

INTERPRETATION NOTE 95 (Issue 2)

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ACT : INCOME TAX ACT 58 OF 1962

SECTION : SECTION 12L

SUBJECT : DEDUCTION FOR ENERGY-EFFICIENCY SAVINGS

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Preamble

In this Note unless the context indicates otherwise –

- “**activity**” means the planned undertaking by any person to reduce that person’s energy usage;
- “**National Energy Act**” means the National Energy Act 34 of 2008;
- “**paragraph**” means a paragraph of the Regulations;
- “**Regulations**” means the Regulations published under section 12L(5) by the Minister of Finance in Government Notice R 971 in *Government Gazette* 37136 of 9 December 2013 and amended by Government Notice R 186 in *Government Gazette* 38541 of 6 March 2015;
- “**SANEDI**” means the South African National Energy Development Institute established under section 7 of the National Energy Act;
- “**section**” means a section of the Act;
- “**the Act**” means the Income Tax Act 58 of 1962; and
- any other word or expression bears the meaning ascribed to it in the Act.

All guides and interpretation notes referred to in this Note are available on the SARS website at www.sars.gov.za. Unless indicated otherwise, the latest issues of these documents on the website should be consulted.

1. Purpose

This Note provides guidance on the deduction for energy-efficiency savings under section 12L read with the Regulations.

2. Background

In response to South Africa ranking as one of the top 20 contributors of greenhouse gas emissions in the world, the government voluntarily announced during the 2009 United Nations Climate Change Conference in Copenhagen and confirmed in Paris in 2015 that it would act to significantly reduce domestic greenhouse gas emissions.¹ Government has thus proposed a carbon tax policy to encourage behavioural change towards cleaner low-carbon technologies. As a complementary measure, government has introduced environmental-related tax incentives to address concerns related to global warming and energy security. Such an incentive is section 12L which allows taxpayers to claim a deduction for most forms of energy-efficiency savings that result from activities performed in the carrying on of any trade and in the production of income. The deduction can create or increase an assessed loss.²

¹ National Treasury Discussion Paper “Reducing Greenhouse Gas Emissions: The Carbon Tax Option” (December 2010) at 3.

² See section 20A which relates to the ring-fencing of assessed losses for natural persons and Interpretation Note 33 “Assessed Losses: Companies: The ‘Trade’ and ‘Income from Trade’ requirements”.

From 1 November 2013 to 28 February 2015, the rate at which the deduction was calculated was 45 cents per kilowatt hour or kilowatt hour equivalent of energy-efficiency savings. For years of assessment commencing on or after 1 March 2015, the deduction is calculated at 95 cents per kilowatt hour or kilowatt hour equivalent of energy-efficiency savings.

Section 12L became effective on 1 November 2013 and applies to years of assessment ending before 1 January 2020 (see **4.3.4** for further details).

3. The law

Section 12L and the Regulations are quoted in **Annexure A** and **Annexure B** respectively.

4. Application of the law

4.1 Introduction

Section 12L, read with the Regulations, allows any person registered with SANEDI to claim a deduction for energy-efficiency savings derived from activities performed in the carrying on of any trade, provided all the requirements of the section are met.

The term “energy efficiency savings” is defined in the Regulations as –

“the difference between the actual amount of energy used in the carrying out of an activity or trade, in a specific period and the amount of energy that would have been used in the carrying out of the same activity or trade during the same period under the same conditions if the energy savings measure was not implemented”.

The term “person” is defined in section 1(1) to include an insolvent estate, the estate of a deceased person, any trust and any portfolio of a collective investment scheme. The word “includes” is generally used in legislation as a term of extension which means that the definition of “person” is not limited to only the persons that are specifically mentioned, but includes natural and juristic persons. A juristic person is a legal entity that is separate and distinct from its members. It has legal rights and incurs legal obligations in its own right.

A REIT (real estate investment trust) is a “person” for purposes of the Act. A REIT is a company or trust listed on the JSE that owns and operates income-producing immovable property. A REIT may be a company or if operating in the form of a trust, is deemed to be a company for taxation purposes. A REIT or a controlled company (a subsidiary of a REIT) may therefore be eligible to claim a deduction on qualifying energy-efficiency savings under section 12L.³

A taxpayer must comply with certain requirements (see **4.3** and **5.**) before being eligible for a deduction under section 12L. The allowance can be claimed only from 1 November 2013 up to years of assessment ending before 1 January 2020 (see **4.3.4** for more clarity on the effective date).

³ See Interpretation Note 97 “Taxation of REITs and Controlled Companies” for more information on REITs.

While section 12L is the enabling section, the Regulations contain the technical measures that have to be complied with before the deduction is allowed. Section 12L must therefore be read with the Regulations which prescribe, amongst other things, the following:

- The institution, board or body that must issue the energy-efficiency certificate to the taxpayer. For the purposes of section 12L, SANEDI is the designated institution (see 4.2).
- The powers and responsibilities of SANEDI (see 4.2).
- The information that must be included in the certificate in addition to the information required under section 12L(3) (see 5.4).
- The determination of a baseline (see 4.4).
- The benefits constituting concurrent benefits (see 4.3.2).
- Any limitation of energy sources for which the allowance may be claimed (see 4.3).

