

(b)	Process of manufacture or similar process	22
(c)	Owned by and brought into use by the small business corporation.....	23
(d)	Meaning of used “directly in a process of manufacture” or similar process	24
(e)	Other deductions and allowances.....	25
4.2.2	Other assets [section 12E(1A)].....	26
(a)	Qualifying assets	27
(b)	Meaning of “in respect of which a deduction is allowable under section 11(e)”	28
(c)	Acquisition by a small business corporation	29
(d)	Election of the small business corporation in the year the asset is brought into use	29
(e)	Amount of the allowance under section 12E(1A)(b).....	30
4.2.3	Cost of an asset [section 12E(2)].....	33
(a)	Determination of cost for replacement assets.....	33
4.2.4	Limitation on the amount of the allowance available under section 12E(1) and 12E(1A).....	34
4.2.5	Cost in moving an asset [section 12E(3)].....	36
4.2.6	Assets acquired for no consideration.....	38
5.	Recoupment and roll-over relief upon disposal.....	39
6.	Loss on disposal of depreciable assets [section 11(o)].....	41
7.	Impact of a fluctuating small business corporation status on the accelerated allowance	42
7.1	Tax treatment of capital allowances claimed under other provisions of the Act before qualifying as a small business corporation.....	42
7.2	Loss of SBC status before deducting the full cost of an asset under section 12E(1A).....	42
8.	Objection and appeal.....	42
9.	Conclusion	43
	Annexure A – The law.....	44
	Annexure B – Permissible holding of shares or interests.....	48

Preamble

In this Note unless the context indicates otherwise –

- “**Close Corporations Act**” means the Close Corporations Act No. 69 of 1984;
- “**Companies Act**” means the Companies Act No. 71 of 2008;
- “**Co-operatives Act**” means the Co-operatives Act No. 14 of 2005;
- “**qualifying entity**” means a “close corporation”, a “co-operative” and any “private company” as defined in section 1 of the Companies Act (see **4.1.1**);
- “**SBC**” means small business corporation;
- “**Schedule**” means a Schedule to the Act;
- “**section**” means a section of the Act;

- “**TA Act**” means the Tax Administration Act No. 28 of 2011;
- “**the Act**” means the Income Tax Act No. 58 of 1962;
- “**VAT Act**” means the Value-Added Tax Act No. 89 of 1991; and
- any other word or expression bears the meaning ascribed to it in the Act.

1. Purpose

This Note provides guidance on the interpretation and application of section 12E which provides accelerated depreciation allowances for a taxpayer that qualifies as an SBC.

This Note does not address other sections in the Act which contain provisions that refer to or are applicable to a “small business corporation” as defined in section 12E. For example, section 8FA(3)(a) provides that section 8FA, which deems hybrid interest to be a dividend in specie, does not apply to a debt owed by an SBC. Section 8FA is not discussed in this Note.

Section 10(1)(zK) and section 23O apply when an amount of funding has been received by or accrued to an SBC from a “small business funding entity” as defined in section 1(1). Generally, these sections provide for the exemption of such receipts and accruals and the reduction of the deduction available for related expenditure. In this regard, this note considers only the impact of such receipts and accruals on the allowances available under section 12E(1) and section 12E(1A).

Some of the requirements in section 12E refer to the Companies Act. This Note discusses those requirements with reference to that Act but does not discuss the requirements, which may have been different in some respects, when the Act previously referred to the Companies Act No. 61 of 1973.

2. Background

Section 12E sets out the requirements which must be met in order for a specified entity to qualify as an SBC. It provides accelerated depreciation allowances on certain capital assets brought into use by an SBC.

In addition, section 5(2) and the annual Rates and Monetary Amounts and Amendment of Revenue Laws Acts provide for concessionary tax rates which follow a graduated marginal structure (0%, 7%, 21% and 28%)¹ as opposed to a flat corporate rate of 28%.

The ITR14 return contains a question asking taxpayers whether they are an SBC as referred to in section 12E. The question must be answered “yes” if a taxpayer meets the requirements of an SBC as stipulated in section 12E. If the question is answered “yes”, a further set of questions relating to section 12E will be asked within the return. The answers to these additional questions will determine whether the taxpayer will be assessed as an SBC for that year of assessment.

3. The law

The relevant provisions are quoted in **Annexure A**.

¹ See the *Guide for Tax Rates/Duties/Levies* (Issue 11) dated 26 March 2015, for the rates and marginal structure applicable to different years of assessment.

4. Application of the law

4.1 Qualifying requirements

In order to qualify as an SBC, an entity must meet the requirements stipulated in the definition of “small business corporation” in section 12E(4)(a). These requirements comprise four key areas, namely:

- A legal entity requirement (see **4.1.1**)
- A holder of shares requirement (see **4.1.2**)
- A gross income limitation requirement (see **4.1.3**)
- A business activity requirement (see **4.1.4**)

In addition, the entity may not be a “personal service provider” as defined in the Fourth Schedule. The prohibition relating to personal service providers is discussed in **4.1.5**.

The requirements must be reconsidered in every year of assessment since an entity could meet all the requirements and be an SBC in one year of assessment but not in another year of assessment.

4.1.1 Legal entity requirement [section 12E(4)(a)]

One of the requirements in qualifying as an SBC is that the taxpayer must be a juristic person in the form of a “close corporation”, “co-operative” or “private company” as defined in section 1 of the Companies Act. In this Note these entities, which are included in the definition of “company” in section 1(1), are referred to as “qualifying entities”.

(a) Close corporation

A “close corporation” is defined in section 1(1) as a close corporation within the meaning of the Close Corporations Act. The Close Corporations Act defines a “corporation” as a close corporation referred to in section 2(1) which has been registered under that Act. A close corporation is therefore a juristic person, with between one and ten² persons who qualified for membership, which has complied with that Act’s requirements for the registration of its founding statement and has duly registered under that Act.

A person or group of persons is prohibited from registering a close corporation as from 1 May 2011. However close corporations incorporated and registered before this date may still qualify as an SBC if the other requirements of section 12E(4)(a) are met.

(b) Co-operatives

A “co-operative” is defined in section 1(1) as any association of persons registered under section 27 of the Co-operatives Act No. 91 of 1981³ or section 7 of the Co-operatives Act.

² Section 28 of the Close Corporations Act.

³ A co-operative registered under the Co-operatives Act No. 91 of 1981 may continue to operate as if that Act had not been repealed subject to the transitional provisions in section 97 of the Co-operatives Act.

The Co-operatives Act and Regulations⁴ provide a regulatory framework for co-operatives by setting out the requirements and procedures for the functioning and operations of the various types of co-operatives.

While it is accepted that a large number of co-operatives may operate informally and, as such, may not be formally registered, only entities that are duly registered under the Acts referred to above may qualify as SBCs.

(c) Private company

A “private company” is defined in section 1 of the Companies Act as –

“a profit company that—

- (a) is not a public,⁵ personal liability,⁶ or state-owned company;⁷ and
- (b) satisfies the criteria set out in section 8(2)(b);”.

Under the Companies Act No. 61 of 1973 a personal liability company was a private company which was not specifically defined or excluded from being a private company. As a result it could historically have qualified as an SBC. This situation, however, no longer prevails since a personal liability company is specifically excluded from the definition of “private company”.

A “company” is in turn defined in section 1 of the Companies Act as a juristic person which is incorporated under the Companies Act, is a domesticated company or immediately before 1 May 2011 was –

- Registered under the Companies Act No. 61 of 1973 (other than as an “external company” as defined in that Act) or under the Close Corporations Act (if subsequently converted under Schedule 2 to the Companies Act); or
- In existence and recognised as an “existing company” under the Companies Act No. 61 of 1973; or
- Deregistered under the Companies Act No. 61 of 1973 and subsequently re-registered under the Companies Act.

A profit company is one which is incorporated for the purpose of financial gain for its shareholders.⁸

Section 8(2)(b) of the Companies Act provides that a private company’s Memorandum of Incorporation must prohibit it from offering its securities to the public and it must restrict the transferability of its securities.

⁴ GNR. 366 of 30 April 2007: Regulations.

⁵ A “public company” is defined in section 1 of the Companies Act as a profit company which is not a state-owned company, a private company or a personal liability company.

⁶ A “personal liability company” is defined in sections 1 and 8(2)(c) of the Companies Act as a profit company which meets the criteria for a private company and its Memorandum of Incorporation states that it is a personal liability company. Personal liability companies are typically incorporated associations of professional persons in which the directors are jointly and severally liable for the debts and liabilities of the company See *Henochsberg on the Companies Act 71 of 2008*, Notes on Section 8 [online] (My LexisNexis: May 2015).

⁷ A “state-owned company” is defined in section 1 of the Companies Act as a) a company which is either listed as a public entity in the relevant Schedules of the Public Finance Management Act No. 1 of 1999 or b) is owned by a municipality as contemplated in the Local Government: Municipal Systems Act No. 32 of 2000 and is otherwise similar to a).

⁸ Definition of “profit company” in section 1 of the Companies Act.

A private company is, therefore, generally a juristic person that has been incorporated under the Companies Act for the purposes of making financial gain and whose founding document prohibits the offer of its shares to the public and restricts the transferability of its shares. The definition of “private company” specifically excludes a public, personal liability or state-owned company.

A company which is incorporated and registered under foreign legislation will not qualify as an SBC. However, a foreign company which has successfully applied under section 13(5) to 13(11) of the Companies Act to transfer its registration from the foreign jurisdiction in which it is registered to South Africa is deemed to have been incorporated in South Africa. Such a company will exist as a company under the Companies Act as if it had originally been so incorporated and registered. A foreign company that has transferred its registration to South Africa is called a “domesticated company” and may qualify as an SBC if it satisfies the requirements of a private company as discussed above and the other requirements of section 12E(4)(a).

4.1.2 Holder of shares requirement

(a) The holding of shares in the potential small business corporation [section 12E(4)(a)]

Section 12E(4)(a) provides that all the holders of shares or members, as appropriate, of a qualifying entity must, at all times during the relevant year of assessment, be natural persons. No part of the share capital or members interest of an SBC can therefore be held by a juristic person such as another company. A contravention of this requirement, even if for one day during the year of assessment, will disqualify a qualifying entity from being an SBC for the year of assessment in which the requirement was not met, irrespective of whether all of the other requirements are met.

A qualifying entity whose shares or members interest are held in a trust may qualify as an SBC provided that the beneficiaries hold a vested right in those shares or members interest throughout the year of assessment and are all natural persons. The holders of shares requirement looks at the beneficial ownership of the shares or members interest.⁹ Therefore, if the shares or members interest held by a trust are beneficially owned by natural persons, the share or interest in the qualifying entity would be viewed as being held by a natural person. However, to the extent that the shares are beneficially held by the trust, the company will not qualify as an SBC even if its trustees are natural persons. The trustees are merely the representative taxpayer of the trust and do not have any beneficial interest in the trust assets.

