Benhaus – a landmark decision, one less hoop for contract miners but a clarion call for an overhaul of the South African mining regime

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Dates:
Received: 25 Nov. 2019
Revised: 21 Jul. 2020
Accepted: 19 Aug. 2020
Published: August 2020

How to cite:
Thambi, K.
Benhaus – a landmark decision, one less hoop for contract miners but a clarion call for an overhaul of the South African mining regime.
The Southern African Institute of Mining and Metallurgy

DOI ID:
http://dx.doi.org/10.17159/2411-9717/1031/2020

ORCiD ID:
K. Thambi
https://orchid.org/0000-0003-4456-3027

Synopsis

The mining industry has evolved, such that the means of production that were once in the hands of major players or power houses have become equally accessible to smaller entrants, *i.e.* junior mining companies and contract miners. Contract mining involves contractual relationships between mine owners or mineral right holders and third parties to conduct mining activities on behalf of the right holders. The current mining income tax legislation has been a considerable obstacle to contract miners. Under its terms, they have been viewed as mining on behalf of third-party mineral rights holders. As such, expenditure incurred in relation to contract mining activities was often disallowed by the South African Revenue Service (SARS). However, the recent judgement of the Supreme Court of Appeal, Benhaus Mining (Pty) Ltd v CSARS 2020 (3) SA 325 (SCA) (Benhaus), rightfully or wrongfully, appears to provide clarity regarding the fate of contract miners' involvement in the mining value chain. The taxpayer, a contract miner, was held to be conducting mining operations within the meaning of S15(a) read with s1 of the Income Tax Act 58 of 1962 (the Income Tax Act). This paper looks at how contract mining has traversed the mining tax landscape, the implications of the Benhaus judgment, and stresses the necessity for clear policy reform to the mining tax regime and equally to legislation framed to give effect to these policies.

Keywords

Contract mining, owner mining, tax, DMRE, mining regime reforms.

Introduction

The mining industry's' evolution is punctuated by factors such as legislative amendments to the Income Tax Act 58 of 1962 (the Income Tax Act), the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry 2018 (the Mining Charter), and the Customs and Excise Act, 91 of 1964 (the Customs Act), not to mention ancillary factors such as restrictions of changes in ore grades, technological advances, national and international standards. Mining is a major contributor to South Africa's economy, directly and indirectly, through job creation and the sustainable development of the communities within which mining companies operate (among others). However, the establishment of a mine involves high startup capital and infrastructure costs, and the assumption of excessive risks with long lead times before any profits are reaped; and these factors have a major impact on the cash-flow implications for a newly established mine. In recognition of these factors and in a bid to encourage mining, from the aspects of both investment and job creation, government incentivized the mining industry. These incentives took the form of tax incentives (among others), namely the deduction of capital expenditure incurred for a mining operation (Redemption Allowance) (Tickle, Ajam, and Padia, 2016).

In spite of the intent behind these tax incentives, it is apparent that at the time of conceptualizing and drafting these provisions, factors such as 'contract mining' were not on the horizon. Furthermore, there have been no efforts at establishing an alignment and/or synergy between the mining income tax regime and South Africa's highly evolved mining industry practices. Thus for most parts both have at times often been incompatible. Current mining income tax legislation and its implementation posed insurmountable burdens for miners and contract miners alike. In terms of the current legislation, contract miners are categorized as mining on behalf of third-party mineral rights holders. As such, expenditure incurred during their contract mining activities has been disallowed by the South African Revenue Service (SARS). SARS' reasoning for this was that the core element of mining is the generation of income from the sale of minerals and that, unless a person is engaged in such sale, that person is not carrying on mining operations. By implication, contract miners were seen as not engaged in mining operations but mere service providers to persons who are mining (Tickle, Ajam, and Padia, 2016).

The contentious issue between SARS and Benhaus Mining (Pty) Ltd (Benhaus) was essentially whether income derived by a company that, in terms of a contract with another company, excavates and removes topsoil, blasts rock, extracts, crushes, and screens the chrome-bearing ore, and delivers it, for a predetermined fee, to that other company which mills, washes, and smelts the concentrate to produce ferrochrome is 'derived ... from mining operations' in terms of section 15 read with section 36(7C) (Income Tax Act).

Benhaus had extracted and delivered mineral-bearing ore on behalf of the mining rights holder for a predetermined fee. Despite having several contracts with other mines, it included the income earned from these mines as a global amount. Even though Benhaus acknowledged that it did not conduct the full spectrum of the chrome mining process, it proceeded to claim the related deductions in respect of its extraction and deliveries in its income tax returns. In claiming such deductions, it relied on the basis that it was conducting mining operations as defined in the Income Tax Act.

