annual depreciation - to be taken from benefits as well as the subsequent gains resulting from the realization of these elements - must be calculated according to the cost price determined for the merged companies after deducting the depreciation already realized.

- The transaction is preapproved by the Ministry of Finance.

However, the gains resulting from mergers and acquisitions are subject to a specific tax on capital gains at the rate of 10%.

Transfer Pricing

Guinea's tax law includes measures to ensure that the Guinean taxable income base associated with cross-border transactions with related parties is based on arm's-length prices.

Any direct or indirect transfer of mining title, direct or indirect or cumulated transfer of shares of a company holding a mining title must be registered with the tax administration, and the gains resulting from such a transaction are subject to a 10% withholding tax.

Dividends

Dividends, percentages, directors' fees and other products distributed to shareholders by operating enterprises, set up as commercial companies, are subject to a 10% withholding tax, which the recipient may credit against corporate income tax.

Tax Year

The company's fiscal year generally matches the financial accounting year (12 months of activities). Therefore, the tax year is from 1 January to 31 December. A tax return must be filed by 30 April of the year following the fiscal year.

Group of Companies' Taxations

An equivalent of fiscal integration of Guinean companies to a consolidated filing position is not available in Guinea.

Mining Royalties

Mining companies are subject to three types of royalties and contributions: fixed fees and annual royalties, surface royalties, and tax on the production of mineral substances.

Fixed Fees and Annual Royalties

A fixed fee or annual royalty is payable on mining titles or the authorization for the sale of mine substances. This fee is also payable on the renewal, extension, sale (marketing), transfer and sublease of such instruments. The fee payable is determined according to the nature of the mining title (such as prospecting, industrial operating, mining concession, semi-industrial operating, artisanal operating license or permit) held by the company. The amount due varies from US$15 to US$12,500 per square kilometre per year.

Surface Royalties

Surface royalties are payable by mining companies that hold exploration permits, operation permits and mining concessions. The rate varies, depending on the type of mining titles, between US$10 and US$250 per square kilometre per year.

Tax on the Production of Mineral Substances

Most mining substances extracted are subject to specific mining taxes when they are removed from stock, based on the product's market value. Those taxes may be deducted in calculating taxable benefits.

The rate varies from 0.075% to 5%, based on FOB value or LME or price of iron ore defined by Platts China Iron Fines, CFR, depending on the substance (such as bauxite, gold, diamond, precious gems, iron or others).

Prospecting Investment Depreciation

The total audited amount of prospecting investment that a mining titleholder made at the date an operating permit was issued may be depreciated in the operational stage (or step) as expenses of the first establishment.

Note: The Mining Convention may contain favourable depreciation rates, particular to the mining industry's use.

Incentives

The Mining Code lightens the tax burden on mining companies by granting tax and customs incentives. These tax incentives are generally approved and registered in a mining convention.

Corporate Tax Exemption

An exemption from corporate tax may be available, depending on the mining phase the company is in. However, the rate has been reduced from 35% to 30%.

Tax Losses

Income tax losses may be carried forward for three years. However, losses resulting from the depreciation of assets can be carried forward indefinitely.

Reserve for Restoring Deposit

Under the Mining Code, it is possible to constitute a non-taxable reserve to restore deposits. The maximum amount allowable in the reserve is 10% of the taxable benefit at the end of each fiscal year.

In the case of deficit, this provision is calculated based on 0.5% of the product's market value exploited by the company.

Such reserves must be used to finance mine prospecting or operations in Guinea within two years of their creation.

There is the possibility to constitute deductible provisions, such as:

- For rehabilitation of mining site
- For the reconstruction of deposit

Other Incentives

Other tax and customs incentives may be granted at different phases of mining activity.

During the research/exploration phase, exemption from:

- Annual minimum (GNF15m to GNF60m)
- Business license fees (GNF60,000 to GNF600,000 per year)
- Contribution to vocational training (1.5% of all salaries, as mentioned previously if the company employs more than 10 people)
- Single land tax
- Apprenticeship tax (3%), if the company employs fewer than 10 people
- Temporary admission (exemption from customs duties) for professional equipment/material pre-indicated within the mining list
- The exemption does not include the registration tax, community withdrawal, additional centime, and license for treatment and liquidation for the material and spare parts for utility vehicles necessary for the functioning of professional materials and equipment.

During the construction phase, exemption from:

- Annual minimum tax
- Business license fees contribution to vocational training
- Single land tax
- Apprenticeship tax
- Temporary admission (exemption from customs duties) for professional equipment/materials pre-indicated within the

mining list and mentioned on the fixed assets register of the companies.

- The exemption does not include the registration tax, community withdrawal, additional centime, and license for treatment and liquidation for the material and spare parts for utility vehicles necessary for the functioning of professional materials and equipment.

During production (operation) phase, exemption (valid for three years starting from the first production) from:

- Annual minimum tax
- Single land tax

Imports are subject to customs duties at a single rate of 5% or 6.5%, depending on the type of material or equipment, according to the provision dispositions of the amended 2011 Mining Code.