(b) The holding of shares in any other company by the holders of shares or members of the close corporation or co-operative [section 12E(4)(a)(ii)]

The holders of shares in, or members of, the qualifying entity may not at any time during the particular year of assessment hold any shares or have any interest in the equity of any other “company” as defined in section 1(1), except in those companies specifically permitted. The reason for the limitation is to prohibit multiple shareholdings or arrangements which may be used to split income between various qualifying entities, thus providing taxpayers with an undue tax benefit. A share or interest held in the equity of another “company”, as defined in section 1(1), which is

⁹ See paragraph 3.2 of the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2011 in relation to section 7(1)(zO) of the Taxation Laws Amendment Act No. 24 of 2011.

held as a trustee or nominee will generally not be regarded as contravening this requirement provided the holder or member is not the beneficial owner of the share or interest and is not entitled to any profits, income or capital of that other company for the relevant year of assessment.

The companies in which a holding of shares is permitted are listed in **Annexure B**. Any shares or interest in any company not specifically permitted, even if held for one day during the relevant year of assessment, will lead to the qualifying entity being disqualified as an SBC for that year of assessment.

Example 1 – Limitation on shares held by holders of shares

Facts:

Company A, which renders information technology (IT) services to a number of clients, has six full-time employees (two holders of shares, X and Y, and four other employees). The employees are all involved in rendering IT services to clients throughout the year of assessment. Company A's gross income for the year of assessment was R5,6 million.

In addition to the shares in Company A, X is the holder of a number of shares in a share block company and Y is the holder of shares in Company Z. Company Z was listed on the JSE but was delisted during the year of assessment.

Result:

The shares held by X in a share block company are permissible under section 12E(4)(a)(ii)(cc). The shares held by Y in Company Z are impermissible owing to the company being delisted during the year of assessment.

Company A cannot therefore qualify as an SBC for the year of assessment as a result of the shares held by Y in Company Z.

4.1.3 Gross income limitation requirement [section 12E(4)(a)(i)]

The gross income of a qualifying entity may not exceed R20 million for the particular year of assessment.¹⁰ Key factors for consideration are what constitutes gross income, what is a year of assessment and the circumstances in which the limitation of R20 million must be reduced. These are considered below.

(a) Gross income

The term "gross income" is defined in section 1(1) and means, in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of that resident¹¹ during the year or period of assessment excluding receipts or accruals of a capital nature but including the amounts (whether of a capital nature or not) listed in paragraphs (a) to (n) of that definition.

¹⁰ The R20 million limitation is deemed to have come into operation on 1 April 2013 and applies in respect of years of assessment ending during the period of 12 months ending on 31 March 2014 [section 7(1) of the Rates and Monetary Amounts and Amendment of Revenue Laws Act No. 23 of 2013]. Clause 140 of the Taxation Laws Amendment Bill, 2015 [B29B-2015] amends this effective date to include all years of assessment ending on or after 1 April 2013. The examples in this Note assume this proposed amendment is promulgated.

¹¹ The position for non-residents is not discussed since it is unlikely that a non-resident company with South African-source income will qualify as an SBC.

In *Geldenhuis v CIR*, Steyn J stated that the words “received by” as used in the definition of “gross income” –¹²

“must mean ‘received by the taxpayer on his own behalf for his own benefit’”.

The term “accrued to” was held by Watermeyer J (as he then was) in *WH Lategan v CIR* to mean –¹³

“to which he has become entitled”.

Gross income includes income that is exempt from normal tax, for example, a government grant of a non-capital nature which qualifies for an exemption under section 12P. Taxable capital gains are not included in gross income since section 26A specifically provides for the inclusion of a taxable capital gain in taxable income.

(b) Year of assessment

The term “year of assessment” as defined in section 1(1) “means any year or other period in respect of which any tax or duty leviable under this Act is chargeable ...”. Under section 5(1)(d) normal tax is payable in respect of the taxable income received by or accrued to or in favour of “any company during every financial year of such company”. A company’s year of assessment is thus its financial year.

Qualifying entities are included in the definition of “company”. It follows that the definition of “year of assessment” in section 1(1) applies to qualifying entities and a qualifying entity’s year of assessment is its financial year.¹⁴

The term “financial year” is defined in section 1(1) in relation to any company and hence also applies to a qualifying entity. The financial year of a newly incorporated or created company is the period commencing on the date of incorporation¹⁵ or creation and which ends on the last day of February immediately succeeding that date or any other date that the Commissioner, having regard to the circumstances of the case, may approve as the date on which the first year of assessment ends. For subsequent years the financial year commences immediately after the last day of the immediately preceding year of assessment and ends on the anniversary of that last day or any other date that the Commissioner, having regard to the circumstances of the case, may approve as the date on which a subsequent year of assessment will end.

Depending on the facts, a financial year may be shorter than, equal to or longer than 12 months in duration.

Therefore, the last day of a year of assessment may differ from qualifying entity to qualifying entity and a qualifying entity’s year of assessment, while often 12 months, may be shorter than, equal to or longer than 12 months. The impact of a longer or shorter year of assessment on the calculation of the gross income limitation is discussed in **4.1.3(c)**.

¹² 1947 (3) SA 256 (C), 14 SATC 419 at 430.

¹³ 1926 CPD 203, 2 SATC 16 at 20. The correctness of the interpretation of “accrued to” in Lategan’s case was subsequently confirmed by Hefer JA in *CIR v People’s Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), 52 SATC 9 at 24.

¹⁴ Definitions of “company” and “year of assessment” in section 1(1).

¹⁵ Under section 27(2)(a) of the Companies Act, date of incorporation is the date that the incorporation of the company is registered, as stated in its registration certificate.

(c) Variation of the gross income limitation

The gross income of an SBC is limited to R20 million for a year of assessment. An exception to this rule is contained in the proviso to section 12E(4)(a)(i) which provides that if a qualifying entity carries on a trade, in which an asset contemplated in section 12E is used, for a period which is *less* than 12 months, the limitation of R20 million must be reduced proportionately. The ratio applied to the R20 million limitation is the number of months the qualifying entity traded divided by 12. In determining the number of months during which a qualifying entity traded, a part of a month is treated as a full month. The proviso does not reduce or increase the denominator of 12 if the year of assessment is shorter or longer than 12 months.

The date on which trade commences (for example, a newly incorporated company which subsequently commenced trade) and ceases (for example, a company in the process of liquidation which has ceased trade) are important considerations in determining an entity's gross income limitation for purposes of section 12E(4)(a)(i). The point at which a trade commences or ceases must be determined on a case-by-case basis taking the detailed facts and circumstances into account. For a detailed discussion on the trade requirement, see Interpretation Note No. 33 (Issue 4) dated 22 July 2014 "Assessed Losses: Companies: The 'Trade' and 'Income from Trade' Requirements".

The proviso does not increase the R20 million limitation when the year of assessment or the period of trading is longer than 12 months. Therefore, when a qualifying entity has, for example, a 14-month year of assessment and traded for 13 months in that year of assessment, the R20 million limitation still applies.

Example 2 – Determination of gross income limitation*Facts:*

A qualifying entity with a year of assessment ending 28 February started trading activities on 15 August 2014. Gross income for the period 15 August 2014 to 28 February 2015 amounted to R15 million. The qualifying entity acquired a machine contemplated in section 12E(1A) on 1 August 2014 and commenced using it on 15 August 2014.

Result:

The period of trade from 15 August 2014 to 28 February 2015 is less than 12 months and the taxpayer must therefore reduce the gross income limitation in proportion to the number of months it has traded.

The qualifying entity has traded for 6½ months, however under section 12E(4)(a)(i) part of a month must be treated as a full month. The qualifying entity is, therefore, treated as if it traded for 7 months.

$$\text{R20 million} \times \frac{\text{number of full months traded}}{12 \text{ months}}$$

$$= \text{R20 million} \times \frac{7}{12}$$

$$= \text{R11,67 million}$$

The gross income limitation for the taxpayer for the year of assessment ended 28 February 2015 is therefore R11,67 million. Gross income for the year of assessment is R15 million which exceeds the limitation of R11,67 million. Therefore, the qualifying entity has not met the gross income limitation requirement and cannot qualify as an SBC for the year of assessment ended 28 February 2015.

4.1.4 Business activity requirement [section 12E(4)(a)(iii) and (iv)]

Broadly, section 12E(4)(a)(iii) imposes a limitation on the amount of income which may be generated from certain income streams, namely investment income and income generated from personal services. An entity cannot qualify as an SBC if more than 20% of the total of all receipts and accruals (excluding capital receipts) and capital gains, consists of investment income and income from the rendering of a personal service.

The terms “investment income” and “personal service” are specifically defined in section 12E(4)(c) [see 4.1.4(a)] and (d) [see 4.1.4(b)] respectively. The calculation of the 20% limitation is discussed in 4.1.4(c).

(a) Definition of “investment income” [section 12E(4)(c)]

Section 12E(4)(c) defines “investment income” as –

- “(c) ‘investment income’ means—
- (i) any income in the form of dividends, foreign dividends, royalties, rental derived in respect of immovable property, annuities or income of a similar nature;
 - (ii) any interest as contemplated in section 24J¹⁶ (other than any interest received by or accrued to any co-operative bank as contemplated in paragraph (a)(ii)(ff)), any amount contemplated in section 24K¹⁷ and any other income which, by the laws of the Republic administered by the Commissioner, is subject to the same treatment as income from money lent; and
 - (iii) any proceeds derived from investment or trading in financial instruments (including futures, options and other derivatives), marketable securities or immovable property;”.

The definition of “investment income” must be interpreted within the context of section 12E(4)(a)(iii) because that provision provides that not more than 20% of the total receipts and accruals (other than those of a capital nature) and capital gains may *consist of* investment income and income from the rendering of a personal service. “Consists” means to “be composed or made up of”¹⁸ and therefore for an amount to be investment income it must first have been included in the qualifying entity’s total receipts and accruals (other than those of a capital nature) or capital gains.

For example, if a qualifying entity had gross income of R400 and also disposed of shares held on capital account with a base cost of R90 for R120, section 12E(4)(a)(iii) requires that not more than 20% of R430 (R400 receipt of a revenue nature plus the capital gain of R30) may consist of investment income and income from rendering a personal service. Under paragraph (iii) of the definition of investment income “proceeds” must be interpreted to refer to the capital gain of R30

¹⁶ Section 24J deals with the incurral and accrual of interest.

¹⁷ Section 24K deals with the incurral and accrual of amounts in respect of interest rate agreements.

¹⁸ www.oxforddictionaries.com/definition/english/consist [Accessed 7 January 2016].

because that is the amount which has been included in the total of R430 in respect of the disposal of financial instruments held for investment purposes (that is on capital account as opposed to being held for trading or revenue purposes). The gain of R30, and not the full proceeds of R120, was included in the total of R430. Therefore, $R30 \text{ investment income} / R430 \times 100 = 6,98\%$ and the limitation has not been exceeded. If the shares had been held on revenue account then the total under section 12E(4)(a)(iii) would be R520 (R400 + R120) and investment income would be R120. Therefore, $R120 / R520 \times 100 = 23,08\%$ and the limitation would have been exceeded with the result that the qualifying entity could not qualify as an SBC even if all the other requirements under section 12E(4)(a) were met.

