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The Tax Implications of Intellectual Property: An Overview of the Development of the Law Pertaining to Deductions

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I hereby declare that this work is entirely my own

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CHAPTER 1*:*

Introduction

1.1. Background

"*Brands pervade everyday life. They are an indispensable guide for consumers and a means for companies to build a reputation and an image in the marketplace. A product's brand appeal can be as important for determining competitive success as its quality or price tag. In short, a recognized brand is among the most valuable intangible assets a company can own."*[1]

Intellectual Property ("IP") is unquestionably a valuable asset especially in the backdrop of the present digital age. Development of applications and software, cellular device designs and components, as well as pieces of entertainment find themselves protectable by IP Law, territorially as well as internationally. Rights to IP may be bought, sold and leased. As with all commercial transactions, transactions relating to IP attract a tax liability. Given the current technological revolution, governments seek to encourage development in their own economies and thus have introduced tax incentives for the development of IP.

The taxing body of South Africa saw fit that the assets provided by IP rights, and the revenue flowing therefrom, should be subject to taxation. Due to the nature of IP, this meant that special provisions had to be introduced into the legislation to accomplish this. The focus of this dissertation will be on the deductions, used in the calculation of normal tax, introduced into the Income Tax Act as part of this process. Providing deductions for the assets would spark an interest in the economy to develop and acquire such rights thereby increasing the economic growth of IP in the country. This would allow the Republic to keep in line with the growth of IP on a global landscape.

It would appear that the process of the introduction of IP legislation has been more reactive than proactive. An examination of the legislation and amendments over the years, which will

[1] '2013 World Intellectual Property Report Brands – Reputation and Image in the Global Marketplace' available at *https://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo_pub_944_2013.pdf* , accessed on 21 January 2020, p. 1.

be undertaken in respect of the deduction provisions of the Income Tax Act, demonstrates this reactive approach. For example, as the provisions were enacted, several tax avoidance schemes were devised by taxpayers, taking advantage of the provisions as they then stood. Each of these will be examined by looking at the wording of the sections, the schemes it gave rise to and how the Legislature sought to curb the avoidance. The examination of these provisions reveals how the legislature had to walk a fine line between encouraging the exploitation of IP and curbing the abuse thereof. This dissertation seeks to track the development of the South African tax laws relating to IP over the years to illustrate this.

When calculating a taxpayer's normal tax[2] liability, there are two types of transactions that cue tax implications: when a taxpayer incurs expenditure and when an amount is received by or accrues to him. When a taxpayer spends money (the payer), this is expenditure incurred and this expenditure can be deducted in terms of specific provisions[3] in the Income Tax Act 58 of 1962 ("the Act"), or the "general deduction formula".[4] When there is money received by the taxpayer, this constitutes gross income.[5]

Concerning IP, if the taxpayer is paying for the IP, there are three types of transactions – the acquisition in terms of a purchase and sale agreement,[6] payment of royalties for the right to use IP[7] or expenditure incurred in research and development for the development of the IP.[8] These are deductible in terms of the Act.[9] With regards to the income generated by IP, there are three transactions that trigger a tax implication – when the taxpayer receives a premium from someone for the right to use his IP or when he disposes of his IP in terms of a purchase and sale agreement and when the taxpayer devises IP.

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[2] Section 5, Income Tax Act 58 of 1962.

[3] Deductions are mainly dealt with by ss 11, 18A, 22 and 23 of the Income Tax Act 58 of 1962.

[4] Sections 11(a) and 23(g) of the Income Tax Act 58 of 1962; this term is found in inverted commas throughout this research as it is a general phrase found in tax.

[5] Section 1, Income Tax Act 58 of 1962. "Gross income" means 'the total amount, in cash or otherwise, received by or accrued to or in his favour, excluding receipts and accruals of a capital nature' – See definition in S1 of the Act.

[6] This expense is deductible in terms of s11(gC).

[7] If the taxpayer is paying a premium to secure the right to use the intellectual property, s11 (f) of the Act applies, however, if they taxpayer is making payments in the form of royalties for ongoing use of the IP, s 11 (a) is referenced.

[8] R. Oosthuizen *A Framework for The Income Tax Deductibility of IP Expenditure Incurred by South African Taxpayers*, International Business & Economics Research Journal, Vol 12, No 3, 2013, p. 373-386.

[9] South African Revenue Service; *Explanatory Memorandum on Act 35 of 2007;* pg. 31 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2007-01%20-%20Explanatory%20Memorandum%20Revenue%20Laws%20Amendment%20Bill%202007.pdf accessed on 17 July 2020.

The development of IP is often fully deductible depending on the taxpayer's status. If the tax payer is fully liable for tax according to South African tax law, the payor may deduct royalties,[10] while the payee's receipt is includible.[11]

For normal tax purposes, IP is dealt with in a number of specific provisions. With regard to IP revenue, the definition of gross income explicitly incorporates the following items: paragraph (a) which deals with income received by way of annuities; paragraph (g) (iii) which provides for amounts derived from the use or the right of use of IP; paragraph (gA) which makes provision for amounts derived from "imparting IP knowledge or information"[12] and paragraph (n) which deals with "amounts recovered or recouped on IP allowances granted."[13]

This dissertation seeks to analyse the specific sections of the Act that provide for the deductibility of expenditure for the acquisition and/or development of IP and/or the rights to IP. It seeks to outline the way IP is deducted through its relevant sections and track the amendments of the sections to better understand the Legislature's intention. The purpose of this analysis is to better understand how the taxation of IP has developed in light of the progress that IP has made over the years, and to demonstrate the reactive approach of the legislature to these amendments, as well as the balancing exercise undertaken, as outlined above.

Before dealing with the sections in detail, a brief overview of the deduction of expenditure is provided below, to understand the basis of deductions before focussing on the specific IP deductions. Since the focus of this dissertation is on the deduction provisions, only these provisions will be outlined here.

1.1.1. General Deduction Formula

The starting point for any examination of deductions is the "general deduction formula". When seeking to claim the deduction of expenditure, the first port of call for a taxpayer is to ascertain whether there are specific provisions that provide for a specific deduction.[14] The Income Tax Act 58 of 1962 (hereinafter referred to as "the Income Tax Act") regulates deductions through

[10] General deduction formula (see footnote 3); Section 9 (1) (b); 9 (1) (bA); s11 (f).
[11] *Explanatory Memorandum on Act 35 of 2007;* pg. 30 (footnote 9)
[12] Section 11 (gA).
[13] Section 11 (n); Vermeulen, J.N, *The Taxation of IP: A South African Exporting Perspective* (LLM Thesis, University of Cape Town, June 2005) p. 9.
[14] Oosthuizen (footnote 8)

the provisions of sections 11 to 19.[15] In the event that the act[16] does not provide a specific deduction or allowance for a particular type of expenditure, a taxpayer can seek to use the "general deduction formula" contained in sections 11, 11 (*a*)[17] and 23 (*g*).[18] Silke[19] states that 11 (*a*) is the positive test of the formula which sets out what may be deducted, whereas section 23 (*g*) sets out the negative part of the formula which provides what may not be deducted.

The opening words of section 11 show that for the "general deduction formula" to apply the taxpayer must be "carrying on a trade". Section 1 of the Act defines the term "trade"[20] which specifically includes "the use of or the grant of permission to use any patent as defined in the Patents Act, or any design as defined in the Designs Act, or any trade mark as defined in the Trade Marks Act, or any Copyright as defined in the Copyrights Act, or any other property which is of a similar nature."[21]

Silke states that the "general deduction formula" can be deconstructed into the subsequent six components, which the taxpayer must meet in order to qualify for a deduction in terms thereof. The elements are as follows: "expenditure and losses; actually incurred; during the year of assessment; in the production of income; not of a capital nature; either in part or in full laid out or expended for the purposes of trade."[22]

To qualify for a deduction in terms of the "general deduction formula", the abovementioned elements must be satisfied. The courts will give effect to claim and decide based on case law whether the requirements laid above are met. Should an owner or developer of IP not qualify for a specific deduction in terms of the sections discussed below, they are able to claim a deduction based on the "general deduction formula" if it can be shown that the above requirements are met.

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[15] *Ibid*

[16] The Income Tax Act 58 of 1962

[17] "Provides for the deduction of expenditure and losses actually incurred in the production of the income, provided that the expenditure or losses are not of a capital nature, money claimed as a deduction from income derived from trade, to the extent to which such money were not laid out or expended for the purposes of trade."

[18] "Provides that no deductions will be allowed in respect of any moneys claimed as a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of trade;"; Oosthuizen (footnote 8)

[19] Stiglingh M *et al*, *Silke: South African Income Tax*, 2017, Volume 1, p. 136.

[20] "…every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act, or any design as defined in the Designs Act, or any trade mark as defined in the Trade Marks Act, or any Copyright as defined in the Copyrights Act, or any other property which is of a similar nature."

[21] Section 11.

[22] *Silke*, p. 139. (footnote 19)

1.1.2. Section 11 (gA)

Section 11 (gA) provides for an allowance in respect of any expenditure[23] in devising or developing any IP,[24] in obtaining, restoring or registering any IP,[25] in acquiring by assignment "from any other person any IP or property of a similar nature or knowledge required for the use thereof",[26] which is utilised by the taxpayer in the production of income. If such expenditure is incurred before the 29th of October 1999, section 11 (gA) (iii) (aa) (A) applies and if the expenditure incurred is after 29 October 1999, subparagraph (iii) (aa) (B) applies. The section ceases to apply to "any expenditure incurred by the taxpayer during any year of assessment commencing on or after 1 January 2004."[27]

The provisions and amendments of section 11(gA) are dealt with in detail in Chapters 2, 3 and 4 of this dissertation.

1.1.3. Section 11 (gB)

Section 11 (gB) provides for the deduction of expenses for the granting, restoring or extending of any rights pursuant to Patents, Designs or Trade marks. The Act requires that such expenses must be "actually incurred by the taxpayer in the year of assessment."[28] It is the only section that expressly provides for a deduction for trade marks. This section will be dealt with in Chapters 2 and 3.

1.1.4. Section 11 (gC)

This section mirrors section (gA), it provides for the deduction of "expenditure actually incurred by the taxpayer during any year of assessment commencing on or after 1 January 2004 to acquire" [29] any invention or patent, design or copyright as defined by the respective

[23] This excludes "expenditure which has qualified in whole or in part for a deduction or allowance under any of the other provisions of section 11 or the corresponding provisions of any previous Income Tax Act." This is to prevent taxpayers from claiming double deductions and being unjustifiably enriched.
[24] Section 11 (gA) (i).
[25] Section 11 (gA) (ii).
[26] Section 11 (gA) (iii).
[27] Section 11 (gA).
[28] Section 11 (gB).
[29] Section 11 (gC).

applicable acts or any property deemed to be of a similar nature, or knowledge essential to the use of any of the abovementioned IP.

The amendments to the section from its inception to present will be outlined in Chapter 2, while its operation will be dealt with in Chapter 3. Further, due to the fact that it replaces section 11 (gA) in respect of acquisition of IP after January 2004, a detailed comparison will be made of the two sections in Chapter 4.

1.1.5. Section 11 (D)

This section provides for an incentive in respect of the research and development ("R&D") of IP. The substantive provisions and their amendments will be dealt with briefly in Chapter 6 of this dissertation. For the purposes of this dissertation, the procedural provisions of the sections will not be dealt with.

The amendments to section 11 D and its operation will be discussed in Chapter 6 of this dissertation. Section 11 D added a special R&D incentive regime for companies in 2006, the section was substituted in its entirety with effect from 1 April 2012, and again amended thereafter.[30] As a result of the amendments, there are different effective dates. So slightly different rules could apply depending on when the R&D expenditure was incurred (on or after 1 Jan 2012, 1 Jan 2014 or 1 Jan 2015). It is important to note at the outset that section 11D contains a sunset clause and will therefore not apply to research and development expenditure incurred on or after 1 October 2022.[31]

1.2. Rationale

The taxation of tangible property has taken place since the development of commerce. It follows that there is an established body of principles that adequately deal with this subject matter. However, the development and exploitation of IP, and its potential as a generator of economic development and revenue, is far more recent. As a result, the South African legislature has had to "play catch-up" in devising provisions that would allow IP to be exploited and taxed, whilst not unduly restricting its development and use. This need to "catch-up" has

[30] See footnote 212 for amending statutes.

[31] Tax: Juta's Practice Collection/Income Tax, Juta's/Income Tax Act 58 of 1962/CHAPTER 2 THE TAXES (ss5 – 64N)/ Part 1 Normal Tax (ss5-37H)/11D Deductions in respect of scientific or technological research and development.

lead to a piece-meal, reactive approach to the development of legislation dealing with the taxation of IP in South Africa.

This dissertation seeks to explore the development of the taxation of IP, by examining the development of provisions dealing with deductions. An examination of these provisions demonstrates the reactive, piece-meal approach of the Legislature to this area. It will be seen that despite a cohesive strategy towards the taxation revenue generated by IP, the legislation has managed to deal with the issue adequately, for example by dealing with tax-avoidance schemes that arose in response to earlier versions of the provisions.

1.3. Research Questions

1. What are the provisions dealing with the deductions and allowances relating to the determination of normal tax on the proceeds of IP development and exploitation?
2. What do the development of the provisions reveal about the approach of the South African Legislature to the taxation of proceeds of IP development and exploitation?
3. Are these provisions, and the approach, adequate, or is a more cohesive approach required?

1.4. Methodology

This research adopted an empirical, desk-based process of research. Reference was made primarily to legislation and explanatory memoranda. Reference to text books and scholarly writings proved to be of little use, because this area has received very little attention from both sources. Writings on this area tend to be descriptive of the amendments only, without dealing with the reasons or policy behind specific amendments. In this regard, it is only the explanatory memoranda which provided a measure of explanation of the policy background, but this tended to be in general terms only.

1.5. Chapter Outline

Chapter 2 deals with tracking the amendments of sections 11 (gA), (gB) and (gC) and the reasons provided for these amendments by the Legislature in the various Explanatory Memoranda. The purpose of tracking the amendments and the reasons thereof are to look at the development of the law pertaining to the deductions of expenditure for IP and to note the Legislature's intention in amending the various sections.

Chapter 3 deals with the operation and comparison of the sections. This chapter will deal with expenditure for the acquisition, development or right to use the IP. In order to determine the deductibility of the expenditure incurred, one must consider whether there are specific provisions in the Income Tax Act that allow for a deduction of the type of expenditure incurred and what the expenditure is for. It is important to distinguish whether the taxpayer incurred expenditure in developing or acquiring IP or whether the expenditure incurred is merely a premium for the right to use IP, as different provisions operate for these transactions.

Chapter 4 deals with the comparison of the sections and their operation. The chapter seeks to analyse the wording of the sections and the interpretation of their operation, mainly by the examination of case law in which the sections have been considered. The terms analysed are as follows: "allowance and expenditure", "actually incurred" and "property of a similar nature". An examination of the courts' interpretation of the phrases contained in the wording of the Act will lead to a better understanding of how the Act operates.

Chapter 5 sets out the operation of section 11B which was replaced by section 11D. This chapter will analyse the section from its inception until its operation was suspended by the insertion of section 11D. Examining this earlier section will give a better understanding of the development and operation of later sections.

Chapter 6 will deal with the tax incentive contained in section 11 D. The purpose of examining section 11D is to ascertain how the sections have evolved from their inception to their finality.

Chapter 7 will conclude the research by discussing the findings of each chapter.

CHAPTER 2:

Tracking the Amendments of Sections 11 (gA), (gB) and (gC)

2.1. Purpose of Chapter

The purpose of this Chapter is to set out and discuss the amendments to sections 11(gA), (gB) and (gC). This discussion will also demonstrate the approach of the Legislature to IP legislation in general. These sections also gave rise to tax avoidance schemes. The amendments put in place to deal with these schemes will also be examined, to illustrate the approach of the Legislature.

2.2. Introduction

The purpose of tax is to provide the government with revenue to take care of the day to day needs of the country. From the tax collected, governments pay salaries as well as take care of the upkeep of the country's infrastructure, government funded projects, the military and education. The more tax collected, the more revenue the government has. In order to optimise both the revenue collected as well as the development of technology within the country, the Legislature has introduced tax incentives to encourage development, and amended laws to curtail tax evasion to optimise revenue collected.

To fully understand the taxation of IP in South Africa, it is important to look at its history. In this chapter the history of the sections relating to the deduction of IP expenditure from gross income will be examined by tracking the amendments of the sections through the years. Reference will be made to the various Explanatory Memoranda[32] relating to each amending act to give a comprehensive understanding of the operation of the sections and the Legislature's

[32] Explanatory Memorandum on the Income Tax Bill, 1966; Explanatory Memorandum on the Income Tax Bill, 1969; Explanatory Memorandum on the Income Tax Bill, 1977; Explanatory Memorandum on the Income Tax Bill, 1983; Explanatory Memorandum on the Income Tax Bill, 1991; Explanatory Memorandum on the Income Tax Bill, 1993; Explanatory Memorandum on the Income Tax Bill, 1996; Explanatory Memorandum on the Revenue Laws Amendment Bill, 1999; Explanatory Memorandum on the Revenue Laws Amendment Bill, 2000; Explanatory Memorandum on the Taxation Laws Amendment Bill, 2002; Explanatory Memorandum on the Revenue Laws Amendment Bill, 2003; Explanatory Memorandum on the Taxation Laws Amendment Bill, 2007; Explanatory Memorandum on the Taxation Laws Amendment Bill, 2013.

intention, as they detail the background, reasons, further explanations and examples for and of proposed amendments.[33]

However, it must be appreciated that full reasons are not provided for within the various Explanatory Memoranda. As such, external aids of interpretation shall be used to ascertain the reasoning behind the Legislature's amendments by comparing the differences in meaning of the previous wording and the amended wording.

2.3. Background to the introduction of the sections

Before examining the amendments, a brief background will be necessary, to understand what the law was at its inception and to better understand how the law developed with each amendment. All IP deductions were dealt with within section 11 (gA) of the Act from its promulgation. Thereafter, certain issues with the legislation became apparent and tax avoidance schemes which had developed were identified which lead to the Legislature amending the legislation to address these issues. It has been identified that "within the domain of multinational enterprises with branches, subsidiaries and affiliated companies transacting with each other… that intellectual property owning structures have the potential to be used for tax avoidance and tax planning schemes."[34]

These issues and schemes will be identified and addressed in the course of this dissertation. Due to the development of and the increase in use of IP globally, the Legislature sought to amend the law to keep in line with such developments. Thereafter section 11 (gA) applied to all IP prior to 1 January 2004[35] and sections 11 (gB) and (gC) were introduced.