Stabilization of Fiscal and Customs Regimes

A stabilization tax clause is included in the Mining Code and usually, in the mining convention or agreement, guarantees constancy of the rates, the basis of tax assessment and taxes to all the holders of mining operation titles or the beneficiaries of mining convention.

The stabilization of the tax and customs regulations is effective when the mining agreement is signed or the ministerial or presidential decree granting the mining operation title is issued, throughout the term of such agreement or decree that may not exceed 15 years.

Article 182 of the Mining Code specifically refers to these rates in the stabilization clause, on a limited basis:

- The corporate tax
- The contribution to local development
- Flat-rate entry fee
- Other specific mining taxes

Withholding Taxes

Mining companies are subject to four types of withholding tax:

- Withholding tax on dividend or interest or qualified as the distributed amount
- Withholding tax on salary
- Withholding tax on non-salary revenue
- Withholding tax on rent paid to an individual (physical owner)

According to the 2012 Finance Law, a 15% withholding tax, which precludes payment of any other income taxes, applies to fees and service payments to foreign companies or individuals not resident in Guinea. This amount may not be deducted from the tax on benefits (corporate income tax). Insurance contracts concluded with foreign companies not resident in Guinea are subject to prevailing legislation.

The amounts indicated above apply throughout the prospecting, construction (development) and operation period.

They are imputable to employees or people supplying services and are paid by the enterprise receiving such services.

Local Providers of Goods not Registered to VAT

In the mining sector, companies are subject to a withholding tax at the rate of 10% of the amount paid to a provider of goods who is not registered for VAT in Guinea.

Interest

There is a withholding tax applicable to interest at the rate of 10%.

Financing Considerations

Under the Guinean Mining Code, the state is entitled to free shares representing at least 15% of the capital of a company holding a mining operating title. This 15% of shares are acquired as soon as the mining operating title is signed (granted).

The state can also acquire 20% to 32.5% in the capital of a company holder of an operation title, depending on the type of substances that are concerned by the title. But the details of acquiring these additional shares (above the 15% minimum) are worked out with each investor within the scope of an agreement.

The state has created a public limited company for the management of the mining patrimony (participation in the capital of mining companies).

Indirect Taxes

Value-Added Tax (VAT) specific to mining operations

The standard VAT rates are 18% for goods and services and 0% on exports.

According to the provision of the amended 2011 Mining Code, holders of mining titles in the research, construction or operation phase are subject to VAT.

However, mining companies and their direct subcontractors are exempt from VAT on imports of equipment material machines, raw materials and consumables indicated in the mining list submitted and pre-approved.

Imports of goods that are excluded from the right of deduction according to the provisions of the general tax code are not exempt from VAT even if these goods were included in the duly approved mining list, except for heavy fuel oil.

VAT Reimbursement

Strict conditions govern VAT refunds. Mining companies may ask for VAT reimbursement within 15 days of the month following the credit realization.

In principle, for the mining sector, the refund will be processed no later than 60 days after the receipt of the refund request. Before contracts or orders are signed, mining companies have to ensure that their partners have a valid tax certificate (NIF). A refund cannot be obtained if the firm's partners do not have a valid tax registration certificate. Mining companies can also receive a full refund if their activity is entirely dedicated to mining research and development.

The reimbursement procedure

The reimbursement claim is presented to the Tax National Direction (DNI) by filing a specially printed document, along with a copy of these justifying documents:

- The last three single monthly declarations
- Bills, payments, certificates and customs receipts justifying the amount of VAT for the last month
- Export customs entry for the last month
- A summary of deductible VAT

Duties and entry taxes

To be entitled to the custom allowances, industries and persons affected by this article must draw up inventories of their goods (referred to as the mining list) and have them approved by the Minister of Mines and the Minister of Finance before they start operations.

Such inventories may be revised periodically to reflect changes in the enterprise's needs, national production capacities and the availability of products manufactured locally in terms of time and competitive conditions.

Temporary admission

Equipment, materials, machines, apparatuses, heavy equipment, vehicles and engines that a permit holder imports in the prospecting or construction phase fall under the rules of temporary admission and are therefore exempt from duties throughout the term of the prospecting and construction phases. When these periods expire, all items temporarily admitted must be re-exported.

Within the first quarter of each year, prospecting permit holders must submit a list of such materials to the Center of Promotion and Development of Mining (CPDM) Business and Customs Service.

Customs Allowances

Research permit

During the prospecting phase, the permit holders are granted temporary admission exemptions for the import of equipment, materials, machines, raw materials and consumables indicated in the mining list relating to exploration/research phase.

However, material and spare parts for utility vehicles necessary for the functioning of professional materials and equipment included in the mining list are not eligible for the exemption of Registration Tax (TE), the Community Tax (PC), the additional surcharges (CA) and the Administrative Processing Fee (RTL).