Example 3 – Determination of investment income

Facts:

A close corporation conducts two trades, namely, selling imported kitchen equipment and operating a small guesthouse. The guesthouse offers accommodation on a bed-and-breakfast basis. Guests can, however, request dinner at an additional cost.

Gross income consisted of the sale of kitchen equipment of R10 million, accommodation at the guesthouse of R4 million and supply of dinner meals of R400 000.

Result:

Gross income for the year of assessment is R14 400 000 which means it has not exceeded the gross income limitation of R20 million.

Total receipts and accruals (other than those of a capital nature) and capital gains = R14 400 000 + Rnil = R14 400 000.

The provision of serviced accommodation at the guesthouse gives rise to rental income from immoveable property which is "investment income" as defined. The room rate is a daily fixed periodical return, the guest is a tenant or occupier of the room and the guesthouse owner is a landlord. The gross income from the sale of kitchen equipment and the provision of dinner meals is not investment income. Therefore, investment income = R4 million.

Investment Income / Total receipts and accruals (other than those of a capital nature) and capital gains = $R4\,000\,000 / 14\,400\,000 \times 100 = 27,8\%$.

The 20% limitation has been exceeded and as a result the close corporation has not met the business activity requirement and cannot qualify as an SBC.

(b) Definition of "personal service" [section 12E(4)(d)]

For the purposes of the 20% limitation, one of the tainted income streams besides investment income is income from the rendering of a personal service.

Section 12E(4)(d) defines "personal service" as –

- “(d) **‘personal service’**, in relation to a company, co-operative or close corporation, means any service in the field of accounting, actuarial science, architecture, auctioneering, auditing, broadcasting, consulting, draftsmanship, education, engineering, financial service broking, health, information technology, journalism, law, management, real estate broking, research, sport, surveying, translation, valuation or veterinary science, if—

an interest in the qualifying entity is involved in performing a service included in the list in section 12E(4)(d) and the qualifying entity would like to benefit from the exclusion from the personal service income requirement. A qualifying entity wishing to use the exclusion must maintain a minimum of three full-time employees *throughout* the year of assessment despite any lay-offs or resignations that may occur. An employee must –

- be engaged on a full-time basis in the qualifying entity's business of performing the relevant service;
- not be a holder of shares in or a member of the qualifying entity; and
- not be a connected person in relation to a holder of shares in or a member of the qualifying entity.

The number of shares held or the size of the member's interest and how the shares or interest were acquired are irrelevant since section 12E(4)(d)(ii) merely refers to "a holder of a share in the company or a member of the co-operative or close corporation". Thus, for example, an employee who holds one share acquired through an employee share incentive scheme cannot be included in the three or more full-time employee count.

The persons considered in the employee count need not necessarily be involved in an activity that directly generates the income from the potential personal service. For example, a receptionist in an accounting firm who does not directly perform the accounting services for which a client is invoiced but is involved on a full-time basis in the support services which allow that accounting service to be provided, will be considered to be involved in the business of performing that service. The receptionist would be included in the three or more full-time employee count because he or she is engaged in the business of the qualifying entity of rendering *that service*, '*that service*' meaning the accounting service falling in one of the categories listed in section 12E(4)(d).

The term "full-time employee" is not defined for purposes of section 12E and must therefore be given its ordinary grammatical meaning taking into account the context in which the term appears and the purpose to which it is directed.²⁰ The terms "full-time" and "employee" are considered separately below.

The Merriam-Webster Dictionary describes "full-time" as –²¹

"working the full number of hours considered normal or standard...done during the full number of hours considered normal or standard ...requiring all of or a large amount of your time".

The Oxford Online Dictionary defines "full-time" as –²²

"occupying or using the whole of someone's available working time".

The facts and circumstances of each case are thus critical in determining if an employee is a full-time employee at a particular employer because it is necessary to consider the number of hours the employee works for that employer in relation to the full normal working hours for other employees at that employer. Casual, temporary or

²⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

²¹ www.merriam-webster.com/dictionary/full-time [Accessed 7 January 2016].

²² www.oxforddictionaries.com/definition/english/full-time [Accessed 7 January 2016].

part-time employees are not employed on a full-time basis since they work less than the standard full number of hours and are therefore not taken into account when determining the employee count in the personal service definition.

Although not directly relevant to section 12E, the definition of “part-time employee” in section 198C(1) of the Labour Relations Act No. 66 of 1995 is consistent with the above interpretation.

The Business Dictionary defines “employee” as follows.²³

“An individual who works part-time or full-time under a contract of employment, whether oral or written, express or implied, and has recognised rights and duties. Also called worker.”

Under common law, an employee does not include an independent contractor since this type of contract does not generally result in an employer-employee relationship. An independent contractor who has been hired by a qualifying entity will therefore not be taken into account when determining the employee count in the personal service definition. The definition of “employee” in the Fourth Schedule, which includes independent contractors in certain instances, is applicable only to the Fourth Schedule and not section 12E.

Example 4 – The amount of income attributable to the rendering of a personal service

Facts:

Company A renders services in the field of actuarial science. The services are performed by X and Y. X holds shares in Company A.

Company A also employs a full-time receptionist whose duties relate only to the actuarial services part of the business. Z is also employed on a full-time basis to write articles for various financial magazines.

The following amounts have been received by or accrued to Company A during a year of assessment:

Income from the rendering of actuarial services by X	R250 000
Income from the rendering of actuarial services by Y	R350 000
Income from articles written for financial magazines	R150 000

Result:

The actuarial services rendered by Company A fall within the “actuarial science” category listed in section 12E(4)(d). Some of the services were performed by X who is a holder of shares in the company [section 12E(4)(d)(i)].

Y and the receptionist are employed on a full-time basis in the business of the rendering of actuarial services. However, Z is engaged in a different service [section 12E(4)(d)(ii)]. The income from the actuarial services performed by X of R250 000 is thus income from rendering a personal service. The income from the actuarial services performed by Y of R350 000 is not income from rendering a personal service because Y is not a holder of shares in the company.

²³ www.businessdictionary.com/definition/employee [Accessed 7 January 2016].

The income of R150 000 from writing articles for financial magazines falls outside the definition of “personal service”. Although the service falls within the “journalism” category listed in section 12E(4)(d), it is not performed by a holder of shares in the company.

Example 5 – Three or more full-time employees

Facts:

Skin Care (Pty) Ltd is a company owned by three dermatologists, each holding an equal percentage of shares in the company.

The practice consists of the three dermatologists, one receptionist and three pathologists who are involved in analysing skin and blood samples of patients in their own in-house laboratory. All the employees are employed on a full-time basis. The receptionist is appointed to schedule appointments for the dermatologists and pathologists and to handle patient accounts. One of the pathologists is married to one of the dermatologists.

Result:

The services rendered by the dermatologists and pathologists fall within the “health” category listed in section 12E(4)(d).

The services are being performed personally by the three holders of shares in Skin Care (Pty) Ltd [section 12E(4)(d)(i)]. However, their services are not a personal service because the company employs three employees who are not holders of shares in the company and are not related to, and therefore connected to, any of the holders of shares, on a full-time basis in the business of rendering the services. These three employees are the receptionist and the two pathologists who are not connected persons in relation to the holders of shares in Skin Care (Pty) Ltd [section 12E(4)(d)(ii)].

The pathologist who is married to the dermatologist is a connected person in relation to one of the holders of shares in Skin Care (Pty) Ltd and is therefore not included in the three-or-more employee count.

(c) Calculation of the 20% limitation on investment income and income from rendering a personal service [section 12E(4)(a)(iii)]

As noted in 4.1.4, the aggregate income from investment and personal services may not exceed 20% of the qualifying entity’s total receipts and accruals (excluding receipts and accruals of a capital nature) and capital gains.

The words “of a capital nature” are not defined in the Act. The South African courts have considered the meaning of these words in a number of capital versus revenue disputes and in deciding these cases have developed a number of tests or guidelines for distinguishing between the two concepts. However, as Smalberger JA put it in *CIR v Pick ‘n Pay Employee Share Purchase Trust* there is –²⁴

“no single infallible test of invariable application”.

²⁴ 1992 (4) SA 39 (A), 54 SATC 271 at 279.

See paragraph 2.4 of the *Comprehensive Guide to Capital Gains Tax* (Issue 5) for a detailed discussion on the various tests and guidelines. The onus of proving that an amount is of a capital nature rests upon the taxpayer under section 102 of the TA Act.

The term “capital gain” is defined in section 1(1) as “an amount determined in terms of paragraph 3 of the Eighth Schedule”. Under paragraph 3(a) of the Eighth Schedule, a person’s capital gain on the disposal of an asset in the current year of assessment, is the amount by which the proceeds received or accrued on the disposal exceed the base cost of the asset. It may also happen that an asset disposed of in a previous year of assessment gives rise to a capital gain which must be accounted for in the current year of assessment. Paragraph 3(b) of the Eighth Schedule deals with the circumstances in which this may arise. See paragraph 5.1.2 of the *Comprehensive Guide to Capital Gains Tax* (Issue 5) for more detail.

The total of different capital gains arising in a year of assessment must be determined and used when calculating a qualifying entity’s total receipts and accruals (excluding receipts and accruals of a capital nature) and capital gains. For example, if the qualifying entity realised a capital gain of R50 000 on asset A and a capital gain of R60 000 on asset B, the sum of the capital gains of R110 000 must be taken into account under section 12E(4). Capital losses arising on the disposal of assets by a qualifying entity are not taken into account in this calculation.

The term “capital gain” must be distinguished from an “aggregate capital gain”, “aggregate capital loss”, “net capital gain” and “taxable capital gain”. The latter four terms take into account, amongst other things, the sum of all capital gains and capital losses and any assessed capital loss brought forward from the previous year of assessment.²⁵

The amount received or accrued on disposal of an allowance asset held on capital account is of a capital nature even though part of it may represent a recoupment included in the taxpayer’s gross income under paragraph (n) of the definition of that term. The definition of “gross income” includes amounts “whether of a capital nature or not”. While the effect of the special inclusions in gross income is to treat an amount of a capital nature as gross income, they do not deem amounts of a capital nature to be of a revenue nature. The full amount received or accrued on disposal of an allowance asset held on capital account must therefore be excluded from the denominator in the 20% limitation formula. The capital gain, if applicable, is included.

Example 6 – Nature of amount derived on disposal of allowance asset for purposes of the 20% limitation formula

Facts:

Manufacturing Company A acquired a machine at a cost of R100 and claimed allowances under section 12E of R100. It disposed of the asset for R110.

Result:

There is a recoupment of R100 of the capital allowances under section 8(4)(a) which is included in Manufacturing Company A’s “gross income” under paragraph (n) of the definition of that term.

²⁵ See paragraphs 6, 7, 8 and 10 of the Eighth Schedule.

There is also a capital gain of R10 arrived at as follows:

	R
Amount received or accrued on disposal of machine	110
Less: Recoupment [paragraph 35(3)(a) of Eighth Schedule]	<u>(100)</u>
Proceeds	10
Less: Base cost (see below)	<u>Nil</u>
Capital gain	<u>10</u>

The base cost of the asset is determined by reducing the acquisition cost of R100 by the capital allowances under paragraph 20(3)(a) of the Eighth Schedule.