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[33] South African Revenue Services; All Explanatory Memoranda for the period 1997 – 2020 are available at https://www.sars.gov.za/Legal/Preparation-of-Legislation/Pages/Explanatory-Memoranda.aspx accessed on 17 July 2020.

[34] Gutuza, T; "Intellectual Property: A Few Thoughts on Tax and Exchange Control" (2016); IPLJ 1; *South Africa Intellectual Property Law Journal,* p.10.

[35] Section 11 (g) (A) (iii) (ff) provides that "no deduction will be allowed under this paragraph in respect of any expenditure incurred by the taxpayer during any year of assessment commencing on or after 1 January 2004".

Regarding research and development, the deduction was provided for in terms of section 11B, which was replaced with section 11D[36] which provided for a deduction for expenditure on research and development.

The amendments of the above sections take two forms, namely textual amendments and material changes to the law. Each of these amendments will be analysed in detail below. The amendments will be outlined per subsection.

2.4. Sections

2.4.1. Section 11 (gA)

Prior to the insertion of section 11 (gA) in the Act, it can be assumed that the deduction of IP was dealt with in terms of the "general deduction formula", as a specific section dealing with IP cannot be found.

Seeing that IP is a valuable asset and that there had been an increase in the interest of technology, its development and the need for its protection, the Legislature of South Africa decided fit that the intangible, yet valuable assets provided by IP rights should be provided for in tax. It was hoped that by providing deductions for the assets, an interest would be sparked in the economy to develop and acquire such rights thereby increasing the economic growth of IP. This in turn would allow the Republic to keep in line with the rate of growth of IP globally. Further, in view of the increase in the dealings of IP globally, as well as locally, the Legislature sought to include such assets in order to optimise the tax payable to the state through the use of this asset in the economy.

Section 11(gA) was inserted by section 12 (1) (c) of Act 55 of 1966 for the above reasons; substituted by section 14 (1) (b) of Act 89 of 1969 and amended by section 10 (1) (d) of Act 94 of 1983, to cater for all the changes relating to the Tax Ordinance of South West Africa. These are dealt with in detail below.

[36] Price, S.T. (2010), *An Analysis of the South African Tax Incentive for Research & Development and an International Comparison*, LLM. Dissertation. Durban: University of KwaZulu Natal.

For these reasons, section 11(gA) was inserted in to the Act in section 12(1) (c) of the Income Tax Act 55 of 1966.[37] The Explanatory Memorandum on the Income Tax Bill of 1966 provided that the section was inserted to provide for "an allowance in respect of certain expenditure incurred in connection with inventions, patents, designs, trademarks, copyright or similar property."[38] Seeing that the section provided for an allowance, it can be said that the Legislature sought to implement an incentive to encourage the development and registration of IP within the country.

At the time of its introduction, the Act provided that "where such expenditure exceeds R200 the allowance made in respect of any year of assessment will not exceed a proportion of the expenditure (determined according to the probable duration of use of the asset) or one twenty fifth of the expenditure, whichever is greater. Where the expenditure was incurred prior to the commencement of the year of assessment in question the expenditure will normally be regarded as having been written off and the allowance will then be calculated only on the balance and not written off."[39]

The amount was later altered by an amendment effected by section 9 (1) of Act 36 of 1996, where the amount was increased from R 200 to R 3 000 seeing that the amount had not been increased since 1962 and having regard for inflation.[40] The effect of increasing the amount was that where a taxpayer incurs expenditure of R3000 or less in respect of such property, the expenditure will be deducted in full in the year in which it was incurred.[41] The increase in the amount was to cater for inflation, but the effect of the provision remained the same. Thus, this amendment did not substantively alter the operation of the section, but increased the monetary threshold to cater for inflation.

The amount referred to was again altered by an amendment effected by section 14 (1) (a) of Act 30 of 2002 where the amount increased from R3000 to R5000. The reason for this increase as set out in the Explanatory Memorandum was "Companies that invest in certain IP are able to deduct the full cost of the investment in the year of assessment during which the expenses are incurred if the total cost of the investment is not more than R3 000. The Minister of Finance

[37] Income Tax Act 58 of 1962.
[38] Organisation of South African Law Libraries; SARS Tax Legislation; Explanatory Memorandum on the Income Tax Bill 1966, pg. 6 available at https://osall.org.za/docs/2011/02/1966-IT-Bill.pdf accessed on 17 July 2020.
[39] Explanatory Memorandum on the Income Tax Bill 1966 (footnote 38).
[40] Ibid
[41] Ibid, p. 9.

proposed in his Budget Review this year that this amount be increased to R5 000 in respect of expenditure incurred on or after 1 March 2002 and this amendment give effect to this proposal."[42] Further research yielded no further explanation for the increase in the values. As such, one can assume that where amounts were increased, the Legislature merely sought to keep pace with inflation.

Section 11 (gA) was substituted in its entirety by s 14 (1) (b) of the Income Tax Act 89 of 1969. The substitution was primarily of a textual nature and supplementary references were inserted to the Income Tax Ordinance of South West Africa to exclude from the calculation of any allowance in respect of expenditure in respect of patents, designs, trade marks, or copyright, any expenditure allowed under such ordinance.[43] These provisions were subsequently deleted by the amendment of the section by s 10(1) (d) of Act 94 of 1983.[44] While amendments relating to South West Africa were introduced, these bore no effect on the substantive position in South Africa.

It was observed that "more than fifty of the amendments effected in terms of the Bill have a bearing on those provisions in the principal Act which relate to the taxation of South West African companies."[45] The Explanatory Memorandum on the Income Tax Bill of 1983 provides that "Prior to 1969 those companies were subject to income tax under the Ordinance of South West Africa, but in 1969 the principal Act was extensively amended in order to render them liable to tax under the law of South Africa"[46] In 1978, the Administrator General of South West Africa issued a proclamation[47] which had the effect of transferring the administration of the Income Tax Act in relation to South West African companies from South Africa's Secretary of Inland Revenue to their South West African Director of Finance; and rendered section 111A of the Income Tax Act inoperative.[48] Further, in 1981, the National Assembly of South West

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[42] South African Revenue Services; *Explanatory Memorandum on Act 30 of 2002;* pg. 15 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2002-02%20-%20%20Explanatory%20Memorandum%20Taxation%20Laws%20Amendment%20Bill%202002.pdf accessed on 17 July 2020.

[43] Organisation of South African Law Libraries; SARS Tax Legislation; Explanatory Memorandum on the Income Tax Bill 1969, pg. 11 available at https://osall.org.za/docs/2011/02/1969-IT-Bill.pdf accessed on 17 July 2020.

[44] Income Tax Act 58 of 1962; Organisation of South African Law Libraries; SARS Tax Legislation; Explanatory Memorandum on the Income Tax Bill 1983, pg. 11 available at https://osall.org.za/docs/2011/02/1983-IT-Bill.pdf accessed on 17 July 2020.

[45] Explanatory Memorandum on the Income Tax Bill 1983, pg. 3 (footnote 44).

[46] Ibid.

[47] Executive Powers Transfer Proclamation (No. A.G. 18 of 1978).

[48] Explanatory Memorandum on the Income Tax Bill 1983, pg. 3 (footnote 44).

Africa promulgated the Income Tax Act 24 of 1981 which "repealed the principal Act in so far as it applied within South West Africa"[49] The Explanatory Memorandum goes on to state that in addition to removing the reference to South West Africa, it took the opportunity to improve the wording of the provisions in the principal Act and remove other obsolete provisions.[50] [51]

Section 11 (gA) (i) was substituted by section 13 (c) of Act 129 of 1991; section 20 (b) of Act 53 of 1999 and by section 27 (1) (d) of Act 31 of 2013.[52]

The substitution by Act 129 of 1991 removed the discretionary powers of the Commissioner, by removing the phrase "in the opinion of the Commissioner" and effected other amendments of a textual nature.[53] It has been noted that there have been limits imposed on the discretionary powers of the Commissioner as these wide powers often lead to uncertainty.[54] The need for certainty in our law is imperative to ensure justice and fairness as it creates uniformity in the law and in its precedent.

The Revenue Laws Amendment Act 53 of 1999 merely proposed textual amendments[55] to subparagraph (i).[56] These textual amendments amended the references to the various IP acts which were themselves amended.

Section 11 (gA) (i) was amended for the final time in the Taxation Laws Amendment Act 31 of 2013 where the Legislature proposed "to standardise references to the Patents Act, Designs

[49] Ibid.
[50] Ibid.
[51] The changes formed part of South West Africa's journey to independence. Upon achieving Independence, South West Africa became Namibia.
[52] Taxation Laws Amendment Act 31 of 2013.
[53] Organisation of South African Law Libraries; SARS Tax Legislation; Explanatory Memorandum on the Income Tax Bill 1991, pg. 14 available at https://osall.org.za/docs/2011/02/1991-IT-Bill.pdf accessed on 17 July 2020; These textual amendments include: removing "1952 (Act No. 37 of 1952)" and inserting "1978 (Act No. 57 of 1978)"; removing "1965 (Act No. 63 of 1965)" and inserting "1978 (Act No. 98 of 1978)", this is due to the fact that both the Patents Act and the Copyright Act were amended.
[54] Van Schalkyk, L. '*The discretionary powers of the Commissioner for the South African Revenue Service – Are they constitutional?*' Department of Accountancy, University of Stellenbosch.
[55] South African Revenue Service; *Explanatory Memorandum on the Revenue Laws Amendment Bill of 1999;* pg. 13 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-1999-01%20-%20%20Explanatory%20Memorandum%20Revenue%20Laws%20Amendment%20Bill%201999.pdf accessed on 17 July 2020.
[56] Here the Legislature changed the citations of the Designs Act and Trade Marks Act, which were amended.

Act, Trade Marks Act and the Copyright Act in the Income Tax Act."[57] The citations of the aforementioned acts were changed due to their respective amendments.

Section 11 (gA) (ii) was substituted by section 20 (b) of Act 53 of 1999, by section 15 (d) of Act 59 of 2000 and by section 27 (1) (d) of Act 31 of 2013. We can note that the amendments to subparagraph (ii) by Act 53 of 1999 and Act 31 of 2013 bear the same nature as subparagraph (i) and are purely of a textual nature as a result of the amendments of the various IP acts mentioned in the sections.

However the amendment to section 11 (gA) (ii) by Act 59 of 2000 inserted the words or "under similar laws of any other country", this was done in accordance with the deletion of section 11 (gC) which will be dealt with later on in this chapter.

Section 11 (gA) (iii) was substituted twice: firstly, by section 9(1) (b) of Act 113 of 1993 and s11 (1) (c) of Act 8 of 2007.[58] With the first amendment, the Legislature removed the words "…which in the opinion of the Commissioner is…" This provided for the removal of the discretionary powers of the Commissioner.[59] This amendment was proposed to create more uniformity.[60] The amendment effected by Act 8 of 2007 [61] changed the words "connected with" to "essential to". This had the effect of narrowing the section as the section now restricted the qualifying assets to that which were absolutely necessary as opposed to that which was just connected with the "use of a patent, design, trade mark, copyright or other property or the right to have such knowledge imparted." [62]

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[57] South African Revenue Service *Explanatory Memorandum on the Taxation Laws Amendment Bill of 2013;* pg. 107 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2013-02%20-%20Explanatory%20Memorandum%20Taxation%20Laws%20Amendment%20Bill%202013.pdf accessed on 17 July 2020.

[58] Income Tax Act 58 of 1962.

[59] Organisation of South African Law Libraries; SARS Tax Legislation; Explanatory Memorandum on the Income Tax Bill 1993, pg. 33-4 available at https://osall.org.za/docs/2011/02/1993-IT-Bill.pdf accessed on 17 July 2020; Legislature removed the words "…in the opinion of the Commissioner…"

[60] Limits imposed on the discretionary powers of the Commissioner as these powers tend to create uncertainty - see footnotes 48 and 49.

[61] Section 11 (1) (c) of Act 8 of 2007.

[62] South African Revenue Service; *Explanatory Memorandum on the Taxation Laws Amendment Bill of 2007*; pg. 20 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2007-05%20-%20Explanatory%20Memorandum%20Taxation%20Laws%20Amendment%20Bill%202007.pdf accessed on 17 July 2020.

Having set out the respective provisions, we now turn to an examination of the anti-avoidance schemes. Section 11 (gA) (iii), which is the core of section 11 gA, provides for the deduction allowed for IP expenditure. The subsections of this paragraph have been amended several times to counter to tax avoidance schemes that were devised by IP holders. These schemes will be outlined below.

2.4.1.1. Anti-avoidance provisions in respect of deductions.

In Act 25 of 2015 the Legislature substituted Section 11 (gA) (aa) (A) by removing the discretion of the Commissioner.[63] Sub sections AA and BB of 11 (gA) (iii) (aa) (B) was substituted by s 11(1) (e) of Act 8 of 2007.[64] In both sub sections the Legislature tightened the provisions on the depreciation of "know how to that which is essential to as opposed to connected with the use of IP." [65]

Although no reason is stated for the amendment relating to the replacement of the word "connected with" with "essential to", using an external aid of interpretation, being the dictionary meaning in a contextual framework, one can ascertain the reasoning behind the Legislature's amendments by comparing the differences in meaning.

It has been held that "Dictionary definitions serve to mark out the scope of the meanings available for a word, but the task, remains of ascertaining the particular meaning and sense of the language intended in the context of the statute under consideration." [66] Further, in *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka*[67] it was stated that words cannot be determined decisively by its dictionary meaning and that the dictionary meaning is merely a guide. In order to conclusively determine the meaning that the Legislature intended, one must take in to account the context in which it is used.[68]

Since the Explanatory Memorandum contains no explanation for the amendment, the following is proposed.

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[63] Section 18 (g) – (h); Taxation Laws Amendment Act 25 of 2015.
[64] Income Tax Act 58 of 1962.
[65] Ibid.
[66] Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council 1972 (1) SA 88 (W) 94G, as cited by Botha.
[67] *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 T.
[68] Botha, C. *Statutory Interpretation an Introduction for Students* 5 ed: Juta (2012).

The South African Oxford School Dictionary [69] defines "connect" as "…*verb* – (1) join together; link (2) think of as being associated with each other" while "essential" is defined as "*adjective* – not able to be done without." This shows that the Legislature has limited the depreciation of know-how to that which is imperative for the use of certain IP. It is submitted that this narrowing of the legislation was to act as a filter so that businesses and taxpayers are limited in what they could claim in terms of the provision.

A broader section would allow for astute businessman and accountants to devise tax avoidance schemes by providing that certain assets are merely "connected with" the use of any form of IP or other property or the right to have such knowledge imparted. In other words "connected with" is an easier threshold to meet. By restricting the provision to knowledge that is inherent to the use of the IP, there is less room for taxpayers to attempt to claim for knowledge that was not intended by the Legislature.

The provision provides that a deduction may be claimed for expenditure on the acquisition of "any knowledge [connected with] essential to the use of such invention, patent, trade mark, copyright or other property or the right to have such knowledge imparted".[70]

Section 11 (gA) (aa) was amended by s 9 (1) of Act 36 of 1996, where the Legislature raised the amount that should not be exceeded from R200 to R 3 000. The section came into operation on 1 August 1996 and applied to any expenditure incurred on and after that date.[71] It was further substituted by s 20 (c) of Act 53 of 1999 and amended by s 14 (1) (a) of Act 30 of 2002. In Act 53 of 1999 the Legislature added "and was incurred before 29 October 1999" and substituted the words "one twenty-fifth" for "four percent" to 11 (gA) (aa) (A) and added the words "on or after 29 October 1999, the allowance shall not for any one year" to the words in section 11 (gA) (aa) (B) and added the words "right to have such knowledge imparted" to the end of section 11 (gA) (aa) (B) (BB).

The Explanatory Memorandum for the Revenue Laws Amendment Bill of 1999 provides that at the time of the then proposed amendment there was a dramatic increase in the number of

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[69] *South African Oxford School Dictionary*, 2nd Edition, Oxford University Press, 2004.
[70] Section 11 (gA).
[71] Section 9 (1), Income Tax Act 36 of 1996.

taxpayers selling assets, a substantial percentage of which related to trade marks. It was identified that the reason for this increase was due to the fact that the disposal of IP was generally regarded as a transaction of a capital nature, whereas the acquisition of the property qualified for a favourable annual allowance, which is discussed below.[72] The law as it stood at the time created a discrepancy "between the deduction and taxation of consideration in respect of intellectual property."[73] It was further stipulated that the review of the various transactions, and the establishment of the probable duration of future use, took excessive time and resources.[74]

The issue identified by the Legislature was that where a business was sold as a going concern, the parties to the transaction often inflated the values of the goodwill and trade marks included in the agreement of sale, in their favour. This ensured a favourable tax result depending on the tax status of the individual parties.[75] At the time the Act gave the Commissioner a discretion relating to the write off period of the IP but no discretion was given regarding the determination of the value of the assets. The escalation in the frequency of transactions of this nature coupled with the strengthening of the Rand began to pose a threat to the tax base.[76]

The Legislature stated, in the Explanatory Memorandum on the Revenue Laws Amendment Bill of 1999 that:

> *"In only five recent transactions of this nature, the costs allocated to trade marks exceeded R2 billion and it has, therefore, become necessary to address the situation."*

With regard to trade marks, the Legislature proposed that "no allowance be granted in respect of any expenditure incurred by such taxpayer on or after the date of Tabling of [the Revenue Laws Amendment Bill of 1999], which relates to the acquisition of any trade mark or other property of a similar nature." [77]

It was further proposed that the discretion in respect of the period of the expenditure should:

[72] See following paragraph.
[73] *Explanatory Memorandum on the Revenue Laws Amendment Bill of 1999;* pg. 13 (footnote 55).
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.

