THE DEDUCTION OF REPAIRS TO PROPERTY IN TERMS OF SECTION 11(d) OF THE INCOME TAX ACT 58 OF 1962

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INDEX

1. INTRODUCTION

As the burden borne by the South African taxpayer seems to increase yearly, the prudent taxpayer must embrace the various deductions available to him or her in terms of the Act[1]. In order to do so the taxpayer must understand the ambit of each deduction so that he or she may plan accordingly. A deduction that has for many years granted relief to the weary taxpayer is that contained in Section 11(d).

This section reads as follows "for the purpose of determining the taxable income derived by any person from carrying on a trade within the Republic, there shall be allowed a deduction from the income of such person so derived -

(d) expenditure actually incurred during the year of assessment on repairs of property occupied for the purpose of trade or in respect of which income is receivable, including expenditure so incurred on the treatment against attack by beetles of any timber forming part of such property and sums expended for the repairs of machinery, implements, utensils and other articles employed by the taxpayer for the purpose of his trade."

In order to appreciate the ambit of the deduction contained in Section 11(d), I intend to consider this subsection in detail and have elected to concentrate on repairs effected to property. More specifically, I will investigate what constitutes a repair for the purpose of the Act, concentrating on the principles relating to repairs contained in

[1] Income Tax Act 58 of 1962

ITC 617[2]. Furthermore, I will address the question of the trade requirements contained in Section 11(d).

2. WHAT IS MEANT BY THE WORD "REPAIR"

In ITC 238[3] Manfred Nathan KC, endorsing the approach in ITC 122[4], states that "(t)he Act does not contain any definition of "repairs" and it must be taken, as has been previously laid down in income tax cases, that the word repairs must be understood in the ordinary natural sense of the word, and according to its ordinary grammatical meaning."[5]

Manfred Nathan KC further clarified the meaning of the term "repairs" in ITC 491[6]. Here the taxpayer sought to deduct the expense of tiling the leased premises from which he carried on a butcher's business. The necessity of tiling the building arose as the result of a Municipal by-law[7]. The court held that "in the ordinary sense of the term "repairs" means the replacement or renewal of something which has become defaced or worn out or worn down by using or possibly by wear and tear (- although there is provision under Section 11(2)(d) of the Act relating to wear and tear) ... it will be necessary for the applicant to show that one of these physical causes has occurred"[8]. On the facts, the court found that "there is no proof of such a physical cause of the breaking down of the property or the deterioration in its condition so as to necessitate

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[2] (1946) 14 SATC 474
[3] (1932) 6 SATC 353
[4] (1928) 4 SATC 353
[5] ITC 238 (1932) 6 SATC 353 at 354
[6] (1941) 13 SATC 77
[7] ITC 491 (1941) 13 SATC 77 at 78.
[8] ITC 491 (1941) 13 SATC 77 at 77 - 78

repairs."[9] The tiling was thus not a repair and expenditure incurred in so doing was not deductible as it was of a capital nature.

The above requirement that some physical deterioration must have occurred in order for the expenditure incurred to constitute repairs has been accepted and applied by subsequent cases. In ITC 576[10] faced with facts similar to the abovementioned hapless butcher, the court applied the decision of ITC 491[11]

Similarly in ITC 821[12] Newton Thompson J stated that "'repairs' has a very ordinary meaning. It is a thing that you repair if you put it back to where it was, as far as possible. But in this case the building was perfectly alright; it had to be broken down in order to enable the boiler to be put in; then it had to be built up again because it had been broken down. I do not think that in the ordinary use of the words that could possibly be regarded as a repair".[13]

Nowhere is the importance of physical deterioration more clearly illustrated than in ITC 1264[14]. Here the taxpayer's hotel premises were incorporated into a municipal area resulting in him being obliged to make use of the municipal sewerage system. The taxpayer converted to the required sewerage system and attempted to deduct the cost of so doing, as a repair. After his objection to the secretary's disallowance was

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[9] ITC 491 (1941) 391 13 SATC 77 at 78
[10] (1944) 13 SATC 485
[11] (1941) 12 SATC 77
[12] (1955) 21 SATC 75
[13] ITC 821 (1955) 21 SATC 75 at 75.
[14] (1977) 39 SATC 133

overruled, the taxpayer appealed to the Special Court. Here he led evidence that established that although the taxpayer had apparently not previously been fully aware of the situation, the work of conversion had revealed that much of the existing drainage system was faulty and obsolete, constituted a potential health hazard, and needed to be replaced[15] As in the abovementioned cases of ITC 491[16] and ITC 576[17], the taxpayer in ITC 1264[18] was "not motivated by any desire to repair his property ... but was forced by the municipality to install a new system"[19]. However, unlike in the abovementioned ITC 491[20] and ITC 576[21], in ITC 126[22] there was physical deterioration requiring repair.

Thus the question which had to be addressed was whether the taxpayer's state of mind was relevant (did he have to be motivated by a desire to repair his property) or whether the test for repairs was an objective one requiring only a consideration of the physical state of the object. In ITC 1264[23], Grosskopf J addressed this issue stating that he did not "think that the appellant's (taxpayer's) state of mind or his degree of knowledge of the circumstances is a relevant factor. Where property is claimed to have been repaired by the replacement of a part thereof, the taxpayer will have to show that the part required replacement because of decay, wear or deterioration or damage, whether in the ordinary course or through the elements ..."[24].

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[15] ITC 1264 (1977) 39 SATC 133 at 133
[16] (1941) 13 SATC 77
[17] (1944) SATC 485
[18] (1977) 39 SATC 133
[19] ITC 1264 (1977) 39 SATC 133 at 136
[20] (1941) 13 SATC 77
[21] (1944) 13 SATC 485
[22] (1977) 39 SATC 133
[23] (1977) 39 SATC 133
[24] ITC 1964 39 SATC 133 at 136

Thus clearly this is an objective test. It is irrelevant what the taxpayer's state of mind was at the time the repairs were undertaken.

A further dimension to the word "repair" is provided by the Appellate Division case of Flemming v Kommissaris van Binnelandse Inkomste[25]. The taxpayer was the usufructuary of a farm on which there was an existing borehole with a windmill to provide water for farming activities. As a result of a decrease in the volume of water supplied by the existing borehole, the taxpayer sunk a new borehole and erected a new windmill on the farm to ensure there was sufficient water for the cattle farming activities on the farm. After the Commissioner for Inland Revenue disallowed the deduction of the expenses incurred in constructing the new borehole and windmill and the taxpayer's appeal to the Special Court had failed, the taxpayer appealed to the Appellate Division. Counsel contended on the taxpayer's behalf "... **dat die plaas Leeubosch 'n kapitaalstruktuur is. Voortbouend hierop het hy beweer dat die grondliggende beginsel tot art 11(d) is dat 'n belastingpligte geregtig sou wees om die verdienvermoe van 'n kapitaalstruktuur in stand te hou tot die mate wat laasgenoemede gehad het toe dit oorspronklik deur die belastingpligtige verkry is. Waar daardie verdienvermoe egter met tydsverloop verswak of verklein het, soos in die onderhawige geval met die eerste boorgat se watervoorsiening, behoort 'n belastingpligtige geregtig te wees kragtens art 11(d) op 'n aftrekking van sodanige uitgawes wat nodig is om die verdienvermoe te herstel of te behou**

[25] 57 SATC 73, 1995 (1) SATC 574 (A)

wat die kapitaalstruktuur gehad het toe die belastingpligtige sy of haar regte ten opsigte daarvan verkry het".[26]

In other words, it was contended that the fundamental principle of Section 11(d) was that the earning capacity of a capital structure could be maintained in the condition it was originally acquired by the taxpayer.[27] Thus the taxpayer could deduct the costs of repairing the income capacity of her farm by repairing the water supply. ("**Op hierdie basis sou Mev Flemming uit hoofte van 11(d) geregtig wees op die aftrekking van die onkoste van R10 447.00 weens die herstel van die verdiens vermoe van die plaas Leeubosch deur die herstel van sy watervoorsiening**").[28]

Joubert JA clarified the issue by stating that "**art 11(d) nie regstreeks gemoeid is met onkoste wat vir die herstel van die verdienvermoe van 'n eiendom deur 'n belastingpligtige aangegaan is nie. Artikel 11(d) het betrekking op onkoste wat aan die herstel van die eiendom self bestee is**" (my emphasis).[29]

Thus, in order for expenditure to be deductible as a repair, it is imperative that the property itself is repaired. In this case the initial borehole and windmill were not repaired as the physical state was unaltered - a further borehole and windmill were constructed instead.

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[26] Flemming van Kommissaris van Binnelandse Inkomste 1995(1) SA 574 at 583 C-D
[27] Flemming v Kommissaris van Binnelandse Inkomste 1995(1) SA 574 at 576
[28] Felmming v Kommissaris van Binnelandse Inkomste 1995(1) SA 574 at 583E)
[29] Flemming v Kommissaris van Binnelandse Inkomste 1995(1) SA 574 at 583F)

While the above is the approach of the courts to the meaning of the word "repair" generally, when determining what expenditure falls within the ambit of Section 11(d), our law has further distilled the meaning of repairs by elucidating "useful principles"[30] as to what constitutes a repair in the context of Section 11(d). These are contained in the oft cited case of ITC 617[31]

Here the court reviewed the numerous authorities and summarised the principles relating to repairs as follows[32].

> "(1) **Repair is restoration by renewal or replacement of subsidiary parts of the whole. Renewal as distinguished from repair is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject matter under discussion.**
>
> (2) **In the case of repairs effected by renewal it is not necessary that the materials used should be identical with the materials replaced.**
>
> (3) **Repairs are to be distinguished from improvements. The test for this purpose is - has a new asset been created resulting in an increase in the income-earning capacity or does the work undertaken merely represent the cost of restoring the asset to a state in which it will continue to earn income as before?[33]"**

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[30] Silke on South African Income Tax Volume II, 1989 edited by A de Koker at paragraph 8.91A
[31] (1946) 14 SATC 474
[32] Meyerowitz: Meyerowitz on Income Tax (1995) at 12.7
[33] ITC 617 (1946) 14 SATC 474 at 476

Each of the above essential elements of a repair will be analysed below.