4.2 South African National Energy Development Institute

SANEDI was established by the National Energy Act and its functions are contained in section 7 of that Act. These functions give effect to various government policies, legislation and constitutional requirements. The role of SANEDI involves, amongst others, ensuring that South Africa will have the necessary information and planning support for a sustainable and secure energy future that will satisfy the country's economic, social and environmental needs. SANEDI is further tasked with influencing or facilitating an immediate and critical change in the country's energy culture towards more considered and sustainable energy practises.⁴ SANEDI is the institution prescribed by the Regulations.

In fulfilling its responsibilities⁵ under section 12L, SANEDI must –

- appoint suitably qualified persons to consider the reports submitted;
- consider, keep and maintain all reports submitted by taxpayers claiming the allowance;
- issue taxpayers with certificates containing the relevant information required by paragraph 4;
- create and maintain a database of all issued certificates; and
- provide the Minister and the Commissioner with access to the reports and to the database.

Before a certificate is issued, SANEDI must also satisfy itself on the accuracy of the information contained in the report by investigating or causing to be investigated any energy-efficiency savings of the taxpayer.

⁴ Extracted from the South African National Energy Development Institute Strategic Plan (Version 9) 2012/13 – 2016/17 at 9.

⁵ See **Annexure B** – paragraph 3.

This information must –

- comply with the South African National Standard – “SANS50010:2018: Measurement and verification of energy savings” as published by the South African Bureau of Standards (SABS) Standard Division (“the standard”);
- be an accurate reflection of the energy-efficiency savings for which a deduction is claimed by the taxpayer during the year of assessment; and
- comply with the Regulations.

4.3 Deduction under section 12L

4.3.1 Qualifying activities

Having regard to the definition of “energy efficiency savings” in the Regulations and the content of the standard, any activity that results in an energy efficiency savings may qualify for a deduction if all the necessary requirements are met and the limitations under Regulation 6 do not apply (see 4.3.2). This will, for example, include activities that –

- result in the same production volumes being produced using less energy, or that results in a product being produced using less energy.
- allows for more products to be produced while using the same amount of energy, or that increases the product yield per unit of energy.
- captures some or all of the energy from a waste stream that was previously discarded.

In addition, activities generating energy from combined heat and power as well as those that involve the use of qualifying captive power plants are also considered eligible activities. A person generating energy through a captive power plant will, however, qualify only if the energy-conversion efficiency of the captive power plant is greater than 35%.

The term “**captive power plant**” is defined in paragraph 1 and means –

“where the generation of energy takes place for the purposes of the use of that energy solely by the person generating that energy”.

4.3.2 Non-qualifying activities

The general rule is that energy generated from renewable sources (other than energy generated from combined heat and power) does not qualify.⁶ The term “**renewable sources**” is defined in paragraph 6(1) as energy generated from –

- biomass;
- geothermal;
- hydro;
- ocean currents;
- solar;
- tidal waves; or

⁶ Paragraph 6(2).

- wind.

The generation of energy from biomass is an exception to the general rule. If biomass is produced specifically to generate energy, any resultant energy savings will not qualify for a deduction under section 12L. However, should biomass be a waste product resulting from a particular industrial process, it may be considered under the definition of combined heat and power. Such waste can then be re-introduced into the process to improve the energy usage of the plant.

Concurrent benefits

Under section 12L(4), a taxpayer receiving a concurrent benefit relating to the same energy-efficiency savings will not be able to claim a deduction under section 12L.

Paragraph 7 of the Regulations defines a concurrent benefit and stipulates that –

“for the purposes of section 12L(4) of the Income Tax Act any credit, allowance, grant, cost recovery agreement or other similar benefit granted by or through—

- (a) any sphere of government;
- (b) any public entity that is listed in Schedule 2 or 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999); or
- (c) any power purchase agreement as defined in Electricity Regulations on New Generation Capacity made by the Minister of Energy under section 35(4) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006) published by Government Notice 721 of 5 August 2009 in respect of the IPP bid programme as defined in those regulations,

for any energy efficiency savings or the sale and purchase of electricity constitutes a concurrent benefit.”

The Act has various sections allowing different tax incentives. For example, while section 12L is aimed at directly incentivising investments in local energy efficiency projects and provides a deduction for actual savings resulting from a reduction in energy use, section 12K provides a tax exemption for income earned from the sale of carbon emission reduction credits which are generated from Clean Development Mechanism projects.⁷

The incentive under section 12K can only be a concurrent benefit if it is regarded as an incentive as described in paragraph 7 of the Regulations and granted specifically for any energy efficiency savings or the sale and purchase of electricity. The exemption under section 12K is distinct from the benefit envisaged in paragraph 7 of the Regulations since it does not relate to energy efficiency savings or the sale and purchase of electricity. Therefore, should a taxpayer claim the section 12K exemption and the section 12L deduction simultaneously, there will be no concurrent benefit. This will also apply, for example, to section 12I which provides for an additional deduction on any new or unused manufacturing assets which are used in an industrial policy project.

