THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 550/2023

In the matter between:

SISHEN IRON ORE COMPANY (PTY) LTD **APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Sishen Iron Ore Company (Pty) Ltd v CSARS* (550/2023) [2025] ZASCA 16 (5 March 2025)

Coram: MOLEMELA P and DAMBUZA JA and GORVEN, KOEN and COPPIN AJJA

Heard: 6 November 2024

Delivered: 5 March 2025

Summary: Taxation – taxpayer deriving income from mining operations – whether expenditure incurred in respect of the relocation of a neighbouring residential township, expenditure incurred in respect of the relocation of certain infrastructure within the mining area, legal costs incurred with regard to the relocation of the township, and the costs of relocating a 66kV line supplying

electricity to mine equipment to a new location within the mining area, deductible – special deductions provisions in s 15*(a)* read with s 36(7C) of the Income Tax Act 58 of 1962 (the ITA) in respect of 'capital expenditure' – meaning of 'in terms of a mining right' and 'other than in respect of infrastructure' in s 36(11)*(e)* of the ITA – meaning of 'mine equipment' in s 36(11)*(a)* of the ITA – whether deduction for wear and tear under s 11*(e)* of the ITA established in respect of 66kV line – in the alternative, whether general deduction provision in s 11*(a)* of the ITA applies to expenditure in respect of relocation of the 66kV line – burden of proof in s 102 of Tax Administration Act 28 of 2011 (TAA) – whether legal expenditure deductible in terms of s 11*(c)* of the ITA – whether interest in terms of s 89*quat*(2) of the ITA on outstanding tax on disallowed deductions a result of circumstances beyond the control of the taxpayer – whether the Commissioner for the South African Revenue Services (CSARS) should have determined, in terms of s 89*quat*(3) of the ITA, that interest not be paid, whether in whole or in part.

ORDER

On appeal from: Tax Court of South Africa, Gauteng (Malindi J, with two assessors):

1 The appeal succeeds to the extent set out in paragraph 5 below but is otherwise dismissed.

2 The respondent is directed to pay two thirds of the appellant's costs of the appeal, to include the costs of two counsel where so employed.

3 The cross-appeal succeeds to the extent set out in paragraph 5 below but is otherwise dismissed.

4 The respondent is directed to pay one half of the appellant's costs of the cross-appeal, to include the costs of two counsel where so employed.

5 Paragraph 1 of the order of the tax court is set aside and substituted with the following:

'1 (a) The relocation expenditure in respect of Dingleton and the SWEP infrastructure, is deductible;

(b) The 66kV line expenditure is deductible;

(c) The understatement penalties imposed by the CSARS in terms of s 187(1) of the Tax Administration Act 28 of 2011 are set aside;

(d) The interest raised in terms of s 89*quat*(2) of the Income Tax Act 58 of 1962 is set aside and referred back to the CSARS for determination whether any interest should be payable, and if so, the amount thereof;

(e) The legal expenditure is not deductible.'

JUDGMENT

Koen AJA (Molemela P and Dambuza JA and Gorven, Koen and Coppin AJA concurring):

Introduction

[1] This appeal considers whether various items of expenditure incurred by the appellant, Sishen Iron Ore Company (Pty) Ltd (Sishen), for the 2012 to 2014 tax years, are deductible from its taxable income. To the extent that the expenditure was not deductible, the question arises whether interest on the unpaid tax in respect of the disallowed expenditure became payable and if so, whether the respondent, the Commissioner for the South African Revenue Services (the CSARS), should have directed that such interest should not be paid.

[2] The expenditure included: the costs of relocating a residential area known as the Dingleton township (Dingleton) and relocating certain infrastructure referred to as the Sishen Western Expansion Project (SWEP) infrastructure (collectively referred to as the relocation expenditure); legal expenditure incurred in connection with the relocation of Dingleton (the legal expenditure); and the costs of relocating a 66kV power line (the 66kV line expenditure). The CSARS disallowed the deduction of this expenditure. He also raised understatement penalties,[1] and interest in terms of s 89*quat*(2) of the Income Tax Act 58 of 1962 (the ITA)[2] in respect of the disallowed tax.

[3] The Tax Court of South Africa, Gauteng (the tax court), on appeal disallowed the deduction of the relocation expenditure and the legal expenditure,

[1] These were raised in terms of sections 222 and 223 of the Tax Administration Act 28 of 2011 (the TAA).
[2] All references to sections hereafter are to the ITA, unless indicated otherwise.

allowed the deduction of the 66kV line expenditure, and set aside the understatement penalties and the interest raised, with no order as to costs. Sishen appeals against the disallowance of the relocation and legal expenditure. The CSARS cross-appeals against the order of the tax court allowing the deduction of the 66kV line expenditure and disallowing the interest.[3] The appeal and cross-appeal are with the leave of the tax court.

Background

[4] The factual matrix and the statutory framework material to deciding this appeal are common cause. Sishen conducts open cast mining for iron ore in the Northern Cape province in terms of a converted mining right[4] issued in terms of the provisions of the Mineral and Petroleum Resources Development Act (the MPRDA)[5] (the mining right). It was granted in respect of a specified area of land (the mining area). The mining area includes the open pit where Sishen has been conducting mining for many years. It also includes an area to the west of the pit, which prior to the tax years in question, had not yet been mined.

[5] Open cast mining commences with waste stripping. It entails the removal of overburden. The overburden is anything that would hamper optimally and safely accessing the iron ore deposits below the surface, such as vegetation, structures, other impediments, topsoil and other waste materials. Waste stripping is a continuous process, regularly assessed by Sishen with reference to geological, technological and economic information as to where next to access viable iron-ore deposits within its mining area.

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[3] The CSARS also cross-appealed against the disallowance of the understatement and underestimation penalties. He however recorded in his practice note in this Court that this part of the cross-appeal was no longer persisted with.

[4] A mining right is defined in s 1 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) as 'a right to mine granted in terms of s 23(1)'. It is granted in respect of specific land.

[5] Section 2*(h)* of the MPRDA provides that one of its objects is to give effect to s 24 of the Constitution.

[6] As mining affects the environment, a constitutionally protected right,[6] and mining operations involve dangerous activities, the provisions of the MPRDA and other applicable legislation must be adhered to strictly. Specifically, s 25(2)*(d)* of the MPRDA requires Sishen, as the holder of the mining right, to comply with the provisions of the MPRDA,[7] which by definition includes the regulations under the MPRDA,[8] and any 'other relevant law'. The Mine Health and Safety Act and the regulations promulgated thereunder (the Safety Act) is such a relevant law.[9] Section 23(1)*(f)* of the MPRDA requires that Sishen must have the ability to comply with the relevant provisions of the Safety Act.

[7] Section 5(2)*(b)* of the Safety Act provides, in general terms, that an employer, such as Sishen, must as far as reasonably practicable, ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety.[10] Thus, regulation 4.16(2) under the Safety Act,[11] prohibits blasting operations within a

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[6] Section 24 of the Constitution provides that:
'Everyone has the right-
(a) to an environment that is not harmful to their health or wellbeing; and
(b) to have the environment protected, for the benefit of present and future generation, through reasonable legislative and other measures that –
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

[7] See below.

[8] Section 1 of the MPRDA defines 'this Act' to include 'the regulations and any term or condition to which any permit, permission, licence right, consent, exemption, approval, notice, closure certificate, environmental management plan, environmental management programme or directive issued, given, granted or approved in terms of this Act, us subject.'

[9] Act 29 of 1996.

[10] Section 5(2) provides:
'As far as reasonably practicable, every employer must –
(a) . . .
(b) ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety.'

[11] 'General precautions
4.16 The employer must take reasonable measures to ensure that–
4.16 (1) . . .
4.16 (2) no blasting operations are carried out within a horizontal distance of 500 meters of any public building, public thoroughfare, railway line, power line, any place where people congregate or any other structure, which it may be necessary to protect in order to prevent any significant risk, unless–

radius of 500 meters (the safety buffer) of any public infrastructure, such as a railway line, power line, and any place where people congregate, unless, in certain exceptional circumstances, written approval has been obtained from the Principal Inspector of Mines. Paragraph 11 of Sishen's mining right,[12] read together with s 54 of the MPRDA,[13] obliges Sishen to compensate third parties who suffered any damage or losses, including, but not limited to, damage to the surface and to any improvements as a result of, or arising from, or in connection with the exercise of Sishen's mining right and mining operations.

(a) a risk assessment has identified a lesser safe distance and any restrictions and conditions to be complied with;
(b) a written application is submitted to the Principal Inspector of Mines accompanied by the following documents for approval . . .
(c) a written approval has been granted by the Principal Inspector of Mines; and
(d) any restrictions and conditions determined by the Principal Inspector of Mines are complied with.'

[12] Paragraph 11 provides:
'Holder's Liability for payment of Compensation for Loss or Damage
11.1 Subject to section 43 of the Act, the Holder shall, during the tenure of this right while carrying out the mining operations under this right, take all such necessary and reasonable steps to adequately safeguard and protect the environment, the mining area and any person/s using or entitled to use the surface of the mining area from any possible damage or injury associated with any activities on the mining area.
11.2 Should the Holder fail to take reasonable steps referred to above, and to the extent that there is legal liability, the holder shall compensate such person or persons for any damage or losses, including but not limited to the surface, to any crops or improvements, which such person or persons may suffer as a result of, arising from or in connection with the exercise of his/her rights under this mining right or of any act or omission in connection therewith.'

[13] Section 54 inter alia provides:
'(1) The holder of a . . . Mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from . . . conducting any . . . mining operations because the owner or the local occupier of the land in question –
(a) refuses to allow such holder to enter the land;
(b) places unreasonable demands in return for access to the land; or
(c) cannot be found in order to apply for access.
(2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1) –
(a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the . . . mining right . . . ;
(b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act;
(c) set out the provisions of this Act which such owner or occupier is contravening;
(d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.
(3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the . . . mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.
(4) . . .'

[8] To the west of the open mine pit, but still within the mining area covered by Sishen's mining right, were some roads, railways and electricity and water infrastructure belonging to third parties (the SWEP infrastructure).[14] Further to the west of the south-western boundary of the mining area, at a distance of approximately 600 meters, was Dingleton. It was situated on land not owned by Sishen and in respect of which Sishen did not hold any mining right. The SWEP infrastructure was within Sishen's mining area. Sishen could not mine that area because of the physical obstacles presented by the SWEP infrastructure, and the safety buffer required to be maintained between any of its mining operations and Dingleton.[15]

[9] As waste stripping and mining occurred as part of ongoing mining operations, the edge of the pit progressed increasingly westwards, closer towards the SWEP infrastructure and Dingleton. A point would be reached where further exploitation of the ore reserves towards the western and south-western parts of Sishen's mining area would be impossible, although the boundary of the mining area would not have been reached, due to the location of the SWEP infrastructure, and the safety buffer requirement.

[10] Excavating another pit to the west of the railway line was not feasible because Sishen would have to create another pit, stripped on all four sides, which would require higher volumes of waste stripping to access the ore body. If the railway line remained in place, it would be impossible to mine a significant quantity of ore on both sides of the railway line as safe slopes would be required

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[14] The SWEP (Sishen Western Expansion Project) implemented by Sishen, also included the 66kV line. In this judgment the 66kV line expenditure is dealt with separately, consistent with the findings of the tax court. The collective term 'SWEP infrastructure' is accordingly used in this judgment to refer to the infrastructure owned by third parties which had to be relocated, excluding the 66kV line.