(3) REPAIR VS RENEWAL

As indicated above, repairs are deductible in terms of Section 11(d) while renewals are not. It is thus vital that repairs are distinguished from renewals. Silke suggests that "the distinction between repairs and renewals was clearly brought out in the case of Rhodesia Railways Ltd vs Collector of Income Tax, Bechuanaland[34]

In this case the taxpayer owned a railway line. As the track was generally worn and in a dangerous state, the taxpayer embarked on an extensive programme of renewal which went beyond normal maintenance. New sleepers, rails and fastening were laid over part of the track. The result of the renewals was to restore the track to its normal condition, capable of giving the same service as before[35]. The Collector of Income Tax, Bechuanaland disallowed the deduction in assessing the profits arising in Bechuanaland, on the grounds that the expenditure was not a "repair" as envisaged in a provision equivalent to Section 11(d) but constituted a reconstruction of the line and was therefore of a capital nature".[36]

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[34] (1933) AC 368 16 SATC 225) as in Silke on South African Income Tax (edited by A. de Koker, Volume 11, 1989 at 8.94)

[35] Silke on South African Income Tax (edited by A. de Koker, Volume 11, 1989 at 8.94) and Emslie et al: Income Tax Cases and Materials (1995) p 662

[36] Silke on South African Income Tax (edited by A. de Koker ,Volume 11, 1989 paragraph 8.94 and Emslie et al: Income Tax Cases and Materials (1995) p 662

The taxpayer's objection to the disallowance of the deduction was overruled and its appeal to the Special Court was dismissed, thus the taxpayer appealed to the Privy Council[37]

Lord MacMillan (with Lord Askin and Lord Russell of Killowen concurring) cited the judgment of Lurcott v Wakely and Wheeler[38] where Lord Justice Buckley (as he then was) stated that "repair" and "renew" are not words expressive of a clear contrast and at 924: "Repair is restoration by renewal or replacement of subsidiary part of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject matter under discussion"[39]

Turning to the facts, the Privy Council stated that "the periodical renewal by sections of the rails and sleepers of a railway line as they wear out by use is in no sense a reconstruction of the whole railway and is an ordinary incident of railway administration. The fact that the wear, although continuous, is not, and cannot be, made good annually does not render the work a renewal, when it comes to be effected, necessarily a capital charge. The expenditure here in question was incurred in consequence of the rails having been worn out in earning the income of previous years, on which tax had been paid without

[37] Emslie et al: Income Tax Cases and Materials (1995) p 662
[38] (1911) 1 KB 905 at 923
[39] Rhodesia Railways Ltd v Collector of Income Tax, Bechunanaland 6 SATC 225 at 229

deduction in respect of such wear, and represented the cost of restoring them to a state in which they could continue to earn income".[40]

Thus the expenditure constituted a repair as the taxpayer replaced sleepers, railways and fastenings which were subsidiary to the railway as a whole and the expenditure was thus deductible.

A further case which distinguishes repairs from renewal is that of ITC 637[41]. Here the taxpayer owned a large building which was used for the purpose of cold storage. It consisted of a basement, ground floor and first floor. The chemicals used for the purpose of refrigeration damaged the interior of the building and dry rot had set in. The building had deteriorated to such an extent that it was dangerous and the municipal authorities condemned it for use for cold storage purposes. The taxpayer therefore undertook a scheme of reconstruction[42]. The wooden floors and pillars were replaced, partitions, insulating materials and electrical fittings were removed. Thus the building was left merely a brick shell. Thereafter, the building was reconstructed by laying concrete floors in lieu of wood and replacing wooden pillars with concrete pillars[43]. "As a result a strong and substantial building took the place of the rotten and dangerous structure which had existed previously"[44].

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[40] Rhodesia Railways Ltd v Collector of Income Tax, Bechunanaland (1933) 6 SATC 225 at 229 in Emslie: Income Tax Cases and Materials (1995) p662
[41] (1947) 15 SATC 126
[42] ITC 637 (1947) 15 SATC 126 at 127 to 128
[43] ITC 637 (1947) 15 SATC 126 at 128
[44] ITC 637 (1947) 15 SATC 126 at 128

When the Commissioner refused to allow the deduction of the above expenses as a repair, the taxpayer appealed to the Special Court.

Referring to the judgment of African Products Manufacturing Company Limited[45], and quoting from the ratio of Lurcott v Wakely and Wheeler[46], C J Ingram KC stated that "the question of repair is in every case one of degree, and the test is whether the act to be done is one which in substance is the renewal or replacement of defective parts or replacement of substantially the whole"[47].

Turning to the facts, the learned judge stated that "the substantial question that arises is has there been if not a reconstruction of the entirety i.e. the whole of the subject matter, then at least of substantially the whole subject matter under discussion. The Court is of the opinion that the question must be answered in the affirmative."[48] Explaining this decision, C J Ingram KC stated that "after the demolition only the old skeleton of the building remained ... (t)he whole of the interior was rebuilt from floor to floor. It was reconstruction if not of the whole, of substantially the whole of the subject matter under discussion .... It is clear from the evidence that the time had long passed when the building was capable of repair. The interior had to be reconstructed from floor to ceiling. In the case of buildings needing repair the owner may elect to adopt one of two alternatives. He may repair the building from time to time, or he may let the

[45] (1944) TPD 13 SATC 164
[46] (1911) 1 KB 905
[47] ITC 637 (1947) 15 SATC 126 at 129

building deteriorate till it is no longer usable and then set about a scheme of reconstruction. This latter course, whether forced upon it by circumstance or otherwise, the appellant company adopted. It did not repair and as a result it was forced to reconstruct the building practically in its entirety."[49]

Thus both the cases of ITC 637[50] and African Products Manufacturing Company Limited[51] clearly illustrate that in order for a replacement or renewal to be regarded as a repair, the subject matter which is repaired must be subsidiary to the whole. Whether this is the case or not is often a question of degree. Furthermore, ITC 637[52] raises an issue which was raised in ITC 238[53].

In ITC 238[54], the taxpayer had for many years carried on business in premises owned by them. For at least ten years, the taxpayers only effected those repairs to the premises that could not be delayed, with the result that the building was very dilapidated.[55] When the local authority raised the matter, the taxpayer decided to embark on a large scheme of reconstruction[56] and at the same time to modernise and improve the premises[57]

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[48] ITC 637 (1947) 15 SATC 126 at 129
[49] ITC 637 (1947) 15 SATC 126 at 129 - 130
[50] (1947) 15 SATC 126
[51] 1944 TPD 13 SATC 164
[52] (1947) 15 SATC 126
[53] (1932) 6 SATC 353 (1932)
[54] (1932) 6 SATC 353
[55] ITC 238 (1932) 6 SATC 353
[56] ITC 238 (1932) 6 SATC 535 as in Emslie et al: Income Tax Cases and Materials (1995) p 667
[57] ITC 238 (1932) 6 SATC 535 at 535

Dr Manfred Nathan KC in his judgment stated that "the real question which arises in this case is whether the repairs which have been delayed for such a long period are to be considered as ordinary repairs, or whether the injury which had resulted to the building occupied by the (taxpayers) became so great that instead of it being necessary to effect mere ordinary repairs, the result was that what virtually amounted to structural alterations had to be taken to hand. The consequence, in the latter case, would be that it would be capital expenditure and not properly chargeable against the trading income of the (taxpayers)[58]". The learned judge found that "... on the very fair and candid evidence which was given by the witnesses for the applicant in this matter, it appears abundantly clear to us that this was in fact a reconstruction. There had been originally the intention to effect repairs, but what they embarked upon, according to the plans and contract, was something entirely new. They incorporated a great deal which was not there before, with the very laudable object of modernising these particular business premises"[59].

Thus both ITC 637[60] and ITC 238[61] address an issue which is vital with regard to the timing of repairs. As ITC 637[62] crisply states, a taxpayer "may repair the building from time to time, or he may let the building deteriorate till it is no longer usable and then set about a scheme of reconstruction."[63] Clearly in both of the abovementioned cases, the taxpayer chose the latter option, he did not

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[58] ITC 238 (1932) 6 SATC 535 at 535
[59] ITC 238 (1932) 6 SATC 535 at 353 and 356.
[60] (1947) 15 SATC 126
[61] (1932) 6 SATC 353
[62] (1947) 15 SATC 126
[63] ITC 637 (1947) 15 SATC 126

repair his buildings regularly rather he allowed his building to deteriorate to such an extent that replacing or renewing the worn out parts was on such a scale that the whole or substantially the whole of the subject matter is replaced or renewed, rendering the expenditure a renewal rather than a repair. However, had the taxpayer replaced or renewed those parts of the building which required attention regularly, the cost of such expenditure would probably have been deductible as repairs.

Thus clearly a taxpayer should rather repair or renew regularly to avoid his expenditure being on such a large scale that the deduction of such expenditure is disallowed as a renewal.

It is interesting to speculate whether the outcome of the above two cases would have been any different had the taxpayer, realising that his building required an overhaul decided to effect the repairs gradually, say over a few years of assessment. In both cases this course of conduct was not possible as the municipalities were bringing pressure to bear on the taxpayers to remedy the seriously dilapidated buildings. However, had the option of gradually repairing his building been available and had the taxpayers availed themselves of this opportunity, it is my contention that the outcome would have been favourable for the taxpayer. Such renewals or replacements would have been to the subsidiary of the whole and would thus not have been a renewal but rather a repair.

Thus it is in the taxpayer's interests to time his repairs correctly, not to let his building deteriorate to the extent that a renewal is necessary and if such deterioration has occurred, if possible, to gradually correct the building thus ensuring that the expenditure would constitute a repair rather than a renewal.

A further issue which has been glossed over until now but which in the context of a distinction between repairs and renewals requires further consideration is the meaning of the term "the entirety". ITC 617[64] states that "renewal as distinguished from repair is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject matter under discussion"[65] . In other words in order to determine whether the replacement or renewal of a subsidiary part of a whole or the entirety has occurred, it is vital to determine what constitutes the entirety.

This issue was addressed in ITC 709[66]. The taxpayer was a miller. In order to power his mill, he removed water from a river and lead it by means of a mile long furrow to his mill where it was used to drive a turbine. To get the water from the river, a weir had been constructed, raising its level.[67] After the weir was damaged by flood, work was undertaken to enable the weir to continue performing its function of raising the level of the river to deliver water into the

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[64] (1946) 14 SATC 474
[65] ITC 617 (1946) 14 SATC 474 at 476
[66] (1950) 17 SATC 227
[67] ITC 709 (1950) 17 SATC 227 at 227

furrow. The work performed raised the level of the weir and caused certain other changes in the structure including the incorporation of a sluice gate. After the taxpayer's objection to the disallowance of the deduction of the £440.00 cost of the work was dismissed, he appealed to the Special Court[68].