⁷ The term “Clean Development Mechanism project” is defined in section 12K(1) as a CDM Project as defined in regulation 1 of the Regulations, Regulations referred to in section 12K are the Regulations for the Establishment of a Designated National Authority for the Clean Development Mechanism, 2005.

Essentially, when determining whether a concurrent benefit exists under section 12L, it is important to consider what is being incentivised and whether the benefit relates to energy efficiency savings or the sale and purchase of electricity. If this is not the case, there will be no concurrent benefit.

4.3.3 Concept of “combined heat and power”

A deduction is allowed for energy that is generated from co-generation. Paragraph 6(1) describes co-generation as “combined heat and power”. Combined heat and power means –a

“the production of electricity and useful heat from a fuel or energy source which is a co-product, by-product, waste product or residual product of an underlying industrial process”.

The production of electricity and useful heat from qualifying combined heat and power should, however, from a single integrated process.

Combined heat and power is limited to the production of electricity and useful heat from a fuel or energy source which is a co-product, by-product, waste product or residual product of an underlying industrial process. The terms “co-product”, “by-product”, “waste product” and “residual product” are not defined in the Act or the Regulations. They should therefore be afforded their ordinary grammatical meaning while having regard to the context in which they are used.⁸ The *Merriam-Webster Dictionary* defines these terms as follows.

The term “co-product” is defined as a “by-product”.⁹ A “by-product” means –¹⁰

“1: something produced in a usually industrial or biological process in addition to the principal product <a chemical by-product of the oil-refining process>

2: a secondary and sometimes unexpected or unintended result <The loss of jobs is an unfortunate by-product of technological advancements in the industry.>”.

“Waste product” is defined as follows:¹¹

“[U]seless material that is produced when making something else <a hazardous waste product>.”

The term “residual product” means a –¹²

“by-product <coke and coal tar from gasworks are *residual products*>”.

By applying the definition of “combined heat and power”, it means that a deduction may be allowed if electricity and useful heat is generated from a co-product which has been created by an industrial process other than the core product for which the industrial process was undertaken.

⁸ See *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) SA 593 (SCA).

⁹ www.merriam-webster.com/dictionary/coproduct [Accessed 6 December 2018].

¹⁰ www.merriam-webster.com/dictionary/by-product [Accessed 6 December 2018].

¹¹ www.merriam-webster.com/dictionary/waste%20product [Accessed 6 December 2018].

¹² www.merriam-webster.com/dictionary/residual%20product [Accessed 6 December 2018].

4.3.4 The “trade” requirement and income

A deduction can be claimed under section 12L from a person’s income derived from carrying on any trade during a year of assessment ending before 1 January 2020.¹³

The deduction allowable against the income from carrying on a trade in a year of assessment should be based on the energy-efficiency savings generated for that year. Energy-efficiency savings generated in a particular year of assessment cannot be carried forward and used to calculate the deduction in a following year.

Since section 12L came into effect on 1 November 2013, a person carrying on a trade and generating energy-efficiency savings between 1 November 2013 and the year of assessment ending before 1 January 2020, could be eligible to claim a deduction under section 12L. Provided that all requirements are met, a taxpayer generating energy-efficiency savings from a date preceding the effective date may claim only the portion relating to savings from 1 November 2013.

Ownership of energy-efficient machinery and equipment is not a requirement in order to claim a deduction under section 12L. It may therefore be possible for a lessee to claim a deduction under section 12L even though the lessee is not the owner of the machinery or equipment. As long as the lessee is actually carrying on a trade and the activities from which the savings are generated are registered in the lessee’s name, a deduction may be claimed by the lessee. The lessee will not, however, be able to claim other allowances in the Act which require ownership of the machinery or equipment.

Carrying on of a trade

The right to claim a deduction under this section is limited to the person actually carrying on the trade and who is responsible for the energy-efficiency savings, that is, the person in whose name the activity is registered. A third party employed to manage an activity for a taxpayer will accordingly not be able to claim a deduction.

Section 1(1) defines “trade” as follows:

“**[T]rade**’ includes every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act or any design as defined in the Designs Act or any trade mark as defined in the Trade Marks Act or any copyright as defined in the Copyright Act or any other property which is of a similar nature.”

The courts have interpreted “trade” as being neither exhaustive nor restrictive.¹⁴ Trade thus includes any activity in which a person risks something with the object of making a profit. However, in *Modderfontein Deep Levels Ltd & Another vs Feinstein*¹⁵ it was held that as a rule a trade or business is carried on for the purpose of making a profit, but profit-making is not of the essence of trading.

