

DRAFT INTERPRETATION NOTE

DATE:

ACT : INCOME TAX ACT NO. 58 OF 1962

SECTION : SECTION 12I

SUBJECT : ADDITIONAL INVESTMENT AND TRAINING ALLOWANCES FOR INDUSTRIAL POLICY PROJECTS

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Preamble

In this Note unless the context indicates otherwise –

- “adjudication committee” means the adjudication committee contemplated in section 12I(16);
- “regulations” mean the regulations published by Government Notice No. R639 of 23 July 2010 made under section 12I, as amended by the regulations published by Government Notice No. R633 issued on 20 August 2012;
- “section” means a section of the Act;
- “the Act” means the Income Tax Act No. 58 of 1962; and
- any word or expression bears the meaning ascribed to it in the Act.

1. Purpose

Section 12I provides for the deduction of additional investment and training allowances from the income of a company carrying on an “industrial project” which qualifies as an “industrial policy project”.

This Note provides guidance on the interpretation and application of section 12I.

2. Background

Section 12C(1)(a), read with paragraph (c) of the proviso to section 12C(1), allows for the deduction of the cost to a taxpayer of machinery or plant used by a taxpayer directly in a process of manufacture or any other similar process at a rate of 40:20:20:20 over four years. Section 12H, in turn, allows the taxpayer an additional

deduction of R30 000 per learner in respect of any registered learnership agreement entered into between the learner and an employer.¹

Section 12I, which provides for an additional investment allowance and an additional training allowance, was introduced with the aim of supporting the main objectives of the National Industrial Policy Framework to diversify South Africa's industrial output, support a knowledge-based economy and nurture labour intensive industries. These incentives are aimed solely at benefitting projects within the manufacturing sector.

3. The law

For ease of reference, the relevant sections of the Act are quoted in **Annexure A** and the Regulations are quoted in **Annexure B**.

4. Application of the law

4.1 Introduction

In order to qualify for either the additional investment allowance or additional training allowance, the company must be engaged in an "industrial project" (see **4.2**) which qualifies as an "industrial policy project" (see **4.3**). Enhanced allowances may be claimed if the industrial policy project is approved with preferred status (see **4.4**).

4.2 "Industrial project"

An "industrial project" is defined in section 12I(1) as a trade carried on solely or mainly² for the manufacture of products, goods, articles, or other things³ within the Republic that are classified under "Major Division 3: Manufacturing" in the most recent Standard Industrial Classification Code,⁴ or, in the case of products, goods, articles or things which are not yet classified, the adjudication committee (see **7** for a discussion regarding the adjudication committee) is of the view that such products, goods and so forth will be classified as above.

Projects involving the manufacture of the following goods do not constitute an "industrial project" as defined:⁵

- Spirits and ethyl alcohol from fermented products and wine⁶
- Beer and other malt liquors and malt⁷
- Tobacco products⁸

¹ Interpretation Note No. 20 (Issue 4) dated 10 June 2011 "Additional Deduction for Learnership Allowance".

² It is settled law (see *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Eindoms) Bpk*, 1966 4 SA 444 (A)) that "mainly" means more than 50%.

³ It is evident that "other things" is limited to corporeal "things" and would not extend to incorporeal "things" as incorporeal things would not be "manufactured" and would in any case not fall within the classification contemplated in paragraphs (a) and (b) in definition of "industrial project".

⁴ Issued by Statistics South Africa and also referred to as the "SIC Code".

⁵ Paragraphs (i) to (v) of the definition of "industrial project" in section 1(1).

⁶ SIC Code 3051.

⁷ SIC Code 3052.

⁸ SIC Code 3060.

- Arms and ammunition⁹
- Bio-fuels if the manufacture thereof adversely affects food in South Africa

4.3 “Industrial policy project”

An “industrial project” (see 4.2) constitutes an “industrial policy project”¹⁰ if –

- | |
|--|
| <p>(a) the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that—</p> <p style="padding-left: 20px;">(i) the cost of all manufacturing assets to be acquired by the company for the purposes of the project will exceed—</p> <p style="padding-left: 40px;">(aa) in the case of greenfield projects,¹¹ R200 million; and</p> <p style="padding-left: 40px;">(bb) in the case of brownfield projects,¹² the higher of—</p> <p style="padding-left: 60px;">(A) R30 million; or</p> <p style="padding-left: 60px;">(B) the lesser of R200 million or 25 per cent of the expenditure incurred to acquire assets previously used in the project;</p> <p style="padding-left: 20px;">(ii) the project does not constitute an industrial participation project¹³ and does not receive any concurrent industrial incentive provided by any national sphere of government;¹⁴ and</p> |
|--|

⁹ SIC Code 3577.

¹⁰ Section 12I(7).

¹¹ A “greenfield project” is defined in section 12I(1) as “a project that represents a wholly new industrial project which does not utilise any manufacturing assets other than wholly new and unused manufacturing assets”.

¹² A “brownfields project” is defined in section 12I(1) as “a project that represents an expansion or upgrade of an existing industrial project”.

¹³ Under Regulation 3.1 of the Regulations an industrial project constitutes an “industrial participation project” if that project at any time before or during the “additional investment allowance benefit period” (see further below in this footnote) receives any credits in terms of the National Industry Participation Programme (September 1996), the Defence Industrial Participation Programme (September 1996) or the Competitive Supplier Development Programme (January 2007). An “additional investment allowance benefit period” is defined in Regulation 1 as meaning “the period during which the additional investment allowance for manufacturing assets is allowable in terms of section 12I(2) of the Act”.

¹⁴ Under Regulation 3.2 of the Regulations, a project is regarded as receiving a “concurrent industrial incentive” if any credit or benefit is received during the “additional investment allowance benefit period” (see footnote 13) by virtue of the Motor Industry Development Programme (September 1995), its successor, the Automotive Production and Development Programme, the Small Medium Manufacturing Development Programme (October 1996), or its successor, the Enterprise Investment Programme (July 2008), the Productivity Asset Allowance (July 2000), the Small Medium Enterprise Development Programme (September 2000), or its successor, the Enterprise Investment Programme (July 2008), or any other programme of any national sphere of government that provides grants, subsidies, rebates or interest-free loans – unless the adjudication committee is satisfied that those grants, subsidies, rebates or interest-free loans are immaterial in relation to the monetary benefit provided by section 12I.

- (iii) the project is not integrally related to any other project of the company (or any other company that forms part of the same group of companies as that company) that has been approved as contemplated in subsection (8);¹⁵
- (iv) the project will upgrade an industry within the Republic by—
- (aa) providing skills development; and
- (bb) utilising new technology that results in improved energy efficiency;
- (b)
- (c) more than 50 per cent of the manufacturing assets to be acquired by the company for the purposes of the project will be brought into use by that company within four years from the date of approval;¹⁶ and
- (d) the application for approval of the project by the company is received by the Minister of Trade and Industry not later than 31 December 2015,¹⁷ in such form and containing such information as the Minister of Trade and Industry may prescribe.

It will be evident that the requirements of (a), (c) and (d) above must all be met before an “industrial project” will be considered to be an “industrial policy project”.

While an “industrial project” will constitute a qualifying “industrial policy project” if it meets the requirements of section 12I(7), it must also meet the Ministerial approval requirements of section 12I(8). The Minister of Trade and Industry must,¹⁸ after taking into account the recommendations of the adjudication committee (see 7), approve an “industrial project” as an “industrial policy project” (with or without preferred status – see 4.4) if the Minister is satisfied that the industrial project will significantly contribute to the Industrial Policy Programme within South Africa having regard to –

- the extent to which the project will upgrade an industry within South Africa by using innovative processes, using new technology that results in improved energy efficiency and cleaner production technology;
- the extent to which the project will provide general business linkages within South Africa;
- the extent to which the project will acquire goods and services from small, medium and micro enterprises;
- the extent to which the project will create direct employment within South Africa;
- the extent to which the project will provide skills development in South Africa; and
- in the case of a greenfield project, the location of the project within an industrial development zone (IDZ).

¹⁵ This requirement is intended to prevent a group of companies from dividing the project within the group into sub-parts so as to qualify for multiple incentives under section 12I. Whether a project is integrally related to another is a factual inquiry.

¹⁶ Section 12I(2).

¹⁷ The date was extended from 31 December 2014 to 31 December 2015 by the Taxation Laws Amendment Act No. 7 of 2010 with effect from 2 November 2010.

¹⁸ Section 12I(8).

The Minister of Finance is tasked, after consultation with the Minister of Trade and Industry, to make regulations prescribing the factors to be taken into account in assessing the section 12I(8) criteria discussed above.¹⁹ The necessary regulations were published by the Minister of Finance on 23 July 2010,²⁰ and amended on 20 August 2012.²¹ In essence, the factors prescribed by the Regulations, and the points allocated to these factors (see 7.4), are used by the adjudication committee to determine whether or not to recommend approval of an industrial project to the Minister of Trade and Industry.

