Peru amends mining tax regime

Peru's Parliament approved new laws on 22 September 2011 that increase mining taxes to fund anti-poverty infrastructure projects in the country. The rules, which make fundamental changes to the taxation of the mining industry, were published in the Official Gazette on 29 September 2011 and apply as from 1 October 2011. Supplementary regulations were published on 29 September 2011 and 1 October 2011 to facilitate compliance.

The new law distinguishes between companies that have concluded a legal stability agreement with the government and those that have not. The General Mining Law allows holders of mining rights to conclude such agreements with the Peruvian government in connection with new investments in mining operations or an expansion of existing mining operations. Legal stability agreements provide a number of guarantees for the foreign investor, including: equal treatment with national investors; tax stability, i.e. the tax regime (income tax, treatment of exports, transferable nature of consumption taxes, etc.) that applies at the time the agreement is concluded cannot be changed unilaterally during the term agreed with the government (10 or 15 years), and therefore any new tax imposed during that period would not be applicable to the investor; and the ability to exchange currency and remit profits abroad.

The new law changes the scheme for royalty payments, so that mining companies that have not signed legal stability agreements with the government will have to pay royalties of 1% to 12% on operating profit; royalties under the previous rules were 1% to 3% on net sales. In addition to these royalties, such companies will be subject to a "special tax" at a rate ranging from 2% to 8.4% of operating profit. Companies that have concluded legal stability agreements (under the General Mining Law) will be required to pay a "special contribution" of between 4% and 13.12% of operating profits.

Peru is the world's second largest copper and silver producer and a major producer of gold, zinc, lead and other minerals. The revisions to the mining tax rules have been closely watched by foreign mining companies already operating in the country, as well as potential foreign investors interested in Peru's mining sector. Now that the rules have been enacted, they require careful analysis to ensure compliance.

Changes to royalty system

The new rules amending the mining royalty system affect, primarily, the event triggering the obligation to pay a mining royalty, the determination of the taxable base and the applicable rates for calculating the royalty.

Under the regime in force until 30 September 2011, the mining royalty was regarded as representing the economic consideration that holders of mining concessions paid to the government for the exploitation of metal and non-metal mineral resources. The royalty was determined on a monthly basis, using a compound cumulative progressive scale applying rates of 1% to 3% to the value of the concentrate or its equivalent, according to prices quoted on the international markets. The amount paid qualified as a cost (i.e. was deductible) for purposes of the corporate income tax.

The new rules provide that the mining royalty is to be paid to the government by mining sector enterprises holding mining concessions and entities engaged in the exploitation of metal and non-metal resources, including integrated enterprises, as a charge for the use of the resources. The royalty will be determined based on a progressive system by reference to the quarterly operating profits of the taxpayer. Such profits would be the profits arrived at by deducting sales costs and related operating expenses, including sales and administrative expenses, from the income generated as a result of sales in a calendar quarter, all items being determined at market value according to the income tax provisions. The tax rate ranges from 1% to 12%, depending on the operating margin. In no case may the mining royalty be less than 1% of quarterly sales income, so that mining companies with negative operating profits will have to pay a royalty of at least 1% of sales income derived. The amount paid will qualify as an allowable deduction for corporate income tax purposes.

Mining sector enterprises are required to file a quarterly tax return and make payments in local currency within the last 12 business days of the second month following the month in which the quarterly period ends, according to guidelines to be issued by the tax authorities. Failure to make the required payment will result in the imposition of late payment interest, determined by applying the moratoria interest rate provided for tax obligations administered or collected by the Peruvian tax authorities.

Exceptionally, for the period October-December 2011, mining sector enterprises will have to submit a return and make monthly prepayments of the royalty determined on the basis of the monthly sales income and the operating margin for

2010. The due date for submitting the return and making these payments is the last business day of the month following the month to which the return relates.

The royalty for the quarterly period October-December 2011 will be determined based on the operating profits of that period, but cannot be less than 1% of the quarterly sales income. The monthly prepayments will be set off against the amount so determined. The period for submitting the tax return relating to this period and for complying with payment obligations (where there is an outstanding balance, i.e. where the royalty for the quarterly period exceeds the monthly prepayments) will be the last 12 business days of February 2012, according to guidelines to be approved by the tax administration. A credit balance (i.e. where the prepayments exceed the royalty for the quarterly period) will be able to be carried forward and set off against the royalty due for the next quarter.

Special mining tax

Under the new regime, mining sector enterprises, including integrated enterprises, not enjoying the benefits of legal stability agreements signed under the General Mining Code regime are subject to a new tax based on their operating profits obtained from the sale of metal and non-metal mining resources, taking into account the self-consumption of these goods where such self-consumption is not supported by proper documentation.

The special mining tax will be levied on the quarterly operating profits (i.e. income derived from the sale of the minerals less sales costs and related operating expenses, including sales expenses and administrative expenses, all determined at market value) at a tax rate ranging from 2% to 8.4%. Costs and expenses relating to the self-consumption of mineral resources will not be deductible to the extent they are not supported by proper documentation. The amount of special mining tax paid will qualify as an allowable deduction for corporate income tax purposes.