The denominator in the 20% limitation formula is determined as follows:

	R
Amount received or accrued	110
Less: Amount of a capital nature derived on disposal of machine	<u>(110)</u>
Capital gain	<u>10</u>
Denominator	<u>10</u>

Example 7 – Determination of whether a close corporation qualifies as an SBC by considering the 20% limitation of income from rendering a personal service and investment income

Facts:

Compzone CC trades mainly in the supply of computer hardware and pre-packaged software. The company employs three full-time sales assistants who are engaged in the processing of sales orders, merchandising of stock and assisting customers in the store.

On a smaller scale, the company offers its clients a computer software development service which is performed by three holders of shares in the company and independent contractors who are occasionally hired for specific projects.

In addition, the close corporation disposed of a capital asset that was used for purposes of trade, received an award under a will and derived royalty income. Proceeds from the disposal of the asset were R900 000, with a capital gain derived of R40 000.

The receipts and accruals of Compzone CC for the year of assessment are as follows:

	R
Income from sales	3 900 000
Income from computer software development service	1 100 000
Royalties received	23 000
Cash payment under a will (capital receipt)	50 000
Amount received from the sale of a capital asset	<u>900 000</u>
Total receipts and accruals	<u>5 973 000</u>

Result:

The main business activity, that is, the supply of hardware and software, concerns the sale of goods and is therefore not a service or personal service.

The computer software development service constitutes a “personal service” as defined because –

- the computer software development service falls within the “information technology” category listed in section 12E(4)(d); and
- the service is rendered by persons who hold shares in Compzone CC and Compzone CC does not employ three or more other employees, who are not connected to the members of Compzone CC, on a full-time basis in rendering that service.

The fact that Compzone CC employs three full-time employees in the part of its business dealing with the supply of computer hardware and software is irrelevant since they are not engaged in the rendering of the computer software development service.

The royalty income constitutes investment income [section 12E4(c)(i)].

The total of all receipts and accruals (other than those of a capital nature) and all capital gains for the purposes of calculating the 20% limitation is R5 063 000 (R5 973 000 total receipts and accruals – R50 000 payment under a will – R900 000 proceeds from disposal of a capital asset + R40 000 capital gain).

The 20% limitation calculation is as follows:

$$\frac{[(\text{investment income} + \text{personal service income}) / (\text{total receipts and accruals of non-capital nature} + \text{capital gains})] \times 100}{}$$

$$[(R23\ 000 + R1\ 100\ 000) / R5\ 063\ 000] \times 100 = 22,18\%$$

Investment income and income from the rendering of a personal service **exceeds** the 20% limitation for the relevant year of assessment and accordingly the close corporation will not qualify as an SBC even if all the other requirements of section 12E(4)(a) are met.

Example 8 – Determining whether a company qualifies as an SBC by considering the 20% limitation of income from rendering a personal service and investment income

Facts:

A and B hold shares in PetDoc (Pty) Ltd and practice as veterinarians. Besides consulting, the practice also generates income from the dispensing of medicine and the selling of pet goods such as nutritional supplements, pet food and treats.

PetDoc (Pty) Ltd has a full-time receptionist, sales assistant and cleaner.

The company disposed of two assets that were used in the veterinary practice.

An X-Ray machine was disposed of for R500 000 generating a capital gain of R35 000. A veterinary table was disposed of for R2 000 which resulted in a loss of R1 000 under section 11(o).

The receipts and accruals of PetDoc (Pty) Ltd for the year of assessment are as follows:

	R
Income from sales of pet goods	1 360 000
Income from veterinary services	5 000 000
Amount received from the sale of the X-Ray system	500 000
Amount received from the sale of the table	<u>2 000</u>
Total receipts and accruals	<u>6 862 000</u>

Result:

The total of receipts and accruals (other than those of a capital nature) and all capital gains for the purposes of calculating the 20% limitation is R6 395 000 (R6 862 000 – R500 000 – R2 000 + R35 000 capital gain). The loss of R1 000 under section 11(o) on the disposal of the veterinary table is disregarded for purposes of this calculation.

The sale of goods is not a service and as a result does not fall within the definition of “personal service”.

Veterinary services falls within the “veterinary science” category listed in section 12E(4)(d). The veterinary services are rendered by the two holders of shares. Although the full-time receptionist is also engaged in the business of rendering the veterinary services, the sales assistant and cleaner are not engaged in the business of rendering the veterinary services on a full-time basis. PetDoc (Pty) Ltd does not therefore employ three or more full-time employees who are not connected to the holders of shares in the business of veterinary services, the income from the veterinary services constitutes a “personal service” as defined.

PetDoc (Pty) Ltd does not earn any investment income [section 12E4(c)].

The 20% limitation calculation is as follows:

$$\frac{[(\text{investment income} + \text{personal service income}) / (\text{total receipts and accruals of non-capital nature} + \text{capital gains})] \times 100}{}$$

$$[(\text{Rnil} + \text{R5 000 000}) / \text{R6 395 000}] \times 100 = 78,19\%$$

Investment income and income from the rendering of a personal service **exceeds** the 20% limitation for the relevant year of assessment and the company will not therefore qualify as an SBC even if all the other requirements of section 12E(4)(a) are met.

4.1.5 Prohibition of personal service providers [section 12E(4)(a)(iv)]

Section 12E(4)(a)(iv) excludes a company which is a “personal service provider” as defined in paragraph 1 of the Fourth Schedule from qualifying as an SBC.

A “personal service provider” is defined in the Fourth Schedule as a company²⁶ if the services rendered on behalf of such company to a client are rendered personally by a connected person²⁷ in relation to the company and –

- the connected person would be regarded as an employee of the client if that person had rendered the service directly to the client; or

²⁶ The definition refers to companies and trusts; however, in the context of an SBC, trusts are irrelevant.

²⁷ The term “connected person” is defined in section 1(1). For more information, see Interpretation Note No. 67 (Issue 2) dated 14 February 2014 “Connected Persons”.

- the services must be performed mainly at the premises of the client and the connected person or the company is subject to the control or supervision of the client as to the manner in which the services are rendered; or
- more than 80% of the income of the company during the year of assessment is or is likely to be received directly or indirectly from any one client or associated institution in relation to that client,

except if the company, throughout the year of assessment, employs three or more full-time employees who are engaged on a full-time basis in the business of the company of rendering any such service excluding any employee who is a holder of a share in the company or is a connected person in relation to a holder of a share in the company. A full-time employee who holds one or more shares in the company is not included in the “three or more full-time employee” count even if that employee is not a connected person in relation to the company.

A “personal service” as discussed in **4.1.4(b)** is different to a “personal service provider”. Although the definitions of a “personal service” and a “personal service provider” share some common features, they also contain some distinct differences. Both definitions must therefore be considered in light of the facts of a particular case. A company that is not a “personal service provider” under the Fourth Schedule may render a “personal service” under section 12E and *vice versa*. A company will need to ensure that it is not a “personal service provider” as defined in the Fourth Schedule and that its investment income and income from personal services is equal to or less than 20% of its total receipts and accruals (excluding those of a capital nature) and capital gains in order to potentially qualify as an SBC.

4.2 Small business corporation assets [sections 12E(1) and (1A)]

Under section 12E, two sets of accelerated depreciation rates potentially apply to the assets of an SBC. Subject to certain conditions, assets used directly in a process of manufacture or a process of a similar nature may qualify for a 100% write-off in the year of assessment in which the asset is brought into use. Assets that do not fall into this category may qualify for write-off over a period of three years at a rate of 50, 30 and 20% in the respective years.

4.2.1 Plant or machinery used directly in a process of manufacture or a process of a similar nature [section 12E(1)]

An SBC may deduct the cost²⁸ of any plant or machinery used directly in a process of manufacture, or a process²⁹ which in the opinion of the Commissioner is of a similar nature, in the year of assessment in which the SBC brings the plant or machinery into use, provided it is –

- brought into use for the first time by that SBC on or after 1 April 2001;
- brought into use for the purposes of the taxpayer’s trade (other than a trade of mining or farming); and

²⁸ See **4.2.3**.

²⁹ Clause 21 of the Taxation Laws Amendment Bill, 2015 [B29B-2015] proposes to remove the Commissioner’s discretion in determining whether a process is similar to a process of manufacture. The proposed amendment will come into operation on the date of promulgation of the Taxation Laws Amendment Act, 2015 [B29B-2015].

section 23B prohibits double deductions. In addition, section 12C(3)(d) specifically states that no deduction shall be allowed under section 12C on any asset for which an allowance has been granted to the taxpayer under section 12E. Similarly, section 11(e) also specifically states that it does not apply to assets for which a deduction may be granted under, amongst others, section 12E(1).

4.2.2 Other assets [section 12E(1A)]

Subject to section 12E(1), an SBC that acquires any machinery, plant, implement, utensil, article, aircraft or ship –

- in respect of which a deduction is allowable under section 11(e);⁴³ and
- that was acquired under an agreement formally and finally signed by every party to the agreement on or after 1 April 2005,

may elect, subject to the provisions of section 11(e), to determine the amount which may be deducted as either –

- the amount allowable for those assets under section 11(e) (the wear-and-tear allowance);⁴⁴ or
- an amount over three years of assessment calculated at the following rates with apportionment not being required for assets used for part of a year of assessment:⁴⁵
 - 50% of the cost in the year of assessment in which the asset was first brought into use (first year).
 - 30% of the cost in the first succeeding year (second year).
 - 20% of the cost in the second succeeding (third year).

In order to claim an allowance under section 12E(1A), the qualifying entity must be an SBC in both the year of assessment in which the asset is acquired and the year of assessment when it is first brought into use [see **4.2.2(c)** and **4.2.2(d)**]. The election between the two alternative methods for calculating the amount of the deduction is made when the asset is first brought into use [see **4.2.2(d)**]. For example, if a qualifying entity qualifies as an SBC in year one when the asset was acquired, but does not qualify in year two when the asset is first brought into use, the election is not available to it and section 12E(1A)(b) cannot apply.

An asset which qualifies for a deduction under section 12E(1) does not qualify for a deduction under section 12E(1A).⁴⁶

An SBC may elect to calculate the amount of the deduction allowable under section 12E(1A) according to the provisions of section 11(e) under section 12E(1A)(a) if, for example, it provides a more favourable allowance than the three-year spread under section 12E(1A)(b). For example, a “small” item which does not form part of a set and which is acquired at a cost of less than R7 000 may be written off in full under section 11(e) in the year of assessment in which it is acquired

⁴³ See Interpretation Note No. 47 (Issue 3) dated 2 November 2012 “Wear-and-Tear or Depreciation Allowance” for a detailed discussion on section 11(e).

⁴⁴ Section 12E(1A)(a).

⁴⁵ Section 12E(1A)(b).