¹³ Section 12L(1).

¹⁴ *Burgess v CIR* 1993 (4) SA 161 (A), 55 SATC 185.

¹⁵ 1920 TPD 288 at 294.

Although “trade” has been given a wide meaning, it does not cover all the activities that might produce income. For example, the watching over of investments¹⁶ and the earning of interest on funds advanced by a holding company to its subsidiary¹⁷ do not constitute the carrying on of a trade. The facts and circumstances of each case must therefore be evaluated in determining whether a trade is being conducted.¹⁸

“Income” of a taxpayer

Section 1(1) defines “income” as follows:

“**[I]ncome**’ means the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under Part I of Chapter II.”

The deduction under section 12L is allowed against the *income* of a person. “Income” consists of gross income reduced by exempt income. “Gross income” is defined in section 1(1) and means, in relation to any year or period of assessment –

“(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic,

during such year or period of assessment, excluding receipts or accruals of a capital nature...”.

All amounts listed in paragraphs (a) to (n) of the definition of “gross income” are specifically included, irrespective of whether they are of a capital nature.

If a taxpayer did not generate any trade income in a year of assessment, but can substantiate that a trade was in fact carried on in that year, energy-efficiency savings by the taxpayer in that year may still qualify for a deduction under section 12L, subject to all the requirements being met.¹⁹ An entity receiving only exempt income under section 10 will not have derived any “income” as defined and will therefore not be entitled to a deduction under section 12L. However, should the entity implement an activity in a trade from which it also earns “income” as defined, a deduction may be possible in certain instances.²⁰

¹⁶ ITC 1275 (1978) 40 SATC 197 (C).

¹⁷ ITC 496 (1941) 12 SATC 132 (U).

¹⁸ For more information on the “trade” requirement, see Interpretation Note 33 “Assessed Losses: Companies: The ‘Trade’ and ‘Income from Trade’ Requirements”.

¹⁹ See Interpretation Note 33 “Assessed Losses: Companies: The ‘Trade’ and ‘Income from Trade’ requirements”.

²⁰ In this regard, certain requirements relating to exempt entities have to be fulfilled. See the SARS *Tax Exemption Guide for Public Benefit Organisations in South Africa* for more information on tax-exempt entities and the rules applying to them.

A person implementing an activity which relates to an entire building but who operates two different trades in the same building, namely, a trade from which exempt income is earned and another from which taxable income is earned, must make an apportionment to limit any deduction for energy-efficiency savings to the portion of savings relating to the portion of the amount that constitutes income. Under section 102 of the Tax Administration Act 28 of 2011, the onus rests on the taxpayer to prove that a reasonable basis of apportionment was used and that an amount is exempt.²¹ Before an apportionment is made, a proper examination of the facts will therefore be required.

Example 1 – Exempt income

Facts:

Body Corporate ABC was incorporated to take responsibility for the enforcement of the rules and control, administration and management of the common property for the benefit of all owners in Greenhouse Estate, an extensive residential development scheme. The body corporate carries on a trade and earns income in the form of levies, fees charged for the use of facilities and equipment such as squash courts, tennis courts and washing machines, and rental income from the letting of immovable property such as parking bays, servants' quarters and a demarcated area for a cell phone mast. For the 2018 year of assessment, the body corporate received levies of R600 000 and R900 000 relating to fees charged for the use of facilities and equipment as well as rental income.

In an effort to make the Estate more energy efficient, the body corporate implemented certain energy-efficient technologies in the 2018 year of assessment. Body Corporate ABC wants to claim a section 12L deduction for the energy-efficiency savings resulting from such implementation.

Result:

The first aspect that has to be determined before a deduction can be granted under section 12L is whether the body corporate is carrying on a trade. In this regard, its specific activities have to be evaluated. If it is established that the body corporate is carrying on a trade, the exemptions provided for in section 10 have to be taken into consideration.

Section 10(1)(e)(i)(aa) states that a body corporate shall be exempt from normal tax on any levies received by or accrued to it. The amount received for levies, that is, R600 000 will therefore be exempt from normal tax.

Section 10(1)(e)(ii) further states that any other receipts and accruals derived by a body corporate shall be exempt, but up to a maximum of R50 000. For the 2018 year of assessment, the body corporate received R900 000 in consequence of fees and rental income. Of this amount, R50 000 will be exempt. The balance of R850 000 (R900 000 – R50 000) constitutes "income" as defined and will be subject to normal tax.

²¹ Section 102(1)(a).

Assuming that Body Corporate ABC complies with all the requirements of section 12L, it will be allowed to claim the portion of the energy savings determined under section 12L relating to “income” as defined. Under section 102(1)(a) of the Tax Administration Act, 28 of 2011, the onus rests on the taxpayer to prove that a reasonable basis of apportionment was used. If Body Corporate ABC generated only exempt income, it will not be allowed to claim any section 12L deduction.

