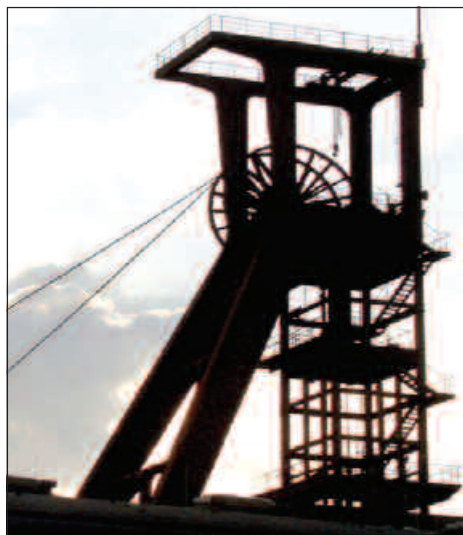


Aspects of a tax claim for rehabilitation



The act refers to November 2 2006 as the commencement date. This being the case, the existing provisions relating to deductions claimed prior to November 2 will continue to apply under the ambit of section 11(hA).

The second comment relates to the compliance requirements associated with section 37A. The current wording of section 37A(5) provides that any constitution of a company or instrument establishing a trust that conducts the functions of a rehabilitation fund, should incorporate the provisions of section 37A and any subsequent amendments.

There is no obligation, as currently worded, for the constitution or trust deed to be lodged with the South African Revenue Service (SARS) commissioner for prior approval. If this was the case it would be assumed that the wording of the act would be explicit as, for example, with the wording contained in section 30 relating to public-benefit organisations.

Practically, however, it appears that SARS does require sight of the relevant constitutional documents and will have to give their approval before confirming the status of the entity concerned as falling within the ambit of section 37A.

The confusion may stem from the fact that the deleted wording of section 10(1)(cH) did impose a positive obligation on the entity concerned to obtain the prior approval of the commissioner for the content of the constitutional documents.

The new sections therefore create a mismatch between the legisla-

tive provisions and the practical requirements for SARS.

The proposed amendments to the provisions of section 37A(5) as contained in the Taxation Laws Amendment Bill of June 7 2007 do not remedy the lacuna that has been created. The amendments only provide that to the extent that a company or a trust has founding documents that do not comply with the provisions of section 37A, there is a grace period of two years within which the noncompliance will be condoned, subject to the proviso that a written undertaking is furnished to the commissioner confirming compliance with the provisions of section 37A.

THE immediate question is how this will be implemented. It may well be that there is a trust deed in existence that in no way reflects any of the provisions of section 37A. Given the fact that the trustees' powers are limited to those contained in a trust deed, it may not be possible for the trustees to comply with the provisions of section 37A even if that is the intent. In the situation of a company, it could be easier for there to be compliance with section 37A.

In conclusion, it would seem that the regulation of the structure and operations of a rehabilitation fund are important for SARS, and even though there is no explicit reference in the section to submission or confirmation of acceptance of any particular trust deed or company document, the practice that has been adopted is for SARS to grant its consent to the relevant terms of the trust deed or company documents.

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create a framework for deduction of payments made to a so-called closure rehabilitation company or trust, commencing on or after November 2 2006.

This section was introduced under the Revenue Laws Amendment Act of 2006.

According to the explanatory memorandum, its purpose is to streamline the administration of funds held by a rehabilitation fund.

Rehabilitation funds will be applied towards environmental rehabilitation upon closure of certain activities, including prospecting, exploration and mining.

Before the introduction of section 37A, the act made provision for claiming deductions for monies paid by a taxpayer carrying on mining, prospecting, quarrying or similar operations to a company, society, association of persons or trust referred to in section 10(1)(cH).

So how environmentally friendly is our tax law relating to deductions for closure rehabilitation?

Section 37A, as currently worded, applies to prospecting, exploration or mining. The deduction is limited to taxpayers undertaking these

particular types of activities. In his 2005 budget speech, the finance minister indicated there was a possibility for extending tax relief to other industries, such as the chemical and electrical-generation sectors.

The scope and reach of section 37A does not meet this goal and further amendments may be required to address additional environmental issues not covered by section 37A. The section does provide a simplified approach to claiming deductions in that the cumbersome formula included in section 11(hA) does not apply to those deductions claimed after November 2.

Although the wording of the Income Tax Act seems to be clear regarding the timing of the implementation of the new section 37A, practical implementation appears to be lagging behind.

There are two interesting observations that can be made to the application of the section.

Firstly, there is the issue of the timing of application of the section.