[15] Some of the area occupied by the roads, railways, electricity and water infrastructure, approximately 10km long (north to south) and 30 meters wide (west to east) formed part of such buffer.

to be kept to protect the integrity of the railway line. Blasting would also have to be limited to times when the railway line was not used, with time being allowed after each blasting to verify that the structural integrity of the railway line remained unaffected.

[11] The optimal exploitation of its mining area accordingly required Sishen to relocate the SWEP infrastructure as part of waste stripping of that area, to allow access to the iron ore subsurface. As such exploitation progressed, a new safety buffer zone situated further to the west, encroaching on land on which Dingleton was situated, would be required. Dingleton would have to be relocated to maintain a 500-meter safety buffer between it and the most western point to which Sishen's mining operations would advance.

[12] Regulation 10(1)*(f)* of the regulations promulgated under the MPRDA provides that an application for a mining right must include a Mining Work Programme (MWP).[16] The MWP forms part of the mining right when granted. Section 25(2)*(c)* of the MPRDA requires the holder of a mining right to actively conduct its mining in accordance with the MWP.[17] Regulation 11(1) of the MPRDA regulations provides that a MWP must contain, inter alia: details of the mineral deposit concerned with regard to the type of mineral to be mined, its locality, extent, depth, geological structure, mineral content and mineral distribution; details of the applicable timeframes and scheduling of the various

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[16] Regulation 10(1)*(f)* provides:
'Application for mining right
(1) An application for a mining right in terms of section 22(1) of the Act must be completed in the form of Form D contained in Annexure I and must contain –
. . .
(f) a mining work programme contemplated in regulation 11; . . .'

[17] Section 25(2)*(c)* provides:
'(2) The holder of a mining right must –
(a) . . .
(b) . . .
(c) Actively conduct mining in accordance with the mining work programme;
(d) . . .'

implementation phases of the proposed mining operation; a financing plan with details of costs; and an undertaking signed by the holder of the mining right to adhere to the proposals as set out in the MWP.[18]

[13] If Sishen conducted mining operations in contravention of the MPRDA or MWP or breached any material term of the mining right, then the Minister of Minerals and Energy could, in terms of s 47 of the MPRDA, suspend or cancel Sishen's mining right.[19] Similarly, if Sishen in the opinion of the Minerals and Mining Development Board did not mine the iron ore optimally as required by s 51(1),[20] in accordance with the terms of the MWP, then the Board could recommend to the Minister to direct Sishen,[21] as holder of the mining right, to take corrective measures, and if not corrected, to cancel its mining right.

[14] Section 54(1) of the MPRDA provides for the circumstances when compensation is payable to third parties and provides, in relevant part, that the

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[18] Regulation 11(1)*(h)*.

[19] Section 47 of the MPRDA provides:

'Minister's power to suspend or cancel rights, permits or permissions

(1) Subject to subsections (2), (3) and (4), the Minister may cancel or suspend any reconnaissance permission, prospecting right, mining Right, mining permits, retention permit or holders of old order rights or previous owner of works, if the holder or owner thereof –

(a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;

(b) breaches any material term or condition of such a right, permit or permission;

(c) is contravening any condition in the environmental authorisation; or

(d) has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under this Act.

(2) . . .'

[20] Section 51 of the MPRDA provides:

'Optimal mining of mineral resources

(1) Subject to subsection (2), the Board may recommend to the Minister to direct a holder of a mining right to take corrective measures if the Board establishes that the minerals are not being mined optimally in accordance with the mining work programme or that a continuation of such practice will detrimentally affect the objects referred to in section 2*(f)*.

(2) . . .

(3) . . .

(4) The Minister may, on the recommendations of the Board, suspend or cancel a mining right if –

(*a*) the holder of that mining right fails to comply with a notice contemplated in subsection (3); or

(*b*) having regard to any representations by the holder, the Minister is convinced that any act or omission by the holder justifies the suspension or cancellation of the right.

(5) . . .'

[21] At the time of enactment of the MPRDA it was the Minister of Minerals and Energy.

holder of a mining right must notify the relevant regional manager if the holder is prevented from commencing or conducting the mining operation because the owner or the lawful occupier of the land refuses to allow the holder to enter the land, or places unreasonable demands in return for access to the land.[22] In terms of s 54(3), if the Regional Manager concludes that the owner or occupier has suffered, or is likely to suffer loss or damages as a result of the mining operations, he or she must request the parties concerned to endeavour to reach an agreement for payment of compensation for such loss or damage.[23] In terms of s 54(6), if the Regional Manager determines that the failure to reach an agreement or resolve the dispute is due to the fault of the holder of the mining right, the Regional Manager may prohibit such holder from commencing or continuing with mining operations on the land.[24]

[15] The approved MWP forming part of Sishen's mining right contained inter alia the following provisions:

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[22] Section 54(1) provides:
'Compensation payable under certain circumstances
(1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question-
(a) refuses to allow such holder to enter the land;
(b) places unreasonable demands in return for access to the land; or
(c) cannot be found in order to apply for access.
(2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1)-
(a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit;
(b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act;
(c) set out the provisions of this Act which such owner or occupier is contravening; and
(d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.

[23] Section 54(3) of the MPRDA provides:
'If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.'

[24] Section 54(6) provides:
'(6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the . . . mining right . . ., the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or by a competent court.'

(a) It specifically provided for the relocation of Dingleton and the SWEP;

(b) It obliged Sishen to undertake mining activities on the strip of land over which a portion of the Transnet's Dingleton-Hotazel railway line was located and also over other areas where the SWEP third-party infrastructure was located;

(c) Regarding the Dingleton-Hotazel railway line and power line, it stipulated ore extracts from the 500-meter blast perimeter (protecting the Dingleton-Hotazel railway line and adjacent power line) along the north-western margin of the pit by 2012. The waste within this perimeter would have to be stripped at an earlier date, which implied that the railway and power lines would probably have to be relocated around 2008;

(d) The infrastructure, which included the SWEP infrastructure, was to be relocated further to the west. It stipulated that contractors would most likely do the bulk of the work relating to the relocation;

(e) It also covered the mining of the safety buffer zone. The Dingleton township would have to be relocated to provide sufficient ore of the required quality, which was sterilised by the 500-meter safety buffer around the town of Dingleton, for the ore to be accessed by 2020. The waste within this perimeter would have to be stripped at an earlier date, which necessarily implied that the people of Dingleton would have to be resettled even earlier; it was suggested probably around 2010. A number of contractors were expected to be involved in the project, especially with the construction of alternative housing for the residents of Dingleton.

[16] Consistent with what was required by the MWP, Sishen embarked on the relocation of Dingleton to maintain a safety buffer as its mining operations

advanced increasingly to the west. It also relocated the SWEP infrastructure to allow it to mine that portion of the mining area optimally.

[17] The SWEP infrastructure entailed: relocating 26 kilometres of the Transnet Hotazel-Postmasburg rail line (owned by Transnet); the realignment of 6km of the Sishen Lylyveld rail siding (owned by Transnet and situated on land owned by Eskom); a diversion of the TR405 provincial road (owned by the Northern Cape Province); the relocation of the Sishen Traction substation (owned by Transnet/Eskom and situated on property owned by Transnet, but to be allocated to Assmang Property); the relocation of portion of the 132kV Traction supply line (owned by Eskom); the construction of a new Emil Traction substation (to be owned by Transnet on land owned by Transnet); the redevelopment of the ballast loading siding (owned by Transnet); the rerouting of a 22kV rural power supply line (owned by Transnet); the construction of a new 132kV distribution line for the new Emil Traction substation (owned by Eskom); the relocation of 23km of the Vaal Gamagara pipe line (owned by Sedibeng Water); and the relocation of 12km of the Eskom 275kV Ferrum-Garona overhead (owned by Eskom). Sishen accordingly entered into agreements with the relevant authorities owning this infrastructure, which included Transnet, Eskom, Sedibeng Water, the Northern Cape Province, the Gamagara Municipality and the former residents of Dingleton, to achieve its aforesaid purpose.

[18] The former residents of Dingleton were relocated to similar properties in Kathu or elsewhere, constructed for and on behalf of Sishen, in accordance with the choice of the owners of land in Dingleton. Sishen would not own the relocated Dingleton infrastructure. No cash settlements, in lieu of relocation, were allowed.

[19] The SWEP involved the relocation of the infrastructure owned by the third parties from land included in Sishen's mining right. Sishen did not acquire

ownership of the relocated infrastructure. The expenditure incurred was for the costs of demolition, removal and subsequent reconstruction of the SWEP infrastructure. The amenities of the third parties remained essentially the same after the SWEP relocation. Only the physical location of the infrastructure changed; the third parties gave up their existing rights and these were replaced by similar rights and infrastructure but in a different location.

[20] The legal expenditure comprised fees paid by Sishen to legal practitioners. These practitioners advised the Dingleton residents in relation to their relocation.

[21] The mining operations conducted by Sishen make extensive use of electricity to drive various items of equipment. Electricity is required, amongst others, to operate blast hole drilling rigs and huge electrical shovels which load haul trucks that remove the iron ore from the pit of the mine. The 66kV line is part of the plant belonging to Sishen and used by it to successfully conduct its mining operations. It provides the mine equipment with electricity from the main Eskom electricity supply.

[22] At each transfer point along the conduit of electricity, where there is a different regulation of the voltage, there is a transformer and substation. Hence, there is a transformer where the main power supply is transferred from Eskom to a 66 kV line. Sishen has several such lines. Masts and poles are necessary to carry the lines at a safe height above ground level into the pit so that haul trucks can pass safely under the lines.

[23] The pylons from which the lines are suspended are permanent supporting structures erected in the mining area. They are planted into the soil, as is typical of electricity related infrastructure. The lines then lead to further transformers and substations, as part of a more fixed electric infrastructure, where the voltage is

stepped down from the 66kV line and distributed to trailing cables which lie on the ground inside the mine and connect to the various items of equipment like, for example, the rigs and shovels.

[24] The 66kV line was moved as the need arose to operate mine equipment in new locations, in accordance with Sishen's MWP and its mining operations. The 66kV line expenditure claim entailed the costs of dismantling the old line and masts and relocating the parts thereof, as could be used, to new positions, where it was re-established with old parts being replaced with new parts where required.

The contentions of the parties and the findings of the tax court

[25] The relocation expenditure was claimed by Sishen based on the provisions of s 15*(a)*,[25] and s 36(7C)[26] read with s 36(11)*(e)*[27] (expenditure incurred in terms of a mining right other than in respect of infrastructure). In the alternative, Sishen contended that the relocation expenditure was of a revenue nature, being part of its operating costs incurred in open cast mining, or its obligation to pay compensation in terms of s 54 of the MPRDA and should have been allowed under s 11*(a)*.[28] The CSARS disputed that this expenditure was in terms of Sishen's mining right and contended that it was capital in nature.

[26] The tax court found that since the Dingleton community was not within the mining area, the demolition and relocation did not constitute employing a process of mining. Hence it was not expenditure incurred in terms of exercising a mining right. Similarly, it found that the SWEP project did not constitute a method or process of extracting a mineral in the exercise of a mining right. Accordingly, it

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[25] See fn 38 infra.
[26] See fn 39 infra.
[27] See fn 43 infra.
[28] See fn 51 infra.

held that: the Dingleton relocation and SWEP project were not matters incidental or sufficiently closely connected to the mining operations relating to the act of mining; the expenditure was not in respect of Sishen's own infrastructure; and the expenditure was therefore not as envisaged in s 36(1)*(e)*.