"be allowed be removed and that the write-off period for IP be brought more in line with the legislation regulating such property. In terms of the Patents Act, 1978, the duration of the registration of a patent is 20 years. In terms of the Designs Act, 1993, the duration of the registration of an aesthetic design is 15 years and a functional design 10 years. In terms of the Copyright Act, 1978, the term of copyright is 50 years. It is, therefore, proposed to fix the duration periods of patents, inventions, copyright, knowledge and similar property at 20 years and any design, or any other property of a similar nature at 10 years. These proposals are in line with the methods employed in some foreign tax jurisdictions to deal with similar situations. The proposed measures also remove the Commissioner's discretion to allow shorter write-off periods. This will enhance certainty and simplify the application and administration of the provisions." [78]

This explanation further applies to the insertion of proviso (ee) by s20 (d) of Act 53 of 1999.[79]

It was stated by Kosie Louw, the director in charge of legislation at SARS, at the time, that there was a substantial amount of tax revenue lost as a result of deductions allowed on inflated prices of trade marks. Thus this justified the ban on the deduction of trade marks.[80] It was further stated that SARS would monitor the situation, and should the problem persist with other forms of IP, the entire system would be reviewed. SARS stated that due to the fact that large amounts were being lost, "drastic measures" were required.[81]

Section 11 (1) (d) and (e) of Act 8 of 2007 tightened the "depreciation for know-how to that which is "essential to" (as opposed to "connected with") the use of a patent, design, trade mark, copyright or other property or the right to have such knowledge imparted." [82]

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[78] Ibid, p. 30.

[79] This provision was further substituted by s11 (1) (f) of Act 8 of 2007 where 'the proposed amendment tightened the depreciation for know-how to that which is "essential to" (as opposed to "connected with") the use of a patent, design, trade mark, copyright or other property or the right to have such knowledge imparted.'

[80] Ban on trademark tax `overkill`; Business Report, 20 May 1999, Accessed at: https://www.iol.co.za/business-report/economy/ban-on-trademark-tax-overkill-802831.

[81] Ban on trademark tax `overkill`; Business Report, 20 May 1999, available at: https://www.iol.co.za/business-report/economy/ban-on-trademark-tax-overkill-802831 accessed on 17 July 2020.

[82] South African Revenue Service *Explanatory Memorandum on the Taxation Laws Amendment Bill of 2007;* pg. 20 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2007-05%20-%20Explanatory%20Memorandum%20Taxation%20Laws%20Amendment%20Bill%202007.pdf accessed on 17 July 2020.

Section 11 (gA) (bb) was substituted by section 10 (1) (e) of Act 94 of 1983 where the Legislature omitted the words "and in the case of a company under any Income Tax Ordinance of the territory". This had the object of deleting provisions relating to South West Africa which appeared in s11 (gA) of the Income Tax Act. [83] The provision was further amended by s 18 (1) (h) of Act 25 of 2015 where the Legislature deleted the words "In the opinion of the Commissioner" which had the result of removing the discretion of the Commissioner[84]. It has been noted that there have been limits imposed on the discretionary powers of the Commissioner as these powers tend to create uncertainty.[85] The need for certainty in our law is imperative to the purposes of justice and fairness as it creates uniformity in the law and in its precedent. By removing the discretion of the Commissioner, the Legislature sought to create more uniformity.

The Legislature provided for a substitution in paragraph (gA*)* of sub paragraph (cc) of the proviso for subparagraphs (A) and (B) in section 27 (1) (e) of Act 31 of 2013 by substituting the words "shareholder" for "holder of shares" as a matter of style consistency.[86] Amendments of this nature (i.e., textual amendments) have little to no impact on the effect of the provision, whereas the tightening up of other provisions materially affect the taxpayers' rights.

Section 11 (gA) (dd) [87] was added in 1993.[88] This amendment was introduced as a result of the Legislature finding 11 (gA) to be "ineffective" in that it did not adequately provide for all cases where the buyer and seller had common economic interests. Due to the fact that 11 (gA) provides for the possibility that a purchaser of IP may qualify for a deduction without the seller having to be taxed on a corresponding receipt or accrual, purchasers of a business sold as a going concern often allocate a substantial portion of the purchase price to IP. To prevent abuse

[83] Organisation of South African Law Libraries; SARS Tax Legislation *Explanatory Memorandum on the Income Tax Bill of 1983* pg. 11 available at https://osall.org.za/docs/2011/02/1983-IT-Bill.pdf accessed on 24 July 2020; see pages 12 – 13 for discussion on South West Africa.
[84] To enhance certainty and simplify the application and administration of the provisions.
[85] Van Schalkwyk, L. *'The discretionary powers of the Commissioner for the South African Revenue Service – Are they constitutional?'* Department of Accountancy, University of Stellenbosch.
[86] *Explanatory Memorandum on the Taxation Laws Amendment Bill of 2013, p. 107* (footnote 57).
[87] "…where any such invention, patent, design, trade mark, copyright or other property or knowledge was so acquired or obtained by the taxpayer on or after 1 July 1993 from any other person who is a resident of the Republic or who is ordinarily resident in a neighbouring country (or, in the case of a company, is incorporated or has its place of effective management in a neighbouring country), and who is a connected person in relation to the taxpayer, the allowance under this paragraph shall be calculated on an amount not exceeding the lesser of the cost of such invention, patent, design, trade mark, copyright or other property or knowledge to such connected person or the market value thereof as determined on the date upon which such invention, patent, design, trade mark, copyright or other property or knowledge was acquired or obtained by the taxpayer."
[88] Added section 9 (1) (d) of Act 113 of 1993.

of the provision, especially between companies of the same group, this anti avoidance provision was introduced.[89]

The Legislature further stated that the section was "too restrictive in so far as it forbids any deduction whatsoever where the limited relationship between buyer and seller exists, notwithstanding that there may be compelling reasons other than the obtaining of a tax benefit why the right should be transferred." [90] The clause "accordingly provides that the total prohibition on a deduction will not apply to rights acquired on or after 1 July 1993, [this sub clause] provides that where on or after that date such rights are acquired by a taxpayer from a connected person,[91] the deduction to the taxpayer is limited to the lesser of the cost to the connected person or the market value at the time of acquisition." [92]

Section 11 (gA) (dd) was further substituted by section 5 (1) (b) of Act 140 of 1993 where the Legislature inserted the words "*an amount not exceeding"* before the words "the lesser of the cost of such". In the Explanatory Memorandum for the Revenue Laws Amendment Act of 1993, the Legislature explains that section 11 (gA) permits a deduction on an asset which is "calculated on the cost of the asset to the taxpayer". Further, the section provides that "where an asset has increased in value is sold to a connected person, the deduction allowable to the connected person is limited to the lesser of the original cost to the seller or the market value at the time of sale to the connected person." Further, the Legislature was concerned that the section could be misinterpreted to mean that "where an asset is sold to a connected person at a price which is lower than both the original cost and market value, the purchaser is entitled to claim a deduction which exceeds his actual cost." In order to remove the doubt, the Legislature amended the section, which was deemed to have come into operation on 1 July 1993. The subparagraph was further substituted, where the amendment was consequential upon the word "resident" being introduced into section 1 of the Act.[93]

Subparagraph (ff) of section 11 (gA) was added by section 27 (1) (b) of Act 45 of 2003. This proviso provides that "no deduction shall be allowed under this paragraph in respect of any

[89] *Tax: Juta's Practice Collection/ Income Tax: Juta's/Income Tax Act 58 of 1962*/CHAPTER 2: THE TAXES (ss 5 – 64C)/PART I Normal Tax (ss 5 – 37H)/11 General Deductions allowed in determination of taxable income, 11 gA – 4A.
[90] See Footnote 59, p. 34.
[91] See definition – Section 1, Income Tax Act 58 of 1962.
[92] See footnote 59, p. 34.
[93] Substituted by section 15 (f) of Act 59 of 2000.

expenditure incurred by the taxpayer during any year of assessment commencing on or after 1 January 2004." The Legislature stated in the Explanatory Memorandum that accompanied the amendment that expenditure for R&D, by virtue of its nature, could not fall within the scope of the "general deduction formula". The Legislature noted that the country's rules had become "obsolete and too restrictive" and did not extend to cover the ambit of modern technology. It was imperative that a more flexible system that was in line with technological advancements, that was on par with international standards and that encouraged innovation, be introduced.

The amendments of the respective IP acts and by virtue of that the amendments of the Income Tax Act, demonstrates that IP law is an ever changing and developing field. It is important to note that the law is fluid and therefore changes as more protection is needed. In the case of tax law, it is important for the Legislature to keep up with the developments of property and commercial rights as the economy fluctuates and supply and demand figures change. The amendments effected were to protect interest of the fiscus against tax avoidance, and to ensure that South Africa's tax laws remain competitive in order to encourage industry and to attract foreign investment.

The above also reveals a trend in the amendments. The Legislature sought to limit and narrow the section to adequately prevent any tax avoidance and abuse of the section due to its initial wide scope of operation. As IP became more common and valuable, with the increase in its protection both locally and internationally, deductions and allowances that are too generous threaten the tax base.

2.4.2. Section 11 (gB)

Section (11) (gB) was inserted by section 12 (1) (c) of Act 55 of 1966. The Legislature stated that it was to provide for the deduction from income of expenditure incurred "during the year of assessment in obtaining the extension of the term of a patent or the extension of the registration period of a design or the renewal of a trade mark." [94]

[94]Organisation of South African Law Libraries; SARS Tax Legislation; *Explanatory Memorandum for the Income Tax Bill 55 of 1966* pg. 6 available at https://osall.org.za/docs/2011/02/1966-IT-Bill.pdf accessed on 24 July 2020.

The amendments by section 14 (1) (c) of Act 89 of 1969 and section 20 (e) of Act 53 of 1999 were merely textual in nature. The Legislature sought to amend the reference to the various IP acts.

The substitution by section 13 (d) of Act 129 of 1991 sought to remove the discretionary powers of the Commissioner, in addition the Legislature effected other textual changes to the section.

Section 15 (g) of Act 59 of 2000 inserted the words "or under similar laws of any other country" to the section. The Legislature identified that the section applied to the restoration, registration or extension of IP within South Africa and seeing that income derived from foreign IP would be taxable in the hands of the resident, the Legislature proposed that the provision be extended to provide for an allowance in respect of expenditure incurred in the registration of any IP under any similar law of any other country.[95]

Section 11 (gB) was further amended by section 27 (1) (c) of Act 45 of 2003 where the following proviso was added: "Provided that no deduction shall be allowed under this paragraph in respect of any expenditure incurred during any year of assessment commencing on or after 1 January 2004."[96] It was stated in the Explanatory Memorandum for the Bill that a more flexible system of taxation of IP, in line with international standards, was needed. The amendments to section 11 proposed in this Act introduced the dates applicable to the deduction of IP expenditure. In order to ascertain which section applies to the IP in question, the taxpayer must take heed of when the IP came into being.[97]

Section 11 (1) (a) of Act 20 of 2006 provided for the addition of the words "the grant of any patent or the restoration of any patent" and "the registration of any design". Further, the Legislature removed the phrase "Provided that no deduction shall be allowed under this paragraph in respect of any expenditure incurred during any year of assessment commencing on or after 1 January 2004"[98] from the section. The Explanatory Memorandum provides that

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[95] Organisation of South African Law Libraries; SARS Tax Legislation; *Explanatory Memorandum for Revenue Laws Amendment Bill of 2000* pg. 20 available at https://osall.org.za/docs/2011/02/2000-Revenue-Laws-Amendment-Bill.pdf accessed on 24 July 2020.

[96] Section 27 (1) (c) of Act 45 of 2003.

[97] South African Revenue Service *Explanatory Memorandum on the Revenue Laws Amendment Bill of 2003;* pg. 23 - 24 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2003-01%20-%20Explanatory%20Memorandum%20Revenue%20Laws%20Amendment%20Bill%202003.pdf accessed on 24 July 2020.

[98] Section 11 (1) (a) Revenue Laws Amendment Act 20 of 2006.

"It is proposed that the amendment in respect of the costs of registration of IP will be effective for years of assessment commencing on or after 2 November 2006." [99]

The Legislature sought to correct the oversight whereby the deduction of the cost of registering "trade marks was inadvertently omitted" by the substitution proposed by section 11 (1) (g) of Act 8 of 2007.

The substitution proposed by section 17 (1) (b) of Act 35 of 2007 removed the words "payment" and "terms" from the section. The Legislature stated that this amendment merely corrected a textual error and the final substitution proposed by section 27 (1) (f) of Act 31 of 2013 proposed to standardise references to the Patents Act, Designs Act and the Trade Marks Act in the Income Tax Act. This amendment, along with other amendments of a textual nature do not have any effect on taxpayers, as these are merely corrections of language and/or grammar.

2.4.3. Section 11 (gC)

Section 11 (gC) was inserted by section 9 (1) (d) of Act 113 of 1977. It provided that an "exporter may be allowed as a deduction from his income expenditure incurred in obtaining in any export country the registration or restoration of any patent or the registration of any design or trade mark or the extension of the term or registration period of any patent, design or trade mark. Such expenditure may also qualify as marketing expenditure for the purposes of the exporters"[100] allowance granted under section 11bis of the principal Act"[101] This section was subsequently deleted by section 15 (h) of Act 59 of 2000 due to the amendments to sections 11(gA) and (gB). The amendments to section (gB) extended the section to include the registration of IP in other countries, therefore the original provisions of section (gC) were deleted, and the current section (gC) was inserted by section 27 (1) (d) of Act 45 of 2003.

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[99] South African Revenue Service *Explanatory Memorandum on the Revenue Laws Amendment Bill of 2006;* pg. 72 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2006-01%20-%20Explanatory%20Memorandum%20Revenue%20Laws%20Amendment%20Bill%202006.pdf accessed on 24 July 2020.

[100] Section 9 (1) (d) of Act 113 of 1977.

[101] Organisation of South African Law Libraries; SARS Tax Legislation; *Explanatory Memorandum on the Income Tax Bill of 1977* pg. x available at https://osall.org.za/docs/2011/02/1977-IT-Bill.pdf accessed on 24 July 2020.

In the Explanatory Memorandum to the Revenue Laws Amendment Bill of 2003, the Legislature noted that there was a problem with the taxation laws as they stood at the time as they discouraged R&D in the country.[102] Furthermore, the law was viewed as restrictive and archaic. The proposed changes sought to create a more flexible system which was in line with modern reality and encouraged innovation.[103] Further, the Legislature hoped to put our law on a platform where it was comparable to international standards.[104] After the amendments were proposed the taxpayer had a choice when a capital asset was brought into use. They could claim a deduction under the provisions proposed or any other section that may have yielded more benefits, but no double deductions would be allowed.[105]

The amendments effected by section 16 (1) (d) and (e) of Act 32 of 2004[106] were purely of a textual nature where the word "cost" was replaced with "expenditure" and "of acquiring, devising, developing or creating that invention, patent, design, copyright or other property or knowledge" was inserted to section 11 (gC) (bb) relating to acquisitions from connected persons. This amendment had no implication on taxpayers, as it is merely a correction of language.

The section was further amended by section 11 (1) (i) of the Taxation Laws Amendment Act 8 of 2007 where the words "if that invention, patent, design, copyright, other property or knowledge, as the case may be, is used by the taxpayer in the production of his or her income" was inserted. This was added for the purposes of consistency as deductions in the form of depreciation of IP costs will only be allowed if the use of the IP is "in the production of income."[107] At the time the requirement was not necessary in order to qualify for the deductions allowed for the acquisition of IP. The proposed amendment alters this position and requires that in order to qualify for the depreciation benefits the IP must be used "in the production of income."[108]

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[102] South African Revenue Service *Explanatory Memorandum on the Revenue Laws Amendment Bill of 2003;* pg. 23 - 24 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2003-01%20-%20Explanatory%20Memorandum%20Revenue%20Laws%20Amendment%20Bill%202003.pdf accessed on 24 July 2020.

[103] Ibid.

[104] Ibid.

[105] Ibid.

[106] The Revenue Laws Amendment Act of 2004.

[107] See footnote 82.

[108] Ibid.

Sections 11 (gC) (i) to (iv) was substituted by section 27 (1) (g) of Act 31 of 2013 where "the amendment proposed to standardise references to the Patents Act, Designs Act, Trade Marks Act and the Copyright Act in the Income Tax Act."[109]

The Income Tax Act states that sub-paragraph (v) was substituted by section 10 (1) (h) of Act 8 of 2007, however in the writer's research and analysis of the amending acts, it was found that the subparagraph was substituted by section 11 (1) (h).[110] The substitution proposed to tighten the "depreciation for know-how to that which is "essential to" (as opposed to "connected with") the use of a patent, design, trade mark, copyright or other property or the right to have such knowledge imparted."[111] This amendment was proposed by section 11 (1) (j) for sub-items A and B.

Sections 11 (gC) (aa) and (bb) were amended by section 16 (1) (e) of Act 32 of 2004.[112] The Legislature sought to delete the word "cost" as it appears in the subsections and replace it with the word "expenditure". In the Explanatory Memorandum the Legislature merely suggests that these amendments are "of a textual nature". It is submitted that this amendment was to create more uniformity as the word "expenditure" is the word typically used elsewhere in the Act to refer to "cost". As such this amendment had no substantive effect on the IP provisions.

Subsection (aa) was amended by section 2 (2) (b) [113] of the Taxation Laws Amendment Act 8 of 2007. The amending act states that "The Income Tax Act, 1962, is hereby amended… by the substitution for each monetary amount in the provisions specified in the second column of the Tables in Part II of Appendix I to this Act of the monetary amount in the third column opposite the relevant provision." The Explanatory Memorandum states that "small scale IP, which is IP below the indicated amount is immediately deductible".[114] The amount indicated was to be R 5000.00.

Section 11 (gC) (aa) was further amended by section 1 (2) (c) of the Taxation Laws Amendment Act 3 of 2008. This amendment is the same amendment as effected in the Taxation Laws

[109] *Explanatory Memorandum on the Taxation Laws Amendment Bill of 2013;* clause 27 (footnote 57)
[110] Income Tax Act 58 of 1962.
[111] See footnote 63.
[112] The Revenue Laws Amendment Act 32 of 2004.
[113] Fixing of rates of normal tax and amendment of certain amounts for purposes of Act 58 of 1962.
[114] See footnote 82, p.13.

Amendment Act 8 of 2007. The Legislature retained the provision that the IP that had a value of less than the indicated amount of R 5 000.00 was immediately deductible.