When the exploration phase is deemed terminated, the goods that benefited from the temporary admission regime exit from the temporary admission regime and must either be re-exported or be kept or resold in Guinea by the holder of the exploration permit, who will be liable for all duties and taxes charged by the customs service based on an evaluation, taking into account the depreciation that has occurred until the date of exit from the temporary admission regime.

Construction (development) phase

During the installation phase, a permit holder is granted temporary admission exemptions for the import of equipment, materials, machines, raw materials and consumables indicated in the mining list relating to the construction phase.

However, material and spare parts for utility vehicles necessary for the functioning of professional materials and equipment included in the mining list are not eligible for the exemption of Registration Tax (TE), the Community Tax (PC), the additional surcharges (CA) and the Administrative Processing Fee (RTL).

When the construction phase is deemed terminated, the goods that benefited from temporary admission regime exit from the temporary admission regime and must either be re-exported or be kept or resold in the Republic of Guinea by the holder of the construction permit, who will be liable for all duties and taxes charged by the customs service based on an evaluation, taking into account the depreciation that has occurred until the date of exit from the temporary admission regime.

Operational phase

During the operational phase, imports are subject to customs duties at a single rate of 5% or 6.5%, depending on the type of material or equipment according to the dispositions of the amended mining code:

- ➢ 5% is applied to:
- ➢ Goods included on the register of fixed assets belonging to titleholders or beneficiaries as soon as they are assigned for local processing of mineral substances into finished and semi-finished products
- ➢ Consumables intended for the local processing of mine substances into finished or semi-finished products, excluding fuels, lubricants and other petroleum products
- ➢ 6.5% is applied to Goods included in the register of fixed assets belonging to titleholders or beneficiaries as soon as they are

assigned to the extraction and concentration of crude mine substances

The raw material and other consumables intended for the extraction and concentration of crude mine substances, except for fuels, lubricant and other petroleum products

Other

Foreign exchange controls — currency
Mining titleholders are subject to currency regulations prevailing in Guinea. They may open currency accounts in Guinea for any kind of a transaction with foreign countries, including payments to foreign suppliers of goods and services required for carrying out mining or quarrying operations.

The appropriate banking arrangements are carried out with the Guinean Central Bank to make it easier to open accounts abroad for debt servicing.

However, within Guinean territory, the legal currency that every company is obliged to use for its invoicing and payments is the local currency, Guinean franc (GNF).

Transfer guarantees
Provided they meet their obligations, mining titleholders are guaranteed free transfer abroad for dividends, income from capital invested, and the products of liquidation or capitalization of assets.

Before gold, diamonds and other precious stones can be imported or exported, the company must make a declaration to the Guinean Central Bank.

Tax treaty
Guinea currently has a double tax treaty with France and the United Arab Emirates.

Local participation

There is no obligation for local participation when a mining license is granted. The only obligation of participation locally is related to the state participation as stated above in Section F.

5.6 SOUTH AFRICA FISCAL REGIME

The fiscal regime that applies in South Africa to the mining and metals industry consists of a combination of corporate income tax and royalties.

Corporate income tax	28%
Capital allowances	Accelerate depreciation, exploration write-offs
Investment incentives	Loss carry forward, research and development
Royalties	Variable rate between 0.5% and 7%, depending on whether the mineral is refined or unrefined

The standard South African corporate tax rate is currently 28%. Note that the corporate tax rates applicable to companies mining for gold will differ. A detailed analysis of corporate tax rates is set out in Section B.

Accelerated tax depreciation allowances are available for mining companies; deduction of mining capital expenditure is conditional on the income that a company earns from mining operations.

Losses can be carried forward indefinitely, provided that the company continues to trade; research and development incentives are available.

Royalties are formula based. The formula to be applied will depend on whether the mineral is refined or unrefined. Both terms (refined and unrefined) are defined in supporting schedules to the South African Mineral and Petroleum Resources Act.

Corporate Tax

South Africa has a residence-based tax system that applies for tax years beginning on or after 1 January 2001. Companies are considered to be resident in South Africa if they are incorporated or have their place of effective management in the country.

South African resident companies are taxed on their worldwide income and non-resident companies are taxed on their South African-sourced income. Income is generally considered to be from a South African source if its originating cause is in South Africa.
It is also important to note that under the South African Income Tax Act (the Act), "mining for gold" or "to mine for gold" includes "mining for uranium" or "to mine for uranium." As such, all references made throughout this document to gold mining will also apply to uranium mining.

Basic rates of corporate income tax

Corporate tax rates: companies not mining for gold

Companies not mining for gold (or uranium) will pay tax at 28%.