The Minister of Trade and Industry must, after taking into account the recommendations of the adjudication committee, approve an industrial project as an industrial policy project where the industrial project meets at least five of the 10 potential points in terms of the criteria contemplated in section 12I(8) and two out of four points in terms of the direct employment creation and the skills development criteria provided for in section 12I(8)(d) and (e).²²

4.4 Preferred status

An “industrial project” that has been approved as an “industrial policy project” may also be approved with preferred status. Should an industrial policy project be conferred with preferred status, the project will be entitled to enhanced additional investment and additional training allowances (see 5 and 6 below). The Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, must approve an industrial policy project as having preferred status should it achieve at least eight out of 10 potential points in terms of the criteria contemplated in section 12I(8).²³

4.5 Overall limitation

The Minister of Trade and Industry is prohibited from approving any industrial project where the potential additional investment and training allowances in respect of that project, together with all other approved industrial projects will in the aggregate exceed R20 billion.²⁴

5. Additional investment allowance

5.1 Quantum of the allowance

A company that has been approved as an industrial policy project as discussed above may, in addition to any other deductions which may be allowable under the Act, deduct an additional investment allowance²⁵ equal to –

- 55% of the cost of any new and unused (see 5.3) “manufacturing asset” (see 5.2) used in an “industrial policy project” (see 4.3) with “preferred status” (see 4.4); or

¹⁹ Section 12I(10).

²⁰ Regulations published by Government Notice No. R 639 issued on 23 July 2010.

²¹ Regulations published by Government Notice No. R 633 issued on 20 August 2012.

²² Regulation 4(a) of the Regulations.

²³ Regulation 4(b) of the Regulations.

²⁴ Section 12I(9).

²⁵ Section 12I(2).

- 100% of the cost of any new and unused manufacturing asset used in an industrial policy project with preferred status that is located within an IDZ;²⁶ or
- 35% of the cost of any new and unused manufacturing asset used in any industrial policy project other than an industrial policy project with preferred status;²⁷ or
- 75% of the cost of any new and unused manufacturing asset used in any industrial policy project other than an industrial policy project with preferred status that is located within an IDZ.²⁸

The additional investment allowance must be claimed in the year of assessment in which the asset is first brought into use by the company as owner thereof for the furtherance of the industrial policy project carried on by that company. However, in order to qualify for the additional investment allowance the asset must be “acquired and contracted for” (see **5.5**) on or after the date of approval of the project by the Minister of Trade and Industry and brought into use within four years from the date of such approval.²⁹

The cost to the company of any manufacturing asset is deemed to be the lesser of the actual cost to the company or the direct cost which a person would have incurred on the acquisition of the manufacturing asset if the person had acquired the manufacturing asset under a cash transaction concluded at arm’s length on the date on which the transaction was concluded.³⁰

The additional investment allowance may not exceed –

(a) for a greenfield project –

- with preferred status : R900 million; or
- without preferred status : R550 million

(b) for a brownfield project–

- with preferred status : R550 million; or
- without preferred status : R350 million

from the date of approval of the project,³¹ over the life of the project.

²⁶ Effective for projects approved on or after 1 January 2012. An IDZ is an area designated by the Minister of Trade and Industry as an IDZ in terms of the IDZ programme announced under section 10 of the Manufacturing Development Act, 1993.

²⁷ Section 12(2)(b)(i).

²⁸ Effective for projects approved on or after 1 January 2012. See footnote 22.

²⁹ Section 12(2).

³⁰ Section 12(24).

³¹ Section 12(3).

5.2 “Manufacturing asset”

The term “manufacturing asset” means any building,³² plant or machinery acquired, contracted for or brought into use³³ by a company which will mainly be used by that company in South Africa for the purposes of carrying on an industrial project of that company within South Africa, and which will qualify for a deduction under section 12C(1)(a), 13 or 13*quat*.³⁴

The definition of “manufacturing asset” also includes any improvements to such building, plant or machinery.³⁵ Any improvement made by a taxpayer as contemplated in section 12N, that is, improvements effected to an asset which is not owned by the taxpayer, is deemed to be a new and unused manufacturing asset and the expenditure incurred by the taxpayer to complete the improvement is deemed to be the cost of that new and unused manufacturing asset.³⁶ The company is in these circumstances also deemed to be the owner of the manufacturing asset for the purposes of section 12I.³⁷

5.3 New and unused

The manufacturing asset must be new and unused. There is a clear distinction between the words “new” and “unused”, since unused manufacturing assets need not necessarily be new. For example, a manufacturing asset acquired some years ago but never used until the current tax year will not be considered new³⁸ and will accordingly not qualify as a manufacturing asset for purposes of section 12I.

³² The term “building” is not defined in the Act and it bears its normal meaning. The meaning has been considered in a number of court cases from which several general principles have emerged. Normally a building is a substantial structure, consisting of walls, a roof and the necessary appurtenances (accessories). Anything attached to the building of a permanent nature will be considered part of that building only if it is structurally integrated or otherwise permanently and physically integrated into the building in such a manner that it has lost its own separate identity and character. Fences or paving will not form part of the building.

³³ The determination of when an asset is “brought into use” is one of fact. An asset is not brought into use merely because it is used once. The asset “*must be used in a way that is consistent with the intended and future use thereof*” (Juta Law Online Publications – Commentary on the Income Tax Act, notes on the meaning of “brought into use” in section 12C(1).

³⁴ Section 12I(1). The taxpayer is not limited on the number of manufacturing assets in respect of which an additional allowance may be claimed, nor does section 12I specify that the manufacturing assets need to be on the same premises. The asset must first qualify for the manufacturing machinery or plant [section 12C(1)(a)], buildings used in a process of manufacture (section 13) or erection or improvement of building in a urban development zones (section 13*quat*) deduction(s) in order to qualify.

³⁵ Section 12I(1).

³⁶ Section 12I(1A) which came into effect on 2 November 2010, the date of promulgation of the Taxation Laws Amendment Act No. 7 of 2010.

³⁷ Section 12N(1).

³⁸ Juta Law Online Publications – Commentary on the Income Tax Act, notes on section 12C(1).

5.4 First brought into use as owner

Ownership of the manufacturing asset is a pre-requisite in order to claim the additional investment allowance. Should ownership not have passed to the company before the company uses the manufacturing asset for the first time in a qualifying industrial policy project, the additional investment allowance may not be claimed.³⁹

The determination of when a manufacturing asset can be said to have been brought into use for the first time by the company is a factual one. Importantly, the manufacturing asset must have been “used” by the company, which requires that the asset be deployed by the company in such a way that it contributes to the conduct of the qualifying manufacturing activity. Stated differently, the manufacturing asset must be used in such a way that it in fact forms a meaningful part of the manufacturing activities of the company. The use of the manufacturing asset for a short period may be indicative that the asset was not used in the sense contemplated in section 12I. The learned authors of Juta’s *Commentary on the Income Tax Act* correctly note that: “The asset must be used in a way consistent with the intended and future use”.⁴⁰

5.5 Acquired and contracted for

The manufacturing asset must be “*acquired*⁴¹ and *contracted for*⁴² on or after the date of approval of the project and brought into use within four years from the date of approval. Therefore, if the taxpayer acquires and contracts for the asset before the date of approval, the asset will not qualify for the allowance even if it is brought into use for the first time within four years of the date of approval of the project. The facts of, for example, turnkey projects⁴³ and their respective contractual dates as well as suspensive and resolute conditions in contracts which may affect the date of acquisition will need to be carefully considered under section 12I.

³⁹ Compare section 12B where the section requires that the relevant asset be “owned by the taxpayer or acquired by the taxpayer as purchaser in terms of... ‘instalment credit agreement’ as defined in section 1 of the Value-Added Tax, 1991...”. Thus, in the case of the section 12B allowance the taxpayer must be the owner of the asset or a purchaser of an asset under an instalment sale agreement, that is, be the lessee of the asset and not be the owner.

⁴⁰ Juta Law Online Publications - Commentary on the Income Tax Act, notes on section 12C(1).

⁴¹ The meaning of “acquired” in the context of the Transfer Duty Act, 1949 has been judicially considered on a number of occasions. In relation to the meaning of “acquired” in section 2(1) of the Transfer Duty Act, 1949, the courts (see *SIR v Wispeco Housing (Pty) Ltd*, 35 SATC 14; 1973 (1) SA 783 (A) and authorities referred to therein) have held that the word connotes not the acquisition of actual ownership of fixed property, but the right to acquire the ownership of fixed property, that is, the acquisition of a *jus in personum ad rem acquirendum*. However, the court in *Brodie & another v SIR*, 36 SATC 159; 1974 704 (A) preferred the narrower meaning of “acquired” as postulated by Innes CJ in *Transvaal Investment Company v Springs Municipality*, 1922 AD 337, namely, that “...juristically, the word ‘acquire’ connotes ownership; the ordinary legal meaning implies the acquisition of dominium. To acquire a thing is to become the owner of it...”.