Mr Robertson on behalf of the taxpayer contended

"(a) that the weir was a vital and integral portion of the plant and machinery, this plant and machinery consisted of the weir, the water furrow and the turbine and the amount of £440.00 had been expended in repairing a portion only of this machinery;

(b) the whole of the weir had not been washed away inasmuch as the platform of the weir remained undamaged and only those portions of the weir above the platform, viz. the loose stones and the wall, had been damaged and required to be replaced."[69]

Thus Mr Robertson was attempting to bring the expenditure within the boundaries of the equivalent of Section 11(d) by alleging that such expenditure was with regard to "a portion only of the property or machinery necessary for the supply of motive power used for the purpose of manufacturing the products of his trade".[70]

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[68] ITC 709 (1950) 17 SATC 227 at 228
[69] ITC 709 (1950) 17 SATC 227 at 228
[70] ITC 709 (1950)17 SATC 227 at 229

The Commissioner contended that the taxpayer had "reconstructed substantially the whole of a permanent structure"[71].

Herbstein J then considered the meaning of the concept of "the entirety" and stated that "the instant case has presented many difficulties, the first of which is the determination of the "entirety". Must the appellant's undertaking - weir, furrow and factory - be looked upon as an integral whole? Or must the weir be looked upon as a separate entity and as the "entirety"? If it is, was what applicant did "the reconstruction of the entirety?"[72]

The court held that the taxpayer's "undertaking should be viewed as a whole ... That the weir and factory were separated (and, incidentally, connected with one another) by a furrow of a mile in length, does not, in the Court's view, lead to a contrary conclusion. For the length of the furrow does not serve to create three "entireties"; the weir, the furrow (whatever its length) and the factory are but part of one whole enterprise and each is essential to the production of appellant's income: each of them is valueless to the taxpayer without the other."[73] The Court then held that since only the weir had been damaged, the replacement or renewal was not to substantially the whole of the subject matter and was thus deductible as a repair.[74]

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[71] ITC 709 (1950)17 SATC 227 at 230.
[72] ITC 709 (1950) 17 SATC 227 at 230
[73] ITC 709 (1950) 17 SATC 227 at 231
[74] ITC 709 (1950)17 SATC 227 at 231.

Thus in determining what should be regarded as the entirety, the Court considered the issue from the perspective of what constitutes the enterprise of the miller. The weir, furrow and factory were all part of the same enterprise and each of them were "valueless" to the taxpayer without the others.[75] The physical distance between the weir and the factory - a mile in length - was not considered to be important. Thus the approach which ITC 709[76] seems to endorse is to regard the enterprise as the entirety.

In the seminal decision of ITC 617[77], C J Ingram KC turned his attention to the question of how one determines the "entirety". In this case, the taxpayer was a horse-racing club.[78] It sought to deduct various items of expenditure incurred by it during the 1944 and 1945 tax year[79] such as replacing starting gates, fencing and a stand.

After stipulating the oft quoted abovementioned principles to determine whether an expense constitutes a repair[80], the learned judge turned to the facts and stated that "in the case at hand, the taxpayer's business was sui generis and for the purpose of applying the above principles to the particular items of expenditure of which it is claimed should be deductible it is necessary to have

[75] ITC 709 (1950) 17 SATC 227 at 230
[76] (1950) 17 SATC 227
[77] (1946) 14 SATC 474
[78] ITC 617 (1946) 14 SATC 474 at 474
[79] ITC 617 (1946) 14 SATC 474
[80] As quoted on page 7 above

regard to the undertaking itself".[81] Thus CJ Ingram KC seems also to consider the taxpayer's enterprise as a relevant factor. The learned judge continued by stating that "in the case of an ordinary building ascertainment of the whole subject matter does not present any particular difficulty. A racecourse, however, embraces several distinct units which may be regarded as essential to the carrying on of the business, and consists of buildings such as stands, totalisators, stables, refreshment rooms, etc.; and the course proper, to which the rails are appurtenant, as also starting gates and so on. Further the property, as a whole, requires to be fenced for the purpose of excluding persons who have no right of admission"[82].

The learned judge continued to state that "(i)n the case of such an undertaking in the opinion of the Court, as far as the buildings are concerned, the general principles applicable to the repair of each building as constituting a separate and distinct subject matter, are applicable to that particular building, whether used for one purpose, or jointly for several purposes. In the case of the race track of course itself the whole subject matter is to be regarded as comprising the track itself, the rails along it and the starting gates, discs indicating distance and so on.

[81] ITC 617 (1946) 14 SATC at 476
[82] ITC 617 (1946) 14 SATC 474 at 476

As regards the fencing around the course, this is not a separate subject matter but is a subsidiary part of the race course"[83].

C.J. Ingram KC then proceeded to address each item of expenditure claimed by the taxpayer[84].

The above approach of the learned judge to the question of what constitutes the "entirety" for the purpose of determining whether expenditure constitutes a repair or renewal is most enlightening. Firstly, he pointed out that" (i)n the case of an ordinary building, the ascertainment of the whole subject matter does not present any difficulty"[85]. Presumably, C.J. Ingram KC is suggesting that where a building is repaired, the building will constitute the entirety. It is my belief that where the reconstruction undertaken is similar to that in ITC 637[86] and ITC 238[87] - major overhauls of entire buildings - it is not difficult to agree that the building constitutes the entirety or whole of the subject matter. Furthermore this seems to be the approach adopted by many cases (such as ITC 1408)[88]. Thus where repairs are effected to a building, the approach seems to be to consider the building itself as the subject matter.

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[83] ITC 617 (1946) 14 SATC 474 at 477
[84] ITC 617 (1946) 14 SATC 474 at 478 to 480
[85] ITC 617 (1946) 14 SATC 474 at 476
[86] (1947) 15 SATC 126
[87] (1932) 6 SATC 353
[88] (1985) 48 SATC 21

Secondly, the learned judge does take cognisance of the enterprise carried on by the taxpayer stating that it is "necessary to have regard to the undertaking itself"[89]. However, unlike the court in the abovementioned ITC 709[90] which determined what constituted the entirety by determining what are "part of the whole enterprise"[91] and essential to the taxpayer's income, in other words where the enterprise constituted the entirety, in ITC 617 the enterprise of a taxpayer seems to play a lesser role. In this case, CJ Ingram KC states that "in the case of such an undertaking (horse racing course) ... the general principles applicable to the repair of each building as constituting a separate and distinct subject matter, are applicable to that particular building, whether used for one purpose, or cojointly for several purposes."[92] The learned judge considered each physical structure separately to evaluate whether the expenditure constitute a repair, for example, he considered the native stand as "a separate building"[93] and the race track as a separate entity "comprising the track itself, the rails along it and the starting gate, discs indicating distance and so on".[94]

Thus, CJ Ingram KC regards each separate physical entity as a separate entity rather than considering the whole enterprise of the taxpayer as a separate subject matter as was the approach in ITC 709[95]. The question is, which is the decisive approach.

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[89] ITC 617 (1946) 14 SATC 474 at 476
[90] (1950) 17 SATC 227
[91] ITC 709 (1950) 17 SATC 227
[92] ITC 617 (1946) 14 SATC 474 at 477
[93] ITC 617 (1946) 14 SATC 474 at 477
[94] ITC 617 (1946) 14 SATC 474 at 477
[95] (1950) 17 SATC at 227

This issue was addressed by Meyerowitz SC[96]. He asks "must the entity be regarded as the whole commercial or industrial undertaking or must it be regarded as that which physically constitutes the separate building on which the work in question has been done? The latter seems to have been the approach in most of the decided cases ..."[97] Similarly in ITC 855[98] it was observed that "a study of the English and Scottish cases discloses that the English courts in considering what is the entirety have approached the problem very much as an architect or builder would do and have inquired - what physically constitutes the building or structure on which the work in question has been done? Scottish courts, on the other hand, have adopted more the approach of the economist and have inquired - what is the commercial or industrial undertaking? ... It seems to me with respect that the English approach is correct".[99]

Thus it seems that the approach in ITC 617[100] - to concentrate on the separate building rather than the enterprise seems to be the general approach in determining what constitutes the "entirety".

Once one determines what constitutes the subject matter. The final issue to be addressed with regard to the distinction between repairs and renewals is when is the renewal or replacement subsidiary to the whole so that it constitutes

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[96] Meyerowitz: Meyerowitz on Income Tax (1995) at 12.8
[97] Meyerowitz: Meyerowitz on Income Tax (1995) at 12.8
[98] As quoted by R.C. Williams: Income Tax in South African Law and Practice (Butterworths) 1996, page 269
[99] Williams: Income Tax in South African Law and Practice (1996) P269

repairs and when is the work done to the subject matter a reconstruction of the entirety so that it constitutes a renewal? In other words, once one determines what constitutes the "whole" how much work can one do to that structure before it is no longer a repair but a renewal.

Meyerowitz SC[101] states that the "test as to renewal or replacement of a subsidiary part of the entirety is a quantitative one and not always easy of application"[102]. In other words, one must consider what proportion of the subject matter was replaced or renewed.

This issue is addressed comprehensively in a case we have visited before, that of ITC 1264[103] where the taxpayer changed his existing drainage system at the instance of the municipality only to discover that his drainage system was in any event in need of repair. In considering whether the work constituted a repair or renewal, Grosskopf J stated that "the property in respect of which the work was done was the hotel premises, consisting of the land and buildings mentioned earlier. The drainage system is an adjunct to the premises - it can have no useful existence otherwise than to serve the premises for whose benefit it was constructed and of which it forms a part. And although the drainage system forms an indispensable function, it is not a major part of the property in terms of size or, which is more important, of value. The cost of replacing the drainage system was R400.00 representing less than 10% of the total

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[100] (1946) 14 SATC 474
[101] Meyerowitz: Meyeowitz on Income Tax (1995) par 12.8
[102] Meyerowitz: Meyeowitz on Income Tax (1995) par 12.8

expenditure for the year, and only a fraction of the value of the property. In my view the drainage system forms only a subsidiary part of the property as a whole, and its replacement is prima facie a "repair" in terms of the first prnciple in the passage from the judgment in ITC 617 quoted above".[104]

Thus the learned judge based his determination of whether the repair is subsidiary to the whole on the size of the replaced item and, on what he regarded as more important, its value in relation to the total expenditure on the whole subject matter and the value of the entire subject matter. He regarded the fact that the replacement of the drainage system was less than 10% of the value of the expenditure for the year as a sufficiently small amount for the expenditure to constitute a subsidiary of the whole and thus a repair.