4.4 Determining the baseline

Section 12L(3) provides that the energy-efficiency certificate must contain a baseline at the beginning of the year of assessment. This baseline is then compared to the consumption at the end of the year of assessment to determine the savings in energy usage for the year of assessment.

Paragraph 1 defines “baseline” to mean “baseline as defined in the standard”. Paragraph 3.4 of the standard²² defines “baseline” as –

“energy use representing conditions before the implementation of the energy-savings measures under a set of known energy-governing factors or relationships applicable at the time of the baseline measurement period to the activity in question, (or both)”.

Paragraph 5 stipulates how the baseline for a greenfield project or any other activity must be determined for each year of assessment. In the first year of assessment in which the allowance is claimed for a greenfield project, the baseline must be determined by taking into consideration comparable data in the relevant sector. In this instance, comparable data is used because no actual energy data is available to establish an accurate baseline for a greenfield project.

The term “greenfield project” is defined in paragraph 5 as –

“a project that represents a wholly new project which does not utilise any assets other than wholly new and unused assets”.

The word “new” was explained in ITC 672 as follows:²³

“[T]he word ‘new’ means new in the sense of not having been used before by the particular taxpayer and in the sense of not having been acquired from somebody else and so second-hand.”

Activities making use of any assets that have previously been used will therefore not be regarded as “greenfield projects” as defined.

For other projects the baseline must be determined from data collected during the year before the first year of assessment in which the allowance is claimed. Unlike “greenfield projects”, comparable data is not used. Actual data that is specific to the activity in question is used in the calculation.

²² The South African National Standard 50010 (SANS 50010, Measurement and Verification of Energy Savings), issued by the South African Bureau of Standards in terms of the Standards Act, 2008 (Act 8 of 2008).

²³ (1948) 16 SATC 227 (U) at 229.

Generally, if the newly registered activity operates within the same activity boundary and if a measurement and verification body agrees, the last adjusted baseline may be used when submitting the assessment to SANEDI. The baseline of an activity running over several years will have to be reset for each year of assessment. The baseline that was calculated at the beginning of a particular year of assessment can therefore not be used as the baseline in subsequent years of assessment. The reporting period of energy use at the end of a year of assessment will become the new baseline for the following year of assessment. Moreover, the baseline should be adjusted in accordance with the standard and included in reporting in a way that ensures there is no duplication of savings.²⁴

4.5 Calculation of the allowance

Generally, a deduction under section 12L is granted for energy-efficiency savings derived over a period of 12 consecutive months. Thus, the beginning of this period need not be the first day of a year of assessment or the first day of a calendar year. Since a deduction can be claimed only during the year of assessment in which the energy-efficiency savings are derived, it may be necessary to allocate the savings over two years of assessment. For example, if the savings for 12 months commence in the last four months of a year of assessment, the savings for those four months will be deducted in that year of assessment while the balance of the savings for eight months will be deducted in the next year of assessment. Two certificates must be obtained, one for the first four months and another for the remaining eight months.

When calculating the deduction, the taxpayer must use the amount reflected in the certificate as the savings for that particular year of assessment. If multiple activities are combined on a single certificate, the aggregate of the savings certified by SANEDI for all of the activities should be calculated for each year of assessment.

Under section 12L(2) the energy-efficiency savings for years of assessment commencing on or after 1 March 2015 must be calculated at 95 cents per kilowatt hour or kilowatt hour equivalent of energy-efficiency savings. The baseline as well as the marginal rate of tax must be taken into consideration when calculating the monetary value of the energy-efficiency savings.

Example 2 – Calculation of the deductible amount

Facts:

Hothouse Ltd owns an industrial plant and for the 2018 year of assessment, reduced its energy usage through the use of more efficient technologies as well as changes in human behaviour.²⁵ In consequence of these savings, Hothouse wanted to claim a deduction under section 12L.

²⁴ See SANS 50010:2018 for detailed information on how to calculate the baseline and for an example on this calculation.

²⁵ Changes in human behaviour will include, but is not limited to, actions such as switching off machinery or equipment instead of leaving it in standby mode when not in use or switching off lights when not in the room.

Result:

For each year of assessment, Hothouse's energy-efficiency savings must be multiplied by 95 cents per kilowatt hour. Assume that Hothouse Ltd's savings were 3,5 million kWh for the current year of assessment. The amount allowed to be deducted from the income of Hothouse Ltd was therefore R3 325 000 (3,5 million kWh × R0,95).

5. The procedure for claiming the allowance

Before claiming an allowance under section 12L, a taxpayer must, for each year of assessment, take specified steps as required by paragraph 2.

5.1 Registration with SANEDI

Taxpayers are required by paragraph 2(a) to register with SANEDI in the form and manner as ascribed by SANEDI. This registration can be done through the SANEDI website (www.sanedi.org.za).

