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Some Aspects of Mining Taxation

A report in partial satisfaction for the degree of LL.M
of the University of the Witwatersrand

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GENERAL HISTORICAL INTRODUCTION

1

1.1 "Taxation is part of the price of civilisation; for whilst it is possible to have Government without taxation, it is not possible to have taxation without Government. It was, therefore, a comparatively late arrival on the scene of social development: "for man, the hunter, man the farmer and man the villager remained for the most part in happy ignorance of any form of taxation." (B E V Sabine, 'A Short History of Taxation'). Although Sabine was dealing with tax in the United Kingdom, his words were equally true of the position in South Africa and as will be seen later, income tax was a very late development in the history of South Africa.

1.2 Taxation was introduced into the United Kingdom shortly after the Norman Conquest. In comparison with its European neighbours, Normandy was unusually developed and possessed certain elements of direct taxation, having a fairly well developed taxation system to finance its feudal states.

1.3 The first tax levied in the United Kingdom was 'Danegeld' which was a tax on land. During the 12th Century under Henry II, a tax known as 'scutage' was introduced. In the forty-five years of Henry II's reign, he exacted 8 scutages, the rates varying from £1 per Knight to at least double that for the Clergy. Scutage was eventually replaced by 'tallage' which was originally the right of the Lord of the Manor to tax his villeins.

1.4 The idea of taxing income and chattels was already making its appearance in the 12th Century, when a tax on movables was impose to subsidise the first Crusade. In 'Legal Milestones (3). The Introduction of Income Tax' Professor Broomberg said in De Rebus, March 1981 at 129 -

> "Thus, new taxes are, more often than not, the children of war. Certainly this is true of the income tax (which was born twice, both times in response to war situations)."

He was referring to Pitt's Income Tax Act of 1799, which was repealed after the Peace of Amiens in 1802 and reintroduced in 1803 when war broke out again. He might well have referred also, to the situation under Henry II, since the Crusade was a Holy War.

1.5 In relation to this tax on movables, Sabine (op cit at p.25) said -

> "Henry II in 1166 ordered a levy of tuppence in the Pound on all movables The contributions, which were self-assessed, were to be paid into chests provided in every Parish. Fraud was to be punished by excommunication, but it is a fiscal axiom that the oath of the taxpayer never has formed the basis of fair taxation, except when combined with some power of verification."

Here we see the birth of the rule regarding the burden of proof, which by Section 82 of the

Income Tax Act No 58 of 1962, as amended ("the Act") is placed upon the taxpayer claiming that he is entitled to some exemption, non-liability, deduction, abatement or set-off. It is also the origin of the reluctance of tribunals to rely upon the ipse dixit of the taxpayer.

1.6 1489 saw the birth of what became known 'Morton's Fork' or the 15th Century version of Catch 22. Chancellor Morton introduced a statutory tax on income which was administered by commissioners who were not just collectors, but, in fact, made assessments "after their discretion". The rate was the tithe which was imposed on all freeholders from 1 January 1489. The taxpayer was entitled to deduct rents, fees and services. There was also a tax on immovables. The principle of 'Morton's Fork' was that -

> "Such as are sparing in their manner of living, must have saved money, while those that live in a splendid manner, give evidence of ability to pay."

1.7 One Will and Mary, C 20 of 1688 is remembered as the 'Original Land Tax Act'. In fact, however, it was theoretically designed to levy a general

tax on income. Sabine states at p. 103 that -

> "Liability was attached to the first place to income arising from estates in ready money or debts or in goods, wares or any other personal estate; after deducting 'desperate debts and moneys bona fide owing'."

This tax ceased in 1712.

1.8 It was round about this time that we see the origins of the present day sales tax. Theorists such as Hobbes and Sir William Petty, advocated a theory that a man's total expenditure was an equitable test of his taxability. Tax was imposed on a large variety of items. There was the notorious salt tax, a widows tax and many others. The interested reader is referred to the humerous, but rather sad "Earl Grey" poster appearing on the cover of the March 1981 edition of 'De Rebus' referred to in 1.4.

1.9 William Pitt was greatly influenced by Adam Smith's 'The Wealth of Nations' which was published in 1776. But according to Sabine, what really influenced Pitt to a major degree in deciding to introduce an income tax into the

United Kingdom, was the "dixieme or 'tenth' of Louis XIV imposed in 1710 on all incomes under four schedules, realty, salaries, securities and businesses."

1.10 The real beginning of income tax as we know it today in the United Kingdom was 3 December 1798, when Pitt rose as both Prime Minister and Chancellor of the Exchequer to deliver his budget speech. In the course of his speech, he confessed that he was a belated convert to income tax and that only then was he convinced that -

> "A general tax should be imposed on all leading branches of income."

The tax continued to be in force (with the short break referred to in 1.4) until 1815 when it was dropped. It was again imposed in 1842 under Sir Robert Peal and henceforth continued as an annual tax in the United Kingdom.

2 An abridged history of the taxation of Gold Mines in the Transvaal

2.1 Law No 1 of 1871 of the Zuidafrikaansche Republiek was, what might be termed, the first gold law of the Transvaal. The main purpose of this

law was to make provision regarding the discovery, the control and the management of the lands on which precious stones and precious metals might be found in the Transvaal. Section 1 of this law set a precedent which has been followed ever since in South Africa, when it provided that the right to mine all precious stones or precious metals belongs to the State, without prejudice to rights already acquired by private persons. Although this section did not deprive landowners of the ownership of precious stones and precious metals situate in, on or under their land, but only vested in the State the right to mine them, in practice there does not appear to be a great difference between the two concepts. The taxes collected by the State during the early day of the Zuidafrikaansche Republiek were mainly personal and land taxes. The first signs of the introduction of the tax on gold appeared in Article 38 of Law No 6 of 1875, which imposed a levy of Stg. 3/- on each ounce of gold produced by companies to which concessions had been granted over land not profitable to be worked by individuals. One third of this levy was paid to the landowner.

2.2 This levy was followed by Law No 1 of 1883, Article 33 of which required all claimholders to pay to the Government each month 2½% of all gold produced By Article 28 of Law No 15 of 1896, the holder of a mynpachtbrief was required to pay to the State the greater of Stg. 10/- per morgen per year in respect of the land covered by his title, or 2½% of the 'gross income' during the year. It was not until 15 February 1899 that the first direct tax on gold mining profits was introduced This is to be found in 'Regulations regarding the payment of a 5% tax on the net profits of gold mines contained in the 'Staatscoerant' published on 15 February 1899.'

2.3 The next development in the saga of the taxation of gold took place on 5 June 1902 when the Administrator of the Transvaal, by the Profits Tax (Gold Mines) Proclamation, No 34, 1902, repealed the existing 1899 Tax Regulations and by Section 2 imposed a tax of 10% on the annual net produce obtained from the working of claims and mynpachts and other gold-bearing properties situated in the Transvaal Colony. 'Annual net produce' was defined as 'the value of the gold

produced after deduction therefrom of the cost of production and of such sums as may be allowed in respect of the exhaustion of capital as hereinafter defined'. Cost of production was defined as being all amounts actually expended during the year on winning and treating the ore under heads specified in an account contained in a schedule annexed to the Proclamation, but excluding all amounts of a capital nature.

2.4 I quote Section 4 of the Proclamation ir full, because it is clearly the forerunner of the definition of capital expenditu e contained in Section 36 (11) of the Act. The definition was -

> "(1) all amounts actually expended in mine equipment, shaft-sinking, and development, whether incurred before or after the commencement of production not being of a recurrent character, or such as are ordinarily defrayed out of revenue; and
>
> (2) all amounts expended for ordinary purposes of administration prior tc the commencement of production."

The Proclamation also made provision for a determination of 'the exhaustion of capital' which was also defined and provided for an allowance for that exhaustion which was to be such sum which, if paid by way of annuity over the life of the mine, would at 3% compound interest, produce an amount equal to the amount of such capital.

2.5 There must have been some problem regarding the interpretation of that portion of Section 4 of the 1902 Proclamation which referred to 'all amounts actually expended'. The meaning of those words was, by Section 3 of the General Revenue Amendment Ordinance, No 23 of 1906, deemed to be "the net amounts expended after taking into account all refunds, rebates, discounts and like recoupments". The provisions of the 1902 Proclamation, as amended, bear a remarkable similarity to the provisions for the taxation of mines as it now exists in the Act. The principal features have remained unchanged in concept, although the details have been modified in various ways.

The next legislation [illegible] was the passing in the Transvaal of the Precious Base Metals Act, 1908 (No 35 of 1908) - the Gold Law which was only replaced in 1967 by the Mining Rights Act, No 20 Of 1967. Section 46 (2) (d) of the Gold Law directed that in the case of a mining lease, no tax should be payable on the annual net produce under the 1902 Proclamation, and this situation continued until 1918, after which a share of profits derived from a lease granted to a mynpacht holder of land adjoining his mynpacht was payable to the State in addition to taxation.

Shortly after the establishment of the Union of South Africa, Parliament enacted the Mining Taxation Act, No 6 of 1910, which came into force on 30 December 1910. This act repealed the Profits Tax (Gold Mines) Proclamation of 1902 of the Transvaal, as amended, together with other relevant laws in the other Provinces of what had become the Union. The Mining Taxation Act provided for differential rates of tax on the profits of mining, these rates being 10% in the case of diamonds and gold and a sliding scale depending on the ratio of profit to gross

revenue, in the case of other minerals. Section 4 (1) of the Act, defined 'profits' as all revenue after deducting therefrom "the amount of the working expenditure and an allowance for amortisation of capital expenditure, as hereinafter provided". An interesting provision in this act was Section 6 which, in order to avoid double taxation of Gold Mines, directed that where the State was entitled to a share of profits under the 1902 Proclamation (which it repealed) and such share was not less than the tax leviable under the 1910 Act, no tax should be payable. There was a further direction that future leases granted by the State for the mining of gold, should provide for the payment of an amount of not less than the tax leviable under the 1910 Act.

2.8 All these provisions for the taxing of gains derived from mining, preceded the introduction of a general Income Tax Act in South Africa. That situation terminated on 20 July 1914, with the introduction of the Income Tax Act No 28 of 1914. Prior to the passing of this Act, there was no general tax on income in the Transvaal or

Orange Free State although such a tax was introduced into the Cape by Cape Act No 36 of 1904 and into Natal by Natal Act No 33 of 1908.

2.9 Section 5 ( ) of this act exempted from income tax, dividends received from -

2.9.1 a company liable to tax on its profits derived from mining; or

2.9.2 a company holding a gold mining lease under Section 46 of the Gold Law and itself exempt from tax as set out in 2.6.

Section 5 (n) exempted from tax, income derived from mining and subject to tax in terms of the Mining Taxation Act No 6 of 1910 or exempt from tax in terms of Section 46 (2) of the Gold Law, ie where, in terms of the lease with the Transvaal Government, a share of the annual produce was payable to the Government. The exemption under Section 5 (n) did not apply to income derived from sources other than mining.

2.10 The Mining Taxation Amendment Act of 1915 repealed Section 46 (2) (d) of the Gold Law,

whilst retaining the tax exemption arising out of leases granted before the Amendment Act was passed. The 1914 Act was replaced by the Income Tax (Consolidation) Act No 41 of 1917 and at the same time, the Mining Taxation Act of 1910, as amended in 1915, were repealed. This Act specifically provided for the taxation of profits derived from mining, including a tax on dividends distributed, including those distributed by gold mining companies. Special provision was made in Sections 17 (f) and 23 for the continuation of the system, by which in the determination of taxable income from mining operations, an allowance was made for the redemption of capital expenditure. Section 23 (1) introduced the 'quotient' system appearing in Section 36 (1) of the Act, resulting from the division of the aggregate of unredeemed capital, at the commencement of a tax year, and further capital expenditure during the tax year, divided by the estimated life in years of the mine.

