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Introduction

On July 3rd, 2024, the long-awaited **Mining (Royalty Collection and Management) Regulations, 2024** were published to give effect to Section 183 of the Mining Act, 2016, which requires holders of mineral rights in Kenya to pay royalties. The Regulations outline a comprehensive framework for the determination and payment of royalties by licensees. They revoke several regulations published in 2013 and 2015 that prescribed royalties on minerals, fluorspar, Magadi Soda products, cement minerals, and diatomite.

The payment of royalties under the Regulations is guided by five principles, including the provision of monetary compensation to Kenyans for the extraction of mineral resources based on the full market value of the mineral in its most processed and marketable form, including any enhancements that increase value. The basic royalty rate to be shared shall be determined by the gross value of the minerals extracted, subject to permitted deductions and offsets. Finally, it is expected that appropriate safeguards, including periodic reconciliation for exports of minerals and the transfer of mineral rights, shall be in place to ensure the recovery of all due royalties.

Computation of Royalties

Rare Earth Elements and Radioactive Materials will attract the highest royalty rate at 8%

Royalties due are to be calculated by applying the royalty rate to the determined royalty base. The royalty base will be computed based on the volumes transported from the license area or, where the minerals have not been moved, then the royalty base will be computed on minerals that are subject to a mineral dealing right during the royalty period. In both instances, the royalty base for a mineral shall be the full market value of all mineral products capable of being produced from the mineral and that are saleable.

In the absence of a reference price, the Regulations guide that the full market value shall be determined by subtracting production costs from the reference price of commercially producible end products and incorporating all associated costs. However, if information is insufficient to determine the royalty base, the Director of Mines is required to use the available data to determine the royalty base.

In the case of exported minerals, the royalty base shall be the mineral's value at the port of exit, based on its full market price. The Director of Mines may permit adjustments in the calculation of the royalty base for minerals that are intended to be used exclusively in Kenya, based on whether they are sold directly at the extraction site or not.

Finally, the Regulations list specific royalty rates by mineral type, ranging from 1% for cut gemstones to a high of 8% for rare earth elements and radioactive minerals.

Payment and Reconciliation of Royalties

The Regulations require that royalties for locally sold or exported minerals be paid within 120 days of the end of the month in which the sale or export occurred, and late payments will incur an administrative penalty based on the Central Bank of Kenya's prevailing interest rate, which was 12.75% at the date of publication.

Where royalties have been paid for the same minerals in a different period, the amount paid will be credited toward the current period's liability, up to the amount actually paid. Further, where multiple parties are liable for royalties for the same minerals, payments by one party will be credited to the liability of others without affecting any right of contribution among parties.

Mineral right holders may apply to the Cabinet Secretary for a reduction or temporary suspension of the royalty rate or royalty payment for up to six months, provided all required reports and statements have been submitted, and subject to a cap of 50% of the published royalty rates. Non-compliance with the Act or Regulations disqualifies holders from royalty rate reductions or suspensions.

The Regulations grant the Director of Mines the mandate to adjust the reference price for the full market value of mineral products in a transaction to reflect what it would have been in an arm's length transaction where the parties' failure to deal at arm's length leads to a decrease in the mineral product's market value.

Royalties will also be applicable to samples removed for testing if their total value exceeds Kes 200,000 per consignment. In computing the royalties on samples, consideration will be given to quantity, composition, and prevailing market price.

The Regulations provide a framework for the reconciliation of royalty payments due for different categories of permit holders, and in those instances when a reconciliation report identifies unpaid royalties, the holder shall be obliged to pay an amount equal to the outstanding royalty. Interest on unpaid or partially unpaid royalties shall accrue monthly at the Central Bank of Kenya's prevailing rate.

Concluding Remarks

While the Regulations establish a clear framework for the computation, payment, and reconciliation of royalties, there remains a significant gap in how these royalties, once paid by licensees, will be managed and distributed amongst the different categories of beneficiaries. Section 183 of the Mining Act requires that these royalties be distributed at a ratio of 70:20:10 among the national government, county government, and affected communities, respectively.

There have been previous recommendations for the Ministry to set up a mineral royalties collection account, with 70% of the royalties transferred to the Consolidated Fund and 30% to the relevant county mineral royalty account for onward transmission of the 10% to affected communities. However, the Regulations have failed to address this critical issue of how these funds will be managed, audited, and distributed, and it remains to be seen how the county governments and affected communities will realize the benefits that could accrue to them from these mineral activities.

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