In terms of the judgement handed down by the Supreme Court of Appeal, the taxpayer, Benhaus, a contract miner, was held to be conducting mining operations within the meaning of s15(a) read with s1 of the Income Tax Act. While the case sheds some light regarding the place of contract miners within the mining value stream for income tax purposes, it focuses attention on the need to address longstanding inefficiencies and incongruence in the mining regime as a whole. There has been a definite lack of alignment between various departments, policy considerations, and processes, a lack of appreciation of the operational issues between mining right holders and contractors alike. This inadvertent disjuncture, is the 'elephant in the room'.

The problem

The fate of contract mining hinges on whether the interpretative process in the Benhaus judgement of the current legislation is an exact one. If so, then there are aspects of the 'mining' regime, that require policy reviews/intervention and alignment to current industry practice, failing which there are may be unintended consequences against the backdrop of this judgment. The problem is multifaceted. Firstly, mining tax legislation was not initially designed to provide for contract mining. SARS has long relied on policy considerations that are in the current mining climate. The definitions of 'mining operations' and 'mining' are broad, and the requirement that minerals be 'won' is counterintuitive to these definitions; limiting the winning of a mineral to a single taxpayer. Secondly, mining is limited to persons who 'hold' mining rights in terms of the MPRDA. Thirdly, this is exacerbated by the fact that contractual arrangements between holders of mineral rights and contract miners remain unregulated. Finally, there is no synergy between the diverse legislation (and regulations) that impacts the mining industry.

Brief background to contract mining

Today, mining operations include both internal and subcontracted functions. While larger companies whose core business is mining prefer that their operations be controlled and managed by the owner's team junior mining companies rely on contract miners as they often lack sufficient experience to carry out mining operations. Where joint ventures are involved, the default seems to be the utilization of contractors as a bargaining chip or 'deal sweetener' for both parties. (Keel, 2018; Rupprecht, 2015). Ultimately, it boils down to 'control'. Although in most cases control normally vests with the party owning or leasing the mining equipment, it is the control of the actual mining process which determines whether an operation is owner mined or contract mined. However, the decision between owner mining and contract mining remains a corporate one, taken in conjunction with project-specific issues such as life of mine, mining rate and variability of the mining rate, availability and experience of personnel, project management issues, and financial limitations (Rupprecht, 2015).

Starting a new mine in a remote area poses challenges to mining companies, as the local available labour pool does not have the necessary skills to operate large specialized equipment. In such scenarios contract mining allows for the prompt deployment of modern equipment and a skilled workforce, while providing cost efficiencies and effective performance management systems, and still securing attractive commercial terms for additional capital equipment requirements. In other words, it provides owners with some advantages, *i.e.* economies of scale and scope through access to capital equipment and human resources; optimized mining, plant, and equipment utilization rates and labour productivity; and minimization of the owner's capital exposure. This allows the company to better utilize capital and better equip (or re-equip) mines with restricted capital budget. (Keel, 2018; Rupprecht, 2015). The downside to the use of contractors is that the owner does not have direct control over mining activities or health and safety issues (Rupprecht, 2015). This is exacerbated by their inability to access capital needed to procure equipment, which has a knock-on effect on other core business, turnaround time, and changes in the pace and nature of mining operations (van Wyngaardt, 2013). Another downside is the uncertainty of unregulated contract mining arrangements, as to who is engaged in mining and therefore whether the owner of the mining right or the contract miner could claim the relevant tax allowances (Tickle, Ajam, and Padia, 2016).

Nevertheless, in practice there are various permutations to contract mining. Often the contractor undertakes mining operations for the benefit of another, and receives no share in the resultant profits other than a negotiated fee related effort and costs. Sometimes, especially in the case of opencast mining, the owner of a mine or mine 'owner' subcontracts all or a portion of the mining operations to a third party. Typically, the contracting arrangement requires a third party or contract miner to use earthmoving equipment to win ore by opencast mining methods and transport the ore to a processing plant. Evidently, when applying these scenarios to tax incentives as per the current mining income tax, the results indicated that the contractor was clearly 'conducting a process by which a mineral is won from the earth'; thus the income that he derived ought to be taxed in accordance with mining tax rates and the expenditures deductible in accordance with the special mining tax provisions. Of course, to the extent that the contractor does not undertake the mining operations but merely rents or leases capital equipment to a party who does undertake such operations, the contractor is not undertaking mining operations. In Gloucester Manganese Mines (Postmasburg) Ltd *v* Commissioner for Inland Revenue 1943 TPD 232 (12 SATC 229) (a case relied on by the litigant Benhaus), the taxpayer granted the sole right to mine manganese on a certain property to a third party, in return for a lease charge of 25% of the net profits. It was held that the lessee was carrying on mining operations. In fact, since the lease did not constitute a partnership, the lessee was the only party carrying on such operations.