[27] As Sishen's expenditure was not incurred in exercising a mining right, the tax court concluded that it is difficult to know how an alternative claim under s 11*(a)* would have been a revenue generating expense in respect of a mining activity in a mining area – the expenditure was not money used in the employ of a method or process to extract the income earning ore from the soil and there was no sufficient close link to the act of producing income. Expenditure incurred to comply with statutory requirements was viewed as capital expenditure for the benefit of third parties, and not income generating.

[28] The legal expenditure was claimed by Sishen as being of a revenue nature in terms of s 11*(c)*.[29] The CSARS maintained that the legal expenditure was not incurred 'in the production of income' as it was not sufficiently closely connected to the business operations of Sishen for it to be proper, natural and reasonable to regard such expenditure as part of Sishen's legal costs in performing its mining operations.

[29] The tax court disallowed the legal costs as deductions against its income. It found that as the removal and relocation costs of the Dingleton area were not deductible under s 36(11)*(e)* or s 11*(a)*, the legal costs incurred in the process were not incurred in terms of an existing mining right, because Sishen had no mining right over Dingleton and they did not fall within the mining area of Sishen. The legal costs were accordingly not incurred in the course of or by reason of the

[29] See fn 52 infra.

ordinary operations undertaken by the taxpayer in the carrying on of the taxpayer's trade, as contemplated in s 11*(c)*.

[30] The 66kV line expenditure was claimed by Sishen as capital expenditure in respect of 'mine equipment' in terms of s 36(11)*(a)*,[30] alternatively in terms of the general deduction provision in s 11*(a)*, as not being of a capital nature. In the further alternative, it was contended that the 66kV line expenditure qualified as a depreciation allowance under s 11*(e)*.[31] The CSARS contends that this expenditure was of a capital nature for 'infrastructure', which is excluded from s 36(11)*(e)* and, being of a capital nature, not deductible under s 11*(a)*. He contended further that a deduction under s 11*(e)* was excluded as the expenditure did not constitute wear and tear but involved the costs of a relocation in order for Sishen to continue mining operations in a portion of its mining area previously sterilised because of the location of the 66kV line.

[31] The tax court agreed with Sishen and allowed the expenditure. The 66kV line was found to be equipment attached to an electric substation that required to be moved to different parts of the mining area depending on the location of the mining pits. Costs would be incurred each time the line was brought to the proximity of the point where ore was being extracted. This activity is closely linked to the employ of a method or process to extract a mineral in the mining area, considered to be an activity integral to Sishen's income earning activities. The 66kV line expenditure was accordingly found to be deductible under s 11*(a)* read with s 36(11)*(a)*.

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[30] See fn 42 infra.
[31] See fn 53 infra.

[32] Section 89*quat*(2) provides for interest to be raised on an amount by which the normal tax payable exceeded any credit due to a taxpayer.[32] The CSARS has a discretion in terms of s 89*quat*(3) to remit or reduce the interest charged, if satisfied, having regard to the circumstances of the case, that the interest payable 'is a result of circumstances beyond the control of the taxpayer'.

[33] The CSARS contended that the normal tax payable by Sishen in respect of the taxable income excluding the deductions allowed, exceeded the credit amount available in the relevant tax years, and that interest was therefore chargeable in terms of s 89*quat*(2) at the prescribed rate on the amount by which the normal tax exceeded the credit. Although he has a discretion in terms of s 89*quat*(3) to remit or reduce the interest charged, if satisfied, having regard to the circumstances of the case, that the interest payable 'is a result of circumstances beyond the control of the taxpayer . . .' the CSARS contended that there was no basis for the interest to be waived.

[34] The tax court disallowed the interest. It categorised it as 'interest on understatement penalties'. In that respect the tax court erred. Following on that error, and as it had found that Sishen did not understate its tax liabilities as contemplated in the TAA, the interest on understatement penalties in terms of s 187(a) of the TAA and in terms of s 89*quat*(2) of the ITA was set aside. The CSARS contends that the tax court should not have disallowed the interest.

[35] The tax court accordingly dismissed Sishen's appeal except for allowing the 66kV line expenditure as deductible and setting aside the understatement penalties and the interest thereon, with no order as to costs.

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[32] See fn 112 infra.

The issues

[36] The issues accordingly are:

(a) whether:

(i) the relocation expenditure constituted deductible expenditure incurred 'in terms of a mining right' but other than in respect of infrastructure, within the meaning of s 36(11)*(e)*;

(ii) the 66kV line expenditure was in respect of 'mine equipment' as contemplated in s 36(11)*(a)*, or whether it qualified for the depreciation allowance under s 11*(e)*;

(b) In the alternative to para (a), whether the relocation, and 66kV line expenditure, constituted expenditure actually incurred in the production of income, and which was not of a capital nature, for the purposes of s 11*(a)*;

(c) Whether the legal expenditure was of a revenue nature incurred in the production of Sishen's income derived from mining operations and therefore deductible under s 11*(a)* alternatively s 11*(c)*;

(d) In respect of the interest raised, whether it properly accrued and if so, whether it was 'beyond the control of the taxpayer' as contemplated in s 89*quat*(3), and should have been waived.

The deductibility of expenditure

[37] The ITA:

(a) specially permits Sishen, because it derives its income from mining operations,[33] to deduct certain expenditure, of a capital nature, from its

[33] Section 15 of the ITA. It is not in dispute that Sishen derives it income from mining operations. 'Mining operations' and 'mining' is defined in the ITA to 'include every process by which any mineral is won from the soil or from any substance or constituent thereof.'

income – in accordance with what is generally referred to as the special deductions provisions; and

(b) generally permits Sishen, like any other taxpayer, to deduct expenditure incurred in the production of its income, if not of a capital nature[34] – in accordance with what is generally referred to as the general deductions formula.

[38] In *Western Platinum v Commissioner for the South African Revenue Service*,[35] Conradie JA drew attention to what was referenced as the 'golden rule' in interpreting s 15 and the related special deduction provisions, namely that:

'The *fiscus* favours miners and farmers. Miners are permitted to deduct certain categories of capital expenditure from income derived from mining operations. Farmers are permitted to deduct certain defined items of capital expenditure from income derived from farming operations. These are class privileges. In determining their extent, one adopts a strict construction of the empowering legislation. That is the golden rule laid down in *Ernst v Commissioner for Inland Revenue* 1954 (1) SA 318 (A) at 323C-E and approved in *Commissioner for Inland Revenue v D & N Promotions* (Pty) Ltd 1995 (2) SA 296 (A) at 305A-B.'

Section 23B(3) requires a taxpayer to first claim a deduction in terms of the special deductions provisions, if applicable, and only if no special deductions provision applies, to consider whether the general deductions formula finds application.[36] This judgment shall follow that sequence.

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[34] Section 11*(a)* of the ITA.

[35] *Western Platinum Ltd v Commissioner for SARS* [2004] ZASCA 83; [2004] 4 All SA 611 (SCA) para 1.

[36] Section 23B(3) of the ITA provides:

'No deduction shall be allowed under section 11*(a)* in respect of any expenditure or loss of a type for which a deduction or allowance may be granted under any other provision of this Act, notwithstanding that –

(a) such other provision may impose any limitation on the amount of such deduction or allowance; or

(b) that deduction or allowance in terms of that other provision may be granted in a different year of assessment.'

Special deductions

[39] As Sishen derives its income from mining operations, the ITA allows the deduction of specific expenditure,[37] even if of a capital nature, in recognition of the nature of the mining industry, the high financial risks involved, the significant upfront capital investment required, and the extended periods which might follow after the expenditure is incurred but before income is earned. Sishen, in keeping with other mining companies, is accordingly allowed the deduction of certain capital expenditure, otherwise not deductible from income, or the immediate deduction of certain expenditure, as opposed to the deduction thereof over a period of time. The special deductions provisions of the ITA in respect of capital expenditure relevant to this appeal are found in s 15*(a)*, read with s 36(7C) and s 36(11).

[40] Section 15*(a)* permits Sishen to deduct amounts ascertained under the provisions of s 36.[38] Section 36(7C) provides for amounts of 'capital expenditure' incurred to be deducted.[39] What constitutes 'capital expenditure' is defined in

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[37] *ABC Mining (Pty) Ltd v The Commissioner for the South African Revenue Service* (IT 24606) [2021] ZATC 12 (25 February 2021) para 69. Davis Tax Committee. 2016. *Second and Final Report on Hard-Rock Mining*, p 49 para 2.3.2.1.1:

'The rationale for the special tax saving deduction incentives given to miners was explained in the Davis Tax Committee's report as follows: "Mining involves very substantial upfront investment costs at the development phase of the mine, typically followed by a prolonged time lag before mining production (and hence generation of income) commences. This prolonged interval between upfront investment and generation of income is subject to heightened risks posed by adverse changes in commodity prices, and geological risks. These incentives provide for upfront capital allowances for exploratory and development expenditure, and for deductions which are designed to ensure adequate provision is made for the closure and rehabilitation of mines".'

[38] Section 15*(a)* provides:

'There shall be allowed to be deducted from the income derived by the taxpayer from mining operations –

(a) an amount to be ascertained under the provisions of section 36, *in lieu* of the allowances in sections 11 (*e*), *(f)*, (g*A), (g*C), *(o),* 12D, 12DA, 12F and 13*quin:*

(b) . . .'

[39] Section 36(7C) provides:

'Subject to the provisions of subsections (7E), (7F) and (7G), the amounts to be deducted under section 15 *(a)* from the income derived from the working of any producing mine shall be the amount of capital expenditure incurred.'

s 36(11).[40] It includes, in s 36(11)*(a)*, 'expenditure (other than interest or finance charges) on shaft sinking[41] and mine equipment (other than expenditure referred to in paragraph *(d)* and (*d*A)'.[42] Section 36(11)*(e)* provides for the deduction of 'any expenditure incurred in terms of a mining right pursuant to the provisions of [the MPRDA] other than in respect of infrastructure or environmental rehabilitation'. [43]

Did the relocation expenditure constitute deductible capital expenditure incurred 'in terms of a mining right' but other than in respect of infrastructure? - s 36(11)(e)

[41] The deductibility of the relocation expenditure under this heading depends on a proper textual, contextual and purposive interpretation of what is meant by the phrases, 'in terms of' and 'infrastructure'.[44] It is correct, as the CSARS has submitted, that the expenditure must be directly connected to the mining right, which is itself 'subject to . . . any relevant law'.

[42] Removal of the overburden by waste stripping is an ongoing process for the further optimal mining of viable iron-ore deposits within the mining area of Sishen. It was specifically required in the mining right granted to Sishen. Unless the SWEP was relocated and the Dingleton residents translocated, the progression

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[40] The amount of any capital expenditure falls to be determined in accordance with the definitions of 'capital expenditure incurred' and 'expenditure' as defined in s 36(11) (*f*). The determination of the amounts involved is not an issue in this appeal.

[41] In terms of s 36(11) '"expenditure on shaft sinking" includes the expenditure on sumps, pump-chambers, stations and ore bins accessory to a shaft'. The expenditure claimed to be deducted in this appeal does not relate to shaft sinking.

[42] The balance of the definition of 'capital expenditure' is not relevant to this judgment and is accordingly omitted. Paragraph *(d)* and (*d*A) also do not apply.

[43] Section 36(11)*(e)* provides:
'where that trade constitutes mining, any expenditure incurred in terms of a mining right pursuant to the Mineral and Petroleum Resources Development Act other than in respect of infrastructure or environmental rehabilitation'.