⁴² On the basis that “acquired” is used in a narrow sense to mean the acquisition of ownership, the meaning of “contracted for” must mean that the company and the supplier have entered into a binding agreement for the acquisition of the relevant manufacturing asset. Should the contract be subject to a suspensive condition, the manufacturing asset will not have been acquired until the condition has been fulfilled.

⁴³ A turnkey project is a type of project that is constructed by a developer and sold or handed over to a buyer in a ready to use condition.

The Minister of Trade and Industry may, after taking into account the recommendations of the adjudication committee, extend the four year period by no more than one year.⁴⁴

5.6 Inflationary adjustment

The benefit of the additional investment allowance may not be significant where the company qualifying for the allowances is in an assessed loss position and will accordingly only derive a cash flow benefit sometime in the future. Given that many of the industrial policy projects will be large-scale, it may in fact take several years before the cash benefits of the deductions become available. As a result, inflation would erode the value of the benefit if there was no adjustment to the present day value of the additional investment allowance benefit.

In order to mitigate this potential adverse outcome, section 12I(6) provides for an adjustment to the balance of assessed loss that is occasioned by the deduction of any additional investment allowance. In essence, to the extent that the section 12I deductions are not able to be used (that is, the deduction, or portion thereof, create an assessed loss), the balance of assessed loss that may be carried forward and deducted in the following year of assessment must be adjusted for inflation.

The adjustment is calculated as follows. The balance of assessed loss that may be carried forward in a year of assessment must be increased by the amount by which that balance of assessed loss exceeds an amount equal to any balance of assessed loss that would have been carried forward had the additional investment allowance (in that year of assessment or any previous year of assessment) not been allowed, multiplied by the “prescribed rate”⁴⁵ contemplated in paragraph (a) of that definition as at the end of that year of assessment. The current “prescribed rate”⁴⁶ is 4,5%.

5.6.1 Inflationary adjustment examples

Example 1

Company A deducts an additional investment allowance under section 12I(2) of R10 million in Year 1. At the end of the year of assessment the company determines that it has derived taxable income of R1 million. No section 12I(6) adjustment is allowable as the section 12I additional investment allowance was used in full.

⁴⁴ Section 12I(19)(a).

⁴⁵ Section 1(1).

⁴⁶ Paragraph (a) of the definition of “prescribed rate”, being 4% below the rate determined under paragraph (b) of the definition of “prescribed rate”. The “prescribed rate” is fixed by the Minister of Finance by notice in the *Government Gazette* from time-to-time. The prescribed rate was determined as 8,5% with effect from 1 March 2011 for purposes of paragraph (b) of the definition of “prescribed rate” under Notice No. 3 in *Government Gazette* 33915 of 7 January 2011.

Example 2

Company B deducts an additional investment allowance under section 12I(2) of R10 million in Year 1. At the end of the Year 1 the company determines that it has incurred an assessed loss of R10 million after taking into account the R10 million section 12I allowance. The balance of assessed loss that may be carried forward in Year 2 is –

	R
Balance of assessed loss – Year 1	10 000 000
Balance of assessed loss that would have been carried forward had the section 12I allowance not been allowed (R10 million – R10 million) – adjusted balance of assessed loss	<u>nil</u>
Excess of balance of assessed loss (Year 1) over adjusted balance of assessed loss	10 000 000
Excess multiplied by “prescribed rate” (4,5%) = R10 million × 4,5%	450 000
New balance of assessed loss carried forward to Year 2 = R10 million (balance of assessed loss) + R450 000 (inflation factor)	<u>10 450 000</u>

Example 3

Company C deducts an additional investment allowance under section 12I(2) of R8 million in Year 1. At the end of Year 1 the company determines that it has incurred a balance of assessed loss of R15 million. The balance of assessed loss that may be carried forward in Year 2 is –

	R
Balance of assessed loss – Year 1	15 000 000
Balance of assessed loss that would have been carried forward had the section 12I allowance not been allowed (R15 million – R8 million) – adjusted balance of assessed loss	<u>(7 000 000)</u>
Excess of balance of assessed loss (Year 1) over adjusted balance of assessed loss	8 000 000
Excess multiplied by “prescribed rate” (4,5%) = = R8 million × 4,5%	360 000
New balance of assessed loss carried forward to Year 2 = R15 million (balance of assessed loss) + R360 000 (inflation factor)	<u>15 360 000</u>

Example 4

Company D deducts an additional investment allowance under section 12I(2) of R10 million in Year 1. At the end of Year 1 the company determines that it has incurred a balance of assessed loss of R15 million. The balance of assessed loss that may be carried forward to Year 2 is –

	R
Balance of assessed loss – Year 1	15 000 000
Balance of assessed loss that would have been carried forward had the section 12I allowance not been allowed (R15 million – R10 million) – adjusted balance of assessed loss	<u>(5 000 000)</u>
Excess of balance of assessed loss (Year 1) over adjusted balance of assessed loss	10 000 000
Excess multiplied by “prescribed rate” (4,5%) = = R10 million × 4,5%	450 000
New balance of assessed loss carried forward to Year 2 = R15 million (balance of assessed loss) + R450 000 (inflation factor)	<u>15 450 000</u>

Company D deducts an additional investment allowance under section 12I(2) of R10 million in Year 2. At the end of Year 2 the company determines that it has derived taxable income of R1 500 000 before deducting the balance of assessed loss carried forward from Year 1 of R15 450 000. After deducting the balance of assessed loss from Year 1 of R15 450 000, the balance of assessed loss of the company for Year 2 is R13 950 000. The balance of assessed loss that may be carried forward to Year 3 is –

	R
Balance of assessed loss – Year 2	13 950 000
Balance of assessed loss that would have been carried forward had the section 12I allowances in the current and previous years of assessment (R10 000 000 Year 1 + R10 000 000 Year 2) not been allowed (R13 950 000 – R20 000 000)	<u>nil</u>
Excess of balance of assessed loss (Year 2) over adjusted balance of assessed loss	13 950 000
Excess multiplied by “prescribed rate” (4,5%) = R13 950 000 × 4,5%	627 750
New balance of assessed loss carried forward to Year 3 = R13 950 000 (balance of assessed loss) + R627 750 (inflation factor)	<u>14 577 750</u>

No inflation factor may be applied where the balance of assessed loss is incurred in any year of assessment more than four years after the year of assessment during which the approval is granted by the Minister of Trade and Industry (see 4.3).

6 Additional training allowance

6.1 Introduction

In addition to any other deductions allowable under the Act, a company may, subject to certain limitations referred to in section 12I(5) (see **6.6**) deduct any “cost of training”⁴⁷ incurred by the company as an “additional training allowance”.⁴⁸ This additional training allowance must be claimed in the year of assessment during which the cost of training is incurred.⁴⁹

The provisions of section 12I(4) are designed to ensure that the company can only deduct the genuine costs of training, as opposed to normal salary expenses disguised as training. The definition of “cost of training” essentially makes provision for three types of training, namely –

- training provided by the company;
- training provided by a connected person in relation to the company; and
- training provided by an independent person.

The three sources of training are discussed below.

6.2 Training provided by the company

Where the relevant training is provided by the company, the “cost of training” (that is, the additional training allowance) is limited to the cost to the company of the remuneration of the company’s employees who are *exclusively* employed by the company to provide training to the company’s employees, and includes the cost of training materials.⁵⁰ In this regard, the employees providing the training have to be exclusively dedicated for this purpose, in other words, the relevant employee must be wholly engaged in providing the relevant training and may not render other services to the company.

There may, however, be circumstances in which an employee who is exclusively employed to provide training is requested to perform an activity which is not strictly speaking training in nature (for example, an *ad hoc*, short-term non-training assignment). The performance of non-training related activities on a very limited and ad hoc basis does not necessarily mean that the employee is no longer considered to be employed exclusively to provide training. The facts and circumstances of the particular case will need to be considered in assessing whether as a result of performing non-training related activities the employee can no longer be considered to be *exclusively* employed to provide training.

6.3 Training provided by a connected person

In this instance,⁵¹ “the cost of training” (that is, the additional training allowance) is limited to so much of the cost charged by the connected person in relation to the company as is incurred by the connected person for the remuneration of employees who are employed by the connected person to provide training to the company’s

⁴⁷ As defined in section 12I(1).

⁴⁸ Section 12I(4). The company may claim the section 12I(4) allowance in addition to the learnership allowance under section 12H, provided the company also meets the requirements of section 12H.

⁴⁹ Section 12I(4).

⁵⁰ Paragraph (a) of the definition of “cost of training” in section 12I(1).

⁵¹ Paragraph (b) of the definition of “cost of training” in section 12I(1).

employees. The cost of training in this instance also includes the cost of materials used by the connected person.

6.4 Training provided by an independent person

Where the relevant training is provided by an independent person, the “cost of training” (that is, the additional training allowance)⁵² is the cost to the company of the charge levied by the person providing the training.

