THE SELEBI-PIKWE TAX AGREEMENT RATIFICATION ACT, 1970

No. 6 of 1970.

AN ACT TO RATIFY A TAX AGREEMENT ENTERED INTO BETWEEN THE GOVERNMENT OF THE REPUBLIC OF BOTSWANA AND BAMANGWATO CONCESSIONS LIMITED AND BOTSWANA R.S.T. LIMITED

Date of Assent: 31.3.70

Date of Commencement: 31.3.70

ENACTED by the Parliament of Botswana.

Short Title

1. This Act may be cited as the Selebi-Pikwe Tax Agreement Ratification Act, 1970.

Ratification

2. The tax agreement entered into between the Government, Bamangwato Concessions Limited and Botswana RST Limited on the 5th March, 1970 and set out in the Schedule to this Act is ratified.

SCHEDULE

AGREEMENT

THIS AGREEMENT is made the 5th day of MARCH One thousand Nine hundred and Seventy BETWEEN THE MINISTER OF FINANCE FOR AND ON BEHALF OF THE GOVERNMENT OF THE REPUBLIC OF BOTSWANA (hereinafter called "The Government") of the first part, BAMANGWATO CONCESSIONS LIMITED (hereinafter called "BCL") whose registered office is at Tswana House, The Mall, Gaborone in the Republic of Botswana of the second part and BOTSWANA RST LIMITED (hereinafter called "BRST") a company incorporated in the Republic of Botswana and having its registered office at Tswana House aforesaid of the third part.

WHEREAS:

(A) BCL has made certain mineral discoveries at Selebi-Pikwe in the Republic of Botswana;

(B) BRST owns the majority of the issued shares in the capital of BCL;

(C) Under the Income Tax (Consolidation) Proclamation, 1959, as amended by the Income Tax (Consolidation) (Amendment) Act, 1970, the Minister has power to enter into tax agreements with any person to vary the provisions of the Income Tax (Consolidation) Proclamation, 1959, or any other law in so far as such provisions impose liability to tax or regulate the imposition of such liability, provided however that any such agreement shall not come into effect unless and until it has been ratified by Act of Parliament;

(D) Pursuant to the provisions of the Income Tax (Consolidation) Proclamation, 1959, aforesaid the Government, BCL and BRST have agreed to enter into this Agreement to the intent that the provisions of the said Income Tax (Consolidation) Proclamation, 1959, (as from time to time amended) shall be varied as hereinafter set forth.

NOW IT IS HEREBY AGREED as follows:–

PART I

DEFINITIONS, COMMENCEMENT DATE AND RATIFICATION

1. In this Agreement where the context so permits the following words and expressions shall have the respective meanings hereinafter set out:

"the Act" means the Income Tax (Consolidation) Proclamation 1959, and any amendment or re-enactment thereof from time to time in force (and reference to any Section, subsection, paragraph or subparagraph thereof shall be similarly construed);

"the current Act" means the Act as currently in force at the date of this Agreement;

"the area" means the area of Grant as specified in clause 2 of the Schedule to the Bamangwato Concessions Limited Mining Lease Act, 1970;

"the operations" means mining operations carried on by BCL within the area and all exploration carried out by BCL within Botswana, and processing, servicing, administrative and marketing operations related to such mining operations or exploration;

"operating profit margin" means the result obtained by subtracting the production cost from the sales revenue and expressing the difference as a percentage of sales revenue;

"sales revenue" means the amount realised by BCL from the operations;

"production cost" means the cost of production of minerals or metals, including the operating costs down to and including delivery by BCL to buyers, the royalties payable by BCL to the Government, and rents or other like amounts payable to the Government including payments made by BCL as contribution towards the cost of establishing a township at Selebi-Pikwe, interest payable on loans, expense of administration (including Directors' fees), depreciation, or other like amounts set aside to provide for the replacement of assets and the amount of all such other provisions as in the opinion of the auditors of BCL it is proper to make according to the principles of sound accountancy but not including appropriations to reserves nor provisions for income tax, profits tax, or any tax of a substantially similar nature;

Save where the context otherwise requires and subject to the provisions of Section 9 (iii) hereof expressions in the Act shall have the same meaning in this Agreement.