⁴⁶ Section 12E(1A) is subject to section 12E(1) and section 11(e) specifically prohibits a deduction under section 11(e) if a deduction may be granted under section 12E(1).

and brought into use. An SBC meeting the requirements of section 12E(1A) may therefore elect to claim a deduction of R7 000 in the year in which the asset is brought into use under section 12E(1A)(a) instead of writing it off over three years under section 12E(1A)(b). The election to calculate the amount of the deduction under section 12E(1A)(a) [that is, the amount determined under the provisions of section 11(e)] or section 12E(1A)(b) is made on an asset-by-asset basis.

The total amount of the allowance available under section 12E(1A) over the various years of assessment may be limited to less than 100% of the cost of the asset concerned if funding was received from a small business funding entity or in the form of a government grant – see **4.2.4**.

(a) Qualifying assets

A wide range of assets can potentially qualify for the allowance under section 12E(1A). The assets listed in section 12E(1A) are all tangible assets and do not include intangible assets such as patents, trademarks and goodwill. The types of qualifying assets are considered below.

Plant and machinery

See **4.2.1(a)** for a discussion of the terms “plant” and “machinery”. Section 12E(1A) potentially applies to plant and machinery that is not used directly in a process of manufacture or similar process, that is, plant and machinery that does not qualify for a deduction under section 12E(1).

Implements

The Oxford Online Dictionary provides the following meaning of “implement”:⁴⁷

“A tool, utensil, or other piece of equipment that is used for a particular purpose: ‘garden implements’.”

Utensils

The Collins Dictionary provides the following meaning of “utensil”:⁴⁸

“[A]n implement, tool, or container for practical use.”

Articles

In *SIR v Charkay Properties (Pty) Ltd*,⁴⁹ the court considered whether demountable partitions used in the 14 floors of a building that were let as offices constituted articles for purposes of the wear-and-tear allowance. The relevant floors did not contain any permanent internal walls. Partitions were used to create flexible divisions to suit a tenant’s requirements. The demountable partitions were designed to be moved about from time to time but could not survive more than three to six removals. Even if they were left in position, partitions had a shorter life than that of an inner brick wall or of the building itself. Trollip JA who delivered the judgement held as follows:⁵⁰

“The word ‘article’ is of a wide and somewhat vague or indefinite connotation. Its ordinary meaning, relevant here, is a material thing forming part of, or coming under the head of, any class... ‘Articles’... means the class of all those material things

⁴⁷ www.oxforddictionaries.com/definition/english/implement [Accessed 7 January 2016].

⁴⁸ www.collinsdictionary.com/dictionary/english/utensil [Accessed 7 January 2016].

⁴⁹ 1976 (4) SA 872 (A), 38 SATC 159.

⁵⁰ At SATC 165 and 166.

that are used by the taxpayer for the purpose of his 'trade'. 'Things' means, of course, material entities or objects of any kind ... Hence the class of things involved is of considerable amplitude. Apart from machinery, implements, and utensils, the material things that are capable of being used in those multifarious activities, and which are subject to wear and tear through being used, are infinite. Yet the legislature must have intended (subject, of course, to the provisos to s 11(e)) that all those material things so used should qualify for the depreciation allowance – no reason emerges from the Act why some and not others should qualify; and, because of the difficulty or impracticality of denominating all those things precisely, the legislature probably used the compendious, albeit somewhat vague, designation of 'articles' as a convenient and practical way of covering them all. Moreover, the preceding words, 'machinery, implements, utensils' do not sufficiently clearly point to any genus of material things that might otherwise, through the *ejusdem generis* rule, serve to confine 'articles' to some species of that genus; so no reason exists for not giving that word the ordinary, wide connotation canvassed above ... Moreover, the fact that the Act elsewhere specifically excludes certain things from the application of 'machinery, implements, utensils and articles', which would otherwise fall under 'articles', tends to confirm that conclusion. Thus, ships and aircraft are excluded by proviso(iii), as amended; and vehicles and equipment for managers' and servants' rooms and offices are excluded for the purpose of the hotel-keepers' allowance provided in s 12(3) as amended."

After considering the facts, the court found that the demountable partitions constituted "articles" which had not lost their own separate identity and character, and qualified for the wear-and-tear allowance. Although the case considered the meaning of "article" in the context of section 11(e), the same meaning should apply in the context of section 12E(1A).

Aircraft and ships

Aircraft and ships for which a deduction is allowable under section 11(e) potentially qualify for the accelerated allowance under section 12E(1A). Section 11(e) specifically prohibits an allowance if a deduction may be granted under, amongst others, sections 12B and 12C. Aircraft and ships will generally qualify for a deduction under section 12C(1)(f) or section 12C(1)(g) respectively or section 12B if used in farming or the production of specified renewable energy. Aircraft and ships will thus generally not qualify for a deduction under section 11(e) nor, consequently, under section 12E(1A).

SBCs may be able to claim a deduction for ships and aircraft under section 12B or 12C as appropriate.

(b) Meaning of "in respect of which a deduction is allowable under section 11(e)"

Section 12E(1A) applies to assets "in respect of which a deduction is allowable under section 11(e)". Thus, an SBC will be entitled to a deduction under section 12E(1A) only if the asset qualifies for a deduction under section 11(e).

Under section 11(e) a deduction will generally be allowable if –

- any machinery, plant, implements, utensils and articles;
- owned by the taxpayer or acquired by the taxpayer as a purchaser under an instalment credit agreement;
- are used for the purposes of the taxpayer's trade; and

- have diminished in value by reason of wear-and-tear or depreciation during the year of assessment.

In certain circumstances an allowance for some assets is prohibited under section 11(e). For purposes of section 12E(1A), an SBC must be cognisant of the exclusions which apply under section 11(e). For example, no deduction may be granted under section 11(e), and therefore section 12E(1A), for the following assets:

- Assets used by a person carrying on farming activities which qualify for a deduction under paragraph 12(1) or 12(1A) of the First Schedule.⁵¹
- Assets for which a deduction may be granted under sections 12B, 12C, 12DA, 12E(1) or 37B.⁵²
- Assets which are not owned by the person claiming the allowance unless acquired as purchaser under an “instalment credit agreement”.⁵³
- Assets the ownership of which is retained by the taxpayer as a seller under an “instalment credit agreement”.⁵⁴
- Buildings or other structures or works of a permanent nature.⁵⁵
- Assets the cost of which has been allowed as a deduction from the taxpayer’s income under section 24D (expenditure on a National Key Point or specified important place or area).⁵⁶

See Interpretation Note No. 47 (Issue 3) dated 2 November 2012 “Wear-and-Tear or Depreciation Allowance” for a detailed discussion on section 11(e).

As stated, the SBC must be the owner of the asset or have acquired it as a purchaser under an instalment sale agreement. Lessees of assets do not therefore qualify for a deduction under section 11(e) or section 12E(1A).

(c) Acquisition by a small business corporation

Section 12E(1A) stipulates that the asset must be acquired by an SBC under an agreement formally and finally signed by every party to the agreement on or after 1 April 2005. The asset must have been acquired by the SBC as owner or as purchaser under an agreement contemplated in paragraph (a) of the definition of “instalment credit agreement” in section 1(1) of the VAT Act.⁵⁷

In order to claim a deduction under section 12E(1A), a taxpayer must qualify as an SBC in the year of assessment in which the asset is acquired.

(d) Election of the small business corporation in the year the asset is brought into use

Section 12E(1A) provides that the amount which may be deducted must, “*at the election of the small business corporation and subject to the provisions of that section*”, be the amount determined under section 12E(1A)(a) or section 12E(1A)(b).

⁵¹ Opening words of section 11(e) and paragraph 12(2) of the First Schedule.

⁵² Opening words of section 11(e).

⁵³ Opening words of section 11(e).

⁵⁴ Paragraph (iA) of the proviso to section 11(e).

⁵⁵ Paragraph (ii) of the proviso to section 11(e).

⁵⁶ Paragraph (iiiA) of the proviso to section 11(e).

⁵⁷ Through the reference in section 12E(1A) to section 11(e).

The election to calculate the amount allowable under section 12E(1A) in accordance with section 12E(1A)(a) or (b) can be made only by a taxpayer meeting the requirements of an SBC as specified in section 12E(4)(a) (see 4.1). It must be made in the year of assessment when the asset is first brought into use by the taxpayer. This outcome is apparent from –

- the words “subject to the provisions of that section” [being section 11(e)] which requires an asset to be used by a taxpayer in the taxpayer’s trade before qualifying for the allowance; and
- the wording of section 12E(1A)(b) which specifically refers to the amount of the deduction in the year of assessment when the asset is first brought into use.

The election is made only once for each asset on an asset-by-asset basis with the consequences of the election following automatically. If the SBC elects to calculate the amount of the deduction under section 12E(1A)(b), that section specifies how the deduction must be calculated in the year the election is made and in the following two years of assessment. Alternatively, if the SBC elects to calculate the amount of the deduction under section 12E(1A)(a), the amount of the deduction claimed under section 12E(1A) is determined according to the provisions of section 11(e). The election is binding and an SBC cannot change the election made in a subsequent year of assessment.

The qualifying entity must be an SBC in both the year of assessment in which the asset was acquired and in the year of assessment in which the asset is first brought into use and at which time the election under section 12E(1A) is made. For example, if a qualifying entity qualifies as an SBC in year one when the asset was acquired, but does not qualify in year two when the asset is first brought into use, the election is not available to it and section 12E(1A) cannot apply.

(e) Amount of the allowance under section 12E(1A)(b)

Section 12E(1A)(b) provides that the amount of the allowance is equal to–

- 50% of the cost of the asset in the year of assessment in which the asset was first brought into use;
- 30% of the cost in the first succeeding year; and
- 20% of the cost in the second succeeding year.

The deduction is a percentage of cost and no apportionment is therefore required if the asset is used for only part of the year of assessment. The first succeeding year and second succeeding year are made in reference to the year of assessment in which the asset is brought into use by the SBC.

Under the opening words of section 12E(1A), the deduction under section 12E(1A) is “subject to the provisions of that section”, being section 11(e). This condition means that a taxpayer’s entitlement to the 50:30:20 allowance during any one of the three years of assessment in which it applies is conditional on continued compliance with section 11(e). One of the ongoing requirements of section 11(e) is that the asset must be used for the purposes of the taxpayer’s trade. This requirement means that a taxpayer that fails to use the asset in a year of assessment will not be entitled to the allowance for that year of assessment. A taxpayer that brings an asset into use in the first year would be entitled to the 50% deduction even if the asset was used for

The amount of the deduction in each year of assessment is as follows:

- 2013 = R200 000 cost × 50% = R100 000. This amount is not apportioned even though the machine was used for only a portion of the year of assessment.
- 2014 = R200 000 cost × 30% = R60 000. The deduction is available despite ABC having used the machine for only a part of the year of assessment and not meeting the requirements of an SBC.
- 2015 = ABC is not entitled to the 20% deduction in the third year of assessment (R200 000 cost × 20% = R40 000) because it failed to use the machine in the year of assessment.