In line with the powers conferred on SANEDI under section 12L(5), SANEDI requires that once the taxpayer is registered, each activity being engaged in should also be registered.²⁶

5.2 Appointment of a measurement and verification professional

Under paragraph 2(b) a person, in the course of registering, must engage with and appoint a measurement and verification professional belonging to an accredited measurement and verification body.²⁷ The South African National Accreditation System (SANAS) provides a list of accredited measurement and verification bodies. The names, technology, scope and contact information of these bodies are available on the SANEDI website. An activity cannot be registered if a SANAS-accredited measurement and verification body is not appointed.

5.3 Submission of a report

The measurement and verification professional appointed by the taxpayer in accordance with the prescribed requirements must compile a report containing a computation of the energy-efficiency savings generated by the taxpayer for that year of assessment. This report should be submitted to SANEDI.

According to SANEDI requirements and in the process of registering an activity, a baseline (see 4.4) must be submitted to SANEDI followed by a performance assessment. SANEDI will then evaluate the assessment and either approve or reject it. SANEDI will send a notification to the taxpayer regarding the approval or rejection of the baseline after which implementation can take place.

²⁶ See the SANEDI website for the processes and requirements that must be followed in order to effect a registration.

²⁷ See **Annexure B** for the definition of "measurement and verification professional" and "measurement and verification body".

5.4 Energy-efficiency performance certificate

(a) The obligation to obtain an energy-efficiency certificate

Section 12L(3) requires that an energy-efficiency performance certificate must be obtained from SANEDI, for the energy-efficiency savings generated for the year of assessment. This certificate is issued by SANEDI for a year of assessment after the performance assessment report is presented to and approved by the panel, which is after the implementation of the activity and after the energy savings have been achieved.

Each certificate issued contains a separate activity identification number which is allocated to each activity undertaken. Once the certificate is issued for the particular year of assessment, the activity identification number expires and a new activity must be registered in the following year of assessment. This requirement also applies to an activity running over several years. A new activity identification number will therefore have to be obtained for each year of assessment if the same activity is a multi-year project.

Although the certificate that is issued by SANEDI (see 4.2), SARS still has to be satisfied that all the requirements of section 12L, amongst others, the trade requirement, has been complied with. Since the calculation of the energy-efficiency savings is a highly technical process, SARS accepts that the contents and calculations reflected in such certificates comply with the requirements under the Regulations.

The energy-efficiency certificate does not have to be submitted to SARS but must be retained for audit purposes for a period of five years from the date of submission of the return of income in which the deduction was claimed.²⁸ These certificates are not tradeable.

(b) Contents of the certificate

The certificate must contain –²⁹

- the baseline at the beginning of the year of assessment for which the allowance is claimed, derived and adjusted in accordance with paragraph 5 and determined in accordance with the standard;
- the reporting period energy use³⁰ at the end of the year of assessment for which the allowance is claimed;
- the annual energy-efficiency savings expressed in kilowatt hours or the equivalent of kilowatt hours for the year of assessment for which the allowance is claimed determined in accordance with the standard; and

²⁸ Section 29 of the Tax Administration Act 28 of 2011.

²⁹ See paragraph 4.

³⁰ “Reporting period energy use” is defined in SANS 50010:2018 as the “application of energy for the reporting period after implementation of any energy-savings measure”.

- for a captive power plant, the difference between the kilowatt hours equivalent of energy input and the kilowatt hours equivalent of energy output during a year of assessment in accordance with the standard. Each of the above components, that is, the baseline energy use, annual energy-efficiency savings and the energy output for captive power plants must all be determined in accordance with the standard, which ensures a standard approach to the measurement and verification of energy savings and energy efficiency.

The certificate must also indicate –

- the initials and surname of the measurement and verification professional who compiled the report;
- the name and accreditation number of the measurement and verification body the professional belongs to;
- the name and tax registration number of the person to whom the certificate is issued;
- the date that the certificate was issued; and
- the certificate number.

(c) Certificates and multiple activities

Taxpayers involved in multiple activities must ensure that a separate certificate is obtained for each year of assessment. In accordance with SANEDI requirements, these taxpayers may register each activity separately or combine activities so that only one certificate is needed.

Section 1(1) defines “year of assessment” as follows:

“**[Y]ear of assessment**’ means any year or other period in respect of which any tax or duty leviable under this Act is chargeable, and any reference in this Act to any year of assessment ending the last or the twenty-eighth or the twenty-ninth day of February shall, unless the context otherwise indicates, in the case of a company or a portfolio of a collective investment scheme in securities be construed as a reference to any financial year of that company or portfolio ending during the calendar year in question.”

The year of assessment of a person other than a company ends on the last day of February³¹ and a company’s year of assessment is its financial year.³²

A certificate under section 12L(3) will thus have to be issued for the year of assessment in which the deduction is claimed. A company that changes its year of assessment or any other information which would cause it to differ from the information on the certificate must notify SANEDI through its website www.sanedi.org.za.

³¹ Definition of “year of assessment” in section 1(1) read with section 5(1)(c).

³² Definition of “year of assessment” in section 1(1) read with section 5(1)(d).

