Guide on the Allowances and Deductions Relating to Assets Used in the Generation of Electricity from Specified Sources of Renewable Energy

Income Tax

SARS
South African Revenue Service

Guide on the Allowances and Deductions Relating to Assets Used in the Generation of Electricity from Specified Sources of Renewable Energy

Preface

This guide provides general guidance on the tax incentives available for the generation of electricity from specified sources of renewable energy under section 12B(1)(*h*) and (*i*), the enhanced form of this deduction under section 12BA and the deduction under section 12U for amounts actually incurred on the construction of any road, the erecting of any fence and a foundation or supporting structure designed for such a fence as well as on the cost of the improvements to any road, fence or foundation or supporting structure that are used for the generation of electricity from specified sources of renewable energy.

This guide is not an "official publication" as defined in section 1 of the Tax Administration Act 28 of 2011 (the TA Act) and accordingly does not create a practice generally prevailing under section 5 of that Act. It does not consider the technical and legal detail that is often associated with taxation and should, therefore, not be used as a legal reference.

It is also not a binding general ruling (BGR) under section 89 of the TA Act. Taxpayers requiring an advance tax ruling[1] or a VAT ruling[2] should visit the SARS website at **www.sars.gov.za**[3] for details of the application procedure.

This guide is based on the legislation as at date of issue.

For more information, assistance and guidance you may –

- visit the **SARS website**;
- contact the SARS National Service Centre (between 8am and 4.30pm South African time except on Wednesdays when the service centre can be called between 9am and 4.30pm) –
  - if calling locally, on 0800 00 7277; or
  - if calling from abroad, on +27 11 602 2093;
- have a virtual consultation with a SARS consultant by making an appointment via the **SARS website**;
- visit your nearest SARS service centre, after making an appointment via the **SARS website**; or
- contact your own tax advisor or practitioner.

Comments on this guide may be e-mailed to **policycomments@sars.gov.za**.

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1 For further commentary, see the *Comprehensive Guide to Advance Tax Rulings*.
2 For further commentary, see the *VAT Rulings Process Reference Guide*.
3 Navigate to Legal Counsel ⇨ Legal Counsel Publications ⇨ Find a Guide, and select the category Tax Administration (for the guide relating to advanced tax rulings) **or** Value-Added Tax (VAT) (for the guide relating to VAT rulings.

Contents

Glossary

In this guide, unless the context indicates otherwise -–

- **“asset”** means any machinery, plant, implement, utensil or article as contemplated in sections 12B(1)(*h*) and (*i*) and 12BA;[4]
- **“instalment credit agreement”** means an agreement contemplated in paragraph (*a*) of the definition of “instalment credit agreement”[5] in section 1(1) of the VAT Act;
- **“renewable energy”** means energy produced from sources such as sunlight, wind and water which are naturally replenished and do not run out;[6]
- **“Schedule”** means a Schedule to the Act;
- **“section”** means a section of the Act;
- **“the Act”** means the Income Tax Act 58 of 1962;
- **“the TA Act”** means the Tax Administration Act 28 of 2011;
- **“the VAT Act”** means the Value-Added Tax Act 89 of 1991; and
- any other word or expression bears the meaning ascribed to it in the Act.

All guides, interpretation notes, and rulings referred to in this guide are the latest versions, unless indicated otherwise, available on the SARS website at **www.sars.gov.za** or via eFiling at **www.sarsefiling.co.za** (guides only).

1. Background

South Africa, as a party to the United Nations Framework Convention on Climate Change, aims to reduce greenhouse gas emissions and to incentivise investments in low carbon, clean energy by, amongst others, promoting investment in renewable energy projects.[7] Given the favourable climate in the country, South Africa is rich in possibilities when it comes to renewable energy initiatives, which include various sources such as solar energy, wind power, biomass or hydro power, to generate electricity. These sources of energy are preferable to the use of fossil fuels such as coal or crude oil which, when burned to produce energy, cause harmful greenhouse gas emissions.

In order to promote investment in renewable energy technologies and potentially reduce South Africa’s dependency on coal, various tax incentives have been introduced in the form of deductions[8] and accelerated capital allowances. Section 6C,[9] section 12B(1)(*h*) and (*i*),

4 See **2.2** for detail on the assets which potentially qualify for the deduction under section 12B(1)(*h*).

5 See the **Annexure** for the definition of “instalment credit agreement”.

6 **www.un.org/en/climatechange/what-is-renewable-energy#:~:text=Renewable%20energy%20is%20energy%20derived,plentiful%20and%20all%20around%20us** [Accessed 23 November 2024].

7 *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2016*.

8 See for example section 12L and the consideration of the incentive in Interpretation Note 95 “Deduction for Energy-Efficient Savings”.

9 Section 6C provides for a natural person to claim a solar energy tax credit on the cost actually incurred in respect of the acquisition of qualifying solar PV panels provided all the requirements of the section are met. For more detail on section 6C see the *Guide on the Solar Energy Tax Credit Provided under Section 6C*.

section 12BA and section 12U were introduced with the intention of promoting the generation of electricity from specified sources of renewable energy.

2. Qualifying criteria – sections 12B, 12BA and 12U

Although section 12B(1)(*h*) and (*i*), section 12BA and section 12U share certain common qualifying criteria, they also have specific distinguishing features. The common criteria will be considered below while the distinguishing features will also be highlighted.[10]

Section 12B(1)(h) and (i)

Under section 12B(1)(*h*) and (*i*), a deduction (see **6.1**) may be claimed by a taxpayer[11] on the cost (see **5**) of any asset or improvement (see **4**) to that asset if –

- the asset is machinery, plant, an implement, a utensil or an article (see **2.2**);
- the asset is owned by the taxpayer (see **2.3**) or acquired by the taxpayer as a purchaser under an instalment credit agreement (see **2.3**);
- the asset was or is brought into use for the first time by such taxpayer (see **2.4**) for the purposes of the taxpayer's trade (see **2.5**); and
- the asset is used by that taxpayer (see **2.3**) in the generation of electricity from specified sources of renewable energy (see **2.1**).[12]

Provided that all the requirements of the section are met, the deduction can be claimed on a 50:30:20 basis over three years on the cost of the asset or improvements. In the case of assets used to generate photovoltaic solar energy which does not exceed one megawatt, the cost of the asset may be claimed in full (100%) in the year that the asset is brought into use by that taxpayer for the purposes of trade.[13] See **6.1** for more on the calculation of the deduction.

In addition to the cost of the acquisition of the asset, the expenditure actually incurred on the erection of a foundation or supporting structure designed for the asset (see **3**) and on improvements to the asset (see **4**) are potentially deductible.

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[10] Section 15 deals with deductions from income derived from mining operations and provides, amongst others, for a deduction of an amount in respect of capital expenditure, as determined under section 36, in lieu of specified allowances including section 12B and section 12BA. If the amount is not capital expenditure, then the specified allowance section remains relevant. Broadly, paragraph (*d*A) of the definition of "capital expenditure" in section 36(11) brings certain expenditure on renewable energy assets into the capital expenditure of a mine. Importantly, the capital expenditure provided for under section 36(11) may only be deducted from mining income from a person conducting "mining operations" and "mining" as defined in section 1(1). Although this Guide does not deal with section 15 or section 36, the wording in paragraph (*d*A) is similar to the wording in section 12B and 12BA and therefore the underlying principles included in this Guide will often be useful in interpreting that paragraph.

[11] Under section 1(1), a "taxpayer" means any person chargeable with any tax leviable under the Act. A "person", as defined under section 1(1), includes an insolvent estate, the estate of a deceased person, a trust and any portfolio of a collective investment scheme. A foreign partnership is, however, excluded.

[12] Under section 12B(1)(*h*) and (*i*) there is a limitation of the amount of electricity which may be produced by hydropower, one of the specified sources of renewable energy, namely the electricity produced may not exceed 30 megawatts.

[13] Section 12B(2)(*b*).

See **7.1** for specified circumstances when a deduction will not be allowed even if the requirements of the section are met.

Section 12BA

Under section 12BA(1), a deduction may be granted –

- in respect of any new and unused (see **2.4**) machinery, plant, implement, utensil, or article (see **2.2**);
- which is owned by the taxpayer (see **2.3**) or acquired by the taxpayer as a purchaser under an instalment credit agreement (see **2.3**);
- was or is brought into use for the first time by that taxpayer on or after 1 March 2023 and before 1 March 2025 (see **2.4**);
- for the purpose of that taxpayer's trade (see **2.5**); and
- to be used by the taxpayer or the lessee of that taxpayer in the generation of electricity from the specified sources of renewable energy in South Africa (see **2.1** and **2.3**).

The deduction equals 125% of the cost incurred by the taxpayer for the acquisition of the asset if all the requirements are met. See **6.2** for more on the calculation of the deduction.

In addition to the cost of acquisition of the asset, the expenditure actually incurred on the erection of a foundation or supporting structure designed for the asset (see **3**) is potentially deductible.

See **7.2** for specified circumstances when a deduction is not allowed even if the requirements of the section are met.

Section 12U

Section 12U allows a taxpayer to claim a deduction on an amount actually incurred during the year of assessment on the construction of any road or erection of any fence used by such person for the purposes of their trade[14] of generating electricity which exceeds five megawatts from specified sources of renewable energy (see **2.2**).[15] See **6.3** and **6.3.1** for more on the calculation of the deduction. See **6.3.2** for the timing of the deduction for pre-trade expenditure which is subject to different rules.

In addition to a deduction of the amount incurred on the construction of the roads and the erecting of the fences referred to above, the expenditure actually incurred on the foundation or supporting structure (see **3**) designed for such fence and on improvements (see **4**) to the roads, fences, and the foundation or supporting structure for the fences is also deductible.

2.1 Specified sources of renewable energy

A common feature of section 12B(1)(*h*) and (*i*), section 12BA and section 12U is that they all apply to the generation of electricity from the following sources of renewable energy:

- Wind power

[14] See **2.5** for more information on the trade requirement.

[15] Under section 12U there is a limitation of the amount of electricity which may be produced by hydropower, one of the specified sources of renewable energy, namely the electricity produced may not exceed 30 megawatts.

- Solar energy
- Hydropower
- Biomass made up of organic wastes, landfill gas or plant material

Under section 12B(1)(*h*), the owner must use the assets in the generation of electricity from specified sources of renewable energy [see **2.3** for how this impacts leasing under section 12B(1)(*h*)]. The generation of electricity by the owner could be used by the owner in conducting their trade or it could be sold to others. Section 12BA requires the owner or the owner's lessee to use the assets in the generation of electricity from specified sources of renewable energy, it does not require the lessee to conduct a trade.

Under section 12U the road, fence, supporting foundation or structure for such fence, or improvement must be used by the taxpayer for the purposes of their trade of the generation of electricity.

2.1.1. Wind power

Brittanica.com explains that wind power is a form of energy conversion in which turbines convert the kinetic energy of wind into mechanical or electrical energy that can be used for power.[16] Historically, wind power in the form of windmills has been used for centuries for such tasks as grinding grain and pumping water and, more recently, wind turbines have produced electricity by using the energy generated to drive electrical generators.[17]

2.1.2. Solar energy

Solar energy is radiant light and heat from the sun that is harnessed using a range of technologies.[18] Solar energy technologies essentially convert sunlight into electrical energy through photovoltaic panels or through concentrated solar energy technologies. This energy can then be used to generate electricity or be stored in batteries or thermal storage.

(a) Photovoltaic solar energy

Photovoltaic solar energy is essentially the conversion of thermal energy into electricity.[19] When the sun shines onto a solar panel, energy from the sunlight is absorbed by the photovoltaic cells in the panel which creates electrical charges that, through an internal process, causes electricity to flow.[20] Basically, a photovoltaic system uses sunlight to generate electricity.

Sections 12B(1)(*h*) and (*i*), 12BA and section 12U were introduced to incentivise development in the generation of electricity. As such, photovoltaic solar energy must be distinguished from a solar thermal system. A solar thermal system harvests sunlight to generate heat[21] and no

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16 **www.britannica.com/science/wind-power** [Accessed 23 November 2024].
17 **www.britannica.com/science/wind-power** [Accessed 23 November 2024].
18 **www.solarschools.net/knowledge-bank/renewable-energy/solar/energy** [Accessed 23 November 2024].
19 **www.products.pcc.eu/en/blog/photovoltaic-panels-vs-solar-panels-differences/#:~:text=Photovoltaic%20panels%20are%20installed%20for,they%20may%20complement%20each%20other** [Accessed 23 November 2024].
20 **www.energy.gov/eere/solar/how-does-solar-work#:~:text=When%20the%20sun%20shines%20onto,cell%2C%20causing%20electricity%20to%20flow** [Accessed 23 November 2024].
21 **www.essentracomponents.com/en-gb/news/guides/solar-thermal-vs-solar-pv-panels** [Accessed 23 November 2024].

electricity is being generated. For example, a solar geyser, that harnesses heat from solar panels which in turn directly or indirectly heats water or heats a fluid which in turn is used to heat water does not generate electricity. A solar geyser consequently does not fall within the ambit of the above sections even though it may ease the pressure on the national electricity grid by reducing the use of electricity to heat water.

