A reader of The Taxpayer had the following problem in August 1953: "During the course of auditing the books of an engineering works, I came across the case of a taxpayer who uses his own plant and machinery on a large scale to build new machinery for permanent use in his business. Where a taxpayer uses his plant in this manner, I have no hesitation in saying that the correct accounting procedure would be to regard the wear and tear on the present plant as being part of the cost of producing the new machinery. Accordingly the wear and tear appertaining to the production of the new plant would be capitalized and would not be written off in the profit and loss account as an expense against income. Under the Income Tax Act, the wear and tear allowance granted to the taxpayer is contained in a special provision—section 11(2)(d) [now section 11(e)]—which extends the allowance to 'any machinery, utensils and articles used by the taxpayer for the purposes of his trade'. Surely in the case of my client it can be argued that he is using his machinery for the purpose of his trade?" It is submitted that the question be answered in the affirmative. The accounting treatment is, in any event, irrelevant. [Pyott Limited v CIR, 1945 AD 128, 13 SATC 121; Sub-Nigel Limited v CIR, 1948 (4) SA 580(A), 15 SATC 381].

Interest paid on money borrowed to purchase plant will be allowed as a deduction by a taxpayer in the determination of his taxable income under section 11(a). However, where interest has been incurred prior to the use of plant or prior to production, such interest was held to be of a capital nature, and not part of the cost of the asset [SIR v Eaton Hall (Pty) Ltd 1975 (4) SA 953(AD), 37 SATC 343]. In terms of an amendment to the Income Tax Act in 1981, such pre-production interest is now deductible in full during the year in which the plant is
brought into use (Section 11(bA)). Finance charges incurred on the acquisition of plant, on the other hand, were held to be part of the cost of the asset (ITC 774, 19 SATC 311).

It is submitted that, should machinery implements utensils or articles be donated to the taxpayer, wear and tear could be claimed on the market value of the items donated. Section 11(e) uses the word "value" and not "cost". It is the practice of the Commissioner to allow a taxpayer to use the market value of an asset acquired for no value, for the purposes of calculating the wear and tear allowance.

21.5 Machinery, implements, utensils and articles

A taxpayer is allowed a deduction of an amount representing the wear and tear of "any machinery, implements, utensils and articles" (section 11(e)). The expression "machinery, implements, utensils and articles" is not defined in the Act, but is limited in terms of section 11(e)(ii) in that "in no case shall any allowance be made for the depreciation of buildings or other structures or works of a permanent nature". The words "machinery, implements, utensils and articles" in the view of De Wet J in ITC 769 (19 SATC 214) "obviously are of wide import" and it is submitted that it would include the expression "machinery or plant" as used in other sections of the Act.

A taxpayer is therefore allowed a deduction of wear and tear unless the machinery, implements, utensils and articles which are the subject matter of the allowance are classified as being buildings or other structures or works of a permanent nature. When the subject matter is a movable and not attached to a building or other
structure of a permanent nature, no problem arises. Should the subject matter be attached to a building or structure of a permanent nature proviso (ii) of section 11(e) would become operative. The Commissioner enjoys no discretionary powers in this connection and his decision as to what constitutes buildings, structures or works of a permanent nature is subject to objection and appeal.

The South African fiscal law still retains the proviso to section 11(e) - "Provided that in no case shall any allowance be made for the depreciation of buildings or other structures or works of a permanent nature". It is interesting to note that this proviso is word for word identical with the original proviso of section 17(1) of Act no 41 of 1917 which in many years has not changed its form in any respect.

The above proviso to section 11(e) was extended in 1975 to the effect that foundations or supporting structures would under certain circumstances not be deemed to be structures or works of a permanent nature, for the purposes of the wear and tear allowance. This amendment brought to an end the longstanding departmental practice prior to that date of viewing such foundations or supporting structures as being structures or works of a permanent nature. It was further provided in that amendment that under certain circumstances such foundations and supporting structures "shall for the purposes of this Act" be deemed to be a part of the machinery, implements, utensils or articles. The cost of such foundations and structures would therefore be included in the cost of machinery or plant for the purposes of the scrapping allowance in terms of section 11(o) and the allowances under section 12. (See C22 infra). The circumstances referred to in proviso (iiA) to section 11(e) are as follows -
the machinery, implements, utensils, or article must be mounted on or affixed to any concrete or other foundation or supporting structure; and

the Commissioner must be satisfied in respect of the following two factors -

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

the useful life of the foundation or supporting structure would match the useful life of the machinery, implement, utensil or article mounted thereon or affixed thereto.