A similar approach seems to have been followed by the court in B v Commissioner of Taxes, Southern Rhodesia[105]. Here the taxpayer, a medical practitioner bought a building for £3 400.00 in partnership to use as consulting rooms.[106] In 1953 the premises were examined by an architect revealing that there were cracks in the wall, the flooring was ant-eaten and the roof beams required replacing[107]. The taxpayer ascertained that the cost of these repairs would be considerable and he decided that he would not only effect repairs but also make additions to the existing building. The cost of the additions and

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[103] (1977) 39 SATC 133
[104] ITC 1264 (1977) 39 SATC 133 at 136 to 137
[105] 19 SATC 353
[106] B v Commissioner of Taxes, Southern Rhodesia 19 SATC 353 at 353
[107] B v Commissioner of Taxes, Southern Rhodesia 19 SATC 353 at 354

alterations came to £12 184.00 and the taxpayer alleged that £2 000.00 constituted repairs to the existing building[108]. The Commissioner of Taxes, however, contended that all the work was reconstruction and was thus not deductible[109].

Quoting the ratio from Lurcott v Wakely and Wheeler[110] which was approved by Rhodesia Railway v Income Tax Collector of Bechuanaland[111], Beadle J stated that the approach to be taken to this case is to determine whether the operation undertaken by the taxpayer, so far as it affected the old building, constitutes a reconstruction of substantially the whole of the existing building[112]. Addressing this issue, the learned judge stated that "(i)t will be seen so far as this particular point is involved the issue is purely one of fact, and to a very large extent one of degree"[113]. As Silke points out[114], the fact that the distinction between repairs and renewals is a matter of degree "has been emphasised in many decisions"[115]. Beadle J continued by saying that it order to appreciate the extent of the alterations made to the existing building, it was necessary to compare the plans of the building before and after the work was undertaken[116]. The comparison revealed that half the existing walls were demolished and rebuilt. Furthermore, many doors and windows were rebuilt in

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[108] B v Commissioner of Taxes, Southern Rhodesia 19 SATC 353 at 354
[109] B v Commissioner of Taxes, Southern Rhodesia 19 SATC 353 at 354
[110] [1911] (1) KB 905
[111] (1933) AC 368
[112] B v Commissioner of Taxes, Southern Rhodesia 19 SATC 353 at 355
[113] Silke on South African Income Tax edited by A. de Koker, Volume II, 1989, 8 - 25
[114] Silke on South African Income Tax edited by A. de Koker, Volume II, 1989, 8 - 29
[115] Silke on South African Income Tax edited by A. de Koker, Volume II, 1989, 8 - 29
[116] B v Commissioner of Taxes, Southern Rhodesia 19 SATC 353 at 355

different places. Only one room was unchanged[117]. Furthermore, almost the entire roof was removed and 60% of the roof timbers were replaced and further beams were added. A large portion of the floor was relaid and the electric wiring of the building was completely renewed[118]. The learned judge continued to say that "(s)ome idea of the magnitude of the alterations that had been effected can be gained by some comparison of the relative costs ... The probabilities seem to me to be that ... it would have been almost as cheap if not quite as cheap, to have pulled down the whole building and to have reconstructed the building exactly to the same design as it is now[119]. Beadle J concluded that "viewing this undertaking as a whole, ... I am satisfied that what has been undertaken did involve a reconstruction of substantially the whole of the building."[120]

Thus, as mentioned above, the distinction between a repair and a renewal, between reconstruction of a subsidiary part of the subject matter as opposed to the entirety, is one of degree.

The distinction between repairs and renewals is, however, not always easy to determine. R.C. Williams states that "the difficulty with this approach is that it merely exchanges one enquiry - was the work a "repair" or "renewal" - for another namely does the work relate to a subsidiary part of the whole? The

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[117] B v Commissioner of Taxes, Southern Rhodesia 19 SATC 353 at 355
[118] B v Commissioner of Taxes, Southern Rhodesia 19 SATC 353 at 356
[119] B v Commissioner of Taxes, Southern Rhodesia 19 SATC 353 at 356
[120] B v Commissioner of Taxes, Southern Rhodesia 19 SATC 353 at 357

latter question is no easier than the former and the cases give very little guidance."[121]

I believe that Mr Williams, with respect, is not entirely correct. While it is often difficult to determine whether the magnitude of the renewal or replacement renders the expenditure a repair, it does seem that the courts do provide us with some help by suggesting that one adopt a qualitative approach and determine what constitutes the entirety that is being renewed or replaced and whether the work done to the whole is a repair or reconstruction in terms of its relative size and value. It is this approach that I believe a taxpayer should adopt to the distinction between renewals and repair.

While the taxpayer must be mindful not to allow his expenditure to constitute a reconstruction, in terms of the principles elucidated by ITC 617[122], the taxpayer must also be vigilant to ensure his work does not constitute an improvement.

(4) REPAIR VS IMPROVEMENT

In the abovementioned decision of ITC 617[123], C.J. Ingram KC, in clarifying the principles that relate to repairs, states that:

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[121] RC Williams: Income Tax in South African Law and Practice (1990) page 297
[122] (1946) 14 SATC 474
[123] ITC 617 (1944) 14 SATC 474 at 476

"Repairs are to be distinguished from improvements. The tests for this purpose is - has a new asset been created resulting in an increase in the income-earning capacity or does the work undertaken merely represent the cost of restoring the asset to a state in which it will continue to earn income as before?"[124]

As with the distinction between repairs and reconstruction, it is vital that one distinguish between renewals or replacement that constitute repairs and those which constitute improvement to the property. The distinction seems clear - if the income earning capacity is increased, the work done constitutes an improvement. While it is often not difficult to determine whether or not this is the case, there are instances where this distinction is unclear.

ITC 617[125] provides clear examples of repairs. As mentioned above, the taxpayer in this case was a horse racing club which sought to deduct various renewals and repairs it had undertaken. Part of the expenditure the taxpayer attempted to deduct was the cost of filling in a dip in the race course[126]. The course found that this constituted "an improvement for the purpose of levelling the course and to do away with the natural dip which had existed previously"[127]. Similarly, the court found that the cost of re-grading the course "consisted of raising the outside of the course and altering the camber at the

[124] ITC 617 14 SATC 474 at 476
[125] (1944) 14 SATC 474 at 476
[126] ITC 617 (1946) 14 SATC 474 at 474
[127] ITC 617 (1946) 14 SATC 474 at 477 to 478

bends so as to enable the horses to negotiate them more easily. It is an improvement and does not constitute repairs".[128]

It is not difficult in the above two examples to conclude that the taxpayer had increased the income earning capacity of his assets by creating a race track which is superior to that which existed before and thus such expenditure constitutes an improvement. However, in more complex examples, it is important to come to grips with the concept of an improvement. As set out in the above quote from ITC 617[129], two concepts need to be explained in order to fully grasp the distinction between repairs and improvements. These are incoming earning capacities and the original conditions of the subject matter. If the renewal or replacement results in there being no increase in earning capacity, the expenditure constitutes a repair. One thus requires an understanding of what constitutes the income-earning capacity of a property. Furthermore, in order to determine whether the income earning capacity has increased, it is obviously essential to determine what was the original condition of the property or machine.

A. INCOME EARNING CAPACITY

A case which addresses the concept of income earning capacity is that of ITC 915[130]. In this case the taxpayer owned a commercial property which had a

[128] ITC 617 (1946) 14 SATC 474 at 478
[129] 14 SATC 474
[130] (1960) 24 SATC 219

lean-to corregated iron roof which leaked. On the recommendation of an architect it was decided to reuse iron from the roof but to change the lean-to structure to a rigid roof. It was also necessary to replace certain purlins which had split. The change in the roof's shape requires new roof trusses, additional iron sheeting, ridging and piping as well as substantial other consequential expenditure[131].

In addressing the issue of whether this constitutes a repair, J.C.R. Fieldsend stated that "(t)here are a variety of cases in which the distinction between repairs and improvements have been discussed, but the principle that emerges from them seems to be succinctly summed up in Blann's Principles of South African Income Tax, paragraph 114, page 131, as follows: 'if a building has been altered or added to or improved in form, character or durability, even if the premises are thereby rendered more suitable, convenient or attractive and thus productive of increased revenue, the cost thereof is not admissible as a "repair"; such expenditure increases the capital value of the asset and ranks as expenditure of a capital nature'"[132].

"In short, the "taxpayer" has to establish that the work that was done for the purpose of restoring the roof to its original condition and not for the purpose of improving the form, character or durability of the building. It is clear to me

[131] ITC 915 (1960) 24 SATC 219
[132] ITC 915 (1960) 24 SATC 220

that the evidence does not establish this. The roof as replaced was of a better design and more durable and added to the value of the building as a whole"[133].

The above description clearly illustrates the test for increased earning capacity. It appears to be relatively widely defined. The premises need only be rendered more attractive, convenient, suitable, durable or be improved in form or character so that the revenue producing capacity increases, for the expenditure to constitute an increase in the income-earning capacity and thus an improvement. If one applies the above test to the facts of ITC 617[134], it is clear that the levelling and regrading of the race track would have improved the form of the race track making it more suitable for racing thus increasing its income earning capacity. Thus the decision can be explained in terms of the test provided by ITC 915[135]

While a renewal or replacement will not constitute an improvement if the income earning capacity has not increased, it is important to bear in mind that such expenditure will only constitute a repair if it complies with the other requirements of a repair. In Flemming vs Kommissaris van Binnelandse Inkomste[136] mentioned above, the taxpayer sunk a new borehole and erected a new windmill as the volume of water supplied by the existing borehole and windmill had decreased[137].

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[133] ITC 915 24 SATC 220
[134] ITC 1408 (1984) 48 SATC 21 at 25
[135] ITC 915 (1960) 24 SATC 220
[136] 57 SATC 73 1995 (1) SAT 574 (A)
[137] Flemming v Kommissaris van Binnelandse Inkomste 1995(1) SA 574(A) at 576

The taxpayer claimed that the principle of Section 11(d) is that the taxpayer can maintain the income earning capacity of a capital structure. Thus where the income earning capacity has decreased as a result of a reduction in the water supply of the original borehole, the taxpayer can repair the income earning capacity by erecting a new borehole and windmill[138]. Joubert JA held that Section 11(d) is not concerned with expenditure to repair the income earning capacity of a property but rather with the costs that relate to the repair of the property itself[139]. Thus while the income earning capacity has not increased, the existing borehole was not repaired so that the expenditure in constructing a new borehole could not constitute a repair.