4.2.3 Cost of an asset [section 12E(2)]

Under section 12E(2) the cost of an asset is, for the purposes of sections 12E(1) (see 4.2.1) and 12E(1A) (see 4.2.2), deemed to be the lesser of –

- the actual cost to the taxpayer to acquire that asset; or
- the cost that a person would have incurred if the asset had been acquired under an arm's length cash transaction on the date on which the transaction was in fact concluded.

Cost excludes interest and finance charges but includes the direct cost of installation, erection or construction of the asset.

(a) Determination of cost for replacement assets

Section 12E(2) provides that if an asset has been acquired to replace an asset which was damaged or destroyed, the cost of that replacement asset must be reduced by any amount that has been recovered or recouped in respect of the damaged or destroyed asset and which was excluded from the taxpayer's income under section 8(4)(e), whether in the current or any previous year of assessment.

Section 8(4)(e) applies notwithstanding the general recoupment provision in section 8(4)(a) but *subject to* section 8(4)(eA), (eB), (eC), (eD) and (eE). It provides that no amount must be included in income if an amount is recovered or recouped on the disposal of an asset and the taxpayer has elected that paragraph 65 or 66 of the Eighth Schedule will apply (see 5.). Under sections 8(4)(eA), (eB), (eC), (eD) and (eE), the amount of the recovery or recoupment is *effectively* included in income by deeming a recoupment to arise over the period that the replacement asset is written off and in the same proportion as the allowances granted on the replacement asset. Since the amount of the recovery or recoupment is effectively included in income through sections 8(4)(eA), (eB), (eC), (eD) and (eE), and section 8(4)(e) is subject to those sections, for purposes of section 12E(2) the amount which was recovered should not be seen as having been excluded from income under section 8(4)(e). The reduction in cost referred to in section 12E(2) for amounts excluded under section 8(4)(e) is therefore not required.

For example, if an SBC elects that paragraph 65 or 66 of the Eighth Schedule will apply and the cost of the replacement asset is to be written off under section 12E(1A), then the deemed inclusion in the taxpayer's income of the amount as contemplated and initially excluded from income under section 8(4)(e) will follow a 50%, 30% and 20% inclusion over three years in accordance with sections 8(4)(eA), (eB), (eC), (eD) and (eE). Since the amount contemplated in and initially excluded

from income under section 8(4)(e) is effectively included in the SBC's income over three years, the cost of the replacement asset which will be deducted under section 12E(1A) must not be reduced by the amount of the recovery or recoupment. See Example 18 for an example dealing with the interaction between section 12E(1A)(b) and section 8(4)(eB) for an SBC that has elected that paragraph 65 of the Eighth Schedule applies.

4.2.4 Limitation on the amount of the allowance available under section 12E(1) and 12E(1A)

Section 10(1)(zK) exempts from normal tax any amount received by or accrued to or in favour of a small, medium or micro-sized enterprise from a small business funding entity.⁵⁸ Section 23O limits the deduction by the small, medium or micro-sized enterprise as a result of the amount received or accrued under section 10(1)(zK). Section 12P exempts from normal tax a government grant listed in the Eleventh Schedule or one which is identified by the Minister in the *Government Gazette*. It also contains provisions limiting expenditure funded by such an exempt grant.

Sections 10(1)(zK), 12P and 23O⁵⁹ are of potential application to an SBC that receives funding –

- for the acquisition, creation or improvement of an asset that qualifies under section 12E(1) or 12E(1A); or
- as a reimbursement for expenditure incurred in respect of the acquisition, creation or improvement of that asset.

The funding may take the form of –

- a “government grant” as defined in section 12P; or
- an amount from a small business funding entity.

The consequences for the SBC are generally that –

- the amount received by or accrued to or in favour of it is exempt from normal tax under section 10(1)(zK) or section 12P; and
- the aggregate amount of the deductions allowable to the SBC in respect of the asset concerned may not exceed an amount equal to the aggregate of the expenditure incurred, reduced by an amount equal to the sum of
 - the amount received or accrued from the government or small business funding entity for that purpose; and
 - the aggregate amount of all deductions and allowances previously allowed to that SBC in respect of that asset.

A taxpayer will therefore effectively not be allowed to claim more than the actual expenditure incurred net of the amount of exempt funding received in respect of that expenditure.

⁵⁸ Defined in section 1(1) as an entity approved by the Commissioner in terms of section 30C.

⁵⁹ Section 23O applies to small, medium or micro-sized enterprises which are defined in section 1(1) as specifically including an SBC.

Example 16 – Limitation of allowances*Facts:*

On 1 March 2015 JHK (Pty) Ltd, which qualifies as an SBC and has a financial year ending on the last day of February, received an amount of R10 000 from the DEF Trust. The DEF Trust is an approved small business funding entity and provided the funding for the purpose of subsidising the cost of machinery to be purchased by JHK (Pty) Ltd. On 1 April 2015 JHK (Pty) Ltd purchased a machine at a cost of R100 000 (not used in a process of manufacture).

The asset qualifies for a deduction under section 12E(1A) and JHK (Pty) Ltd elected that the amount of the deduction be calculated on the 50:30:20 basis under section 12E(1A)(b).

Result:

Since the SBC received funding from a small business funding entity for the purchase of machinery, any allowance in respect of that machinery must be subject to the limitation formula set out in section 23O(4).

JHK (Pty) Ltd will be entitled to the following deduction on the machine under section 12E(1A):

2016 year of assessment:	R
Section 12E(1A) deduction	(50 000)
<i>Limitation calculation under section 23O(4) for the 2016 year of assessment</i>	
Acquisition cost	100 000
Less: Exempt amount from the DEF Trust in 2015	(10 000)
Section 12E deduction claimed previously	<u>Nil</u>
	<u>90 000</u>

The deduction for the 2016 year of assessment must not exceed R90 000. Therefore, the full deduction of R50 000 ($100\,000 \times 50\%$) may be claimed because it is within the limitation.

2017 year of assessment:	R
Section 12E(1A) deduction	(30 000)
<i>Limitation calculation under section 23O(4) for the 2017 year of assessment</i>	
Acquisition cost	100 000
Less: Exempt amount received from the DEF Trust in 2015	(10 000)
Section 12E deduction claimed for 2016	<u>(50 000)</u>
	<u>40 000</u>

The deduction for the 2017 year of assessment must not exceed R40 000. Therefore, the full deduction of R30 000 ($100\,000 \times 30\%$) may be claimed because it is within the limitation.

2018 year of assessment:	R
Section 12E(1A) deduction	(10 000)
<i>Limitation calculation under section 23O(4) for 2018 year of assessment</i>	
Acquisition cost	100 000
Less: Exempt amount received from the DEF Trust in 2015	(10 000)
Section 12E allowance claimed for 2016	(50 000)
Section 12E allowance claimed for 2017	<u>(30 000)</u>
	<u>10 000</u>

The deduction for the 2017 year of assessment must not exceed R10 000. Therefore, the full deduction of R20 000 (100 000 × 20%) is limited to R10 000.

4.2.5 Cost in moving an asset [section 12E(3)]

An SBC may incur costs in moving an asset, for example, when relocating its business operations to a new site. Section 12E(3) provides that any expenditure [other than expenditure falling within section 11(a)] which has been incurred during a year of assessment in moving an asset for which a deduction was allowed or allowable under sections 12E(1) or 12E(1A) must be deducted –

- if the taxpayer was entitled to a deduction for that asset under section 12E(1A) in that year and one or more succeeding years of assessment, in equal instalments over that and the remaining number of years in which a deduction is allowable; or
- in any other case, in that year of assessment.

The moving costs must relate to moving an asset for which “a deduction was allowed or is allowable” under sections 12E(1) or 12E(1A) even if the SBC neglected to claim the deduction. For assets contemplated in section 12E(1A), taxpayers have a choice between calculating the amount of the allowance under section 12E(1A)(a) [determined under section 11(e)] or adopting the 50:30:20 write-off specified in section 12E(1A)(b). Irrespective of whether the amount of the allowance is calculated under section 12E(1A)(a) or section 12E(1A)(b), the allowance is deducted under section 12E(1A) and therefore the moving costs must be deducted under section 12E(3).

Moving costs incurred in a year of assessment before a qualifying asset has been brought into use may not be written off under section 12E(3). Such expenditure has not been incurred in a year of assessment during which a deduction is or was allowable under section 12E(1) or section 12E(1A). A deduction is allowable –

- under section 12E(1) in the year in which the asset is brought into use for the first time; and
- under section 12E(1A) in the year in which the asset is brought into use for the first time and in the two succeeding years of assessment if the amount of the deduction is calculated under section 12E(1A)(b) or the number of succeeding years under section 11(e) if calculated under section 12E(1A)(a).

A claim for moving costs must commence in the year of assessment in which such costs are incurred, provided a deduction for the asset concerned is allowable under section 12E.

Section 12E(3)(a) regulates the spreading of the deduction for moving costs in respect of an asset for which the taxpayer is or was entitled to a deduction under section 12E(1A) in the year the moving costs were incurred and at least one succeeding year. The use of the word “entitled” indicates that a deduction need not necessarily have been claimed under section 12E(1A) in order for the moving costs of an asset to qualify for a deduction under this section. The requirement for deductibility of the moving costs is simply that the deduction was “allowable” under section 12E(1A). If the requirements are met, the moving costs are deductible in equal instalments in the year in which the moving costs are incurred and in the

remaining years of assessment in which a deduction is allowable under section 12E(1A).

Section 12E(3)(b) provides for a deduction of 100% of the moving costs in the year of incurral if a deduction was allowed or is allowable under section 12E(1) or section 12E(1A) and section 12E(3)(a) does not apply. This provision encompasses assets qualifying for the section 12E(1) deduction in the current or a prior year, and assets qualifying for the section 12E(1A) deduction in respect of which the final deduction as calculated under section 12E(1A)(a) [in line with the provisions of section 11(e)] or section 12E(1A)(b) (that is, 20% of cost) was allowable in the current or a prior year of assessment.

For example, if an SBC acquires an asset which is eligible for the three-year write-off under section 12E(1A)(b) and incurs costs in moving the asset in year two when relocating to new business premises, the moving costs must be deducted under section 12E(3)(a) in equal amounts in year two and year three. Alternatively, if the SBC relocated to new premises and incurred the costs in moving the relevant assets only in year three, then the taxpayer must claim those moving costs in full under section 12E(3)(b) in year three. If the moving costs were incurred in year 4 or a later year, the full amount of the moving costs would be allowable in the year in which they were incurred since the asset should already have been written off in full under section 12E(1A)(b).

Example 17 – Deduction of moving costs

Facts:

Company X is an SBC with a year of assessment that ends on the last day of February. Company X moved the location of its business operations. The following information is relevant:

- Asset A was acquired on 1 May 2011 at a cost of R100 000 and was brought into use during May 2011. The asset qualified for an allowance under section 12E(1A)(b) and 50/30/20 % of the cost was allowed as a deduction in the 2012, 2013 and 2014 years of assessment respectively. The cost to move asset A was R6 000.
- Asset B was acquired on 1 April 2010 at a cost of R50 000 and was brought into use during that month. The asset qualified for an allowance under section 12E(1) and 100 % of the cost was allowed as a deduction in the 2011 year of assessment. The cost to move asset B was R4 000.
- Assume the assets were moved on the following alternative dates –
 - 1 July 2011;
 - 1 July 2012;
 - 1 January 2015.