Despite courts justifying the disallowance of capital expenditure incurred by contract miners based on the latter's degree of 'risk-taking', contract miners do engage in various levels of risk. There are several risks in mining regardless of who does the actual mining. The mine owner bears the risks of geological modelling, grade control, mine design, geotechnical stability, environmental and community issues, and the instability of the market price for the end product (Kirk, 2002). However, when evaluating contract and owner mining, the main comparative risk areas are equipment selection and matching, equipment performance (productivity, availability, and utilization), quality and control of the ore, health and safety, human resources management, contractual and litigation issues, and production or operating costs (Suglo, 2009). Not to mention the fact that contracting companies have traditionally followed a very specific remuneration and benefit model so as to operate at a lower cost base and to remain profitable.

Context to the Benhaus judgment

Prior to the Benhaus judgment, the Tax Court had dealt with the issue regarding contract mining and the redemption allowance in two cases.

The Tax Court, in ITC 1913 (supra) and ITC 1907 80 SATC 271 (Classic Challenge Trading (Pty) Ltd), vigorously justified a finding that the core element of mining is the generation of income from the sale of minerals and that, unless a person is engaged in the sale of the minerals, that person is not carrying on mining operations. In both instances, the findings had been that the contract miner was a service provider to the person or persons who were mining and therefore not engaged in mining operations.

Following these two earlier judgments of the Tax Court regarding the applicability of the Redemption Allowance to contract miners, Benhaus articulated something very different. The court *a quo found* stated that Benhaus was not engaged in mining within the meaning of sections 1 and 15(a) of the Income Tax Act and was therefore not entitled to deduct the capital expenditure in respect of the equipment it used for the extraction of mineral-bearing ore from the ground as it did not derive its income from mining operations.

The activities undertaken by Benhaus on behalf of its clients were as follows per paragraphs [11] and [12] of the judgment of Lewis ADP:

> '[11] *The services that Benhaus rendered included establishing sites for open cast mining, and fencing them off; constructing workshops; constructing and maintaining access roads, and primary and secondary haul roads; removing topsoil and stockpiling it in designated areas; excavating and stockpiling material extracted from the ground; removing waste; constructing storm water drainage; blasting mineral-bearing ore; delivering the ore to the client's premises for processing; and rehabilitating the mining area after extraction.*
> [12] *The essence of the contracts between Benhaus and its clients was to extract the mineral bearing ore (the mineral being chrome) on behalf of the client in return for a fee calculated at a rate per ton of chrome-bearing ore that was delivered to the client's processing plant…'* (Benhaus, 2019).

Benhaus claimed the deduction of capital development expenditure in terms of section 15 of the Income Tax Act. In disallowing this claim, the crux of SARS' reasoning was that mining is a risky business in which the return on investment is unpredictable and that policy considerations indicate that Benhaus should not be entitled to claim mining incentives. It went on to say that the mining allowances were designed to incentivize mining development; and since contract miners earned returns upon commencement of mining operations they had thus not carried any risk therein. Despite SARS' reliance on policy considerations, including the 2016 Davis Committee Report, Lewis ADP found that the court was not concerned with policy but with interpreting the law in light of the facts (Benhaus, 2019).

Lewis ADP focused on two primary issues, which had been central to the judgment of Sutherland J in ITC 1907. The first issue was the proposition that a person could only be conducting mining operations if they bore the risk inherent in the operation. To which Lewis ADP (at paragraph [27]) acknowledged that this may have been the case in the precedent that had been relied upon by Sutherland J; however, she added that it was not evident as to why the question whether an entity is conducting mining operations is dependent on the miner bearing risk (Benhaus, 2019).

The second issue at paragraph [29] of the judgment was that it is inconceivable that any part of the process of winning minerals from the earth could constitute mining operations. The definition of mining and mining operations refers to a process 'by which any mineral is won from the soil or from any substance or constituent thereof'. This could be construed in such a way that both the entity that dug the mineral-bearing ore from the earth and the entity that operated the process of separating the mineral from the ore or rock would be involved in mining the same mineral. That construction, she held, was incorrect (Benhaus, 2019).

