

# INFOLEX

NEWSALERT

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## MINING REFORMS: TRANSFER OF LEASE, A SMOOTHER RIDE

### 1. Introduction

The Central Government has, on May 30, 2016, notified the Minerals (Transfer of Mining Lease Granted Otherwise than through Auction for Captive Purpose) Rules, 2016 (the “Rules”).

These Rules have been notified pursuant to section 12A of the Mines and Minerals (Development and Regulation) Act, 1957 (the “Act”).

The Rules are a step forward towards enabling existing holders of mining leases (which were granted otherwise than through auction and being used for captive purpose) to transfer those leases to persons that meet the prescribed criteria.

This move is aimed to facilitate distressed companies to make a smooth exit and to address the concerns of banks and other financial institutions that have invested in such companies.

### 2. Conditions for transfer

Rule 4 specifies the following conditions for transfer of a mining lease:

- (i) transfer is permitted only where the entire quantity of mineral extracted from such mining lease is being used in a manufacturing unit owned by the lessee;
- (ii) all approvals for transfer shall be subject to additional conditions, namely:
  - all consents, approvals, permits, no-objections and the like as may be required under applicable laws for conducting mining operations, and which were obtained by the transferor, shall stand transferred *mutatis mutandis* to the transferee;
  - the transferee has to accept all the conditions and liabilities under any law for the time being in force which the transferor was subject to in respect of such mining lease;
  - on and from the date of transfer of the mining lease, the transferee shall be liable to the Central Government and the State Government with respect to any and all liabilities relating to the mining lease;
  - the transferee shall ensure that the entire quantity of mineral including rejects or tailings or slimes or dumps or overburden extracted from the mining lease shall be used exclusively for captive purpose and shall not be sold or exported; and

- on and from the date of transfer of the mining lease, the transferee shall be bound by the provisions of the Act and the rules made thereunder.

It should be noted that the State Government may terminate the mining lease if the holder has, in the opinion of the State Government, committed a breach of any of the provisions of the Rules or has transferred such lease or any right, title, or interest therein otherwise than in accordance with the provisions of the Act or the rules made thereunder, as the case may be.

However, the holder of the mining lease shall be given reasonable opportunity of stating his case.

### 3. Procedure for transfer

Rule 5 sets out the procedure for transfer of a mining lease, requiring the holder of the lease making an application to the State Government (*in the format provided in Schedule I*).

The State Government is required to convey its decision to approve or reject such application within a period of 90 days. In the event the application is rejected, the reasons for such rejection shall be communicated to both the transferor and the transferee.

In the event the State Government does not convey its decision within a period of 90 days, the application for transfer is deemed accepted.

Within fifteen (15) days of approval, the State Government shall, based upon an estimation of the value of the resources which are the subject of the mining lease, raise a demand upon the transferee for making an upfront payment of an amount equal to 0.50% of the value of the estimated resources.

The upfront payment shall be made in one lump sum within a period of thirty days from the date of receipt of the demand and shall be adjusted in full against the total amount payable for transfer.

Within fifteen (15) days of the upfront payment, the transferee shall sign the Mine Development and Production Agreement (the “**Agreement**”) with the State Government.

Within fifteen (15) days of signing the Agreement, the transferee shall provide a performance security to the State Government in the form of a bank guarantee (*in the format provided in Schedule II*) or as a security deposit for an amount equivalent to 0.50% of the value of estimated resources.

The performance security shall be adjusted every five (5) years so that it continues to correspond to 0.50% of the reassessed value of estimated resources. The State Government is at liberty to invoke the performance security in accordance with the terms and conditions of the Agreement.

Thereafter, the transferor and the transferee are required to jointly submit a duly registered deed for transfer to the State Government within a period of thirty (30) days of submitting the performance security.

The approval given by the State Government for transfer shall be deemed null and void if the duly registered transfer deed is not submitted to the State Government.

The State Government shall then execute a mining lease deed with the transferee (*in the format provided in Schedule VII appended to the Minerals (Other than Atomic and Hydro Carbons Energy Minerals) Concession Rules, 2016*), within ninety days of registration of the deed for transfer of mining lease.

#### 4. Transfer charges and payments

In cases where royalty is payable, the transferee shall, in addition to royalty, pay transfer charges to the State Government of an amount equal to 80% of the royalty paid.

The transferee is also required to contribute to the National Mineral Exploration Trust and the District Mineral Foundation, in accordance with the applicable rules.

#### 5. Intimation

The State Government shall inform the Controller General, Indian Bureau of Mines in writing about the transfers made under Rule 5.

#### IndusLaw View:

The Rules are an attempt to unlock projects that are in distress and attract M&A activity in the mining sector.

It will also be a relief measure for companies that are in distress and also benefit creditors to such companies.

However, the rules require that the resource must be used in a *manufacturing unit* of the lessee, so an incoming acquirer will not be able to *delink* the *resource* from its *captive use*.

Time bound obligations on the State Government to approve or reject such applications for the transfer of an existing mining lease is a welcome move. However, the requirement to pay transfer charges at a percentage of the estimated value of the resource will, in the absence of a clear and transparent pricing mechanism, lead to disputes on valuation.

It remains to be seen whether interested parties will consider paying an *additional* royalty (where royalties by the transferor are already being paid) amounting to 80 per cent of the royalty already paid as an acceptable condition.

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