(b) Concentrated solar energy

Concentrated solar energy technologies make use of mirrors or lenses to reflect and concentrate sunlight onto a receiver. A high temperature fluid in the receiver is heated and thermal energy is produced. This thermal energy is then used, for example, to spin a turbine or power an engine to generate electricity.[22]

2.1.3. Hydropower

Hydropower is a renewable source of energy that uses turbines in dams or other bodies of water to convert kinetic energy into electricity.[23] This electricity is then transferred into the electrical grid to power, for example, homes and businesses.

Under section 12B(1)(*h*) and section 12U(1) there is a limitation on the amount of electricity which may be produced by hydropower, namely the electricity produced may not exceed 30 megawatts. Section 12BA does not have a limitation on the amount of electricity which may be produced.

2.1.4. Biomass made up of organic wastes, landfill gas or plant material

Biomass is regarded as any carbon-based material such as animal or human waste, plant material, food waste and industrial waste such as reclaimed woody material which, when processed, can produce organic fuels or biofuels.[24] Biofuels can generally be used for a number of applications such as, but not limited to, energy generation in the form of electricity.

For purposes of the deductions available under the respective sections, the assets used to generate electricity from biomass comprised of organic wastes, landfill gas or plant material, are potentially eligible for a deduction. Organic waste refers to "any material that comes from a plant or animal and is biodegradable".[25] Landfill gas "is a natural by-product of the decomposition of organic material in landfills".[26] Plant material includes, but is not limited to, material such as wood, wood residue and plants.

New technology generators use almost any waste products, renewable and non-renewable or a combination of the two to generate electricity. Sections 12B(1)(*h*), 12BA and 12U stipulate that the asset concerned must be used "in the generation of electricity from" the sources mentioned. The sections do not make, for example, use of words such as "to the extent", or "mainly or wholly". Having regard to the wording of the sections, the deduction is available only for assets that are used for the generation of electricity from the sources mentioned. Therefore, an asset which makes use of renewable sources and non-renewable sources to

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22 **www.energy.gov/eere/solar/concentrating-solar-thermal-power-basics** [Accessed 23 November 2024].
23 **www.energy.gov/eere/water/how-hydropower-works** [Accessed 23 November 2024].
24 **www.dffe.gov.za/biomass-energy** [Accessed 23 November 2024].
25 **www.millerrecycling.com/organic-waste-and-how-to-handle-it/** [Accessed 23 November 2024].
26 **www.epa.gov/lmop/basic-information-about-landfill-gas** [Accessed 23 November 2024].

generate electricity will not be eligible for the deduction under section 12B(1)(*h*), section 12B(1)(*i*) or section 12BA.

2.2 Machinery, plant, implement, utensil or article

Section 12B(1)(*h*) and (*i*)[27] and section 12BA potentially apply to "any machinery, plant, implement, utensil or article" used by the taxpayer in the generation of electricity from the specified sources. The words "machinery", "plant", "implement", "utensil" and "article" are not defined in the Act and must, therefore, be interpreted according to their ordinary meaning as applied to the subject matter with regard to which they are used[28] and applicable case law.

The following definitions for the words "machinery", "plant", "implement", "utensil" and "article" are provided for in the various dictionaries:

> **Machinery:** "a group of large machines or large machines in general." [29]
>
> **Plant:** "machines used in industry."[30]
>
> **Implement:** "1: a device used in the performance of a task : TOOL, UTENSIL." [31]
>
> **Utensil:** "2: a useful tool or implement." [32]
>
> **Article:** "a particular thing or item." [33]

In *Blue Circle Cement Ltd v CIR*[34] the issue was whether a 41 kilometre extension to an existing railway line was "plant" under section 12. The railway line was used to convey limestone from the taxpayer's quarry, where the process of manufacture began, to the factory where it was made into cement. Referring to the definition of "plant" in the *Oxford English Dictionary*, the court held that the relevant enquiry in determining if the railway line was "plant", was whether it constituted fixtures, implements, machinery or apparatus used in carrying on an industrial process. The court agreed that in making that determination, it was useful to apply a functional test and a durability test. The English cases held that "plant" connoted a degree of durability and did not include articles that were quickly consumed or worn out in the course of a few operations.[35]

The functional test considers how the particular asset is used and whether it is employed to carry on or promote the taxpayer's business activities. In applying the above tests to the facts, the learned judge concluded that the function performed by the railway line of conveying materials was part of the taxpayer's industrial process and that the railway line was part of the

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27 Section 12B(1)(*i*) potentially applies to improvements to the assets mentioned.

28 Kellaway, E. A. (1995). *Principles of Legal Interpretation of Statutes, Contracts and Wills*. Butterworths, South Africa Series. Also, see Steyn, L. C. (1981). *Die Uitleg van Wette* (5de uitg.) at 4 to 7. Juta and Company (Pty) Ltd.

29 **https://dictionary.cambridge.org/dictionary/english/machinery** [Accessed 23 November 2024].

30 **https://dictionary.cambridge.org/dictionary/english/plant** [Accessed 23 November 2024].

31 **www.merriam-webster.com/dictionary/implement** [Accessed 23 November 2024].

32 **www.merriam-webster.com/dictionary/utensil** [Accessed 23 November 2024].

33 **https://dictionary.cambridge.org/dictionary/english/article** [Accessed 23 November 2024]. See also *SIR v Charkay Properties (Pty) Ltd* 1976 (4) SA 872 (A), 38 SATC 159 (A) and ITC 1313 (1980) 42 SATC 197 (R).

34 1984 (2) SA 764 (A), 46 SATC 21.

35 See also *Hinton v Maden and Ireland Ltd* (1959) 3 All ER at 356.

apparatus used in carrying on the industrial process of manufacturing cement. The railway line, in spite of needing repairs from time to time, was intended to last the life of the limestone deposits (approximately 40 years) and clearly met the durability test. The railway line thus qualified as plant for purposes of section 12.

In ITC 1468,[36] Friedman J referred to *Blue Circle Cement Limited* v *Commissioner for Inland Revenue*[37] in which Corbett JA stated that a plant must have a degree of durability and must "not include articles which are quickly consumed or worn out in the course of a few operations". The lasts and knives passed the durability test since the lasts had a minimum life of two to three years and although the knives were used for shorter periods, both were kept for possible re-use in the future. Friedman J also referred to the "functionality test" and stated, in relation to a plant, that:[38]

> "The functional test is a test which provides the criterion to be applied of whether the subject-matter is the apparatus or part of the apparatus employed in carrying on the activities of the taxpayer's business. If it is, then it is plant, and if it is not, then whatever other characteristics it may have, it is not plant."

The lasts and knives also passed the functionality test as they were used by the taxpayer in the course of manufacturing shoes.

In ITC 1469[39] it was held that lithographic plates, embossing dies, cutting and creasing rules and creasing matrixes (all small capital items), did not constitute plant because the items lacked the required degree of durability. The items enjoyed no permanence and were used only for a single job and then discarded. They consequently related more to consumable items than a "plant".

In essence, in order for an asset to pass the durability test, it must not be quickly consumed or worn out. It must, in other words, have a degree of permanence and have a relatively long useful life. With regard to the functionality test, the asset must be used to carry on or promote the taxpayer's trade. In the context of section 12B(1)(*h*) and section 12BA, the asset in question must be used in the process of generating electricity.

It is apparent from the definitions and considerations above and the word "any" that "machinery, plant, implement, utensil or article" has a wide meaning. Machinery, plant, implement, utensil or article, however, refer to corporeal assets and do not include incorporeal assets, for example, patents or licenced rights.[40]

Under section 12B(1)(*h*) and (*i*) and section 12BA(1), the assets concerned must be used "in the generation of electricity" from the specified sources of renewable energy. The word "in" implies that the deduction is not only for assets producing electricity. If, for example, storage and conversion assets form part of a system of assets that produce electricity, such assets will qualify for the deduction if all the requirements of the particular section are met. For example, in relation to a plant using renewable solar energy to generate electricity, items such as the solar PV panels inclusive of the concrete foundations and supporting steel structures; direct current (DC) combiners and feeder lines as well as alternating current (AC) inverters,

36 ITC 1468 (1989) 52 SATC 32 (C) at 35 - 36.
37 1984 (2) SA 764 (A), 46 SATC 21.
38 ITC 1468 (1989) 52 SATC 32 (C) at 36.
39 (1989) 52 SATC 40.
40 van der Merwe, C. G (2014) "Things". *Law of South Africa (LAWSA) 27* (Second Edition) in paragraph 133. My LexisNexis [online].

will constitute a "plant" used in the generation of electricity for the purposes of these sections.[41] Of importance is that it needs to be part of a system that generates electricity. Therefore, if a taxpayer is only drawing power from the grid and storing it, such storage assets will not qualify. The assessment of these criteria is dependent on the facts of each case.

The generation of electricity can be described as "the process of generating electric power from sources of primary energy such as heat (thermal), wind, solar, and chemical energy".[42] The generation of electricity must be distinguished from the transmission or storage of electricity. The transmission of electricity can be described as "the process of delivering generated electricity - usually over long distances - to the distribution grid located in populated areas".[43] Assets used for the transmission of electricity, for example transformers and transmission lines, or for storage, for example batteries, do not generate electricity and therefore will generally not qualify for a deduction under section 12B or section 12BA. However, should a transformer or battery form an integral part of a system that generates electricity, the cost of such assets may be deductible under section 12B or section 12BA, as appropriate, if the requirements of those sections are met. The assessment of the requirements is dependent on the facts of each case.

2.3 "Owned or acquired"

Under section 12B(1) and section 12BA(1), the asset must be owned by the taxpayer or be acquired through an instalment credit agreement. In the latter case, although the seller remains the owner of the asset until the final instalment is paid by the purchaser, the purchaser (and not the seller) will be entitled to claim the deduction on the asset.

Owned by the taxpayer

Although the taxpayer must be the owner of the asset, the taxpayer does not have to be the owner of the land or the building to which the asset is mounted or affixed. The phrase "owned by" is not defined in the Act. As such, the general common law principles apply. One such principle that needs to be considered is the maxim *superficies solo cedit* (owner by accession). Under this principle anything planted, sown or artificially attached to land becomes part of the land and thus the property of the landowner.

"Owner by accession" is often a very important aspect to consider under section 12B and section 12BA as, depending on the circumstances, the asset and if applicable its foundation or supporting structure, may be permanently or temporarily "attached" to the land. If the asset accedes to the land, the person who purchased the asset may not be the owner and, if so, will not be entitled to a deduction under section 12B or section 12BA.

MacDonald Ltd v Radin No & Potchefstroom Dairies & Industries Co,[44] de Villiers J P referenced *Olivier v Haarhof* (T.S., 1906, p. 497) and stated that the elements to be considered when determining whether an article, originally movable, has become immovable through annexation by human agency are "the nature of the particular article; the degree and manner

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41 See Binding Private Ruling 172 "Plant Used in the Generation of Renewable Energy". Although this BPR relates to section 12B(1)(*h*), the principles relating to a "plant" also apply to section 12BA. See also Binding Class Ruling 85 "*En Commandite* Partnerships Investing in Photovoltaic Solar Energy Plants" and Binding Class Ruling 88 "*En Commandite* Partners Investing in Solar Assets".

42 **www.sciencedirect.com/topics/engineering/power-generation** [Accessed 23 November 2024].

43 **https://energyeducation.ca/encyclopedia/Electrical_transmission** [Accessed 23 November 2024].

44 1915 AD 454 at 467.

of its annexation; and the intention of the person annexing it”. Further, that “the thing must be in its nature capable of acceding to realty, there must be some effective attachment (whether by mere weight or by physical connection) and there must be an intention that it should remain permanently attached”.

In *Olivier and Others v Haarhof & Co*, Innes CJ stated the following:[45]

> “The conclusion to which I come is that it is impossible to lay down one general rule; each case must depend on its own circumstances.”