Corporate tax rates: companies mining for gold

Companies mining for gold (or uranium) will typically pay tax on their income streams as follows:

- Non-mining taxable income = 28%
- Mining taxable income (formula-based rate) y= 34 – 170/x; where y = the rate to be applied on

taxable income from gold mining, x = total revenue (turnover) from gold mining

Capital Gains

The South African capital gains tax (CGT) was introduced on 1 October 2001 and applies to the disposal or deemed disposal of all capital assets on or after that date.
South African resident companies are subject to CGT on capital gains derived from the disposal of worldwide tangible and intangible assets.

Nonresident companies are subject to CGT on gains derived from:

- The disposal of immovable property in South Africa
- Any interest in or right to immovable property in South Africa
- Any asset that is attributable to a permanent establishment of a person in South Africa

An interest in immovable property includes any equity shares in a company if, at the time of disposal, 80% or more of the shares' market value is attributable, directly or indirectly, to that immovable property (held otherwise as trading stock). The non-resident company must hold at least 20% of the shares of that company. We note that mining rights (new order and old order) are considered to be an interest in or a right to immovable property. As such, a nonresident shareholder should be careful when disposing of shares in a South African resident mining company as there are potential CGT consequences of doing so.

A capital gain is equal to the amount by which the disposal proceeds of an asset exceed its base cost. A capital loss arises if the base cost exceeds the disposal proceeds.

Capital losses may offset capital gains and ordinary tax losses may offset capital gains. However, capital losses may not offset the ordinary taxable income and are ring-fenced for use against future capital gains.

Inflation indexation of an asset's cost base is not a concept that is recognized in South Africa's CGT regime.

CGT is calculated at a rate of 66.6% and included in taxable income, on which tax is raised at 28%. The CGT inclusion rate applicable to companies is 66.6%.

Rates of CGT: companies not mining for gold

When a mining company disposes of an asset not subject to the capital redemption allowance afforded to mine companies (refer to Section C), the standard effective CGT rate applicable to companies will apply. As such, companies not mining for gold will be subject to CGT at an effective rate of 18.6%.

Rates of CGT: companies mining for gold

The different rates at which gold mining companies pay tax will also result in these companies having different effective CGT rates. Again, CGT will apply only to assets that have not been subject to the capital redemption allowance.

Transfer Pricing

South Africa's tax law includes measures to help ensure that the taxable income base associated with cross-border transactions with related parties is based on arm's length prices.

Tax Year

A company's tax year will generally match its financial accounting year.

Mining Royalties

The Mineral and Petroleum Resources Royalty Act 28 of 2008 (the Royalty Act) became effective 1 March 2010.

The royalty is imposed on an extractor, which includes people who:

- Hold a prospecting, mining, exploration or production right

- Hold a retention permit
- Hold a mining permit
- Hold a lease or sublease in respect of a production right
- Win or recover a mineral resource within the Republic

The extractor also needs to transfer the mineral resource for their benefit through:

- Disposal of a mineral resource
- Consumption, theft, destruction or loss of a mineral resource

The royalty calculation is based on a variable royalty percentage rate, depending on whether the mineral is transferred as:

- Refined mineral resources, which have undergone comprehensive beneficiation (for example, smelting and refining); Schedule 1 lists minerals in their refined condition
- Unrefined mineral resources, which have undergone limited beneficiation (i.e., some processing); Schedule 2 of this legislation lists minerals in their unrefined condition

Royalty percentage rate determination for refined minerals:

- 0.5% + [earnings before interest and taxes/ (gross sales in respect of refined mineral resources x 12.5) %] × 100
- Note: The percentage determined concerning the above formula cannot exceed 5%.

Royalty percentage rate determination for unrefined minerals:

- 0.5% + [earnings before interest and taxes/ (gross sales in respect of unrefined mineral resources x 9)] × 100
- Note: The percentage determined with reference to the above formula cannot exceed 7%.

Further, the Royalty Act allows for the deduction of royalty payments made as part of an agreement with the state or local tribes before the implementation of the royalty regime.

There are two key payment periods for the mining royalty. The first payment is due six months after the start of the taxpayer's financial year and must be equal to half of the estimated annual royalty. The second payment is due on the last day of the taxpayer's financial year and must equal the estimated mining royalty less the amount paid as the first payment. Once the financial statements are finalized, a taxpayer may make a top-up payment six month after the financial year-end without incurring a penalty or interest.

The duly completed mining royalty form must accompany the payment in each instance. It should be submitted to the revenue authority, demonstrating that the following details are classified under refined or unrefined minerals:

- Earnings before interest and taxes
- Gross sales
- Royalties rate percentage
- Transitional credits
- Royalty payment

Capital Allowances

Preproduction expenditure

There are no specific tax incentives for mining companies setting up a business in South Africa. However, the tax treatment of mining capital expenditure may be considered to be advantageous, specifically concerning the capital expenditure.

Capital expenditure is defined to include not only ongoing mining capital expenditure once mining commences but also any expenditure incurred on development, general administration and management (including interest and other charges) before production begins. These preproduction expenses are accumulated and carried forward and ranked for deduction against mining income.