Taxpayers will be required to submit tax returns and comply with payment obligations in local currency for each quarter within the last 12 business days of the second month following that in which the relevant quarterly period ends, according to the guidelines to be approved by the tax administration, which will also collect and administer the special mining tax.

Exceptionally, for the period October-December 2011, taxpayers will have to submit a return and make monthly prepayments of the special mining tax determined on the basis of the monthly sales income and the operating margin for 2010. The due date for submitting the return and making the payments is the last business day of the month following the month to which the return relates.

The special mining tax for the quarterly period October-December 2011 will be determined based on the operating profits of that period. The monthly prepayments will be set off against the amount so determined. The period for submitting the tax return relating to this period and for complying with payment obligations (where there is an outstanding balance, i.e. where the special mining tax liability for the quarterly period exceeds the monthly prepayments) will be the last 12 business days of February 2012. A credit balance (i.e. where the prepayments exceed the special mining tax liability for the quarterly period) will be able to be carried forward and set off against the special mining tax liability due for the next quarter.

Additional guidelines to facilitate compliance are expected to be issued shortly. The Mining and Energy Ministry will provide the tax administration with any information the tax administration may request regarding mining sector enterprises, as well as the necessary technical support in relation to any of the procedures connected with the new obligations.

Special mining contribution

The new rules set out the legal framework for a special mining contribution applicable to mining sector enterprises, including integrated enterprises, that have legal stability agreements in force (and are therefore not subject to the special mining tax) and that voluntarily agree to sign an "agreement" with the government (represented by the Energy and Mines Ministry). An appendix to the regulations accompanying the new law contains a "model agreement."

The mining sector enterprises will commit to pay the special mining contribution by signing the agreement. The special mining contribution will then represent a source of public revenue collected for the exploitation of nonrenewable natural resources and will be determined on a progressive basis by reference to the quarterly operating profits obtained. Such profits will be the profits arrived at by deducting sales costs and operating expenses, including sales and administrative expenses, from the income generated as a result of sales in a calendar quarter, all items being determined at market value according to the income tax provisions. The tax rate ranges from 4% to 13.12%, depending on the operating margin.

For purposes of determining the special contribution due, mining sector enterprises must deduct mining royalties paid under the law regulating mining royalties, as well as contractual mining royalties, when the payment due dates for such royalties fall after the date on which the enterprises sign the agreement. Any credit balance will be carried forward for set off against special mining contribution liabilities of subsequent quarterly periods. The special contribution amount effectively paid qualifies as an allowable deduction for corporate income tax purposes.

Mining sector enterprises are required to file tax returns and comply with payment obligations in local currency for each quarter within the last 12 business days of the second month following the month in which the quarterly period ends, according to guidelines to be issued by the tax authorities. Any delay in making payments will give rise to penalty interest as laid down in the Tax Code.

The funds obtained by the government from collecting the special mining contribution qualify as income of the public treasury. Exceptionally, as from the date of the signing of the agreement, the tax authorities will carry out all the functions associated with the payment and collection of this public revenue source. The tax court will address any controversies relating to the special contribution as an administrative tribunal of second instance.

Exceptionally, for the period October-December 2011, mining sector enterprises will have to submit a return and make monthly prepayments of the special mining contribution determined on the basis of the monthly sales income and the operating margin for 2010. The due date for submitting the return and making these payments is the last business day of the month following the month to which the return relates.

The monthly prepayments will be set off against the special mining contribution for the quarterly period October-December 2011. The period for submitting the tax return relating to this period and for complying with payment obligations (where there is an outstanding balance, i.e. where the special mining contribution for the quarterly period exceeds the monthly prepayments) will be the last 12 business days of February 2012. A credit balance (i.e. where the prepayments exceed the special mining contribution for the quarterly period) will be able to be carried forward and set off against the special mining tax contribution due for the next quarter.

Comments

The main characteristics of the new rules, which dramatically change the tax regime applying to this key sector of the Peruvian economy, can be summarized as follows:

	Without legal stability agreement		With agreement
	Royalty	Special tax	Special contribution
Regime	Amended	New	New
Minimum payment	1% of sales	Not applicable	Not applicable
Base of calculation	Operating profits	Operating profits	Operating profits

The government expects to generate additional annual revenue of approximately USD 1,000 million from the new regime. Although the changes to the mining tax regime will increase the tax burden for the mining sector from 38.5% to 42.7%, according to the economic analysis performed by the government, this still leaves the Peruvian market in a competitive position in relation to other major markets.

The new provisions were approved as a matter of urgency, with a view to expediting the issuing of all regulations necessary to enable the government to begin collecting the relevant royalties, taxes and contributions. If everything proceeds as planned, the collection of these payments will commence in November 2011.

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