2. (A) Subject to this Agreement being ratified by legislation in the manner described in Clause 3 below this Agreement shall come into force on the date upon which such legislation comes into operation.

(B) This Agreement shall terminate on 1st March, 1998, provided always that if on such date production has not ceased as a result of depletion of ore reserves in the area and the remaining ore reserves in the area are such that BCL is in a position to continue production on a commercial basis this Agreement shall be automatically extended for a further period of twenty-five years from such date. Any termination of this Agreement shall be without prejudice to rights and liabilities accruing hereunder in respect of all periods ending on or before such termination.

3. The Government will introduce legislation for this Agreement to be ratified by Parliament and will use its best endeavours to cause such legislation to be passed on or before the Thirty-first day of March, 1970. This Agreement is conditional upon such legislation being passed and if such legislation is not so

passed this Agreement shall for all purposes be deemed to have been void ab initio and of no effect.

PART II

TAXATION OF BCL IN RESPECT OF INCOME FROM THE OPERATIONS

4. (A) In respect of income from the operations BCL shall be chargeable to income tax under the Act but subject to such modifications as are required to give effect to the following provisions of this part of this Agreement. In the event of BCL carrying on activities other than the operations, BCL's expenditure, receipts, assets and liabilities shall be apportioned between the operations and such other activities in such manner as the Collector shall determine as reasonable in order to permit the income from the operations and from such other activities to be fairly ascertained.

(B) This part of this Agreement shall not affect BCL's liability to taxation in respect of activities other than the operations and income from such other activities shall be treated for all tax purposes as being entirely independent of the income from the operations. The expression "income" where hereinafter used in this part of this Agreement means BCL's income from the operations and all other expressions shall be similarly restricted so as to relate only to the operations.

5. Interest and commitment fees on monies borrowed or subject to borrowing by BCL and for the time being applied or which on receipt will be applied for the purposes of the operations shall be allowed as a deduction in computing the income other than such interest or fees in respect of any period prior to the commencement of production.

6. (A) In respect of capital expenditure on the following items namely:—

(i) the items specified in Section 17(5) (a) of the current Act provided that

(a) for this purpose the word "buildings" shall be deemed to include such dwellings which, in the opinion of the Collector, are reasonably required for the purposes of the operations

(b) the limitation as to value contained in Section 17(5) (a) aforesaid shall not apply.

(ii) exploration, development (including payments made by BCL for the right of use of any process, plant or machinery or of any patent, design, trade mark or copy-right or any other property which in the opinion of the Collector is of a similar nature), general administration and management including interest on monies borrowed by BCL and for the time being applied for the purposes of the operations, where such expenditure is in respect of a period prior to commencement of commercial production;

BCL shall be entitled in computing its income to the deductions set out in the following paragraphs in lieu of any other allowances or deductions (including in particular but without prejudice to the generality of the foregoing the allowances or deductions set out in paragraphs (c), (d), (h)(i) and (i) of subsection 13 (1) and Section 17 (1) of the current Act). Paragraphs (c), (d), (h)(i) and (i) of subsection 13(1) and subsections (1) to (4) of Section 17 of the current Act and any modifications or re-enactments thereof shall not apply to BCL.