Expenditure incurred in acquiring mining rights and surface rights will constitute nondeductible capital expenditure. This expenditure will not qualify for an income tax deduction but will also qualify for inclusion in the base cost of the asset acquired. It may also be used for determining the capital gain or capital loss arising from the future disposal of those rights.

Prospecting expenditure

Prospecting expenditure refers to expenditure incurred on prospecting operations, together with any other expenditure that is incidental to such prospecting operations.

Regarding prospecting expenditure, the Act provides for a deduction that includes surveys, boreholes, trenches, pits and other prospecting work, preliminary to establishing a mine.

Note that this deduction is available only where prospecting expenditure is incurred within South Africa.

Mining capital allowances

Mining companies are granted accelerated capital allowances in place of capital allowances afforded to other industries operating within South Africa's private and public sectors.

This accelerated allowance recognizes the fact that the capital requirements of the mining industry are more onerous than that of most other industries. The material capital costs are also incurred by mining companies long before income is earned.

Section 15(a) of the Act allows mining companies to deduct 'capital expenditure' (as determined under the provisions of Section 36) from income derived from mining operations. The capital expenditure deducted is referred to as capital expenditure redeemed. This deduction is limited each year to the taxable income from mining and is granted in place of:

- Wear-and-tear allowance
- Lease premium allowance
- Allowance on the cost of patents and similar items
- Scrapping allowance
- Commercial building allowance

The capital expenditure redemption deduction is also subject to various limitations, commonly referred to as ringfencing restrictions. There are three key ring-fences in South Africa's mining tax legislation:

- The deduction is permitted only against income derived from mining operations; the deduction may not be used to reduce the company's non-mining income.
- Tax losses cannot be created by way of the capital redemption deduction.
- The mining capital expenditure deduction is determined on a mine-by-mine basis, although this ring-fence can be relaxed through the “new mine allowance” in very specific circumstances.

The unredeemed balance of capital expenditure is carried forward and ranks for deduction (within the limits described above) from mining taxable income in succeeding years of assessment.

Certain categories of capital expenditure — including housing, hospitals, recreational buildings, railway lines and motor vehicles for private use — qualify for redemption over 5 or 10 years.

When assets on which capital expenditure can be claimed are disposed of, the proceeds are first used to reduce capital expenditure and the “excess recoupment,” if any, will be included in taxable income and taxed at the corporate tax rate.

Incentives

Tax Losses

Income tax losses can be carried forward indefinitely provided the company continues to trade. Tax losses may not be carried back. Capital losses can be carried forward indefinitely.

Research and Development

Section 11D of the Act provides for a 150% deduction for qualifying R&D expenditure of a revenue nature. This section also outlines that 100% of certain research and development (R&D) expenditure of a capital nature may be written off over four years on a 40%, 20%, 20% and 20% basis. Mining companies cannot claim the R&D allowance on exploration or prospecting activities.

Changes to R & D Legislation

With effect from 1 October 2012, the R&D legislation was amended to include a pre-approval process. Some additional refinements, effective from 1 January 2014, were made to accommodate anomalies experienced during the first year of the newly introduced pre-approval process. The legislation allows for a 100% deduction for direct R&D costs without completing an application. However, to claim a 50% deduction, the taxpayer must file a preapproval form before commencing R&D activities. Costs to significantly improve existing inventions, designs or computer programs also qualify as R&D. Such improvements may result in more costs qualifying for R&D deduction.

Department of trade and industry incentives

Other incentives in the form of grants are also potentially available to mining companies to the extent that capital expansions or new capital projects are planned for a facility that represents a manufacturing facility (for example, smelters and processing). These incentives are provided where a company can prove, among other criteria, job creation or retention.

As per Section 12 of the Income Tax Act, additional tax allowance is also available to mining companies where capital expansion or new capital project represents a project or facility that would be classified as manufacturing.

Withholding Taxes

Dividends

With effect from 1 April 2013, South Africa imposed a 15% withholding tax (WHT) on dividends paid by a resident company or for cash dividends paid by the Johannesburg Stock Exchange (JSE) listed shares of a nonresident. WHT replaced secondary tax on companies.

The 15% domestic WHT may potentially be reduced by an applicable double taxation agreement (DTA) (where applicable), which normally requires the foreign company, as beneficial owner, to hold a specified amount of the shares or voting rights of the company paying the dividends.

Interest

Currently, the interest income of a non-resident company is exempt from South African tax, provided that the non-resident company does not have a permanent establishment in the country.

South Africa does not impose a WHT on cross-border source interest payments as well. However, with effect from 1 March 2015, cross-border interest payments are now subject to a 15% WHT, subject to certain exceptions and potential DTA relief.

Royalties

South African-sourced royalty payments to a nonresident were subject to a 12% royalty WHT if that royalty is not connected to a South African permanent establishment of that nonresident. The tax may be reduced under an applicable DTA. This normally required the foreign recipient to be the beneficial owner of the royalty.