B. ORIGINAL CONDITION

As mentioned above, in order to determine whether the income earning capacity of any property has been increased, one clearly must be able to determine the original condition of the property in order to make the comparison between the income earning capacity before and after the renewal or replacement. This issue is particularly complex when the deterioration occurred before the taxpayer acquired the asset - pre-acquisition deterioration. The issue alluded to here is the legal position where a property is acquired in a state of disrepair. As David Clegg states[140] "does renewal mean renewal to the

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[138] Flemming v Kommissaris van Binnelandse Inkomste 1995(1) SA 574(A) at 583 C-D
[139] Flemming v Kommissaris van Binnelandse Inkomste 1995(1) SA 574(A) at 583F
[140] Clegg: "Repairs and Pre-Acquisition Deterioration" 1995 5 Tax Planning 29 at 30

original condition when the building was new or to the original condition when acquired by the taxpayer?"[141] Clearly if the answer to the above question is the latter, when the asset is acquired by the taxpayer, then when restoring the asset to the condition it was when first created would usually constitute an improvement as the income earning capacity of the asset would in all likelihood have increased. If the original condition means the conditions of the asset when new, restoring the asset to this condition would not constitute an improvement.

Mr Clegg refers to ITC 203[142] where the taxpayer had acquired a complex of shops in a poor state of repair and performed substantial work to ensure that they all had an appearance similar to certain new shops acquired by him. The Commissioner for Inland Revenue contended that sums incurred for the purpose of repair are not deductible in the case of repairs to newly acquired property. This assertion was based on the leading United Kingdom case on this issue - Law Shipping Co vs CIR 1923 22 TC 621[143]. In the Law Shipping case, it was found that even where a ship had been operated on an initial voyage by its new owners before necessary repairs were carried out, those repairs were in fact part of the cost of acquisition of the vessel, of a capital nature and not deductible[144].

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[141] Clegg: "Repairs and Pre-Acquisition Deterioration" 1995 5 Tax Planning 29 at 30
[142] (1931) 6 SATC 34
[143] Clegg: Repairs and Pre-Acquisition Deterioration 1995 5 Tax Planning 29 at 30
[144] Clegg: Repairs and Pre-Acquisition Deterioration 1995 5 Tax Planning 29 at 30

Dr Manfred Nathan in ITC 203[145] pointed out that the Law Shipping case was determined under an entirely different statute but decided the case on the basis that the work undertaken by the taxpayer was a substantial reconstruction[146]. Clegg then refers to ITC 1408[147]. In this case, the taxpayer purchased land and constructed a building on it. The taxpayer observed a deterioration in the brick facade of the building. When this worsened, he consulted an architect and civil engineer. They advised that the facade had become so insecure, dangerous and defective that it should be demolished and replaced with a structurally safe cladding[148]. Thus the entire facade was removed and replaced by pre-cast concrete panels.

The Commissioner contended that what had been effected was not a repair but an improvement falling outside the scope of Section 11(d).

Nestadt J summarised the law in the following fashion: " the principle is that where something that was not previously there is added to the subject matter, this will not usually be a repair but rather an improvement ... Where, however, something which is already in place is found to be in a state of disrepair and requires replacement, the latter will normally be categorised as a repair"[149].

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[145] (1931) 6 SATC 34
[146] Clegg: Repairs and Pre-Acquisition Deterioration 1995 5 Tax Planning 29 at 29
[147] (1985) 48 SATC 21
[148] ITC 1408 (1985) 48 SATC 21
[149] ITC 1408 (1985) 48 SATC 21 at 25 as in Clegg page 30

He continued to state that he could "see no reason for holding that work which is directed to putting right a defect which existed when a building was first completed cannot qualify as a repair ... The condition of a building may be (i) sound, or (ii) inherently defective or (iii) actually defective. The work taken to rectify (iii) does not fall outside the scope of repair simply because it results in the condition of the building being changed to (i) rather than (ii)"[150]. The learned judge then held that "the work can without doing violence to the language of Section 11 (d) be accommodated under the concept of repair.[151]

The above quotation seems to solve the question posed by Mr Clegg as well as providing additional insight into the concept of "original condition".

As Clegg points out, after referring to the above quote "this then is some support for the proposition that there is an objective state of good repair which may be applied to any building and which does not necessarily equate to the condition in which it was when the taxpayer concerned took possession. But there is, on the other hand, no direct authority for this view .... Having regard to all the above, it is my view that repair (restoration) in the context intended by Section 11(d) involves reinstatement of an asset to its condition as new when first constructed. This statement made in ITC 1408 (above), although obiter seems to me to be the proper interpretation"[152].

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[150] ITC 1408 (1985) 48 SATC 21 at 26
[151] ITC 1408 (1985) 48 SATC 21 at 26
[152] Clegg: Repairs and Pre-Acquisition Deterioration 1995 5 Tax Planning 29 at 30

I submit with respect that Clegg's interpretation of ITC 1408[153] seems correct. This case certainly seems to advocate the position that a taxpayer is entitled to restore an asset to its state when first completed. As Clegg himself emphasises, Nestadt J states that he found "no reason for holding that work which is directed to putting a defect which existed when a building was first completed cannot comply as a repair"[154]. Thus a taxpayer is probably entitled to repair deterioration which had occurred pre-acquisition. In other words, the original condition to which a taxpayer is entitled to repair his assets without such expenditure constituting an improvement is not the condition of the asset at time of purchase but rather at time of completion of the asset.

The significance of ITC 1408[155] is not, however, limited to pre-acquisition deterioration. As alluded to by Clegg[156], ITC 1408[157] seems to suggest that there is an objective state of good repair which may be applied to an asset[158]. In this case, the taxpayer's building was constructed with an inherent defect. The taxpayer's expenditure did not return the property to its condition when first completed, (which was with an inherent defect), but in fact left the building in a better condition - in a sound condition without the inherent defect. If one were to regard the condition of the property at date of completion as the original condition, the taxpayer's expenditure removing the inherent defect

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[153] (1984) 48 SATC 21
[154] Clegg: Repairs and Pre-Acquisition Deterioration 1995 5 Tax Planning 29 at 30
[155] (1984) 48 SATC 21
[156] Clegg: Repairs and Pre-Acquisition Deterioration 1995 5 Tax Planning 29 at 30
[157] (1984) 48 SATC 21
[158] Clegg: Repairs and Pre-Acquisition Deterioration 1995 5 Tax Planning 29 at 30

could amount to an improvement. This was indeed contended by the Commissioner which claimed that "if one started with a faulty building and then rectified it, the inevitable result was an improvement"[159].

However, as quoted above, the court found that a taxpayer is entitled to repair his building to a sound state even if it had been inherently defective[160]. This was alluded to by Clegg[161].

Thus, to sum up, the "original condition" to which a taxpayer is entitled to restore his assets (without such restoration constituting an improvement) is to the condition of the asset after it was first completed regardless of when the taxpayer acquired the asset. Furthermore, in the situation where the asset was initially completed suffering from an inherent defect, the taxpayer is entitled to restore the asset to a sound condition and the expenditure may still be deducted as a repair. Finally, it is important to keep in mind that expenditure will only be regarded as an improvement if it increases the income earning capacity of the asset.

(5) THE MATERIALS USED FOR REPAIR

The final principle elucidated by ITC 617[162] regarding the deductibility of repairs is that "in the case of repairs effected by renewal it is not necessary that

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[159] ITC 1408 (1984) 48 SATC 21 at 25
[160] ITC 1408 (1984) 48 SATC 21 at 26
[161] ITC 1408 (1984) 48 SATC 21 at 30
[162] (1946) 14 SATC 474

the materials used should be identical to the materials replaced"[163]. The taxpayer is free to use materials different to those originally used in the deteriorated asset and such expenditure will be deductible as a repair as long as the renewal does not constitute an improvement or a reconstruction of the whole asset. As Silke puts it, "(a)s long as the purpose of the work is to restore the assets to its original condition, as distinct from creating an improvement, the work constitutes a repair"[164]

The issue of a change of material was addressed in ITC 520[165]. Here the taxpayer replaced wooden fences that surrounded a property that he let with brick walls. Owing to the dilapidated condition of the fences, the only alternative to the erection of a brick wall was the entire replacement of the existing fences with new wooden fences. To do so would have been more expensive than constructing the brick walls[166].

Referring to the facts, Dr Manfred Nathan KC stated that "(t)here is nothing whatsoever to indicate that brick work of this nature is more permanent than the wooden fence was previously ... The facts as proved disclose that nothing was added to the property which was not there before, except that a different material was used for executing the repairs"[167].

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[163] (1946) 14 SATC 474
[164] Silke on South African Income Tax edited by A. de Koker, Volume II, 1989, 8 - 29
[165] (1942) 13 SATC 404
[166] ITC 520 (1942) 13 SATC 404 at 404
[167] ITC 520 (1942) 13 SATC 404 at 404

The learned judge continued to state that "(i)t appears to us that there must be many cases where a repair cannot be effected without new materials and without what in effect amounts to a replacement of integral parts of the property. To hold that a repair in such a case is a capital addition would mean that in no case could repairs be made except from or with original materials"[168]. Thus the court clearly endorsed the approach that a taxpayer can not be prevented from deducting work done as a repair simply because the materials used were different to the original materials. Dr Manfred Nathan KC does point out that "(i)n the present case there were no improvements"[169] and there was no suggestion that the work constituted a reconstruction of the subject matter. Thus the taxpayer was successful.

A similar approach was adopted in the abovementioned case of ITC 1264[170] in which the taxpayer was obliged by the municipality to change its sewerage system[171]. Grosskopf J held having established that the work completed did not constitute an improvement to the property and the expenditure did not amount to a renewal, stated that "(t)he fact that new and different materials were used in replacing the drainage system is in my view irrelevant"[172]. After referring to ITC 617[173], African Products Manufacturing Company Limited[174] and ITC 520[175], the learned judge stated that "by a parity of reasoning, I

[168] ITC 520 (1942) 13 SATC 404 at 406
[169] ITC 520 (1942) 13 SATC 404 at 405
[170] (1977) 39 SATC 133(c)
[171] ITC 1264 (1977) 39 SATC 133 at 133
[172] ITC 1264 (1977) 39 SATC 133 at 137
[173] (1946) 14 SATC 474
[174] (1942) 13 SATC 164
[175] (1942) 13 SATC 404

consider it equally irrelevant that the new system worked according to a somewhat different method than the one replaced[176].

Thus as long as the work which involves a change of materials does not fall foul of the other requirements of a repair, such expenditure will be deductible.