Reference to the above two cases was made by Mcewan J in *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Transvaal)*[46] which dealt with the issue of whether lifts installed in a building have acceded to the building. It was held that, based on the agreement between the installer and the owner of the building, which expressly stated that it was the intention of the installer that the lift was not to become a fixture in the building until fully paid for, accession had not taken place.[47]

The ownership requirement can be demonstrated as follows:

- Installation of an asset by the owner of the land

  Taxpayer Q owns land and decides to acquire and install an asset as contemplated in sections 12B(1)(*h*) and 12BA. This asset was purchased by Q and was permanently affixed to a foundation which could not be moved. Since Taxpayer Q is the owner of the land to which the asset is permanently attached, Taxpayer Q meets the ownership of the asset requirement.

- Permanent installation of an asset by a lessee of the land

  Owner X lets immovable property to Lessee Y. Lessee Y decided to purchase a renewable energy asset and permanently mounted it to a supporting structure which was also permanently affixed to the land. The asset was attached to the land in such a manner that it was not capable of being moved to a different location on the land or from the land. Owner X and Lessee Y were in agreement that the asset would not be removed at the expiry of the lease. Under the common law principle of *superficies solo cedit* (owner by accession) and taking into consideration the fact that the asset was attached to the land in such a way that it was not movable and that this was also in alignment with Owner X and Lessee Y’s intention, the asset affixed or attached to land has become the property of the owner of the land, Owner X. Owner X is the owner of the asset, not Lessee Y. Lessee Y will not be able to claim a deduction under section 12B(1)(*h*) or section 12BA since the ownership requirement is not met. Owner X will also not be allowed to claim the deduction since Owner X did not incur the cost to acquire the asset.

- Temporary installation of an asset by a lessee of the land

  Owner S lets immovable property to Lessee Z. Lessee Z decided to purchase a renewable energy asset and temporarily mounted it to concrete which was fixed to the land. Although the concrete was permanently affixed to the land, the asset was movable and could be easily detached without damage. Owner S and Lessee Z had

45 1906 TS 497 at 500.
46 [1980] 1 All SA 498 (W) at 499.
47 At 507(2).

an agreement that at the end of the lease term, Lessee Z would detach and remove the asset from the property.

Since Lessee Z is not the owner of the land to which the asset has been affixed or attached, if Lessee Z can show that the manner of the attachment is such that it has not structurally become part of the land or building and that Lessee Z's intention was that the asset should not become permanently attached to the land, Lessee Z will retain ownership of the asset and will meet the ownership of the asset requirement. Lessee Z is not the owner of the concrete supporting structure since it is permanently affixed to the land.

Section 12N facilitates allowances under specified sections of the Act, amongst others, sections 12B and 12BA, for improvements made to land or buildings not owned by a taxpayer but over which the taxpayer holds a right of use or occupation. This is achieved by deeming a taxpayer that is not otherwise the owner of the improvement (see the principles considered above), to be the owner of the improvement under the specified sections. Should the requirements[48] of section 12N not be met, it would mean that the ownership requirement in section 12B and section 12BA is not met and no deduction will be permissible under either of those sections.[49]

Under section 12B(1)(*h*) and (*i*), a taxpayer that owns a qualifying asset or that acquired it through an instalment credit agreement can potentially[50] claim the deduction if the taxpayer brought the asset into use for the first time for the purposes of that taxpayer's trade and it is used by that taxpayer in the generation of electricity from one of the specified sources of renewable energy. Generally, no allowance is granted if the taxpayer lets the asset to a lessee as it is then the lessee, not the taxpayer, that uses the leased asset to generate electricity. Should circumstances arise in which a qualifying asset is leased but is still used by the owner (not the lessee) to generate electricity, the owner may be entitled to an allowance under section 12B(1)(*h*) provided all the requirements of the section are met. The taxpayer must discharge the onus of proof in this regard. If the taxpayer is eligible for the allowance when the qualifying asset is leased then, depending on the facts, section 12B(4) (see **7.1**) and section 12B(6) (see **8.2**) may be relevant.

Under section 12BA, a taxpayer that owns a qualifying asset, or that acquired it through an instalment credit agreement, and lets the asset (whether under an operating or finance lease), can potentially[51] claim the deduction if the lessee uses the asset to generate electricity in South Africa from one of the specified sources of renewable energy. It is, however, a requirement that the taxpayer brought the asset into use for the first time for the purposes of that taxpayer's trade. There is no requirement on the lessee to conduct a trade.

In the case of persons investing in an *en commandite* partnership that conducts the generation of electricity from specified sources of renewable energy, each partner will have an undivided proportionate share in each generating asset as determined under the partnership agreement. Thus, each partner will be entitled to a deduction under section 12B(1)(*h*) or (*i*) or section 12BA equal to the partner's proportionate share provided that all the requirements of the relevant

48 See Interpretation Note 119 "Deductions in respect of Improvements to Land or Buildings not Owned by a Taxpayer" for information on the requirements for section 12N.

49 Section 12N(1) was amended to include section 12BA for assets brought into use on or after 1 March 2023.

50 All the requirements of the relevant section must be met.

51 All the requirements of the section must be met.

section are met.[52] The proportionate deduction available to a partner under section 12B(1)(*h*) or (*i*) or section 12BA may, under section 24H(3), be limited in the year it would otherwise have qualified for a deduction with the excess deduction being rolled forward to the next year of assessment for potential deduction under section 24H(4) (see Example 7 in **6.2**).

2.4 "Brought into use for the first time" and "new and unused"

The determination of when an asset is brought into use for the first time by a taxpayer is a factual one. Essentially, this may be regarded as the first time when the asset is brought into use in a way which is consistent with its intended and future use. The installation and testing phase of the asset will thus not be regarded as meeting the requirement of "brought into use". When making the determination of when an asset is "brought into use for the first time", the merits of each case must be evaluated. Proof as to when the asset was "brought into use for the first time" may include, amongst others, an electrical certificate of compliance, written confirmation from a duly registered person of the date on which the assets were installed and "brought into use" for its intended purpose, generation and utilisation reports, if the electricity is being sold then the initial metering reports, as well as contracts and invoices, to name a few. Ultimately, the onus rests on the taxpayer to prove when the assets were brought into use.

Boruchowitz J, in ITC 1804, explained the rationale behind the phrase "brought into use for the first time by that taxpayer" as follows: [53]

> "…the allowance is available only if the asset is brought into use for the first time by the taxpayer (or his lessee, where applicable). This requirement prevents a taxpayer from claiming that the allowance is available for a further five, four or three years on an asset that was previously brought into use by him (or his lessee), is retired from use and is then brought into use again."

The asset under section 12B(1)(*h*) must be brought into use for the first time by the taxpayer seeking to claim the deduction. The section does not require the asset to be new and unused. Therefore, if Company A purchased a second-hand asset from B and a new and unused asset from C, both assets can qualify for the deduction under section 12B(1)*(h*) if all the requirements of the section are met. A deduction will, however, not be allowed if the taxpayer is a company and the asset that is brought into use for the first time is an asset that, amongst other requirements, was previously used by another company that is managed, controlled or owned by the same persons (see **7.1**). Unlike section 12BA, section 12B(1)(*h*) does not have a time limitation within which the asset has to be brought into use.

Under section 12BA, the acquired asset must be new and unused when acquired and brought into use and the asset must also be brought into use for the first time on or after 1 March 2023 and before 1 March 2025. No specific period can be set for the requirement of "new" and it will be determined on the facts of each case.

The word "unused" means that the assets must not have been previously used for any purpose by any person. Therefore, the asset must not have been used before by the current owner or a previous owner. If an asset had, for example, been acquired long before but had not been

52 See Binding Class Ruling 85 "*En Commandite P*artnerships Investing in Photovoltaic Solar Energy Plants" and Binding Class Ruling 88 "*En Commandite* Partners Investing in Solar Assets".

53 68 SATC 105 at 109. This case considered a deduction under section 12C and the wording in that section, namely "plant which … was or is brought into use for the first time by the taxpayer (*or lessee)* for purposes of the taxpayer's (*or lessee's*) trade…. ", is comparable to the wording used in section 12B(1)(*h*) and section 12BA regarding first use of the asset.

installed, it would be unused but not new. The requirement that the asset be new and unused should ensure that more renewable generation assets are brought into use within the country. No deduction will be granted on the cost of assets brought into use outside the period mentioned above. Furthermore, the asset must be used by that taxpayer or the lessee of that taxpayer in the generation of electricity in South Africa from the specified renewable sources.

In the event that an asset is brought into use during a year of assessment, no apportionment of the deduction is necessary. This means that even if the asset is, for example, brought into use on the last day of the year, the deduction in that year will be the full depreciable amount provided by either section 12B(1)(*h*)[54] or section 12BA for that particular year (see **6**). For example, the full 125% of the cost of the asset may be deducted under section 12BA subject to all the requirements being met.

It is evident from the wording of section 12U that the relevant expenditures must be incurred on the construction or erection of new roads, fences or supporting structures in relation to such fences as opposed to existing roads, fences or supporting structures.

Example 1 – "brought into use for the first time by that taxpayer"

Facts:

In 2017, Greenhouse decided to construct a hydropower plant in order to generate enough electricity to power two large property developments. The electricity generated did not exceed 30 megawatts.

In order for the plant to function optimally, Greenhouse purchased a hydro-impulse turbine and brought this asset into use for the first time in the 2020 year of assessment. The asset was used in 2020 and 2021 but Greenhouse ceased to use it on 31 December 2021 when it was replaced by a hydro-reaction turbine. The hydro-reaction turbine was purchased and brought into use for the first time in the 2022 year of assessment.

Greenhouse was, however, not satisfied with the performance of the hydro-reaction turbine and consequently decommissioned it on 31 December 2022. Greenhouse then brought the same hydro-impulse turbine that was previously decommissioned back into use for the second time on 1 January 2023.

Greenhouse's year of assessment is 1 January – 31 December.

Result:

Under section 12B(1)(*h*), a deduction may be claimed by a taxpayer on the cost of any asset or improvement to that asset if the asset is, amongst other requirements, brought into use for the first time.

Under section 12B(1)(*h*) read with 12B(2), Greenhouse was able to claim a deduction of 50% of the cost of the hydro-impulse turbine in the 2020 year of assessment, that is, the year that the asset was brought into use for the first time. Thereafter, Greenhouse was also able to claim a deduction of 30% of the cost of the asset during the 2021 year of assessment.

[54] Read with section 12B(2).

When the hydro-impulse turbine was brought into use for the second time in 2023 after it had previously been decommissioned, Greenhouse could not claim any more deductions under section 12B(1)(*h*) read with 12B(2), since the “brought into use for the first time” requirement was not met.

With regard to the hydro-reaction turbine, this asset also met all the requirements under section 12B(1)(*h*) during the 2022 year of assessment, including the “brought into use for the first time” requirement. As such, Greenhouse was able to claim a deduction of 50% of the cost under section 12B(2) for that year. No further deductions were available to Greenhouse under section 12B(2) in relation to the hydro-reaction turbine once it was decommissioned, since it was no longer used for purposes of trade by Greenhouse.

Example 2 – Assets used by previous owners

Facts:

WaterWorks purchased a used hydro-impulse turbine from AB in the 2020 year of assessment and brought it into use for the first time in 2021 to generate electricity for purposes of trade. The asset was also used for purposes of trade in the 2022 and 2023 years of assessment.

AB had previously used the turbine in its trade. WaterWorks and AB are not managed or controlled by the same person (see **7.1**).

Result:

Under section 12B(1)(*h*), a deduction may be claimed by a taxpayer on the cost of any asset or improvement to that asset if the asset is, amongst other requirements, brought into use for the first time by that taxpayer. It is not a requirement that the asset must be new and unused.

WaterWorks may claim a deduction from the 2021 year of assessment when the asset was brought into use for the first time. The fact that it was previously used by another person, does not prohibit WaterWorks from claiming the deduction.

Therefore, 50% of the cost of the asset can be claimed in 2021, 30% in 2022 and 20% in 2023.

2.5 The trade requirement

A taxpayer claiming the deduction under section 12B(1)(*h*) and (*i*), section 12BA or section 12U must use the relevant asset for the purposes of trade. The test to be applied in determining whether a trade is being carried on is an objective test and if objective factors indicate that the taxpayer is trading, the trade requirement will be satisfied.

The term “trade” is defined in section 1(1) as follows:

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

In ITC 770[55] it was held that the definition of "trade" should be widely construed and is obviously intended to embrace every profitable activity. In *Burgess v CIR*[56] the court noted that the definition of "trade" should be given a wide interpretation and that the definition was not necessarily exhaustive.