The rate of the WHT has increased to 15%, effective from 1 January 2015, with further changes in legislation. Under the new regime, a specific procedure must be followed to qualify for a reduced rate in terms of a DTA. However, under the old regime, the South African Revenue Service (SARS) was approached for a royalty exemption certificate.

Technical Services

South Africa does not impose WHT on the technical fees (assuming it is not a royalty). However, it is proposed that a 15% WHT on management fees be introduced from 1 January 2016. The tax may be reduced under an applicable DTA.

Nonresident Contractors

No WHT expressly applies to nonresident independent contractors. However, in the case of individual contractors or service providers, such as individual labour brokers and personal service providers, the employees' tax withholding rules (PAYE) should be applied to determine whether a withholding requirement exists.

Financing Considerations

Financial assistance granted to a South African tax resident from an offshore connected person will be subject to rules in Section 31 of the Act, which relate to transfer pricing and thin capitalization.

Transfer Pricing

The South African transfer pricing provisions are contained in Section 31 of the Act and should be read in conjunction with the SARS Practice Note No. 7, dated 6 August 1999, and the Addendum to SARS Practice Note No. 7, dated 29 September 2005 (henceforth collectively referred to as PN7). The last few years have seen an increased focus on transfer pricing audits with some significant assessments being raised. SARS has a specialized transfer pricing team which has experienced significant growth in the last few years. In November 2014, SARS indicated to the Parliament that during the past three years, there have been more than ZAR20 billion (approximately USD1.754 billion) in transfer pricing adjustments from 30 cases. Currently, the SARS transfer pricing team is evaluating a similar number of cases while others are being risk-assessed. Further, Section 31 of the Act was completely revised with effect from years of assessment commencing on or after 1 April 2012.

Section 31 of the Act read with PN7 aims to counter tax loss brought about by pricing that does not conform to the arm's-length principle. The legislation achieves this by requiring a taxpayer to ensure that the terms and conditions around an arrangement, transaction, operation or scheme are conducted at arm's length. The rules do not apply to transactions between third parties, as one of the criteria is that the parties must be legally connected in terms of Section 1 of the Act.

The new legislation allows for the re-characterization of transactions, as described in the Organisation for Economic Cooperation and Development (OECD) Guidelines, which arguably was not permissible under the previous legislation. The changes also suggest that a domestic transaction that forms part of an overall arrangement with a cross-border nexus may be caught by the provisions.

Section 31 previously authorized the tax authority to adjust the consideration for goods or services to an arm's length price to compute the South African taxable income of a person.

For years of assessment commencing on or after 1 April 2012, the legislation changed, allowing the tax authority to consider whether any term or condition imposed as part of any transaction, operation, scheme, agreement or arrangement differed to the terms and conditions that would have been agreed if the parties to the transaction were independent. Any difference in price between what was charged between the connected persons and what would have been charged between independent parties needs to be adjusted for in the tax return of the taxpayer. This is often referred to as the primary adjustment. To the extent that the taxpayer has not recovered the difference between the arm's length charge and the actual charge from the foreign related party, a deemed loan will arise. This is often referred to as the secondary adjustment. Deemed interest will accrue on the deemed loan.

From 1 January 2015, the deemed loan was replaced by a dividend in specie and a dividends tax of 15% will be applied to the dividend.

In March 2013, SARS issued a draft Interpretation Note on transfer pricing relating to financial transactions and thin capitalization (Draft IN). While the Draft IN is not binding, it provides an indication of what SARS considers relevant and necessary when a taxpayer determines whether the level of debt and the interest rate charged is acceptable.

Currently, no case law surrounding transfer pricing exists in South Africa, so guidance must be sought from international sources.

Effective from 1 January 2013, transfer pricing does not apply to certain cross-border loans and intellectual property transactions. More specifically, transfer pricing will not apply to holders (i.e., creditors) of a loan or holders of intellectual property if:

- The holder is a South African company

- The obligator is a controlled foreign company (CFC) in relation to the South African holder and 10% is directly owned by the holder
- The CFC is highly taxed (an aggregate effective rate of 75% of the South African rate that would otherwise be imposed)
- The CFC has a foreign business establishment

This relief also roughly corresponds with the effective management relief for high-taxed CFCs.

Also effective from 1 January 2013 and in line with the headquarter (HQ) company regime, the rules in this regard mimic the existing rules regarding back-to-back loan interest. More specifically, transfer pricing does not apply, but net losses in this regard must be ring-fenced. As an ancillary matter, the headquarters of the company is exempt from WHT on royalties in respect of back-to-back royalties if they are paid to a foreign shareholder with 10% or more stake.

SARS introduced an updated income tax return (ITR14) in 2013 to account for the change in the transfer pricing legislation in South Africa. Most taxpayers only encountered this ITR14 in 2014 because the ITR14 is lodged within one year after a company's financial year-end. The ITR14 requires additional disclosures for transfer pricing transactions including disclosures of transaction amounts, certain ratios (regarding thin cap) and other specific information.