[44] *Natal Joint Municipal Pension Fund v Endumeni Municiaplity* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18; *Tshwane City v Blair Athol Home Owners Association* [2018] ZASCA 176; [2019] 1 All SA 291 (SCA); 2019 (3) SA 298 (SCA) para 63; *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 50.

of the mine pit to the west, as contemplated by and in terms of the mining right, could not continue.

[43] The 'overburden' constituted by the SWEP infrastructure would have precluded Sishen from fully mining its mining area in accordance with the terms of the MWP, and its mining right. The failure to actively conduct mining optimally and in accordance with the MWP as contemplated by sections 51 and 25 of the MPRDA would risk the possible suspension or cancellation of Sishen's mining right by the Minister in terms of s 47 of the MPRDA.

[44] As mining operations progressed to the west, the Dingleton residents and the owners of the SWEP infrastructure were likely to suffer damage. This could initiate a request by the Regional Manager in terms of s 54(3) of the MPRDA to the affected parties, apart from any obligation which would in any event arise at common law, or in giving effect to s 5(2)*(b)* of the Safety Act read with s 23(1)*(f)*[45] of the MPRDA,[46] or the obligation in regulation 4.14(2) under the Safety Act prohibiting blasting operations from being carried out within the safety buffer, to reach agreement for the payment of compensation for such loss or damage. The Regional Manager, in terms of s 54(6) of the MPRDA, could furthermore prohibit the commencement or continuation of such mining operations until any dispute relating to such compensation was resolved.

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[45] Section 23(1)*(f)* of the MPRDA provides:
'(1) Subject to subsection (4), the Minister must grant a mining right if –
(a) . . .
(b) . . .
(c) . . .
(d) . . .
(e) . . .
(f) The applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No 29 of 1996);
. . .'

[46] These provisions provide that every employer like Sishen must ensure that persons who are not employees but who may be directly affected by mining activities should not be exposed to hazards to their health and safety.

Prudence demanded that these eventualities be anticipated, addressed pro-actively and obviated.

[45] The mining right required Sishen to take all necessary and reasonable steps to adequately safeguard and protect persons from any possible damage. If it failed to do so, it would have to compensate such persons for losses they may suffer arising from the exercise of the mining right. There would be nothing wrong in anticipating these legal obligations and dealing with them.

[46] The MWP in giving recognition to the aforesaid realities detailed the applicable time frames and scheduling of various implementation phases of the mining operation. The relocation of the Dingleton township was specifically addressed, with reference to schedules and costs, in the annual revision of the life-of-mine plan. It was also addressed as part of the obligations to be discharged during the 30-year development phase of the mine and the extraction of the iron ore, over development phases, during the following 25 years. The MWP provided that by 2022 Sishen would extract ore from the 500 meter safety buffer.

[47] The terms ‘mining operation’ and ‘mining’ are defined in the MPRDA in broad terms to include ‘every method or process by which any mineral is won from the soil’. The relocation expenditure was incurred as a necessary part of the method and process of opencast mining. Without the relocation, Sishen could not have adhered to the MWP in respect of the mining rights it held and which it was obliged to optimise.

[48] It is difficult to envisage expenditure more indispensable to mining the mining area optimally in terms of its mining right, and to maintain productivity and sales volumes, than for Sishen to have attended to the relocations. Absent the relocations, Sishen would have breached, or stood to breach, the provisions of its

mining right and applicable legislation. The expenditure was necessary and inextricably connected and indispensable to its obligations to comply with the MWP and the mining right. The relocation expenditure was incurred in terms of a mining right, as contemplated in s 36(11)*(e)*.

[49] The CSARS contended that Sishen, in any event, could not have mined the safety buffer, although it held a mining right in respect thereof, as that part of the mining area was effectively sterilised; similarly that it could never have mined the area occupied by the SWEP infrastructure; that it did not have to mine those areas and specifically also the Dingleton area over which it held no mining right; that it incurred this expenditure simply because it had elected to do so; and that the expenditure was therefore not in terms of its mining right, but in terms of the applicable legislation, notably the Safety Act and the regulations, and as a result of its own volition to expand its mining. This line of reasoning is, with respect artificial, but more significantly ignores the express terms of the mining right and the MWP which contemplated the mining of these areas at certain stages. The argument cannot be sustained.

[50] Sishen was entitled and indeed required in optimally mining the mining area in accordance with its mining right, to mine the areas occupied by the SWEP infrastructure, and the safety buffer zone (which necessitated the relocation of Dingleton). It could mine the safety buffer zone with the required permission, but that would invariably have held the risk of damage or loss to the Dingleton residents and the potential of damage to the SWEP infrastructure, for example imperilling the integrity of the railway line. Sishen simply anticipated its expected and reasonable legal obligations in terms of what its mining right and MWP required it to do.

[51] The tax court failed to recognise that the mining right, whether it initially did so or not, and the MWP required, or had come to expressly require, Sishen in mining the mining area to attend to the relocations. Even accepting that Sishen possibly might have been entitled to elect not to mine to the full extent of its mining right, does not mean that if it elected to carry out mining contemplated in the mining right and as a result incurred expenditure, that this expenditure was not 'in terms of a mining right'.

[52] That leaves considering the effect and meaning of the phrase 'excluding expenditure relating to "infrastructure"'. Insofar as the expenditure was on infrastructure, it was not infrastructure owned by Sishen. Sishen did not acquire the right to use third party infrastructure as part of its income earning structure. Its income earning structure was not enhanced by the relocation expenditure.

[53] I agree with Sishen that the reference to 'infrastructure' is to infrastructure owned by and forming part of the income-earning structure belonging to, created or controlled by Sishen for the purpose of conducting mining operations. Although the provision does not expressly confine the reference to 'infrastructure' to infrastructure of the taxpayer and not that owned by third parties, the distinction is required on a proper interpretation of the provision in its context.

[54] If the provision did not exclude Sishen's own infrastructure then there would be a conflict with deductions over longer periods of time in respect of what is clearly Sishen's own infrastructure referenced in s 36(11)*(d)*.[47] The

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[47] Section 36(11)*(d)* provides:
'expenditure (excluding the cost of land, surface rights and servitudes) the payment of which has become due on or after 1 July 1989 in respect of the acquisition, erection, construction, improvement or laying out of –
(i) housing for residential occupation by the taxpayer's employees (other than housing intended for sale) and furniture for such housing;
(ii) infrastructure in respect of residential areas developed for sale to the taxpayer's employees;

infrastructure in s 36(11)*(e)* contrasts with the costs of infrastructure owned by a taxpayer in respect of which deductions might be claimable under s 36(11)*(a)* and s 36(11)*(d)*, which properly construed deal with the taxpayer's own infrastructure, not that of third parties, and expenditure relating to environmental rehabilitations under s 37A. Capital expenditure on infrastructure belonging to or which would become owned by third parties cannot conceivably be deductible by a taxpayer, unless justified on some other basis.

[55] The words 'any expenditure' in s 36(11)*(e)* are broad enough to sensibly include compensation paid to third parties, whether in kind or otherwise, in respect of damages or anticipated damages caused by or inevitably to arise from Sishen's mining operations, as opposed to being in respect of the acquisition of a fixed asset infrastructure item required for mining. The relocation expenditure

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(iii) any hospital, school, shop or similar amenity (including furniture and equipment) owned and operated by the taxpayer mainly for the use of his employees or any garage or carport for any motor vehicle referred to in subparagraph (vi);
(iv) recreational buildings and facilities owned and operated by the taxpayer mainly for the use of his employees;
(v) any railway line or system having a similar function for the transport of minerals from the mine to the nearest public transport system or outlet;
(vi) motor vehicles intended for the private or partly private use of the taxpayer's employees:
Provided that-
(aa) such expenditure shall for the purposes of this definition be deemed to be payable in ten successive equal annual instalments or, where subparagraph (vi) is applicable, five successive equal annual instalments, the first of which shall be deemed to be payable on the date on which payment of the relevant expenditure became due and the succeeding instalments on the appropriate anniversaries of that date, but if any such anniversary falls on a date after the asset to which such expenditure relates has been sold, disposed of or scrapped by the taxpayer, the instalment of such expenditure so deemed to be payable on such anniversary shall be disregarded;
(bb) where it is shown to the satisfaction of the Commissioner that the life of the relevant mine will extend over a period which is shorter than the period during which the said instalments are so deemed to be payable, the Commissioner may reduce the number of instalments relating to the expenditure not yet redeemed and the amount of each such instalment shall be determined by dividing the amount of the expenditure remaining to be redeemed by the number of years in the remainder of the life of the mine;
(cc) where any asset the expenditure in respect of which has qualified as capital expenditure under this paragraph is sold, disposed of or scrapped by the taxpayer during any year of assessment, an allowance shall be made in respect of that asset, equal to the amount by which the full amount of the expenditure incurred by the taxpayer in respect of that asset, as contemplated in this paragraph, exceeds the total amount of all the instalments of such expenditure which are deemed by paragraph *(aa)* of this proviso to be payable before the asset was sold, disposed of or scrapped, and in such case the amount of the said allowance shall be deemed to be the final instalment of the said expenditure made on the date on which the asset was sold, disposed of or scrapped; and
(dd) where a taxpayer completes an improvement as contemplated in section 12N in respect of the items contemplated in subparagraph (i), (ii), (iii), (iv) or (v), the expenditure incurred by the taxpayer to complete the improvement shall be deemed to be expenditure for the purposes of this section.'

incurred did not relate to working the open cast mine, or to tangible corporeal things forming part of the plant belonging to or controlled by Sishen as a mining company, which might be considered under s 36(11)*(a)* or s 36(11)*(d)* in respect of its own equipment.[48]

[56] The CSARS has placed emphasis inter alia on an explanatory memorandum which accompanied the introduction of: s 36(11)*(e)* by the Revenue Laws Amendment Act 60 of 2008 (dealing with allowances in respect of expenditure on Government business licences) where, in respect of infrastructure, it was said that infrastructure was excluded 'because it often can have nearby enduring benefits'; the Taxation Laws Amendment Bill which introduced an amendment to s 36(11)*(e)* which dealt with expenditure to cover social and labour plan expenditure; and the Taxation Laws Amendment Bill 17B of 2016, which introduced s 36(11)*(e*A*)* for tax relief for mining companies' capital expenditure on infrastructure in terms of the social and labour plan requirements of the MPRDA. The latter would be for the benefit of people living in mining communities. It would range from roads and drainage systems to crèches, schools, clinics, housing and recreational buildings to benefit communities surrounding a mine. The fact that it was specifically stated, to be clear, that expenditure on social and labour plans requirements of the MPRDA for the benefit of people living in mining communities, which would probably be on land of the mine owned by it was deductible, militates against an interpretation that the 'infrastructure' referenced included infrastructure not belonging to the taxpayer.

[57] The tax court erred in not concluding that the relocation expenditure was deductible under s 36(11)*(e)*. The appeal in respect of the disallowed relocation

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[48] ITC 1110 (1967) 29 SATC 169 (T) 170.

expenditure accordingly succeeds. This conclusion makes it unnecessary to consider the deductibility of the relocation expenditure as a general deduction.[49]

Was the 66kV line expenditure in respect of 'mine equipment' as contemplated in s 36(11)(a)?