(6) CONCURRENT REPAIRS AND IMPROVEMENTS

Having considered the principles which guide the taxpayer as to what will constitute a repair for the purposes of Section 11(d), the final issue to be addressed in this regard is the legal position when a taxpayer undertakes both repairs and improvements simultaneously.

This issue was addressed in the abovementioned case of ITC 238[177]. Here the taxpayer carried on business in premises which they owned and effected only those repairs which could not be delayed. As a result, the business premises became very dilapidated. The taxpayer found that in view of the condition of the premises, it was necessary to embark on a large scheme of reconstruction and at the same time it was decided to take the opportunity of modernising and improving the premises. An inclusive contract for all the work was entered into and a proportionate amount of the expenditure incurred was claimed as a deduction. This amount represented (A) the proportion of the work which could be regarded as repairs - some repairs had been undertaken by the taxpayer strictly as repairs[178] - and (B) expenditure which had taken

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[176] ITC 1264 (1977) 39 SATC 133 at 137
[177] (1932) 6 SATC 353
[178] ITC 238 (1932) 6 SATC 353 at 353

the place of repairs which would otherwise have been necessary in view of the condition of the building[179].

With regards to category (A), those repairs which were undertaken at the same time as a scheme of improvement, the court found that certain items claimed as repairs were "actually repairs that had been made. There was no question whatsoever on the evidence that has been produced to us that those were not repairs and we think that those items ought to be allowed to the (taxpayer)"[180].

In respect of category (B), the taxpayers claimed that repairs were necessary and portions of the building, where the repairs were to have been effected, were replaced. Thus they should be allowed to deduct the amounts which they would have had to have spent upon the particulars items referred to as repairs pure and simple, notwithstanding that a larger amount of expenditure was incurred[181].

In other words, the taxpayers had improved their premises while the building was in a state of disrepair, the taxpayer did not only restore it to its original state but improved it to a condition better than its original condition. The taxpayers claimed that they should be allowed to deduct expenditure that restored the building to its original condition as repairs and that only expenditure incurred in order to improve the building (the difference between the original and final condition) should not be deductible. That is, the taxpayers were attempting to deduct notional repair which are described by Meyerowitz as "an amount representing costs of notional repairs had they in fact been

[179] ITC 238 (1932) 6 SATC 353 at 353
[180] ITC 238 6 SATC 353 at 355

undertaken instead of the reconstruction or improvement"[182]. In ITC 238[183], Dr Manfred Nathan KC found in respect of category (B) that "we do not see what justifies us, under the Act, in giving the (taxpayers) the right to say that as they intended to repair the building, they should be allowed to deduct so much of that figure as represents repairs considered independently or permanent structural alterations which amounts to capital expenditure.

"But we are faced with a further difficulty in this case. The whole contract was undertaken as one, and it is not possible ... having regard to the evidence which has been tendered to us, to separate the precise items in money so far as each particular item of repair is concerned, from the alterations which were undertaken in terms of the contract ... If the contention of the (taxpayer) prevails, we would actually have to go so far as to say that repairs could be allowed in respect of a building which had no existence that is to say, a building might be completely pulled down, just as portions of these particular buildings were pulled down, and then treated as though repairs which were originally contemplated had been effected, notwithstanding that they had been pulled down, and that the (taxpayers) would be entitled to the benefit of repairs which they had originally contemplated making but in actual fact they had not made."[184]

Thus the court clearly rejected the deductibility of notional repairs. As the learned judge explained, it would be nonsensical to allow a taxpayer to deduct repairs which were never undertaken only because they had once been contemplated. One cannot with respect dispute that this would indeed result in anomalies as in the

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[181] ITC 238 6 SATC 353 at 355
[182] Meyerowitz: Meyeowitz on Income Tax (1995) par 12.8

abovementioned instance where a building is completely destroyed and rebuilt and the taxpayer attempts to deduct repairs. Furthermore, on a practical level, in this and other cases it would indeed be difficult to separate the expenditure on repairs from the globular figure expended by the taxpayer on the renewal or improvement.

However, while ITC 238[185] clearly rejects the deduction of notional repairs, the court did in that case allow the deduction of certain expenditure which was clearly expended on repairs (category A). This expenditure could, presumably, easily be distinguished from the large scale scheme of reconstruction undertaken by the taxpayer.

Thus, while notional repairs are not deductible, where repairs were actually effected (not just contemplated as in the case of notional repairs), such expenditure can be deducted if it can be separated from the scheme of renewal or improvement. Where repairs and improvements or renewals are undertaken simultaneously, it is therefore essential to determine if the repairs were indeed effected or merely contemplated (thus rendering them notional repairs) as the former may be deductible while the latter are not. Meyerowitz seems to agree stating that "where the work consists of both repairs and improvements or reconstruction, the costs of the repairs are deductible, but this must not be confused with the case where in lieu of repairs an improvement or reconstruction is effected".[186]

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[183] (1932) 6 SATC 353
[184] ITC 238 6 SATC 353 at 357
[185] 6 SATC 353
[186] Meyerowitz SC Meyerowitz on Income Tax (1995) page 12 - 9

The above approach is the attitude adopted consistently by our courts. In ITC 442[187], Dr Manfred KC was again asked to consider the deductibility of notional repairs. Here the taxpayer erected a new dance hall at an expense of £415 as well as spending £600 on a new cisterns and lavatory buildings, these latter being erected to replace buildings in use for many years in connection with the taxpayers hotel business. The taxpayer claimed a deduction of £200 in respect of expenditure on the new dance hall and £400 in respect of the new cisterns and lavatory buildings, being the amount which the taxpayer estimated it would have cost to repair the old building had he not replaced them by new buildings.[188]

The learned judge stated that the taxpayer's argument is "that it would have cost the amount he is claiming as a deduction to repair the old buildings, and he is claiming the imaginary expenses by way of repairs which he seeks to set off".[189] Nathan KC continued to state that "(t)here was ... nothing spent on repairs. That is the sole ground on which the taxpayer in fact claims the deductions. But, as I have said, it is purely imaginary expense".[190] After quoting the ratio of the abovementioned case of ITC 238[191], the learned judge continued to state that ITC 238[192] "appears to be applicable exactly to this case. Therefore ... it is clear that no deduction can be allowed ..."[193].

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[187] (1939) 11 SATC 78
[188] ITC 442 (1939) 11 SATC 78 at 78
[189] ITC 442 (1939) 11 SATC 78 at 79
[190] ITC 442 (1939) 11 SATC 78 at 79
[191] (1932) 6 SATC 353
[192] (1932) 6 SATC 353
[193] ITC 442 (1939) 11 SATC 78 at 79

Thus ITC 442[194] entirely endorses the approach in ITC 238[195].

In the aforementioned case of ITC 915[196], the taxpayer owned a commercial building which had a lean-to type of corrugated iron roof which was leaking. On the recommendation of an architect, it was decided to re-use the iron of the roof after re-rolling but to change the lean-to structure to a rigid roof. It was also necessary to replace certain purlins which had split. The change in the roof shape required the use of new trusses, additional iron sheeting, ridging and piping as well as substantial other consequential expenditure. The new roof was, in the opinion of the architect, better than it was new and likely to last longer.[197] The taxpayer claimed the entire costs of constructing the new roof as a deductible repair.

Having found that the construction of the new roof constituted an improvement not a repair[198], J.C.R. Fieldsend stated that "the only remaining points to consider is whether any portion of the expenditure can be allowed as a cost of repair ... It is clear from such a case as Nyasaland Railways Ltd v Commissioner of Taxes 1957 R&N 889[199] that when improvement work coincides with the need for repair, a taxpayer cannot be allowed to deduct that portion of the cost of the work which would have been incurred had he effected repairs rather than the improvements - what has been referred to as the notional costs of repairs ... but from Highland Railway Co. v Balderston 2TC 485 it seems that if the costs of repairs actually effected can be segregated from the costs of improvement, the former can be allowed as a deduction. But such costs must be

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[194] (1939) 11 SATC 78
[195] 6 SATC 353
[196] (1960) 24 SATC 219
[197] ITC 915 (1960) 24 SATC 219 at 219
[198] ITC 915 (1960) 24 SATC 219 at 220 to 221

capable of being clearly segregated; for example in the present case the cost of removing and replacing the iron was something that had to be met in order to effect the improvements to the structure of the roof, whereas the cost of re-rolling and cleaning the iron was entirely independent of any such reconstruction"[200].

The above distinction between notional repairs and repairs conducted concurrently with an improvement or renewal is clearly in line with the previous judgment. The learned judge turned to the facts and found that re-rolling and cleaning the iron was "not part of the operation of producing a roof better than that originally in position but was undertaken to restore the roof to its original condition. For these reasons I think that the cost of re-rolling and cleaning the iron, but not of removing and replacing it, which cannot be segregated from the improvement scheme, can be allowed as a deduction."[201] J.C.R. Fieldsend found that the cost of replacing purlins could similarly be allowed as their replacement "did nothing more than restore them to their original condition"[202]. However, the cost of the labour of removing and replacing them was not allowable as it could not be segregated from the improvement scheme[203]. The learned judge then noted that the taxpayer's case had not been presented on the basis that certain items of work were severable from the improvement and no evidence specifically dealt with the cost of each of the two items. Thus he referred the matter back to the Commissioner for reassessment on the basis that the costs of re-rolling and cleaning the iron of new purlins was allowable[204]

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[199] ITC 885 (1959) 22 SATC 195
[200] ITC 915 (1960) 24 SATC 219 at 221
[201] ITC 915 (1960) 24 SATC 219 at 221
[202] ITC 915 (1960) 24 SATC 219 at 221
[203] ITC 915 (1960) 24 SATC 219 at 221
[204] ITC 915 (1960) 24 SATC 219 at 221

Thus while the interpretation of the law by the learned judge in ITC 916 was with respect, in line with previous cases, the application of the principles to the facts is significant. The court seems keen to apportion expenditure between repairs and improvements even where the taxpayer had not raised the issue. Furthermore, the criteria for segregation between a repair and improvement seem relatively easy to comply with. The taxpayer constructed a new roof - it would clearly have been possible for the court merely to regard the new roof as an improvement and disallow any deductions in relation thereto. However, the court investigated the material used to construct the roof and discovered that the iron from the existing roof had been re-rolled and cleaned and used for the new roof. The court, as mentioned above, allowed the cost of doing so as a repair as the taxpayer was merely restoring the iron to its original condition. Similarly the costs of purlins could be deducted as the existing purlins had deteriorated and required replacing. However, by contrast the learned judge found that removing and replacing the iron was part of the scheme of improvement and was not deductible.

