

THE MMDR AMENDMENT

Silver lining for M&As

Amongst many things troubling the mining industry, an important factor is that of transfer restrictions, which affects the sector. With the amendment in the MMDR Act, a positive impact is in the offing.

Indian soil is blessed with rich mineral resources and has a long history of mining, mineral production, and mineral utilisation. The mining sector in India is governed by the provisions of the Mines and Mineral (Development and Regulation) Act, 1957 (MMDR Act) together with the rules prescribed there under. The MMDR Act specifies the requirement for obtaining and granting of mining lease for mining operations. Indian laws recognise three kinds of mineral concessions (i) Reconnaissance Permit, (ii) Prospecting License and (iii) Mining Lease.

Amongst many things troubling the mining industry, an important factor is that of transfer restrictions which affects the sector. However, the government has made significant efforts to address this issue in terms of the recent amendment to the MMDR Act which can have a positive impact on mining and other sectors.

TRANSFER RESTRICTIONS

Since the enactment of the MMDR Act in 1957, the Act has been amended from time to time in order to make it relevant with the changing times and requirements in the mining sector. When the MMDR Act was amended in the year 2015 (2015 Amendment) to enhance transparency in mineral allocations in India, it introduced the concept of using the auction route to obtain mineral concession and only allowed transfer of mining leases in cases where the mines have been acquired through auction. Prior to the auction era, the transfer of mining lease was permissible with the approval of the state government and as such was not linked to the manner in which the concessions were acquired by the transferor.

While the 2015 Amendment was a welcome change in a sector which has always been a breeding ground for scams, in the absence of transferability of mining lease, it affected a few major mergers and acquisitions transactions in or relating to the mining sector. Even the banks and corporate houses, who have been trying to reduce the bad debts in the mining sector by way of consolidation of assets, were unable to liquidate the stressed and non-performing assets which are generally offered as security.



2016 AMENDMENT BILL

Taking into account several representations made by the stakeholders to provide relief from the restrictive transfer provision under the 2015 Amendment, the government decided to introduce a limited amendment (2016 Amendment Bill) to the MMDR Act. The 2016 Amendment Bill aims to include the provisions to allow transfer of captive mines granted otherwise than through auction where mineral from such mining lease is used exclusively for captive purpose.

The expression “used for captive purpose” has been explained in the 2016 Amendment Bill to mean the use of the entire quantity of mineral extracted from the mining lease in a manufacturing unit owned by the lessee. The Mineral (Transfer of Mining Lease Granted Otherwise than through Auction for Captive Purpose) Rules, 2016 (2016 Mining Rules) also defines the expression “used for captive purpose” in a similar way.

Although the 2016 Amendment Bill was cleared by both the Houses, certain apprehensions were still harbored in the mind of the stakeholders regarding the applicability of the additional transfer provisions to the acquisition deals in the mining sector. In order to put the speculation to rest, the government has recently notified the 2016 Mining Rules. These rules provide two amendments which alter the entire mechanism for acquisition and transfer of mining leases for the captive purpose which offers solutions to ease the worry of stakeholders.

TRANSFER CONDITIONS

The 2016 Mining Rules clearly spell out the conditions for transfer and require the transferee to comply with all the conditions and liabilities under any law which the transferor was required to comply with relating to such mining lease. In the event of any liabilities relating to the mining lease, the 2016 Mining Rules further provide that the transferee shall be liable to the Central government and the state government.

The transfer of mining lease is subject to prior approval of the state government. In this regard, an application (in the format as set out in the 2016 Mining Rules) shall be required to be made to the state government. The 2016 Mining Rules further provide that the state government shall be required to convey its decision to approve or reject such transfer within 90 days of receipt of the application, failing which it shall be construed to be a deemed approval.

The delay in granting of the approval by the regulatory bodies and lack of clarity on the possible conditions required to be fulfilled by the parties has resulted in several transactions being adversely affected. This in turn has led to important transactions being stalled, renegotiated or rescinded because of the inordinate delays. This also has the effect of overall increase in the cost of the transaction. With the time-bound approval provisions and clarity on the transfer conditions in place, it will certainly go a long way to complete transactions in a cost-effective manner.

FINANCIAL OBLIGATIONS

As regard to the transfer charges, the Mining Rules provides that the transferee shall be liable to pay an amount equal to 80 per cent of the royalty paid by the right holder in terms of the MMDR Act. Royalty on minerals is charged on ad valorem basis as percentage of price notified by the government except in case of a few minerals where royalty is charged on the basis of units of production. The Central or the state government may however increase the rate of royalty for major mineral and minor minerals, respectively once in three years. Additionally, there are a series of financial obligations which the transferee shall have to bear such as (i) dead rent, (ii) upfront payment of an amount equal to 0.50 per cent of the value of the estimated resources. The transferee shall also have to provide a performance security to the state government in the form of a bank guarantee as a security deposit, for an amount equivalent to 0.50 per cent of the value of the estimated resources, which shall be adjusted every five years so that the performance security corresponds to 0.50 per cent of the then value of the estimated resources.

The MMDR Act also provides for entry tax, forest tax, water tax, surface rent and contributions to National Mineral Exploration Trust and District Mineral

Foundation. The list of taxes, cess and levies are merely indicative. While the government has taken steps to set out the nature of transfer charges and other applicable cost and taxes, the cumulative cost when put together, will affect the revenue margin of the parties in the transaction and may also prove to be financially burdensome for them.

IMPLICATION OF THE AMENDMENTS

The recent amendments to the MMDR Act are expected to revive and encourage mergers and acquisitions in sectors related to coal, limestone, iron & steel and bauxite. The Indian mining industry produces many products which include a total of 84 minerals consisting of 49 non-metallic minerals, 11 metallic minerals, 4 fuels and 20 minor minerals. This amendment will also encourage consolidation in the mining sector as well as allied sectors concerning the 84 minerals.

The increase in mineral exploration activities would certainly result in overall employment generation and economic growth of India. It will also generate indirect employment by stimulating demand for goods and services. Mines spend heavily on equipment, maintenance, and other services and often use local contractors and suppliers. This creates employment opportunities indirectly in processing and manufacturing mined goods, transportation, and providing equipment and services to the mining industry.

The amendments will also enable companies to transfer captive mines.

WAY AHEAD

Although the 2016 Amendment Bill permits transfer of the mining lease without resorting to competitive bidding (i.e. through auction route), the transferee companies will have to factor whether they are ready to exclusively consume the entire quantity of mineral extracted by them, besides taking into consideration the additional financial obligations set out under the 2016 Mining Rules. However, there is no denying that the current amendments are much awaited and positive steps are being taken by the government, and the same will certainly help unclog a number of deals stuck in the mining, cement and steel sectors.

The removal of the transfer restriction will also help the financially stressed companies holding mining leases to treat the mines as an asset and to monetise the same in the event of change of ownership by way of mergers, acquisitions, transfers or disposal of stressed assets. **IT**



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