Paragraph (bb) of Section 11 (gC) was deleted by section 17 (1) (c) of Act 35 of 2007. The Income Tax Act has several identical provisions scattered around which deal with the purchase of property that qualifies for a depreciation allowance, from “connected persons”. The purpose of provisions such as these is to ensure that taxpayers do not obtain an unintended tax advantage by depreciating at normal rates assets that were purchased at a reduced rate, due to tax concessions. One such provision is subsection (bb) of section 11 (gC). What often happened was that the depreciable cost was set at artificially high amounts. In order to combat avoidance, a new system was introduced with the insertion of Section 23I. Thus paragraph (bb) was deleted so that the new system under 23I could operate. Section 23I will be discussed in more detail in Chapter 3.

2.5. Conclusion

The amendments of the sections examined in this Chapter take two forms, namely textual amendments and material changes to the law. The Legislature sought to improve the wording of the sections and create uniformity to the Act as a whole. It may be noted that the when the section was introduced, while it fulfilled its purpose, over time it was found to be too wide, which allowed for avoidance schemes, thus the Legislature sought to narrow these provisions. Further, the Legislature proposed different systems to be applied at different intervals of time. Despite the changes in systems, the sections’ purposes remained fundamentally the same as it provided for expenditure incurred in the registration of the various forms of IP.

CHAPTER 3

Normal Tax Consequences of IP

3.1. Purpose of Chapter

The previous chapter outlined the IP tax provisions' history and how they developed with each amendment. Against this background, this chapter will deal with the effect of the provisions as they currently operate. Expenditure for the acquisition, development or the right to use IP will be discussed. In sum, this chapter records the provisions as they currently stand, in preparation for the analysis of these sections in Chapter 4.

3.2. Introduction

In order to determine the deductibility of the expenditure incurred in respect of IP, one must consider whether there are specific provisions in the Income Tax Act that allow for a deduction of the type of expenditure incurred and what the expenditure is for. It is important to distinguish whether the taxpayer incurred expenditure in developing or acquiring the IP or whether the expenditure incurred is merely a premium for the right to use the IP.[115]

Each of these issues will be addressed in this chapter.

3.3. Deductions

3.3.1. Expenditure incurred in the Acquisition of IP

[115] Oosthuizen, see footnote 8.

In this section expenditure that was incurred in the acquisition of IP through purchase and sale will be dealt with. The research will be based on the assumption that both the seller and buyer are South African residents.

Before determining whether expenditure is deductible in terms of the Act, the tax payer must consider whether or not there is a specific deduction available. If not, the taxpayer can seek a deduction by use of the "general deduction formula". With regard to deductions available in respect of IP, "the amount and timing of the various specific deductions depend on whether the taxpayer has spent amounts on developing or acquiring the IP items or whether payments were made to someone else for the use of these items."[116]

Expenditure incurred for the acquisition of IP may qualify for deduction in terms of two specific provisions of the Income Tax Act, namely section 11 (gA) and 11 (gC). Section 11 (gA) provides for the development of IP, while 11 (gC) provides for expenditure incurred in the acquisition of the IP.[117]

Section 11*(g*A*)* provides for a deduction of expenditure incurred before 1 January 2004 on acquiring and developing IP assets. It must be read in conjunction with paragraphs (a),[118] (f) [119] and (g)[120] of the gross income definition found in section 1 of the Income Tax Act.[121]

Section 11 (gC) of the Income Tax Act deals specifically with expenditure incurred for the acquisition of IP. This section is applicable when the taxpayer "actually incurred expenditure" in the acquisition of IP, provided that the acquisition took place after 1 April 2004. It is

[116] Oosthuizen, see footnote 8.

[117] *Tax: Juta's Practice Collection: Income Tax/Income Tax Act 58 of 1962*/CHAPTER II THE TAXES (ss 5 – 37H)/11 General deductions allowed in determination of taxable Income.

[118] any amount received or accrued by way of annuity, including any amount contemplated in the definition of "living annuity" or the definition of "annuity amount" in section 10A (1), other than an amount contemplated in paragraph (*d*) (ii).

[119] "…any amount received or accrued in commutation of amounts due under any contract of employment or service."

[120] "…any amount received or accrued from another person, as a premium or consideration in the nature of a premium—(i) for the use or occupation or the right of use or occupation of land or buildings; or (ii) for the use or the right of use of plant or machinery; or (ii)*bis* for the use or the right of use of any motion picture film or any film or video tape or disc for use in connection with television or any sound recording or advertising matter connected with such motion picture film, film or video tape or disc; or (iii) for the use or right of use of any patent as defined in the Patents Act or any design as defined in the Designs Act or any trade mark as defined in the Trade Marks Act or any copyright as defined in the Copyright Act or any model, pattern, plan, formula or process or any other property or right of a similar nature."

[121] See footnote 89*,* 11 General Deductions allowed in determination of taxable income, 11 gA – 2.

significant to note that 11 (gC) only pertains to the acquisition of IP and does not apply when the IP is devised, developed or created.[122]

The IP as referenced in the section, means any invention or patent as defined in the Patent Act,[123] any design as defined in the Designs Act,[124] any copyright as defined in the Copyright Act,[125] other similar property[126] or knowledge essential to the use of any of these assets or the right to have such knowledge imparted.[127] With regards to trade marks, section 11 (gA) ceases to apply to expenditure incurred for the acquisition of trade marks from another person on or after 29 October 1999 [128] and section 11 (gC) does not apply to trade marks as defined in the Trade Marks Act.[129] Despite the fact that no allowance is granted for the development of trade marks, a deduction is allowed for the registration and renewal costs of the Trade Mark under Section 11 (gB) if the trade mark is used by the tax payer in the production of income.[130]

To understand why trade marks are treated differently for tax purposes, it is important to distinguish them from the other forms of IP. Trade marks differ from other forms of IP in a number of important ways, as outlined in the World Intellectual Property Report of 2013.[131]

The most fundamental way that trade marks differ from other forms of IP is in its protection term. IP Rights afford exclusivity to their holders for certain periods of time, after which they fall in to the public domain. Trade marks, however, may exist in perpetuity provided that the owner pays a renewal fee at the end of every period.[132]

Seeing that fees are paid for the renewal of trade marks every 10 years, it would not make sense for a deduction to be allowed annually. Therefore, SARS has limited the deduction for trade marks to be solely for the renewal fee paid every 10 years.

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[122]Silke, p. 289, see footnote 19.
[123] S11 (gC) (i) of the Income Tax Act 58 of 1962.
[124] S11(gC) (ii) of the Income Tax Act 58 of 1962.
[125] S11 (gC) (iii) of the Income Tax Act 58 of 1962.
[126] Silke. p. 289, see footnote 19.
[127] Silke, p. 289, see footnote 19.
[128] Section 11 (gA) (ee), Income Tax Act 58 of 1962.
[129] S11 (gC) (iv), Income Tax Act 58 of 1962.
[130] Section 11 (gB), Income Tax Act 58 of 1962.
[131] Gurry, F et al. *World Intellectual Property Report: Brands – Reputation and Image in the Global Market Place* WIPO (2013) 84 – 7.
[132] In South Africa, according to the Trade Marks Act, trade marks are registered for 10 years at a time. At the end of every ten-year period, the owner of the trade mark pays s R260.00 renewal fee which allows the trade mark to remain on the Register for a further period of 10 years.

If a deduction were to be allowed for the development of trade marks, it would have the effect of the government paying for the development of the trade marks of private companies.

3.3.1.1. Section 11 (gA)

Section 11 (gA) makes provision for any expenditure actually incurred by the taxpayer in devising, developing,[133] obtaining, restoring[134] or acquiring by assignment[135] any IP as defined in the Income Tax Act and the respective IP acts. The deduction will only be allowed subject to the condition that the IP is used by the taxpayer in the production of his income.

The Explanatory Memorandum of the Income Tax Bill of 1996 states that the section provides for a deduction of an allowance in respect of expenditure actually incurred by a taxpayer in respect of the developing or acquisition of IP. An allowance equal to the greater of an amount calculated by dividing such expenditure by the life of the property or one-twenty fifth was granted. This is the basic operation of the Act.

ITC 1772 dealt with the interpretation of section 11 (gA). it was held that 11 (gA) (i) "deals with a taxpayer who himself devised or developed any invention or who created or produced any design or any trade mark or any copyright as defined in the respective Acts or any property which is of a similar nature and incurred expenses in doing so" while 11 (gA) (ii) dealt with a case where "the taxpayer incurred costs in obtaining any patent or the restoration thereof or the registration of any design or trade mark" and 11 (gA) (iii) deals with cases where "the taxpayer incurred costs in acquiring by assignment such a patent, design, trade mark or copyright or property of a similar nature or knowledge connected with the use" of the abovementioned types of IP.[136]

The court held further that the essential requirements of s 11 (gA) (iii) are: [137]

1. The taxpayer must make a payment to a person (A) who has property that, through the use of their own intellect, they created or developed;
2. A must have disposed the right to exploit his creation[138] to another;

[133] Section 11 (gA) (i), Income Tax Act 58 of 1962.
[134] Section 11 (gA) (ii), Income Tax Act 58 of 1962.
[135] Section 11 (gA) (iii), Income Tax Act 58 of 1962.
[136] ITC 1772 66 SATC 211, p. 216.
[137] Ibid, p. 217; ITC 1726 64 SATC 236, p. 242.
[138] This refers to any creation that is created by virtue of a taxpayer's own intellect.

3. The disposal must be by virtue of an agreement which transfers to the recipient the rights of an assignee to the property itself.

Subsection (aa) of the section provides for the allowance to be spread out over a number of years.[139] If the expenditure is in excess R 5 000.00 and was incurred before 29 October 1999, proviso (aa) provides for two things: First, that the allowance should not exceed the total cost of the IP divided by the life of the IP (probable duration) or 4% of the total cost of the IP. These amounts should be calculated and the greater amount will yield the deduction allowed. Second, where the expenditure exceeds R 5000.00 and was incurred on or before 29 October 1999 proviso (aa) provides that the deduction allowed will be 5% of the total cost of the IP, or in the case of a design, 10% of the total cost of the design, but not greater.[140]

By reading the section and assigning values, a formula for calculating the allowance in terms of proviso (aa) can be said to be:

If expenditure exceeds R 5 000.00 and is incurred before 29 October 1999:

$$A \leq \frac{x}{y} \text{ OR } 4\% \text{ of } x \text{ (whichever is greater)}$$[141]

Where expenditure is below R 5000.00, the whole amount will be "deductible in the year in which it is actually incurred". This is an exception to the general rule that "when a deduction of expenditure of a capital nature is specifically provided for, the deduction is spread over a number of years."[142]

Subsection (bb) deals with the claiming of allowances in a year following the year in which the expenditure was actually incurred. Here the allowance would be calculated by subtracting all allowances that can be claimed and allowances that could have been claimed from the total cost of the IP in question. Although the allowance would be permissible in a subsequent year of assessment, the deduction is forfeited for the years in which the taxpayer would have been entitled to a deduction under the section or a preceding income tax act. *Juta's Commentary* states that the test is "Whether the taxpayer was entitled to the deduction?" Whether the taxpayer claimed it or not bears no relevance to the operation of the proviso.[143]

[139] See footnote 89, 11 General Deductions allowed in determination of taxable income.
[140] Section 11 (gA) (aa) (B).
[141] Where A = allowance; x = Total cost of IP (not less than R 5000.00) and y = life of IP or probable duration.
[142] See footnote 89.
[143] Ibid.

Subsection (cc) of the section is an anti-avoidance provision that has been replaced by subsection (dd). Subsection (cc) provides that no allowance will be permissible for IP acquisitions between 24 June 1988 and 1 July 1993 from a "connected person" who is either a resident of South Africa or a neighbouring country, if one or both parties are a company and has an interest in more than 50% of the shares held by either of the companies. The section allows for the possibility that when IP is purchased, the Purchaser may obtain a deduction without the seller being taxed on the receipt or accrual. Due to this possibility, a number of purchasers of business sold as a going concern would allot an excessively large portion of the purchase price to the IP.[144]

Subsection (dd), which replaced subsection (cc), provides that where the IP is obtained or acquired on or after 1 July 1993 from a person who is resident in South Africa or in a neighbouring country and is a connected person, an allowance will be permissible and shall be calculated based on the cost of the IP or the market value of the asset at the time of the assignment. The deduction allowed shall be the lesser of the two values. This prevents the excessive over-inflation of the purchase price for the sole reason of obtaining a tax advantage.

Subsection (ee) provides that the section will not apply to any allowances claimed for expenditure incurred in respect of trade marks on or after 29 October 1999 and subsection (ff) provides that no deduction will be allowed under the paragraph for any year of assessment after 1 January 2004; Section 11 (gC) applies to all expenditure incurred following this date. The effect of these provisos are that the provision ceases to apply to trade marks after 29 October 1999 and subsection (ff) is the sunset clause which ceases the operation of the clause. Taxpayers will then claim their deductions using the provisions of 11 (gC).

3.3.1.2. Section 11 (gC)

This section represents the next stage in the development of the provisions relating to the deduction of IP expenditure. Section 11(gC) is applicable to "expenditure actually incurred by the taxpayer during any year of assessment commencing or after 1 January 2004"[145] in the acquisition of any patent, design, copyright or property of a similar nature, any "knowledge

[144] See footnote 89, 11 General Deductions allowed in determination of taxable income, 11 gA – 4A.
[145] Section 11 (gC).

essential to the use of such IP or right to have such knowledge imparted;" but specifically excluding trade marks.[146]

Subsection (aa) of section 11 (gC) "provides that where the expenditure incurred in the year of assessment is R5 000 and less, the whole of the expenditure can be deducted in that year. However, where the expenditure exceeds R5 000, the allowance has to be spread over a number of years."[147] Silke explains that the implications of section 11 (gC) are that the taxpayer can deduct the full amount in the year of assessment that the IP is brought in to use if the expenditure incurred is less than R 5000.00. The annual allowance on cost incurred will be limited to 5% per year of assessment for a patent, invention or copyright and 10% per year of assessment for a design, if the expenditure incurred is more than R 5000.00.[148]

From the above it may be noted how IP is treated for the purposes of tax deductions. From the fact that there are specific anti avoidance measures in place, it may be inferred that the Legislature identified that IP transactions presented a loophole for tax avoidance and it sought to remedy this. Further, the Legislature sought to provide for interactions between connected persons, again to curtail possible opportunities for abuse presented by this relationship.

SARS Interpretation Note 67 deals with the definition of "connected persons" for the purposes of the Income Tax Act. It provides that "related-party transactions are more likely to be open to manipulation in order to secure a fiscal advantage than transactions entered into between unconnected parties, hence the need for specific rules to deal with connected persons."[149]

3.4. Conclusion:

In sum, section 11 (gA) and (gC) are specific provisions which deal with the development and acquisition of IP, respectfully. Section 11 (gA) ceases operation after 1 January 2004, when section 11 (gC) begins its operation.

In order to qualify for a deduction in terms of 11 (gA), in addition to the provisions contained in Act, the courts have provided for certain factors which must be taken into account.[150]

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[146] As defined in the Trade Marks Act.
[147] See footnote 89, 11 General Deductions allowed in determination of taxable income, section (gC).
[148] *Silke*, See footnote 19.
[149] South African Revenue Service *Interpretation Note 67* (Issue 4), 'Connected Persons', p. 3.
[150] See footnote 127.

Section 11 (gC) excludes expenditure for the development and creation of IP, and merely provides for a deduction of expenditure actually incurred in the acquisition of IP, either by licensing or sale.

Any expenditure that does not fall within the ambit of sections 11 (gA) and (gC) may be claimed in terms of the "general deduction formula", should they qualify for same.

Having explained the content and operation of these sections in this chapter, they will now be analysed in Chapter 4.

CHAPTER 4

Interpretation of Sections 11 (gA) and (gC)

4.1. Purpose of Chapter

This chapter sets out the provisions of the current sections that deal with deductions relating to IP expenditure. The chapter will show that, once again, even though these sections are largely current, there have been a number of amendments to the sections that demonstrate the reactive, piecemeal approach of the Legislature to this area,

4.2. Introduction

Sections 11 (gA) and (gC) are similar in that they both deal with the purchase of IP. They both apply to the same types of property, namely, patents, inventions, copyrights and design and they both refer to “property of a similar nature”. The sections differ in that (gA) provided for deductions for expenditure on trade marks and 11 (gC) specifically excludes expenditure attached to the acquisition of trade marks from its allowance. A further difference is that the sections apply to IP acquired at different times. Section 11 (gA) applies to property acquired prior to 1 January 2004 and section 11 (gC) applies to assets acquired after the abovementioned date.[151] The purpose of the interpretation and comparison is to decipher whether or not there are material differences in law between the sections, in order to establish how the tax treatment of IP may have changed over the years.

Oosthuizen stated that it is essential to determine the factors that need to be taken into account and that there are various changes that have been effected by the Legislature to the sections pertaining to IP. These changes must be taken into account when contracts which provide for payments of royalties are drafted and that failure to fully comprehend the effect of the recent developments may have the effect of tax losses that may be potentially severe and unintended.[152] This illustrates, firstly, the Legislature’s lack of a cohesive approach to the taxation of IP, in favour of a reactive approach, where the Legislature chooses to respond to

[151] Oosthuizen, see footnote 8.
[152] Ibid.

difficulties with the provisions as they arise. Second, this highlights the practical difficulties caused to any taxpayer affected by the provisions and demonstrates what they must do to ensure that they do not fall foul of the provisions.

In looking at these factors, sections 11 (f) and 23 (I) also have to be considered. They will be included in this chapter, in addition to section 11 (gA) and (gC).