[58] To qualify for deduction under s 36(11)*(a)*, the expenditure relating to the relocation of the 66kV line had to be in respect of 'mine equipment'. The term 'mine equipment' is not defined in the ITA. It however has been pointed out that the CSARS has 'continued with a practice of a broad interpretation of this term to include all underground equipment as well as surface railway lines, administrative buildings, schools, storage facilities and processing plants, among others.'[50]

[59] In support of its cross-appeal, the CSARS argued that the 66kV line expenditure was of a capital nature, falling 'in the same category as the SWEP expenditure', as it related to the relocation of 'infrastructure which allowed Sishen to access the ore that had been sterilised by the safety buffer zone', and hence not expended for the purposes of Sishen's trade. This judgment has however found above that the SWEP expenditure was deductible as being in terms of Sishen's mining right and hence its trade.

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[49] Although no finding to effect that is made here, a very compelling case also exists for the deduction of the relocation expenditure as a general deduction. The expenditure, viewed from a practical and business outlook: had as its purpose to remove an obstacle to the effective extraction of iron ore from the mine; did not relate to the acquisition of a capital asset; did not lead to the acquisition of anything of intrinsic value; simply related, in the case of the SWEP relocation to the removal of overburden and its location to access iron ore which, if not removed, would bring the mining operation to a halt, or seriously impede the mining operations; produced a transitional benefit which had no enduring value but was required if the mining operation was to be continued at all into the future; related to what was contemplated in the MWP from the outset as required for the optimal exploitation of Sishen's mining right; was required as there was no evidence to indicate that the mining operations could continue into the future without this expenditure; did not produce an asset to Sishen which may be made subject to either capital costs or a depreciation allowance; and, did not increase the productive capacity of the mine beyond what the mining right contemplated, nor affect any asset of Sishen. At the end, Sishen would simply be left with a larger hole in the surface of the earth within its mining area.

[50] Van Blerck, M. (1992). *Mining Tax in South Africa*. 2nd ed. Rivonia, South Africa: Taxfax CC page 12-12.

[60] It is difficult to envisage equipment more integral to the mining process than the equipment required to conduct the electricity to a point where it is required to energise what is plainly mining equipment, such as blast hole drilling rigs, electric face shovels and the like. Without the 66kV line, the electric rigs and shovels cannot operate. Clearly, the 66kV line is an integral part of the mine equipment. The particular 66kV line, supported by the pylons erected to carry it into the mining pit and suspending it at a safe height to allow the passage of traffic underneath, had to be relocated as the mining progressed to the west.

[61] The tax court was correct in concluding that the expenditure relating to the relocation and reconstruction of the 66kV line constituted expenditure incurred on mine equipment, and hence deductible as contemplated under s 15*(a)* read with s 36(11)*(a)*. Insofar as it might be contended that it was not expenditure in respect of mining equipment, the costs of removing and re-establishing the pylons elsewhere would be a revenue expense, as I shall demonstrate when discussing the deduction of the 66kV line expenditure, in the alternative, under the general deductions formula below. It is also under that heading that I shall briefly deal with the further alternative basis advanced by Sishen, namely for a deduction of the 66kV line expenditure as a general depreciation allowance deduction under s 11*(e)*.

General deductions

[62] The general deductions formula, contained in s 11*(a)* of the ITA provides that for the purpose of determining the taxable income derived by a taxpayer from carrying on any trade, there shall be allowed as deductions from the income of such taxpayer such expenditure and losses that are not of a capital nature.[51]

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[51] Section 11 provides:
'For the purposes of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived –

Section 11*(c)* provides specifically for the deduction of any legal expenditure actually incurred by a taxpayer in respect of any claim, dispute or action at law, arising in the course of, or by reason of the ordinary operations undertaken in the carrying on of its trade.[52] Section 11*(e)* provides for a depreciation allowance to be claimed in respect of such machinery, plant, implements and utensils as the CSARS may think just and reasonable.[53] The provisions of s 11*(a)* and s 11*(e)* are both qualified by s 23*(g)*,[54] which provides that no deduction shall be made in respect of any moneys claimed as a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of the taxpayer's trade.

(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature;
(b) . . .'

[52] Section 11*(c)* provides for:
'any legal expenses (being fees for the services of legal practitioners, or expenses incurred in procuring evidence or expert advice, court fees, witness fees and expenses, taxing fees, the fees and expenses of sheriffs or messengers of court and other expenses of litigation which are of an essentially similar nature to any of the said fees or expenses) actually incurred by the taxpayer during the year of assessment in respect of any claim, dispute or action at law arising in the course of or by reason of the ordinary operations undertaken by him in the carrying on of his trade: Provided that the amount to be allowed under this paragraph in respect of any such expenses shall be limited to so much thereof as -
(i) is not of a capital nature; and
(ii) is not incurred in respect of any claim made against the taxpayer for the payment of damages or compensation if by reason of the nature of the claim or the circumstances any payment which is or might be made in satisfaction or settlement of the claim does not or would not rank for deduction from his income under paragraph *(a)*; and
(iii) is not incurred in respect of any claim made by the taxpayer for the payment to him of any amount which does not or would not constitute income of the taxpayer; and
(iv) is not incurred in respect of any dispute or action at law relating to any such claim as is referred to in paragraph (ii) or (iii) of this proviso;'

[53] Section 11*(e)* provides for the deduction of:
'save as provided in paragraph 12(2) of the First Schedule, such sum as the Commissioner may think just and reasonable as representing the amount by which the value of any machinery, plant, implements, utensils and articles (other than machinery, plant, implements, utensils and articles in respect of which adduction may be granted under section 12B, 12C, 12DA, 12E(1) or 37B) owned by the taxpayer or acquired by the taxpayer as purchaser in terms of an agreement contemplated in paragraph *(a)* of the definition of "instalment credit agreement" in section 1 of the Value–Added Tax Act and used by the taxpayer for the purpose of his or her trade has been diminished by reason of wear and tear or depreciation during the year of assessment: Provided that- . . .'
(and then follows a list of exclusions not relevant to repeat for the purpose of this judgment).

[54] Section 23*(g)* provides:
'No deductions shall in any case be made in respect of the following matters, namely –
. . .
(g) any moneys claimed as a deduction from income derived from trade to the extent to which such moneys were not laid out or expended for the purposes of trade. . .'

[63] What remains to be considered are: whether the 66kV line expenditure, in the alternative to being deductible in terms of s 36(11)*(a)*, is deductible in terms of s 11*(a)*, or as depreciation under s 11*(e)*; and whether the legal expenditure is deductible under s 11*(c)* alternatively s 11*(a)*. Section 11*(a)* requires a distinction to be made between capital and revenue expenditure. A comprehensive discussion of that distinction would justify a thesis on its own and is beyond the scope of this judgment. It is an age-old debate. I shall however endeavour to briefly highlight the salient principles material to identifying whether the expenditure which features in this appeal, is capital in nature or not.

Capital versus revenue

[64] The general deductions provision in s 11*(a)* permits the deduction from income of expenditure and losses actually incurred in the production of the income,[55] provided they are not of a capital nature.[56] Whether expenditure generally, and specifically expenditure in respect of infrastructure, is capital, as opposed to being revenue in nature and incurred in the production of income, is often unclear.[57]

[65] What constitutes capital expenditure for the purpose of the general deduction formula, is not defined in the ITA. The distinction between revenue and capital is one which our courts, and those in foreign jurisdictions, have had to grapple with and develop. Guidance must accordingly be sought from the relevant case law.

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[55] The reference is to expenditure 'actually incurred' as opposed to 'necessarily incurred'. It has been remarked that this probably widens the scope of the deductibility of expenditure – *Port Elizabeth Electric Tramway Co Ltd v Commissioner for Inland Revenue* 1936 CPD 241, 8 SATC 13 (*PE Tramway*).

[56] Section 11 reads:

'For the purposes of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived –

(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature;

(*b*) . . .'

[57] *Johns-Manville, Canada Inc v The Queen* 85 DTC 1985 (*Johns-Manville*).

[66] Our courts have over time, developed various tests, some of which are listed below, to introduce a measure of predictability in determining whether expenditure is of a capital or revenue nature. The tests have variously emphasised: the purpose for which the expenditure was incurred (the purpose test); whether the expenditure incurred was sufficiently close to producing income (the closeness test); whether the expenditure was a necessary concomitant to the income produced (the necessary concomitant test); whether the expenditure was a once and for all item of expenditure (the once and for all test); and whether the expenditure ensured an enduring benefit (the enduring benefit test).

[67] The aforesaid tests are not exhaustive of the considerations a court shall have regard to in determining whether expenditure is of a capital nature. They are simply guides in applying a broader common-sense approach to the facts of each case. The cases below seek to elucidate some of the principles that are applied.

[68] The CSARS argues that to determine whether expenditure is of a capital nature, a distinction must be drawn between expenditure incurred in creating an income earning structure, as opposed to expenditure incurred in conducting income earning operations.[58] That distinction is not conclusive nor always easy to apply. Indeed, in *New State Areas Ltd v Commissioner for Inland Revenue* (*New State*),[59] Watermeyer CJ held that revenue expenditure cannot be differentiated from capital expenditure by enquiring whether or not the expenditure was incurred in the production of income. Both can be incurred in the production of income. The judgment concluded that the purpose of the

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[58] That is with reference to *CIR v George Timber Co Ltd* 1924 AD 516 (1 SATC 20) 525. The CSARS also relied on *New State Areas Ltd v Commissioner for Inland Revenue* 1946 AD 610 at 627 and *Rand Mines (Mining and Services) Ltd v Commissioner for Inland Revenue* 1997 (1) SA 427 (SCA) where, it is argued, this was applied.
[59] *New State Areas Ltd v Commissioner for Inland Revenue* 1946 AD 610 *(New State)* at 164 and 170.

expenditure needs to be determined to establish whether it is capital or revenue in nature. The judgment records:

'The conclusion to be drawn from all [the] cases, seems to be that the true nature of each transaction must be enquired into in order to determine whether the expenditure attached to it is capital or revenue expenditure. Its true nature is a matter of fact and *the purpose of the expenditure is the important factor*; if it is incurred for the purpose of acquiring a capital asset for the business it is capital expenditure, even if it is paid in annual instalments; if, on the other hand, it is in *truth no more than part of the cost incidental to the performance of the income-producing operations,* as distinguished from the equipment of the income producing machine, *then it is revenue expenditure,* even if it is paid in a lump sum.'[60] (Emphasis added.)