Result:

a) Calculation of section 12E(3) deduction of moving costs of asset A

Asset moved on 1 July 2011 (2012 year of assessment) [section 12E(3)(a)]

2012 year of assessment: $R6\ 000 / 3 = R2\ 000$

2013 year of assessment: $R6\ 000 / 3 = R2\ 000$

2014 year of assessment: $R6\ 000 / 3 = R2\ 000$

2015 year of assessment: Nil

Moving costs were incurred during the year of assessment in which the asset was brought into use. Therefore, the write-off period for the moving costs is the same as the write-off period for the cost of the asset under section 12E(1A)(b), that is, three years. The moving costs must be deducted in three equal instalments over three years.

Asset moved on 1 July 2012 (2013 year of assessment) [section 12E(3)(a)]

2013 year of assessment: R6 000 / 2 = R3 000

2014 year of assessment: R6 000 / 2 = R3 000

2015 year of assessment: Nil

Two years (the current year of assessment and the 2014 year of assessment) remain in which the cost of the asset may be deducted under section 12E(1A)(b). Therefore, the moving costs must be claimed over two years of assessment in equal instalments.

Asset moved on 1 January 2015 (2015 year of assessment) [section 12E(3)(b)]

2015 year of assessment: R6 000 / 1 = R6 000

The asset was fully written off under section 12E(1A) by the end of the 2014 year of assessment. Therefore, the moving costs are claimed in full in the 2015 year of assessment.

b) Calculation of section 12E(3)(b) deduction of moving costs of asset B

Asset moved on 1 July 2011, 1 July 2012 or 1 January 2015

The full cost of asset B was allowed as a deduction under section 12E(1) in the 2011 year of assessment. Irrespective of whether asset B is moved in the 2012, 2013 or 2015 year of assessment, the full amount of the moving costs (R4 000) must be allowed as a deduction in the year of assessment in which the moving costs were incurred.

4.2.6 Assets acquired for no consideration

Assets acquired for no consideration, for example, by donation, inheritance or as a dividend *in specie*, are not eligible for a deduction under section 12E(1) and 12E(1A). The deduction under section 12E(1) and 12E(1A) is based on cost and there is no cost in these circumstances.

In addition, expenditure incurred by an SBC in moving an asset acquired in either of those circumstances will not qualify for a deduction under section 12E(3). Section 12E(3) applies only to expenditure incurred in moving an asset in respect of which a deduction was allowed or allowable under section 12E. No deduction is allowed or allowable under section 12E on assets acquired for no consideration.

An asset acquired for no consideration, as well as expenditure incurred in installing, erecting or moving that asset, may qualify for a deduction under section 11(e) based on the amount by which the value of the asset is reduced owing to wear and tear. The requirements of section 11(e) must be met in order to qualify for a deduction under that section. See Interpretation Note No. 47 (Issue 3) dated 2 November 2012 "Wear-and-Tear or Depreciation Allowance" for a detailed discussion on section 11(e).

5. Recoupment and roll-over relief upon disposal

References here to “paragraph” are to paragraphs of the Eighth Schedule.

A recoupment under section 8(4)(a) and a capital gain may be triggered if an SBC disposes of an asset.

Under paragraph 11(1) the meaning of “disposal” is described in wide terms as –

“any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset”.

Section 8(4)(a) provides that all amounts deducted under, amongst others, sections 12E and 11(e), which have been recovered or recouped, must be included in a taxpayer’s income.

Despite section 8(4)(a), section 8(4)(e) provides that the amount recovered or recouped must not be included in income if a taxpayer has elected that either paragraph 65 (involuntary disposal) or 66 (reinvestment in replacement assets) applies to the disposal of the asset. The amount recovered or recouped is recognised on a deferred basis over time in line with the requirements of sections 8(4)(eB), (eC), (eD) and (eE). The capital gain is also deferred and recognised over time under paragraphs 65 and 66.

Involuntary disposals – paragraph 65 election

Paragraph 65 enables a taxpayer to elect to defer a capital gain when the asset is disposed of by way of operation of law, theft or destruction and proceeds accrue to the taxpayer by way of compensation. The following conditions apply:

- Proceeds⁶⁰ must be equal to or exceed the base cost⁶¹ of the asset.
- The full amount received or accrued on disposal has been or will be invested in one or more replacement asset or assets.
- Contracts for the replacement assets must be concluded within 12 months after the date of disposal of the asset.
- All the replacement assets must be assets contemplated in section 9(2)(j)⁶² or (k).
- Replacement assets must be brought into use within three years from the date of disposal of the asset.
- The asset must not have been deemed to have been disposed of and reacquired by that person. For example, the relief will not apply in a “degrouing” situation in which a deemed disposal and immediate reacquisition is triggered.

The Commissioner may on application by the taxpayer extend the period within which the contract must be concluded or the asset brought into use by a maximum of

⁶⁰ Paragraph 35 of the Eighth Schedule.

⁶¹ Paragraph 20 of the Eighth Schedule deals with the base cost of assets acquired on or after valuation date (generally 1 October 2001) while paragraph 25 of the same Schedule deals with the base cost of pre-valuation date assets.

⁶² The reference to section 9(2)(j) is proposed to be inserted by the Taxation Laws Amendment Bill, 2015 [B29B-2015] and is deemed to come into operation on 1 January 2012 and applies to disposals during years of assessment commencing on or after that date.

six months but only if all reasonable steps were taken to conclude the contract or bring the asset into use.

Reinvestment in replacement assets – paragraph 66 election

Paragraph 66 enables a taxpayer to elect to defer a capital gain arising on the disposal of qualifying depreciable assets, which includes assets qualifying for a deduction under section 12E, when the proceeds are reinvested in qualifying depreciable assets. The conditions to be satisfied are the same as for paragraph 65 except that the replacement asset is limited to movable assets from a South African source under section 9(2)(k).

For a detailed discussion on paragraphs 65 and 66, see Chapter 13 of the *Comprehensive Guide to Capital Gains Tax* (Issue 5).

Example 18 – Recoupment of deductions allowed for the cost of assets

Facts:

X, an SBC with a year of assessment ending on the last day of February, acquired a truck costing R400 000 on 1 May 2010 and immediately brought the truck into use in its business operations.

The truck was damaged beyond repair in an accident on 2 December 2011. An amount of R300 000 was paid out under a contract of insurance on 31 March 2012. X concluded an agreement for the acquisition of a truck to replace the previous one on 1 April 2012 and brought it into use on 15 April 2012. The cost of the replacement truck was R450 000.

X met the requirements of paragraph 65 of the Eighth Schedule and elected that it must be applied.

Result:

	R
2011 year of assessment	
Section 12E(1A)(b) deduction (R400 000 × 50%)	(200 000)
The truck was brought into use for the first time by the taxpayer in the 2011 year of assessment and qualified for the 50% deduction in that year.	
2012 year of assessment	R
Section 12E(1A)(b) deduction (R400 000 × 30%)	(120 000)
2013 year of assessment	
No deduction may be claimed because the asset was written off in the 2012 year of assessment and no longer exists.	
Section 12E(1A)(b) deduction in respect of replacement truck:	
R450 000 × 50%	(225 000)
Recoupment under section 8(4)(a)	
Amount received or accrued	300 000
Less: Tax value (R400 000 – 200 000 – 120 000)	<u>(80 000)</u>
Recoupment	220 000

However, the full R220 000 is not included in income under

9. Conclusion

Section 12E sets out the requirements for a “close corporation”, “co-operative” or “private company” as defined in section 1 of the Companies Act to qualify as an SBC. All the holders of shares in the SBC must be natural persons who may not hold shares in other unlisted companies (with some exceptions), its turnover for the year may not exceed R20 million and not more than 20% of its receipts and accruals, other than those of a capital nature, plus capital gains may consist of “investment income” and income from rendering a “personal service”. In addition, the entity may not be a “personal service provider” as defined in the Fourth Schedule (see **4.1**).

Section 12E provides for an accelerated depreciation allowance on certain capital assets acquired and brought into use by an SBC. There are two sets of accelerated depreciation rates which may apply. Subject to certain conditions, assets used directly in a process of manufacture or process of a similar nature, may qualify for a 100% write-off of cost in the year of assessment in which the asset is brought into use. Assets that do not fall into this category may be subject to a write-off under section 12E(1A), the amount of which may, at the election of the SBC, be calculated under the provisions of section 11(e) or over a period of three years at a rate of 50%, 30% and 20% of cost in the respective years. The term “cost” is specifically defined in section 12E(2). In addition to the accelerated depreciation allowance the section also deals with the deduction of costs incurred in moving assets which fall within the ambit of the section.

SBCs are subject to concessionary tax rates which follow a graduated marginal structure and are not taxed at the corporate tax rate of 28%.

In order to qualify as an SBC an entity must meet the requirements of section 12E in each year of assessment.

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Annexure A – The law

Section 12E

12E. Deductions in respect of small business corporations.—(1) Where any plant or machinery (hereinafter referred to as an asset) owned by a taxpayer which qualifies as a small business corporation or acquired by such a 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,—

- (a) is brought into use for the first time by that taxpayer on or after 1 April 2001 for the purpose of that taxpayer’s trade (other than mining or farming); and
- (b) is used by that taxpayer directly in a process of manufacture (or any other process which is of a similar nature) carried on by that taxpayer,⁶⁴

a deduction equal to the cost of such asset shall be allowed in the year that such asset is so brought into use.

(1A) Subject to subsection (1), where any machinery, plant, implement, utensil, article, aircraft or ship in respect of which a deduction is allowable under section 11(e) (“the asset”) is acquired by a small business corporation under an agreement formally and finally signed by every party to the agreement on or after 1 April 2005, the amount allowed to be deducted in respect of the asset must, at the election of the small business corporation and subject to the provisions of that section, be either—

- (a) the amount allowable in terms of and subject to that section; or
- (b) an amount equal to 50 per cent of the cost of the asset in the year of assessment during which it was first brought into use, 30 per cent in the first succeeding year and 20 per cent in the second succeeding year.

(2) For the purposes of this section the cost to a taxpayer of any asset shall be deemed to be the lesser of the actual cost to the taxpayer to acquire that asset or the cost which a person would, if he had acquired the said asset under a cash transaction concluded at arm’s length on the date on which the transaction for the acquisition of the said 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 or, where the asset has been acquired to replace an asset which has been damaged or destroyed, such cost less any amount which has been recovered or recouped in respect of the damaged or destroyed asset and has been excluded from the taxpayer’s income in terms of section 8(4)(e), whether in the current or any previous year of assessment.

(3) Any expenditure (other than expenditure referred to in section 11 (a)) incurred by a taxpayer during any year of assessment in moving an asset in respect of which a deduction was allowed or is allowable under this section from one location to another must—

- (a) where the taxpayer is or was entitled to a deduction in respect of that asset under subsection (1A) in that year and one or more succeeding years, be allowed to be deducted from his or her income in equal instalments in that year and each succeeding year in which that deduction is allowable; or
- (b) in any other case, be allowed to be deducted from that taxpayer’s income in that year.