6.5 Remuneration of employees

Neither “remuneration” nor “employee” is specifically defined for purposes of section 12I. SARS accepts that “remuneration” and “employee” for purposes of section 12I have the same meaning as those words have in paragraph 1 of the Fourth Schedule to the Act. “Remuneration” for purposes of section 12I accordingly includes any amount of income which is paid or is payable to any person by way of any salary, leave pay, wages, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether in respect of services or not. There are a number of other amounts that are included within the ambit of the definition of “remuneration” and these too would form part of “remuneration” for purposes of section 12I.

An “employee” is in turn essentially defined in paragraph 1 of the Fourth Schedule to the Act as meaning –

- any person (not being a company) who receives “remuneration” as defined (see above), or to whom remuneration accrues;
- any person who receives any “remuneration” as defined, or to whom remuneration accrues by reason of any services rendered by that person to or on behalf of a labour broker;
- a “labour broker” as defined,⁵³ and
- any person or class or category whom the Minister of Finance by notice in the *Gazette* declares to be an employee for purposes of the definition.

6.6 Overall limitations

The relevant “cost of training” must be incurred within six years from the date of approval of the project.⁵⁴ The expenditure must, therefore, be incurred *after* the approval of the project and for the furtherance of the industrial policy project carried on by the company. Any cost of training incurred before the date of approval will accordingly not qualify for the additional training allowance.

The additional training allowance may not exceed R36 000 per employee.⁵⁵

⁵² Paragraph (c) of the definition of “cost of training” in section 12I(1).

⁵³ Paragraph 1 of the Fourth Schedule to the Act. A “labour broker” is essentially defined as any natural person that provides clients with other persons to render a service or perform work for the clients, or procures other persons for the clients and such other persons are remunerated by the clients.

⁵⁴ Section 12I(5)(a).

⁵⁵ Section 12I(5)(a).

The additional training allowance that may be claimed by a company with preferred status may not in total exceed R30 million over the six year period from the date of approval of the project.⁵⁶

In the case of projects other than projects with preferred status, the additional training allowance may not in total exceed R20 million over the six year period from the date of approval of the project.⁵⁷

Only the cost of training incurred in respect of training that is accredited by SAQA or training that the adjudication committee determines to be equivalent to training accredited by SAQA may be taken into account.

7. The adjudication committee

The adjudication committee plays an important role in the application of section 12I and is established under section 12I for purposes of evaluating, investigating and monitoring all applications submitted to the Minister of Trade and Industry for approval, and for making recommendations to the Minister in respect of these applications.

7.1 Composition

The adjudication committee must consist of at least three persons employed by the Department of Trade and Industry and appointed by the Minister of Trade and Industry and three persons employed by National Treasury or SARS and appointed by the Minister of Finance. Either Minister may appoint alternative persons so employed if an appointee is not available to perform any function as a member of the adjudication committee.⁵⁸

7.2 Functions

The adjudication committee is an independent body which performs its functions impartially and without fear, favour or prejudice. These functions are as follows:⁵⁹

- Evaluate any application and make recommendations to the Minister of Trade and Industry for the purposes of the approval of any industrial project under section 12I(8).
- Investigate or cause to be investigated any industrial policy project for the purposes of section 12I.
- Monitor all industrial policy projects to determine whether the objectives of section 12I are being achieved, and advise the Minister of Finance and the Minister of Trade and Industry on any future proposed amendment or adjustment to section 12I.
- Require any company applying for approval of any industrial project as an industrial policy project under section 12I to furnish the necessary information or documents for the adjudication committee and the Minister of Trade and Industry to perform their duties under section 12I.

⁵⁶ Section 12I(5)(b)(i).

⁵⁷ Section 12I(5)(b)(ii).

⁵⁸ Section 12I(16).

⁵⁹ Section 12I(17). For the purposes of section 12I the committee may require any company applying for approval of an industrial project under section 12I to furnish such information or documentation as is necessary for the committee and the Minister to perform their functions under this section.

- Obtain the services of any person for a specific purpose and on such conditions and for such period as it may determine, to advise the adjudication committee on any function assigned to it under section 12I.
- Appoint its own chairman and determine procedures for its meetings, provided that all procedures must be properly recorded and minuted.

7.3 Restrictions

The members of the adjudication committee and any person whose assistance has been obtained by the adjudication committee may not –

- act in any way that is inconsistent with the functions mentioned in **7.2** above;
- expose themselves to any situation involving the risk of a conflict between their responsibilities and private interests; or
- use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.⁶⁰

7.4 Factors and point allocation by the adjudication committee

A point allocation system⁶¹ which is linked to specific factors is used by the adjudication committee to determine the final scoring for an application submitted by an applicant for purposes of making a recommendation to the Minister of Trade and Industry. These factors and the point allocation associated with each factor are briefly highlighted hereunder.

7.4.1 Brownfield projects

Upgrading an industry

A brownfield project is regarded as upgrading an industry within South Africa for the purposes of sections 12I(8)(a) and 12I(10)(a) should it –

- use processes of innovation, thereby changing pre-existing techniques and the use of plant, machinery or equipment and these processes materially improve production time, reduce production costs, improve product quality or improve product longevity (**1 point**); and
- the manufacturing assets of the project will attain an energy efficiency improvement of at least 12,5% (but less than 15%) relative to the baseline⁶² (**1 point**) or an energy efficiency improvement of at least 15% (**2 points**) relative to the baseline.⁶³

General business linkages

A brownfield project will be regarded as providing general business linkages for purposes of sections 12I(8)(b) and 12I(10)(b) if –

- the project engages in the production of goods and less than 40% of the local demand is produced in South Africa or the goods were not previously produced in South Africa, or

⁶⁰ Section 12I(18).

⁶¹ Regulations 4 to 6 of the Regulations.

⁶² The baseline is determined by the South African National Energy Development Institute for a 12-month period before the application.

⁶³ Above.

- the project contributes to the global competitiveness of an industrial sector by the production of goods where identical or similar goods would not be produced in South Africa without substantial capital investment (**1 point**).

Acquiring goods and services from small, medium or micro enterprises

A brownfield project is regarded as acquiring goods and services from small, medium and micro industries for purposes of sections 12I(8)(c) and 12I(10)(c) if at least 10% (**1 point**) or at least 15% (**2 points**) of raw materials, intermediate products and services are acquired, based on the annual cost to the industrial project, from enterprises which at time of acquisition are small, medium and micro enterprises, excluding connected persons in relation to the company.

Direct employment creation

A brownfield project is regarded as providing direct employment for purposes of sections 12I(8)(d) and 12I(10)(d) if at the end of the additional investment allowance benefit period at least 0,5 full time jobs (**1 point**) or one full time job (**2 points**) has been created for each R1 million of the cost of the manufacturing assets.

Skills development

A brownfield project is regarded as providing skills development for purposes of sections 12I(8)(e) and 12I(10)(e) if the cost of training will exceed as a percentage of the wage bill, more than 2% but less than 2,5% (**1 point**) or 2,5 % or more of the annual average (**2 points**).

7.4.2 Greenfield projects

Innovative processes

A greenfield project is regarded as upgrading an industry within South Africa for purposes of sections 12I(8)(a)(i) and 12I(10)(a) if it uses processes of innovation, changing pre-existing techniques and the use of paint, machinery or equipment and these processes materially improve production time, reduces production costs, improve product quality or improve product longevity. (**1 point**)

Improved energy efficiency with emphasis on cleaner production technology

A greenfield project is regarded as utilising new technology that results in improved energy efficiency and cleaner technology for purposes of sections 12I(8)(a)(ii) and 12I(10)(g) if the project uses modern, viable energy-efficient equipment and process, as certified by the South African National Energy Development Institute (**a maximum of 2 points depending on energy efficiency**).

General business linkages

A greenfield project is regarded as providing general business linkages within South Africa for purposes of sections 12I(8)(c) and 12I(10)(c) if the project engages in the production of goods, and less than 40% of the local demand is produced in SA or the goods were not previously produced in SA or the project contributes to the global competitiveness of an industrial sector by the production of goods where identical or similar goods would not be produced in SA without substantial capital investment (**1 point**).

Acquiring goods and services from small, medium or micro enterprises

A greenfield project is regarded as acquiring goods and services from small, medium or micro enterprises for purposes of sections 12I(8)(a)(c) and 12I(10)(c) if at least 10% of raw materials, intermediate products and services, based on the annual cost to the industrial project, will be acquired from enterprises which at time of acquisition are small, medium and micro enterprises, excluding connected persons in relation to the company (**1 point**).

Direct employment creation

A greenfield project is regarded as creating direct employment within South Africa for purposes of sections 12I(8)(a)(d) and 12I(10)(d) if it will at the end of the additional investment allowance benefit period create at least 0,67 full time jobs (**1 point**) or one full time job (**2 points**) for each R1 million of the cost of the manufacturing assets.

Skills development

A greenfield project is regarded as providing skills development within South Africa for purposes of sections 12I(8)(a)(e) and 12I(10)(e) if the cost of training will exceed as a percentage of the wage bill, more than 2% but less than 2,5% (**1 point**) or 2,5% or more of the annual average (**2 points**).