Under the Australian Income Tax Act "buildings" form integral part of plant, wholly or in part, when, and to the extent that the structures are absolutely essential to the support of the working plant. There have been a number of Australian decisions of both the High Court and Boards of Review in which depreciation has been allowed on a building, or part of a building, where it has performed such a function that it is regarded as plant. In Broken Hill (Pty) Ltd v Federal Commissioner of Taxation [(1968), 10 AITR 481], Kitto J regarded buildings which were more than convenient housing for working equipment, as plant (C21.7 infra). A similar general view was taken by McTernan J in Wangaratta Woollen Mills Ltd v Federal Commissioner of Taxation [(1969), 1 ATR 329], but he felt bound to exclude the roof and external walls.
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In order to evaluate whether the subject matter qualifies for the wear and tear allowance, the following must be examined:

- Whether the subject matter can be regarded as a building or other structure of a permanent nature.
- Whether the subject matter qualifies as machinery, implements, utensils or articles; and if attached or affixed to any building or other structures of a permanent nature:
  - the type of building or structure to which the subject matter is attached or affixed; and
  - the manner and degree of permanency with which the subject matter is attached or affixed.

Our courts have on numerous occasions been required to establish whether the subject matter, which has been attached or affixed to a building or structure of a permanent nature, has lost its character or identity as a movable asset.

21.6 Buildings

The judicial interpretation of the word "building" is as follows:

- Botha AJA in CIR v le Sueur [1960 (2) SA 709(AD), 23 SATC 261 at 273] "I think it is correct to say generally that a building is a substantial structure, more or less of a permanent nature, consisting of walls, roof and the necessary appurtenances thereto".
- Henochsberg J in Masonite Africa Ltd v Estcourt Municipality [1955 (3) SA 88]- "(It) seems to me that the word 'buildings' as used in the other sections means something less than a structure or edifice affixed to the soil and it must
mean a structure in the nature of a house, that is to say, something having walls, roof and a means of normal entry and exit to enable human beings, and others, to enter and leave in the course of attending to their affairs therein.

Ludorf J in R v Raphael v [1957 (3) SA 41] —
"To define building as meaning 'any structure whatsoever for whatever purpose used' is in my view clearly an extension of the meaning to embrace all manner of structures which cannot by any stretch of imagination be regarded as buildings. Such as wire fences, fish ponds, pumps, water tanks, dog kennels and wire fowlruns".

James J in ITC 1007 (25 SATC 231 at 233):
"In our view the word 'building' in the subsections in question must be understood in a non-technical sense, and be used as it would be used in ordinary everyday speech ..... (When) one speaks of a building in ordinary conversation one has in mind ..... things such as houses, store rooms and offices ..."

In a Zimbabwean case (ITC 1296, 41 SATC 98 at 100) the court defined "building" as being: "In its ordinary sense a building (is) — a single integrated structure having its own separate identity."

21.7 Plant and machinery

The term "plant and machinery" is not defined in the Act. It was therefore left to the courts to decide whether items qualified as plant and machinery. A farmer in ITC 589 (14 SATC 132) claimed an allowance of wear and tear on trek oxen. He contended that the oxen were plant and machinery, and as such were fixed as opposed to floating capital. He used the argument that "because the farmer who used the alternative means of traction of a tractor would be allowed depreciation whereas the
taxpayer who used oxen is precluded from obtaining the allowance. The court held that such livestock (he chose not to be taxed on the 'stock basis') are floating capital and not fixed capital. The allowance was not granted. The court did not take into consideration the use to which the livestock has been put.

In ITC 641 (15 SATC 233) a race horse owner claimed a wear and tear allowance on race horses. In having to decide whether the rate allowed by the Commissioner is reasonable, the court held at 237: "It seems to the court extremely doubtful that animals like horses can be regarded as implements, utensils, and articles." and: "It seems to me that reference is made to some inanimate object and not live animals." The court also made the following observations at 237, but did not commit itself to a conclusion: "In the present case the appellant's horses may be subject to wear and tear for racing purposes". The English case of Earl of Derby v Aylmer (6TC 665) was referred to where it was held that stallions are not plant because they were not things subject to wear and tear. They continued their services until they died.