6. Conclusion

Section 12L provides a deduction to a taxpayer for savings derived from implementing more energy-efficient methods for conducting a trade. In claiming the deduction, regard should be had to –

- the Regulations and the standard;
- the method of calculating the baseline and the energy savings in multi-year activities;
- registration requirements;
- certificates that have to be obtained from SANEDI for each activity and year of assessment;
- exclusions and limitations; and
- the effective date of section 12L.

Legal Counsel

SOUTH AFRICAN REVENUE SERVICE

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Annexure A – The law

12L. Deduction in respect of energy efficiency savings.—(1) For the purpose of determining the taxable income derived by any person from carrying on any trade in respect of any year of assessment ending before 1 January 2020, there must be allowed as a deduction from the income of that person an amount in respect of energy efficiency savings by that person in respect of that year of assessment determined in accordance with subsection (2), subject to subsection (3).

(2) The amount of the deduction contemplated in subsection (1) must be calculated at 95 cents per kilowatt hour or kilowatt hour equivalent of energy efficiency savings.

(3) A person claiming the deduction allowed in terms of subsection (1) during any year of assessment must obtain a certificate issued by an institution, board or body prescribed by the regulations contemplated in subsection (5) in respect of the energy efficiency savings for which a deduction is claimed in respect of that year of assessment containing—

- (a) the baseline at the beginning of the year of assessment;
- (b) the reporting period energy use at the end of the year of assessment;
- (c) the annual energy efficiency savings expressed in kilowatt hours or kilowatt hours equivalent for the year of assessment including the full criteria and methodology used to calculate the energy efficiency savings; and
- (d) any other information prescribed by the regulations contemplated in subsection (5).

(4) A deduction must not be allowed in terms of this section if the person claiming the allowance receives any concurrent benefit in respect of energy efficiency savings.

(5) The Minister of Finance, in consultation with the Minister of Energy and the Minister of Trade and Industry, must make regulations prescribing—

- (a) the institution, board or body that must issue the certificate contemplated in subsection (3);
- (b) the powers and responsibilities of the institution, board or body contemplated in paragraph (a);
- (c) the information that must be contained in the certificate contemplated in subsection (3) in addition to the information contemplated in that subsection;
- (d) those benefits that constitute concurrent benefits for the purpose of subsection (4); and
- (e) any limitation of energy sources in respect of which the allowance may be claimed.

Annexure B – Regulations under section 12L

Definitions

1. In these Regulations, any word or expression to which a meaning has been assigned in the National Energy Act, or the Income Tax Act bears the meaning so assigned, and—

“**accreditation number**” means an accreditation number contained in a certificate of accreditation issued by the South African National Accreditation System under section 22(2)(b) of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, 2006 (Act No. 19 of 2006), to a measurement and verification body for the inspection, measurement, reporting and verification of energy efficiency savings;

“**allowance**” means the amount allowed to be deducted in respect of energy efficiency savings as contemplated in section 12L of the Income Tax Act;

“**baseline**” means baseline as defined in the standard;

“**captive power plant**” means where generation of energy takes place for the purposes of the use of that energy solely by the person generating that energy;

“**certificate**” means an energy efficiency savings certificate contemplated in section 12L(3) of the Income Tax Act that is issued by SANEDI, comprising the content set out in regulation 4;

“**certificate number**” means a unique traceable number allocated to a certificate by SANEDI;

“**energy efficiency**” means energy efficiency as defined in the standard;

“**energy efficiency savings**” means the difference between the actual amount of energy used in the carrying out of any activity or trade, in a specific period and the amount of energy that would have been used in the carrying out of the same activity or trade during the same period under the same conditions if the energy savings measure was not implemented;

“**Income Tax Act**” means the Income Tax Act, 1962 (Act No. 58 of 1962);

“**measurement and verification**” means measurement and verification as defined in the standard;

“**measurement and verification body**” means a body that is accredited by the South African National Accreditation System in terms of section 22 of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, 2006 (Act No. 19 of 2006), for the purposes of inspection, measurement, reporting and verification of energy efficiency savings;

“**measurement and verification professional**” means a natural person who performs measurement and verification of energy efficiency savings under the auspices of a measurement and verification body;

“**National Energy Act**” means the National Energy Act, 2008 (Act No. 34 of 2008);

“**report**” means a measurement and verification report that—

- (a) contains a computation of energy efficiency savings in respect of a person for a year of assessment; and
- (b) is compiled by a measurement and verification professional in accordance with the criteria and methodology contained in the standard;

“**reporting period energy use**” means reporting period energy use as defined in the standard;

“**SANEDI**” means the South African National Energy Development Institute established in terms of section 7 of the National Energy Act; and

“**standard**” means the South African National Standard 50010 (SANS 50010, Measurement and Verification of Energy Savings), issued by the South African Bureau of Standards in terms of the Standards Act, 2008 (Act No. 8 of 2008).