Location in industrial development zone

A greenfield project is regarded as being located within an IDZ for purposes of sections 12I(8)(a)(f) and 12I(10)(f) if the project is located in an area designated by the Minister of Trade and Industry as an IDZ under the IDZ programme announced under section 10 of the Manufacturing Development Act No. 187 of 1993 (**2 points**).

7.5 Reporting to the adjudication committee

A company which is carrying on an approved industrial policy project must report to the adjudication committee within 12 months after the close of each year of assessment, starting with the year in which approval is granted. The company must report on the progress of the industrial policy project and meet the requirements as stated in 4.2.⁶⁴

7.6 Withdrawal of approval of an industrial policy project

The approval granted for an industrial policy project may be withdrawn⁶⁵ if –

- during any year of assessment, any material fact changes or the company fails to comply with any requirements as mentioned in 4.3 which has the effect that approval would not have been granted had such change in fact or failure to comply been known at the time;
- the company fails to submit the required report to the adjudication committee; or
- the approval that was granted, was based on fraudulent information, misrepresentation or non-disclosure of material facts.

The Minister of Trade and Industry may, after taking into account the recommendations of the adjudication committee, withdraw the approval granted for

⁶⁴ Section 12I(11).

⁶⁵ Section 12I(12).

that industrial policy project with effect from a specified date, and must inform the Commissioner of the withdrawal and the date.

8. Duties of the Commissioner

The Commissioner may, despite the confidentiality of information provisions of Chapter 6 of the Tax Administration Act No. 28 of 2011 –

- notify the Minister of Trade and Industry whenever he discovers information that may lead to a withdrawal of Ministerial approval;
- disallow all deductions, otherwise provided for under this section as from the date of approval if the company is guilty of fraud, misrepresentation or non-disclosure of material facts with regard to any tax, duty or levy administered by the Commissioner and must notify the Minister of Trade and Industry accordingly; and
- inform the Minister of Trade and Industry where any company has requested the Commissioner to issue a certificate of compliance with tax obligations and that certificate was denied.⁶⁶

The Commissioner must submit an annual report to the Auditor-General containing a list of all certificates issued and of failures by the Commissioner to respond to requests for such certificates within 60 days.⁶⁷

Despite the confidentiality of information provisions in Chapter 6 of the Tax Administration Act, 2011, the Commissioner must disclose to the Minister of Trade and Industry and to the adjudication committee, including any person whose assistance has been sought by that committee, information relating to the affairs of any company carrying on an industrial policy project as is necessary to enable the Minister of Trade and Industry and the adjudication committee to perform their respective functions under section 121.⁶⁸

9. Preservation of secrecy

Every employee of the Department of Trade and Industry and every member of the adjudication committee, including any person whose assistance has been sought by that committee is obliged to preserve and aid in preserving secrecy with regard to all matters that may come to their knowledge and may not communicate any such matter to any person whatsoever other than to the company concerned or its legal representative, nor allow anybody to have access to any records in their possession except in terms of the law or an order of court.⁶⁹ Contravention of this or of the restriction is an offence and punishable to a fine or to imprisonment for a period not exceeding two years.⁷⁰

⁶⁶ Section 121(13).

⁶⁷ Section 121(20).

⁶⁸ Section 121(21).

⁶⁹ Section 121(22).

⁷⁰ Section 121(23).

10. Additional assessment

The Commissioner may raise an additional assessment for any year of assessment where an additional investment allowance, which has been allowed in any previous year, must be disallowed for reasons provided for above under 7 or 8. The Commissioner may do so despite the provisions of sections 99 and 100 of the Tax Administration Act No. 28 of 2011, which deals with the period of limitation for the issuance of assessments or decisions, respectively.⁷¹

11. Functions of the Minister of Trade and Industry

The Minister of Trade and Industry –

- must take into account the recommendations of the adjudication committee on applications submitted to it for approval;
- may, after taking into account the recommendations of the adjudication committee, extend the periods as stated in section 12I(2) and (6)(b) by a period not exceeding one year;
- must provide written reasons for any decision to grant or deny any application for approval or for any withdrawal of approval;
- must inform the Commissioner of approvals, setting out particulars as are required by the Commissioner to determine the amount of the additional investment allowance;
- must publish the particulars of any application received in the *Gazette* not later than 30 days after providing the company with written reasons for granting or denying the application; and
- must submit an annual report to Parliament and a copy thereof to the Auditor-General, setting out certain information for each company that received approval.⁷²

12. Recoupment

Section 8(4)(n) provides for the recoupment of the additional investment allowance allowed under section 12I where the company disposes of a manufacturing asset. Should the company, therefore, dispose of the manufacturing asset before completion of the write-off period for the purposes of section 12C or 13, all amounts allowed as a deduction under section 12I, whether in the current year or any previous year of assessment, which have been recovered or recouped in the current year of assessment, will be included in the company's income. This recoupment applies in addition to any recoupment under section 8(4)(a) that may apply in respect of allowances claimed under sections 12C(1), 13 or 13*quat*.

⁷¹ Section 12I(14).

⁷² Section 12I(19).

13. Conclusion

Section 12I aims to encourage investment in industrial projects, predominantly large industrial projects, in order to improve productivity within the manufacturing sector and thus support South Africa's industrial strategy. This is done by allowing an additional investment allowance on manufacturing assets and an additional training allowance for the training of employees engaged in providing services in relation to the qualifying industrial policy project.

Legal and Policy Division
SOUTH AFRICAN REVENUE SERVICE

Annexure A – The law

12I. Additional investment and training allowances in respect of industrial policy projects.—(1) For the purposes of this section—

“**adjudication committee**” means the committee contemplated in subsection (16);

“**brownfield project**” means a project that represents an expansion or upgrade of an existing industrial project;

“**cost of training**” means—

- (a) in the case of training provided by the taxpayer, the cost of remuneration of employees of the taxpayer who are employed exclusively to provide training to the taxpayer’s employees and the cost of training materials;
- (b) in the case of training provided by a person that is a connected person in relation to the taxpayer, so much of the cost charged by the connected person as is incurred in respect of the remuneration of employees who are employed to provide training to the taxpayer’s employees and the cost of materials used by the connected person to provide the training; and
- (c) in any other case, the cost to the taxpayer of the training charged by the person providing the training;

“**date of approval**” means the date of the approval contemplated in subsection (8);

“**greenfield project**” means a project that represents a wholly new industrial project which does not utilise any manufacturing assets other than wholly new and unused manufacturing assets;

“**industrial project**” means a trade solely or mainly for the manufacture of products, goods, articles, or other things within the Republic that—

- (a) is classified under “Major Division 3: Manufacturing” in the most recent Standard Industrial Classification Code (referred to as the “SIC Code”) issued by Statistics South Africa; or
- (b) in the case of products, goods, articles or things which are not yet classified, the adjudication committee is of the view will be classified as contemplated in paragraph (a),

but does not include the manufacture of—

- (i) spirits and ethyl alcohol from fermented products and wine (SIC Code 3051);
- (ii) beer and other malt liquors and malt (SIC Code 3052);
- (iii) tobacco products (SIC Code 3060);
- (iv) arms and ammunition (SIC Code 3577); and
- (v) bio-fuels if that manufacture negatively impacts on food security in the Republic;

“**manufacturing asset**” means any building, plant or machinery acquired, contracted for or brought into use by a company, which—

- (a) will mainly be used by that company in the Republic for the purposes of carrying on an industrial project of that company within the Republic; and
- (b) will qualify for a deduction in terms of section 12C(1)(a), 13 or 13*quat*,

and includes any improvement to such building, plant or machinery.

(1A) For the purposes of this section, if a taxpayer completes an improvement as contemplated in section 12N, the improvement shall be deemed to be a new and unused manufacturing asset and the expenditure incurred by the taxpayer to complete the improvement shall be deemed to be the cost of that new and unused manufacturing asset contemplated in subsection (2).

(2) In addition to any other deductions allowable in terms of this Act, a company may, subject to subsection (3), deduct an amount (hereinafter referred to as an additional investment allowance) equal to—

- (a)
 - (i) 55 per cent of the cost of any new and unused manufacturing asset used in an industrial policy project with preferred status; or
 - (ii) 100 per cent of the cost of any new and unused manufacturing asset used in an industrial policy project with preferred status that is located within an industrial development zone; or
- (b)
 - (i) 35 per cent of the cost of any new and unused manufacturing asset used in any industrial policy project other than an industrial policy project with preferred status; or
 - (ii) 75 per cent of the cost of any new and unused manufacturing asset used in any industrial policy project other than an industrial policy project with preferred status that is located within an industrial development zone,

in the year of assessment during which that asset is first brought into use by the company as owner thereof for the furtherance of the industrial policy project carried on by that company, if that asset was acquired and contracted for on or after the date of approval and was brought into use within four years from the date of approval.

(3) The additional investment allowance contemplated in subsection (2) may not exceed—

- (a) R900 million in the case of any greenfield project with preferred status, or R550 million in the case of any other greenfield project from the date of approval;
- (b) R550 million in the case of any brownfield project with preferred status, or R350 million in the case of any other brownfield project from the date of approval.

