BENTSI-ENCHILL LETSA & ANKOMAH

In this newsletter, we review the impact on Ghana's mining industry of the Income Tax Act, 2015 (Act 896) ("the ITA"). The objective of the ITA, which came into force on 1 January 2016, is to revise and consolidate all the income tax laws of Ghana, bring all tax rules into a comprehensive code, and improve compliance levels. Though the corporate income tax rate of 35% is preserved, the ITA introduces several changes to the taxation of income derived from the mining of minerals under a mining lease in Ghana, as well as some wholly new concepts.

Application

The ITA applies to world-wide income of companies that are tax-resident in Ghana, regardless of the source of income, and whether or not income earned abroad is brought into Ghana. For non-resident companies, the ITA applies to all income accrued from a source in Ghana. A company is tax-resident in Ghana if it is incorporated under the laws of Ghana; or if its management and control has been exercised in Ghana at any time during the relevant tax year.

Mineral income tax is imposed on all of the income of a company that is derived from the mining of minerals under a mining lease ("mining operations").

Income from business, being all gains and profits from a business, now includes gains from the realization of capital, and gifts received in respect of the business. Similarly, income from investment, which is the gains and profits from conducting investment for the year or a part thereof, now includes a gain from the realization of an investment asset.

New concepts

Ring-fencing — in determining a mining company's chargeable income, a mining company that owns or operates more than one mine shall not be permitted to deduct expenses wholly or exclusively incurred in relation to one mine from revenue derived from another mine. Each mine will be taxed on income derived from its operations as if that mine was a separate, independent business entity.

Separate mineral operation — a separate mineral operation is a mineral operation pertaining to each mine; or a mineral operation with a shared processing facility. Each separate mineral operation is treated as an independent business for income tax purposes. The transition from one type of mineral right to another, or from a lease to a mining area, does not create a separate mineral operation.

To prevent tax avoidance schemes, the provisions of the ITA require that arrangements between a separate mineral operation and any other activity of the person conducting that mineral operation must be carried out at arm's length. For example, a service agreement between a parent and a subsidiary in connection with a mineral operation owned by either party may not be considered to be arm's length.

Pool of reconnaissance and prospecting expenditure

The ITA attempts to meet criticism by the industry that the tax laws did not take into account the special needs of companies undertaking reconnaissance and prospecting operations, and to give appropriate tax reliefs for certain expenditure incurred during those operations. Companies can now capitalize all capital and revenue expenditure incurred during reconnaissance and prospecting operations. To do this, the expenditure must be placed in a pool. Deductions from the pool are not permitted, as pooled expenditure does not form part of the cost of a mining asset. Capital allowances in respect of the pool may be utilized only when production commences.

The following are excluded from the pool:

Expenditure that is not part of the cost of an asset;

Any amounts included in income from a separate mineral operation; and

The consideration received from depreciable or capital assets of the mineral operation.

Deductions

Tax deductible expenses are all expenses which are wholly, exclusively and necessarily incurred in acquiring or improving a valuable asset used in mining operations, or acquiring services or facilities for mining operations. A company cannot claim the balance of a reconnaissance and prospecting expenditure pool as a deduction.

Some tax exemptions

Gains from mergers, amalgamations, re-organizations are tax-exempt if there is at least 50% continuity in underlying ownership of the asset.

Dividends paid by a resident company to another resident company that directly or indirectly controls at least 25% of the voting power in the paying company are exempt from tax.

Monies in, or withdrawn from, an approved rehabilitation fund by a mineral right holder for the purpose of rehabilitating an area is exempt from all tax.

Mining machinery and equipment imported under the general concessionary and duty-free tariff regime of the Ghana Revenue Authority (the Mining List) – are not subject to VAT.

Withholding tax rates

In respect of:	Now	Then
Interest on payments (excluding payments to individuals)	8%	8%
Dividends	8%	8%
Natural resource payments, royalties and rent	15%	10%

Service fees paid to a resident person	15%	15%
Service fees paid to a non-resident person	20%	15%

Capital gains tax and gift tax

Capital gains and gifts must now be included in the category to which they relate (e.g. investment income, employment income or business income). The gain or gift is then taxed at the rate of the relevant category. So, capital gains incurred upon realization of an asset will be taxed as business income, and any losses incurred upon realization of an asset will be offset against business income. Gifts given to employees must be included in that employee's employment income and taxed accordingly. Similarly, gifts received by a company must be included in the company's business income and taxed accordingly.

Thin capitalisation

The thin capitalisation rules, which define the debt-to-equity ratio above which interest payments on all forms of debt shall not be tax deductible, has increased the ratio from 2:1 to 3:1. Also, the limits on the applicability of the thin capitalisation rules have been removed and so the rules now apply to all debt, not just shareholder and related party loans.

Losses

An unrelieved loss may be carried forward and treated as incurred during any of the following 5 years of assessment. Losses must be utilized in the order in which they were incurred.

Capital allowances

Mining companies are granted deductions for capital allowance at a rate of 20% each year in respect of depreciable fixed assets. Any part of that capital allowance that is not utilized within the year is written off. Where separate mineral operations utilise the same asset, capital allowance must be apportioned between the separate mineral operations in proportion to their use of the asset.

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