2.11 Consolidating Tax Laws were subsequently passed in 1925 (Act No 40 of 1925) and in 1941 (Act No 31 of 1941). The latter in due course was replaced by the Act of 1962. This has been

substantially amended over time and it is with aspects of the Act, as amended, that I propose to deal.

RULES OF INTERPRETATION

3 In considering the incidence of taxation upon mining companies, one must, as in the construction of all statutes, have regard to the primary rules of interpretation. The following examples of the general rules will suffice -

4.1 in Schenker v The Master and Another, 1936 AD 136 at 142, De Villiers J A quoted with approval, the rule in Rex v Venter, 1907 TS 915, which he said "had again and again been approved and followed by this court". He said -

> "That rule is that, where the language of a statute is unambiguous, and its meaning is clear, the court may only depart from such meaning 'if it leads to absurdities so glaring that it could never have been contemplated by the legislature, or if it leads to a result contrary to the intention of Parliament as shown by the context, or by such other considerations as the court is justified in taking into account.' I

quote from the judgment of Innes C J in Rex v Venter."

3.2 Lord Cairns in Partington v The Attorney General, 21 LT 370 at p.375 quoted with approval by De Villiers J A in Commissioner for Inland Revenue v George Forest Timber Company Limited, 1924 AD, 516 at 531, stated -

"As I understand t · principle of all fiscal legislation, i: is this: if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is freed, however apparently within the law, the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

3.3 In the Canadian Eagle Oil VR (1946) AC 119 at 139 approved in CIR v Frankel, 1949 (3) SA 738, Viscount Simon quoted with approval the words of Rowlatt J in Cape Brandy Syndicate v Inland Revenue Commissioners, 1921 1 KB 64, at 71 -

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> "In a Taxing Act one has only to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in. Nothing is to be implied. One can only look fairly at the language used."

4 Ab initio I point out that the taxable income of both mining companies and individuals carrying on mining is determined in precisely the same manner as the taxable income of other income earners, subject to special provisions of the Act relating only to mining and mining operations. The only difference between mining companies and individuals carrying on mining is in the rates of tax, the individual being taxed at the same rate as income derived from non-mining sources.

WHAT IS A MINERAL?

5 Section 1 of the 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;".

Before considering the meaning of 'mining operations' or 'mining' for the purpose of applying the definition, I propose to consider what is a mineral for the purpose of the Act. Clearly, if the method or process is not the winning of a mineral from the soil, the operation will not fall within the scope of the definition.

6

6.1 The Act does not contain a definition of 'mineral' (other than to provide that it includes natural oil), and not one of the South African judgments, dealing with the meaning of 'mineral' relate to income tax. Nevertheless I propose, below, to examine those cases in which the meaning of the word is investigated to see if one can arrive at an authoritative statement which can be applied in interpreting the definition 'mining operations and mining'.

6.2 In Roman times, minerals were regarded as fructus in the legal sense, derived from ownership of land. However, a distinction was drawn between minerals and metals which are renascent and those which are not (Digest 24.3 7.13). Ulpian held the view, for example, that marble

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in certain parts of Asia and Gaul renewed itself. (H P Viljoen in "Rights and Duties of the Holder of Mineral Rights" a thesis submitted to the University of Leyden for the degree of Ph.D.) In "Commentar on the Pandects" Book VII Title 1, Section 24 (i), Ganes translation, Voet stated, when dealing with the rights of a usufructuary "meanwhile it makes a great difference whether or no stones and metals renew themselves on the farm held in usufruct." Even in Voet's time, the different treatment of 'metals, chalks, sand and stone' to which I shall refer below emerged. It is also interesting to note that in Ex Parte Lanham's Executors, 1908 TS 330 at 331, Wessels J refers to cases where minerals .e "naturally renewed".

7 What emerges from the cases is that 'mineral' -

"does not have a defined content, but should be interpreted anew in the circumstances of each case. Generally, however, the analysis of the word into two senses, is one which has been adopted by the courts in approaching difficulties of interpretation. The two general senses of the word 'minerals' are:

(a) an extremely wide sense in which the word refers to all substances which are neither

vegetable or animal and which are present in the earth's crust;

(b) a narrower sense (sometimes called the popular sense) in which a substance is required to comply with certain scientific criteria before being classed as a mineral. When used in this sense, substances such as stone, sand and clay, are generally excluded from the categories of minerals."

(Hattingh A J in Finbro Furnishers v Registrar of Deeds, Bloemfontein, 1983 (3) 191 (O) at 195 (H) to 196 (B). This is the most recent case dealing with the interpretation of 'mineral' and the Judge decided that stone was not a mineral. The case involved the interpretation of a clause in a deed of cession of mineral rights and a cession of rights to stone, which was tendered for registration to the Registrar of Deeds, Bloemfontein. The Registrar refused to register the cession on the ground that stone is not a mineral and that was upheld by the court. The Judge in this case was not referred to Commissioner of Taxes v Nyasaland Quarries and Mining Co Limited, 24 SATC 579 to which I shall refer below. However the judgment sets out all the other relevant cases at 195 and I

...ose to examine those cases in some detail in ... to illustrate the two senses in which the ...ord 'mineral' or 'minerals' have been interpre...ed by our courts.

Donovan v Turfontein Estate Co, (1895) (2) O R ...98, was the ...case to espouse the 'popular' ...heory of th... ...rpretation of the word 'mineral'. The case was before the High Court ...f the late South African Republic and was con...cerned with the interpretation of a clause in a ...ninety-nine year lease of cer...land, clause 7 ... which provided that the lessee was to be ...entitled to "alle mineralen, edelgesteenten, ...metalen of andere delfstoffen" on the land ...leased and also conferred a right to prospect ...nd dig for those minerals. Kotze C J who ...delivered the judgment of the court said -

> "It cannot be denied that Brissonius, and Dalloz, and other authorities quoted by Mr Wessels classify clay under metals or minerals, but it does not follow that in the case before us, we have to attach the same meaning to the word. Clay, which mostly appears in the soil, is not considered in South Africa as metal or mineral. It has been very correctly remarked that it

> is not customary with us to speak of prospecting and digging for clay."

The issue in the case was whether the lessee was entitled under the lease to win clay from the land leased to him, and it was held that he was not After pointing out that it was necessary to arrive at the intention of the parties to the lease by considering the whole contract, His Lordship continued -

> "We must not give a scientific or extraordinary meaning to the word 'mineral' ..... The words in the contract must be explained in accordance with the usual and common meaning as in use in this country, although the scientific may be different."

7.2 Brick and Potteries Co v Registrar of Deeds, 1903 TS 473, was a case regarding the payment of transfer duty. The Registrar of Deeds took the attitude that a lease of all earths, clay, sand and other materials for pottery, earthenware, bricks, tiles and all other goods and wares manufactured from the said substances, was a lease of mineral rights and that accordingly transfer duty was payable. The judgment in the

court below is quoted in this case and at 475, Bristowe J is quoted as saying -

> "It cannot, I think, be disputed that the Dutch word 'mineraal' like the English word 'mineral' includes both in its derivation and in its scientific sense, clay, sand and brick earth."

He continued at 476 -

> "The meaning of the word 'mineral' is therefore a question of intention to be ascertained from an examination of the instrument in which it is used.
>
> The rule thus applied by the Learned Chief Justice to an in- ent inter partes applies (with th ubstitution of the intention of the legislature for the intention of the parties) to the interpretation of a statute."

He continued quoting from Maxwell on the Interpretation of Statutes -

> "The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view. Their meaning is not so much in a strictly grammatical or etymological propriety of language, nor even in its popular sense as in the subject or in the occasion

> in which they are used and the object to be attained."

The Court below, came to the conclusion accordingly that brickclay was a mineral, but this judgment was reversed on appeal by Innes C J, who referred to Donovan's case, which he pointed out, had stood for seven years, and had undoubtedly been acted upon very frequently during that period. He therefore, in effect, applied the principle of stare decisis. At 480, Innes C J said -

> "Now are earths, clay and sand included within the term 'minerals'? In the wider sense of the word, there is almost nothing mined or taken from under the ground which is not a mineral. But after all the meanings of mining terms vary in different countries, and it seems to me most important to ascertain the sense in which the word is ordinarily used in this country, than to define its exact etymological significance."

Continuing at 481, the Learned Chief Justice said -

> "Mr Barber relied on the definition of minerals in law No 12 of 1898, but that definition does not help us in determining

> what the word means in a different statute passed three years earlier, and in any case, the definition there is not very clear as it depends largely upon the meaning of the word 'mining', and the definition of mine again depends on the meaning of 'minerals'."

This is, of course, the situation to be found in the definition of 'mining operations' and 'mining' in the Act.

7.3 Brick and Potteries Co Limited v City Council of Johannesburg, 1945 TPD 194. In this case a municipal valuator took into account the value of a deposit of clay situate on the land to be valued, which was used by the appellant for making bricks. The land was to be rated in terms of Ordinance 20 of 1933 of the Transvaal. Section 9 (2) of that Ordinance provided that in valuing any ratable property, the valuer was not to take into account any value accruing to such property by reason of the presence of inter alia base metals or minerals therein or thereon. Being dissatisfied with the judgment of the Valuation Court, the appellant appealed to a magistrate and the latter, at appellant's request, reserved, inter alia, the following

question for the decision of the Supreme Court -

> "Whether the words 'base metals or minerals' used in Section 9 (2) of Ordinance 20 of 1933 should be interpreted to include fire clay and/or other brickmaking clay found on the properties occupied by appellant?"

In the course of his judgment, Maritz J found that -

> "What substance must be included in the general word 'minerals' appearing in a document or in a statute is a mixed question of law and fact. What the public means by the word 'minerals' is a matter to be determined by evidence. The legislature, when it uses the word 'minerals', may not necessarily have in mind the popular meaning of the word. The construction, therefore, to be placed upon the word 'minerals' appearing in a statute is a question of law."

In his concurring judgment in this case, Ramsbottom J said at 204 -

> "The meaning of a word used in a statute is primarily a question of law. In answering that question, the court may decide that the word was used in its ordinary popular

> sense, or it may find by reason of the context or from a consideration of the circumstances in which the statute was passed, that the word was used in a different sense. So far it is a matter of interpretation, a matter of law. If the court finds as a matter of interpretation, that the word was used in its ordinary popular sense, then in relation to a word like 'minerals', the question of fact may arise what substances are included therein 'in the vernacular of the mining world, and commercial world and landowners.'"

His Lordship, in the last two lines, was referring to the test laid down in Hext v Gill, (1871 L.R. Ch. 699), Lord Provost of Glasgow v Fairie, (13 A.C. 657) and North British Railway v Budhill Coal and Sandstone Co, 1910 A.C. 116).

At 208, the Learned Judge said -

> "But in my opinion it is not profitable to discuss the meaning of the expression 'minerals' as if the subject were res integra. The question is what did the legislature mean by 'minerals', and the answer to that question is to be found in the history of Section 9 (2) and the decided cases."

After a consideration of the history of the sub-section from 1903 to 1933, when the Consolidation Ordinance was enacted, Ramsbottom J continued at 209 to 210 -

> "in the absence of any indication to the contrary, the word 'minerals' in Section 9 (2) bears the same meaning that it bore in the earlier enactments from 1906 onwards. See Maxwell, Interpretation of Statutes (7th Ed. page 52). What then did the Legislature mean by 'minerals' in that year? I can find nothing in any of the Ordinances to show that the word was not used in its ordinary popular sense. That being so, the enquiry is what was the ordinary popular meaning of the word 'minerals' in 1906. The authorities quoted by Mr Quenet, which I have mentioned above, show that this may be a question of fact to be decided on evidence. But as I have shown, evidence is not always necessary. Where the ordinary popular meaning of a word has been judicially determined, the Legislature may be presumed to have used the word in that sense. And that, in my opinion, is the position in the present case."