(B) The amount to be deducted for each year under sub-clause (A) of this Clause shall be as follows:–

(i) for the year of assessment in respect of which the Collector has accepted the accounts of BCL for the period during which BCL commences commercial production an amount equal to the quotient obtained by dividing the relevant capital expenditure for that and all previous years of assessment (less any recoupments received in respect of such capital expenditure) by five;

(ii) for the three succeeding years of assessment an amount equal to the quotient obtained by dividing the sum of the unredeemed capital expenditure at the commencement of the year plus the relevant capital expenditure for that year (less any recoupments received in respect of that year from capital expenditure incurred in that or in any previous year of assessment) by four, three and two respectively;

(iii) for each subsequent year of assessment an amount equal to the sum of the unredeemed capital expenditure at the commencement of the year plus the relevant capital expenditure during the year (less any recoupments received in respect of that year from capital expenditure incurred in that or in any previous year of assessment).

Provided nevertheless that the deductions allowed for any year of assessment under the preceding provisions of this sub-clause (B) shall not exceed 75% of the taxable income for that year prior to charging such deductions but after charging all other allowable deductions and to the extent that the deductions under this sub-clause (b) for any year of assessment are so restricted they shall be added to the balance of unredeemed capital expenditure carried forward and available to be set off as deductions against the taxable income of the next and subsequent years of assessment in accordance with paragraph (ii) or (iii) (as the case may require) of this sub-clause (B).

(C) The amount of the balance of unredeemed capital expenditure at the end of any year of assessment available for carry forward as provided in sub-clause (B) of this Clause shall not otherwise be available for set off against future taxable income (and in particular, but without prejudice to the generality of the foregoing, shall not be included in computing any "assessed loss" under Section 13(2) of the current Act).

7. For all periods after 31st December, 1969 the accounting period of BCL shall (unless the Government and BCL agree in writing) be the calendar year. For the purpose of Section 31 (13) of the Act the Collector shall accept the accounts of BCL for each accounting period ended 31st December for the year of assessment ending on the following 30th June.

8. (A) The rate of income tax payable by BCL on its taxable income for each year of assessment shall be 40% subject to increase as provided in sub-clause (B) of this Clause, provided that, for the purpose of ascertaining the said taxable income, there shall be deducted from the income of BCL any payments made by BCL as contribution towards the cost of establishing a township at Selebi-Pikwe.

(B) If the operating profit margin from the operations for any accounting year exceeds 48.5% the rate of tax payable by BCL on its income for the corresponding year of assessment (ascertained in accordance with Clause 7) shall be increased by the figure equal to the excess of the operating profit margin over 48.5%. Provided that the rate of income tax shall not exceed 65% for any year of assessment (i.e. where the operating profit margin equals or exceeds 73.5%).

9. The Government hereby undertakes that:—

(i) BCL shall not be liable for any taxes or duties other than as provided in this Agreement related to production, sales, exports, turnover or the profits of the operations;

(ii) BCL shall not be liable for any capital tax, duty or levy, other than local rates, imposed by reference to the value of or increase in value of any property whether real or personal used by it in relation to the operations;

(iii) to the extent that any amendment or re-enactment of the current Act together with all other such amendments or re-enactments has the effect of increasing the liability of BCL to income tax by more than a nominal amount over that to which BCL would have been liable on the basis of this agreement and the current Act such amendment or re-enactment shall not apply to BCL;

(iv) neither BCL nor BRST (nor their respective shareholders, creditors or employees) shall in any manner whatsoever be the object of unfavourable discriminatory legislation in the field of direct or indirect taxation imposed by Botswana (or any political subdivision thereof) independently of any other governments and the Government undertakes to use all reasonable endeavours to ensure that no such unfavourable discrimination will be imposed in Botswana in conjunction with any other state or other political entity.

10. BCL shall from time to time during each accounting year at such reasonable intervals as the Government may request provide the Collector with estimates of its income and operating profit margin for that year broken down into such quarterly or other periods as the Collector may from time to time request.

PART III

DIVIDENDS AND INTEREST PAID BY BCL AND BRST

11. (A) The expression "dividends" where hereinafter used in this Part of this Agreement means dividends paid by BCL and BRST from income derived from the operations. The expression "interest" where hereinafter used in this Part of this Agreement means interest payable by BCL or BRST on monies borrowed by BCL or BRST and applied for the purposes of the operations.