Procedure for claiming allowance

2. A person that claims the allowance must, in respect of each year of assessment for which the allowance is claimed—

- (a) register with SANEDI in the form and manner and at the place that SANEDI may determine;
- (b) appoint a measurement and verification professional to compile a report containing a computation of the energy efficiency savings in respect of that person for that year of assessment;
- (c) submit the report to SANEDI; and
- (d) obtain a certificate from SANEDI.

Responsibilities of SANEDI

3. (1) SANEDI must appoint suitably qualified persons to consider reports submitted by a person claiming the allowance.

(2) If after consideration of a report SANEDI is satisfied that the information contained in a report—

- (a) complies with the standard;
- (b) is an accurate reflection of the energy efficiency savings of the person claiming the allowance in respect of the year of assessment for which the allowance is claimed; and
- (c) complies with these Regulations,

SANEDI must issue a certificate containing the information set out in regulation 4 to the person claiming the allowance.

(3) SANEDI may investigate or cause to be investigated any energy efficiency savings of a person contained in a report to be satisfied that the information contained in the report is an accurate reflection of the energy efficiency savings of the person submitting the report.

(4) SANEDI must—

- (a) keep and maintain all reports submitted for consideration;
- (b) create and maintain a database of all certificates issued by SANEDI in accordance with these Regulations; and
- (c) at all times provide the Minister of Finance and the Commissioner for the South African Revenue Service with ready access to—
 - (i) the reports contemplated in paragraph (a); and
 - (ii) the database contemplated in paragraph (b).

Content of certificate

4. The certificate issued by SANEDI as contemplated in regulation 3(2) must contain-

- (a) the baseline at the beginning of the year of assessment for which the allowance is claimed, derived and adjusted in accordance with regulation 5 and determined in accordance with the standard;
- (b) the reporting period energy use at the end of the year of assessment for which the allowance is claimed, determined in accordance with the standard;
- (c) (i) the annual energy efficiency savings expressed in kilowatt hours or the equivalent of kilowatt hours for the year of assessment for which the allowance is claimed, determined in accordance with the standard; and

- (ii) in case of a captive power plant, the difference between the kilowatt hours equivalent of energy input and the kilowatt hours equivalent of energy output during the year of assessment in accordance with the standard;
- (d) the initials and surname of the measurement and verification professional who compiled the report;
- (e) the name and accreditation number of the measurement and verification body under whose auspices the measurement and verification professional compiled the report;
- (f) the name and tax registration number of the person to whom the certificate is issued;
- (g) the date on which the certificate is issued; and
- (h) the certificate number.

Baseline calculation

5. (1) For the purpose of this regulation “**greenfield project**” means a project that represents a wholly new project which does not utilise any assets other than wholly new and unused assets.

(2) The baseline—

- (a) for the first year of assessment for which the allowance is claimed must—
 - (i) in the case of a greenfield project, be constructed from comparable data in the relevant sector; or
 - (ii) in any other case, be derived from data gathered during the year of assessment preceding the first year of assessment for which the allowance is claimed; and
- (b) must be adjusted for every year of assessment for which the allowance is claimed—
 - (i) in accordance with the methodology in the standard; and
 - (ii) by taking into account the reporting period energy use at the end of the immediately preceding year of assessment for which the allowance was claimed to compute the baseline for the beginning of the subsequent year of assessment for which the allowance is claimed.

Limitation of allowance

6. (1) For the purpose of this regulation—

“**co-generation**” means combined heat and power;

“**combined heat and power**” means the production of electricity and useful heat from a fuel or energy source which is a co-product, by-product, waste product or residual product of an underlying industrial process;

“**energy conversion efficiency**” means the difference between the useful heat and equivalent kilowatt hours of energy output and the equivalent kilowatt hours of input energy expressed as a percentage;

“**renewable sources**” means—

- (a) biomass;
- (b) geothermal;
- (c) hydro;
- (d) ocean currents;
- (e) solar;
- (f) tidal waves; or
- (g) wind;

(2) A person may not receive the allowance in respect of energy generated from renewable sources other than energy generated from combined heat and power.

(3) A person generating energy through a captive power plant may not receive the allowance unless the energy conversion efficiency of the plant is greater than 35 per cent.

Concurrent benefits

7. For the purposes of section 12L(4) of the Income Tax Act any credit, allowance, grant, cost recovery agreement or other similar benefit granted by or through—

- (a) any sphere of government;
- (b) any public entity that is listed in Schedule 2 or 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999); or
- (c) any power purchase agreement as defined in Electricity Regulations on New Generation Capacity made by the Minister of Energy under section 35(4) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006) published by Government Notice 721 of 5 August 2009 in respect of the IPP bid programme as defined in those regulations,

for any energy efficiency savings or the sale and purchase of electricity constitutes a concurrent benefit.

Short title and commencement

8. These regulations are called the Regulations in terms of section 12L of the Income Tax Act, 1962, on the allowance for energy efficiency savings and come into operation on 1 November 2013.