His Lordship then referred to the Brick & Potteries Co case and Donovan's case and came to

word an unusual meaning. He therefore supported the traditional popular interpretation of the word. At 790 he quoted the following from the judgment of Innes C J in the Brick and Potteries Co case -

> "But after all the meanings of mining terms vary in different countries; and it seems to me more important to ascertain the sense in which the word is ordinarily used in this country than to define it exact etymological significance. That was the view taken by the late High Court in the case of Donovan v Turffontein Estates, where the court attached great importance to the sense in which the word 'mineral' was habitually used in this country. The decision in that case was given seven years ago, and has doubtless been frequently acted upon; and in dealing with this matter, it is impossible to lose sight of the inconvenience of disturbing, except upon the most cogent and convincing grounds, a definition of the meaning of an important expression once settled by legal authority..... it is in the highest degree probable that the Volksraad intended to use the word in the sense in which it was ordinarily used."

This judgment has been criticised by the authors of the Mining and Mineral Laws of South Africa, at 588, where they state -

the conclusion that the word 'minerals' in Section 9 (2) must be interpreted as excluding ordinary brick-making clay.

7.4 Ex parte Erasmus 1968 (4) SA 788, was a case in which the word 'mineral' in Section 3 (1) (m) of the Deeds Registries Act, 47 of 1937, conferring on the Registrar the power, inter alia, to register leases of rights to minerals, fell to be interpreted. The Registrar of Deeds was not prepared to register a lease of rights to minerals in respect of stone and sand because he said that in the absence of a clear definition of the term 'minerals' in the Deeds Registries Act, he, as a layman, was not in a position to determine whether the substances were in fact minerals. Rabie J in delivering his judgment, referred to the Brick and Potteries Co case referred to in 7.2 and the New Blue Sky Gold Mining Company Limited v Marshall, 1905 TS 363 (referred to below), nd came to the conclusion that the word 'miner in Section 3 (1) (m) of the Deeds Regist s Act, did not have a wide or scientific meaning and that there was no reason to think that the legislature intended to give the

"This narrow interpretation of the concept of 'minerals' renders it incompetent to register as a mineral contract, a contract relating to such substances as sand, stone and clay. It is submitted that the decision in the Erasmus case is open to criticism. Rabie J reached the conclusion that sand and stone are not to be regarded as minerals, after reviewing various authorities on the interpretation of that expression. A further reason which he advanced against the inclusion of sand and stone as minerals, is that, if the substances were to be included within the concept of minerals, the lessee of the right to minerals would be entitled to go upon the land, remove the actual surface and thus render the ownership of the land useless to the freeholder. He went on to say that it could not be suggested that the right of the lessee of rights to minerals could extend to that degree, and that it was necessary to strike a balance between the competing interests of the surface owner and those of the mineral right holder. Although Rabie J referred in this regard to the case of Hudson v Mann and Another, 1950 (4) SA 485 (T), he did not refer to the principle laid down in that case, that where the conflict between the rights of the mineral right holder and the surface owner are irreconcilable, the rights of the mineral right holder prevails. It is an established principle that where the grant of mineral rights or a mineral contract

> fairly contemplates open cast mining, the surface owner of necessity accepts that the surface will be destroyed."

It is submitted that while this proposition is with respect to the Learned Judge perfectly correct in regard to the rights of the holder to get to and win his minerals, it is of no assistance in determining the meaning of the word 'mineral' for the purposes of the Act.

7.5 The next case to be considered is Secretary for Inland Revenue v Bozzone and Others, 1974 (3) SA 826. This case was one relating to transfer duty and did not turn upon the interpretation of the word 'minerals'. It did decide, however, as other cases did, that stone, gravel and sand and other like materials did not constitute minerals as that word is used in the definition of 'property' contained in Section 1 of the Transfer Duty Act No 40 of 1949. The subsection read -

> "'Property' means land and any fixtures thereon, and includes -
>
> (a)
> (b)

(c) any right to minerals (including any right to mine for minerals) and a lease or sub-lease of such a right."

In Loubser en Andere v Suid-AfrikaanseSpoorwee en Hawens, 1976 (4) SA 589 T. the court was concerned with the interpretation of a servitude. Once again the normal or popular meaning of the word 'minerals' was espoused and it was held that it did not include substances such as ordinary brick clay, sand or stone.

... the above cases decided that certain substances were not minerals. I now turn to consider those cases in which, in respect of different substances, a different conclusion was reached.

In Marshall v Registrar of Mining Rights, 1904 TH 210 it was held that fire clay, a stratified rock extracted by blasting, as opposed to ordinary clay (a soft substance obtained by quarrying on the surface and not as valuable as fire clay), was a mineral. This case was concerned with the renewal of a licence under the Base Metals Law 14 of 1897 of the Transvaal.

7.9 The case of New Blue Sky Gold Mining Company Limited v Marshall, 1905 TS 473 was a dispute between holders of gold and base metal claims under Law 14 of 1897 and also came to the conclusion that fire clay was a mineral.

7.10 In Bazley v Pongwan Gas Springs (Pty) Limited, 1935 NPD 247, the court was concerned with the interpretation of a reservation of mineral rights in a deed of grant made by the Government. The case depended on the definition of 'minerals' in Section 4 of The Natal Mines Act, No 43 of 1899, as amended (now repealed by the Mining Rights Act No 20 of 1967), which defined 'minerals' as

> "All substances which can be extracted from the earth by mining operations for the purpose of profit."

There are certain exceptions to the definition which are not relevant. The case decided that carbon dioxide extracted from the earth by drilling boreholes to some depths, was a mineral for the purpose of that act. The definition is a simple and very practical one but it is submitted that it is of no assistance in determining

what is a mineral for the purpose of the definition of 'mining operations' and 'mining' in the Act, because of the particular wording of the definition in the Natal act.

7.11 Boksburg Brick and Fire Clay Co Limited v Commissioner for Inland Revenue, 1941 TPD 232, (although also deciding that fire clay was a mineral), was concerned with Section 10 (1) of Ordinance 12 of 1933 of the Transvaal which exempted from tax under the Ordinance "any portion of a taxable income or any portion of a dividend distributed which is derived from mining operations carried on within the Province'. It was held that as fireclay had been regarded as a mineral in the Transvaal for many years, and still was, the extraction thereof from the soil, was 'mining'. I shall refer more fully to this case below, in relation to 'mining operations'.

7.12 Glencairn Lime Co (Pty) Limited v Minister of Labour and Minister of Justice, 1948 (3) SA 894, was a case which turned upon the interpretation of certain War Measures, which exempted employers from payment of cost of living allowance to,

amongst others - "(d) any employee who is employed on a mine and who is provided by his employer with both rations and quarters." 'Mine' was defined in War Measure 39 of 1943 as "includes all excavations for the purpose of searching for, or winning metals, minerals or precious stones, but not including stone, sand, clay or similar materials for roadmaking, building, brick-and-tile-making or like purposes." Counsel for the applicant in this matter, keeping both his options open, advanced the argument that the word 'minerals' in the definition of 'mine', was used in its widest sense, or, alternatively, in its ordinary popular meaning. In the course of his judgment, Dowling J referred to the law in England as set out in Halsbury and I shall refer to the current state of that law elsewhere in this paper. He also referred at 898 to Great Western Railway v Carpella United China Clay Limited, 1909 1 Ch (218). and said that -

> "A useful test of what is a mineral in the ordinary and popular sense of the word, is propounded by Fletcher-Moulton, J. at p.231, in the following terms: -

'if I were rash enough to venture a definition of 'mineral' I should say that it is any substance that can be got from within the surface of the earth which possesses a value in use apart from its mere possession of the bulk and weight which makes it occupy so much of the earth's crust. I should not think that what in engineering cases is usually known as 'contractors muck' is a mineral. To dig out ballast and crush stone and earth, a mere mixture of heterogeneous portions of the earth's crust for the purpose of making embankments, where the material goes from one position in the earth's crust to another, without modification, or being submitted to any process of manufacture, does not seem to me to be making use of minerals, although no doubt, the things that you are handling were originally within the earth's crust. Such materials have not a value in use apart from their bulk and weight, and they are only used as being capable of forming a portion of the earth's crust in a new position. On the other hand, everything that has an individual value in use appears to me to be fairly called a mineral.'"

In the Great Western Railway case, applying the test to limestone, the Judges came to the

conclusion that the substance was a mineral. Dowling J was able to avoid having to decide that the word 'mineral' was used in its widest sense as he came to the conclusion that even if the term 'mineral' were used in the popular sense, limestone should be included in its denotation. He continued that it was legitimate to take into account, the views of the English courts as to the ordinary meaning in English of the term 'mineral' provided that cautious regard is had to the fact that the statutes and instruments under consideration in the English case, are different from the War Measure now under consideration.

He referred apparently with approval to the test that a substance can be regarded as a mineral if it is so regarded 'in the vernacular of the commercial world, mining world, and landowners'. On the uncontradicted evidence produced by the applicant, His Lordship had no difficulty in determining that limestone was a mineral.

7.11 The case of Rex v Blom and Another, 1951 (1) SA 708 (T), was another case concerned with the interpretation of the same War Measure as that

contained in the Glencairn Lime case. The accused had been convicted of contravening the War Measure by failing to pay a cost of living allowance to their employees, and the point in issue was whether or not, a lime quarry was a mine. The Bench consisting of Blackwell and Roper J J had no hesitation in following the judgment in the Glencairn Lime case.

7.14 R v Day and Others, 1952 (4) SA 105 (N), dealt with the definition of 'mineral' in Section 2 of the Mines and Works Act, 12 of 1911. The definition of 'mineral' in that act, was -

> "any substance obtained from the crust of the earth at any depth so long as it is obtained from the earth for the purposes of profit."

De Wet J came to the conclusion that the word 'mineral' as defined in the Mines and Works Act, bore the widest possible meaning, namely that it was any substance obtained from the crust of the earth so long as it was obtained for purposes of profit. In this case, the court was concerned with the extraction of river sand which was dug out of a river bed. This, the Learned Judge held, was winning minerals which meant "getting

or obtaining minerals from the earth." Here again it is submitted that this case, based as it is upon a totally different definition in the Mines and Works Act, is of no value whatsoever in determining what is a mineral for the purposes of the definition of 'mining operations' in the Act.

7.15 S V Funchall 1961 (4) SA 52 is, it is submitted, also of no value whatsoever in determining the meaning of 'minerals' for the purposes of the Act. The case related to regulations framed under the Factories, Machinery and Building Work Act, 22 of 1941 and related to the operation of a plant which was used for the crushing of stone to various grades for use in building roads. The Learned Judge, Jansen J relied on the decision in R v Day and Others, and came to the conclusion that stone crushed to various grades was a mineral for the purpose of Act 22 of 1941.

7.16 ITC 909, 24 SATC 97 a decision of the Special Income Tax Court of the Federation of Rhodesia and Nyasaland, and the appeal against that judgment cited as Commissioner of Taxes v Nyasaland Quarries and Mining Co Limited, 24 SATC 579, a

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judgment of the High Court of Nyasaland handed down in 1961, are of special interest. What was in issue was the definition of 'mining operations' and 'mining' in the Federation Income Tax Act and that definition is identical with the one in the Act save that the latter now refers to natural oil. The facts in the case were that the taxpayer carried on the business of quarrying a type of rock known as gneiss, which had qualities essentially similar to granite. The method of working consisted of drilling holes in the rock face and loosening an area of rock by blasting. The rock so loosened was then transported to crushers and after crushing was screened into sizes suitable for road building, concrete and other building purposes, garden paths and the like. Fieldsend J, the President of the Special Court, after setting out what he characterised as "this vital definition" of mining operations and mining in the Federation Act, stated at 99 -

> "Unfortunately, this definition is not as helpful as it might be in the circumstances of this case, because it is based upon the word 'mineral' which itself has a somewhat elastic meaning. As the Full Court in the Blue-Metal Quarries case said: 'Few words

> have occasioned the courts more difficulty than 'minerals', but in some degree, that is because in legal instruments, it is seldom, if ever, used in its accurate or scientific sense, and yet the word possesses no secondary meaning at once accepted and definite.'"

The President was referring to the judgment in NSW Blue Metal Quarries Limited v Federal Commissioner of Taxes, 1956 (6) AITR 239.