The Australian Income Tax Act, on the other hand, defines "plant" to include "animals used as beasts of burden or working beasts in a business other than a business of primary production". (Farming) (Section 124 E of the Australian Income Tax Act).

In ITC 769 (19 SATC 214) a boat used as a floating tea room was considered to fall within "machinery, implements, utensils and articles".
In **ITC 1234** (37 SATC 188) a Zimbabwean taxpayer carried on the business of manufacturing diamond crowns which were used in the main for the drilling of substances in order to obtain samples for geological purposes. The process of manufacture involved the use of what is known as a graphite mould which consists of an outer and an inner portion which fit together. The inner portion of the mould is fitted to the outer portion. Into the complete mould is placed a powder mixture and a short steel cylinder. The mould with the attached cylinder is then placed into a furnace. After cooling, the inner portion of the mould is broken. The outer portion can, however, be used for approximately seven times. The court had to decide whether the moulds constitute plant. The president of the court held at 190: "There is no definition of the word plant in the Income Tax Act but the most generally invoked meaning is that given by Lindley LJ in **Yarmouth v France** (1887) 19 QBD 647 at 658 but in its ordinary sense, it (plant) includes whatever apparatus is used by a business man for carrying on his business - not his stock in trade which he buys or makes for sale; but all goods and chattels, fixed or movable live or dead, which he keeps for permanent employment in his business". Reference was made to the case of **Hinton (H.M. Inspector of Taxes) v Maden & Ireland Ltd**, 38 Tax Cases 391, where it was held that the word "plant" must be regarded as denoting no more than some degree of durability. "The one point is the durability of these articles. When Lindley LJ used the phrase 'permanent employment in his business' (19 QBD 647 at 658), he was using it in contrast to stock - 'trade which comes and goes, and I do not think that he meant that only very long lasting articles should be regarded as plant. But the word does, I think, connot some degree of durability, and I would find it difficult to include articles which are quickly consumed or worn out in the
course of a few operations". The following which was said in Rose & Company v Campbell (1968) All ER 405 at 409, was also considered by the court: "(It) must be a question of degree in each case whether a given chattel does possess the requisite durability. Obviously the life or expectation of life of a chattel is the primary ingredient of durability, but I doubt whether one can take some conventional period of time, eg, one year, and to say that a chattel having that life or expectation of life possesses the necessary degree of durability. One must, I think, for this purpose take into account all the circumstances including the character and the function of the chattel". The inner portion of the mould was found to be consumed in the process of manufacture and further that, if durability was a pre-requisite, then it was not plant. As to the outer portion the court found that as it became unusable after as few as seven to ten operations, it connoted a low degree of durability quite undeserving of the description of plant, and was thus considered not to be plant.

The courts also had to decide in a few instances whether certain items form part of plant and machinery. In a case which concerned customs duty [Commissioner of Customs v Victoria Falls and Transvaal Power Co Ltd, (6 SATC 131)] and not income tax the court had to decide whether blotting paper was an integral part of a machine. The taxpayer imported for use in an oil filter, blotting paper, cut to the size required and pierced with holes to enable it to be fixed in the machine. The blotting paper was held not to be an integral part of the machine because the paper had "no permanence whatever and must be fed to the machine on various occasions daily".

The court held in another customs duty case (Commissioner of Customs v Cape Truck Co, 15 SATC 474) that the chassis of a motor truck was an integral part of the truck.
The expression "machinery or plant" is not defined in English tax law. Ships and mechanically propelled motor vehicles are specifically included in terms of sections 31 and 32 of the English Capital Allowances Act.

Under English law the word "plant" has received judicial consideration on a number of occasions. What was said by Lindley LJ in construing the word as it appears in the Employers Liability Act 1880 has been long accepted under English law as good guidance. [In Yarmouth v France (19 QBD 47) supra]. It is of interest to note that in that case a horse was held to be plant.

The interpretation of Lindley LJ was accepted in J Lyons and Co Ltd v Attorney General [(1944) Ch 281] and Hinton v Maden and Ireland Ltd [(1959) 3 All ER 356, 38 TC 391].