(4) In addition to any other deductions allowable in terms of this Act, a company may, subject to subsection (5), deduct an amount (hereinafter referred to as an additional training allowance) equal to the cost of training provided to employees in the year of assessment during which the cost of training is incurred for the furtherance of the industrial policy project carried on by that company.

(5) (a) The cost of training contemplated in subsection (4) must be incurred within six years from the date of approval, and the additional training allowance contemplated in subsection (4) allowed to a company may not exceed R36 000 per employee.

(b) The additional training allowance contemplated in subsection (4) allowed to a company within the six-year period from the date of approval may not exceed—

- (i) R30 million in the case of an industrial policy project with preferred status; and
- (ii) R20 million in the case of any other industrial policy project.

(6) (a) Where a taxpayer is allowed a deduction in terms of subsection (2) in the current or any previous year of assessment, any balance of assessed loss carried forward by the taxpayer during a year of assessment must be increased by the amount by which that balance of assessed loss exceeds an amount equal to any balance of assessed loss that would have been carried forward during that year had that deduction not been allowed, multiplied by the rate contemplated in paragraph (a) of the definition of “prescribed rate” as at the end of the year of assessment.

(b) Paragraph (a) does not apply in respect of any balance of assessed loss incurred by a taxpayer during any year of assessment more than four years after the year during which the approval contemplated in subsection (8) is granted.

- (7) An industrial project of a company constitutes an industrial policy project if—
- (a) the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that—
 - (i) the cost of all manufacturing assets to be acquired by the company for the purposes of the project will exceed—
 - (aa) in the case of greenfield projects, R200 million; and
 - (bb) in the case of brownfield projects, the higher of—
 - (A) R30 million; or
 - (B) the lesser of R200 million or 25 per cent of the expenditure incurred to acquire assets previously used in the project;
 - (ii) the project does not constitute an industrial participation project and does not receive any concurrent industrial incentive provided by any national sphere of government; and
 - (iii) the project is not integrally related to any other project of the company (or any other company that forms part of the same group of companies as that company) that has been approved as contemplated in subsection (8);
 - (iv) the project will upgrade an industry within the Republic by—
 - (aa) providing skills development; and
 - (bb) utilising new technology that results in improved energy efficiency;
 - (b)
 - (c) more than 50 per cent of the manufacturing assets to be acquired by the company for the purposes of the project will be brought into use by that company within four years from the date of approval; and
 - (d) the application for approval of the project by the company is received by the Minister of Trade and Industry not later than 31 December 2015, in such form and containing such information as the Minister of Trade and Industry may prescribe.
- (8) The Minister of Trade and Industry must, after taking into account the recommendations of the adjudication committee, approve an industrial project as an industrial policy project, either with or without preferred status, where that Minister is satisfied that the industrial policy project will significantly contribute to the Industrial Policy Programme within the Republic having regard to—
- (a) the extent to which the project will upgrade an industry within the Republic by—
 - (i) utilising innovative processes;
 - (ii) utilising new technology that results in—
 - (aa) improved energy efficiency; and
 - (bb) cleaner production technology; and
 - (iii) providing skills development;
 - (b) the extent to which the project will provide general business linkages within the Republic;
 - (c) the extent to which the project will acquire goods or services from small, medium and micro enterprises;
 - (d) the extent to which the project will create direct employment within the Republic;
 - (e) the extent to which the project will provide skills development in the Republic; and
 - (f) in the case of a greenfield project, the location of the project within an Industrial Development Zone.

(9) Notwithstanding subsection (8), the Minister of Trade and Industry may not approve any industrial project where the potential additional investment and training allowances in respect of that project and all other approved industrial projects (other than those projects where the approval thereof has been withdrawn under subsection (12)), will in the aggregate exceed R20 billion.

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

- (a) the factors to be taken into account in determining whether the industrial project will significantly contribute to the Industrial Policy Programme within the Republic;
- (b) the factors to be taken into account in determining whether the project will provide general business linkages within the Republic;
- (c) the factors to be taken into account in determining whether goods or services will be acquired from small, medium and micro enterprises;
- (d) the factors to be taken into account in determining the extent to which the project creates direct employment within the Republic;
- (e) the extent to which the project must provide skills development in the Republic and the factors to be taken into account in determining whether the project provides skills development in the Republic;
- (f) the factors to be taken into account in determining the location of the project within an Industrial Development Zone;
- (g) the extent to which the project must improve energy efficiency and the factors to be taken into account in determining the extent to which the project must utilise new technology that results in improved energy efficiency and cleaner production technology; and
- (h) what constitutes an industrial participation project and a concurrent industrial incentive.

(11) Within 12 months after the close of each year of assessment, starting with the year in which approval is granted in terms of subsection (8), a company carrying on an industrial policy project must report to the adjudication committee with respect to the progress of the industrial policy project in terms of the requirements of subsections (7) and (8) within such time, in such form and in such manner as the Minister of Finance may prescribe.

(12) Where in respect of any company carrying on an industrial policy project—

- (a) during any year of assessment—
 - (i) any material fact changes; or
 - (ii) the company fails to comply with any requirement contemplated in subsection (7) or (8),
which would have had the effect that approval in terms of subsection (8) would not have been granted had such change in fact or such failure been known to the Minister of Trade and Industry at the time of granting approval;
- (b) the company fails to submit a report to the adjudication committee as required in terms of subsection (11); or
- (c) the approval granted in terms of subsection (8) was based on fraudulent information or misrepresentation or non-disclosure of material facts,

the Minister of Trade and Industry may, after taking into account the recommendations of the adjudication committee, withdraw the approval granted in respect of that industrial policy project with effect from a date specified by that Minister, and must inform the Commissioner of that withdrawal and of that date.

(13) The Commissioner may, notwithstanding the provisions of Chapter 6 of the Tax Administration Act—

- (a) notify the Minister of Trade and Industry whenever the Commissioner discovers information that may cause a withdrawal of approval in terms of subsection (12);
- (b) disallow all deductions otherwise provided for under this section starting with the date of approval if the company is guilty of fraud or misrepresentation or non-disclosure of material facts with regard to any tax, duty or levy administered by the Commissioner and must notify the Minister of Trade and Industry accordingly; and
- (c) inform the Minister of Trade and Industry where any company has requested the Commissioner to issue a certificate contemplated in subsection (7)(b)(ii) and that certificate was denied.

(14) 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 where an additional investment allowance which has been allowed in any previous year must be disallowed in terms of subsection (12) or (13).

(15)

(16) There shall for the purposes of this section be an adjudication committee which must consist of at least—

- (a) three persons employed by the Department of Trade and Industry, appointed by the Minister of Trade and Industry; and
- (b) three persons employed by the National Treasury or the South African Revenue Service, appointed by the Minister of Finance:

Provided that the Minister of Trade and Industry or the Minister of Finance, as the case may be, may appoint alternative persons so employed if any person appointed in terms of paragraph (a) or (b) is not available to perform any function as a member of the committee.

(17) The adjudication committee is an independent committee which performs its functions impartially and without fear, favour or prejudice and for the purpose of this section, the adjudication committee may—

- (a) evaluate any application and make recommendations to the Minister of Trade and Industry for purposes of the approval of any industrial project in terms of subsection (8);
- (b) investigate or cause to be investigated any industrial policy project for the purposes of this section;
- (c) monitor all industrial policy projects—
 - (i) to determine whether the objectives of this section are being achieved; and
 - (ii) to advise the Minister of Finance and the Minister of Trade and Industry on any future proposed amendment or adjustment thereof;
- (d) require any company applying for approval of any industrial project as an industrial policy project in terms of this section to furnish such information or documents as are necessary for the committee and Minister of Trade and Industry to perform their functions in terms of this section;
- (e) for a specific purpose and on such conditions and for such period as it may determine obtain the assistance of any person to advise the adjudication committee relating to any function assigned to the committee in terms of this section; and
- (f) appoint its own chairperson and determine the procedures for its meetings provided that all procedures must be properly recorded and minuted.