The taxpayer had conceded in argument that in common parlance it could not be said to be carrying on mining operations, but it relied upon the statutory definition to which I have adverted above. This, it was claimed, "swept away the distinction in every day language between mining and quarrying." The President quoted the definition of 'mineral' from Great Western Railway and Karpella United China Clay Co (1909) 1 Ch. 218 and which I have set out in 7.12 above, and stated that he found this to be the most useful authority as to the meaning of the word 'mineral' in its ordinary and popular sense. The Learned President came to the conclusion that the activities carried on by the taxpayer were 'mining operations' in terms of

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[illegible] definition in the Federation Income Tax Act. Although he did not rely on it, he drew comfort from the decision in the Boksburg Brick and Fireclay Co Ltd's case, to which I have referred in 7.11.

On appeal to the High Court of Nyasaland, the Chief Justice, Spenser Wilkinson, made it clear that the court was not concerned with the meaning of the expressions 'mining' and 'mining operations' in their every day sense, and that the decision in that case, must depend upon the meaning given to those expressions by the definition contained in Section 2 of the Federation Income Tax Act. Having referred to the fact that the definition was not explanatory and so prima facie restrictive, but inclusive and therefore extensive, the Learned Chief Justice stated at 582 -

> "In my opinion there can be no doubt whatever that in defining the expressions 'mining operations' and 'mining', as it is done, the Legislature intended to give those expressions, when used elsewhere in the Act, a meaning wider than the ordinary every-day meaning of those terms. Moreover, the extension of the usual meaning of

> those expressions, is obviously intended t
> be a wide one, for the words used are very
> general. 'Mining operations' and 'mining'
> are to include every method or process by
> which any mineral is won. It is hardly
> possible to imagine more general words."

His Lordship pointed out that as is customary in the interpretation section in statutes, it was prefaced by the usual caution "unless inconsistent with the context". However, he found nothing in the Federation Act which suggested that this caution had any application in relation to the definition under consideration. He continued at 584, after having come to the conclusion that 'mine' must include 'quarry' that

> "This being so, I agree with the Learned
> President that the whole question in this
> case turns on the meaning to be attached to
> the word 'mineral' in the definition in
> Section 2 of the Act."

He, too, relied on the extract from the Great Western Railway case set out in 7.12 above, and came to the conclusion that the word 'mineral' as used in the definition of 'mining' and 'mining operations' is sufficiently wide to include gneiss.

Of special significance in his judgment, is the following statement -

> "I am of the op nion that the numerous cases in which certain things have been held to be minerals and certain things not to have been minerals, are of very little assistance in determining the matters in question in this appeal, because those authorities merely decide whether a particular commodity is or is not a mineral within the meaning of some particular statute o: document, and it is noteworthy that a large number of things have in some cases been held to be minerals and in other cases, held not to be minerals."

The Learned Judge did not accept the argument on behalf of the Commissioner that all that the taxpayer was really doing was to shift part of the earth's surface from one place to another, so what they were really doing amounted to moving 'contractors muck' as described in the definition of 'mineral' given in the Great Western Railway case. He found at 585 that the taxpayer's activity "not only went far beyond moving material from one position in the earth's crust to another, but also include modifications to the material and submitting it to a process of manufacture, namely, crushing and

screening." Finally, the Chief Justice concurred in the judgment of the President in the Court Below and dismissed the appeal.

Southworth J delivered the main judgment of the High Court and he too quoted, with approval, the definition of 'mineral' from the Great Western Railway case. He did not accept the argument for the Commissioner that the definition directed specifically to the facts of the case in which it was given, and stated that the definition was in the most general terms and clearly not restricted to the facts of any particular case. He pointed out that the definition did not appear to have been called in question in any subsequent case or in any text, but had frequently been cited with approval. He continued at 590 -

> "Though not binding on the court in the present case, it must be entitled to the greatest respect; and in the absence of anything in the local legislation to displace it, must be regarded as a valuable guide to the meaning of the term 'mineral' as that term is used here."

Referring to the Third Edition of Halsbury's Laws of England (to the Fourth Edition of which I shall refer below), the Learned Judge pointed out that granite, a similar rock to the gneiss with which the case was concerned, had been found in one context to be a mineral and in another context not to be a mineral. He said -

> "Thus, it is clear that in the present context, it may or may not be a mineral according to the intention of the statute."

In dealing with the facts of the case in the Court below (which facts are not fully reported in the SATC Report), the President had stated -

> "It is true that geologically, and in its composition, this stone, which is known as gneiss, is not the same as granite, but it is extracted by the appellant just as granite is and it is sold for similar purposes, namely for road building, concrete and other building purposes, garden paths and such like."

Great stress was laid by Southworth J on the fact that there was nothing in the stated case to indicate that gneiss formed the normal substance of the earth's crust in Nyasaland. He said that it was quite clear as a matter of

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common observation that much of the surface of Nyasaland does not consist of outcropping rock, whether of gneiss or any other rock. He also placed great stress on the fact that the gneiss, although undergoing no change in its actual composition before leaving the taxpayer's hands, underwent two processes of treatment, namely crushing and screening, "processes which must be taken substantially to change its physical form, so as to render it suitable for purposes such as road-making, the making of garden paths, the mixing of concrete and other building purposes." He continued at 592 -

> "In these circumstances then, the gneiss quarried by the respondents can hardly be regarded as 'only used as being capable of forming a portion of the earth's crust in a new position'; and the Learned President would seem to be justified in regarding it as having 'a value in use apart from is bulk and weight' within the meaning of Fletcher-Moulton L J's definition."

In the result, he, too, concurred in the judgment of the Special Court and dismissed the appeal.

shall be construed as prohibiting or restricting or enabling the Local Authority to prohibit or restrict -

(a) the winning of minerals by underground working, or the winning of minerals by surface working, or the erection of any buildings or the carrying out of any work which is incidental thereto, as regards any land not included in established townships and agricultural holdings;"

One of the principal issues in the application to the Witwatersrand Local Division, was whether the quarrying operations carried out by the appellant on its property, fell within the exemption conferred by Section 18 (a). What had happened was that the appellant planned to establish a stone quarry on a portion of its property. It obtained the necessary permission from the Department of Mines and made application to the then Local Authority, the Peri-Urban Areas Board, for permission to commence quarrying and ancillary operations. The Board advised the appellant that its consent was not required, the reason given being, that the activities would fall within the terms of Section 18 (a) of the Town Planning Scheme and that in terms of legal opinion given to the Local

For reasons which appear below, it is submitted that this judgment should not be followed in South Africa.

7.1? Falcon Investments Limited v C.D. of Birnam (Suburban) (Pty) Limited and Others, 1973 (4) SA A 384, appears to be the only Appellate Division judgment dealing with the meaning of the word 'mineral'. This was an appeal direct to the Appellate Division from a decision of Margo J in the Witwatersrand Local Division in which an order was granted interdicting the appellant from using or allowing the use of its property for quarrying operations or for the operation of stone crushing, ready-mixed concrete or asphalt plants, until such time as such operations were authorised by an amendment to the Southern Johannesburg Region Town Planning Scheme, 1962. The respondent in the appeal was the owner of certain land in Johannesburg and alleged that the appellant, who was the owner of land in the same area, used its land in contravention of the Town Planning Scheme. However Section 18 of the Scheme provided that -

"18. ..... nothing in the foregoing provisions of this part of the Scheme,

Authority "the word 'mineral' means 'any substance taken or obtained from the earth's crust, which will include sand, gravel, stone, etc.'" The area to be quarried had been successfully prospected for a type of rock known as andesite, which was particularly suitable for use in concrete and for road-making purposes. During December 1969 in anticipation of the takeover of jurisdiction by the Johannesburg City Council, the appellant had entered into an agreement with that Council in terms of which, inter alia, the appellant was given the right for a period of sixty years, to carry on quarrying, stone crushing and ancillary operations, including the operation of ready-mixed concrete and asphalt plants. The Johannesburg City Council had therefore consented to the use of the appellant's property for the purposes aforesaid. However, in the granting of such consent, the provisions of the Town Planning Scheme were not followed. During 1970 quarrying and crushing operations on another property, falling within the jurisdiction of the Johannesburg City Council, were conducted by Tucker's Land Holdings Limited and the City Council successfully applied to the Witwatersrand Local Division for

an interdict restraining such activities on the grounds that they were in contravention of the Town Planning Scheme (see Johannesburg City Council v Tucker's Land Holdings Limited and Others, 1971 (2) SA 478 W. a judgment which is not relevant to the subject under consideration.)

In the Falcon Investments' case it was contended that the substance being quarried, andesite, is a mineral for the purposes of Section 18 (a) of the Town Planning Scheme and that the quarrying and crushing operations constituted the winning of minerals. The court had before it conflicting affidavits by geologists. In the one affidavit a learned professor of Geology stated, inter alia, that -

> "The following definitions of the term 'mineral' and 'rock' are those accepted by geologists in both scientific terms and common parlance."

After setting out the scientific definition, he concluded that in his opinion "andesite is rock and not a mineral in both scientific terms and common parlance." To counter this, there was an affidavit by a consulting geologist who

stated, inter alia, that he had read the definition of a mineral as contained in the Mines and Works Act 27 of 1956, as amended, and the definition of a base mineral, as contained in Section 1 of the Mining Rights Act, 20 of 1967, as amended. He continued that he had examined the substance being quarried and confirmed that it is geologically known as andesite or andesitic lava of the Ventersdorp system; that the said andesite was a substance which occurs naturally in or on the earth and that in his opinion, it was a mineral in terms of the definition of 'mineral' in the two Acts referred to above. He also stated that the andesite occurring on the appellant's property had a substantial commercial value.

On behalf of the appellant, it was submitted that 'mineral' had a broad range of meanings, including the narrowest and broadest meanings, but also an intermediate meaning which "would include stone which has a commercial value because of its special properties apart from its me e bulk." His Lordship quoted from the Oxford English Dictio ary and continued at 396 A -

'From decided cases in our courts, as well
as from statutes of our Legislature, it
also clearly appears that the word
'mineral' may be used in different senses,
and it follows that in order to decide what
the meaning is that has to be given to the
word in a particular case, it is necessary
to determine the intention with which the
word is used."

Illustrating the use of the word 'mineral' in a
narrower sense, His Lordship quoted from Dono-
van's case, the Brick and Potteries Co case, the
Marshall case, the New Blue Sky Gold Mining
Company Limited case, ex parte Erasmus and the
Brick and Potteries Co Limited case. In regard
to the lastmentioned case, after quoting an
extract from the judgment of Ramsbottom J, which
was cited in 3.3 above, Rumpff J A considered
it expedient at 399 to refer to what was said by
Hogan C J and Schreiner, J A in Consolidated
Diamond Mines of South West Africa Limited v
Administrator, SWA and Another, 1958 (4) 572 A
at 599 in which judgment the Chief Justice
stated, inter alia -

'Since words have to be read in their con-
text and in their application to the
subject-matter to which they relate, legal
principles which affect that subject-matter

may well affect the meaning of [illegible] in relation to it. Decisions of our courts are therefore useful precedents in the enunciation of legal principles and as guides in the application of those principles to particular facts and circumstances. When we find in a judgment statements which attach meaning to particular words or phrases, we must remember that the Judge is dealing with those words or phrases in the context in which they occur and with reference to the subjectmatter to which they relate. Beyond that, a statement as to the meaning of a word or phrase, would merely be obiter dictum. I should be loath to read a judge's elucidation of a word with no specialised legal meaning, as intending to lay down as a matter of law, what that word means, independently of the context in which he is dealing with it, for defining the meaning of words as such, is not a judge's function, but that of a philologist. A judge's statement on the meaning of such a word can be no more than an expression of his opinion on a matter outside his domain of special knowledge, which is that of law and not of language."

That statement was approved by Potgieter J A in Jonaes v Anglo African Shipping Company (1936 Limited, 1972 (2) SA, 827 at 834 H.