On appeal, the main question was therefore whether the first stage of the chrome mining process constituted mining under the Income Tax Act, *i.e.* whether Benhaus conducted mining or mining operations (Benhaus, 2020). The court gave due consideration to the clear meaning of the term 'mining operations', and the approach adopted in Western Platinum Ltd *v* CSARS, *i.e.* properly construed, the definition of mining or mining operations, referred to a taxpayer conducting the business of extracting minerals from the soil.

The question confronting the SCA was in essence a question regarding the correct interpretation of the Income Tax Act. Some scholars argue that the SCA digressed in applying a literal approach to the definition in section 1 of the Income Tax Act as to whether Benhaus was conducting mining operations.

Nevertheless, what is pivotal is Mocumie JA's argument in the concurring judgement. She called for the necessity to amend the Income Tax Act. Failing to do so, she added, would merely exacerbate the void between the meaning of mining operations in the Income Tax Act and its corollary of accelerated tax deductions, resulting in a class of unintended beneficiaries, to the detriment of the fiscus.

Aspects of the 'mining' regime, that require policy reviews and alignment to current industry practice

The Benhaus judgement may address but one aspect of the mining regime, wherein the contract miner is a 'player'. In executing their mandates, contract miners may be confronted with additional variables geared for mining right holders and *vice versa* (over and above the Income Tax Act, already discussed above per Benhaus *et al.*), *i.e.* the MPRDA, the Mining Charter, and the Customs Act (among others).

Income Tax Act 58 of 1962

In terms of the Income Tax Act, taxpayers engaged in mining operations are provided with a special dispensation. This special dispensation entails the application of specific rules to the deduction of prospecting expenses and capital expenditure incurred in engaging in mining operations. The Tax Act defines mining operations and mining as including: 'every method or process by which any mineral (including natural oil) is won from the soil or from any substance or constituent thereof'. 'Mining' and 'mining operations' seemingly include the extraction of mineral-bearing ore and the extraction of the mineral or minerals contained therein. Notably, the use of the word 'include' in the definition was meant to indicate that the meaning is not intended to be an exhaustive guide. Furthermore, the application of the relevant sections allowing a deduction for capital expenditure relies on the term 'mineral'. Despite the fact that the term 'mineral' is of great significance in the overall definition, for income tax purposes, of mining operations and mining, the term is not defined in s1.

However, the term 'mining operations' has a somewhat different meaning in terms of s15(a), which incorporates more than merely excavating and extracting mineral-bearing ore. Nevertheless, the provisions of s15(a) of the ITA, read with s36(7C), in light of the definition of 'mining operations or mining' in s1, provide the mechanism and requirements for the deduction of capital expenditure incurred for a mining operation (Redemption Allowance). Section 15 of the ITA provides that a deduction shall be allowed as per s36, in lieu of an ordinary deduction under s11. Section 36 in turn provides for deduction of any capital expenditure from income derived from 'working' any producing mine. The standard deductions relating to capital expenditure require amortization of the expenditure over the useful life of the asset. The effect of these provisions means that a taxpayer engaged in mining operations on a producing mine will be entitled to fully deduct related capital expenditure in the year of assessment it was incurred. However, the core element of mining is the generation of income from the sale of minerals. Therefore, unless a person was so engaged, that person was not carrying on mining operations (van Blerck, 1992; Tax Act, 1962).

Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)

The provisions contained in the MPRDA, which is the principal law governing/regulating the mining industry, affirms the need for the establishment of a nexus between a mining right and mining activity. This approach aligns with the mandate of the MPRDA, *i.e.* equitable access to and sustainable development of the country's' mineral resources, and related matters.

Furthermore, section 5A of the MPRDA provides that '[n] o person may... mine... or commence with any work incidental thereto on any area without... a... mining right'. It limits mining to persons who 'hold' mining rights in terms of the Act. The MPRDA, being a gatekeeper, is a means of securing accountability by the rights holder to ensure compliance with requirements associated with the mining rights. It is also a means at ensuring that the intended beneficiaries of the rights (the mining rights holder) do not subvert their rights contractually to someone else (Tickle, Ajam, and Padia, 2016).

Section 38 of the MPRDA provides that holders of permits or rights in terms of the MPRDA must give effect to the objectives of integrated environmental management laid down in Chapter 5 of NEMA. As such, it is effectively the mining right holder's obligation to make financial provision for the rehabilitation or management of negative environmental impacts before approval of its Environmental Management Plan (EMP). Equally, the mining right holder has to maintain financial provision until receipt of a closure certificate.

