

High Court judgment limits diesel refund claims for mining activities

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The recent *High Court judgment Graspán Colliery v The Commissioner for the South African Revenue Services [2020]* could have significant implications for mining operators and their ability to claim diesel refunds. The judgment dealt with the interpretation of Note 6(f)(iii) to Schedule 6 of the Customs and Excise Act, 1964 and the limitations with regard to what activities constitute primary production activities in mining, for the purposes of claiming diesel refunds.



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What is included in primary production activities in mining is defined in Note 6(f)(iii)(aa)-(w) to Schedule 6. The list of activities included in Note 6(f)(iii) was considered non-exhaustive, following the *Glencore Operations SA (Pty) Ltd v The Commissioner for the South African Revenue Service* judgment. In this judgment, the court concluded that the word “include” in Note 6(f)(iii) goes beyond its primary meaning, and activities that qualify as own primary production activities in Note 6(f)(iii) is non-exhaustive.

In other words, activities may qualify as primary production activities in mining even though they are not specifically included under Note 6(f)(iii), but are operations which the legislature intended to include under primary activities in mining.

However, in the recent case of *Graspán Colliery v The Commissioner for the South African Revenue Service*, the court was called upon to determine whether rehabilitation was an activity that constituted primary production activities in mining, prior to 27 May 2016. Note 6(f)(iii) to Schedule 6 was amended with effect from 27 May 2016, to include rehabilitation as an activity under sub-note (w). In determining whether rehabilitation activities constituted mining activities prior to the amendment, the High Court dealt with the interpretation of Note 6(f)(iii).

The court held that the use of the word “include” in the phrase “own primary production activities” in Note 6(f)(iii) was to give the phrase a more precise meaning by listing what will encompass own primary production activities in mining. The word “include” is therefore, aimed at illustrating that the list is exhaustive of the meaning of primary production activities in mining.

The judgment therefore limits primary production activities in mining to activities listed under Note 6(f)(iii) of the Act. Prior to claiming diesel refunds, mining operators should ensure that their activities are specifically listed under Note 6(f)(iii) and qualify as primary production activities in mining. This is in addition to meeting all the other requirements stipulated by SARS, such as detailed record keeping, etc.

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