[69] In *Ticktin Timbers CC v Commissioner for Inland Revenue* (*Ticktin Timbers*), Hefer JA called the purpose for which expenditure was incurred, the decisive consideration in the application of s 23*(g)*.[61] He quoted the following passage from the judgment of Corbett JA in *Commissioner for Inland Revenue v Standard Bank of SA Ltd*:

'Generally, in deciding whether monies outlaid by a taxpayer constitutes expenditure incurred in the production of income (in terms of the general deduction formula) important and sometimes overriding factors are the purpose of the expenditure and what the expenditure actually effects; and in this regard *the closeness* of the connection between the expenditure and the income-earning operations must be assessed.'[62] (Emphasis added)

[70] The approach, as was said in *Port Elizabeth Electric Tramway Co v Commissioner for Inland Revenue* (*PE Tramway*), should be to first look at the purpose of the act which caused the expenditure.[63] Thereafter, the next enquiry is

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[60] *New State* fn 59 above at 627.
[61] *Ticktin Timbers CC v Commissioner for Inland Revenue* [1999] 4 All SA 192 (A); 1999 (4) SA 939 (SCA) (*Ticktin Timbers*) para 2.
[62] *Commissioner for Inland Revenue v Standard Bank of SA Ltd* [1985] 2 All SA 512 (A); 1985 (4) SA 485 (A) at 500H-J.
[63] *Port Elizabeth Electric Tramway Co v Commissioner for Inland Revenue* 1936 CPD 241; 8 SATC 13 (*PE Tramway*).

to look at the closeness of the connection between the expenditure and the income earning operations, which link must be 'close'. The court explained that:

'[I]ncome is produced by the performance of a series of acts and attendant upon them are expenses. Such expenses are deductible expenses provided that they are so closely linked to such acts as to be regarded as part of the cost of performing them. . .The purpose of the act entailing expenditure must be looked to.'[64]

[71] The application of these principles can be demonstrated with reference to the following cases. In *Warner Lambert SA (Pty) Ltd v Commissioner for South African Revenue Service* (*Warner*), social responsibility expenditure which the taxpayer was obliged to incur in South Africa under American legislation, not adding to any asset of enduring benefit, was, on assessing on the one hand the 'closeness of the connection between the expenditure and the income earning operations' and on the other hand, whether there is a 'relation between expenditure and capital close enough to draw the expenditure in to the ambit of capital', found to be laid out for the purposes of trade and therefore of a revenue nature.[65]

[72] In *W Nevill & Co Ltd v F COT* (*W Nevill*),[66] it was held that, in determining whether expenditure is sufficiently closely linked to the production of income:

'[I]t is necessary, for income tax purposes, to look at a business as a whole set of operations, directed towards producing income. No expenditure, strictly and narrowly considered, in itself actually gains or produces income. It is an outgoing, not an incoming. Its character can be determined only in relation to the object which the person making the expenditure has in view. *If the actual object is the conduct of the business on a profitable basis* with due regard to

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[64] *PE Tramway* at 245.
[65] *Warner Lambert SA (Pty) Ltd v Commissioner for South African Revenue Service* 2003 (5) SA 344 (SCA); 65 SATC 346 (*Warner*) para 17.
[66] *W Nevill & Co Ltd v Federal Commissioner of Taxation* [1937] HCA 9; 56 CLR 290 (8 March 1937) para 2.

economy which is essential in any well-conducted business, then the expenditure is an expenditure incurred in gaining or producing the assessable income'.[67] (Emphasis added)

[73] In *PE Tramway*, the taxpayer, a South African subsidiary of an American company, in complying with the United States Sullivan Code was required to implement a social responsibility program. Expenditure incurred in implementing the program was held, as in *Warner*, to have been incurred in the production of income and hence deductible under s11*(a)* read with s 23*(g)*. It was held that, although the link between the taxpayer's trade and the social responsibility was not close and obvious, it did not mean that the connection was too remote.[68] The deduction was allowed.

[74] Schreiner JA in *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd* (*Genn*),[69] stated that:

'In deciding how the expenditure should properly be regarded the Court clearly has to assess the *closeness* of the connection between the expenditure and the income-earning operations, having regard both to the purpose of the expenditure and to what it actually effects.'[70]

There must be an enquiry as to whether it would be proper, natural or reasonable to regard the expenses as part of the costs of performing the business operated.

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[67] The case concerned the deductibility of a payment made to a manager in instalments over two financial years to terminate his employment, which was sought to be deducted in full in the first financial year, as having been incurred in the course of its business. The Commissioner refused to allow the deduction because it was not expended for the purposes of producing income. The court followed a subjective approach and held that the nature of the expenditure should be established from the taxpayer's perspective. If the purpose was producing profits, then it should be regarded as having been incurred in the production of income. It held that the expenditure was *bona fide* incurred for the purposes of producing income. The taxpayer expended the money *on the grounds of commercial expediency*; to improve its efficiency, and therefore to increase its production capacity. The deduction of the expenditure from the company's income was allowed as it had been incurred bona fide for the purposes of producing income.

[68] In *PE Tramway*, the court stated as follows at 245:

'. . . [I]ncome is produced by the performance of a series of acts and attendant upon them are expenses. Such expenses are deductible expenses provided they are so closely linked to such acts as to be regarded as part of the cost of performing them. A little reflection will show that two questions arise (a) whether the act to which the expenditure is attached is performed in the production of income and (b) whether the expenditure is linked to it closely enough.'

[69] *Commissioner for Inland Revenue v Genn & Company (Pty) Ltd* 1955 (3) SA 293 (A); [1955] 3 All SA 382 (A); 20 SATC 113 (*Genn*).

[70] *Genn* at 299.

[75] In *Joffe & Co Ltd v Commissioner for Inland Revenue* (*Joffe*),[71] the taxpayer was required to prove that the expenditure was a necessary concomitant of the taxpayer's business, that is that the expense must be inseparable from the taxpayer's trading operations. If the expenditure is *bona fide* incurred for the purposes of producing income, it is deductible.

[76] Regarding 'the once and for all test', in *Commissioner for Inland Revenue v African Oxygen*,[72] Steyn CJ held that what is important is the link between expenditure and income. If the expenditure is part of *the cost of operating* the taxpayer's income-earning machine, it is revenue expenditure. If the expenditure is incurred once-off, it is likely to be capital, and if it is recurrent, it is likely to be revenue. Similarly, in the Scottish case of *Vallambrosa Rubber Co Ltd v Farmer*,[73] Lord Dunedin found that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing that is going to recur every year. But this is not a final or determinative test. It is to be used in conjunction with other tests to determine whether the expenditure is capital or revenue.

[77] The 'enduring benefit' test was referenced in *British Insulated & Helsby Cables v Atherton*[74] as follows:

'. . .when an expenditure is made, not only once and *for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an* opposite conclusion) for

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[71] *Joffe & Company Ltd v Commissioner for Inland Revenue* 1946 AD 157.
[72] *Commissioner for Inland Revenue v African Oxygen Ltd* 25 SATC 67; 1963 (1) SA 681 (A) (*African Oxygen*) at 690B-D.
[73] *Vallambrosa Rubber Company Ltd v Farmer* [1910] ScotLR 488; [1910] SLR 488 (16 March 1910) at 492.
[74] *British Insulated & Helsby Cables v Atherton* [1926] A.C. 205, (1925) 10 TC 155 at 192.

treating such an expenditure as properly attributable not to revenue but to capital.'[75] (Emphasis added.) It has been held that 'enduring' means that it must have a long-lasting benefit.[76]

[78] In *Johns-Manville*,[77] the Supreme Court of Canada held that the ongoing costs of acquiring land surrounding an open pit mine to maintain a proper slope for economic and safety reasons, were revenue expenses. The court noted that the expenditure produced a transitional benefit which had no enduring value because similar expenditure would be required in the future if the mining operation was to be continued.[78]

[79] The court in *Johns-Manville* reaffirmed that the answer to the question whether expenditure is an expense or capital, must always depend on the facts of each particular case, quoting from *Minister of National Revenue v Algoma Central Railway*,[79] that not any single test is conclusive in making that determination, and from *B.P. Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia*,[80] that the solution to the problem is not to be found by any rigid test or description, but a common-sense appreciation of all the guiding features which must provide the ultimate answer. The answer ultimately: 'depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process per Dixon J in *Hallstroms Pty Ltd v Federal Commissioner of Taxation* (1946) C.L.R. 634, 648.'[81]

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[75] The test was adopted and applied by Steyn CJ in considering the peculiar facts in *African Oxygen* and confirmed in *ITC 1528* 54 SATC 243 (T) at 248-249.
[76] De Koker, A P. and Williams, R C. (2012) *Silke on South African Income Tax*. LexisNexis. Para 7.9.
[77] *Johns-Manville* fn 57 supra.
[78] This might have been an alternative basis to find that the relocation expenditure was deductible, had it not been concluded above that the relocation expenditure was deductible also as capital expenditure in terms of the provisions of s 36(11)*(e)*.
[79] *Minister of National Revenue v Algoma Central Railway* [1968] S.C.R. 447 at 449.
[80] *B.P. Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1966] A.C. 224 at 264-265.
[81] *Johns-Manville* para 13.

It was observed that the various tests were 'almost an endless rainbow of expression used to differentiate between expenditures in the nature of charges against revenue and expenditures which are capital', which all emphasise different aspects, but:

'. . . the weight which must be given to a particular circumstance in a particular case must depend rather on common sense than on strict application of any single legal principle[82] [because it] is of little help . . . to attempt to classify the character of the expenditure according to the subject of that expenditure.'[83]

The answer '. . . depends in no way upon what may be the nature of the asset in fact or in the law . . . The determining factor must be the nature of the trade in which the asset is employed'.[84]

[80] In *Palabora Mining Company Limited v Secretary for Inland Revenue*,[85] expenditure, in the form of inducements paid to contractors to expedite the construction of a dam which a municipality was constructing, to supply water to conduct mining operations, was held not to have been incurred for the purpose of acquiring a capital asset. Although the expenditure was for the enduring benefit of the company, it was held to be revenue in nature.

[81] The ultimate answer in instances such as the present depends, as also suggested elsewhere,[86] on applying a common-sense appreciation of all the guiding features relating to the relevant provisions of the ITA to the peculiar facts of the expenditure claimed. The classification of the expenditure depends on what each item of expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal right. I turn then

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[82] *Regent Oil Co Ltd v Strick* [1966] A.C. 295 at 313.
[83] *Johns-Manville* para 22.
[84] *Golden Horse Shoe (New) Ltd v Thurgood* [1934] 1 KB 548 (C.A.) at 563.
[85] *Palabora Mining Company Ltd v Secretary for Inland Revenue* 1973 (3) SA 819 (A); 35 SATC 159.
[86] Per Lord Pearce in *B.P. Australia Ltd supra* at 264.

to a consideration of the specific deductions claimed by Sishen in the light of the aforesaid principles.

Was the 66kV line expenditure deductible in terms of either s 11(a) or (e)?

[82] Sishen claimed the deduction of the 66kV line expenditure, in the alternative to it being a s 36(11)*(a)* deduction (which was considered above), on the basis of s 11*(a)*, as expenditure related to its trade and not of a capital nature. In the further alternative, Sishen claimed the expenditure as wear and tear or depreciation in terms of s 11*(e)*.

[83] To qualify as a general deduction, the 66kV line expenditure had to comply with two requirements. First, it had to be expended in carrying on Sishen's trade. Second, it could not be of a capital nature. Sishen thus bore the onus, in terms of s 102(1)*(b)*[87] of the Tax Administration Act (the TAA),[88] of proving that the expenditure was: actually, incurred for the purposes of producing income; *bona fide* incurred for that purpose; and is so closely connected to its business operations that it would be proper and reasonable to regard the expense as part of the costs of performing its business operations, and hence not capital in nature. Generally, all expenditure attached to the performance of a business operation *bona fide* performed for the purpose of earning income is deductible, provided it was so closely connected with the earning of income that it may be regarded as part of the cost of conducting its income earning business.[89]

[84] The purpose of incurring the expenditure to relocate the 66kV line was to enable Sishen to operate its electrical mining equipment. This was closely linked

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[87] Section 102 of the TAA provides:
'(1) A taxpayer bears the burden of proving-
(a) that an amount, transaction, event or item is exempt or otherwise not taxable;
(b) that an amount or item is deductible or may be set-off. . .'.
[88] Act 28 of 2011.
[89] *PE Tramway* at 246.

to and was incurred for the purpose of conducting Sishen's income-earning operations and trade and in earning an income. Even if the line was moved for the first time, it is expenditure which, by its very nature, is likely to be incurred again in the future, and therefore recurring, as the mine operations extend into further new areas.