4.3. Discussion and comparison of provisions

4.3.1. Allowance and expenditure

Both sections 11 (gA) and (gC) provide for "an allowance," which in general refers to the deduction of expenditure that is not ordinarily deductible in terms of the "general deduction formula". An example would be expenditure which is capital in nature.[153] It should be noted that allowances are usually spread out over a number of years,[154] but section 11 (gC) departs from the general rule by allowing expenditure below R 5000.00 to be deducted in one year.[155] Further, as both sections apply to "expenditure", it has been noted that the Legislature's intention was "clearly" to provide for a deduction of capital expenditure.[156]

4.3.2. Actually Incurred

In interpreting the phrase "actually incurred" as it appears both in the "general deduction formula" as well as in section 11 (gA) and (gC), the courts have held that "expenses "actually incurred" does not necessarily mean "actually paid." So long as the liability to pay them has been actually incurred, they may be deductible."[157] The general principle that arises from the case law is that expenditure is "actually incurred" when there is an absolute and unconditional

[153] Capital expenditure is dealt with in terms of Capital allowances which are more restrictive than the General deduction formula.
[154] For example, section 11 (e) which is an allowance granted in respect of wear and tear for machinery, plants, implements, utensils and articles. The allowance is apportioned for the period it was used in the taxpayer's trade.
[155] See footnote 89, 11 General Deductions allowed in determination of taxable income.
[156] Ibid.
[157] See *Port Elizabeth Electric Tramway Company Ltd v Commissioner For Inland Revenue* 8 SATC 13, page 15; and confirmed in *C:SARS v Labat Africa* 72 SATC 75.

obligation to pay.[158] *ITC 1838* 72 SATC 6 dealt with the "amount" actually incurred - it was held that the market value of the asset when claiming the allowance is irrelevant, thus whether the taxpayer had the IP valued is not relevant in assessing whether the taxpayer qualifies for the deduction.

4.3.3. Property of a similar nature

The phrase "any other property which is of a similar nature" is found both in section 11(gA) and 11 (gC). South African courts have been faced with the task of interpreting the meaning of the phrase as many taxpayers have attempted to claim a deduction on expenditure incurred in what they submitted was "property of a similar nature". It has been said that in order to qualify for the deduction under section 11 (gC), should the property not be listed in the section, the taxpayer needs to prove that the property is a result of the creator's intellectual powers.[159]

It has been stated that the Commissioner is of the view that seeing that patents, design, trade marks and copyrights are all registered, in order to qualify as "property of a similar nature", the right should be registered. It is further stated that "this interpretation should not be followed, as it effectively leads to the words being superfluous." It is submitted further that a wider interpretation should apply to cover any property that may be similar, whether registered or not and in the case of a registered right, the section should apply to property that may be registered in the Republic or elsewhere.[160]

By taking the above interpretation of the phrase, it seems that the Commissioner has tried to make the registration of the right a requirement. This view is flawed as copyright is not required to be registered in terms of the law that it is protected by. Copyright under any law and under any jurisdiction subsists automatically.[161] In South Africa the only copyright that is registered is that of cinematographic films.[162] Therefore, it is submitted that in interpreting the phrase, whether or not a right is registered should not be a consideration.

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[158] *Caltex Oil (SA) Ltd v Secretary for Inland Revenue* 1975 (1) SA 665 (A); *Port Elizabeth Electric Tramway Co Ltd v Commissioner for Inland Revenue* 1936 CPD 241 at 244; and *Commissioner for Inland Revenue v Delfos* 1933 AD 242 at 257; Price, S.T. See footnote 36.
[159] Oosthuizen, see footnote 8.
[160] See footnote 89, 11 General Deductions allowed in determination of taxable income, 11 (gA) – 3.
[161] Article 5 (2), Berne Convention, 1887.
[162] Copyright: Registration Procedure, CIPC. Available at: http://www.cipc.co.za/index.php/trade-marks-patents-designs-copyright/copyright/registration-procedure/ accessed on 31 January 2019.

Our courts have adopted a narrow interpretation of this phrase and it has been held in various cases[163] that in order to qualify as property of a similar nature the property must stem from the creator's intellect and creativity, the taxpayer must have a proprietary right and have the ability to dispose of this right; further the property must have some economic advantage.

In *Commissioner for the South African Revenue Service v SA Silicone Products (Pty) Ltd* [164] it was held that "the expression, properly interpreted, requires that any property which is similar in nature shall possess fundamental characteristics common to those possessed by the specifically identified properties, minor or superficial similarities will not themselves suffice."[165] It was further noted that a narrow interpretation of the section supports the intention of the Legislature in creating the allowance.[166] The allowance was created to stimulate "investment in IP which is commercially productive and likely to provide an enduring economic advantage to the Republic." [167]

The court in *Silicone*[168] used the similarities between the types of IP mentioned in the section and held that in order to qualify as "property of a similar nature", the property in question should "embrace their intellectual origins."[169] This means that the property should be a "derivation from a creative mind"[170] and further, the property should have the "potential for commercial exploitation"[171] and the law should regard "such exploitation as creating a justifiable monopoly which is only available to the creator or persons whom the creator transfers his rights to and protection of ownership of such property."[172]

It is important to qualify that in both *ITC 1772*[173] and *ITC 1726,*[174] which dealt with licenses to construct and operate radio telephony services, it was held that such property did not qualify as "property of a similar nature" as envisaged in section 11 (gA).[175]

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[163] *ITC 1735* 64 SATC 455; *ITC 1726* 64 SATC 236; 2002(11) JTLR 384; *ITC 1772* 66 SATC 211.
[164]*Commissioner for the South African Revenue Service v SA Silicone Products (Pty) Ltd* (358/02) [2004] ZASCA 3; [2004] 2 All SA 1 (SCA) (5 March 2004).
[165] Ibid, Paragraph 18.
[166] Ibid.
[167] See footnote 157.
[168] See footnote 164
[169] Ibid, paragraph 18.
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] *ITC 1772* 66 SATC 211.
[174] *ITC 1726* 64 SATC 236.
[175] See footnote 89*,* 11 General Deductions allowed in determination of taxable income, 11 gA – 3.

In *ITC 1726,*[176] which dealt with a taxpayer wanting to deduct license fees paid for the acquisition of cellular license fees and renewal fees, the court held that the "ordinary grammatical interpretation refers to the acquisition of IP which came into existence by" exercising the creator's intellectual powers.[177]

The interpretation of this phrase is important, as it determines what qualifies as IP for the purposes of a tax deduction, it provides the requirements that need to be met for an asset to be considered IP. It is submitted that this can be related to the section 11D definition of 'research "definition and the interpretation of property of a similar nature" has been wide in the past, which gave rise to certain deductions which ordinarily should not have been allowed. By amending the definitions and having the courts interpret the legislation it becomes more clear what the deductions can be claimed for.

4.3.4. Payments for Right of Use

Apart from the acquisition of IP by means of purchase and sale, a taxpayer may acquire the right to use IP by paying the owner or creator of such IP a premium or a royalty.

Royalty payments for the right to use IP can be deducted in terms of the "general deduction formula" found in section 11 (a). The payment of royalties for the use of IP is often compared to the payment of rent and as such is inherently revenue in nature and qualifies for deduction in terms of the "general deduction formula".[178] It has been noted that one must draw a distinction between the payment of royalties and a fixed purchase price paid in instalments.[179] One must bear in mind the phrase "substance over form" as the form of the payment cannot impact the nature of the expenditure. It is noted that expenditure incurred in an acquisition will not be deductible even if the purchase price is paid in instalments.[180] However, royalty payments will be deductible irrespective of whether they are paid in instalments or as a lump sum.[181]

[176] *ITC 1726* 64 SATC 236.
[177] Oosthuizen, see footnote 8.
[178] See footnote 89, 11 General Deductions allowed in determination of taxable income; 11(a) – 26A.
[179] See footnote 89, 11 General Deductions allowed in determination of taxable income.
[180] See footnote 89, 11 General Deductions allowed in determination of taxable income; 11(a) – 26A.
[181] See footnote 89, 11 General Deductions allowed in determination of taxable income.

The issue of expenditure incurred for IP which is used in the production of income has been the subject of numerous court cases[182] over the past decade. In particular, the issue in these cases has been whether or not such expenses, where they take the form of royalty payments, qualify for deduction in terms of the "general deduction formula". There is a difference of opinion as to whether such expenditure is of a capital or revenue nature, with only the latter qualifying for deduction under the "general deduction formula".[183]

Initially royalty payments were considered non-capital and were deductible in terms of the "general deduction formula". However, in *ITC 1798* the Cape Tax Court held that in terms of license agreements pertaining to trade marks, royalty payments were capital in nature, therefore did not qualify for deduction under the "general deduction formula".[184]

In *BP Southern Africa,*[185] the decision of the Cape Tax Court was overturned when it was held that the purpose of expenditure is imperative in determining whether an amount paid is capital in nature and is a decisive factor. It further held that royalty expenditure was non-capital in nature and therefore was deductible but the courts went on to note that royalty payments are not automatically non-capital in nature and effect must be given to the purpose of such expenditure.[186]

When dealing with amounts such as royalties, one must ascertain whether or not they qualify as a "premium". Should the amount qualify as such, section 11 (f) of the Income Tax Act will apply.

Section 11 (f) makes provision for "an allowance in respect of any premium or consideration in the nature of a premium paid by a taxpayer for […] the right of use of [IP]"[187] as listed in the Income Tax Act. It provides that "an allowance in respect of any premium or consideration in the nature of a premium paid by a taxpayer for... the right of use of a motion picture... Patents, Designs, Trade Marks, Copyrights or property of a similar nature if it used in the production of income/ income is derived from its use... imparting of or undertaking to impart any knowledge

[182] *ITC 1838* (72 SATC 6); *ITC 1726* (64 SATC 236); *C: SARS v SA Silicone Products (Pty) Ltd* 2004 (66 SATC 131 (SCA)); *ITC 1798* (68 SATC 9); *BP Southern Africa (Pty) Ltd v The Commissioner for SARS*, 2007, SCA 7 (RSA) (69 SATC 79.

[183] S&Z Attorneys '*Tax Nature of Royalty Payments*' available at https://snz.co.za/articles/taxation/tax-nature-of-royalty-payments/ accessed on 25 July 2020.

[184] *ITC 1798* (68 SATC 9).

[185] *BP Southern Africa (Pty) Ltd v The Commissioner for SARS*, 2007, SCA 7 (RSA) (69 SATC 79).

[186] *BP Southern Africa* ibid; Oosthuizen, see footnote 8.

[187] Section 11 (f).

directly or indirectly connected with use of such film, sound recording, advertising matter, Patents, Designs, Trade marks, Copyrights or other property."[188]

Silke states that the allowance is available only when a premium is paid for the right of use of an asset;[189] payments made for a complete acquisition would fall under section 11 (gA) or (gC). The amount of the allowance will be calculated by the total payment divided by the number of years for which the taxpayer is entitled to use the asset. However, this number is limited to a maximum of 25 years. In the case of IP, the probable duration of the asset is used.[190]

It would appear that a taxpayer paying royalties may have the option of choosing to claim a deduction in terms of the "general deduction formula" or in terms of the specific provisions of 11(f). Due to the fact that the taxpayer has a choice, it is possible that the same expenditure could be claimed twice under different provisions.[191] In order to circumvent this section 23B[192] of the Income Tax Act would apply.

In terms of section 11 (f) a deduction is allowed "in respect of any premium or consideration in the nature of a premium paid by a taxpayer." In order to qualify for the deduction the amount paid should be a premium or a consideration in the nature the premium. It can be presumed that words "have the same meaning as the words "premium or like consideration" in paragraph (g) of the definition of 'gross income'".[193] Parties have the option of structuring their payments in terms of a contract. However, courts will give effect to the intention of the parties and will look at the contract to decipher whether or not the parties intended for the payments to be a premium or not.[194]

4.3.5. Section 23I

[188] Section 11 (f), Income Tax Act 58 of 1962.
[189] *Silke*, p. 272, see footnote 19,
[190] This is the probable duration is the amount of time that a right is expected to last. Most durations are prescribed by law, but are subject to extensions by the proprietors.
[191] Feinstein, K. 135 Double Deductions, April 1995, *SAICA Integritax* at www.saica.co.za/integritax/1995/135_double_deductions.htm ; Last Accessed 7 July 2020.
[192] "Where an amount qualifies or has qualified for a deduction or allowance; or is otherwise taken into account in determining the taxable income of any person, under more than one provision of the Act, such amount or any portion thereof, shall not be allowed or taken into account more than once as a deduction or allowance in the taxable income of any person."
[193] See footnote 89, 11 General Deductions allowed in determination of taxable income.
[194] Ibid.

Section 23I was inserted by section 37 (1) of the Revenue Laws Amendment Act 35 of 2007 and has subsequently been substituted in its entirety by section 38 (1) of the Taxation Laws Amendment Act 60 of 2008.[195] This provision is an anti-avoidance provision which applies to royalty payments made on or after 1 January 2009.[196] Section 23I prohibits a South African taxpayer that utilizes "tainted intellectual property" from claiming a deduction for royalty payments made to the licensor which is not subject to taxation in South African.

The section prohibits a deduction in respect of expenditure incurred for the permission to use IP or the right of use.[197] The section was introduced in order to address situations where South African developers of IP disposed of their IP to connected persons or companies. The South African companies would then pay royalties for the use of the IP. The connected person would attract little to no tax liability and thus tax liability of both companies would be reduced.[198]

In order to avoid tax, a fully taxable entity (A) would transfer their IP to a fully or partly tax-exempt entity (B). Following the transfer, a licensing agreement would be introduced between the two entities whereby A would be the licensee and B, the licensor. Royalties would then be paid from A to B. Thus, 23I was introduced to avoid such schemes.

Silke noted that the reason for the anti-avoidance measure was due to the fact that majority of IP developed by residents was subsidized by the South African government in the form of tax incentives.[199] The subsidies took the form of sections 11 (gC) and 11 D, which it was identified to be tools used to "erode the South African tax base."[200] Silke stated that 23I was introduced to prevent avoidance by "assigning South African intellectual property to entities with a lower effective tax rate, followed by the licensing of the intellectual property back to a fully taxable South African taxpayer."[201]

The addition and development of the section shows the Legislature's intention of circumventing any and all tax avoidance schemes developed using loopholes in the legislation. The Legislature

[195] Income Tax Act 58 of 1962, s23I.

[196] *Tax: Juta's Practice Collection/Income Tax/Income Tax 58 of 1962*/CHAPTER II: THE TAXES (ss5-64C)/Part 1 Normal Tax (ss5-37H)/23I Prohibition of deductions in respect of certain intellectual property.

[197] South African Revenue Service *Draft Interpretation Note* on *S23I*, p. 2, available at https://www.sars.gov.za/AllDocs/LegalDoclib/Drafts/LAPD-LPrep-Draft-2018-01%20-%20Draft%20IN%20%20Prohibition%20of%20deductions%20for%20certain%20intellectual%20property.pdf accessed on 24 July 2020.

[198] Ibid.

[199] *Silke*, p. 295, see footnote 19

[200] Ibid.

[201] Ibid.

further aimed to prevent tax avoidance schemes “without undermining foreign investment in South African research and development.”[202]

4.4. Conclusion

From the comparison of the sections and their wording, it can be seen that in the application of the section, the courts strive for uniformity. The material differences in their operation include that they apply to expenditure incurred at different times. The sunset clause of 11(gA) marks the operation date of (gC). 11 (gA) applies to expenditure incurred for the acquisition and development of IP, while 11 (gC) only applies for expenditure incurred for acquisition. The interpretation of the sections by the courts shows uniformity in creating precedent.

The promulgation of s23I attempts to cater for any defects in the sections relating to transactions between connected persons. Further, the section attempted to avoid the erosion of the South African tax base using government subsidies in the form of sections 11 (gC) and 11D, without threatening foreign investment in research and development in South Africa.

The pattern of frequent amendment of the sections discussed in this Chapter demonstrates that the reactive, piecemeal approach of the Legislature to the regulation of this area continues to this day, and that a cohesive approach to the taxation of IP has yet to be developed. Once again, the need to balance the interests of the fiscus in the collection of revenue, against the interests of taxpayers becomes evident from the frequent amendments. While the efforts of the Legislature to constantly re-balance the interests of the fiscus and taxpayers is commendable, the disadvantage is that the frequency of amendments create some uncertainty for taxpayers active in the area, especially in respect of forward planning.

[202] Ibid, p. 296.

CHAPTER 5

Section 11B

5.1. Purpose of Chapter

Having discussed the provisions of the Income Tax Act relating to the deduction of expenditure relating to IP activities, the focus in this chapter shifts slightly to an examination of the capital allowances relating to capital expenditure on research and development of new IP. The purpose of this examination is the same as that in respect of the previous provisions – to determine the approach of the Legislature in dealing with the provisions, and the consequences of this approach.

This chapter will focus on section 11B, and the subsequent chapter will focus on the successor to section 11B, section 11D.

5.2. Introduction

The focus of the previous chapters was on deductions relating to expenditure in the area of IP. The focus in this Chapter turns to the allowances in respect of expenditure on research and development in the area of IP. The focus of these allowances is slightly different, because these seek to encourage the development of new IP, as opposed to the previous provisions, which simply dealt with expenditure in relation to existing IP.

Section 11B was initially introduced to cater for deductions in respect of R&D, it was subsequently replaced by section 11D. To better understand the development of the law, we must look at the amendments to section 11D. 11B outlined in this Chapter, then a discussion and analysis of the "R&D provisions" namely 11B & 11D will follow after 11D is described.