When determining whether a trade is being carried on, an objective test is applied and the facts and circumstances of each case are evaluated on its merits.[57]

For purposes of sections 12B(1)(*h*) and 12BA, no restriction is placed on the type of trade that a taxpayer must conduct. In other words, the taxpayer does not have to trade in renewable energy. Instead, as long as the *asset* is used for the purpose of the taxpayer's trade and that asset generates electricity from the specified sources of renewable energy, a deduction may be claimed provided that all the requirements of the sections are met. For example, a glass producer that has solar panels which are used to produce electricity that is used in the taxpayer's process of manufacturing glass will be eligible for the deduction under section 12B(1)(*h*) or section 12BA if all the requirements of those sections are met.

However, for the purposes of section 12U a restriction applies as the taxpayer has to be conducting a trade of generation of electricity. This is evident from the wording of the section, particularly, "for the purpose of trade of that person of generation of electricity".

3. Foundations or supporting structures

Assets that are used to generate electricity often require foundations or supporting structures that effectively stabilise them and ensure that they operate optimally.

Section 12B and section 12BA

If an asset that qualifies for a deduction under sections 12B(1)(*h*) or 12BA(1) (see **2**) is mounted or affixed to a concrete or other foundation or supporting structure, that foundation or supporting structure is deemed to be a part of the asset and thus deductible in the same way as the asset (see **5**) provided that all of the following requirements are met: [58]

- The foundation or supporting structure is designed for the asset and constructed in such a manner that it is or should be regarded as being integrated with the asset.
- The useful life of the foundation or supporting structure is or will be limited to the useful life of the asset mounted or affixed to it.
    - In the case of section 12B, the foundation or supporting structure was brought into use on or after 1 January 2013 and in the case of section 12BA, the foundation or supporting structure was brought into use on or after 31 March 2023 but on or before 28 February 2025.

55 (1953) 19 SATC 216 (T).
56 1993 (4) SA 161 (A), 55 SATC 185 at 196.
57 For more information on the "trade" requirement, see Interpretation Note 33 "Assessed Losses: Companies: The 'Trade' and 'Income from Trade' Requirements" and specifically paragraph 4.1.7 on when trade commences.
58 Proviso to section 12B(1) and section 12BA.

Example 3 – Deduction of costs incurred in respect of supporting structures

Facts:

ABC (Pty) Ltd installed a solar system and brought it into use during the year of assessment to generate electricity. The electricity generated was used in a factory that produced items which were sold in the course of ABC (Pty) Ltd's trade. The solar panels forming part of the solar system were positioned on the factory's roof which was strengthened by ABC in order to support the solar panels. The strengthened roof has a useful life in excess of 30 years.

Result:

Although the roof was strengthened to accommodate the solar panels:

- the roof was not designed and constructed in such a manner that it was regarded as being integrated with the solar system. It was, instead, integrated with a different asset, that is, the factory building; and
- the useful life of the roof, including its strengthening features, exceeds the useful life of the solar panels affixed to it.

Therefore, since all the requirements in the proviso to section 12B and section 12BA were not met, neither the roof nor the expenditure incurred in strengthening the roof was deemed to be part of an asset that potentially qualified for a deduction under those sections.

Section 12U

Under section 12U a deduction may be claimed under section 12U(1)(*a*)[59] on the expenditure incurred in respect of the foundation or supporting structure that is designed for a fence that qualifies for a deduction under that section 12U(1)(*a*) (see **2**) provided that both of the following requirements are met:

- The foundation or supporting structure is constructed in such a manner that it is or should be regarded as being integrated with the fence.
- The useful life of the foundation or supporting structure is or will be limited to the useful life of the fence. [60]

The deduction for the expenditure actually incurred in constructing the foundation or supporting structure is available in the year that the expenditure is actually incurred provided that the trade has commenced (see **6.3.2** for the timing of the deduction of qualifying expenditure incurred before the commencement of trade).

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59 Under sections 12B and 12BA, if the foundations and supporting structures meet the requirements of those sections, they are deemed to be part of the cost of the asset and qualify for a deduction as part of the cost of the asset. Under section 12U the expenditure incurred on foundations and supporting structures is not deemed to be part of the related fence but if it meets the requirements of that section it will qualify for a deduction in its own right.

60 Section 12U(2) specifies the criteria for a deduction under section 12U(1) for foundations and supporting structures.

“Mounted on or affixed to”

The words “mounted” and “affixed” are not defined in the Act and should, therefore, be interpreted according to their ordinary meaning as applied to the subject matter with regard to which they are used.[61]

According to the online *Collins Dictionary*, the words “mounted”, and “affix” are defined as follows:

Mounted: “4. Fixed on or in the proper backing, support, setting, etc.[62]

Affix: “1. To attach, fasten, join, or stick.”[63]

"Integrated”

The word “integrate” is not defined in the Act but is defined in the *Merriam Webster Dictionary* to mean –[64]

“1: to form, coordinate, or blend into a functioning or unified whole : UNITE

2a: to incorporate into a larger unit

b: to unite with something else”.

This means that the supporting structure or foundation, when integrated with the asset or fence, must be of such a nature that it cannot be regarded as a separate component. Moreover, if the asset or fence is dismantled from the foundation or supporting structure there must be no other use for the foundation or supporting structure except for the use that it was designed for in relation to the asset.

“Useful life”

“Useful life” is not defined in the Act. Its ordinary grammatical meaning is “the estimated lifespan of a depreciable fixed asset…”.[65]

As noted above, the useful life of the foundation or supporting structure must be limited to the useful life of the asset that is attached to it or to the fence. For example, when using a wind turbine which has a useful life of 30 years, the useful life of the gravity-based foundation needed to secure the turbine must also be limited to the same period of 30 years. Similarly, if a fence has a useful life of 10 years, the useful life of the foundation or supporting structure must be limited to this timeframe.

The burden of proving the useful life of the foundation or supporting structure rests on the taxpayer.[66]

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61 Kellaway, E. A. (1995). *Principles of Legal Interpretation of Statutes, Contracts and Wills* (1995) Butterworths, South Africa Series. Also, see Steyn, L. C. (1981). *Die Uitleg van Wette* (5de uitg.) at 4 to 7. Juta and Company (Pty) Ltd.

62 **www.collinsdictionary.com/dictionary/english/mounted** [Accessed 23 November 2024].

63 **www.collinsdictionary.com/dictionary/english/affix** [Accessed 23 November 2024].

64 **www.merriam-webster.com/dictionary/integrate** [Accessed 23 November 2024].

65 **www.accountingtools.com/articles/useful-life** [Accessed 23 November 2024].

66 Section 102 of the TA Act.

4. Improvements to assets and foundations or supporting structures

Sections 12B(1)(*i*) and 12U(1)(*b*) make provision for a deduction of the expenditure incurred for certain improvements to the asset, road, fence and foundation or supporting structure as contemplated in section 12B(1)(*h*) and section 12U(1)(*a*). Deductions of the costs of repairs are specifically excluded under both sections.

No provision is made under section 12BA for the deduction of any costs relating to the improvements to the assets and foundations or supporting structures mentioned in that section.

The word "improvement" is not defined in the Act for purposes of section 12B(1)(*i*) or section 12U and thus has to be given its ordinary grammatical meaning.[67] According to the *Cambridge Dictionary*, the word is defined as:[68]

> "the process of making something better or of getting better"

An improvement accordingly enhances something that is already in existence. Such enhancement can take the form of adding something to an existing asset or by replacing an existing part of the asset.

An improvement must be distinguished from a repair as the repair of an asset falls out of the ambit of these sections.

The word "repair" is not defined in the Act and reliance must therefore be placed on its ordinary grammatical meaning and relevant case law. The *Cambridge Dictionary* defines "repair" as something that will –[69]

> "… put something that is damaged, broken, or not working correctly, back into good condition or make it work again"

The meaning of "a repair" was also considered in various court cases. In *Flemming v KBI*, Joubert AR concluded that a repair involves the process of renewing, renovating or restoring decayed or damaged parts.[70] Furthermore, in ITC 491 it was stated that in the ordinary sense of the word, "repairs" means replacement or renewal of something that has become defaced or worn out or worn down by use or possibly by wear-and-tear.[71]

Therefore, while a repair will restore or renew something, an improvement will enhance the particular object to make it better.[72]

67 The word "improvements" is defined in section 13(9) for the purposes of section 13 only. It is not defined under section 12B, 12U or section 1(1).

68 **https://dictionary.cambridge.org/dictionary/english/improvement** [Accessed 23 November 2024].

69 **https://dictionary.cambridge.org/dictionary/english/repair** [Assessed 23 November 2024].

70 1995 (1) SA 574 (A), 57 SATC 73.

71 (1941) 12 SATC 77 (U) at 77.

72 See Interpretation Note 74 "Deduction and Recoupment of Expenditure Incurred on Repairs" for a detailed explanation of the differences between a "repair" and an "improvement".

Section 12B improvements

Section 12B(1)(*i*) allows a taxpayer to claim a deduction on any improvements made to the assets referred to in section 12B(1)(*h*) (see **2**) as well as improvements to a foundation or supporting structure that is deemed to be part of such assets (see **3**), provided the improvement is used during the year of assessment as contemplated in section 12B(1)(*h*).

In relation to improvements being made to an asset referred to in section 12B(1)(*h*), if the asset, foundation or supporting structure, that was improved, did not, as appropriate, meet any of the requirements in section 12B(1)(*h*) or the proviso to section 12B(1), thus resulting in the asset not potentially qualifying for a deduction under that section, the cost of the improvement will not qualify for a deduction under section 12B(1)(*i*). For example, if the asset that was improved had been brought into use by that taxpayer for the second time or if it was used to generate electricity from hydropower exceeding 30 megawatts, the asset would not be an asset referred to in section 12B(1)(*h*) and the improvement to that asset would not qualify for a deduction under section 12B(1)(*i*). If an asset that was improved met all the requirements for deduction under section 12B(1)(*h*) but had already been fully deducted in line with section 12B(2), the cost of the improvement would qualify for a deduction under section 12B(1)(*i*).

The cost of the improvements to the assets referred to in section 12B(1)(*h*) are deductible in the same manner as provided for under section 12B(2) (see **6.1**) provided the improvement is used during the year of assessment as contemplated in section 12B(1)(*h*), that is, 100% if the improvement is to an asset brought into use to generate photovoltaic solar energy which does not exceed one megawatt otherwise over a three-year period at a rate of 50:30:20.

The cost incurred on the improvements does not include the cost of the underlying asset.

Section 12U improvements

Under section 12U(1)(*b*) a taxpayer may claim a deduction for the expenditure actually incurred on the improvements made to any road or fence contemplated in section 12U(1)(*a*) (see **2**) or improvements to any foundation or supporting structure designed for such fence (see **3**). This means that the underlying asset to which improvements are made must qualify for a deduction under section 12U(1)(*a*) to enable the taxpayer to claim the deduction for the improvements. Under section 12U(1), the expenditure incurred on the improvement is deductible in full in the year that the expense is incurred.[73]

Example 4 – Deduction of costs relating to the improvement to an asset brought into use during a previous year of assessment

Facts:

Efficient was the owner of a biomass plant utilising plant material to generate electricity which was used in Efficient's trade. In order to ensure adequate and safe access to the plant, Efficient constructed a tar road leading to the plant in 2017. The cost of the road was R500 000. The biomass plant included two biomass generators which were purchased in the same year at a cost of R300 000 each. All components utilised in the plant were new when acquired and brought into use by Efficient. The plant achieved its production capacity of 10 megawatts of energy.

[73] See **6.3.2** for the provisions applicable to pre-trade expenditure.

The plant was brought into use in the 2018 year of assessment and more specifically:

a) Generator X was brought into use for the first time on 1 January 2018. It was decommissioned and taken out of use in June 2019. Trading conditions changed towards the end of 2021 and after effecting small improvements to the generator at a cost of R25 000, Generator X was brought back into use on 1 January 2021.

b) Generator Y was brought into use for the first time on 1 March 2018. While in use, improvements were made to the generator in 2021. The cost of the improvements was R110 000 and they were used for the first time in 2022. Efficient used the generator in the same way in the 2023 and 2024 years of assessment.

Due to the increase of traffic on the road, the tar road that was constructed in 2017 had to be made wider. Efficient proceeded to make improvements to the road in 2023 at a cost of R200 000.

Efficient's year of assessment is 1 January – 31 December.

Result:

2023

Generator X

Under section 12B(1)(*i*) a taxpayer may claim a deduction on any improvements made to assets referred to in section 12B(1)(*h*), provided the improvement is used during the year of assessment as contemplated in section 12B(1)(*h*). Such assets need to meet all the requirements of section 12B(1)(*h*).