Lastly, section 37A of the Income Tax Act attempts to connect the aforementioned regulation regarding mining rehabilitation with tax policy, by establishing a mining rehabilitation fund. This section applies strict rules and allows a tax deduction for cash payments made to a dedicated mining rehabilitation fund. To the extent that there has been a contravention of Section 37A, Section 37A (8) is a catch-all provision that ensures that the rehabilitation fund and mining company pay tax where it is triggered.

The Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (Mining Charter)

The Mining Charter came into force on 1 March 2019. The Guidelines do not address ambiguities created by the Charter. What is more, they contain provisions that give reason for alarm: to name but one, 'the absence of provisions for the amendment of existing mining rights; and the Minister's seemingly unlimited ability to review and revise the obligations imposed under the Charter from time to time' (Leon, 2019).

However, interestingly, the Mining Charter 2018 does recognize contract miners/mining in paragraph 5.7...

> '5.7 Contractors and inclusive procurement
> 5.7.1 Where a mining right holder uses a contractor to undertake extraction and/or processing (crushing and concentration) of minerals on their behalf, any mining goods and services used by the contractor will be deemed to have been used by the right holder.
> 5.7.2 The mining right holder will therefore be expected to report on the procurement element using procurement spend data from their contractor' (Mining Charter, 2018).

These are factors that can easily be incorporated in the contract mining arrangements.

The Customs and Excise Act, 91 of 1964 (Diesel Rebates)

The Tax Court had to determine, in a recent decision, which activities qualify as 'primary production activities in mining' as required by note 6(f) of Schedule 6, part 3 of the Customs and Excise Act, for a taxpayer to qualify for the specific diesel rebates. The court determined that the rebate in question was available to taxpayers in the business of mining. It added that this ensured that these businesses could be internationally competitive. As such the term 'mining' was interpreted accordingly. The court went on to interpret the term mining to include 'the process or business of digging in mines to obtain minerals' (Glencore Operations SA (Pty) Limited *v* The Commissioner for the South African Revenue Service unreported case no 11696/18 of 24 October 2019 para 30 and 35).

The way forward

No doubt, Benhaus is a landmark case. In retrospect, the case deals with the salient issues affecting contract mining. It ameliorates the impact that the current mining income tax regime has had on contract miners. This includes measures to try to fit contract mining into a somewhat discombobulated framework, never designed with contract mining in mind.

However, this case signals the need for the DMRE, in consultation with the various stakeholders, to review current policy considerations relating to mining as a whole. The start, as per scholars, including the Davis Committee, is the recommendation for the sorely needed amendment of the Income Tax Act, as well as the establishment of clear policies for the taxation of mining income; in equal measure to legislation framed to give effect to these policies, and aligning the mining regime to industry norms. Secondly, research into policy considerations that seek to consider South Africa's National Development Plans in resuscitating the mining sector. These are changes one can hope to see in the near future (Tickle, Ajam, and Padia, 2016).

In the interim

Pending the aforementioned overhaul of the mining income tax and mining regimes, due consideration should be given to the ideologies of 'agency-principal' in relation to contract miners and mining right holders. To facilitate this concept, the Davis Tax Committee recommended the setting up of a comprehensive guide containing the terms under which the agent and principal would operate. The Treasury, working with SARS, could also provide guidance by ameliorating the practical implication of the findings in this judgment.

Furthermore, the issue around unregulated contract mining arrangements could be addressed by requiring the lodging of respective contracts at the DMRE; as addendums to new and/or existing mining right holders permits. This would ensure the establishment of accountability as well as compliance with the aforementioned legislation, and enable the regulator (DMRE) to retain control of the mining processes, and possibly intercede or adjudicate such contract terms where necessary.

Conclusion

In terms of the Mining Charter 2018, South African mines have to drastically change their operating model and ensure that they align with global and national strategies. Furthermore, as Rupprecht (2015) suggests, in future, owners must fully understand when to use contract mining and when to pursue owner mining. Until the mining regime has been given a complete overhaul, it is important that owners fully understand the technical and economic ramifications of engaging in contract mining (per the Benhaus case), while ensuring that they have a handle on their contract management systems. If the mining sector is to truly become the 'sunrise industry' that the government wishes it to be, it will have to become more proficient in how it regulates the industry (Leon, 2019). Current policy initiatives do not sufficiently address the fragmentations facing the mining industry, nor do they support developmental linkages, to sustain this sector – a sector that hovers between policy and politics.

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