[85] The expenditure incurred, including any costs of part of the infrastructure required to be replaced, was inextricably and closely connected to Sishen's income producing activities. The predominant purpose in incurring the expenditure was not to enhance Sishen's corporeal income earning structure, but to enable it to operate mining equipment for the proper utilisation of its mining right and to earn income from its trade.

[86] The part of the expenditure, probably an insignificant portion, relating to replacing part of the pylons and related construction in the process of relocation, does not make the 66kV line expenditure 'capital in nature'. It is similar to the funds expended in *Johns-Mayville* to buy land to facilitate the slope access to the mine, which was found to be not capital, but revenue. And it is similar also to the expenditure expended on a social upliftment program, totally unrelated to the actual earning of mining income, which was found to be revenue and not capital in nature in *PE Tramways* and *Warner*.

[87] The income earning structure, which is the mining pit, buildings and the like, would have been acquired and would constitute expenditure of a capital nature. But relocating the electricity supply lines when circumstances demand that mine equipment be used as part of the income producing process in a new location, and probably new locations in the future, is expenditure inherently involved in generating mining income.

[88] It is difficult to envisage expenditure, the true nature of which is more purposed towards (as in *New State*), close to (as in *Ticktin Timbers*) and not too remote from (as in *PE Tramway*), necessarily concomitant to (as in *Joffe*) and incurred on a common sense approach (as in *Johns-Mayville*), with the object to (as in *W Nevill*) conduct Sishen's income generating activities. The 66kV line expenditure was, by its very essence, required to properly energise the electrical mining equipment so that iron ore could be extracted and an income earned. Even if the line had never been relocated before and the expenditure was possibly incurred 'once and for all' and might not recur, the expenditure is nevertheless inextricably part of conducting mining operations. Common sense dictates that the expenditure should be recognised as a revenue expense and not as of a capital nature.

[89] The tax court found, and its factual findings are not disputed by the CSARS, that: the 66kV line was attached to an electric substation; it could be moved to different parts of the mining area depending on the location of the mining pits to which it would be required to relay electricity; costs would be incurred each time the line was brought to the proximity of the point where ore was being extracted; this activity was closely linked to the employ of a method or process to extract the minerals in the mining area; and this activity was part of Sishen's income earning activities. Based on those facts, the tax court concluded that the 66kV line expenditure was 'deductible under s 11*(a)*, read with s 36(11)*(a)*'.[90] It had not erred in doing so. The 66kV line expenditure was deductible in terms of s 36(11)*(e)*, alternatively s 11*(a)*. The CSARS' cross-appeal in respect of the 66kV line expenditure accordingly falls to be dismissed.

[90] The reference to s 36(11)*(a)* appears to be an error.

Wear and tear – section 11(e)

[90] As regards the application of s 11*(e)* to the 66kV line expenditure, in the light of the above finding, the issue as to whether the 66kV line expenditure was deductible in terms of s 11*(e)*, as wear and tear of machinery, plant, implements, utensils and articles used by the taxpayer for the purpose of his or her trade as the CSARS may think just and reasonable,[91] falls away.

The legal expenditure – s 11(c)

[91] The legal expenditure comprises fees paid by Sishen to legal practitioners to assist the Dingleton residents with advice in respect of their relocation. The legal expenses were claimed as deductible under s 11*(c)* read with s 11*(a)*.[92]

[92] Section 11*(c)* provides for the deduction of expenses incurred in respect of fees for the services of legal practitioners, actually incurred during the year of assessment, in respect of any claim, dispute or action at law 'arising in the course of or by reason of the ordinary operations undertaken' by a taxpayer in carrying on his trade.[93] The ITA does not define the words 'claim, dispute or action at law'.

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[91] Section 11*(e)* provides for the deduction of:
'[S]ave as provided in paragraph 12(2) of the First Schedule, such sum as the Commissioner may think just and reasonable as representing the amount by which the value of any machinery, plant, implements, utensils and articles (other than machinery, plant, implements, utensils and articles in respect of which adduction may be granted under section 12B, 12C, 12DA, 12E(1) or 37B) owned by the taxpayer or acquired by the taxpayer as purchaser in terms of an agreement contemplated in paragraph *(a)* of the definition of "instalment credit agreement" in section 1 of the Value–Added Tax Act and used by the taxpayer for the purpose of his or her trade has been diminished by reason of wear and tear or depreciation during the year of assessment: Provided that – . . ..' (and then follows a list of exclusions not relevant and therefore not required to be repeated for the purpose of this judgment).

[92] It is claimed that this should be read with s 11*(a)*. Sections 11*(c)* and *(a)* are however independent, distinct, stand-alone provisions each with its own jurisdictional requirements.

[93] Section 11*(c)* provides, in part for:
'any legal expenses (being fees for the services of legal practitioners, or expenses incurred in procuring evidence or expert advice, court fees, witness fees and expenses, taxing fees, the fees and expenses of sheriffs or messengers of court and other expenses of litigation which are of an essentially similar nature to any of the said fees or expenses) actually incurred by the taxpayer during the year of assessment in respect of any claim, dispute or action at law arising in the course of or by reason of the ordinary operations undertaken by him in the carrying on of his trade: Provided that the amount to be allowed under this paragraph in respect of any such expenses shall be limited to so much thereof as –
(i) is not of a capital nature; and

[93] A 'claim' is defined in the Oxford Dictionary as asking for something which one has the right to have. The words, 'claim, dispute or action at law' were considered in *ITC 1419*, which held that the word 'dispute' covers 'any disagreement as a result of which parties require legal assistance'.[94] Rossouw points out that the words 'claim' or 'dispute' are not qualified by the phrase 'at law'.[95] He further contends that the words 'claim' or 'dispute' are widely interpreted to include litigation, or any other action which does not involve the courts at all. But the expenditure must arise in the course of, or by reason of the ordinary operations undertaken by the taxpayer in carrying on his trade.

[94] The deduction of legal expenses is further subject to the proviso that the expenses must: not be of a capital nature;[96] and, not be incurred in respect of any claim made against the taxpayer for the payment of damages or compensation, if, by reason of the nature of the claim or the circumstances, the satisfaction or settlement of the claim would not rank for deduction from the taxpayer's income under s 11*(a)*.[97] The legal expenses must therefore be incurred in respect of a claim, either for the taxpayer to pay damages or compensation deductible in terms of s 11*(a)* of the Act, or to derive an amount that will be included in its income as part of its trade.[98]

(ii) is not incurred in respect of any claim made against the taxpayer for the payment of damages or compensation if by reason of the nature of the claim or the circumstances any payment which is or might be made in satisfaction or settlement of the claim does not or would not rank for deduction from his income under paragraph (*a*); and
(iii) is not incurred in respect of any claim made by the taxpayer for the payment to him of any amount which does not or would not constitute income of the taxpayer; and
(iv) is not incurred in respect of any dispute or action at law relating to any such claim as is referred to in paragraph (ii) or (iii) of this proviso. . ..'

[94] *ITC 1419* (1986) 49 SATC 45.
[95] Rossouw, H. (1989) *Legal expenses: when are they tax deductible*. De Rebus, 245, at 127.
[96] Section 11*(c)*(i).
[97] Section 11*(c)*(ii).
[98] Nyanin, G. (2017) *Deductibility of Legal Expenses*, Tax and Exchange Control Alert, 1 December, at 9-10.

[95] The ITA does not define what is meant by 'carrying on of a trade'. The term 'trade'[99] is defined in s 1 in wide terms to include 'every profession, trade, business, employment, calling, occupation or venture . . .'.[100] As with a deduction in terms of s 11*(a)*, the provisions of s 11*(e)* must be read with s 23*(g)* which prohibits the deduction of 'any moneys claimed as a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of trade'. The deductibility of legal expenses therefore depends on a causal connection between the expenditure and the taxpayer's trade.

[96] The tax court concluded that the legal expenditure was not incurred in the course of, or by reason of, the ordinary operations undertaken by Sishen in the carrying on of its trade. The CSARS supports that finding. It maintains that the legal expenditure was not incurred 'in the production of income' of Sishen as it was not sufficiently closely connected to the business operations of Sishen, for it to be proper, natural and reasonable to regard such expenditure as part of Sishen's legal costs in performing its mining operations.

[97] The burden of proving that it was entitled to the deduction was on Sishen. *Ticktin Timbers* held that the decisive consideration in the application of s 23*(g)* is the purpose for which the expenditure was incurred.[101] In the United Kingdom, the courts, for example in *Strong & Co Romsey Ltd v Woodifield*, interpreted the words 'expended for the purposes of trade' to mean for the purposes of enabling

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[99] 'Trade' is defined in s 1 of the ITA to mean:
'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, 1952 or any design as defined in the Designs Act, 1967 or any trade mark as defined in the Trade Marks Act, 1963 or any copyright as defined in the Copyright Act, 1965 or any other property which in the opinion of the Commissioner is of a similar nature.'

[100] Trade includes a venture, but there does not have to be a risk, as normally with a venture, for a venture to be considered a trade. All that is required is the real hope to make profit - not a hope based on fanciful expectations but on reasonable possibility – *ITC 1292* 41 SATC 163. The attainment of profit is not necessarily the hallmark of a trading transaction – *De Beers Holdings (Pty) Ltd v Commissioner for Inland Revenue* 1986 (1) SA 8 (A)1986 (1) SA 8 (A), 47 SATC 229.

[101] *Ticktin Timbers* para 2.

the taxpayer to carry on and earn profits in his trade.[102] In *Warner,*[103] Conradie JA said:

'Deductible expenditure has certain characteristics: it must be incurred in the production of income (s 11*(a)*) and will not be allowed as a deduction against gross income if it is not laid out or expended for the purposes of trade. Up to and including the 1992 year of assessment such moneys must have been "wholly or exclusively laid out or expended for the purposes of trade" (s 23*(g)*). From the 1993 year of assessment onwards expenditure was not permitted as a deduction save "to the extent to which such moneys were...laid out or expended for the purposes of trade."'

[98] Sishen carries on a trade by conducting mining operations. What requires to be decided is whether these were legal expenses incurred in conducting that trade. Ultimately, a court has to assess the closeness[104] of the connection between the expenditure and the income-earning operations[105] to determine the purpose of the expenditure. The 'purpose' and 'effect' of the legal expenditure are decisive considerations in determining whether the expenditure was incurred in the production of Sishen's income.[106]

[99] In *Commissioner of the South African Revenue Services v Thor Chemicals SA (Pty) Ltd*,[107] the taxpayer and some of its employees were charged with culpable homicide and contraventions of the Machinery and Occupational Safety Act. It pleaded guilty to some of the charges, but it was acquitted on the charge of culpable homicide and other charges. It sought to deduct the legal expenses incurred in its defence in terms of s 11*(c)* of the Act. The court considered the requirement imposed by s 11*(c)* that the expenditure had to be incurred in the

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[102] *Strong & Company Romsey Ltd v Woodifield* [1906] UKHL 624; 44 SLR 624.
[103] Para 7.
[104] Ibid.
[105] *Commissioner for Inland Revenue v Allied Building Society* 1963 4 SA 1 (A) per Ogilvie-Thompson.
[106] *Commissioner for Inland Revenue v Standard Bank of SA Ltd* [1985] 2 All SA 512 (A); 1985 (4) SA 485 (A) at 498F-G.
[107] *Commissioner for South African Revenue Services v Thor Chemicals SA (Pty) Ltd* 62 SATC 308 (N).

course of or by reason of the ordinary operations of the taxpayer in the carrying on of its trade. It held that the expenditure arose in the course of the taxpayer's business. It applied the test developed in *Joffe* that the deductibility of the expenditure must depend on whether the expenditure is a necessary concomitant of the taxpayer's business operations. It concluded that the dominant intention was to defend the taxpayer's stance that it was not negligent and that it had not contravened the Machinery and Occupational Safety Act. Hence the legal expenses were deductible, not being of a capital nature.