One of the requirements in section 12B(1)(*h*) is that the asset must be brought into use for the first time by the specific taxpayer for the purpose of their trade. Generator X was brought into use for the first time in 2018 and the asset was then decommissioned before being brought back into use for the second time in 2021 after improvements had been made. The "brought into use for the first time" requirement was not met in the case of Generator X when it was brought back into use in 2021. As such, the improvement was not made to an asset referred to in section 12B(1)(*h*) and the cost of the improvements was not deductible under section 12B(1)(*i*).

Generator Y

The same requirements that applied to Generator X are applicable to Generator Y, that is, the improvements must have been made to an asset referred to in section 12B(1)(*h*) and the improvement is used during the year of assessment as contemplated in section 12B(1)(*h*). Generator Y is an asset referred to in section 12B(1)(*h*) as it is owned by Efficient, it was brought into use for the first time by Efficient in 2018 for the purposes of Efficient's trade, it was not taken out of use and then brought back into use at a later stage and it is used in the generation of electricity from biomass consisting of plant material. Further, the improvements were brought into use as contemplated in section 12B(1)(*h*) in the 2022 year of assessment and continued to be used in the same way in the 2023 year of assessment.

Accordingly, under section 12B(1)(*i*) read with section 12B(2), 50% of the cost of the improvements made to the asset is deductible in the year of assessment that it is brought into use (2022) and 30% is deductible in 2023. If Efficient continues to use the improvement in the same way in 2024, a deduction of 20% of the cost will be available in the 2024 year of assessment.

Improvements to the tar road

Under section 12U(1)(*b*)(i), a deduction may be claimed on the cost of improvements to a road or fence which was constructed or erected for the purpose of a taxpayer's trade of the generation of electricity which exceeds 5 megawatts from, amongst others, biomass comprising plant material. Efficient met the requirements of this section since it was conducting a trade of energy generation, the road was used for the purposes of this trade and it generated more than five megawatts of energy from one of specified sources of renewable energy. Thus, a deduction was permitted on the cost of the improvements to the road. The cost of the road itself was deductible under section 12U(1)(*a*) (see **2**).

5. The cost of the renewable energy asset

5.1 Sections 12B and 12BA – cost of the machinery, plant, implement, utensil or article

The deduction under section 12B(2) and section 12BA(2) (see **6.1** and **6.2**) is calculated on the cost to the taxpayer to acquire the asset. See **3** for the circumstances in which the foundation and supporting structure on which an asset is mounted or affixed is deemed to be part of that asset.

Section 12B(3) and section 12BA(3) deem the cost to the taxpayer to be the lesser of the actual cost to the taxpayer or the cost that the taxpayer would have incurred on the direct cost of the acquisition, including the direct cost of the installation or erection, if the asset had been acquired under a cash transaction concluded at arm's length on the date on which the transaction for the acquisition was concluded.

The phrase "direct cost" is not defined in the Act and should therefore be interpreted according to its ordinary meaning as applied to the subject matter with regard to which it is used.[74]

The online *Merriam-Webster Dictionary* describes the words as:[75]

> "a cost that may be computed and identified directly with a product, function, or activity and that usually involves expenditures for raw materials and direct labor and sometimes specific and identifiable items of overhead —contrasted with indirect cost"

The direct costs of installing or erecting the asset may, therefore, be included in the cost of the asset. This may include, for example, installation planning costs, panel delivery costs and the cost of appointing the installation safety officer.[76] The direct costs of acquisition may include the cost of a number of components – see **2.2**.

[74] Kellaway, E. A. (1995). *Principles of Legal Interpretation of Statutes, Contracts and Wills* at 224. Butterworths, South Africa Series.

[75] **www.merriam-webster.com/dictionary/direct%20costs** [Accessed 23 November 2024].

[76] See Binding Private Ruling 311 "Photovoltaic Solar Energy Plants".

Ultimately, the determination of what constitutes a direct cost in each case is one of fact.

To be included in the cost of the asset, the taxpayer must have incurred the cost. This means that the taxpayer must have a definite and absolute liability to pay the amount. Anticipated, conditional or contingent expenditure may not be included in cost.

5.2 Sections 12U – cost of the roads and fences

Under section 12U(1), the amount actually incurred on the road, fence, foundation, supporting structure or improvement may be deductible.

The term "actually incurred" means that the taxpayer must have a definite and absolute liability to pay an amount.[77] Anticipated expenditure is not actually incurred. A liability that is conditional or contingent in any way will not be deductible.[78]

6. Calculating the deduction under the respective sections

6.1 Section 12B(2)

The deduction under section 12B(1)(*h*) is calculated under section 12B(2) on the cost of the asset, as specified under section 12B(3) (see **5**), at the rate of –

- 100% in the case of an asset brought into use by the taxpayer to generate photovoltaic solar energy which does not exceed one megawatt (that is, one megawatt or less); or
- In all other cases:
  - 50% of the cost in the year of assessment during which the asset is brought into use;
  - 30% of the cost in the second year of assessment; and
  - 20% of the cost in the third year of assessment.

The deduction commences in the year of assessment in which the asset or improvement is brought into use by the taxpayer for the first time. The first part of the deduction (100% or 50% as appropriate) must be claimed in the year of assessment that the asset or the improvement is brought into use for the first time and cannot be postponed to and claimed in a future year of assessment. The 30% and 20% portions, as appropriate, can similarly be claimed only in the two succeeding years of assessment if the taxpayer uses the asset as required under section 12B(*h*) and (*i*) during each of those succeeding years.

For example, if a taxpayer purchased an asset falling within the ambit of section 12B(1)(*h*), brought it into use in year one to generate electricity exceeding one megawatt that was used in the taxpayer's trade and discontinued using the asset as required during year two, the taxpayer may claim the deduction in year one (50% of the cost) and year two (30% of the cost) but no deduction is available in year three. The deduction for the third year of assessment is forfeited and may not be claimed in the future should the taxpayer bring the asset back into use at a later stage. This is owing to the requirement that a taxpayer may claim a deduction under section 12B(1)(*h*) if the asset is, amongst others, brought into use by the taxpayer for the first time (see **2.4**) and bringing the asset back into use is not brought into use for the first time.

[77] ITC 1545 (1992) 54 SATC 464 (C) at 471.
[78] *Nasionale Pers Bpk v KBI* 1986 (3) SA 549 (A), 48 SATC 55.

No apportionment of the deduction is necessary if the asset is brought into use during a year of assessment or only used for part of the year of assessment. This means that even if the asset is brought into use on the last day of the year, if the asset qualifies for a deduction of 50% then the deduction in that year will be 50% of the cost of the asset.

In determining whether an asset is brought into use to generate photovoltaic solar energy which does not exceed one megawatt (that is, one megawatt or less) or which exceeds one megawatt (that is, more than one megawatt), it is important to note that if a taxpayer owns multiple photovoltaic solar energy systems, that each photovoltaic solar system is considered separately. The combined generation capacity of all the photovoltaic solar energy systems is not relevant in this regard.

Example 5 – Calculating the deduction under section 12B(2)

Facts:

In 2020, Windy Towers acquired a wind turbine for purposes of generating electricity, at a cost of R500 000. The turbine was brought into use for the first time in 2021.

Also in 2020, Windy Towers was obliged to erect supporting structures (see **3**) to which the turbine was attached. This was designed and done in such a way that the structures and the turbine became integrated. The useful life of the structures is limited to the useful life of the turbine. The cost of the structures was R200 000.

In 2021, Windy Towers expanded its business through a subsidiary called PV Solar which would on-sell the electricity it generated to clients. PV Solar set up its first solar farm consisting of photovoltaic panels which produced less than one megawatt of electricity. The cost to PV Solar was R800 000 and the assets were brought into use for the first time in January 2023.

Result:

Windy Towers – Turbine and supporting structure

Under section 12B(1)(*h*)(ii)(*aa*) read with section 12B(2)(*a*), a deduction may be claimed on the cost of the assets used to generate electricity from photovoltaic solar energy of more than one megawatt.

Since the supporting structure and wind turbine were integrated and had the same useful life, and the supporting structure was brought into use after 1 January 2013, the proviso to section 12B(1) deems the supporting structure to be part of the wind turbine qualifying for the section 12B deduction. Therefore, in calculating the deduction under section 12B(2), the cost of the wind turbine must be added to the cost of the supporting structures, that is, R500 000 + R200 000. Thus, Windy Towers was able to claim 50% of the cost in the 2021 year of assessment, that is, the year that the asset was brought into use for the first time. Thereafter, Windy Tower was able to claim 30% of the cost and then 20% of the cost during the 2022 and 2023 year of assessment.

2021: R700 000 × 50% = R350 000

2022: R700 000 × 30% = R210 000

2023: R700 000 × 20% = R140 000

PV Solar – solar panels

Under section 12B(2)(*b*), the cost incurred on assets contemplated in section 12B(1)(*h*)(ii)(*bb*), that is, those used to generate electricity of one megawatt or less from photovoltaic solar energy, is deductible in full in the year of assessment that it is brought into use for the first time. As such, PV Solar was able to claim a deduction of the full cost of R800 000 in the 2023 year of assessment.

6.2 Section 12BA(2)

The accelerated deduction under section 12BA(1) read with section 12BA(2) is equal to 125% of the cost incurred for the acquisition of the renewable energy asset in the year of assessment that such asset is brought into use for the first time.

Importantly, the asset must be brought into use for the purposes of the taxpayer's trade on or after 1 March 2023 and before 1 March 2025 and must be used by such taxpayer or the lessee of that taxpayer in the generation of electricity in South Africa from the specified sources of renewable energy mentioned in the section.

Example 6 – Calculating the deduction under section 12BA(2)

Facts:

In June 2023, Turbinator (Pty) Ltd acquired a wind turbine, for purposes of generating electricity, at a cost of R750 000 including erection and installation. The cost that would have been incurred in a cash transaction concluded at arm's length was R800 000.

In order to ensure that the turbine works effectively, Turbinator was obliged to erect a supporting structure to which the turbine was attached. This was done in such a way that the structure and the turbine became integrated and essentially formed a single asset with the same useful life. The cost of this structure amounted to R300 000.

The turbine and the supporting structure were brought into use for the first time in August 2023. Turbinator's year of assessment ends on 31 December.

Result:

Under section 12BA(3), the cost to the taxpayer is the lesser of the actual cost incurred and the cost that would have been incurred in a cash transaction concluded at arm's length which is R750 000.

The supporting structure is deemed to be part of the asset as it was designed for and is integrated with the asset and has the same useful life. Therefore, when calculating the deduction under section 12BA(1) read with section 12BA(2), the cost of the supporting structure must be added to the cost of the asset, that is, R750 000 + R300 000 = R1 050 000. Turbinator was able to claim 125% of the cost in the 2023 year of assessment, that is, the year that the asset was brought into use for the first time.

The amount claimable was R1 312 500 (R1 050 000 × 125%). This amount may be deducted from the taxpayer's income.

Example 7 – Calculating the deduction of limited partners under section 12BA(2)

Facts:

A formed a limited partnership with B in the year of assessment ending 28 February 2024 with both making a capital contribution to the partnership of R250 000. The only amount for which A and B were liable to creditors was for their capital contribution of R250 000 each. The limited partnership's trade was the sale of electricity generated from solar energy to customers. The solar plant, which was installed and brought into use during the 2024 year of assessment, cost R500 000. All components of the solar plant were new and unused when brought into use.

During 2024 the limited partnership generated income of R100 000 from the sale of electricity and incurred deductible operating expenditure of R40 000.

Result:

1) *Potential deductions before section 24H(3):*

Operating expenses under section 11(*a*) (R40 000 × 50% share)	20 000
Deduction under section 12BA [(R500 000 × 125%) × 50% share]	<u>312 500</u>
	332 500

2) *Section 24H(3) limitation:*

Under section 24H(3), the total allowances and deductions that a *limited partner may deduct* in any year of assessment in respect of or in connection with the trade carried on by the partnership may not exceed the sum of:

(i) the amount for which the limited partner may be held liable to any creditor

- A and B's capital contribution to the limited partnership of R250 000 each; and

(ii) the portion of the partnership income included in A and B's income in the current or any previous years of assessment R50 000

- R100 000 × portion of 50%; only the first year of operation

less the total allowances and deductions allowable in any previous year of assessment in respect of or in connection with the trade carried on by the partnership (RNil as 2024 is the first year of operation).