(B) Dividends paid by BCL or BRST (i) to companies resident within Botswana, or (ii) to persons who are not resident within Botswana and who do not carry on any trade or business within Botswana through a permanent establishment situated therein, shall not be subject to Botswana tax.

(C) Interest paid by BCL to persons who are not resident within Botswana and who do not carry on any trade or business within Botswana through a permanent establishment situated therein shall not be subject to Botswana tax.

(D) Neither BCL nor BRST shall in relation to any dividends or interest respectively paid by them be deemed to be an agent for the person entitled to the dividends or interest in question under Section 48 of the Act nor shall either company be entitled or required to deduct therefrom any withholding or other tax or levy.

(E) For the purposes of sub-clauses (B) and (C) of this Clause, a person not resident within Botswana shall be treated as carrying on a trade or business within Botswana through a permanent establishment situated therein if but only if he could be treated as so doing (under the provisions of the Agreement entered into in 1949 between the Government of Great Britain and Northern Ireland and the Government of the Bechuanaland Protectorate for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect of Taxes on Income) were he a resident of the United Kingdom.

(F) In the event of BRST borrowing monies and applying such monies (or part thereof) in making loans to BCL to be used by BCL for the purposes of the operations, the interest payable by BRST in respect of such monies (to the extent of the interest received on the loans to BCL) shall be allowed as a deduction in computing income tax payable by BRST on interest received from BCL and such interest if paid by BRST to persons who are not resident within Botswana and who do not carry on any trade or business within Botswana through a permanent establishment situated therein shall not be subject to Botswana tax.

12. Notwithstanding that under the foregoing provisions of this Agreement BRST is not subject to income tax on dividends received in respect of its shareholding in BCL, no deductions otherwise allowable under the Act to BRST in computing its income for the purposes of Botswana income tax shall be disallowed on the grounds that they relate to such dividends.

PART IV

MISCELLANEOUS PROVISIONS

13. Subject to the present provisions of their respective Memoranda and Articles of Association relating to the payment of dividends, BCL and BRST may pay such dividends as may seem to the respective Boards of Directors to be appropriate.

14. The Government agrees that for the purposes of Section 19 of the current Act:—

(i) BRST shall be regarded as a public company so long as a majority in nominal value of its equity share capital is quoted or listed on The London Stock Exchange, The Scottish Stock Exchange, the Johannesburg Stock Exchange or any other recognised Stock Exchange or dealt in on the "over-the-counter" market in the United States of America; and

(ii) BCL shall be regarded as a public company so long as the Government and BRST own in the aggregate a majority in nominal value of its equity share capital.

IN WITNESS WHEREOF the parties hereto have hereunder set their hands.

SIGNED by the Honourable JAMES GEORGE HASKINS, O.B.E., J.P., M.P., Minister of Finance for and on behalf of the GOVERNMENT OF THE REPUBLIC OF BOTSWANA at GABORONE on the 5th day of March, 1970 in the presence of the undersigned Witnesses.

AS WITNESSES:

1. H.C.L. HERMANS J.G. HASKINS

2. J.K. HAVERS

SIGNED for and on behalf of BAMANGWATO CONCESSIONS LIMITED at GABORONE on the 5th day of March, 1970 in the presence of the undersigned Witnesses.

AS WITNESSES:

1. J. KENYON B.D. NAPPER

2. D.C. RITCHIE

SIGNED for and on behalf of BOTSWANA RST LIMITED at GABORONE on the 5th day of March, 1970 in the presence of the undersigned Witnesses.

AS WITNESSES;

1. J. KENYON — B.D. NAPPER

2. D.C. RITCHIE

Passed by the National Assembly this day, the 25th March, 1970

I. GONTSE,
Acting Clerk of the National Assembly