In 2013, the Davis Tax Committee (DTC) was established to evaluate the South African tax system. It was given a specific mandate to evaluate and address concerns with OECD's Base Erosion and Profit Shifting (BEPS) plan. The DTC provided its first interim report in late 2014, including comments concerning transfer pricing documentation. The interim report mentions that South Africa should adopt rules requiring large multinational enterprises to disclose their transfer pricing in a master file, local file and country-by-country report, as recommended by the OECD. The report said this measure should apply to businesses with more than ZAR1billion of group turnover (approximately USD87.7 million).

Thin Capitalization

Under the updated Section 31, the three-to-one safe harbour rules have been replaced by an arm's length test whereby deductions for interest deemed excessive about the arm's length principle will be denied. The OECD guidelines define the "arm's length principle" as the pricing and the terms and conditions agreed upon between independent parties dealing at arm's length.

According to the Draft IN that was released in March 2013, there is no safe harbour debt-to-equity ratio or interest rate. Rather, the Draft IN suggests a risk harbour that can be used to determine whether a taxpayer is more likely to be selected for a tax audit. Where the debt-to-EBITDA ratio of the South African taxpayer exceeds 3:1, the taxpayer will be at greater risk of being audited by SARS. Additionally, from an audit risk perspective, a taxpayer will be at greater risk where the inbound loan is rand-denominated and the interest rate exceeds the weighted average of the Johannesburg Interbank agreed rate plus 2%. Similarly, where the loan is denominated in a foreign currency, the audit risk is greater when it exceeds the weighted average of the base rate of the country of denomination plus 2%.

When evaluating whether or not the level of debt and the interest rate are likely to be acceptable, the Draft IN states that the taxpayer should undertake a detailed functional analysis. The functional analysis should consider factors such as the group's funding structure, the nature of the business, the financial strategy of the business, the taxpayer's current and projected financial position, the availability and quality of security, applicable financial ratios, other indicators of creditworthiness of the taxpayer, as well as terms and conditions of the funding arrangement.

Indirect Taxes

Import and export duties

The normal customs and excise laws apply to imports and exports.

Import and export activities are governed by the Customs and Excise Act 91 of 1964. The SARS Commissioner collects customs duties based on the tariffs following the Harmonized System Customs Tariff Nomenclature. Although large machinery is often duty-free, the rules for the interpretation of a tariff state that correct classification for individual parts, components and accessories may be required in the condition of such parts, components and accessories at the time of importation thereof. These may attract as much as 20% customs duty.

The customs legislation provides for a “staged consignment” facility, in which large projects may be imported in stages under a single tariff heading for the entire project and thus, have a single customs duty rate, which in these types of projects is typically duty-free.

It should be noted that exporting diamonds attracts a 5% customs duty, per the Diamond Export Levy Act 15 of 2007.

The country of origin of goods is important in cases where goods are subject to a customs duty liability. This is because there may be trade agreements that may provide duty relief through a preferential customs duty rate for goods originating in a country that has entered into such an agreement with South Africa. Also, relief may be provided in the form of specific industrial and general rebates of customs duty. These are in the form of a remission of the customs duties ordinarily paid on goods, where the goods are used in a specific process or imported for a specific purpose or circumstance. Import valued-added tax (VAT) is payable at the standard rate of 14% on the value-added for tax purposes, which is calculated based on an uplift formula.

Permits are required for importing second-hand or used goods. In certain circumstances, import permits are required for certain goods that could be seen as potentially harmful (for example, wood and wood products, explosives and dangerous chemicals). When such goods are imported, the relevant controlling body (such as the South African Police Services, the State Vet or the Department of Forestry) may be required to conduct an inspection.

The exportation of ferrous and nonferrous waste and scrap metal requires a permit to be issued by the International Trade Administration Commission of South Africa (ITAC). Besides, there is a draft policy directive in circulation that will strengthen the controls currently imposed by ITAC on all exporters of such goods. As stated above, ITAC requires that a permit be applied for and obtained before exportation.

All importers of goods in South Africa are required to be registered with SARS. In the mining and metals industry, importers and exporters may also need to be registered with the Department of Minerals and Energy (DME) and may need to apply for a permit with the DME. The importers and exporters require a permit from ITAC to participate in any relief instruments specific to their qualifying activities, as well as a permit to import raw materials.

The mining industry also has access to rebate provisions for the remission of the fuel levy for diesel if used in certain specific circumstances. The Government has devised an incentive scheme in which diesel and biodiesel refunds are available for fuel levies and

Road Accident Fund (RAF) levies (some ZAR2 per litre) paid by entities that engage in certain qualifying industries, mainly mining, forestry and similar industries.

Eligibility to claim refunds for mining activities remains controversial (i.e., the legislation is unclear in this regard) and rests on three tiers:

- The user of the diesel or contractor contracting on a "dry" basis must be engaged in its primary production.
- Mining activities must be in the same location as the mining operation.
- The applicant must have the necessary authorization.