Therefore the court considered what expenditure had actually been incurred which would in any event have been incurred had the taxpayer merely undertaken to repair his roof and allowed such expenditure. These were not notional repairs as they had actually been incurred. This seems, with respect, to be the correct approach to the segregation between repairs and improvements or renewals - if the expenditure qualifies as a repair, such expenditure should be deductible regardless of whether the taxpayer had simultaneously undertaken to repair or reconstruct his property.

A further case which considers repairs and improvements or renewals undertaken contemporaneously is that of ITC 1457[205]. The taxpayer in this matter owned a building which had shops on the ground floor below a single floor of residential flats. The shops were in good condition but the flats had fallen into a state of disrepair. After a feasibility study in 1984 concluded that it would be uneconomic to repair the upper floor, the taxpayer decided to convert the upper floor into offices for use as a medical centre by doctors. This was completed in 1985[206]. The total cost of the conversion was R216 800.00, the taxpayer claimed that the sum spent on repairs was R98 123.27.

The Commissioner for Inland Revenue contended that "although certain of the items might have been properly categorised as repair, these were carried out as part and parcel of a contract to convert the first floor from flats to offices for medical practitioners under one contract and it is not possible in the circumstances for purposes of Section 11(d) of the Income Tax Act to apportion or dissect the global contract price to allow of a deduction of portion of the price for repairs and maintenance."

It is submitted that all the work was done in the course of one contract of reconstruction on the first floor and that it cannot be said that repairs of defective parts of the building as such, were carried out"[207].

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[205] (1989) 51 SATC 131
[206] ITC 1457 (1989) 51 SATC 131 at 131 to 132
[207] ITC 1457 (1989) 51 SATC 131 at 135 to 136

The learned judge Melamet J stated that he "did not understand the representative for the Commissioner for Inland Revenue, apart from the extent, to contend that the premises were not in a state of disrepair alleged and required repair but that these were not carried out but an improvement in the course of reconstruction was effected".[208] The court continued to quote from Meyerowitz & Spiro on Income Tax in South Africa Permanent Volume paragraph 743 which states that "(w)here the work consists of both repairs and improvements or reconstruction, the costs of repairs are deductible".[209]

Melamet J quoted from ITC 906[210] and ITC 1038[211] at 136 where "it was decided similarly where it is possible to segregate the cost of repairs from that of reconstruction, this should be done and it should not be thwarted by the fact that one of these operations was more costly or substantial then the other. It does not mean that the deductibility of the costs of the smaller operation is to be determined by the reference to the nature of a larger operation"[212]. The learned judge then stated that certain expenditure "although done at the same time as the major conversation of the first floor, were not an essential part of such scheme and were necessary for the repair of the first floor irrespective of the conversion and were done at the same time as being convenient and being more cost effective so to have been done".[213] Thus this expenditure was deductible as a repair.

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[208] ITC 1457 (1989) 51 SATC 131 at 136
[209] ITC 1457 (1989) 51 SATC 131 at 137
[210] (1959) 24 SATC 90
[211] (1965) 26 SATC 123
[212] ITC 1457 (1989) 51 SATC 131 at 137
[213] ITC 1457 (1989) 51 SATC 131 at 137

This case reiterates that one may deduct expenditure spent on repairs which were simultaneously undertaken with improvements or renewals if it can be separated. The learned judge states that the repairs done were not an essential part of the scheme of improvement or reconstruction. This seems to imply that in order to distinguish between repairs and improvements or reconstruction, one must consider if such expenditure was in fact essential for the scheme of improvement or reconstruction. The court thus seems to approach the segregation of repairs and improvements or reconstruction from the opposite angle of that of the court in ITC 915[214]. In the present case the court is determining what is not essential for the scheme of improvement or reconstruction to determine what is a repair (the starting point is the scheme of reconstruction). While in ITC 915[215] the court determined what was a repair in order to determine what did not fall into the scheme of reconstruction or improvement (the starting point was the repairs). It is submitted that this is merely a question of perspective and the results should be the same.

The law is thus clear. Notional repairs are not deductible while distinguishable repairs undertaken simultaneously with improvements or reconstruction are.

We have thus addressed the issue of what constitutes a repair for the purposes of Section 11(d). One must consider what a repair is in terms of physical deterioration as well as bearing in mind the principles of ITC 617[216]. However, expenditure is not deductible in terms of Section 11(d) merely because it constitutes a repair.

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[214] (1960) 24 SATC 219
[215] (1960) 24 SATC 219
[216] (1946) 14 SATC 474

(7) THE TRADE REQUIREMENT

Section 11(d), as mentioned above, states that there shall be allowed as deductions "expenditure actually incurred during the year of assessment on repairs of property occupied for the purpose of trade or in respect of which income is receivable". Thus, as mentioned above, deductions in terms of Section 11(d) are only allowed in respect of a taxpayer's property if such property is utilised for the purpose of trade. It is thus vital to investigate when a taxpayer has fulfilled this trade requirement. In terms of the Act repairs are only deductible if the property is either occupied for the purpose of trade or is a property in respect of which income is receivable.

The first category of property is property from which the taxpayer carries on his trade. As Silke points out[217], this requirement is confirmed by Section 26(b) which does not permit the deduction of any cost of repair of any premises not occupied for the purposes of trade or of any dwelling house or domestic premises, except that part that is occupied for the purposes of trade[218]. Furthermore, a court has interpreted the expression "for the purpose of trade" as meaning "for the purpose of enabling a person to carry on and earn profits in the trade"[219].

The second category of property in respect of which repairs are deductible in terms of Section 11(d) is property in respect of which income is receivable. Clearly where a taxpayer is leasing his property, such property constitutes property in respect of which

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[217] A. De Koker Silke on South African Income Tax Volume II 8.100
[218] A. De Koker Silke on South African Income Tax Volume II 8.100

income is receivable. However, whether the taxpayer's property falls within such category can be problematic where a taxpayer repairs premises before concluding a lease with a tenant or before such tenant moves in. It is not clear whether in the above instances the repairs were effected to property in respect of which income was receivable.

In ITC 163[220] the court considered whether the repairs effected after a lease had been signed but before the tenant had moved in were deductible[221]. The court held that "premises in need of repair will in all probability not produce the same rental as premises in a good state of repair. In the present case the repairs were necessary in order to produce the rentals and to my mind it matters not that such repairs were executed before occupation of the premises was actually taken. I do not think that any distinction should be drawn between the case where a lessee insists on repairs being executed during his tenancy and the case where a lessee insists on repairs being instituted before he takes possession. But for the undertaking to effect the repairs there may have been no lease at the rental agreed upon. A distinction must clearly be drawn between the expenses incurred in order to put the premises wholly unfit to produce income in such a condition as to be able to earn income, and the facts of this case. The premises in question were occupied by the tenant and her family and merely required certain repairs in order to earn the income stipulated for in the lease. The question stated above should, therefore, I think, be answered in the affirmative.

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[219] Strong & Co. of Romsey Ltd v Woodifield (Surveyor of Taxes) [1906 AC 448, 5 TC 215 as in A De Koker: Silke on South African Income Tax Volume II 8.100

[220] (1930) 5 SATC 77

[221] ITC 163 (1930) 5 SATC 77

But I also incline to the view that the expenditure falls within sub-section 2(c) of Section 11 as being a sum "expended for the repair of property in respect of which income is receivable". As soon as the lease was signed, income became receivable from the property from the date on which occupation was to be signed to the lessee; it then became a rent-producing asset. For these reasons I think the appellant was entitled to deduct the sum claimed and the appeal accordingly succeeds"[222]. Thus the court held that the property fell within the predecessor of Section 11(d) as soon as the lease was signed. There was no distinction drawn between repairs effected before or during a lessee's tenancy. However, the court did caution that the property could not be "wholly unfit to produce income"[223], a principle echoed in future cases.

The issue of whether property constitutes property in respect of which rent is receivable before such property is let was addressed in ITC 243[224]. In this case the taxpayer purchased a house in the Cape Peninsula. At the time when he bought it, the house was in a state of disrepair. The walls were damp, the floors sagging, the veranda leaking and the water pipes were corroded. As the taxpayer could not occupy the house himself he was anxious to obtain a tenant. He was, however, advised by an agent that although several people had inspected the property, they had refused to lease it unless it was put into a proper state of repair. The taxpayer accordingly spent the amount required for the necessary repairs and thereafter secured tenants.. He claimed his expenditure in this regard as a deduction.[225]

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[222] ITC 163 (1930) 5 SATC 77 at 78
[223] ITC 163 (1930) 5 SATC 77 at 78
[224] (1932) 6 SATC 370
[225] ITC 243 (1932) 6 SATC 370 at 370

After noting that "the courts have had great difficulty in determining the words "is receivable"[226] in reference to the then equivalent of Section 11(d), Dr Nathan Manfred KC considers various dictionary definitions of the term "is receivable". He concludes that "from all these dictionaries it appears that the main meaning of receivable is "capable of being received". If this is so, receivable certainly has not as its primary meaning definitely to be received, but merely capable of being received. It would have been otherwise if sub-section (c) of Section 11(1) (the equivalent of Section (d)) had stated "in respect of which income is received or is to be received". It merely means that the property must be in a state, or property of such a kind from which income may be received. That being the primary meaning, we come to the conclusion that this is an allowable deduction. There is an undoubted expenditure on repairs, and according to the meaning of the word "receivable" it does not follow that at the exact date there must be an agreement for the receipt of income. In fact in this particular case income was received in respect of this property during the portion of the tax year in question. The results may be unfortunate for the revenue but we are compelled to give effect to the meaning of the words as they appear in the Act"[227].

This case clearly states that property falls within the ambit of Section 11(d) - is property in respect of which income is receivable in two situations. Either the property is in a condition consistent with income being capable of being received or is of the type of property from which income may be received. Thus presumably a property which is in a dilapidated state and could thus not be let in the year of assessment will still fall within the ambit of Section 11(d) if the property is of the kind which receives

[226] ITC 243 (1932) 6 SATC 370 at 371
[227] ITC 243 (1932) 6 SATC 370 at 370

income. This is a wider definition than that in ITC 163[228] which requires that the property not be unfit to produce income. Furthermore, while ITC 163[229] addressed a situation where the taxpayer had already concluded a lease, in this case no lease had been entered into, yet such property was held to be property in respect of which income was receivable.