Therefore, the total allowances and deductions that A and B may claim in their tax returns in 2024 in respect of the partnership is R300 000 (R250 000 + R50 000).

3) *Calculation of the deductions or allowances that A and B may claim in respect of the partnership when calculating A and B's taxable income for the 2024 year of assessment:*

In consequence of the above, A and B may claim deductions or allowances in respect of the partnership of R300 000 when calculating A and B's taxable income for the 2024 year of assessment.

A and B must both include their share of the partnership income of R50 000 (R100 000 × 50%) when calculating their taxable income for the 2024 year of assessment.

Under section 24H(4), A and B must carry forward an amount of R32 500 (R332 500 – R300 000) to the 2025 year of assessment for deduction, subject to section 24H(3) in 2025.

6.3 Section 12U

6.3.1 Deduction available under section 12U(1)

Under section 12U(1), if the relevant trade has commenced, a taxpayer may claim a deduction of the amount actually incurred during the year of assessment on the construction of any road or the erection of any fence used by such person for the purposes of their trade of generating electricity which exceeds five megawatts from specified sources of renewable energy. The deduction must be taken in the year the expenditure is incurred and cannot be postponed to a future year of assessment.

See **6.3.2** if the expenditure is incurred pre-trade.

Example 8 – Deduction of a fence, a foundation and a road

Facts:

X decided to go into business as a solar farm operator with the objective of generating electricity for resale to a neighbouring town. In pursuance of this project, X bought and installed a collection of photovoltaic solar panels in the 2023 year of assessment. The solar panels were mounted to the ground using a ground mounted racking system which was screwed into a newly laid foundation. The solar farm met its production capacity of 10 megawatts of energy.

Owing to the rough terrain, the solar farm was not easily accessible. X constructed a road during the 2023 year of assessment which led to the solar farm. In addition, X also erected a fence to secure the solar panels from criminal elements. Supporting structures, which were necessary for the proper erection of the fence, were erected in such a manner that they are integrated with the fence and have the same useful life.

The solar farm was brought into use for the first time for purposes of trade in 2023.

Result:

Costs relating to the construction of the road

Section 12U(1) allows a taxpayer to claim a deduction on the expenditure actually incurred during the year of assessment on the construction of any road or erection of any fence used by such person for the purposes of their trade of generating electricity which exceeds five megawatts from specified sources of renewable energy.

Owing to X conducting a trade relating to the generation of electricity, using the road for the purposes of such trade and the farm exceeding five megawatts of electricity from solar energy as required under the section, X was able to claim a deduction for the costs of the construction of the road in the 2023 year of assessment.

Costs relating to the fence and supporting structure

For the same reasons stated above in relation to the construction of the road, X was also able to claim a deduction under section 12U(1) on the cost of the erection of the fence in the 2023 year of assessment.

Under section 12U(2), the foundation or supporting structure designed for a fence qualifying for a deduction under section 12U(1) will also qualify for a deduction under that section if the foundation or supporting structure is constructed in such a manner that it is or should be regarded as being integrated with the fence, and the useful life of the foundation or supporting structure is or will be limited to the useful life of the fence.

Therefore, the cost of the supporting structure was also deductible under section 12U(1), since it was designed for and became integrated with the fence, and had the same useful life.

Costs relating to the solar panels and foundation it is mounted on

The costs of the assets and the foundation and supporting structure on which they are mounted on and affixed to are not deductible under section 12U(1). Instead, a deduction may be available under section 12B(1)(*h*) read with section 12B(2) (see **2** and **3**).

6.3.2 Deduction of pre-trade expenditure under section 12U(3)

Many of the costs incurred by a taxpayer under section 12U will be incurred prior to such person commencing trade. This may include, for example, the costs of the roads, fences, foundations or supporting structures.

Under section 12U(3), any expenditure actually incurred prior to the commencement of and in preparation for carrying on a trade may be deducted as soon as trade commences provided that such costs would have been allowed under section 12U(1) had the expense been incurred after the taxpayer commenced trade and a deduction was not allowed in a previous year of assessment.

Example 9 – Deduction of pre-trade expenditure

Facts:

Bio Inc is the owner of a biomass power plant. In 2021, Bio Inc purchased a biomass generator which used plant material to generate electricity and brought it into use for the first time in the 2022 year of assessment. The power plant's production capacity, which it met in its first year, was six megawatts. This was the first year that Bio Inc began trading in the generation and sale of electricity.

In 2021, Bio Inc decided to erect a security fence, and a supporting structure specifically designed for such fence, around the generator. The expense relating to the security fence and supporting structure was actually incurred in the 2021 year of assessment.

Result:

In order for Bio Inc to claim a deduction in 2022 for the expenditure incurred in 2021 on the erection of the fence and its supporting structure, certain requirements must be met.

Under section 12U(3), Bio Inc claimed a deduction in the 2022 year of assessment for this expenditure because –

- the expenditure relating to the erection of the fence and supporting structure was actually incurred in 2021 prior to the commencement of and in preparation of carrying on Bio Inc's trade which commenced in 2022;
- it would have been allowed under section 12U(1) if the expense had been incurred after the commencement of trade (see Note 1 below); and
- it was not allowed as a deduction in a previous year of assessment.

Note:

1) If Bio Inc had incurred the expenditure after the commencement of trade, it would have qualified for a deduction under section 12U(1) as –

   a) the expenditure was incurred in erecting a fence and a supporting structure for the fence;
   b) the supporting structure was integrated with and had the same useful life as the fence; and
   c) the expenditure was incurred for the purpose of Bio Inc's trade of the generation electricity which exceeded five megawatts from biomass comprising plant material.

7. Prohibitions of deductions

Even if the requirements of the sections are met, certain deductions are prohibited under section 12B and section 12BA. There are also various limitations contained in section 12B. These prohibitions and limitations are briefly detailed below.

7.1 Prohibitions of deductions under section 12B(4) and section 12B(5)

Under section 12B(4) no deduction shall be allowed under section 12B in respect of any asset –

- which has been let by a taxpayer other than under an operating lease as defined in section 23A(1) unless –[79]
  - ➢ the lessee under such lease derives in the carrying on of the lessee's trade amounts constituting income; and
  - ➢ the period for which the asset is let under such lease is at least five years or such shorter period as is shown by the taxpayer to be its useful life [section 12B(4)(*a*)].

[79] See de Koker, A. P., & Williams, R. C. (2023). *Silke on South African Income Tax* in § 8.38A. My LexisNexis [online]. for more detail on section 23A in relation to section 12B.

- brought into use by a company during a year of assessment if it was previously brought into use by any other company during that year, and both companies are managed, controlled or owned by substantially the same persons and a deduction under this section was previously granted to that other company [section 12B(4)(*c*)];
- that has been disposed of by the taxpayer during any previous year of assessment [section 12B(4)(*d*)].

  For example, if a taxpayer qualified for and claimed a deduction under section 12B(1)(*h*) read with section 12B(2)(*a*) in year one when the asset was brought into use and sold the asset in year two, no deduction may be claimed in year three on that asset;
- of a small business corporation[80] in respect of which a deduction has been granted under section 12E [section 12B(4)(*f*)];
- if the ownership is retained by the taxpayer as a seller in terms of an instalment credit agreement [section 12B(4)(*g*)]; or
- in respect of which a deduction has been allowed to the taxpayer under section 6C[81] or section 12BA.[82]

Section 12B(5) limits the aggregate of the deductions that may be allowed under this section to the cost to the taxpayer of the asset concerned. The deemed allowance under section 12B(4B) (see **8.1**) and actual allowances granted under section 12B(1) read with section 12B(2) are taken into account.

7.2 Prohibitions of deductions under section 12BA(4)

Section 12BA(4) prohibits the deduction under section 12BA in respect of any asset –

- if the ownership is retained by the taxpayer as a seller under an instalment credit agreement [section 12BA(4)(*a*)]; or
- the asset is brought into use after 28 February 2025 [section 12BA(4)(*b*)].

Taxpayers can deduct the costs of assets used to generate electricity from specified sources of renewable energy either under section 12B or section 12BA. A deduction cannot be claimed on the cost of the same asset under both sections.[83] Under section 12B(4)(*h*), no deduction may be claimed under section 12B if a deduction was allowed under section 12BA.[84]

A similar provision is contained in section 12E(3B) stating that no deduction shall be allowed under that section on any asset in respect of which a deduction has been granted under section 12BA.[85]

80 For further information on small business corporations, see Interpretation Note 9 "Small Business Corporations".
81 See the *Guide on the Solar Energy Tax Credit Provided under Section 6C* for more information.
82 Section 12B(4)(*h*) was inserted by section 15(1)(*b*) of the Taxation Laws Amendment Act, 2023 and is deemed to have come into operation on 1 March 2023.
83 Section 23B.
84 Section 12B(4)(*h*) was inserted by section 15 of the Taxation Laws Amendment Act, 2023.
85 Section 12E(3B) was inserted by section 17 of the Taxation Laws Amendment Act, 2023.

8. Requirements specific to section 12B

8.1 Deemed deduction under section 12B(4B)

Section 12B(4B) states that if an asset was used by the taxpayer during any previous year for the purposes of any trade and the receipts and accruals were not included in income, any deduction that could have been allowed under this section during such previous years, if the receipts and accruals were actually included in the taxpayer's income, will be deemed for purposes of this section to have been allowed during such previous years.

For example, assume a taxpayer brought into use an asset that potentially qualified for a deduction under section 12B(1)(*h*) read with section 12B(2)(*a*). The taxpayer's receipts and accruals from its trade were exempt in year one after which such receipts and accruals were no longer exempt. In year one the taxpayer would not have qualified for a deduction under section 12B(1)(*h*) read with section 12B(2)(*a*)(i) when calculating taxable income. However, for the purposes of section 12B it will be deemed to have been allowed the deduction of 50% in that year. The taxpayer can therefore claim only the 30% and 20% deductions under section 12B(2)(*a*)(ii) and (iii). In other words, the taxpayer will be treated as if the deduction of 50% had been granted for the purpose of section 12B. When applying the cost limitation in section 12B(5) (see **7.1**), the deemed deduction under section 12B(4B) and the actual deductions granted under section 12B(1) read with section 12B(2) are taken into account.

The recoupment provision under section 8(4)(*a*) (see **9.3**) does not apply to the deduction which is deemed to have been allowed under section 12B(4B). However, in the case of a deduction for the alienation, loss or destruction of a relevant asset, the deemed deduction under section 12B(4) is taken into account (see **9.2**).

8.2 Disposal of an interest in a lease agreement or the right to receive rent on a let asset [section 12B(6)]

In the event that a lessor, that met the requirements under section 12B(1)(*h*) and section 12B(4)(*a*)(i) and (ii) (see **7.1**) and therefore was allowed a deduction under section 12B, entirely or partially disposes of its –

- interest in the lease; or
- right to receive rent under such lease,

within the period contemplated in section 12B(4)(*a*)(ii) (see **7.1**), an amount will be included in the income of the lessor in the year of assessment of the disposal under section 12B(6).

The amount to be included will be equal to the total of the deductions that were allowed under section 12B(1)(*h*) or (*i*) read with section 12B(2) less a proportionate amount of the expired portion of the lease or any portion of the interest or right that has not been disposed of by the lessor. In other words, the deductions that were allowed under section 12B(2) will potentially be partially recouped.

9. The application of some of the other sections of the Act in relation to sections 12B, 12BA and 12U

9.1 The wear-and-tear allowance

Section 11(*e*) provides for an allowance on the value of any machinery, plant, implements, utensils and articles owned by the taxpayer or acquired by the taxpayer as purchaser in terms of an instalment agreement and used in the carrying on of a trade, if the requirements of the section are met. However, no allowance is allowed under section 11(*e*) on any assets for which a deduction may be granted under sections 12B, 12BA and 12U, since section 11(*e*) specifically excludes assets contemplated in these sections.

This exclusion will apply even if a higher deduction would otherwise have resulted under section 11(*e*).[86]

9.2 The alienation, loss or destruction of an asset

Section 11(*o*) provides for a deduction on the alienation, loss or destruction of any depreciable asset that qualified for an allowance or deduction under, amongst other things, sections 12B and 12BA, and was used by a taxpayer in the carrying on of a trade.

The deduction is subject to the following requirements –

- the taxpayer must make an election[87] to claim the deduction;
- the asset must be a qualifying depreciable asset, that is, it must have qualified for an allowance or deduction under specified sections of the Act, (including section 12B and section 12BA but excluding section 12U);
- the expected useful life of the asset must not exceed 10 years as determined on the date of the original acquisition of the asset; and
- the cost of the asset must exceed the sum of any amount received or accrued from the alienation, loss or destruction of the asset and the amount of any allowance or deduction allowed against the asset or deemed to have been allowed (including section 12B(4B) – see **8.1**).