In the High Court of Justice (King's Bench Division), Rowlatt J in Daphne v Shaw [(1927) 11 TC 256] held that the books contained in the law library of a lawyer were neither machinery nor plant for the purposes of the wear and tear allowance. He concluded at 259:

"It is impossible to define what is meant by 'plant and machinery'. It conjures up before the mind something clear in outline, at any rate; it means apparatus, alive or dead, stationary or movable, to achieve the operations which a person wants to achieve in his vocation. But the books which he consults, on his shelves, and which he does not use as 'implements', really, in the direct sense of the word, at all, I cannot believe are included in it ...."

The decision in the Daphne v Shaw case (supra) stood for almost fifty years. During this period the word "plant" has received judicial consideration on numerous occasions under English tax law. Nearly all the cases during that
period dealt with physical things used physically. McVeigh v Arthur Sanderson & Sons Ltd [(1969) 1 WLR 1143, 45 TC 273] is one of those cases and dealt with physical things used intellectually. That case concerned certain designs which were used for making wallpaper. Some of the designs were used physically on the rollers and those which were not used on the rollers were kept for reference. Cross J expressed doubt about the decision in Daphne v Shaw (supra). He said at 285: "If I thought that I was free to do so I am not sure that I would accept the limitation which the Crown's argument imposes on the meaning of 'plant'. If a barrister has to buy a new addition of a textbook in order to help him to write his opinions, I cannot see as a matter of principle why the book should not be regarded as a tool of his trade just as much as the typewriter on which his opinions are typed". Sitting alone, Cross J could not go back on the case decided by Rowlatt J, and said at 285: "But having regard to the decision in Daphne v Shaw, I think that if any extension of the meaning of the word 'plant' beyond a purely physical object is to be made, it ought to be made by a higher court. So I will proceed on the footing that these designs are not 'plant'."

From the statements made by the majority of the House of Lords in the dry dock case of CIR v Barclay Curle & Co Ltd [(1969) 1 WLR 675, 45 TC 221] it would appear that the English courts do not apply the meaning to the word 'plant' as the ordinary Englishman understands it. It has acquired a special meaning in English tax cases. In the words of Cross J above "plant" extends virtually to a man's tools of trade.

The decision in Daphne v Shaw (supra) was reversed by the Court of Appeal in Munby v Furlong, [(1976) STC 72 50 TC 491]. That case concerned a lawyers library. The issue
was whether a lawyer's law reports and textbooks constituted "plant" for the purposes of the capital allowances under English tax law. Lord Denning MR said at TC 503: "Mr Medd in his excellent argument before us, would confine a professional man's 'plant' to things used physically like a dentist's chair or an architect's table, or, I suppose, the typewriter in a barrister's chambers, but for myself, I do not think 'plant' should be confined to things which are used physically. It seems to me that on principle it extends to the intellectual which a barrister or a solicitor or any other professional man has in the course of carrying on his profession. The difficulty has arisen because the Legislature, when it extended this provision to professions, did not make clear the scope of the word 'plant' in that context. It seems to me, in the context of a profession, the provision of 'plant' should be so interpreted that a lawyer's books - his set of law reports and his textbooks - are 'plant'. (The Crown did not appeal against the decision although leave to appeal to the House of Lords was granted).

The judicial interpretations of machinery or plant are summarised in Simon's Taxes, B2.361 A, page 1068: "The term machinery or plant has a very wide meaning. It includes items used in factories such as boilers, furnaces, shafting, motors, dynamos, electrical equipment, conveyors, dust extraction plant, hoists, trucks, storage tanks, refrigerating plant, locomotives, rails of railway sidings, railway wagons and piping, items used in offices such as typewriters, accounting machines, computers, adding machines, calculating machines and furniture, and general items such as aircraft, telephone installations, and hovercraft fixtures and fittings, including carpets and linoleum, but not linen, crockery, or cutlery. It
also includes canteen equipment and such items as wash basins, baths and lavatory pans; heating equipment, lifts, sprinklers, incinerators and fittings in an office block; fixtures and fittings of a permanent and durable nature such as an office desk or a shop counter, but not a shop front (which is part of a building); fire extinguishers, alarm systems, emergency lighting, hoses and hose reels, including plumbing back to the point on the main.

The following items have qualified as "plant" under English tax law:

- Swimming pools of a caravan park operator. *Cook v Beach Station Caravans Ltd* [(1974) STC 402; (1974) 3 All ER 159].
- Transit silos for the bulk unloading of grain. *Schofield v R and H Hale Ltd* [(1975) STC 353].
- Mobile office partitioning. *Jarrold v John Good & Sons Ltd* [(1963) 1 All ER 141; 40 TC 681 CA].