He also quoted the following extract from the judgment of Schreiner J A in the Consolidated Diamond Mines' case at 637 -

> "It is sometimes said, and for certain purposes no doubt correctly, that the proper interpretation of a document is a question of law. But particularly in cases where the effect of the context bulks largely, the approach must necessarily be rather that of the approach to questions of fact, to this extent at least that previous decisions on the meaning of the same word in different contexts can hardly be more than suggestive, and possibly only faintly suggestive, of the meaning that may be proper in the case under consideration."

His Lordship was also referred to a large number of other cases but said that it was not necessary to discuss them, because it was clear that in each case it is the intention with which the parties or the lawgiver used the word 'mineral' that must be ascertained. His Lordship undertook an in-depth investigation of the provisions of the Town Planning Scheme and pointed out that as far as control over the exploitation itself of minerals is concerned, the State had consistently regarded the word 'mineral' in its widest sense. In this connection he referred to the

Mines and Works Act No 12 of 1911 and the Mines and Works Act 27 of 1956. He also referred to the Base Minerals Act 1942. At page 403 B, His Lordship continued -

> "The Scheme is legislation by a Local Authority dealing, inter alia, with the use of land, and restricting such use, within its area of jurisdiction. It also deals with the subject of mining, the general intention discernible in regard thereto being that in certain specified areas, the Scheme is not to operate so as to prohibit or restrict mining. ..... 'Minerals' is not defined in the Scheme. It is desirable, I think that the word should, if possible, be interpreted in such a way that the Scheme blends harmoniously with such other legislation. In the absence of clear indications to the contrary, it can be inferred, I think, that this must have been the intention of the Local Authority. Indeed, the Local Authority could hardly have intended 'mineral' to bear a narrower meaning than the same or similar expressions bore in the statutes just mentioned, especially the Gold Law and Base Minerals Act,".

Finally, at 405 H, His Lordship concluded -

> "In the result, I am of the opinion, that the word 'minerals' in Sec. 18 (a) was

intended to be used in a wide sense. It is not necessary to determine its precise ambit; it suffices merely to say that its meaning is wide enough to include andesite as described in the evidence."

His Lordship then proceeded to uphold the appeal and to dismiss the application for the interdict which had been granted in the Lower Court.

7.18 In an unreported judgment by Moll J in ex parte Wonderstone 1937 Limited which was delivered in the Transvaal Provincial Division on 9 April 1975, His Lordship held that wonderstone pyrophyllite is a mineral for the purposes of Section 3 (1) (m) of the Deeds Registries Act of 1937. In the Finbro Furnishers case at 196, Hattingh A J, states that he was able to obtain a copy of the unreported judgment, from which it appeared that the facts of the case were clearly distinguishable from those in the Erasmus case. In Wonderstone, expert evidence was available to the court to the effect that wonderstone is a wellknown mineral, possessing special characteristics of its own.

7.19 The next case to be considered is that of Bellville-Inry (Edms) Bpk v Continental China

(Pty) Limited, 1976 (3) SA C 583. In this case Van Winsen J, (as he then was), was concerned with a mining lease which conferred the right to prospect, search for and to win, mine and recover all kaolin on the leased property. The lease had been notarially executed and registered in the appropriate Deeds Registry and one of the disputes which arose between the parties in the litigation was whether an extension of the period of the original lease required notarial attestation to render it valid, having regard to the provisions of Section 3 of the General Law Amendment Act 50 of 1956, requiring mineral leases to be notarially executed. The respondent which held the mineral lease, had, by letter, purported to extend the term of the lease, as it was entitled to do, but that letter was not notarially attested. The applicant, therefore, applied for a declaration that the lease had lapsed at the end of its initial period. The first question to be decided by His Lordship, therefore, was whether the extension of the lease was valid. This, in turn, required him to consider whether or not kaolin was a mineral. At 585 G he said -

"It is to be noted that the parties to the lease described it as a mineral, thereby indicating that they considered kaolin to be a mineral and the lease was so registered in the transfer deed under which applicant holds the property. If, however, kaolin is in fact not a mineral, the treatment by the parties of it as such, would not render it a mineral. Act 50 of 1956 does not itself define a 'mineral' and an aid to interpret the meaning of that word in the Act, must be sought elsewhere. While assistance can be sought from the meaning ascribed to the word in dictionaries, in the decisions of the Courts, and in the definition attached to the word in other statutes, it must be remembered that the enquiry remains one as to the sense in which the lawgiver used the word in Section 3 of Act 50 of 1956."

After referring to definitions of the word 'mineral' in the Oxford English Dictionary and Webster's Dictionary, His Lordship pointed out that the word 'mineral' can bear either a wide or a narrow meaning. He then proceeded at 586 to examine the meaning of the word in statutes such as the Mines and Works Act, 27 of 1956 which included the very wide definition of 'mineral' as follows -

> "'Mineral' means any substance, whether in solid, liquid or gaseous form occurring naturally in or on the earth and having been formed by or subjected to a geological process, but does not include water and soil unless they are taken from the earth for the production or extraction therefrom of a product of commercial value."

His Lordship also referred to the Base Minerals Act, 39 of 1942, he continued at 586 F -

> "The tendancy of the legislature to attach a wide meaning to 'base minerals' was continued in Act 20 of 1967, but since I am presently concerned witn the meaning to be attached to a Sec. of a 1956 Act, no further reference to the 1967 Act would be relevant."

He proceeded to refer to the Falcon Investments Limited case, Donovan's case and others referred to above in this report. At 587 D, he pointed out that in Nortje en 'n Ander v Pool N O, 1966 (3) SA 96 (AD), it seemed to have been accepted that a lease granting the right to prospect for and mine kaolin, fell within the scope of Section 3 of the General Law Amendment Act 50 of 1956 requiring notarial attestation.

At 588 D, the Learned Judge said -

"With respect to aspects of the reasoning in certain of the above-quoted cases, I find it difficult to conceive why a statute should be so interpreted as to attach a meaning to a word like 'minerals' narrower than that assigned to it by definition in a number of statutes especially concerned with minerals and the rights associated therewith. More especially is this so when the dictionary meaning of the word, in its more restricted sense, generally accords with the definition contained in the relevant statutes (I use the phrase 'more restricted sense' to distinguish this meaning from the more general one, vis. that 'mineral' is anything not animal or vegetable). According to the evidence, kaolin is the main raw material in the manufacture of china. It therefore has not inconsiderable commercial value as a constituent element of a manufactured article. To achieve its recovery from the ground, it is necessary to mine for it in the sense that the over-burden (sand) under which it lies, has to be removed. To this extent, kaolin would seem to differ from clay found lying on the surface of the ground."

His Lordship therefore concluded that kaolin is a mineral.

I point out that although His Lordship stated in the passage cited above that he was using the

word 'mineral' in a "more restricted sense", in fact he gave it a far wider meaning than did the older authorities cited above, such as Donovan's case and the Brick and Potteries Co case. What he regarded as the 'restricted sense' was the following meaning assigned to the word 'mineral' in the Oxford English Dictionary, namely -

> "Any substance which is obtained by mining; a product of the bowels of the earth."

7.20 The remaining two judgments are cited by Hattingh A J in regard to bentonite -

7.20.1 the Acting Judge stated that in Lantern Trust (Pty) Limited v Van Sittert, 1977 (2) PH A 53 (O), it was held that bentonite, which is a species of clay, was not a mineral. With respect, however, that is not what the case decided. It was a matter in which the applicant sought a declaratory order that by virtue of a notarial deed of cession of mineral rights, he was entitled to certain rights. His Lordship, L C Steyn (as he then was), stated that there was a considerable body of decisions to the effect that in South

Africa 'mineral' in the ordinary popular meaning, does not include clay, used in the manufacture of pottery, earthenware, bricks, tiles, pipes etc. In the short report, the Learned Judge is quoted as saying -

> "I am of the opinion that the present application can only succeed if it is established on the papers that bentonite is a mineral, and although this aspect was put in issue before the application was lodged, no evidence was put in the founding affidavit to establish this disputed fact and the bald statement in the replying affidavit cannot remedy these defects."

With respect, therefore, to Hattingh A J, it is submitted that this case is not an authority to be taken into account;

7.20.2 Van Coller en Andere v Ocean Bentonite Co (Edms) Bpk, 1979 (1) SA 1071 (O), was again a case involving the question of the registration of a notarial lease of mineral rights by the Registrar of Deeds. The Registrar was not involved in the litigation, but he had declined to register a

lease which granted rights in respect of all clays of the montmorillonite group and in particular, bentonite, attapulgite, hektorite and sepiolite, as well as all shale and other types of clay which might be found on a particular farm. Some years after the Registrar had refused to register the initial contract, he indicated that he was prepared to register such a notarial lease providing the rights were restricted to bentonite. Presumably, this was because in some manner the Registrar had become satisfied that bentonite was a mineral for the purposes of Section 3 (1) (m) of the Deeds Registries Act. (Bentonite is clay which swells in the presence of water as opposed to other clay which slake. It is used for drilling purposes in the search for natural oil.) Certain of the mineral right owners were not prepared to sign the amended notarial lease by means of a power of attorney and the purpose of the litigation was to compel them to do so. The judgment in this case was given Van Heerden J (as he then was) but it is quite clear from the judgment at

[illegible] granted rights in respect of [illegible] the montmorillonite group and [illegible]cular, bentonite, attapulgite, hektorite and sepiolite, as well as all shale and other types of clay which might be found on a particular farm. Some years after the Registrar had refused to register the initial contract, he indicated that he was prepared to register such a notarial lease providing the rights were restricted to bentonite. Presumably, this was because in some manner the Registrar had become satisfied that bentonite was a mineral for the purposes of Section 3 (1) (m) of the Deeds Registries Act. (Bentonite is clay whic swells in the presence of water as opposed to other clay which slake. It is used for drilling purposes in the search for natural oil.) Certain of the mineral right owners were not prepared to sign the amended notarial lease by means of a power of attorney and the purpose of the litigation was to compel them to do so. The judgment in this case was given Van Heerden J (as he then was) but it is quite clear from the judgment at

1075 H that it was unnecessary for the purposes of deciding the matter, to decide whether or not bentonite was a mineral. That was not really an issue in the case.

8 In the course of examining the South African judgments on the meaning of the word 'mineral' or 'minerals', reference has frequently been made to the position in England. The present position is to be found in the Fourth Edition of Halsbury's Laws of England, Vol. 31, paragraph 8 where the following is, inter alia, said when dealing with the meaning of 'minerals'.

"'Minerals' admits of a variety of meanings, and has no general definition. Whether in a particular case a substance is a mineral or not, is primarily a question of fact. The test is what 'minerals' meant at the date of the instrument concerned in the vernacular of the mining world, the commercial world and among landowners, and in cases of conflict, this meaning must prevail over the purely scientific meaning. Nevertheless 'minerals' is capable of limitation or expansion according to the intention with which it is used, and this intention may be inferred from the document itself, or from consideration of the circumstances in which it was made."

It continues at paragraph 9, dealing with particular minerals -

> "The numerous cases in which specific substances have been decided or assumed to be or not to be minerals must, for the reasons already stated" (ie in paragraph 8), "be considered as decisions on the particular facts. Thus in particular circumstances the following substances have been held or assumed to be minerals: asphalt; basalt; bog-earth; brick-clay; brine; calc spar and calk (barytes); clay, whether common, china, London or terra cotta; copper; felsite; fireclay; freestone; gravel; granite; ironstone; lead; limestone; loam; marble; peat-earth; petroleum and natural gas; pitch; salt; sand; sandstone; shale; stone; and tin.
>
> On the other hand, the following substances, which include some of those already listed above, have been held or assumed in particular circumstances not to be minerals: brick-earth (although described as valuable); clay in the popular sense; clay of great thickness; free-stone; furnace slag; gravel; limestone; natural gas; salt (obtained from lime); sand; sandstone; stone; and tap-cinder (obtained in the manufacture of pig-iron)."