[100] In *Secretary for Inland Revenue v Cadac Engineering Works* (*Cadac*),[108] *Cadac* was manufacturing cookers under licence from the patent holder. It asked the patent holder to institute legal proceedings against another firm, which had started to market cookers in competition with *Cadac. Cadac* undertook to indemnify the patent holder for its legal expenses. The court held that the legal expenses were of a capital nature as they were directed at preserving and perhaps expanding the field in which the taxpayer's business operated, were incurred to eliminate competition, and were therefore not deductible. Based on this reasoning the court in *ITC 1677* held that where the taxpayer's litigation was instituted to preserve an asset and protect the taxpayer's market, the legal expenses incurred were of a capital nature and not deductible.[109]

[101] The court in *Lockie Bros v Commissioner for Inland Revenue*,[110] interpreted the words 'in the production of income' to mean 'actually incurred in the course of and by reason of the ordinary business operations undertaken for the purpose of conducting the business'.[111] In *ITC 1710*, the taxpayer was held

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[108] *Secretary for Inland Revenue v Cadac Engineering Works (Pty) Ltd* [1965] 2 All SA 547 (A); 1965 (2) SA 511 (A) (*Cadac*) at 556-557.
[109] *ITC 1677* (1999) 62 SATC 288.
[110] *Lockie Bros v Commissioner for Inland Revenue* 1922 TPD 42; 32 SATC 150 at 152.
[111] Losses resulting from money embezzled by a manager was not an operation undertaken for the purposes of the business and could not be deducted from its income.

vicariously liable for damages when his employee negligently set a neighbour's farm alight.[112] The legal expenses incurred to defend the claim were deductible in terms of s 11*(c)* because they were connected with work performed by the employee on the farm, part of the taxpayer's business, and there was a sufficient causal connection with the taxpayer's farming operations.

[102] The legal expenditure in this appeal was not incurred by Sishen for its own direct benefit. It has not been shown to fall within any of the categories that would qualify for deduction. It was expenditure incurred for the benefit of the Dingleton residents. The purpose of the legal expenditure was to provide the Dingleton residents with legal advice in regard to the relocation project.

[103] The relocation expenditure in respect of the Dingleton residents has been allowed under s 36(11)*(e)*. But that does not include the legal expenditure relating to legal advice made available to the Dingleton residents. The legal expenditure was not incurred in terms of any mining right. Nor was it sufficiently closely related to Sishen's trade.

[104] Sishen's trade was to mine for iron ore, not to provide legal assistance to the Dingleton residents. The legal costs were not incurred directly, or naturally, to earn or to produce income, but were simply another expense, with an insufficiently close, if any, *nexus* to the production of income in its trade.

[105] Sishen has not discharged the burden of proving that the legal expenditure was incurred in the production of its income. The legal expenditure was correctly disallowed as a deduction. Sishen's appeal against that finding must fail.

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[112] *ITC 1710* (1999) 63 SATC 403.

The understatement penalties and interest

[106] The tax court set the understatement penalties imposed by the CSARS aside as unjustified. The tax court was correct. The CSARS cross appealed against the disallowance of the understatement penalty, but this cross appeal was rightly abandoned in his heads of argument. The order of the tax court setting aside the understatement penalties therefore stands. The issue of the understatement penalties need not be considered further in this appeal. At most, the cross appeal relating to the understatement penalties is relevant to the question of costs, but only up to the time when the cross appeal was abandoned in the heads of argument filed on 19 February 2024.

The section 89*quat*(2) interest on unpaid tax

[107] Section 89*quat*(2) provides that interest shall, subject to the provisions of subsection (3), be payable by a taxpayer at the prescribed rate on the amount by which the normal tax exceeds the credit amount in relation to a particular tax year, calculated from the effective date in relation to the said year, until the date of assessment of such normal tax.[113] Section 89*quat*(3) provides that where the CSARS, having regard to the circumstances of the case, is satisfied that the interest payable in terms of subsection (2) is as a result of circumstances beyond the control of the taxpayer, he has the discretion to direct that the interest shall not be paid in whole or in part.[114] The discretion is subject to objection and appeal.

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[113] Section 89*quat* provides:
'(1) . . .
(2) If the taxable income of any provisional taxpayer as finally determined for any year of assessment exceeds –
(a) R20 000 in the case of a company; or
(b) R50 000 in the case of any person other than a company,
and the normal tax payable by him in respect of such taxable income exceeds the credit amount in relation to such year, interest shall, subject to the provisions of subsection (3), the payable by the taxpayer at the prescribed rate on the amount by which such normal tax exceeds the credit amount, such interest being calculated from the effective date in relation to the said year until the date of assessment of such normal tax.'

[114] '(3) Where the Commissioner having regard to the circumstances of the case, is satisfied that the interest payable in terms of subsection (2) is as a result of circumstances beyond the control of the taxpayer, the Commissioner may direct that interest shall not be paid in whole or in part by the taxpayer.'

[108] The CSARS contended that the normal tax payable by Sishen in respect of the taxable income, excluding the deductions allowed, exceeded the credit amount available in the relevant tax years, and that interest was therefore chargeable in terms of s 89*quat*(2). As regards the discretion in s 89*quat*(3), the CSARS contended that there was no basis to waive interest.

[109] The interest raised by the CSARS was set aside by the tax court. It erroneously categorised the interest as 'Interest on Understatement Penalties'. As it set aside the understatement penalties, it also set aside the interest. In doing so, it misconceived the basis for the interest claimed by the CSARS in terms of s 89*quat*(2) and erred. The interest was claimed on unpaid tax on the deductions which the CSARS disallowed.

[110] The CSARS accordingly understandably appeals against the disallowance of that interest. The CSARS contends: that he was entitled to charge interest in terms of s 89*quat*(2) as the normal tax payable by Sishen in respect of the taxable income exceeded the credit amount available in the relevant tax years because of the taxation on the disallowed deductions; and, that Sishen had not identified any circumstances which would require the CSARS to have waived the interest.

[111] This judgment allows the deduction of the relocation expenditure in respect of Dingleton, the SWEPs infrastructure and the 66kV line expenditure. Only the deduction of the legal expenditure is disallowed. It is not clear what, if any, tax credit Sishen might have had in respect of the particular tax years in question, and by what amount, if any, the normal tax to be paid might exceed any credit amount in those tax years, calculated from the effective date in relation to each year, until the date of assessment of such normal tax, having regard to the effect of this judgment. The parties were agreed that the assessment of the s 89*quat*(2) interest

should be set aside and referred back to the CSARS for reconsideration and assessment.

[112] In reconsidering the aspect of the interest, the CSARS should also consider the application of s 89*quat*(3) and any factors relevant to the exercise of his discretion. These may include, without being prescriptive in any way:

(a) The commentary of Davis that, where a taxpayer believed that there were grounds which excused liability for the payment of the tax on which interest is sought to be raised, that:

'The test as to whether the grounds are reasonable, is objective, in relation to actions of the taxpayer. A mere subjective belief by the taxpayer that a deduction should be allowed, without taking advice on the matter, is unlikely to be reasonable. On the other hand, the reliance by the taxpayer on expert advice, even if this is wrong, will in most cases constitute reasonable grounds for the action taken.'[115]

(b) Sishen had acted on the advice of an independent registered tax practitioner, KPMG, which confirmed that Sishen's position was more likely than not to be upheld before a court.

(c) Whether the fact that the CSARS disagreed with the advice Sishen had received from KPMG, was a 'circumstance beyond the control of the taxpayer'.

(d) Whether interest should accrue from 1 July 2013, 1 July 2014 and 1 July 2015 respectively.

(e) The uncertainty in accurately predetermining the correct tax treatment of the kind of expenditure featuring in this appeal: the authors of the KPMG report having cautioned that:

'Determining the capital/revenue nature of the expenses in question is complex since there is no single infallible test. Hence . . . we cannot discount the possibility of a court of law arriving at a different conclusion.'

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[115] Davis, D M, Benetello, M, Engels-Van Zyl, R, Mollagee, O, Roeleveld, J and Urquhart, G. (2000) *Juta's Income Tax*. Volume 2. Juta, at 55-3.

(f) The reality is that the correct legal conclusion in tax litigation is often difficult to determine in advance, as demonstrated by the facts in this appeal. The KPMG report advised that the relocation expenditure of Dingleton and the SWEP infrastructure was competent in terms of s 11*(a)*, but the tax court disallowed that expenditure altogether, and this judgment has found that the expenditure is deductible pursuant to s 36(11)*(e)*. The KPMG report advised that the 66kV line expenditure was deductible under s 36(11)*(a)*, the tax court allowed it under s 11*(a)* and s 36(11)*(a)*, and this judgment has confirmed that it is deductible.

Conclusion

[113] In summary, Sishen's appeal has succeeded in respect of the deduction of the relocation expenditure for Dingleton and the SWEP infrastructure but has failed in respect of the deduction of the legal expenditure. The CSARS's cross-appeal has failed in respect of the 66kV line expenditure and the understatement penalties (which were conceded in his heads of argument). The s 89*quat*(2) interest, if any, and whether it should be waived, are referred back to the CSARS for determination afresh.

[114] It is appropriate, having regard to the measure of success enjoyed and the time spent on arguing those issues, that in the exercise of this Court's discretion on costs, the CSARS be ordered to pay two thirds of Sishen's costs of the appeal, and one half of Sishen's costs of the cross-appeal, such costs in each instance to include the costs of two counsel where so employed. The order of the tax court is varied where required to give effect to the above findings.

Order

[115] The following order is accordingly granted:

1 The appeal succeeds to the extent set out in paragraph 5 below but is otherwise dismissed.

2 The respondent is directed to pay two thirds of the appellant's costs of the appeal, to include the costs of two counsel where so employed.

3 The cross-appeal succeeds to the extent set out in paragraph 5 below but is otherwise dismissed.

4 The respondent is directed to pay one half of the appellant's costs of the cross-appeal, to include the costs of two counsel where so employed.

5 Paragraph 1 of the order of the tax court is set aside and substituted with the following:

'1 (a) The relocation expenditure in respect of Dingleton and the SWEP infrastructure, is deductible;

(b) The 66kV line expenditure is deductible;

(c) The understatement penalties imposed by the CSARS in terms of s 187(1) of the Tax Administration Act 28 of 2011 are set aside;

(d) The interest raised in terms of s 89*quat*(2) of the Income Tax Act 58 of 1962 is set aside and referred back to the CSARS for determination whether any interest should be payable, and if so, the amount thereof;

(e) The legal expenditure is not deductible.'

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ACTING JUDGE OF APPEAL

Appearances

For the appellant:	J Cane SC and A Kolloori
Instructed by:	Webber Wentzel, Cape Town
	Honey Attorneys, Bloemfontein
For the respondent:	G Budlender SC and H Cassim
Instructed by:	Maponya Attorneys, Pretoria
	Phatshoane Henney Attorneys, Bloemfontein.