The deduction under section 11(*o*) is equal to the amount by which the consideration received or accrued on the alienation, loss or destruction of the asset is less than its tax value. Tax value for this purpose means the actual cost of the asset (as opposed to the value of the asset) less the qualifying capital allowances and specified deemed capital allowances, for example section 12B(4B) (see **8.1**).[88]

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86 See Interpretation Note 47 "Wear-and-Tear or Depreciation Allowance" for more information on section 11(*e*).

87 An election cannot be made if the amount received or accrued from the alienation, loss or destruction of the asset was from a connected person in relation to the taxpayer.

88 See Interpretation Note 60 "Loss on Disposal of Qualifying Depreciable Assets" for a full consideration of section 11(o).

9.3 Sale of an asset

Upon the sale of the machinery, plant, implement, utensil or article, road or fence, the provisions of section 8(4)(*a*), and if applicable section 8(4)(*n*A), as well as the Eighth Schedule must be considered.

Under the Eighth Schedule, the taxpayer will have to account for any capital gains or losses upon the disposal of the asset.[89]

Section 8(4)(a)

Section 8(4)(*a*) provides for the inclusion in income of all amounts allowed to be deducted or set off in the current or any previous year of assessment under, amongst others, sections 11 to 20, if the amount was recovered or recouped during the current year of assessment.

For an asset for which a deduction was granted under section 12B or section 12U, a recoupment will arise if it is disposed of for an amount in excess of its tax value.[90] In summary, the amount of the recoupment will be equal to the amount for which the asset is disposed of (limited to the cost of the asset) less its tax value. In limited circumstances the recognition of the recoupment may be deferred.[91] The recoupment provision under section 8(4)(*a*) does not apply to the deduction which is deemed to have been allowed under section 12B(4B) (see **8.1**).

For assets for which a deduction was granted under section 12BA, section 8(4)(*a*) provides that to the extent that the deduction of 125% of the cost of the asset previously granted under section 12BA is recovered or recouped, it must be included in income.

Section 8(4)(nA)

Under section 8(4)(*n*A),[92] if a taxpayer disposes of an asset contemplated in section 12BA before 1 March 2026, 25% of the cost of the asset, which has been recouped, must be included in such taxpayer's income. This amount will be in addition to the amount recouped under section 8(4)(*a*). However, the inclusions in income under section 8(4)(*a*) and section 8(4)(*n*A) are limited to the total amount allowed to be deducted under section 12BA. This means that if the asset is disposed of before 1 March 2026, a maximum of 125% of the cost that was recouped may be included in income under these paragraphs.

If the asset is disposed of on or after 1 March 2026, section 8(4)(*n*A) does not apply.

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89 See the *Comprehensive Guide to Capital Gains Tax* for more information on capital gains tax.

90 Tax value means the amount remaining after reducing the cost of the asset by the cumulative deductions under section 12B, section 12U and other sections specified in section 8(4)(*a*) on that asset.

91 See section 8(4)(*e*).

92 Section 8(4)(*n*A) inserted by section 4 of the Taxation Laws Amendment Act, 2023 is deemed to come into operation on 1 March 2023 and applies to assets brought into use on or after this date.

Example 10 – Recoupment of the deduction granted under section 12BA

Facts:

In July 2023, Company A purchased machinery for R500 000 and brought it into use for the purposes of trade for the first time in September 2023. This machinery was used to generate electricity in South Africa. Company A has a year end of 31 January.

In the 2024 year of assessment, Company A claimed a deduction of R625 000 (125% × R500 000) under section 12BA(1) read with section 12BA(2).

Company A decided to sell the machinery for R400 000 in May 2025, that is, prior to 1 March 2026.

Result:

Under section 8(4)(*a*), the amount that was allowed to be deducted and which was recovered or recouped, must be included in Company A's income, namely R400 000. In other words, R400 000 of the deduction of R625 000 was recouped.

Under section 8(4)(*n*A), 25% of the cost of the asset which has been recouped (R400 000 of the cost was recouped × 25% = R100 000) must, in addition to the inclusion of the amount under section 8(4)(*a*) (R400 000), but limited to the total amount allowed to be deducted on that asset (R625 000) be included in income. No limitation was, however, applicable under section 8(4)(*n*A) since the total of the amounts included under section 8(4)(*a*) (R400 000) and the amount to be included under section 8(4)(*n*A) (R100 000) was less than the deduction granted under section 12BA, that is, R625 000.

The total amount that had to be included in Company A's income was R500 000 (R400 000 under section 8(4)(*a*) + R100 000 under section 8(4)(*n*A)).

Note:

1) Company A must also consider whether a capital gain or loss has arisen under the Eighth Schedule to the Act.

2) If the asset had been sold after 1 March 2026, only section 8(4)(*a*) would have applied. This means that the amount that would have been included in Company A's income would have been R400 000 under section 8(4)(*a*) only.

3) If, for example, the asset had been sold for R600 000:

   - The recoupment under section 8(4)(*a*) would have been R600 000, that is, proceeds received upon the sale of the asset limited to the deduction of R625 000.

   - The recoupment under section 8(4)(*n*A) would, before applying the limitation provided for in that section, have been R125 000 [(25% of the cost of the asset which was recouped = 25% × R500 000 cost recouped). However, the limitation under section 8(4)(*n*A) would have applied to limit the R125 000 to R25 000 (R625 000 deducted under section 12BA – recoupment under section 8(4)(a) R600 000).

- Therefore, the total amount which had to be included was R625 000 (R600 000 + R25 000) which is the amount which had been deducted under section 12BA.

9.4 The application of sections 12B, 12BA and 12U in relation to other renewable energy incentives

The Act contains various tax incentives relating to the promotion of energy-renewable initiatives. Taxpayers will have to ensure that a deduction is not claimed more than once on the same expenditure since double deductions are strictly prohibited.[93] For example, a taxpayer may not claim a deduction under section 12B and section 12BA on the same asset even if the requirements of both sections are met.

Taxpayers may, however, be able to make use of, for instance, two different renewable energy incentives and claim deductions under both sections as long as the deductions relate to different amounts. For example, while section 12B allows a taxpayer to claim a deduction on the cost actually incurred on the acquisition of assets used to generate electricity, section 12L is aimed at incentivising investments in local energy efficiency projects and provides a deduction for actual savings resulting from a reduction in energy use. In this instance, the deduction under section 12B is distinct from the benefit envisaged in section 12L. In other words, the deduction under section 12B relates to the cost of the asset itself and clearly does not relate to energy efficiency savings under section 12L.[94] In such a case, a deduction under section 12B and section 12L may be claimed provided that all the requirements of each section are met.

The facts and circumstances of each case and all of the possibly relevant provisions in the Act must be evaluated when deductions under multiple sections are sought.

9.5 Renewable energy and home offices

It has become common for taxpayers to carry on a trade from residential properties. Whether the expenditure relating to renewable energy on a residential property containing a home office is deductible needs to be carefully considered. The predominant form of acquiring electricity in South African households is through photovoltaic solar energy. Most expenditure on photovoltaic solar systems used for the purposes of trade will qualify for a deduction under section 12B(1)(*h*) or section 12BA provided that all the requirements of these sections (see **2**) and the requirements of section 23(*b*)[95] are met.

Section 23(*b*) prohibits a deduction of domestic or private expenses which includes rent, repairs and expenses in connection with the premises not occupied for the purposes of trade or deemed not to be occupied for trade if not specifically equipped and regularly and exclusively used for trade purposes. In the context of home office expenditure, the deductible amount would potentially be a proportional amount. SARS accepts that the correct apportionment method to calculate the proportion of expenditure attributable to a part of a premises occupied for purposes of trade, is apportionment based on floor area of the premises.

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93 See section 23B.

94 See Interpretation Note 95 "Deduction for Energy-Efficiency Savings" for more information.

95 See Interpretation Note 28 "Deductions: Home Office Expenses Incurred by Persons in Employment or Persons Holding an Office" for more information on section 23(*b*).

When using this methodology, it is imperative that the entire area of all of the buildings on the property are used to calculate the portion of expenditure attributable to the home office and not only the area of the main dwelling. Under no circumstances will an estimate of the floor area be allowed, the apportionment must be based on actual measurements. The taxpayer must be in a position to prove[96] the actual floor area of the premises and the part attributable to the home office.

If the expenditure on photovoltaic solar systems used for the purposes of trade does not qualify for a deduction under section 12B(1)(*h*) or section 12BA, it may qualify for a wear-and-tear allowance under section 11(*e*) if the detailed requirements of that section are met. In the context of home office expenditure this would be a proportional amount. No deduction will be permitted under section 11(*e*) if the photovoltaic solar system is affixed to a premises so as to become a work of a permanent nature. Whether a solar system is a work of a permanent nature must be determined on the facts of the particular case. Many photovoltaic solar systems will be a work of a permanent nature, since they are wired into the electrical system of the premises and become integrated into the permanent structure.[97] If the expenditure on a photovoltaic solar system qualifies for a deduction under section 12B(1)(*h*) or section 12BA, it cannot qualify for a deduction under section 11(*e*).[98]

Some employers also require or permit employees to work from home. Such arrangements could be temporary in nature or may have a degree of permanency. Persons in employment or persons holding an office wanting to claim a deduction for certain expenses incurred in relation to a home office must, in addition to the relevant deduction section and section 23(*b*), have regard to section 23(*m*).[99] If applicable, section 23(*m*) prohibits the deduction of the deduction otherwise available under section 12B or section 12BA in connection with the part of the premises used for purposes of trade (the home office) such that no deduction will be allowed. A deduction under section 11(*e*) is not prohibited under section 23(*m*) if the requirements of section 11(*e*) are met. However, if the taxpayer would, but for the prohibition in section 23(*m*), otherwise have qualified for a deduction under section 12B, no section 11(*e*) allowance may be claimed, as the asset in question will not be a qualifying asset under section 11(*e*).

9.6 Section 12BA and government grants

All government grants received by or accrued to a taxpayer must be included in gross income under paragraph (*l*C) of the definition of "gross income" in section 1(1), regardless of whether they are of a capital nature. However, exemptions are provided under section 12P for specified government grants which are listed in the Eleventh Schedule and are paid by government in the national, provincial or local spheres or are identified by the Minister by notice in the *Gazette*.

Section 12P(4) contains an anti-double-dipping rule to ensure that taxpayers do not obtain an unintended reduction in tax by claiming deductions for expenditure funded by exempt government grants contemplated in section 12P(2)[100] or (2A). Essentially, section 12P(4)

96 Section 102(1) of the TA Act.
97 See Interpretation Note 47 "Wear-and-Tear or Depreciation Allowance" for further detail.
98 Section 11(*e*).
99 See Interpretation Note 28 "Deductions of Home Office Expenses Incurred by Persons in Employment or Persons Holding an Office" for detail on section 23(*m*).
100 Paragraph 4.4 of the *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2012*.

provides a limitation calculation which must be performed for each year of assessment in which the taxpayer wants to claim an allowance on the relevant allowance asset.[101]

Example 11 – Calculating the deduction when various payment types are used

Facts:

In July 2023, Taxpayer A invested in a small-scale solar farm with the intention of generating energy to help reduce some of the pressure on the national grid. To this effect, Taxpayer A applied for a government grant to help fund the acquisition of numerous solar panels and the accompanying equipment and supporting structures required.

The cost of the entire system and structures was R2 million. Taxpayer A received a government grant of R1,5 million that was exempt under section 12P and paid R500 000 from its own funds.

For the purposes of this example, assume that all the requirements of section 12BA have been met.

Result:

The potential allowance under section 12BA of R2 500 000 (R2 000 000 × 125%) is greater than the limit of R625 000* in section 12P(4) and therefore Taxpayer A may claim a deduction of only R625 000.

The effect is that a taxpayer may not claim a deduction under section 12BA on the amount of expenditure funded by a government grant, that is, R1,5 million.

* Limitation calculation under section 12P(4) for an asset qualifying under section 12BA:

	R
Acquisition cost	2 000 000
Less: Exempt government grant	1 500 000
	500 000
Proviso to section 12P(4) as section 12BA deduction	125%
Limitation	625 000

10. Conclusion

Section 12B(1)(*h*), section 12BA and section 12U provide an incentive relating to the generation of electricity from specified sources of renewable energy.