(18) The members of the adjudication committee and any person whose assistance has been obtained by that committee may not—

- (a) act in any way that is inconsistent with the provisions of subsection (17) or expose themselves to any situation involving the risk of a conflict between their responsibilities and private interests; or
- (b) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

(19) The Minister of Trade and Industry—

- (a) may, after taking into account the recommendations of the adjudication committee, extend the periods contemplated in subsections (2) and (6)(b) by a period not exceeding one year;
- (b) must provide written reasons for any decision to grant or deny any application for approval of an industrial project as an industrial policy project in terms of subsection (8), or for any withdrawal of approval as contemplated in subsection (12);
- (c) must inform the Commissioner of the approval of any industrial project as an industrial policy project in terms of subsection (8), setting out such particulars as are required by the Commissioner to determine the amount of the additional investment allowance allowable in terms of this section;
- (d) must publish the particulars of any application received from a company for approval of an industrial project as an industrial policy project in the Gazette not later than 30 days after providing to that company the written reasons for any decision as contemplated in paragraph (b);
- (e) must submit an annual report to Parliament, and must provide a copy of that report to the Auditor-General, setting out the following information in respect of each company that received approval in terms of subsection (8):
 - (i) The name of each company;
 - (ii) the description of each industrial policy project;
 - (iii) the potential national revenue forgone by virtue of the deductions allowable in respect of that industrial policy project in terms of this section;
 - (iv) the annual progress relating to the direct benefits of the industrial policy project in terms of economic growth or employment, setting out the details of the factors contemplated in subsections (7) and (8) on the basis of which approval of the industrial project as an industrial policy project was granted;
 - (v) any decision to withdraw the approval of an industrial policy project in terms of subsection (12); and
 - (vi) any decision not to withdraw the approval of an industrial policy project, despite any material change in facts.

(20) The Commissioner must submit an annual report to the Auditor-General containing a list of all—

- (a) certificates issued under subsection (7)(b)(ii); and
- (b) failures to respond within 60 days as contemplated in the proviso to subsection (7)(b)(ii).

(21) Notwithstanding the provisions of Chapter 6 of the Tax Administration Act, the Commissioner must disclose to the Minister of Trade and Industry and the adjudication committee, including any person whose assistance has been obtained by that committee, such information relating to the affairs of any company carrying on an industrial policy project as is necessary to enable the Minister of Trade and Industry and the adjudication committee to perform their functions in terms of this section.

(22) Every employee of the Department of Trade and Industry and every member of the adjudication committee, including any person whose assistance has been obtained by that committee, must preserve and aid in preserving secrecy with regard to all matters that may come to their knowledge in the performance of their functions in terms of this section, and may not communicate any such matter to any person whatsoever other than to the company concerned or its legal representative, nor allow any such person to have access to any records in the possession or custody of that Department or committee, except in terms of the law or an order of court.

(23) Any person who contravenes the provisions of subsections (18) and (22), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

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

Annexure B – The regulations**No. R. 639 23 July 2010****REGULATIONS MADE UNDER SECTION 121 OF THE INCOME TAX ACT, 1962 (ACT NO. 58 OF 1962)**

By virtue of the power vested in me by section 121 of the Income Tax Act, 1962 (Act No. 58 of 1962), I, Pravin Jamnadas Gordhan, Minister of Finance, in consultation with the Minister of Trade and Industry, hereby make the regulations as set out in the Schedule hereto.

SCHEDULE**1. Definitions**

In these regulations, unless the context otherwise indicates, any word or expression to which a meaning has been assigned in the Income Tax Act, 1962 (Act No. 58 of 1962), bears the meaning so assigned, and—

“additional investment allowance benefit period” means the period during which the additional investment allowance for manufacturing assets is allowable in terms of section 121(2) of the Act;

“additional training allowance benefit period” means the period during which the additional training allowance is allowable in terms of section 121(4);

“direct employment” means employment in accordance with the meaning in paragraphs (a) and (b) of the definition of “employee” in the Fourth Schedule;

“energy efficiency improvement” bears the meaning assigned to “reported savings” in the South African National Standard 50010 for the measurement and verification of energy efficiency savings that is issued by the South African Bureau of Standards in terms of the Standards Act, 2008 (Act No. 8 of 2008);

“small, medium or micro enterprise” means a business—

(a) which formally employs not more than 200 full-time employees; and

(b) of which the annual turnover does not exceed R50 million;

“South African National Energy Development Institute” means the organisation as contemplated in section 7 of the National Energy Act, 2008 (Act No. 34 of 2008);

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

“wage bill” bears the meaning assigned to the expression “leviable amount” in section 3(4) and (5) of the Skills Development Levies Act, 1999 (Act No. 9 of 1999).

2. Prerequisites for industrial policy projects*Skills development*

2.1 For the purposes of determining whether a project will upgrade an industry by providing skills development in accordance with sections 121(7)(a)(iv) and 121(10)(e), the Minister, after taking into consideration the recommendations of the adjudication committee, must be satisfied that-

- (a) the industrial project will incur expenditure in respect of the cost of training (including the cost of implements, utensils, articles and materials utilised exclusively in respect of that training) that is at least equal to an average of two per cent of the annual wage bill of the project during the additional training allowance benefit period; and
- (b) the expenditure contemplated in paragraph (a) is likely to result in the upgrading of industrial skills, taking into account only training that is accredited by the South African Qualifications Authority (SAQA) or training that the adjudication committee determines to be equivalent to training accredited by SAQA.

Energy efficiency

2.2 For the purposes of determining whether a project will upgrade the industry by utilising new technology that results in improved energy efficiency as contemplated in sections 12I(7)(a)(iv)(bb) and 12I(10)(g), the Minister, after taking into consideration the recommendations of the adjudication committee, must be satisfied that-

- (a) in the case of a brownfield project, the project will attain an energy efficiency improvement of at least 10 per cent from a baseline, as determined for the 12 month period prior to the application, as certified by the South African National Energy Development Institute, by the end of the additional investment allowance period.
- (b) in the case of a greenfield project, the project will utilise modern, viable energy-efficient equipment and processes, as compared to the industry sector relative to that industrial project, throughout the additional investment allowance benefit period (not taking into account any period before the month in which the industrial policy project reaches 50 per cent of its production capacity), as certified by the South African National Energy Development Institute, by the end of the additional investment allowance period.

3. Limitations

Industrial participation project

3.1 For the purposes of sections 12I(7)(a)(ii) and 12I(10)(h) of the Act, an industrial project of a company constitutes an industrial participation project if that project at any time before the additional investment allowance benefit period received, or during the additional investment allowance benefit period receives, any credits or benefits in terms of—

- (a) the National Industry Participation Programme, which came into operation during September 1996 (unless the credits or benefits are limited to assistance in respect of access to markets for goods and services outside the Republic);
- (b) the Defence Industrial Participation Programme, which came into operation during September 1996; or
- (c) the Competitive Supplier Development Programme, which came into operation during January 2007.

Concurrent benefits

3.2 For the purposes of sections 12I(7)(a)(ii) and 12I(10)(h) of the Act, a project will receive a concurrent industrial incentive if any credit or benefit is received during the additional investment allowance benefit period by virtue of—

- (a) the Motor Industry Development Programme, which came into operation during September 1995, or its successor, the Automotive Production and Development Programme, except to the extent that the credit or benefit is received by any motor vehicle component manufacturer by virtue of any Motor Industry Development Programme;

- (b) the Small Medium Manufacturing Development Programme, which came into operation during October 1996, or its successor, the Enterprise Investment Programme, which came into operation during July 2008;
- (c) the Productivity Asset Allowance, which came into operation during July 2000;
- (d) the Small Medium Enterprise Development Programme, which came into operation during September 2000, or its successor, the Enterprise Investment Programme, which came into operation during July 2008; or
- (e) any other programme of any national sphere of government that provides grants, subsidies, rebates or interest-free loans, unless the adjudication committee is satisfied that those grants, subsidies, rebates or interest-free loans are immaterial in relation to the monetary benefit provided by Section 12I.

4. Point system for qualifying as an industrial policy project

Points system

In terms of section 121(8), the Minister of Trade and Industry must, after taking into account the recommendations of the adjudication committee, approve an industrial project as—

- (a) an industrial policy project where that industrial project achieves at least—
 - (i) five out of the 10 potential points in terms of the criteria contemplated in section 121(8); and
 - (ii) two out of the four points in terms of the direct employment creation and the skills development criteria contemplated in section 12I(8)(d) and (e); and
- (b) an industrial policy project having preferred status, where the industrial project achieves at least eight out of the 10 potential points in terms of the criteria contemplated in section 121(8).

5. Brownfield projects - Factors and point allocation

Innovative processes

5.1 For the purposes of section 12I(8)(a)(i) and 12I(10)(a), a brownfield project is regarded as upgrading an industry within the Republic by utilising innovative processes where the Minister of Trade and Industry, after taking into consideration the recommendations of the adjudication committee, is satisfied that—

- (a) the project will utilise processes of innovation, thereby changing pre-existing techniques and the use of plant, machinery or equipment; and
- (b) these processes will materially improve production time, reduce production costs, improve product quality or improve product longevity.

(1 point)

Improved energy efficiency with emphasis on cleaner production technology

5.2 For the purposes of sections 12I(8)(a)(ii) and 12I(10)(g), a brownfield project will be regarded as upgrading an industry within the Republic by utilising new technology that results in improved energy efficiency and cleaner production technology where the Minister of Trade and Industry, after taking into consideration the recommendations of the adjudication committee, is satisfied that—

- (a) the manufacturing assets of the project will attain an energy efficiency improvement of at least 12,5 per cent (but less than 15 per cent) relative to the baseline, determined for the 12 month period prior to the application as certified by the South African National Energy Development Institute by the end of the additional investment allowance benefit period; or

(1 point) or

- (b) the manufacturing assets of the project will attain an energy efficiency improvement of at least 15 per cent relative to the baseline, as determined for the 12 month period prior to the application, as certified by the South African National Energy Development Institute by the end of the additional investment allowance benefit period.