The following items were considered not to be plant:

- Prefabricated structures consisting of laboratory and a gymnasium. *St John's School (Mountford and Knibbs) v Ward* [(1975) STC 7 CA].
- A canopy over a self-service petrol-filling station. *Dixon v Fitch's Garage Ltd* [(1975) STC 480; (1975) 3 All ER 455].
- False ceilings on a caterer's premises. *Hampton v Forte Autogrille Ltd* [(1980) STC 80].
- A vessel used as a floating restaurant. *Benson v Yard Arm Club Ltd* [(1979) STC 266; (1979) 2 All ER 336].
An electrical installation at a department store, in Cole Bros Ltd v Phillips [(1980) STC 518], was made up of a large number of different items some of which were not classified as plant. On the facts it was held to be correct to consider the various items separately in relation to tests to determine whether each item was expenditure on plant.

The fire escape in a building. Pearl Assurance Co Ltd v O'Callaghan [(1943) 1 All ER 624; 25 TC 211 CA].

The statement of Lindley J in Yarmouth v France (supra) has been adopted by the Australian courts. The following are some of the Australian and English judicial decisions on the meaning of "plant".

In Moreton Central Sugar Mill Co Ltd v Federal Commissioner of Taxation (1967) 10 AITR 420, at pages 423 and 424, Kitto J held that a pit for servicing a locomotive could not be "plant" and said: "All I need say is that the word has never, I think, been held, and should not now be held, to include a structure built into the ground so as to form a static and permanent feature of the place in which a business may be carried on and having no other function than to provide a convenient stand for the performing of work in the business".

In Broken Hill Pty Co Ltd v Federal Commissioner of Taxation (1968) 10 AITR 481, at page 488, Kitto J said that the word plant "includes every chattel or fixture which is kept for use in the carrying on of the mining operations, not being (in the case of a building) merely in the nature of a general setting in which a part of those operations are carried on" and at 499 "--- (But) I regard as plant the buildings which are more than convenient housing for working equipment and (considered
as a whole ie without treating as separate subjects for consideration the iron roofing and cladding of buildings where the main structural members are specially adapted to the needs of the processes to be carried on inside) play a part themselves in the manufacturing processes, eg, the holding bay for the basic oxygen steelmaking installation as well as the very specialised building which, because of its in-built equipment forms part of that installation, and also the casting pit (but not the slag pit)

A few Australian decisions, mostly of the Commonwealth Taxation Board of Review, relate to the deductibility under their statute of depreciation of "plant or articles owned by a taxpayer and used by him during that year for the purpose of producing assessable income". Although there is no specific exclusion of buildings or other structure of a permanent nature, the judicial interpretation of "plant or articles" in that country does not mean the building itself in which the taxpayer's operations are carried on. In 10 CTBR (NS) 151, for example, the taxpayer company was the owner of a building let to a retail merchant. It claimed depreciation in respect of the cost of a shop front attached to the building. The shop front was constructed of glass and it was held in position by a steel frame which was attached by means of screws to the building. A sliding door at one end of the frame gave access to the shop. According to evidence the shop front might readily be removed and new ones fitted when a change was made in the type of business conducted on the premises. The taxpayer, contended therefore, that the shop front had not lost its identity as "an article" so as to become part of the building. The Board said at page 152: "But a similar argument might quite easily be advanced in relation to a door of the building or a window or perhaps even a
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prefabricated wall. The answer, we think, is that for the taxpayer company they have no independent significance, no separate existence as articles: all that they represent to it are parts of a building and nothing more". The shop front was regarded as being structurally integrated into the building in order to display merchandise and to serve the purpose of the shop's outer front wall. The Board held that the shop front was used by the taxpayer "as an integral part of the devised building".

In 10 CTBR (NS) 594 it was held that stoves, sinks, baths, etc, affixed in flats let by the taxpayer to tenants, although readily removable, were held to be fixtures forming part of the building and not "plant or articles" because of the manner and the purpose of their installation in the flats.

A hot-water heater merely affixed by brackets to a wall to supply hot water in a flat let by the taxpayer was held in 10 CTBR (NS) 796, to be, not "plant or (an) article", but "part of the building". The reason was that it was affixed with the intention and for the purpose of remaining in that position permanently.