5.3. Section 11B

Section 11B of the Income Tax Act was inserted by section 29 of the Revenue Laws Amendment Bill of 2003[203] and was to provide for deductions in respect of research and development. The section was proposed to deal with new self-generated research and development which was undertaken by a taxpayer in the Republic of South Africa that could lead to the development of intangible assets in the form of IP.[204] At the time of its insertion, section 11B replaced the definition of "scientific research" with that of "research and development".[205] The Explanatory Memorandum for the bill stated that the proposal sought to encourage "experimental or theoretical work undertaken primarily to acquire new scientific or technical knowledge for its own sake or directed towards a specific practical aim or application."[206] The section provided for "a deduction of expenditure incurred in respect of research and development and an allowance in respect of any building, machinery, plant, implement, utensil and article used for purpose of [R&D]."[207] The section made provision for a 100 percent deduction for operating R&D expenditure that was directly or indirectly undertaken by the taxpayer. With regard to capital expenditure, the section provided for a depreciation allowance for "the cost of any building, machinery or plant, utensils and articles used for the purposes of research and development".[208] In the Explanatory Memorandum, it was stated by the Legislature that the allowance was "based on the cost of the relevant asset."[209]

From its inception, 11B (1) provided definitions for "cost",[210] "copyright", "design", "invention", "patent", "research and development" and "trade mark". For the purposes of the

[203] Which when promulgated became Act 45 of 2003.
[204] Invention, patent, design, copyright, other similar property or research.
[205] Revenue Laws Amendment Bill of 2003, Section 29.
[206] South African Revenue Service *Explanatory Memorandum for the Revenue Laws Amendment Bill of 2003* p. 24 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2003-01%20-%20Explanatory%20Memorandum%20Revenue%20Laws%20Amendment%20Bill%202003.pdf accessed on 24 July 2020.
[207] See footnote 99, p. 6.
[208] Ibid, p. 7.
[209] South African Revenue Service *Explanatory Memorandum on the Revenue Laws Amendment Bill of 2004* pg. 54 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2004-02%20-%20%20Explanatory%20Memorandum%20Revenue%20Laws%20Amendment%20Bill%202004.pdf accessed on 24 July 2020.
[210] ''…cost' in relation to any building, machinery, plant, implement, utensil or article means the lesser of – (a) the actual cost to the taxpayer of the erection, addition, improvement to or acquisition of any building or actual cost of that machinery, plant, implement, utensil or article; or (b) the cost which a taxpayer would have incurred in respect of the direct cost of acquisition of that building, machinery, plant, implement, utensil or article

section the various types of IP listed were defined in terms of their respective applicable acts. The term "research and development" was defined as "research and development conducted in the Republic that will result or potentially may result in an identifiable intangible asset as contemplated under generally accepted accounting practice but does not include research and development relating to – (a) the social sciences, arts, humanities or management; or (b) market research sales of marketing promotion."[211]

Section 11B (2) provided that the deduction allowed in terms of the section will apply "during any year of assessment commencing on or after 1 January 2004."[212] Section 11B (2) (a) (i) makes provision for a deduction for expenditure actually incurred where the taxpayer conducts R&D himself. Subsection 2 (a) (ii) of the same section makes provision for expenditure incurred by the taxpayer where a third party conducts R&D on his behalf.[213] The deduction allowed will be in respect of expenditure incurred for research and development for the purposes of creating IP but specifically excluding trade marks.[214]

Subsection (4) of section 11B contains provisions for claiming a deduction in respect of expenditure incurred where a third party has conducted research and development on behalf of the taxpayer. The section provided that the deduction could only be claimed if the expenditure related to the development or creation of IP,[215] for the discovery of new information[216] or if ownership and control over the results and the IP vested in the taxpayer.[217]

Section 11B (2) (b) provided for the deduction of any expenditure incurred in the registration or renewal of any IP. It is interesting to note that trade marks do not appear in the section but is not specifically excluded as it is in section 11 (2) (a). From the analysis of the sections dealt with previously, we note that trade marks were specifically excluded. Due to the silence of the

(including the direct cost of the installation or erection thereof), if that taxpayer had acquire that building, machinery, plan, implement, utensil or article under a cash transaction concluded at arm's length on the date on which the transaction for the acquisition was in fact concluded.'

[211] Income Tax Act 58 of 1962 as amended by the Revenue Laws Amendment Act 45 of 2003.

[212] See footnote 7.

[213] A third party who may act in terms of a Contract of Agency, where the taxpayer is the Principal or where the third party is an employee of the taxpayer and the research and development is conducted within the course and scope of his employment.

[214] See discussion on exclusion of trade marks from deductions in chapter 3.

[215] Invention, patent, design, copyright or other property.

[216] Section 11B (4) (b) of Income Tax Act 58 of 1962 as amended by the Revenue Laws Amendment Act 45 of 2003.

[217] Section 11B (4) (c) of the Income Tax Act 58 of 1962 as amended by the Revenue Laws Amendment Act 45 of 2003.

Legislature in this particular section it is concluded that the taxpayer may deduct expenditure incurred for the renewal of trade marks.

Subsection (3) provides for a deduction "in respect of any building, machinery, plant, implement, utensil and article of a capital nature used by [the] taxpayer for purposes of research and development." The section further provided for apportionment in cases where the above listed assets were only partly used for research and development.[218] Section 11B (5) provided that if the assets were not used for the purposes of R&D, no allowance will be granted for the listed assets. The new R&D regime under section 11D came into effect in respect of expenditure incurred on or after 2 November 2006 . The previous regime under section 11B terminated simultaneously. An exception, however, exists in that buildings utilized for research and development that were acquired before 2 November 2006 will be treated in terms of the previous depreciation schedule.[219]

The section was first amended by section 17 of the Revenue Laws Amendment Act 32 of 2004 where the Legislature effected both textual[220] and material changes. Section 17 (1) (b) amended the definition of "cost" in section 11B (1) by adding the following paragraph: "… (c) where that building, machinery, plant, implement, utensil or article was acquired from any person who is a connected person in relation to the taxpayer, the cost to that connected person of that building, machinery, plant, implement, utensil or article." [221]

Subsection 2 of the section provided that the amendment by subsection 1 would be deemed to have come into operation on 1 January 2004.[222] The Explanatory Memorandum provided that this was an anti-avoidance provision, dealing with the depreciation of assets, which was similar to those already in place elsewhere in the Act. The Legislature therefore proposed that if the

[218] See footnote 7.
[219] Section 11 B (6).
[220] The Legislature amended the definition of 'cost' by inserting the word 'or' at the end of paragraph (b), this was to provide for the amendment of the definition by adding paragraph (c) to the definition and by adding 'and any other property of a similar nature' to the definition of a trade mark. Section 11B allowed for a deduction of expenditure incurred in respect of research and development relating to intangible assets, but specifically excludes trade marks. The Legislature proposed that the exclusion be extended to refer to assets, which are similar to trade marks.
[221] "(1) For purposes of this section- 'cost' in relation to any building, machinery, plant, implement, utensil or article means the lesser of- (a) the actual cost to the taxpayer of the erection, addition, improvement to or acquisition of any building or actual cost of that machinery, plant, implement, utensil or article; or (b) the cost which a taxpayer would have incurred in respect of the direct cost of acquisition of that building, machinery, plant, implement, utensil or article (including the direct cost of the installation or erection thereof), if that taxpayer had acquired that building, machinery, plant, implement, utensil or article under a cash transaction concluded at arm's length on the date on which the transaction for the acquisition was in fact concluded; or…"
[222] Section 17, Revenue Laws Amendment Act 32 of 2004.

taxpayer acquired the asset from a "connected person, the allowance must be determined on the lesser of the actual cost to the taxpayer, the market related cost, which the taxpayer would have incurred under a cash transaction concluded at arm's length or the actual cost" to the connected person of the asset.[223] By using the lesser value, the allowance claimed would be less thereby preventing the taxpayer claiming an inflated amount.

The Revenue Laws Amendment Act 20 of 2006 again amended the section. Section 12 of the amending act deleted 11B (2) (b).[224] The Explanatory Memorandum for the Act provided that "the proposed amendment is consequential to the proposed amendment to move the deduction of expenditure for the registration of IP and the extension of the registration to section 11 (gB)."[225] The Act inserted subsection 7 into section 11B, which limited when expenditure incurred could be deducted. Expenditure must have been incurred on or after 2 November 2006 and other capital assets[226] had to be put in to use for the first time in that year of assessment. The assets listed could not have been used partly before for other purposes and reinstated for the use of research and development. This amendment was consequential to the insertion of s11D into the Income Tax Act by the same amending act. It must be pointed out that there is a disparity in the numbering of the sections between the Amending Act and its corresponding Explanatory Memorandum. This is evidenced by the fact that the Act puts forward the amendments in section 12, whereas the explanation for the amendment is provided in clause 15. While all the information required is provided, the disparity may cause confusion, and should be addressed by the Legislature, either via a circular or note on the memorandum.

The Legislature stated that the reasons for changing the research and development regime was due to the fact that "innovation, research and technological development are key factors for improved productivity…This enhanced productivity in turn leads to increased economic growth and international competitiveness."[227] However, Research and Development ("R&D") is costly, involving high levels of technical risk. High entry costs are typically a barrier to carrying out R&D activities. In order to encourage R&D activities, and to benefit from the associated economic spin-off, governments often provide both direct and indirect subsidies e.g. tax incentives. The Legislature further stated that while South African Tax Laws did provide for various direct R&D subsidies, there was an overall lack of substantial incentives. Thus

[223] See footnote 209.
[224] 12 (a) of Revenue Laws Amendment Act 20 of 2006.
[225] See footnote 99.
[226] Buildings, machinery, plant, implements, utensils and articles.
[227] See footnote 215.

improved R&D tax incentives were needed to keep South African laws on par with the global standards and to ensure that R&D in South Africa was not at a disadvantage in comparison.[228]

Section 11B was repealed by section 28 of the Taxation Laws Amendment Act 31 of 2013 as the section had become obsolete with the advent of section 11D.

5.4. Conclusion

11B was promulgated in order to provide for deductions for R&D, as the Legislature recognised the importance and advantage of R&D in the scientific and technological spheres within the Republic, which the tax laws, at the time, failed to acknowledge and encourage. The Legislature effected subsequent amendments to curb any tax avoidance schemes which arose from loopholes within the section. It can be noted that the section operated for a period of 10 years from 2003 until its repeal in 2013. In that time, the Legislature formulated and promulgated s11D, which provides for an allowance for R&D, which will be discussed in the following chapter.

[228] See footnote 99, p. 6 – 10.

CHAPTER 6

Section 11D

6.1. Purpose of Chapter

This chapter continues from previous chapter dealing with allowances available in respect of expenditure on research and development. This chapter will examine the successor to section 11B, the section 11D allowance. This allowance has the same purpose as section 11B, which is to encourage the development of IP. Once again this chapter will examine the promulgation and amendment of the section to determine whether it formed part of a cohesive strategy by the Legislature in the development of IP, or whether it also followed the path of reactive, piecemeal development.

6.2. Introduction

Previously, the section that dealt with the deduction of Research and Development expenditure was section 11B of the Income Tax Act. The provisions of this section were examined in the previous chapter. This section was replaced by 11D, which was enacted by section 13 of the Revenue Laws Amendment Act 20 of 2006. Section 11D thus represents the next step in the development of the deduction provisions in respect of IP, and this section will be examined in this chapter. Once again, the numerous amendments to the section demonstrate that the approach of the Legislature to this area is no different to that adopted in respect of the other sections of the Income Tax Act relating to IP.

6.3. Discussion of Section 11D

Like sections 11 (gA) and (gC), the section has undergone various amendments which range from textual amendments to material changes in the law. The section provides for an incentive to conduct Research and Development in South Africa by providing an allowance for expenditure incurred for such research and development, regardless of the level of the expenditure.[229]

The section provides for a deduction in respect of expenditure incurred for scientific or technological research and development after 1 January 2014 and before 1 October 2022. It has been stated that 11D has been amended "to simplify and streamline the section for ease of use and to ensure a more robust definition of research and development."[230]

For the section to be applicable, the following requirements must be met: the taxpayer, which is a company[231] must have actually incurred expenditure,[232] on or before 1 January 2014 but before 1 October 2022, and the expenditure must be "directly and solely in respect of the carrying on of research and development"[233] as defined in 11D (1).[234]

Silke[235] states that the test for deciphering whether or not a person qualifies for a deduction is as follows:

i. Has the taxpayer incurred expenditure in the production of income?
ii. Was expenditure incurred in the carrying on of any trade?
iii. Was the Research and Development approved by the Minister of Science and Technology in terms of s 11D (9)
iv. Was the expenditure incurred on or after the date of receipt of the application by the Department of Science and Technology for approval of that Research and Development?

Section 11D provides that no deductions are allowed in respect of "immovable property, machinery, plant, implements, utensils or articles excluding any prototype or pilot plant created solely for the purpose of the process of research and development and that prototype or pilot

[229] Price, S.T. See footnote 36.
[230] *Silke,* p.290, see footnote 19.
[231] Section 11D (2) (a), Income Tax Act 58 of 1962, 'For the purposes of determining the taxable income of a taxpayer that is a company…'
[232] Section 11D (2) (a) (i), 'that expenditure is incurred in the production of income'
[233] Section 11D (2) (a).
[234] Section 11 D (2) (a), '… any expenditure actually incurred by that taxpayer directly and solely in respect of the carrying on of research and development in the Republic…'
[235] See footnote 230.

plant is not intended to be utilised or is not utilised for production purposes after that research and development is completed; financing, administration, compliance and similar costs"[236]

"Research and Development" is defined in 11D (1) as the

> "systematic investigative or systematic experimental activities of which the result is uncertain for the purpose of discovering non-obvious scientific or technological knowledge; creating or developing an invention as defined in section 2 of the Patents Act, a functional design as defined in section 1 of the Designs Act, capable of qualifying for registration under section 14 of that Act; and that is innovative in respect of the functional characteristics or intended uses of that functional design; a computer program as defined in section 1 of the Copyright Act which is of an innovative nature; or knowledge essential to the use of such invention, functional design or computer program other than creating or developing operating manuals or instruction manuals or documents of a similar nature intended to be utilised in respect of that invention, functional design or computer program subsequent to the research and development being completed; or making a significant and innovative improvement to any invention, functional design, computer program or knowledge contemplated in paragraph (a)or (b) for the purposes of -new or improved function; improvement of performance; improvement of reliability; or improvement of quality of that invention, functional design, computer program or knowledge; creating or developing a multisource pharmaceutical product, as defined in the World Health Organisation Technical Report Series, No 937, 2006 Annex 7 Multisource (generic) pharmaceutical products: guidelines on registration requirements to establish interchangeability issued by the World Health Organisation, conforming to such requirements as must be prescribed by regulations made by the Minister after consultation with the Minister for Science and Technology; or conducting a clinical trial as defined in Appendix F of the Guidelines for good practice in the conduct of clinical trials with human participants in South Africa issued by the Department of Health (2006), conforming to such requirements as must be prescribed by regulations made by the Minister after consultation with the Minister for Science and Technology."[237]

[236] Section 11D (2) (b)

[237] Section 11D (1) (a) – (e) Income Tax Act 58 of 1962.

The sections provide for specific exclusions from expenditure for R&D, which is set out in Silke[238] as follows; for:

- "… routine testing Routine testing, analysis, collection of information or quality control in the normal course of business;
- Development to enhance internal business process, unless the development in respect of the internal business process is conducted for external exploitation for sale/license to customers who are not connected persons in relation to the person carrying on that research and development;
- Market research/ market testing/ sales promotion;
- Social science research;
- Oil and gas or mineral exploration or prospecting, except research and development carried on to develop technology used for that exploration or prospecting - create/develop financial instruments or financial products;
- Trademark creation/goodwill enhancement; and
- Any expenditure deductible under 11gB/gC - expenditure incurred for the acquisition of pre industry inventions/designs or computer programs."[239]

This definition has been the focal point of the section, and as will be seen, the Legislature has stated in the various memoranda which will be discussed below, that the definition is imperative to streamline the incentive.

This dissertation will focus on the operation of and the amendments to subsections (1) – (9) of Section 11D, as the remaining provisions relate to the procedure for claiming the deduction. These "procedural" provisions will not be considered.

A breakdown of the subsections are as follows:

(1) – The definition of "Research and Development" for the purposes of the provision.
(2) – Qualifies what expenditure qualifies for the deduction.

[238] *Silke*, p.291, see footnote 19.
[239] Ibid.

(2A) – Provision relating to improvements and construction done on Government owned l and in terms of Section 12N of the Act, which was removed.

(3) – Removed.

(4) – Provides for a deduction where expenditure is incurred by a third party carrying on Research and Development on behalf of a taxpayer.

(5) – Provides for a deduction where a company funds expenditure incurred by another company as contemplated in subsection (4) (c) (ii).

(5A) – Removed.

(5B) – Removed.

(6) – Qualifies what constitutes "carries on research and development" for the purposes of subsections (2) and (4).

(7) – Provides for the treatment of funds received from Government,[240] a Public Entity[241] or Municipal entity.[242]

(8) – Removed.

(9) – Provides for the criteria to be met when submitting the Research and Development for approval by the Minister of Science and Technology or a person appointed by him.

(10) – Provides for the withdrawal of an approval should circumstances arise which warrant such withdrawal.

(11) – Provides for the appointment of a committee, and how such committee should be made up (hereinafter referred to as "the Committee".

(12) – Defines the powers of the Committee appointed in terms of subsection 1.

(13) – Provides that taxpayers must provide the Committee with an annual report detailing the progress of the Research and Development.

(14) – Provides that the Commissioner may provide information to the Minister of Science and Technology where it relates to the R&D.

(15) – Provides for circumstances where the Committee's behaviour could constitute an irregularity.

(16) – Provides that the Minister must provide reasons for its decision to withdraw or grant any application for approval, inform the Commissioner of any and all approved applications or withdrawals of approvals.

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[240] Section 11D (7) (a) Income Tax Act 58 of 1962.

[241] Section 11D (7) (b) Income Tax Act 58 of 1962.

[242] Section 11D) (7) (c) Income Tax Act 58 of 1962.

(17) – "Provides that the Minister of Science and Technology must account to Parliament annually advising Parliament of the direct benefits of the R&D in terms of economic growth, employment and other broader government objectives and the aggregate expenditure in respect of such activities without disclosing the identity of any person."[243]

(18) – Secrecy and Non – Disclosure provision.

(19) – Provides for an additional assessment to be conducted by the Commissioner.

(20) – Provides for the Commissioner to allow deductions where certain requirements are not met, notwithstanding provisions of the Tax Administration Act.

The section was added by Act 15 of 2006 and amended by fourteen acts,[244] which will be dealt with in more detail below. This again demonstrates the approach of the Legislature to this area of the law.

Since the insertion of Section 11D, the section was amended consistently through the years from 2007 to 2016. Further it can be noted that most amendments were made in 2011. The amendments and the proposed reasons for such amendments, as outlined in the Explanatory Memorandum will be outlined below.[245] This frequency of amendment is consistent with the approach of the Legislature to other IP taxation provisions.

6.4. The Amendments to section 11D

6.4.1. Act 20 of 2006[246]

Section 11D was inserted by section 13 (1) of Act 20 of 2006. The Legislature noted that there was a need to change the research and development regime as research and technological development were key factors that lead to new, improved products, processes or services. Further, conducting Research and Development was costly and involved high levels of technical risk. Due to this, governments often provided subsidies to those conducting research

[243] Section 11D (17).

[244] Act 8 of 2007; Act 9 of 2007; Act 35 of 2007; Act 3 of 2008; Act 60 of 2008; Act 17 of 2009; Act 7 of 2010; Act 24 of 2011; Act 25 of 2011; Act 28 of 2011; Act 21 of 2012; Act 31 of 2013; Act 43 of 2014; and Act 15 of 2016.