The law, in this regard, is currently under review, and there is a proposed amendment to exclude mining for sand, rock, stone, soil (excluding topsoil), clay, gravel and limestone if not mined from a quarry. The proposed amendment also seeks to exclude dredging, surface collection and underground operations.

In the 2015 Budget Speech, the Minister of Finance stated that the above scheme is under review due to technical and administrative challenges. Challenges range from refund disputes with regards to subcontractors as well as the rules for small-scale activities. Clarity will also be sought about the record-keeping requirements currently in place for diesel deliveries to claimants' premises and the approval of diesel tanks on these premises.

Where the goods are imported from a related party, SARS will examine the value disclosed more closely to establish whether such transactions are in fact at arm's length.

Further rebate provisions are available in Schedule 4 of the Customs Act, which provides for the rebate of customs duty for goods imported to be used for the exploration or production of petroleum.

Machinery imported under lease agreements requires special focus as this will affect the customs value to be declared. Also, great care should be taken with transaction invoices (including progress payment invoices) to make sure that all charges are separately reflected for various activities. This is important as some charges included in a project "turn-key" price may be excluded from the value on which customs duty is paid, or subsequent payments may need to be added to the transaction value, should the basis for the payment be deemed to be dutiable. Forward cover exchange contracts may also affect the customs value in that the timing of the conversion of any foreign currency for customs valuation purposes must meet prescribed requirements.

Value-Added Tax

South African VAT is levied on the supply of goods or services by any vendor in South Africa as well as on the importation of goods. People who make taxable supplies above ZAR1million (approx. US $83 000) in any consecutive 12-month period are liable for compulsory VAT registration. A person may also, subject to certain conditions, choose to register voluntarily. Once registered, these persons are referred to as registered VAT vendors.

VAT is presently levied at the standard rate of 14% on most supplies and imports; however, there is a limited range of goods and services that are either exempt or subject to tax at the zero rates (for example, exports are taxed at 0%). Goods delivered to customers in an export country are charged with VAT at 0%. However, if delivery takes place in South Africa (e.g., indirect exports), the goods will be charged at the standard rate of 14%.

Other transaction taxes

Securities transfer tax (e.g., stamp duty) applies to the transfer of security (such as a share) of South African incorporated companies or the JSE listed shares of a foreign incorporated company. The tax is imposed at a rate of 0.25% of the higher of the consideration paid or market value of the shares.

Other

Local participation

Local participation requirements (black economic empowerment) may apply (up to a 26% stake) to be granted or to transfer new-order mining rights.

Foreign exchange controls

It should be noted that exchange control approval will be required for selling shares in a South African company that are held by a non-resident to another non-resident.

This is an administrative matter in terms of which share certificates will be stamped as a non-resident. This endorsement is important to facilitate the future sale of shares in the South African company and the remittance of dividends to non-residents from an exchange control perspective. It should be noted that the South African Reserve Bank may question why funds have not entered South Africa.

Sales of investments (shares) by South African residents to non-residents require exchange control approval. Loan agreements between South African residents and non-residents also require exchange control approval.

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ABOUT THE BOOK

"Understanding Solid Minerals Law and Taxation" was the joint efforts of members of Extractive Industry Taxation Faculty which was approved by the Council of the Institute for publication, over the years there have been limited reference materials to help and guide tax practitioners and tax administrators at various levels of government as well as students. Also, business owners who desire to venture or invest in the industry need to understand what is obtainable in the industry, therefore, this book serves as reference material to close the existing gap and provide readers with a better understanding of the law and taxation applicable in the industry.

The book contained five chapters: The Overview of Nigeria's Mines and Solid Minerals Industry; Legal Framework of Mines and Solid Minerals; Role of Institutional and Regulatory Bodies in Mines and Solid Minerals; Nigeria's Fiscal Regime in Mines; and Solid Minerals and Fiscal Regimes Lessons from Selected Economies in Africa.

If you are in the following categories: Tax practitioners, administrators, academia, taxpayers as well as students even investors and entrepreneurs, no doubt, this book is valuable material needed to enrich your knowledge and make you relevant in the ever dynamic and changing taxation environment.

ABOUT THE INSTITUTE

The Chartered Institute of Taxation of Nigeria was established on February 4, 1982, as the Association of Tax Administrators and Practitioners (ATP). Thereafter, it transformed into Nigeria Institute of Taxation, which was formally launched on February 21, 1982, and statutorily recognized on May 6, 1987, as a company limited by Guarantee.

The Institute became chartered by the Federal Government of Nigeria by the enabling Act No. 76 of 1992 (now CITN Act, CAP C10, Laws of the Federation of Nigeria, 2004) and was charged with the responsibility, among others regulating and controlling the practice of tax profession in its entire ramifications and determining what standards of knowledge and skills are to be attained by persons seeking to become professional Tax Practitioners and administrators.