(2 points)

General business linkages

- 5.3 For the purposes of sections 12I(8)(b) and 12I(10)(b), a brownfield project is regarded as providing general business linkages within the Republic where the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that—

- (a) the project will be engaged in the production of goods, where less than 40% of the local demand for such goods are produced in the Republic or where these goods were not previously produced in the Republic; or
- (b) the project will contribute to the global competitiveness of an industrial sector by the production of goods where identical or similar goods would not be produced in the Republic without substantial capital investment.

(1 point)

Acquiring goods and services from small, medium or micro enterprises

- 5.4 For the purposes of sections 12I(8)(c) and 12I(10)(c), a brownfield project will be regarded as acquiring goods and services from small, medium or micro enterprises where the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that the project will acquire:

- (a) at least 10 per cent; or

(1 point) or

- (b) at least 15 per cent,

(2 points)

of its raw materials, intermediate products and services, based on the annual cost to the industrial project (including direct and indirect operating costs) from enterprises which at the time of acquisition of the goods and services, are small, medium and micro enterprises (excluding any small, medium or micro enterprise which is a connected person, as defined in section 1 of the Income Tax Act, 1962, in relation to the company carrying on that industrial policy project) during the additional investment allowance benefit period.

Direct employment creation

5.5 For the purposes of Sections 12I(8)(d) and 12I(10)(d), a brownfield project is regarded as creating direct employment within the Republic where the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that the project will by the end of the additional investment allowance benefit period create at least—

(a) 0,5 full-time jobs (but less than 1 full-time job); or

(1 point) or

(b) 1 full-time job,

(2 points)

for each R1 million of cost of manufacturing assets in respect of the project (not taking into account amounts above R1 billion).

Skills development

5.6 For the purposes of sections 12I(8)(e) and 12I(10)(e), a brownfield project is regarded as providing skills development within the Republic, where the Minister of Trade and Industry after taking into account the recommendations of the adjudication committee, is satisfied that the cost of training in respect of the project will exceed as a percentage of the wage bill, over the additional training allowance benefit period—

(a) more than 2 per cent of the annual average, but less than 2,5 per cent; or

(1 point) or

(b) more than 2,5 per cent of the annual average.

(2 points)

6. Greenfield projects - Factors and point allocation*Innovative processes*

6.1 For the purposes of sections 12I(8)(a)(i) and 12I(10)(a), a greenfield project is regarded as upgrading an industry within the Republic by utilising innovative processes where the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that—

(a) the project will utilise processes of innovation, thereby changing pre-existing techniques and the use of plant, machinery and equipment within the same industrial sector as the project; and

(b) these processes will materially improve production time, reduce production costs, improve product quality or improve product longevity, as compared to existing production time, production costs, product quality or product longevity within the same industrial sector as the project.

(1 point)

Improved energy efficiency with emphasis on cleaner production technology

- 6.2 For the purposes of Sections 12I(8)(a)(ii) and 12I(10)(g), a greenfield project is regarded as utilising new technology that results in improved energy efficiency and cleaner technology where the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that the project will utilise modern, viable energy-efficient equipment and processes throughout the additional investment allowance benefit period, innovative for the particular industrial sector, as certified by the South African National Energy Development Institute (not taking into account any period before the month in which the industrial policy project reaches 50 per cent of its production capacity).

(a maximum of 2 points depending on energy efficiency)

General business linkages

- 6.3 For the purposes of section 12I(8)(b) and 12I(10)(b), a greenfield project is regarded as providing general business linkages within the Republic where the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that—
- (a) the project will be engaged in the production of goods, where less than 40% of the local demand for such goods is produced in the Republic or where these goods were not previously produced in the Republic; or
- (b) the project will contribute to the global competitiveness of an industrial sector by the production of goods on the basis that identical or similar goods would not be produced in the Republic without substantial capital investment.

(1 point)

Acquiring goods and services from small, medium or micro enterprises

- 6.4 For the purposes of sections 12I(8)(c) and 12I(10)(c), a greenfield project will be regarded as acquiring goods and services from small, medium or micro enterprises where the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that the project will acquire at least 10 per cent of its raw materials, intermediate products and services based on the annual cost to the industrial project (including direct and indirect operating costs) from enterprises which at the time of acquisition of the goods and services are small, medium and micro enterprises (excluding any small, medium or micro enterprise which is a connected person, as defined in section 1 of the Act in relation to the company carrying on that industrial policy project) during the additional investment allowance benefit period.

(1 point)

Direct employment creation

- 6.5 For the purposes of Sections 12I(8)(d) and 12I(10)(d), a greenfield project is regarded as creating direct employment within the Republic where the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied, that the project will by the end of the additional investment allowance benefit period create at least—
- (a) 0,67 full-time jobs (but less than 1 full-time job); or

(1 point) or

(b) 1 full-time job,

(2 points)

for each R1 million of cost of manufacturing assets in respect of the project (not taking into account amounts above R1 billion).

Skills development

6.6 For the purposes of sections 12I(8)(e) and 12I(10)(e), a greenfield project is regarded as providing skills development within the Republic where the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that the cost of training in respect of the project will exceed as a percentage of the wage bill over the additional training allowance benefit period—

(a) more than 2 per cent of the annual average, but less than 2,5 per cent; or

(1 point) or

(b) more than 2,5 per cent of the annual average.

(2 points)

Location in industrial development zone

6.7 For the purposes of sections 12I(8)(f) and 12I(10)(f), a greenfield project is regarded as being located within an Industrial Development Zone where the Minister of Trade and Industry, after taking into account the recommendations of the adjudication committee, is satisfied that the project is located in an area designated by the Minister of Trade and Industry as an Industrial Development Zone in terms of the Industrial Development Zone programme announced under section 10 of the Manufacturing Development Act, 1993 (Act No. 187 of 1993).

(1 point)

(Signed)

PRAVIN J GORDHAN
MINISTER OF FINANCE

Date: 7-7-2010

No. R. 633 20 August 2012**REGULATIONS MADE UNDER SECTION 121 OF THE INCOME TAX ACT, 1962 (Act No. 58 of 1962)**

I, Pravin Jamnadas Gordhan, Minister of Finance, in consultation with the Minister of Trade and Industry, under section 121 of the Income Tax Act, 1962 (Act No. 58 of 1962), make the regulations as set out in the Schedule hereto.

SCHEDULE**Definitions**

1. In these regulations “the Regulations” means the regulations published by Government Notice No. R. 639 of 23 July 2010.

Amendment of regulation 1 of the Regulations

2. Regulation 1 of the Regulations is hereby amended—

- (a) by the deletion in the definition of “additional investment allowance benefit period” of the words “of the Act”;
- (b) by the addition to the definition of “direct employment” of the words “to the Act”;
- (c) by the insertion after the definition of “energy efficiency improvement” of the following definition:

“ ‘**section121**’ means section 121 of the Act”;

Amendment of regulation 2 of the Regulations

3. Regulation 2 of the Regulations is hereby amended—

- (a) by the substitution in subregulation 2.1 for the words “the Minister” of the words “the Minister of Trade and Industry”;
- (b) by the substitution in subregulation 2.1 for the reference “12(7)(a)(iv)” of the reference “12(7)(a)(iv)(aa)”;
- (c) by the substitution in subregulation 2.2 for the words “the Minister” of the words “the Minister of Trade and Industry”;
- (d) by the substitution in subregulations 2.2(a) and (b) for the words “allowance period” of the words “allowance benefit period”;
- (e) by the substitution in subregulation 2.2 for the full stop at the end of sub-subregulation (a) of a semi-colon.

Amendment of regulation 3 of the Regulations

4. Regulation 3 of the Regulations is hereby amended—

- (a) by the deletion in subregulation 3.1 in the words preceding sub-subregulation (a) of the words “of the Act”;
- (b) by the deletion in subregulation 3.2 in the words preceding sub-subregulation (a) of the words “of the Act”.

Amendment of regulation 5 of the Regulations

5. Regulation 5 of the Regulations is hereby amended—

- (a) by the substitution in subregulation 5.4 for the expression “the Income Tax Act, 1962” of the expression “the Act”;
- (b) by the substitution in paragraph (b) of subregulation 5.6 for the expression “more than 2,5 per cent” of the expression “2,5 per cent or more”.

Amendment of regulation 6 of the Regulations

6. Regulation 6 of the Regulations is hereby amended—

- (a) by the substitution in paragraph (b) of subregulation 6.6 for the expression “more than 2,5 per cent” of the expression “2,5 per cent or more”;
- (b) by the substitution in subregulation 6.7 for the expression “**(1 point)**” of the expression “**(2 points)**”.

Commencement

7. These regulations are deemed to have come into operation on 1 January 2012.

(Signed)

Pravin Jamnadas Gordhan
Minister of Finance