[245] This chapter will be a summary of the Explanatory Memoranda, for the sake of completeness.

[246] Revenue Laws Amendment Act 20 of 2006.

and development as well as providing indirect subsidies in the form of tax incentives. Although South Africa provided various direct subsidies, the tax regime for research and development did not provide substantial incentives. As such, South Africa needed an enhanced set of tax incentives for research and development to ensure that South Africa's R&D is not at a global competitive disadvantage.[247]

As there is no requirement in the definition of R&D that the IP must be registered in South Africa, the definition will include foreign registered IP. It is submitted that this omission regarding the residence of the taxpayer was deliberately made to give effect to the purpose of the incentive. It has been stated in the Explanatory Memorandum to the Revenue Laws Amendment Bill of 2011, that the incentive aimed at "promoting an increase in private sector research and development investment in South Africa, to enhance its role as a research and development innovation hub and to promote research and development innovation which will lead to industrial development and job opportunities."

It can be inferred that by excluding the requirement that the IP must be registered in the Republic, the Legislature sought to attract foreign companies to invest and conduct research and development within the Republic. As the 150% deduction effectively pays the companies for conducting such research, this will encourage international companies to establish research and development companies in the Republic which will lead to job opportunities in the Republic as well as encourage an interest in science.

The proposed regime consisted of two sets of incentives. One was for operating expenses and a depreciation allowance for capital research and development.[248] At the time of its promulgation the section provided that to qualify for the deduction, the research and development must have been undertaken within the Republic and must have been directed toward advancing scientific or technological knowledge.

At its inception, Section 11D consisted of 16 subsections. Subsection 1 provided for the deduction for research and development.[249] Subsection 2 provided for the capital depreciation allowance.[250] Subsection 3 set out the cost of a capital asset at an arm's length transaction.

[247] See footnote 228.
[248] The depreciation allowance for capital research and development shifted from a 40:20:20:20 schedule to 50:30:20.
[249] Allowed for a deduction of 150% of expenditure incurred for purposes of scientific or technological research and development.
[250] Provided depreciation deductions for buildings, machinery, plan (i.e. prototype plants), implements, utensils or articles (i.e. tangible assets) that are used for R&D purposes. The full expenditure is claimed over 3 years at 50/30/20.

Subsection 4 provided for apportionment. Subsection 5 set out the types of research and development that were specifically excluded from the deduction, these included: "Exploration or prospecting; Management or internal business processes; Trade marks; The social sciences or humanities and Market research, sales or marketing promotion."[251]

Subsection 6 provided that section 11D would apply in place of any other deduction granted in the Act. Subsection 7 provided for a limited deduction for an amount paid to the taxpayer to conduct research and development. Subsection 8 provided for the treatment of a government grant received for research and development. Subsection 9 provided for recoupment. For example, if a taxpayer was receiving an allowance in respect of a qualifying building, and he stopped using the building or a part thereof, a recoupment would be triggered. This would be the case even if the building was not sold.

6.4.2. Act 8 of 2007[252]

The Taxation Laws Amendment Act 8 of 2007 first amended the section. The amendments provided for stylistic and grammatical changes,[253] as well as clarification of the meaning of the sections. The Legislature sought to clarify the following for the purposes of section 11D (1) - research and development designs must qualify for registration under section 15 of the Designs Act of 1993;[254] expenditure incurred must be directly related to the research and development activity and to "the discovery, devising or development of scientific and technological IP; if expenditure is incurred for knowledge",[255] that knowledge ought to be "essential to" the use of any invention, design or computer program and that the deduction will only apply if the IP is to be used by the taxpayer in the production of his income. In addition to clarifying the aforementioned points, the Legislature removed reference to "other similar property" as it stated it was redundant.[256]

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[251] Section 11D (5).
[252] The Taxation Laws Amendment Act 8 of 2007.
[253] Sub clause (1) (c) of the amending at provided for the substitution of "subsection" for "subsection" in the words preceding paragraph (a).
[254] S15 of the Designs Act deals with the Registration of a Design.
[255] Section 13 (1) (b) and 13 (1) (b) (ii) of Act 8 of 2007.
[256] South African Revenue Services *Explanatory Memorandum on Act 8 of 2007 pg 19* available at *https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2007-05%20-%20Explanatory%20Memorandum%20Taxation%20Laws%20Amendment%20Bill%202007.pdf* accessed on 12 January 2021.

Section 11D (2) was amended to clarify that to qualify for the deduction the assets must be owned by the taxpayer or “acquired by the taxpayer in terms of an instalment credit agreement”; the assets must have been used exclusively for the purposes of research and development and not used by any other person for any other purpose previously and a building may be used in part exclusively for research and development. The subsection was further amended to remove references to “direct” costs due to redundancy and to insert measures to prevent the artificial inflation of research and development costs through transfers between “connected persons”. Further the amendment provided for limited rollover relief for damaged depreciable research and development assets.

Subsection (1) (d) of the amending section inserted paragraphs 5A and 5B to section 11D. This amendment sought to clarify the distinction between expenditure that qualifies for the deduction under subsection 1[257] and subsection 2.[258] Paragraph 5A provided that to the extent that expenditure qualifies for an allowance in terms of both subsections, the subsection 2 regime will take precedence. However, if the taxpayer is dealing with a “connected person”, paragraph 5B operates to limit the deduction to 100% of the expenditure incurred by the taxpayer.

Subsection (1) (e) amended subsection 6 of 11D by replacing “allowance” with “deductions” and inserting the phrases “unless the taxpayer elects in the year of assessment’ and implement, utensil or article, as the case may be.” The amendment allowed the taxpayer to opt out of the regime proposed by subsection (2) in favour of another depreciation regime, provided that the item in question is eligible for such other depreciation relief.[259]

Sub clause (1) (f) substituted paragraph 9 of section 11D, which provided for recoupment on cessation. This was removed as the Legislature found this to be impractical and the amendment proposed that items in respect of 11D (2) will “fall solely within the scope of general recoupment provisions.”[260]

Sub clause 2 provided that the amending provision became effective on 2 November 2006. It applies to “activities undertaken or […] [assets] first brought into use on or after that date.”[261]

[257] Expenditure eligible for the 150% deduction.
[258] Expenditure eligible for 50/30/20 % depreciation.
[259] Once the taxpayer has made his election, he cannot revert to the 50/30/20 regime.
[260] Section 8(4) of the Income Tax Act 58 of 1962.
[261] Section 13 (2) Taxation Laws Amendment Act 8 of 2007.

6.4.3. Act 9 of 2007[262]

The Taxation Laws Amendment Act 9 of 2007 amended section 11D by the substitution of subsections (11), (16) and (17) and inserted subsection (18) into the Act. These subsections relate to procedure, which as stated earlier, will not be discussed in detail for the purposes of this dissertation.

6.4.4. Act 35 of 2007[263]

Section 19 of the Revenue Laws Amendment Act 35 of 2007 amended section 11D by correcting certain cross references in section 19 (1) (a). Prior to the amendment, subsection (1) (b) (i) referenced section 1 of the Patents Act, which was corrected to read section 2, and subsection 1 (b) (ii) referenced section 15 of the act, which was corrected to section 14. It can be inferred that this amendment was effected to cure any inconsistencies in the statute.

Regarding subsection 1 (b), the amending act added to 11D (3) (b)[264] the word "or" and deleted subsection 3.[265] The Explanatory Memoranda provides that the Income Tax Act had contained several scattered, yet identical provisions which dealt with the sale of depreciable property between connected persons. These provisions were essentially "scattered" to provide an anti-avoidance mechanism, in that they prevented "tax-free or low-taxed sales between connected persons of depreciable property, followed by depreciation against ordinary rates. Much of this depreciation was of special concern because the depreciable tax cost was often set at artificially high values."[266]

The Legislature identified that the issue with the legislation at the time was that there was inconsistency in the anti-avoidance rules that prevented sales of property in respect of which a depreciation allowance had been given, to "connected persons", at artificially elevated values. The Legislature noted that these provisions "should be uniform, regardless of the depreciable property involved."[267]

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[262] The Taxation Laws Amendment Act 9 of 2007.
[263] *Explanatory Memorandum on Act 35 of 2007;* p. 62. See footnote 9.
[264] Section 19 (1) (b), Revenue Laws Amendment Act 35 of 2007.
[265] Section 19 (1) (c), Revenue Laws Amendment Act 35 of 2007.
[266] *Explanatory Memorandum on Act 35 of 2007;* pg. 29 – 30. See footnote 9.
[267] Ibid, p.30.

Further the Legislature was concerned that the anti-avoidance rules were too harsh, especially since with the introduction of Capital Gains Tax in the Eighth Schedule, connected person sales of depreciable property could no longer be tax-free. In these circumstances, "the transferor is subject to tax without the base cost of the transferee obtaining any recognition of this new reality."[268]

Thus, the amendment to the section collected the diverse "depreciable property connected person" regimes into one harmonised provision.[269] The amendment to section 11D was brought in line with this proposal. The section would later be deleted by Act 31 of 2013,[270] however, this will be dealt with at a later stage.

Section (1) (d) of the amending act substituted section 11D 5A by effecting stylistic changes, adding "patent" and "work" to 11D 5A (b) and inserting paragraph 11D 5A (c) to read "by any person carrying on any banking, financial services or insurance business". This insertion of paragraph (c) excluded taxpayers carrying on those listed services from claiming the deduction at the 150% rate for R&D expenditure. However, those taxpayers may still claim deduction in for that expenditure in terms of any other provision of the Income Tax Act, if they so qualify.[271]

Section (9) (1) (e) amended paragraph 5B of section 11D. The Explanatory Memorandum introduced the paragraph as follows:

> "for purposes of limiting this deduction to 100 per cent if the expenditure was incurred to defray expenditure incurred by a connected person in relation to the taxpayer. The amendment proposed by this subclause will allow expenditure to be deducted at 150 per cent but only to the extent that the connected person recipient of the funding has incurred expenditure in respect of activities undertaken by that connected person for research and development purposes. In addition, the proposed amendment provides that deductions of expenditure for the use of property, or of expenditure constituting interest, will be allowed in terms of subsection (2), but will be limited to 100 per cent." [272]

[268] Ibid.
[269] Ibid.
[270] Section 11D, Income Tax Act 58 of 1962.
[271] *Explanatory Memorandum on Act 35 of 2007;* pg. 30, see footnote 9.
[272] Ibid; p. 62.

6.4.5. Act 3 of 2008[273]

The Taxation Laws Amendment Act 3 of 2008 amended Section 11D by incorporating the requirements of para (d) of subsection (2), into subsection (2), by cross-reference to subsection (1). This made paragraph (d) obsolete. Sub clause (1) (d) inserted into 11D (7) the phrase "unless that amount is not deductible by any other person in terms of this Act." This amendment provided that companies conducting R&D would still be able to deduct the full 150% provided that the funder did not qualify for a deduction for the funding in terms of any other provision. This provision was aimed at foreign or exempt funders.

6.4.6. Act 60 of 2008[274]

Section 19(1) of the Revenue Laws Amendment Act 60 of 2008 amended s11D (1) by inserting the phrase "or is discovered, devised, developed or created by the taxpayer for purposes of deriving income". The section was deemed to have come into operation on 2 November 2006 and applied retrospectively to all activities undertaken on or after that date.[275] The draft Explanatory Memorandum states that while the section provides for a deduction of 150% of all expenditure incurred by a taxpayer directly in respect of research and development, it did not explicitly provide for a deduction to be claimed by the developer itself. The Legislature intended for the developer to be entitled to such a deduction and therefore this issue was rectified by the amendment.[276]

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[273] The Taxation Laws Amendment Act 3 of 2008.
[274] The Revenue Laws Amendment Act 60 of 2008.
[275] Section 19 (2) Revenue Laws Amendment Act 60 of 2008.
[276] South African Revenue Service *Explanatory Memorandum on the Revenue Laws Amendment Bill 2008* p. 107 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2008-01%20-%20Explanatory%20Memorandum%20Revenue%20Laws%20Amendment%20Bill%202008.pdf accessed on 24 July 2020.

6.4.7. Act 17 of 2009[277]

The Taxation Laws Amendment Act 17 of 2009 further amended section 11D.[278] This amendment was effected in conjunction with various other sections of the Income Tax Act[279] that involved the depreciation on improvements. The Legislature stated that the reason for the changes was that:

> "the specific language in the depreciation rules is inconsistent in so far as improvements are concerned. Some of the rules specifically provide for a depreciation allowance in respect of improvements while others do not. A further problem is the inconsistent treatment of depreciation for improvements in the sections that do not explicitly provide for the allowance. For instance, the depreciation allowance for improvements sometimes lacks the "new and unused" requirement. In other cases, the eligibility of the improvement is linked to the "new and unused" nature of the underlying asset."

Section 20 of the Taxation Laws Amendment Act of 2010 amended the section by inserting subsection 2A to 11D. This section provided that for the purpose of 11D, if a taxpayer completes an improvement as per section 12N of the Income Tax Act, the expenditure incurred in carrying out the improvement will "be deemed to be the cost to that taxpayer of any new and unused building, part thereof, or improvement thereto, contemplate in subsection 2." [280] This provision related to improvements on government land.

6.4.8. Act 7 of 2010 [281]

Section 20 of the Taxation Laws Amendment Act of 2010[282] amended Section 11D by inserting subsection 2A, which read "For the purposes of this section, if a taxpayer completes an improvement as contemplated in section 12N, the expenditure incurred by the taxpayer to complete that improvement shall be deemed to be the cost to that taxpayer of any new and unused building, part thereof, or improvement thereto, contemplated in subsection (2)."[283] In

[277] The Taxation Laws Amendment Act 17 of 2009.
[278] Ibid, section 16.
[279] Sections 11D, 12B, 12C, 12D(2), 12F, 12I, 37B of the Income Tax Act.
[280] Section 11D (2A).
[281] The Taxation Laws Amendment Act 7 of 2010.
[282] Section 20 Taxation Laws Amendment Act 7 of 2010.
[283] Ibid.

terms of section 20(2), the above provision came into effect following the promulgation of Act 7 of 2010.[284]

In terms of the Explanatory Memorandum for Act 7 of 2010[285] The Legislature provides that this Amendment was effected with regard to improvements made on government land. Regarding leased properties, "an allowance exists for expenditure actually incurred by a lessee for obligatory improvements undertaken on leased land or buildings."[286] The allowance is calculated by dividing the expenditure incurred by the period of the lease or 25 years (whichever is sooner). However, a taxpayer is unable to claim the allowance if they hold tax-exempt status, unless the expenditure is incurred in terms of a Public Private Partnership or on land owned by a government body or government owned organization.

The Legislature noted that a prevalent concern was that of the "artificial shifting of depreciation allowances" which could not be deducted "by exempt persons to taxable persons."[287]

Government and Government owned organizations often make arrangements whereby government owned land is leased out to the Private Sector. The Private Sector then undertakes to construct or improve buildings on this land. These arrangements are favourable to government as it circumvents the permanent alienation of the land, which is against government policy.

For the above arrangements a straight line write off was provided to those incurring expenditure for improvements or construction on government owned land. However, it was noted that those allowances were less favourable than the write offs allowed for expenditure incurred for the improvements on direct-owned land.

To encourage the abovementioned arrangements and to allow for these arrangements to be more feasible to all parties concerned, this allowance was designed and promulgated.

6.4.9. Act 24 of 2011 [288]

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[284] Ibid, Section 20(2).

[285] South African Revenue Services Explanatory *Memorandum on the Taxation Laws Amendment Bill 2010* pg. 45 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2010-01%20-%20Explanatory%20Memorandum%20Taxation%20Laws%20Amendment%20Bill%202010.pdf accessed on 20 January 2020.

[286] Ibid.

[287] Ibid.

[288] The Taxation Laws Amendment Act 24 of 2011.

Section 32(1) of the Taxation Laws Amendment Act 24 of 2011 made substantial changes to section 11D. This amendment introduced the vast definition of research and development in 11D (1). The Legislature stated that a "lack of a concrete and precise definition of research and development"[289] has led to certain complications, internationally.

> "Firstly, concerns exist that while the definition has been broadened to cover as many industrial R&D activities as possible, specific areas remain unclear. This uncertainty gives rise to a need to clarify activities and expenditure related to R&D that are eligible to qualify. Secondly, legitimate value-added R&D is often subject to unnecessary uncertainty and audit scrutiny due to lack of R&D expertise among auditors who naturally specialise in law and accounting."[290]

Technically, the incentive had given rise to certain anomalies.[291] One recurring issue, at the time of the amendment, was how to ensure that the incentive was properly applied when the research and development was funded by outside parties.[292] In these circumstances, the funding party's payment for the research and development service that was carried out by a third party resulted in an audit claim, whereby the funding mechanism amounted to a recoupment. This had the result of neutralising the incentive in circumstances where research and development services were performed on behalf of another.[293]

The proposed amendment sought to simplify the deduction relating to R&D expenditures so that it may be streamlined for ease of use.[294] The new regime categorised expenditures relating to research and development in to 3 groups. The groups are as follows:

1. All expenditures incurred for eligible research and development activities will qualify for the automatic deduction irrespective of whether they are capital in nature or not.[295]

[289] South African Revenue Service *Explanatory Memorandum on the Taxation Laws Amendment Bill of 2011* pg. 78 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2011-02%20-%20Explanatory%20Memorandum%20Taxation%20Laws%20Amendment%20Bill%202011.pdf accessed on 24 July 2020.
[290] Ibid, p. 78 - 79.
[291] Ibid, p. 79.
[292] Ibid.
[293] Ibid.
[294] Ibid.
[295] Ibid.

2. Only Research & Development expenditures that have been approved by the Department of Science and Technology (DST) will qualify for the additional 50 per cent uplift.[296]

3. If the research and development expenditure does not qualify for the automatic deduction in terms of the statute, it may qualify for deductions under the "general deduction formula" should it meet the criteria for the operation of that formula.[297]

The definition of "Research and Development" was completely revised to better reflect the Legislature's intention to provide an incentive for commercial, technical and scientific activities that did not constitute routine upgrades or applications. Further, the revisions to the definition were "driven by the objective to allow for novel adjustments to pre-existing products or processes."[298]

In order to rectify the issue identified regarding the funding of research and development services that were undertaken by a third party, the Legislature proposed that

> "only the party who is responsible for determining the research methodology will be eligible to qualify for the 50 per cent uplift. Only this party has full knowledge and information associated with the R&D process to properly interact with government as to the facts relating to the R&D activity."[299]

6.4.10. Act 25 of 2011[300]

Section 1 of the Taxation Laws Second Amendment Act of 2011,[301] introduced subsections (11) – (18) of section 11D.