There have been subsequent cases which have held positions contrary to those in the above cases. In ITC 561[230], for example, the taxpayers owned a large country residence as well as two farms. The residence was unoccupied during the year of assessment but unsuccessful attempts were made to find a tenant for the property during the year of assessment. The taxpayer sought to deduct the costs of certain expenditure, incurred in respect of the residence[231].

C.J. Ingram stated that "income receivable seems to me clearly to connect with income in connection with a lettable proposition. So if a landlord sublets a warehouse and rent is received from that, that rent is taxable, and repairs in connection with the property from which the income is received is allowable. But if the property stands empty and no income is received from it, there is no income received from it, there is no income receivable in respect of it, and in terms of this section, no deduction for repairs is allowable"[232]. The learned judge's approach in this case is with respect confused. Initially he points out that income is receivable if the property is a lettable proposition, an approach which seems to be in line with previous cases. However, C.J. Ingram

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[228] (1980) 6 SATC 77
[229] (1930) 6 SATC 77
[230] (1944) 13 SATC 313
[231] ITC 561 (1944) 13 SATC 313 as in Emslie: Income Tax Cases and Materials (1995 p693
[232] ITC 561 (1944) 13 SATC 313 at 315

K.C. continues to give examples of what he considers to be lettable propositions which clearly illustrate that what he is equating income receivable with income received - "if the property stands empty and no income is received from it, there is no income receivable in respect of it"[233]. This approach clearly runs contrary to that of ITC 163[234] and ITC 243[235] which interprets income receivable to mean capable of receiving income not having received income.

The approach of ITC 561[236] is, however, endorsed by ITC 665[237]. Here the taxpayer owned properties. From one of the properties he obtained £550.00 rent during the year of assessment in question and incurred expenditure amounting to £422.00 which consisted mainly of repairs. In respect of the other property no rent was received but expenses amounting to £244.00 were incurred[238]. The taxpayer attempted to deduct the total expenditure of £666.00. The Commissioner for Inland Revenue disallowed the deduction of expenses with regard to the second property.

B.O.K. Beyers, Acting President of the Transvaal Additional Special Income Tax Court held that "no income was derived from (the second) property during the 1945/46 year and accordingly the expenditure was not incurred in the production of any income"[239]. Furthermore, he stated that ITC 561[240] is "in point[241]. The appeal was accordingly dismissed.

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[233] ITC 561 (1944) 13 SATC 313 at 315
[234] (1930) 5 SATC 77
[235] (1932) 6 SATC 370
[236] (1944) 13 SATC 315
[237] (1948) 16 SATC 127
[238] ITC 665 (1948) 16 SATC 127 at 127
[239] ITC 665 (1948) 16 SATC 127 at 128
[240] (1944) 13 SATC 313
[241] ITC 665 (1948) 16 SATC 127 at 128

Clearly the determining factor in this case was that no income had been received. Thus there are clearly two opposing lines of cases. ITC 163[242] and ITC 243[243] approach the question of whether the property was one in respect of which income is receivable from the perspective of whether rent was capable of being received from the property as opposed to ITC 561[244] and ITC 665[245] which required income to be received before the expenditure fell within the ambit of Section 11(d).

It is my belief that his debate was resolved in ITC 1475[246]. The taxpayer in this matter previously lived with his family in a home owned by him in suburb A. His wife found travelling to and from her place of work daily to be too onerous and the taxpayer decided to buy a new home closer to her place of work. In August 1984 he bought a townhouse in B. He decided to retain his old house in A as an investment and let it out so that he could recover additional income therefrom. With a view to obtaining the best possible return he decided to effect certain repairs and improvements to the property[247]. Although most of the repairs were executed in the year ending 28 February 1985, the Commissioner claimed that the taxpayer had not carried on the trade of letting property during that year of assessment as the property had not been let during the financial year ending February 1985. In fact the taxpayer had advertised for a lessee in January 1995 and he let the house in February or March 1985 with the lessee taking occupation 1 April 1985 and the taxpayer receiving first payment of

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[242] (1930) 5 SATC 77
[243] (1932) 6 SATC 370
[244] (1948) 16 SATC 227
[245] (1944) 13 SATC 313
[246] (1989) 52 SATC 135
[247] ITC 1475 (1989) 52 SATC 135 at 135

rental in March 1985[248]. The Commissioner for Inland Revenue disallowed the deduction of expenditure spent on repairs.

Leveson J stated that "the enquiry in this matter turns upon the meaning to be given to the expression income is receivable. It is common cause that no rental was actually received during the financial year. The meaning of "receivable" in the Shorter Oxford English Dictionary is capable of being received. The question to be decided, where no rental is paid, is whether it can be said that rental is capable of being received in the case of property which is unoccupied while repairs are being executed but not because of that fact but because the taxpayer had been unsuccessful in finding a lessee"[249].

The court, in order to answer the above question considered ITC 163[250] stating that "(t)he ratio appears to have been that income was receivable for the property as soon as the lease was signed although occupation was only taken at a later date"[251]. The learned judge then turned to the judgment of ITC 243[252] where the court held that the meaning of receivable is "capable of being received"[253].

Turning to the facts Leveson J stated that "(t)he question now is when, for the purposes of Section 11(d), can it be said that he has commenced trading"[254]. He continued to state that the taxpayer had "formed the intention to use the property for the purpose of trade long before he vacated it. ... he advertised for a lessee long before

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[248] ITC 1475 (1989) 52 SATC 135 at 137
[249] ITC 1475 (1989) 52 SATC 135 at 135
[250] (1930) 5 SATC 77
[251] ITC 1475 (1989) 52 SATC 135 at 139
[252] (1932) 6 SATC 370
[253] ITC 1475 (1989) 52 SATC 135 at 139
[254] ITC 1475 (1989) 52 SATC 135 at 140

the repairs were completed ... the premises were habitable when he vacated ... the premises were in a lettable condition when he vacated, bearing in mind that he and his family had lived there comfortably until the date of vacation". Leveson J considered the contention by the Commissioner for Inland Revenue that ITC 561[255] applied stating that 'the essence of the judgment is that if no income is received from the property "there is no income receivable in respect of it'. The approach seems to overlook the above quoted dictionary meaning of "receivable" and compels me to say that I prefer the decision in the case of ITC 243"[256].

The appeal was thus allowed with costs.

It is submitted therefore that ITC 1475[257] settles the divide between ITC 163[258] and ITC 243[259] on the one hand and ITC 561[260] and ITC 665[261] on the other.

Leveson J quite clearly has come down in favour of interpreting income receivable as "capable of being received" not having been received. This seems with respect to be the sensible approach. Requiring the taxpayer to have actually received income from his property before the property is regarded as one from which income is receivable seems to do violence against the language of the Act.

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[255] (1944) 13 SATC 313
[256] ITC 1475 52 SATC 135 at 141
[257] (1989) 52 SATC 135
[258] (1930) 5 SATC 77
[259] (1932) 6 SATC 370
[260] (1944) 13 SATC 313
[261] (1948) 16 SATC 227

The final issue to be addressed is whether repairs to a property after the tenant has vacated such property are deductible.

This issue was considered in ITC 643[262]. Here a taxpayer had let out his home for some years while he was in active military service. On reoccupying his premises on 1 October 1944, he discovered that they required extensive repairs as a result of the treatment to which they had been subjected by the tenant in his absence. He repaired his premises, after resuming occupation, during the year of assessment ending 30 June 1945 at the cost of £106.00. During the 1945 year of assessment, he had received £13. 10s 0d rental income and he attempted to deduct the costs of repairs caused by the tenants from this amount. The taxpayers claim was disallowed and he thus appealed to the Special Court[263].

In presenting his case, the taxpayer "agreed that during the period in which the repairs were effected, the property was not occupied for the purposes of trade but he contended that the deduction was admissible in that the expenditure was incurred in respect of property in respect of which income is receivable ... he argued that on the meaning of the term receivable his case fell within the ambit of the sub-section, in that rent had been receivable by him during the tax year."[264]

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[262] (1947) 15 SATC 243
[263] Emslie et al: Income Tax Cases and Materials (1995) p 698 - 699
[264] ITC 643 (1947) 15 SATC 243 at 244

Referring to the case of ITC 243[265] C.J. Ingram KC noted that the above case held that the main meaning of "receivable" is "capable of being received"[266]. The learned judge continued to state that the taxpayer would not be successful in the present matter as his expenditure fell foul of Section 12(g), the predecessor of the present day Section 23(g), in that the expenditure was not incurred for the purposes of trade.[267]. C.J. Ingram KC noted that the above sub-section envisages that the monies must be expended for the purpose of "restoring the income - producing asset to a condition that it will be capable of continuing to earn income as previously"[268].

Turning to the facts, the learned judge noted that it was "admitted by the (taxpayer) that he had on re-occupation of his property ceased to carry on the trade of letting and had no intention of letting in the future. Hence it is impossible to hold that the repairs were effected for the purposes of trade"[269]. Thus the taxpayer's appeal was dismissed.

Thus repairs by a taxpayer after he ceases letting his property will not be deductible. The prudent taxpayer will therefore repair his property before such lease ends.

In order for repairs to comply with the trade requirements of Section 11(d) therefore, the property repairs must be occupied for the purposes of trade or in respect of which income is receivable, that is, capable of being received. Furthermore, repairs to

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[265] (1932) 5 SATC 370
[266] ITC 643 (1947) 15 SATC 243 at 245
[267] ITC 643 (1947) 15 SATC 243 at 243
[268] ITC 643 (1947) 13 SATC 343 at 345
[269] ITC 643 (1947) 13 SATC 343 at 345

property after the lease has expired and where the taxpayer has no intention to relet the property will fall foul of the trade requirements.

(8) CONCLUSION

Thus, in order for a taxpayer to take advantage of Section 11(d), one must carefully plan repairs to one's property.

For example, repairs must be on such a grand scale as to constitute a renewal. Furthermore, if repairs are conducted contemporaneously with improvements or renewals, the repairs must be easily distinguishable from the latter. Such expenditure should be undertaken while income is receivable from the premises not once one has ceased letting ones property.

Generally, if one keeps in mind the abovementioned principles contained in ITC 617[270] and the trade requirement, one should hopefully be able to enjoy the deduction contained in Section 11(d).

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[270] (1946) 14 SATC 474

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ITC 576 (1944) 13 SATC 485

ITC 617 (1946) 14 SATC 474

ITC 637 (1947) 15 SATC 126

ITC 643 (1947) 15 SATC 243

ITC 665 (1948) 16 SATC 227

ITC 709 (1950) 17 SATC 227

ITC 821 (1955) 21 SATC 75

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