9 The United States does not appear to have quite the same difficulty in dealing with the meaning of 'mineral' for tax purposes. It appears from "Tax

Management Mineral Properties other than Gas and Oil - Operation', 1982 Edition at A-1" that for the purposes of the 1954 Internal Revenue Code, "the term 'mineral properties' includes nonmetals such as clay, coal and limestone". An annual percentage depletion allowance is permitted in the calculation of the tax payable by mining companies. An essential factor in the determination of that allowable percentage depletion, is the exact nature of the mineral being extracted. The United States Tax Authorities recognise that there are thousands of minerals and rocks which have been identified by scientists, "many of which grade into each other". It would appear that sand, clay and stone, the substances normally excluded from the scope of the word 'mineral' in South Africa, are all regarded in one form or another, as minerals for the purposes of the Internal Revenue Code. Thus, at page A-60 of "Tax Management", clay in various forms, falls into no less than four different categories for the purpose of determining the percentage depletion to which the mining company is entitled. There is a separate category dealing with "all other minerals" and the direction in which the classification of minerals in the United States is proceeding, is along two lines. Firstly,

the scientific composition of the mineral is a determining factor and in regard to the 'all other minerals', it is stated that some of the definitional problems are alleviated by applying an "end-use test". It seems clear, therefore, that in the United States at any rate, the word "mineral" is given a very extensive meaning.

10 I turn now to consider how the meaning term 'mineral' is to be applied in the definition of 'mining' and 'mining operations' in the Act. I suggest -

10.1 in the words of Bristow J in the Brick and Potteries Co, v Registrar of Deeds (7.2 above), it is a question of intention to be ascertained from an examination of the Act. For that purpose, it is permissible to consider the object which the legislature had in view. As was pointed out by Ramsbottom J, in Brick and Potteries Co Limited v City of Johannesburg (7.3 above), the question is, what does the legislature mean by 'mineral' in the context of the definition. As stated by the Learned Judge, the answer to that question is to be found in the history of the definition. Save for the inclusion of 'natural oil' into the definition, it has remained unchanged for almost seventy

years. It is therefore submitted that what we are today concerned with, is the meaning that the legislature intended to give to 'mineral' in 1917;

10.2 at that time, the legislature would have known of or would be presumed to know of the judgments in the Donovan case and the Brick and Potteries Co case, both of which adopted the popular or narrow interpretation of the word 'mineral'. In other words, the meaning to be given to 'mineral' is that meaning which would be given to it "in the vernacular of the mining world and commercial world and landowners" in South Africa at that time;

10.3 since not one of the judgments referred to in paragraph 7 above, was concerned with the meaning of the word 'mineral', in the Act, or any of its predecessors, great caution must be exercised in assuming that stone, such as adesite or gneiss or clays such as fireclay, kaolin or bentonite, are in fact to be regarded as minerals for the purposes of the Act. In this connection I wish to refer specifically to the Nyasaland Quarries' case referred to in 7.16 above. When dealing with that case, I expressed the view that it should not be followed in

South Africa. I submit that it is clear from the judgment that the Nyasaland court, as one would expect it to do, followed English precedent and relied upon the dictum by Fletcher-Moulton L J who defined 'mineral' in a far wider way than the South African judges do. It is not customary in South Africa to regard stone as a mineral. I submit that the crushed greiss is in fact what Fletcher-Moulton L J referred to as "contractors muck" even though it may not be mixed with earth. It does not have a value apart from its bulk and weight. Except for geological differences there is from a practical point of view no real difference between gneiss and granite and Silke, Tenth Edition at 1096, points out that despite the decision in the Nyasaland case, in practice Inland Revenue does not regard the quarrying of granite as constituting the carrying on of mining operations or mining;

10.4 at pages 707 and 708 of "The Mining and Mineral Laws of South Africa", by Franklin and Kaplan, the learned authors after referring to the fact that in the popular or restricted sense of the word, sand, stone or clay are excluded as minerals, state that these exclusions require immediate qualification, because of the various

judgments set out in 7.8 to 7.20 above. They also state that they are regarded as minerals, and that their extraction from the soil, will be regarded as a mining operation. This may well be the practice of Inland Revenue and be acceptable to mining companies and individuals carrying on mining, because of the favourable provisions of Section 36 (7C) of the Act, relating to the redemption of capital expenditure, but I question whether it is correc from a purely academic point of view. Save for the judgment in Murchison Exploration and Mining Co Limited v The Commissioner for Inland Revenue, 1938 TPD 421, I have not found any case where a taxpayer has sought to establish that it was not carrying on mining operations. In Murchison's case, a mining company had carried out prospecting, but had not yet produced any gold other than for assay purposes. However, it derived income from the investment of its surplus capital and this the Revenue sought to tax on the basis of the taxpayer being a gold mining company. The taxpayer was successful in proving that he was not carrying on gold mining at that stage;

10.5 clearly I cannot suggest what should be encompassed by the 'popular' meaning of mineral but

one thing is, I submit, clear that even today it is not the intention of the legislature to give it the widest of meanings. If it wished to do so, I would suggest that the legislature would have amended the Act to refer not to 'mineral but to "base minerals, natural oil, precious metals and precious stones as defined in Section 1 of The Mining Rights Act, 1967." It is only the base minerals which are a problem in defining the meaning of 'mineral' in the Act and the definition now referred to is in virtually the widest possible terms. The combined effect would be only to exclude from 'base minerals' -

> "water, not being water taken from a borehole, well, excavation or natural sal' for the extraction therefrom of a sul in solution therein and of commercial value"; and
>
> "soil, not being soil taken from the earth for the extraction therefrom of a substance of commercial value therein or for the manufacture therefrom of a product of commercial value".

The legislature has come very close to the "end-use test" applied in the United States of America;

10.6 the legislature has not hesitated to refer in the Act to The Mining Rights Act, 1967. See for example -

10.6.1 Sub-section (a) of the definition of 'gross income' which includes in gross income "any amount received or accrued under the provisions of Section 30 (3) of The Mining Rights Act, 1967. This has the effect of including in a taxpayer's gross income any amount payable by the State to or for the benefit of the holder of the right to natural oil in respect of any private land over which a lease to prospect for natural oil has been granted under Section 25 (1) (g) of the Mining Rights Act. The payment is related to the normal tax to be received by the State under the Act from the disposal of natural oil won in the course of mining operations. But for this sub-section of the Act, such payment would, it is submitted, save in the case of traders in such rights, have been free of

tax as a consideration similar to option money paid for the right to prospect. (See Secretary for Inland Revenue v Struben Minerals (Pty) Limited, 1966 (4) SA 582 A);

10.6.2 Sections 9 (1) (cA) and 9 (1) (fA) dealing with deemed sourceto which I shall refer below; and

10.6.3 Section 15 A (1) (importing the beneficiation allowance) which provides that -

> "For the purposes of this section - 'base mineral' means any base mineral (as defined in The Mining Rights Act, 1967 (Act No 20 of 1967)), which has been mined in the Republic";

10.7 I conclude, therefore, that the present meaning of the word 'mineral' in the Act is still the popular one.

WON FROM THE SOIL

11 I now turn to consider the other aspect of the definition of 'mining operations' and 'mining', namely what is meant by every method or process by which material is "won from the soil or from any substance or constituent thereof".

11.1 As a starting point, I refer to what I regard as the preferred meaning of the verb 'win' in the Shorter Oxford English Dictionary meaning (e) of which is -

> "to get or extract (coal, or other mineral) from the mine, pit or quarry; also to sink a shaft or make an excavation so as to reach (a seam of coal or vein of ore; and prepare it for working."

As will appear below, this meaning accords with the English Law but is too restrictive to be accepted in South African Law.

11.2 In Union Government v Nourse Mines Limited, 1912 TPD 924, the facts were that a producing gold mining company acquired the property of another company including a disused shaft which had

[illegible] filled with water. The water was there-[illegible] pumped out, and the shaft reconditioned. The point in issue in the case was whether the cost of certain sumps and of the de-watering and reconditioning of the shaft was working expenditure within the meaning of Section [illegible] of Act 6 of 1910. In the course of his judgment, Wessels J (as [illegible] was) said at 930 -

> "The ordinary meaning of the word 'to win gold' is to obtain or get the gold in the form of metal. To win gold includes all the operations necessary, not only to reach and extract the ore but also to convert it into metal."

In R v Day and Others, 1952 (4) SA 105 N, the court was called upon to interpret the definitions of 'mine' and 'mineral' in Section 2 of the Mines and Works Act 12 of 1911. The definition of 'mine' to the extent to which it is relevant, was -

> "mean and include all excavations for the purpose of searching for or winning minerals".

At 109 B De Wet J said -

> "Mr MacCaulay also made a point that it cannot be said that when sand is dug from a riverbed, one is thereby 'winning minerals', which are the words used in the definition of 'mine'. But 'winning minerals' means getting or obtaining minerals from the earth, and once it is concluded sand is a mineral within the meaning of the definition of the word, then when sand is dug out of a riverbed, it amounts to mining f minerals within the meaning of the word 'mine' as defined in the Act."

11.4 In England the word 'win' has been given a more restrictive meaning than that placed on it by Wessels J in the Nourse Mines case. In English Clays v Plymouth Corporation, 1974 (2) ALL ER 239 (CA), Russell L J stated at 243 -

> "Our view is that to 'win' a mineral, is to make it available or accessible to be removed from the land, and to 'work' a mineral is (at least initially) to remove it from its position in the land; in the present case the china clay is 'won' when the overburden is taken away, and 'worked' (at least initially) when the water jets remove the china clay together with its mechanically associated other substances from their position in the earth or land to a situation of suspension in water."

This would appear to place far too restrictive a meaning on the word 'win'. Certainly for the definition of 'mining operations' and 'mining', it could hardly be contended that a substance is "won from the soil" if it is merely exposed by removing the overburden in the case of an operation from the surface, or exposing it by means of shafts adits and the like underground, and simply digging it out of the vein or country rock in which it was embedded. The concept of 'winning' must at least go as far as removing the mineral from wherever it is buried in the earth and bringing it to the surface. On the authority of the Nourse Mines' case 'winning' will continue until, in the case of mining for a metal, the meta' s been extracted from the ore.

11.5 The question that now springs to mind is the point at which winning begins and the point at which it ends. As was pointed out at 426 in Murchison's case, to which I have referred in 10.4 above, in the Special Court, the President had said -

> "It appears to us that although the work actually done was prospecting or exploration, mining includes such prospecting or

> exploration. It is exceedingly doubtful whether gold mining can be strictly limited to actual production of the metal."

This did not find favour with His Lordship, Mr Justice Maritz with whom Murray J concurred and he said also at 426 -

> "Further, the definition of 'mining' and 'mining operations' in Sec. 72 of the Act, in my opinion, excludes prospecting and exploration activities. Insofar as the Income Tax Act is concerned, mining is the process by which minerals are won from the soil for the purpose of profit. Prospecting and exploration and assaying work are merely methods adopted in order to test the property; in order to see whether it is worthwhile mining."

11.6 In Rex v Blom and Another, 1948 TPD 708 the issue was whether the appellant was carrying on mining. His company carried on the business of the winning of and quarrying of lime. The raw material was extracted from the ground, processed and turned into building lime At 709 A Blackwell J said -

> "The Mines Department apparently treat all these lime quarries as mines; they come within the definition of 'mine' as used in

the Mines and Works Act, 12 of 1911, and they are required to adhere to all the regulations for the safe conduct of mining made under that Act. The Department of Inland Revenue takes the same view. A mine or mining company pays taxation on a different basis to that of an ordinary company and the Department of Inland Revenue has always treated a company, such as the appellant in the present case, as a mining company. It is somewhat startling, therefore, to be told that another Department of the Government of this country takes a totally different view and says that it is not, for the purposes of labour regulations, to be regarded as a mine. The Mines Department thinks it is a mine; the Revenue Department thinks it is a mine; and the Labour Department thinks it is not a mine."

His Lordship distinguished the processed lime from stone, sand or clay, agreed with the judgment of Dowling J in the Glencairn Lime case referred to at 7.12 above, and upheld the appeal.