A taxpayer may potentially claim a deduction under section 12B(1)(*h*) or section 12BA on the cost of assets acquired for the purpose of trade to be used in generating electricity from wind power, photovoltaic or concentrated solar power, hydropower or biomass. In specified circumstances foundations and supporting structures are deemed to be part of the asset and will also qualify for the deduction under these sections. Under section 12B, the costs of the improvements made to these assets as well as improvements to the supporting structures or foundations deemed to be part of the asset, are also deductible.

[101] For more information see Interpretation Note 59 “Tax Treatment of the Receipt or Accrual of Government Grants” and section 19 of the Taxation Laws Amendment Act, 2023.

The assets under section 12B(1)(*h*) and supporting structures or foundations are generally deductible commencing in the year of assessment that the asset is first brought into use at a rate of 50:30:20 per cent over a three-year period. The cost of the asset used in photovoltaic solar energy to generate electricity not exceeding one megawatt is deductible in full in the year that such asset is brought into use for the first time.

The cost of the improvements to the assets referred to in section 12B(1)(*h*) are deductible in the same manner provided for under section 12B(2) provided the improvement is used during the year of assessment as contemplated in section 12B(1)(*h*), that is, 100% if the improvement is to an asset brought into use to generate photovoltaic solar energy which does not exceed one megawatt otherwise over a three-year period at a rate of 50:30:20.

The incentive under section 12BA is an amount equal to 125% of the cost incurred by the taxpayer for the acquisition of the asset and applies to qualifying new and unused assets brought into use for the first time on or after 1 March 2023 but before 1 March 2025.

A deduction may be claimed under section 12U on the cost incurred of any road, fence and foundation or supporting structures specifically designed for such fence relating to certain qualifying renewable energy projects. Improvements to those assets may also be deductible under this section.

Annexure – The law

Section 12B(1)(*h*) and (*i*)

12B. Deduction in respect of certain machinery, plant, implements, utensils and articles used in farming or production of renewable energy.—(1) In respect of any—

. . . . . .

(*h*) machinery, plant, implement, utensil or article 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 which was or is brought into use for the first time by that taxpayer for the purpose of his or her trade to be used by that taxpayer in the generation of electricity from—

(i) wind power;

(ii) (*aa*) photovoltaic solar energy of more than 1 megawatt;

(*bb*) photovoltaic solar energy not exceeding 1 megawatt; or

(*cc*) concentrated solar energy;

(iii) hydropower to produce electricity of not more than 30 megawatts; or

(iv) biomass comprising organic wastes, landfill gas or plant material; or

(*i*) improvements (other than repairs) to—

(i) any machinery, plant, implement, utensil or article referred to in paragraph (*f*), (*g*) or (*h*); and

(ii) any foundation or supporting structure that is, in terms of the proviso to this subsection, deemed to be part of the machinery, plant, implement, utensil or article referred to in paragraph (*h*),

which is during the year of assessment used as contemplated in the relevant paragraph,

a deduction calculated in terms of subsection (2) shall be allowed in respect of the year of assessment during which such machinery, plant, implement, utensil or article or any improvement thereto (hereinafter referred to as an asset) is so brought into use and each of the two succeeding years of assessment, such succeeding years of assessment hereinafter in this section referred to as the second and third years, in chronological order: Provided that where any machinery, plant, implement, utensil, article or improvement for which a deduction is allowed under paragraph (*h*) is mounted on or affixed to any concrete or other foundation or supporting structure and—

(*a*) the foundation or supporting structure is designed for such machinery, plant, implement, utensil, article or improvement and constructed in such manner that it is or should be regarded as being integrated with the machinery, plant, implement, utensil, article or improvement;

(*b*) the useful life of the foundation or supporting structure is or will be limited to the useful life of the machinery, plant, implement, utensil, article or improvement mounted thereon or affixed thereto; and

(*c*) the foundation or supporting structure was brought into use on or after 1 January 2013,

the foundation or supporting structure shall be deemed to be a part of the machinery, plant, implement, utensil, article or improvement mounted thereon or affixed thereto.

(2) The deduction contemplated in subsection (1) shall be calculated on the cost to the taxpayer of the asset and the rate of the allowance shall be—

(*a*) in the case of an asset other than an asset contemplated in paragraph (*b*)—

(i) in respect of the year of assessment during which the asset is so brought into use, 50 per cent of such cost;

(ii) in respect of the second year, 30 per cent of such cost; and

(iii) in respect of the third year, 20 per cent of such cost;

(*b*) in the case of an asset contemplated in subsection (1) (*h*) (ii) (*bb*), 100 per cent of such cost.

(*c*) . . . . . .

(3) For purposes of this section the cost to a taxpayer of any asset acquired by that taxpayer shall be deemed to be the lesser of the actual cost to the taxpayer or the cost which a person would, if he or she had acquired the asset under a cash transaction concluded at arm's length on the date which the transaction for the acquisition of the asset was in fact concluded, have incurred in respect of the direct cost of acquisition of the asset, including the direct cost of the installation or erection thereof.

(4) No deduction shall be allowed under this section in respect of—

(*a*) any asset which has been let by the taxpayer under a lease other than an operating lease as defined in section 23A (1), unless—

(i) the lessee under such lease derives in the carrying on of his trade amounts constituting income for the purposes of this Act; and

(ii) the period for which the asset is let under such lease is at least 5 years or such shorter period as is shown by the taxpayer to be the useful life of the asset;

(*b*) . . . . . .

(*c*) any asset brought into use by any company during any year of assessment if such asset was previously brought into use by any other company during such year and both such companies are managed, controlled or owned by substantially the same persons, and a deduction under this section was previously granted to such other company;

(*d*) any asset which has been disposed of by the taxpayer during any previous year of assessment;

(*e*) . . . . . .

(*f*) any asset in respect of which an allowance has been granted to the taxpayer under section 12E;

(*g*) any asset the ownership of which is retained by the taxpayer as a seller 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; or

(*h*) any asset in respect of which a deduction has been allowed to the taxpayer under section 6C or 12BA.

(4A) . . . . . .

(4B) Where any asset in respect of which any deduction is claimed in terms of this section was during any previous financial year brought into use for the first time by the taxpayer for the purposes of any trade carried on by such taxpayer, the receipts and accruals of which were not included in the income of such taxpayer during such year, any deduction which could have been allowed in terms of this section during such previous year or any subsequent year that such asset was used by such taxpayer shall for the purposes of this section be deemed to have been allowed during such previous year or years as if the receipts and accruals of such trade had been included in the income of such taxpayer.

(5) The deductions which may be allowed in terms of this section in respect of any asset shall not in the aggregate exceed the cost to the taxpayer of such asset.

(6) Where a lessor of any asset under a lease contemplated in subsection (4) (a) has within the period contemplated in subparagraph (ii) of that paragraph, reckoned from the commencement of the period for which the asset is let under that lease, disposed of the whole or a portion of that lessor's interest in the lease or of his or her right to receive rent under the lease, there must be included in that lessor's income for the year of assessment during which the disposal is made a sum equal to the aggregate of any deductions allowed to that lessor under this section, less a proportionate amount in respect of the expired portion of the lease or any portion of that interest or right which has not been disposed of by the lessor.

Section 12BA

12BA. Enhanced deduction in respect of certain machinery, plant, implements, utensils and articles used in production of renewable energy.—(1) In respect of any new and unused machinery, plant, implement, utensil, or article 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 which was or is brought into use for the first time by that taxpayer for the purpose of that taxpayer's trade on or after 1 March 2023 and before 1 March 2025 to be used by that taxpayer or the lessee of that taxpayer in the generation of electricity in the Republic from—

(*a*) wind power;

(*b*) photovoltaic solar energy;

(*c*) concentrated solar energy;

(*d*) hydropower to produce electricity; or

(*e*) biomass comprising organic wastes, landfill gas or plant material,

a deduction calculated in terms of subsection (2) shall be allowed in respect of the year of assessment during which the abovementioned assets are brought into use: Provided that where any machinery, plant, implement, utensil or article for which a deduction is allowed under this subsection is mounted on or affixed to any concrete or other foundation or supporting structure and—

(i) the foundation or supportive structure is designed for such machinery, plant, implement, utensil or article and constructed in such manner that it is or should be regarded as being integrated with the machinery, plant, implement, utensil or article; and

(ii) the useful life of the foundation or supporting structure is or will be limited to the useful life of the machinery, plant, implement, utensil or article mounted thereon or affixed thereto,

the foundation or supporting structure shall be deemed to be part of the machinery, plant, implement, utensil or article mounted thereon or affixed thereto.

(2) The deduction contemplated in subsection (1) is equal to an amount of 125 per cent of the cost incurred by the taxpayer for the acquisition of the asset.

(3) For the purposes of this section, the cost to a taxpayer of any asset acquired by that taxpayer shall be deemed to be the lesser of the actual cost to the taxpayer or the cost which a person would, if that person had acquired the asset under a cash transaction concluded at arm's length on the date which the transaction for the acquisition of the asset was in fact concluded, have incurred in respect of the direct cost of acquisition of the asset, including the direct cost of the installation or erection thereof.

(4) No deduction shall be allowed under this section in respect of—

(*a*) any asset the ownership of which is retained by the taxpayer as a seller 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; or

(*b*) any asset brought into use after 28 February 2025.

Section 12U

12U. Additional deduction in respect of roads and fences in respect of production of renewable energy.—(1) There must be allowed to be deducted by a person any amount actually incurred during the year of assessment in which that expenditure is incurred, subject to subsection (3), in respect of—

(*a*) the construction of any road or the erecting of any fence and a foundation or supporting structure designed for such a fence for the purpose of trade of that person of generation of electricity which exceeds 5 megawatts from—

(i) wind power;

(ii) solar energy;

(iii) hydropower to produce electricity of not more than 30 megawatts; or

(iv) biomass comprising organic wastes, landfill gas or plant material; or

(*b*) improvements (other than repairs) to—

(i) any road or fence contemplated in paragraph (*a*); or

(ii) foundation or supporting structure designed for such a fence, subject to subsection (2).

(2) For the purpose of any deduction under subsection (1)—

(*a*) the foundation or supporting structure designed for a fence must be constructed in such manner that the foundation or supporting structure is or should be regarded as being integrated with that fence; and

(*b*) the useful life of the foundation or supporting structure is or will be limited to the useful life of that fence.

(3) For purposes of deduction under subsection (1) any expenditure—

(*a*) actually incurred by that person prior to the commencement of and in preparation for carrying on that trade;

(*b*) which would have been allowed as a deduction in terms of subsection (1) had the expenditure been incurred after that person commenced carrying on that trade; and

(*c*) which was not allowed as a deduction in any previous year of assessment,

shall be allowed as a deduction in terms of this section.

Definition of "instalment credit agreement" in section 1(1) of the VAT Act

"instalment credit agreement" means any agreement entered into on or after the commencement date whereby any goods consisting of corporeal movable goods or of any machinery or plant, whether movable or immovable—

(*a*) are supplied under a sale under which—

(i) the goods are sold by the seller to the purchaser against payment by the purchaser to the seller of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future; and

(ii) such sum of money includes finance charges stipulated in the agreement of sale; and

(iii) the aggregate of the amounts payable by the purchaser to the seller under such agreement exceeds the cash value of the supply; and

(iv) (*aa*) the purchaser does not become the owner of those goods merely by virtue of the delivery to or the use, possession or enjoyment by him thereof; or

(*bb*) the seller is entitled to the return of those goods if the purchaser fails to comply with any term of that agreement; or

(*b*) are supplied under a lease under which—

(i) the rent consists of a stated or determinable sum of money payable at a stated or determinable future date or periodically in whole or in part in instalments over a period in the future; and

(ii) such sum of money includes finance charges, including any amount determined with reference to the time value of money, stipulated in the lease; and

(iii) the aggregate of the amounts payable under such lease by the lessee to the lessor for the period of such lease (disregarding the right of any party thereto to terminate the lease before the end of such period) and any residual value of the leased goods on termination of the lease, as stipulated in the lease, exceeds the cash value of the supply; and

(iv) the lessee is entitled to the possession, use or enjoyment of those goods for a period of at least 12 months; and

(v) (*aa*) the lessee accepts the full risk of destruction or loss of, or other disadvantage to, those goods and assumes all obligations of whatever nature arising in connection with the insurance, maintenance and repair of those goods while the agreement remains in force; or

(*bb*) (A) the lessor accepts the full risk of destruction or loss of, or other disadvantage to those goods and assumes all obligations of whatever nature arising in connection with the insurance of those goods; and

(B) the lessee accepts the full risk of maintenance and repair of those goods and reimburses the lessor for the insurance of those goods,

while the agreement remains in force;