(3A)

(4) For the purposes of this section—

- (a) “**small business corporation**” means any close corporation or co-operative or any private company as defined in section 1 of the Companies Act if at all times during the year of assessment all the holders of shares in that company, co-operative or close corporation are natural persons, where—

⁶⁴ As per the proposed amendment in clause 21 of the Taxation Laws Amendment Bill, 2015. The amendment proposes to remove the Commissioner’s discretion in determining what constitutes a process similar to a process of manufacture.

- (i) the gross income for the year of assessment does not exceed an amount equal to R20 million: Provided that where the close corporation, co-operative or company during the relevant year of assessment carries on any trade, for purposes of which any asset contemplated in this section is used, for a period which is less than 12 months, that amount shall be reduced to an amount which bears to that amount, the same ratio as the number of months (in the determination of which a part of a month shall be reckoned as a full month), during which that company, co-operative or close corporation carried on that trade bears to 12 months;
- (ii) at any time during the year of assessment, no holder of shares in the company or member of the close corporation or co-operative holds any shares or has any interest in the equity of any other company as defined in section 1, other than—
- (aa) a company contemplated in paragraph (a) of the definition of “listed company”;
- (bb) any portfolio in a collective investment scheme contemplated in paragraph (e) of the definition of “company”;
- (cc) a company contemplated in section 10 (1) (e) (i) (aa), (bb) or (cc);
- (dd) less than 5 per cent of the interest in a social or consumer co-operative or a co-operative burial society as defined in section 1 of the Co-operatives Act, 2005 (Act No. 14 of 2005), or any other similar co-operative if all of the income derived from the trade of that co-operative during any year of assessment is solely derived from its members;
- (ee) any friendly society as defined in section 1 of the Friendly Societies Act, 1956 (Act No. 25 of 1956);
- (ff) less than 5 per cent of the interest in a primary savings co-operative bank or a primary savings and loans co-operative bank as defined in the Co-operative Banks Act, 2007, that may provide, participate in or undertake only the following—
- (A) in the case of a primary savings co-operative bank, banking services contemplated in section 14(1)(a) to (d) of that Act; and
- (B) in the case of a primary savings and loans co-operative bank, banking services contemplated in section 14(2)(a) or (b) of that Act;
- (gg) a venture capital company as defined in section 12J;
- (hh) any company, close corporation or co-operative if the company, close corporation or co-operative—
- (A) has not during any year of assessment carried on any trade; and
- (B) has not during any year of assessment owned assets, the total market value of which exceeds R5 000; or
- (ii) any company, co-operative or close corporation if the company, co-operative or close corporation has taken the steps contemplated in section 41(4) to liquidate, wind up or deregister: Provided that this item ceases to apply if the company, co-operative or close corporation has at any stage withdrawn any step so taken or does anything to invalidate any step so taken, with the result that the company, co-operative or close corporation will not be liquidated, wound up or deregistered;
- (iii) not more than 20 per cent of the total of all receipts and accruals (other than those of a capital nature) and all the capital gains of the company, close corporation or co-operative consists collectively of investment income and income from the rendering of a personal service; and
- (iv) such company is not a personal service provider as defined in the Fourth Schedule;

- (b)
- (c) **“investment income”** means—
- (i) any income in the form of dividends, foreign dividends, royalties, rental derived in respect of immovable property, annuities or income of a similar nature;
 - (ii) any interest as contemplated in section 24J (other than any interest received by or accrued to any co-operative bank as contemplated in paragraph (a)(ii)(ff)), any amount contemplated in section 24K and any other income which, by the laws of the Republic administered by the Commissioner, is subject to the same treatment as income from money lent; and
 - (iii) any proceeds derived from investment or trading in financial instruments (including futures, options and other derivatives), marketable securities or immovable property;
- (d) **“personal service”**, in relation to a company, co-operative or close corporation, means any service in the field of accounting, actuarial science, architecture, auctioneering, auditing, broadcasting, consulting, draftsmanship, education, engineering, financial service broking, health, information technology, journalism, law, management, real estate broking, research, sport, surveying, translation, valuation or veterinary science, if—
- (i) that service is performed personally by any person who holds an interest in that company, co-operative or close corporation; and
 - (ii) that company, co-operative or close corporation does not throughout the year of assessment employ three or more full-time employees (other than any employee who is a holder of a share in the company or a member of the co-operative or close corporation, as the case may be, or who is a connected person in relation to a holder of a share in the company or a member), who are on a full-time basis engaged in the business of that company, co-operative or close corporation of rendering that service.

Definition of **“personal service provider”** – paragraph 1 of the Fourth Schedule

“personal service provider” means any company or trust, where any service rendered on behalf of such company or trust to a client of such company or trust is rendered personally by any person who is a connected person in relation to such company or trust, and—

- (a) such person would be regarded as an employee of such client if such service was rendered by such person directly to such client, other than on behalf of such company or trust; or
- (b) where those duties must be performed mainly at the premises of the client, such person or such company or trust is subject to the control or supervision of such client as to the manner in which the duties are performed or are to be performed in rendering such service; or
- (c) where more than 80 per cent of the income of such company or trust during the year of assessment, from services rendered, consists of or is likely to consist of amounts received directly or indirectly from any one client of such company or trust, or any associated institution as defined in the Seventh Schedule to this Act, in relation to such client,

except where such company or trust throughout the year of assessment employs three or more full-time employees who are on a full-time basis engaged in the business of such company or trust of rendering any such service, other than any employee who is a holder of a share in the company or member of the trust or is a connected person in relation to such person;

Definition of “instalment credit agreement” – section 1(1)(a) 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;

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Annexure B – Permissible holding of shares or interests

Under section 12E(4)(a)(ii), no holder of shares or member of a qualifying entity may hold shares or have any interest in the equity of any other “company” as defined in section 1(1) except in those entities specifically listed in paragraphs (aa) to (ii) of section 12E(4)(a)(ii). These entities are:

- A company contemplated in paragraph (a) of the definition of “listed company” [section 12E(4)(a)(ii)(aa)]. Under paragraph (a) of the definition of “listed company” in section 1(1), it is a company whose shares or depository receipts for its shares are listed on an “exchange” as defined in section 1 of the Financial Markets Act No. 19 of 2012 and licensed under section 9 of that Act. Therefore, shares in a company listed on the Johannesburg Stock Exchange are permissible.
- Any portfolio in a collective investment scheme contemplated in paragraph (e) of the definition of “company” [section 12E(4)(a)(ii)(bb)]. Paragraph (e) includes two types of portfolios:
 - A portfolio in any investment scheme carried on outside South Africa that is comparable to a portfolio of a collective investment scheme in participation bonds or a portfolio of a collective investment scheme in securities. This portfolio must be in pursuance of any arrangement under which “members of the public” (as defined in section 1 of the Collective Investment Schemes Control Act No. 45 of 2002) are invited or permitted to contribute to and hold participatory interests in that portfolio through shares, units or any other form of participatory interest [definition of “company” in section 1(1), paragraph (e)(ii)].
 - A portfolio of collective investment scheme in property that qualifies as a “REIT” as defined in paragraph 13.1(x) of the Johannesburg Stock Exchange Limited Listing Requirements [definition of “company” in section 1(1), paragraph (e)(iii)].⁶⁵
- A company contemplated in section 10(1)(e)(i)(aa), (bb) or (cc) [section 12E(4)(a)(ii)(cc)], namely:
 - A body corporate established under the Sectional Titles Act No. 95 of 1986;
 - A share block company established under the Share Block Control Act No. 59 of 1980, and
 - Any other association of persons (other than a “company” as defined in the Companies Act, any co-operative, close corporation and trust, but including a “non-profit company” as defined in that Act) formed solely to manage the collective interests common to all its members and that is not permitted to distribute its funds to any person other than to a similar association. For example, a homeowners association.

For more information on the above entities see paragraph 4.1 of Interpretation Note No. 64 (Issue 3) dated 17 August 2015 “Income Tax Exemption: Bodies Corporate, Share Block Companies and Associations of Persons Managing the Collective Interests Common to All Members”.

- Less than 5% of the interest in the following “co-operatives” as defined in section 1 of the Co-operatives Act:

⁶⁵ Effectively applicable to years of assessment commencing on or after 1 January 2015. Previously, for years of assessment commencing on or after 1 April 2013, it referred to a collective investment scheme in property.

- A social co-operative which means a non-profit co-operative which engages in the provision of social services to its members, such as care for the elderly, children and the sick;
- A consumer co-operative which means a co-operative that procures and distributes goods or commodities to its members and non-members and provides services to its members;
- A co-operative burial society which means a co-operative that provides funeral benefits, including funeral insurance and other services to its members and their dependants; or
- Any other similar co-operative if all of the income derived from the trade of that co-operative during any year of assessment is solely derived from its members.

[Section 12E(4)(a)(ii)(*dd*)]

- A “friendly society” as defined in section 1 of the Friendly Societies Act No. 25. of 1956 which is generally an association or business established for the mutual assistance of its members and approved nominees in a specified number of areas [section 12E(4)(a)(ii)(*ee*)].
- Less than 5% of the interest in the following co-operative banks:
 - A primary savings co-operative bank, which is a co-operative which is registered as a primary co-operative under the Co-operatives Act and is also registered as a primary savings co-operative bank under the Co-operative Banks Act No. 40 of 2007, that may only provide, participate in or undertake the banking services contemplated in section 14(1) and 15 of that latter Act; and
 - A primary savings and loans co-operative bank, which is a co-operative which is registered as a primary co-operative under the Co-operatives Act and is also registered as a primary savings and loan co-operative bank under the Co-operative Banks Act No. 40 of 2007, that may only provide, participate in or undertake banking services contemplated in section 14(1), 14(2) and 15 of that latter Act.

[Section 12E(4)(a)(ii)(*ff*)]

- A “venture capital company” as defined in section 12J [section 12E(4)(a)(ii)(*gg*)]. Section 12J defines “venture capital company” as a company which has been approved by the Commissioner under section 12J(5) and has not had that approval withdrawn under section 12J(6). A venture capital company is, broadly speaking, a resident company which has the sole objective of managing investments in “qualifying companies” (as defined in section 12J) and that is licensed under section 7 of the Financial Advisory and Intermediary Services Act No. 37 of 2002.
- Any company, close corporation or co-operative if it has not –
 - during any year of assessment carried on any trade, and
 - during any year of assessment owned assets of which the total market value exceeds R5 000.

[Section 12E(4)(a)(ii)(*hh*).]

- Any company, co-operative or close corporation if it has taken the steps contemplated in section 41(4) to liquidate, wind up or deregister [section 12E(4)(a)(ii)(*ii*)].

This permissible holding will cease to be permissible if the company, co-operative or close corporation withdraws any steps so taken at any time, or does anything to invalidate any of these steps with the result that it will not be liquidated, wound up or deregistered.

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