[296] The purpose of this DST intervention is to ensure that additional allowances are initiated like Government grants with taxpayers being provided well upfront certainty that the originating cause (in the nature of Research and Development) of the additional allowance will be respected by SARS upon audit.
[297] See footnote 289.
[298] Ibid, p. 79.
[299] Ibid.
[300] The Taxation Laws Second Amendment Act 25 of 2011.
[301] South African Revenue Service *Explanatory Memorandum on the Taxation Laws Second Amendment Bill of 2011* pg. 1 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2011-01%20%20Memorandum%20Objects%20Taxation%20Laws%20Second%20Amendment%20Bill%202011.pdf accessed on 20 January 2021.

These amendments related to the approval procedures related to the qualification of activities as R&D under s11D. The sections provided that Application for Approval must be made to the Department of Science and Technology. These applications would be done in a precise format, and be subject to the evaluation of the Approvals Committee sanctioned by the legislation. Further, the Department of Science and Technology was required to provide procedural guidelines for the committee with concurring consent from the Minister of Finance.

The Explanatory Memorandum of Act 24 of 2011, which provided a more detailed explanation for the revision of Section 11D stated that the Applications procedure whereby all R&D activities would require approval from the DST. The Approvals Committee established would evaluate all applications to determine the approval of any R&D activity that is “innovative in nature and requires specialised skills.” The Legislature envisioned that the increased involvement of the DST was for interpretative purposes. The Legislature further noted that the involvement of the DST would enable a collaboration between SARS and the DST which would enable the Taxing body to draw on the expertise of the DST in the interpretation of the definition of R&D.[302]

6.4.11. Act 28 of 2011[303]

Schedule 1 of The Tax Administration Act 28 of 2011[304] was amended Section 11D by amending subsection 14, as follows: by deleting “Section 4 and inserting Chapter 6 of the Tax Administration Act”.[305]

Further, the Tax Administration Act inserted subsection 19 which read “for the purposes of subsection (1), the Commissioner may, notwithstanding the provisions of sections 99 and 100 of the Tax Administration Act, raise an additional assessment for any year of assessment with respect to a deduction in respect of research and development which has been allowed, where approval has been withdrawn in terms of subsection (10).”[306]

[302] See footnote 289, p. 79.
[303] The Tax Administration Act 28 of 2011.
[304] Southern African Legal Information Institute (SAFLII) *The Tax Administration Act 28 of 2011* available at http://www.saflii.org/za/legis/num_act/taa201128o2011g35491267.pdf accessed on 7 August 2019.
[305] Ibid.
[306] Ibid.

No explanation for the above amendments were provided for in the Memorandum.[307] However, one can assume that the discretion of the Commissioner to raise additional assessments in the above circumstance was added to provide checks and balances. Due to the fact that approval was withdrawn, and an allowance still claimed, the Commissioner would have to ensure that the allowance was claimed in good faith.

6.4.12. Act 21 of 2012[308]

This act deleted the words "For the purposes of subsection (1), the…" and replaced it with "The."[309] This had the effect of widening the Commissioner's power to authorise an additional assessment in any one-year assessment period.

6.4.13. Act 31 of 2013[310]

Act 31 of 2013 amended the section by adjusting the R&D definition, clarifying the R&D exclusions and R&D deductible expenditures, by further clarifying the allowable expenditure provided in the regulations and other miscellaneous amendments.[311]

The Legislature provided that

> "the existing R&D tax incentive regime has been revised to achieve the following main objectives:
>
> 1. To align the 100 per cent and 50 per cent deductions. The application by taxpayers to the Minister of Science and Technology will be for the 150 per cent deduction.

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307 South African Revenue Service *Explanatory Memorandum on the Objects of the Tax Administration Bill of 2011* available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2011-03%20-%20Memorandum%20Objects%20Tax%20Administration%20Bill%202011.pdf accessed on 7 August 2019.

308 The Tax Administration Laws Amendment Act 21 of 2012.

309 South African Revenue Service Explanatory Memorandum on the Tax Administration Laws Amendment Act 21 of 2012 available at https://www.sars.gov.za/AllDocs/LegalDoclib/AmendActs/LAPD-LPrim-AA-2012-02%20-%20Tax%20Administration%20Laws%20Amendment%20Act%202012.pdf accessed on 24 July 2020.

310 The Taxation Laws Amendment Act 31 of 2013.

311 South African Revenue Service Explanatory Memorandum on the Taxation Laws Amendment Act 31 of 2013 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2013-02%20-%20Explanatory%20Memorandum%20Taxation%20Laws%20Amendment%20Bill%202013.pdf accessed on 21 August 2019.

2. To ensure a more robust definition of R&D, requiring that R&D for the purpose of this incentive will be innovative in nature (including improvements). Government wishes to encourage R&D expenditure that yields positive externalities for the economy, while recognising that much R&D taking place in South Africa is akin to reverse engineering.

3. To simplify and streamline the legislation for ease of use."[312]

During deliberations on whether a taxpayer could claim the increase of the incentive from 100% to 150%, the adjudicating committee commented that the incentive was too broad, and allowed for claims for activities that were not meant to be included in the ambit of the incentive, e.g., "R&D 'related' expenditure incurred to upgrade internal businesses that are subsequently sold to connected parties."[313]

Further, the wording of the section created uncertainties which would discourage legitimate applications. The Legislature noted that these anomalies needed to be addressed to expedite the adjudication and approval process.

As it stood, the R&D definition gave taxpayers the impression that they automatically qualified for the 50% uplift.

The Legislature further explained that the purpose of the Ministerial approval process was to "require extra effort by taxpayers to be eligible for the uplift. The intent behind this was to ensure that government subsidises R&D expenditure that was unlikely to have occurred in the absence of the incentive, again the need for some additionality."[314]

6.4.14. Act 43 of 2014 [315]

Under the R&D incentive, various R&D activities are catered for, including, but not limited to clinical trials, multisource pharmaceutical products and functional designs.[316] The Legislature sought to amend the legislation in regard to the following activities.

[312] Ibid.
[313] Ibid, p. 58.
[314] *Explanatory Memorandum on the Taxation Laws Amendment Bill of 2013,* p. 58, see footnote 57.
[315] The Taxation Laws Amendment Act 43 of 2014.
[316] *Explanatory Memorandum on the Taxation Laws Amendment Bill of 2013,* p. 77 – 84, see footnote 57.

6.4.14.1. Clinical Trials

With regard to clinical trials, it has become common practice for pharmaceutical companies to split the development process in to two stages. Stage one involves the early research, while stage two involves the clinical trial. Stage two of the process is often outsourced to other countries.

In order to develop increased opportunities to participate in early stage drug development activities, the government sought to develop South Africa's capability to undertake clinical trials.

It is an internationally accepted principle that clinical trials "for the testing and evaluation of treatments and medicines"[317] fall within the scope of R&D activities. With the Taxation Laws Amendment Bill of 2013, the Legislature sought to recognise this to enable certain taxpayers to claim the R&D incentive.

However, protocols for clinical trials are stringently regulated and controlled on both a domestic and international scale. These regulations are stringent and provide no leeway for alteration. Once formulated, finalized, approved and registered, no deviation may occur. Thus, prior to the amendments effected in 2013, clinical trials did not constitute R&D activities for the purposes of the incentive, in circumstances where the entity conducting the R&D lacked authority to determine or alter the research methodology.

Due to the above, section 11D (6) (b) was introduced by the Taxation Laws Amendment Bill. In terms of this amendment, the Minister of Science and Technology was given the power to categorise clinical trials as R&D that qualified for the tax incentive. This overcame the problem of clinical trials not qualifying as R&D because the conductor of the trial lacked authority to determine or alter the research methodology. Thus, the amendments put forward in Act 43 of 2014 sought to amend this oversight. R&D activities would be condoned to constitute R&D for the purposes of section 11D subject to certain criteria which will be provided for in the Regulations "in terms of Section 11D (1) (e) on the Criteria for Clinical Trials in Respect of the Deductions for Research and Development".[318]

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[317] Ibid, p. 77 – 84.

[318] South African Revenue Service Explanatory Memorandum on the Taxation Laws Amendment Bill, 2014, p. 37 – 40 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2014-02%20-%20Explanatory%20Memorandum%20on%20the%20TLA%20Bill%2013%20of%202014.pdf accessed on 25 July 2020.

The proposal put forward sought to deem clinical trials as constituting R&D activities, subject to certain criteria.[319]

6.4.14.2. Multisource Pharmaceutical Products

At the time, the legislation required that multisource pharmaceutical product manufacturers be the inventor of the drug or alternatively make an improvement to the “original” drug which was significant and innovative, therefore conductors of this form of R&D were denied the incentive on the basis that they sought to achieve results which is already commonplace.[320]

Manufacturers of established brand name drugs are required to invest extensively in R&D for each stage of the development process. The companies must further undertake certain studies and pass strict standards before the drugs be made available to the public.[321]

The Legislature identified that the South African Health System is heavily burdened by diseases, and governmental support is indispensable for encouraging and strengthening local R&D. in encouraging local studies and production, drugs will be readily available at a lower cost to the public of RSA.

The R&D that goes into the development of multisource pharmaceutical products also did not qualify as R&D in the traditional meaning. Accordingly, it was decided that section 11D be amended to make provision for this type of R&D. This was done “by way of regulations in terms of 11D (1) (d) on the Additional Criteria for Multisource Pharmaceutical Products in respect of the Deductions for Research and Development.”[322]

6.4.14.3. Functional Designs

Research and development undertaken for the purpose of registration under section 14 of the Designs Act qualified as R&D for the purposes of section 11D. The Designs Act provided that in order to be registered the functional design must be “new and not common place”[323]. The test for determining the “new” requirement is simply that the design must be different from the

[319] Ibid.
[320] Ibid.
[321] Ibid.
[322] Ibid, p. 39.
[323] The Designs Act 195 of 1993

original design. Therefore the issue arose that despite there being no scientific of technological advance a functional design would be registered.

The Legislature proposed that the definition of R &D be altered to emphasise the "innovation requirement" for functional designs in order to reflect the purpose of functional designs in the Oslo Manual, which states in paragraph 162 that - "[d]esign is an integral part of the development and implementation of product innovations. However, design changes that do not involve a significant change in a product's functional characteristics or intended uses are not product innovations."[324]

Further to the above, the Legislature sough to adjust the incentive in relation to funded R&D activities.

It is common practice that companies undertake R&D Activities which are funded by third parties. These types of arrangements are usually made between connected persons.

Before the promulgation of the Taxation Laws Amendment Bill of 2013 the position was as follows:

Between the domestic company conducting the R&D or the funding members, whichever had the authority to determine or alter methodology could attain approval for the additional 50% deduction.

If approval was attained the deduction was limited to expenditure incurred by the domestic company for the R&D activity only. No other expenditure would be deductible such as mark ups or administrative costs.

The 2014 Taxation Laws Amendment Bill introduced amendments to 11D by deleting section 11D (3) and introducing an amended 11D (2) which:

> "allows for a 150 per cent deduction, subject to approval, and not just an additional 50 per cent on qualifying expenditure. Section 11D (4) (c) (ii), which allows funding of qualifying research and development between group companies, was then amended to refer to section 11D (2) of the Act, however, section 11D (5) was left unchanged."[325]

[324] Oslo Manual, paragraph 18, as cited in South African Revenue Services Explanatory Memorandum on the Taxation Laws Amendment Bill, 2014, p. 37 – 40 available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2014-02%20-%20Explanatory%20Memorandum%20on%20the%20TLA%20Bill%2013%20of%202014.pdf accessed on 25 July 2020.

[325] See footnote 318, p. 40.

By leaving 11D (5) unchanged the funding company within a group of companies could only qualify for a deduction of 50% of the actual expenditure incurred by the conducting party, and not the full 150% deduction.

The Legislature proposed that s 11D (5) be amended so that the funding company is "limited to an amount of 150 per cent of actual expenditure incurred by the funded company directly and solely in respect of that research and development."[326]

6.4.15. Act 15 of 2016[327]

Section 27 of the Taxation Laws Amendment Act of 2016 amended s11D by the addition of s20. This provided that the taxpayer was to "apply to the Commissioner to allow all deductions provided for under this section in respect of research and development" in certain circumstances which were provided for in the subsection.[328]

The Explanatory Memorandum[329] provided that the pre-approval adjudication committee had been experiencing "teething, administration and capacity" issues since its inception in 2012. As a result, the system had become backlogged and delayed. The Minister of Science and Technology accordingly appointed a task team to investigate and provide a report on how the incentive could be improved.[330]

The task team completed its mandate and made the following report: "delays in processing approvals could cause assessments to prescribe before an application is adjudicated upon. This situation is exacerbated because SARS has made it clear that submission of income tax and provisional tax returns should not be delayed pending pre-approval by the R&D committee. Further, taxpayers have been advised that when submitting such returns, they should not assume a successful preapproval as wrongfully doing so could result in them being subject to the imposition of interest and penalties."[331]

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[326] Ibid, p. 41.
[327] The Taxation Laws Amendment Act 15 of 2016.
[328] S27, Taxation Laws Amendment Act 15 of 2016.
[329] South African Revenue Service *Explanatory Memorandum on the Taxation Laws Amendment Bill of 2016* available at https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2016-02%20-%20EM%20on%20the%20Taxation%20Laws%20Amendment%20Bill%2017B%20of%202016%2015%20December%202016.pdf accessed on 21 August 2019.
[330] Consisting of expert representatives from academia, government and the private sector.
[331] See footnote 329, p. 44.

Therefore, the proposed amendment was to allow for the assessments to be reopened in the circumstances noted above.

6.5. Conclusion

From the amendments above, we see that the Legislature implemented the section to promote R&D in South Africa. The procedures put in place were to ensure that taxpayers undertook these projects in good faith, as they would be ultimately funded by the government. From the multitude of amendments tabulated above, it can be seen that the section in its original form was insufficient, and it had to developed by subsequent amendment to provide both substantive law, as well as procedural law dealing with the qualifying projects that enable the incentive to be claimed, in addition to dealing with tax avoidance schemes that sought to take advantage of the provisions.

The series of amendments aimed to streamline the incentive and to ensure that the definition of research and development was robust. The section ensures that those qualify for the subsidy are able to claim it and several procedural measures were introduced to avoid any tax avoidance schemes. The section sought to encourage R&D in the country by providing an incentive to the taxpayers. Thus, although the frequent amendments brought about complexity, and uncertainty for taxpayers, especially in respect of future planning, the amendments represent efforts by the Legislature to strike a balance between the interests of the fiscus in the collection of revenue, and the encouragement of taxpayers to undertake research and development.

CHAPTER 7

CONCLUSION

Over the course of this dissertation, the sections pertaining to the deductions for the use, acquisition and development of IP have been identified and analysed. From the overview of the history, the development of the system for deductions of expenditure relating to IP has been recorded and analysed. This development can be summarised as follows:

Section 11 (gA) at its inception in 1966 provided for a deduction of expenditure incurred in both the acquisition and development of IP, the section was amended several times until it ceased operation in 2004.

Section 11 (gB) at its inception in 1966 provided for a deduction for expenditure incurred for official fees spent in the process of obtaining registration for the various types of IP.

Section 11 (gC) at its inception in 1977 dealt with expenditure incurred in cross border transactions, which was changed in its entirety in 2003 to deal with expenditure incurred solely for the acquisition of IP after 2004.

Section 11B at its inception in 2003, saw the Legislature acknowledging the importance of Research and Development in the country, not only for economic purposes but also to allow us to partake in the technological revolution. The section applied to deduction for R&D until it ceased operation in 2013 upon the promulgation of s11D.

Section 11D was enacted in 2006 and begun its operation in 2014 for the R&D incentive. This section will apply to Research and Development conducted within the Republic after 2014 until 2022.

The above shows the development of the system from having one section dealing with all IP transactions, to a series of sections each dealing with a different transaction in the IP process. This specialisation of sections allows the Legislature to control the deductions allowed and perfect the section so as to avoid confusion and tax avoidance schemes.

This analysis attempted to illustrate that the Legislature has adopted a reactive approach to the taxation of this area of activity. This resulted in numerous amendments and new provisions as issues with the existing sections were discovered, including opportunistic tax avoidance schemes. The result was a host of provisions that are ever-changing, posing a challenge for any taxpayer operating in the field to ensure that they keep abreast of the provisions, and meet the requirements. However, notwithstanding this difficulty, it is submitted that the provisions still adequately cater for both the needs of the fiscus to collect revenue, as well as encouraging the use and development of IP, without discouraging taxpayers from operating in the field.

Further, this dissertation has attempted to demonstrate that the law is ever changing and dynamic. As the field of IP law has developed, the tax laws pertaining to the assets and transactions have changed. Had the laws not developed, the provisions would have remained archaic and restrictive in their operation, with many opportunities for tax avoidance.[332] As the law developed it created a more "flexible system which was in line with modern reality and innovation", which is a key driver in the technological landscape we find ourselves in today. IP has become more sophisticated and significant to trade and industry globally, given the technological revolution that we find ourselves in today. Therefore, governments seek to encourage development in their own economies which result in the introduction of tax incentives for the development of IP.

The income tax system pertaining to IP encompasses both an incentive for research and development, and deductions for the acquisition, use and registration of the IP. This shows the government's intention at encouraging the growth of our economy by using the creativity of the people and mobilising the assets created and registered through innovation.

[332] See footnote 318.

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08 September 2017

Ms Ilhaam Khan (213526366)
School of Law
Howard College Campus

Dear Ms Khan,

Protocol reference number: HSS/1607/017M
Project title: The Tax implications for Intellectual Property: An analysis of Section 11(gA) of the Income Tax Act and the amendments

Approval Notification – No Risk / Exempt Application

In response to your application received on 11 August 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

[redacted]..

Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Mr Christopher Schembri and Dr SJ Bosch
Cc Acting Academic Leader Research: Professor Shannon Bosch
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