In a short judgment, Roper J made the following significant remarks -

> "I just want to say that no distinction was drawn in the evidence or has been drawn in argument in this case between the operation

> of excavating limestone by quarrying operations and conveying it thereafter to the roasting kilns and the further operations of roasting the limestone and slaking it and so converting it into lime. It is possible that a distinction may be drawn between these two operations in other cases in which the meaning of 'mining' or a 'mine' is in question. There is no such distinction drawn in the present case and it is not material to the decision in the present appeal."

The Learned Judge appears to be hinting that his decision might have been different if, eg, after the limestone had been won from the soil, it had been sold in an unprocessed form to another party for processing. With respect, it is submitted that, as set out in 7, the real test is, whether limestone is or is not a mineral even without processing. It is, of course, a fact that most substances won from the soil in a mining operation require some form of processing, such as smelting, but could it successfully be contended that if the mining company does not itself undertake the smelting, it is not winning a mineral from the soil? I submit not.

11.7 In Rand Refinery Limited v Town Council of Germiston, 1929 WLD 63, the plaintiff company

went so far as to suggest that the work of refining gold and silver in which the plaintiff was engaged, was a purpose "incidental to mining operations;". The case concerned the liability of the plaintiff to payment of an additional rate imposed under Ordinance 1 of 1916 on improvements used for purposes not incidental to mining. The plaintiff urged that the object of mining for gold and silver is to win those metals in their purest form, and that the object of refining is to take from the bars of bullion what is not gold, and to get a product consisting of pure gold and pure silver and that the work done for this purpose is therefore work incidental to mining operations. In effect they were suggesting that the refining of the bullion was the final step in the process of mining. At 70, the Learned Judge said -

> "As the matter stands on the evidence before me, I think that, on a liberal interpretation of the term 'incidental', it is possible to regard the purposes of refinery works as purposes incidental to 'mining operations', in the general sense of that latter term."

However the plaintiff was not successful in this action since it appeared that a substantial part of the gold refined by the refinery was from outside the Transvaal Province, some of it coming from Rhodesia and Portuguese East Africa. The amount of this 'foreign gold', although a small proportion of the whole, was not so small that it could be disregarded as falling within the maxim "de minimis non curat lex" and His Lordsnip held against the plaintiff. Although this case turns on the meaning of the words "incidental to mining", the concept of the necessity to refine a product before it is "won from the soil", is an interesting one. For example, in the case of the ores of iron and copper, the object of the mining operation is to mine not the ores but the iron and copper. That therefore requires a smelting process to be undertaken after the ore has been brought to the surface. Whilst ores can be disposed of without being smelted, it is submitted that if the mining company proceeds to smelt the metal from the ores, that smelting process can be regarded as a continuation of the mining operations in order to win the mineral from the soil. On the other hand, the fact that the unsmelted ore is

disposed of to another, would not cause the operation to cease to be mining.

11.8 If I am correct in the supposition which I have made above in 7 in regard to the meaning of 'mineral', then one must also consider the meaning of the definition as a whole, as it would have been understood in 1917. Even in those times, it is submitted, the words 'mining' or 'mining operations' would have been given an extended meaning as they are today. In the case of Mutual Life Insurance Co of New York v Ingle, 1910 TPD 540, the Full Bench of that Division was concerned with, inter alia, whether or not a condition in a life policy, had been breached by the insured engaging in employment which necessitated the inspection and oiling of hauling machinery in the shaft of a mine. Innes C J, who delivered the judgment for the court, said at 546 -

> "It was contended for the respondent that only actual miners - the men who sever or break the rock - can be properly said to be engaged in mining operations. But it is impossible to adopt that narrow and limited construction. A mine is an underground excavation or passage; and 'to mine' for

> minerals is to obtain ore in, or by means of, such an excavation or passage and take it to the surface."

With respect I suggest that the Learned Judge's definition of "mine" and "to mine for minerals" should be limited to the actual context with which he was dealing, since even in 1910 it was well known that subterranean excavation was not the only method of mining.

11.9 In this connection I refer to D C T (Qld) v Stronach, (1936) 55 CLR 305, where at 313 Dixon J said -

> "The expression 'mining' is a familiar source of difficulty both in England and here. In its primary meaning the word applies to subterranean working. The minerals sought by subterranean working would, no doubt, be highly prized. But it was natural to extend the application of the word 'mining' in two directions. If th operations were subterranean, the word w applied to them, although the minerals w e of no great value. On the other hand w ce precious metals or minerals usually won by subterranean working were obtained by excavation which did not include subterranean working, it was natural to describe these operations as mining. In Lord

Provost of Glasgow v Farie, (1883) 13 APP Cas 657 at 677, Lord Watson says that although the original meaning of 'mine' might be restricted to subterranean excavation, it appeared to him to be beyond question that for a very long period that has ceased to be its exclusive meaning, and that the word is being used in ordinary language to signify, either the mineral substances which are excavated or mined or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug out "

11.10 Halsbury's Laws of England, Vol 31, 1, has the following to say on the meaning of 'mine' -

> "The word 'mine' is not a definite term, but is susceptible of limitation or expansion, according to the intention with which it is used. 'Mine' originally meant an underground excavation made for the purpose of getting minerals, but in particular context, the word has been given differing meanings. Thus, it has been interpreted so as to include a place where minerals commonly worked underground are in the particular case, being worked on the surface, as in open cast coal workings and in certain ironstone mines."

The authorities quoted by Halsbury in support of the aforegoing, include the Glasgow Corporation

v Farie case mentioned above, and also, inter alia, Sim v Evans, (1875) 23 WR 730.

11.11 In Boksburg Brick and Fireclay Co Limited v Commissioner for Inland Revenue, referred to in 7.11 above, it was agreed that the sole question for the determination by the court was whether, on the facts stated, the plaintiff company carried on mining operations. The relevant facts stated were the following -

"(b) On the said property there exists a deposit of stratified rock ordinarily known as fireclay. This deposit, which lies at a depth of from 6 ft to 12 ft below the surface of the ground, occurs in a layer of 5 ft to 17 ft thick and exists over at least three-fourths of the said property.

(c) The plaintiff causes the soil lying on top of the fireclay to be removed by excavation.

(d) The plaintiff extracts the fireclay by drilling into it, blasting it loose by explosives and hauling it to the surface by cocoa pans on an endless wire rope haulage. This is the usual and customary method of extracting fireclay, except where it has

...been softened by partial, natural
...disintegration, and can therefore be
...removed by pick and shovel.

...on the surface, the fireclay is pas-
...sed through grinding mills."

...at the bottom of 234, Maritz J. who delivered
...the judgment of the court stated -

"The words which fall for construction are
'mining operations'. ..... Ordinance
12 of 1933 is a taxing measure. It does
not define 'mining operations'. It is,
therefore, in my opinion, permissible to
...re ...in deciding what is meant in the
...dinance by 'mining operations' to the
...nion Income Tax Statutes where these words
...re defined. I think I am justified in so
...oing, because of the fact that Section 3
...) of Act 5 of 1921, clearly links the
...rdinance with the Union Income Tax
...Statutes. Section 100 of the old Union
...ncome Tax Act, No .1 of 1917, defines
'mining operations' as follows:

> "'mining operations' and 'mining'
> include every method or process by
> which any mineral is won from the
> ...oil or from any substance or consti-
> ...uent thereof."

...present Income Tax Act No 40 of 1925,
...repeats this definition (Sec. 72). I see

no reason therefore why the words 'mining operation' in the Ordinance should not be given the same meaning as they have in the Union Income Tax Act. It follows on the facts of this case that if 'fireclay' is a mineral, the plaintiff company is employing commercially a method or process by which fireclay is won from the soil; that is to say, it is engaged in mining operations for profit."

11.12 In 7.16 and 10.3 above I have criticised the judgment in the Nyasaland Quarries and Mining Company Limited case on the ground that the rock processed gneiss was not a mineral. However, because of the similarity between the definition of 'mining operations' and 'mining' in the Federal Income Tax Act and that contained in the Act, it is a persuasive authority (although not more than that) where the Chief Justice said at 582 -

"There can in my view be no doubt that we are not concerned with the meaning of the expression 'mining' and 'mining operations' in their everyday sense, ... In my opinion, there can be no doubt whatever that in defining the expressions 'mining operations' and 'mining' as it is done, the legislature intended to give these expressions when used elsewhere in the Act, a

> meaning wider than the ordinary everyday meaning of those terms. Moreoever the extension of the usual meaning of those expressions is obviously intended to be a wide one, for the words used are very general. 'Mining operations' and 'mining' are to include <u>every</u> method or process by which <u>any</u> mineral is won. It is hardly possible to imagine more general words."

11.11 It is my submission, therefore, that even in 1917 'mining' and 'mining operations' would not have been restricted to subterranean excavations. It is a short step from accepting quarrying as being a mining operation to progress to strip mining and open cast mining, and it is submitted that all these types of winning minerals from the soil will fall within the definition of 'mining' and 'mining operations' which we have been considering.

12 A matter of mining or mining operations which calls for special consideration, however, is the recovery of minerals, mainly gold, from any tailings, slimes, waste rock or other residues in accordance with a permit granted under Section 161 of the Mining Rights Act 1967, or at Common Law where Section 161 is not applicable. At page 703 of the Mining and Mineral Laws of South Africa, the authors state -

> "In Australia, it has been held in some cases that dump treatment constitutes mining. There is no decided case in South Africa, but dump recovery operations carried on by operating gold mining companies and by companies whose operations are confined to dump recovery operations, are, for tax purposes, regarded as carrying on mining operations."

Whilst it may only be of academic interest, I propose to consider whether or not the practice of Inland Revenue is correct. I do not propose to become involved in the controversy whether these tailing dumps are movable or immovable, but in relation to whether or not the recovery of minerals from these dumps is 'mining' or a 'process of mining', for the purpose of the Act, requires some thought.

12.1 The case if the dump is a movable.

At 46 the authors of the Mining and Mineral Laws of South Africa state -

> "At common law, once minerals have been severed from the soil, they become movables and the property of the holder of the mineral rights or mining title; and when the ore mined includes sand, rock or other material, these, too, become the property of such holder. ..... Although the general principle governing the question

> whether any particular structure or other object upon a piece of land, is a movable or an immovable, are well settled, there has been a singular dearth of traditional authority in South Africa, upon the question whether or not a mine dump constitutes a movable or immovable property."

As stated above, I do not intend to enter into that controversy. However, the question that arises in relation to the Act and the definition with which we are dealing is whether, once the dump is a movable, the operations to reprocess the sand, slimes and stone in the dump are winning 'from the soil' or from any substance or constituent thereof. It is submitted that having been removed from its original site by excavation and being dumped on top of the soil, the dump can no longer be regarded as part of the soil. Is the dump, therefore, a substance or constituent of the soil? At 704 of the Mining and Mineral Laws of South Africa, the authors say -

> "The definition of mining in the Income Tax Act refers to the winning of the mineral from the soil, which would appear to contemplate that in mining, the mineral or ore must be recovered from the soil. The word 'soil', which is not defined, is more restrictive than the word 'earth' which is

used in the definition in the Mining Rights Act, and was also used in the definition of mining in the Transvaal Gold Law. Soil is usually regarded as the upper layer of the earth in which plants grow, and an igneous or sedimentary formation several thousand metres below the earth's surface would not ordinarily be regarded as soil. In the context in which it is used, however, soil must be regarded as any part of the earth's crust, and mining will cover the recovery of any mineral in and forming part of that crust. The additional phraseology - "any substance or constituent thereof" - does not "it is submitted, extend the concept of mining".

If the learned authors are correct, and on the assumption that the dump is a movable, then it is submitted that it has ceased to be part of the soil - it is no longer part of the earth's crust. What it has become is something deposited upon the soil - upon the earth's crust. It is, therefore, submitted that in those circumstances the removal of the dump or portions thereof and its transport to a treatment plant

for the removal of various mineral substances from the tailings is not a mining operation, nor mining; not a winning from the soil. A possibility to be considered is that the learned authors are wrong when they say the additional phrase - "any substance or constituent thereof", does not extend the concept of mining. Those words have been included in the definition since at least the passing of the Income Tax Act No 40 of 1925 and it is not lightly to be assumed that words included in a statute are without meaning or are tautologous. It has been known since the turn of the century that gold recovery in the early days of mining was incomplete. In a report entitled "Historical Review of certain Aspects of the Taxation of Gold Mines in the Transvaal and Orange Free State" presented by J W Shilling to the University of the Witwatersrand in part fulfilment of the requir ments of the Higher Diploma in Tax Law, the following appears at 17 in connection with the use of the cyanide recovery process discovered by McArthur & Forrest in 1887 -

> "The use of this process probably demonstrated, at a fairly early stage, the ability to recover silver and osmiridium

> occurring in the gold ores, giving rise to additional revenue for the gold mines."

Was not the legislature, in referring to "any substance or constituent thereof" conscious of the ability to retreat dumps in order to extract therefrom minerals left therein by reason of the early imperfect recovery process? There can be little doubt, as pointed out by the authors, that excavations which have taken place several thousand metres below the surface of the earth would not ordinarily be regarded as a removal from the soil. Nevertheless, if it is, in fact, so regarded, then logically, the waste material which has been dumped, must at one time, have formed part of the soil and was, at some time, a substance or constituent of the soil. On that assumption, it is submitted that the retreatment of the dump materials is a continuation of the mining process since, as pointed out by Wessels J in the Nourse Mines' case, the purpose of mining for gold is not only to extract the ore, but also to convert it into metal, the very object of the reprocessing.

Does it make any difference whether this retreatment operation is carried on by the

original mining company, many of which no longer exist, the ownership of the dumps having passed into new hands? It is submitted that it will not, if the dump is soil or a substance or a constituent thereof. As I understand the process of removing the dump for treatment, it can be classed as quarrying or open cast mining. The top of the dump usually contains very little gold if any at all. The real values increase as the excavating proceeds, the particles of gold having gravitated towards the bottom of the dump. In effect, the party retreating the substances in the dump is removing the overburden, a normal practice in strip or open cast mining. It must be remembered that save for the reference to 'mineral', the definition has been given an extended meaning. Will it make a difference if the owner of the dump does not retreat it itself, but leases that right to a third party? This is the situation which Roper J had in mind in R v Blom with which I have dealt above.

12.2 The position if the dump is immovable.

If, as some contend, the dump has acceded to the land on which it is situated, then it is submitted that it will more certainly have become part of the soil or a substance or constituent thereof. A fortiori then the removal of the material will be a method or process of winning a mineral from the soil, whether the mining company, which created the dump, or its successor-in-title or a third party carries out the process.

12.3 It is submitted, therefore, that the practice of the Department of Inland Revenue of regarding dump recovery operations as mining or a mining operation, is correct.

SOURCE

13

13.1 The definition of 'gross income' in Section 1 of the Act stipulates that the total amount in cash, or otherwise, received by or accrued to or in favour of any person during a year of assessment "from a source within or deemed to be within the Republic" excluding, of course, receipts

or accruals of a capital nature, is part of the gross income of a taxpayer. The Act does not define 'source' and indeed it has been said on more than one occasion that it is "probably an impossible task" to formulate a definition which would furnish a universal test for determining when an amount is received from a source within the Republic. The general rules for determining the source of gross income are applicable to gross income derived from mining or mining operations. However, I propose to illustrate some of those general rules in a case relating to the sale of mining claims, and to deal with 'deemed source'.

13.2 In the Privy Council judgment in the case of Rhodesian Metals Limited (In Liquidation) v Commissioner of Taxes, reported at 1940 AD 432 at 436 and 437, Lord Atkin who delivered the judgment of the Judicial Committee of the Privy Council, said -

> "If capital productively employed in the place where it purchases stock which is profitably sold elsewhere; or in the place where the stock which now represents the capital is sold; or for the purposes of the test, must both purchases and sales

occur in the same place; or is it sufficient that the place of the direction of the employment of the capital in purchasing or selling, should denote where the capital is productively employed? Perhaps in other words it may be said, does it mean more than carrying on business in a place? Their Lordships inclined to the view, quoted with approval from Mr Ingram's work on Income Tax by Mr Justice De Villiers in his dissenting judgment: "Source means not a legal concept, but something which a practical man would regard as a real source of income"; "the ascertaining of the actual source is a practical hard matter of fact."

13.3 Although quoting with approval from the dissenting judgment of De Villiers J A, their Lordships upheld the judgment of the Appellate Division in Rhodesia Metals Limited (In Liquidation) v Commissioner of Taxes, 1938 AD 282. The facts in the matter were rather complicated and it is unnecessary to deal with them in any detail. Briefly, what happened was that Sir Edmund Davis, a director of companies in London, obtained an option via his agent in Rhodesia to purchase a number of tungsten claims known as the Sequel Mine in the mining district of Bulawayo. Davis formed two companies in London on the same day. The one was the appellant in the

[illegible] company known as
[illegible] Swithin's [illegible]ac and Metal Limited. As a result of a series of transactions, claims and options passed from Davis personally to the appellant and thence almost immediately, to St Swithin's. The appellant remained with some 1 110 claims and four days after the first stage of the transactions had been completed, the appellant was placed into voluntary liquidation. Twelve days' later the liquidator offered to sell the remaining 1 110 claims to St Swithin's. In the result, both Davis, personally, and the appellant, made substantial profits which the Appeal Court had no difficulty in finding, were gross income and not a capital [illegible] as contended by the appellant.

The second issue in the case was, however, the question of whether or not the receipt or accrual, which had been found was not of a capital nature, was received by or accrued to, or in favour of the taxpayer, from any source within Southern Rhodesia. All the transactions referred between Davis, the appellant and St Swithin's had been carried out in London, which was Sir Edmund's only place of business

The money was paid in London.

13.5 Strathford C J, said at 290 -

> "In the present case we have to determine whether the profit was due to the productive employment of the company's capital in Rhodesia, or on the other hand, to its organisation and connections, or to its special aptitude or equipment, or the special intelligence of its board - all of these being in the place where the company resided, which was London. I accept, unhesitatingly as a premise, that in this case, the capital of the company was employed in Rhodesia. Of its total capital of £10 000, £5 00 was spent in the acquisition of the claims and £2 000 odd in work done on them. The claims were in Rhodesia. Therefore, the risk of depreciation or the hope of appreciation, was attached to the Rhodesian acquisition."

13.6 At 297, Tindall J A, who delivered a concurring judgment, said -

> "The correct interpretation of the facts, in my judgment, is that Rhodesia Metals employed its capital in buying cheaply a valuable asset situate in Rhodesia and had resold the asset at a large profit in London. The purchase and the sale by Rhodesia Metals took place in London where

also, Davis carried out his activities in floating the companies and bringing about the ultimate profitable sale of the claims. But from these facts, it does not follow that the transactions in London were the real cause of the profit made. No doubt the ability and experience of Davis were important factors; but in my view, the dominant factor in, the true origin of, the profit was the value of the claims. I hold, therefore, that Rhodesia Metals, in buying and developing the claims and selling them at a profit, employed its capital in Rhodesia. ..... Under the Rhodesian Statute, the enquiry is concerned with the 'source' of the profit. In the circumstances of a particular case the origin of the profit may be the country where the asset realised is situated. The present, in my judgment, is such a case."

He therefore dismissed the appeal and De Wet J A and Fetham A J A concurred in that judgment.

13.7 In his dissenting judgment, De Villiers J A said at 298 -

"Insofar as it (Rhodesia Metals) can be said to have carried on any 'trade' or 'business' during its brief existence, such trade or business was carried on in London. There are two, and only two, things connecting the transaction with

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Southern Rhodesia, vis (a) the fact that the tungsten claims were situated in Rhodesia, and (b) the fact that Rhodesia Metals spent some £2 000 in developing those claims. ..... I cannot, however, regard these two factors as forming (either singularly or together) the dominant causes of the profit made by Rhodesia Metals. ..... As to the fact that the tungsten claims were situate in Southern Rhodesia, I cannot regard that as a factor of prime importance in the present case, or as a 'dominant' factor."

13.8 He continued at 299 -

"Then the sole question is, where was the capital employed? In my opinion it was employed in London. It was in London before the transactions in question took place. It never left London. It did not travel to Southern Rhodesia in order to fertilise the tungsten claims or in order to cause them to produce a profit. It remained throughout in London. The tungsten claims did not appreciate in value between the dates of buying and selling; no revenue was derived from the tungsten claims, nor was any ore or metal extracted from them, by Rhodesia Metals. In short, the tungsten claims contributed nothing whatsoever to the profit. Had they appreciated in value between the date when Rhodesia Metals bought them, and the date

when it sold them, the case would have been quite different; but clearly there was no enhancement in value between the two dates. Everything else connected with the profit-making took place in London, as I have pointed out, and the profit (£146 000) actually came into the hands of Rhodesia Metals in London. Indeed, to put it shortly, the whole affair was a London financial transaction. To use the phraseology of Searle, J. in Commissioner of Revenue v Dunn, the profits sprang from something carried on or effected in London; the origin of the profit was in London (1918 AD at p.610). Therefore, if it be taken that the profit in this case was made by the productive employment of capital, the 'source' of such profit was in London."

13.9 In the very next judgment at 301, Sir Edmund found himself the unsuccessful appellant in regard to his personal assessment for tax on the profit which he personally made in the same transaction.

13.10 By Act No 95 of 1967 the legislature enacted Sub-section (cA) of Section 9 (1) of the Act, which reads as follows -

"9 (1) An amount shall be deemed to have accrued to any person from a source

within the Republic, if it has been received by or has accrued to or in favour of such person by virtue of ..... (cA) any contract made by such person for the disposal of any mineral (including natural oil) won by him in the course of mining operations carried on by him under any mining lease granted under the Mining Rights Act, 1967 (Act 20 of 1967), whereso-ever such contract was made or such mining operations were carried on;"

13.11 Because the application of Sub-section 1 (cA) of Section 9 is limited to mining operations carried on under any mining lease granted under the Mining Rights Act, it follows that it has no application to gross income derived from base minerals mined on privately owned land, nor to the disposal of any minerals mined pursuant to other mining rights held or acquired under the Mining Rights Act, such as claims or mining claims, or small mining operations referred to in Section 21 (2) of the Mining Rights Act. The Mining Rights Act applies only to mining carried out in the Republic, including the continental shelf, which, in terms of Section 7 of the Territorial Waters Act, No 87 of 1963, is deemed to be part of the Republic for the purposes of the exploitation of natural resources,

and is also deemed to be unalienated State land for the purposes of the Mining Laws, but not the Act. The amendment to the Act was therefore essential to extend its operation to cover gross income received or accrued from operations on the continental shelf.

13.12 Another amendment to the Act, also introduced by Act 95 of 1967, was Sub-section 1 (fA) which deems to have accrued within the Republic any amount received by or accrued to in favour of a person by virtue of "any services rendered by such person to, or work or labour done by such person for, any other person upon, beneath or above the continental shelf referred to in Section 7 of the Territorial Waters Act, in the course of operations carried on by such other person under any prospecting or mining lease granted under the Mining Rights Act, 1967 (Act No 20 of 1967), or under any sublease granted under any such lease, wheresoever payment for such services or work or labour is to be made;". This amendment was also necessary for the reasons set out in 13.11.

Conclusion

14 I have not, in this report, sought to deal with the detail of the taxation of Mining Companies contained in Sections 15, 36 and 37 of the Act. Topics such as Capital Expenditure ranking for redemption, Recoupment, the Capital Allowance, the difference in tax treatment of the various types of gold mines, and diamond mines would warrant a separate report if to be dealt with in a satisfactory manner. I have therefore, in the main, confined myself to a consideration of the starting point in relation to Mining Tax.

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