In Imperial Chemical Industries of Australia and New Zealand v FCT (1 ATR 450) special sound-absorbing ceilings, attached by metal rods to the concrete floor above them, and which could readily be removed for example, for gaining access to service pipes, were held not to be "plant or articles". The ceilings were held to be "part of the building, like its walls, floors, windows and doors, not to mention the roof", that is, because of the purpose, method, and intention of their installation.
In Hobday v Nicol [(1944(1) AER 302] Humphreys J said at 303:

"'Structure' as I understand it, is anything which is constructed; and it involves the notion of something which is put together, consisting of a number of different things which are so put together or built together, constructed as to make one whole, which then is called a structure'.

The court held that tanks built on a river bank were structures in the ordinary meaning of the word.

Atkinson J interpreted the expression "structure" in South Wales Aluminium Co Limited v Assessment Committee for the Neath Assessment Area [1943 (2) AER 587, at 592]:

"I do not think it is denied that the word 'structure' must be construed as in the nature of a building .... As used in its ordinary sense I suppose it means something which is constructed in the way of being built up as is a building; it is in the nature of a building. It seems to me it is not in the nature of a building, or a structure analogous to a building, unless it is something which you can say quite fairly has been built up. I do not think that is the only guide or the only test, but roughly I think that must be the main guide: how has it got there?"

The above two interpretations of the expression "structure" were discussed by Centlivres JA in KWV v Industrial Council for the Building Industry & Others [1949 (2) SA 614 (AD)]. The above interpretation of Atkinson J was viewed to be misleading:
"The phrase 'erections in the nature of a building' is not self explanatory: one can understand what is meant by 'the nature of a building' only if one bears in mind the whole context in which that phrase was used by Atkinson J, and when one reads what Atkinson said in its whole context it does not seem to me that there is any difference between his conception of what a structure is and that of Humphreys J". (at 612).

In the KMV case (supra) the court had to decide whether wine-receiving tanks are "structures". It was held "there can be no doubt that the wine-receiving tanks have been 'built up' from the materials which go to make the concrete of which the tanks were constructed. Consequently it seems to me that the tanks are 'structures'".

21.9 Articles

The word "articles" used in section 11(e) has a broad and somewhat vague or indefinite connotation. In SIR v Charkay Properties (Pty) Ltd [1976(4) SA 872(AD) 38 SATC 159] the taxpayer claimed a wear and tear allowance in respect of demountable partitions used in a building which was 'let by the taxpayer as offices. It was held that the word "articles" means "the class of all those material things that are used by the taxpayer for the purposes of his trade. 'Things' means of course material entities or objects of any kind". It was further held that the preceding words "machinery, implements, utensils" do not sufficiently clearly point to any genus of material things which might otherwise through the ejusdem generis rule serve to confine articles to some species of genus. "So no reason exists for not giving that word the ordinary wide connotation". This
interpretation was confirmed in a Zimbabwean case (ITC 1313, 42 SATC 197).

In ITC 212 (6 SATC 63; See also ITC 180, 5 SATC 256) the taxpayer contended that he was entitled to an allowance of wear and tear in respect of his library books, as being articles used for the purposes of trade. The Commissioner claimed that the word "articles" must be read as *ejusdem generis* with the words "machinery, implements and utensils". The court did not agree and held that "articles" are intended to indicate articles of all kind, and was wide enough to include books or libraries used for the purposes of trade.

A wear and tear allowance was granted by the special court in respect of old scientific books (ITC 693, 16 SATC 510).

In a Zimbabwean case [COT v C 1981(2) SA 298(ZA), 43 SATC 9, at 13] the court defined "articles":

"The word must bear a very wide meaning and connote any identifiable material thing which is not so merged with other things as to lose its separate identity as an article". This case also concerned partitions in a building in lieu of internal walls.

21.10 Movable attached to immovable

The maxim "omne quod inaedificatur solo, solo cedit" is now trite law. Everything that is built on land - or on to another immovable - accedes to that land or immovable and becomes the property of the owner of the land or immovable. Wessels JA said in Van Wezel v Van Wezel's Trustee (1924 AD 409, at 417): "In fact as soon as a structure is built into the soil it accedes to the soil,
for by the civil law as by the Roman-Dutch law the accessory has the same character as the thing to which it acceded. In character such a house would be an immovable both because it is built into the soil and because it is placed there presumably for a permanent purpose."

The question is: in what circumstances must a movable which has been attached to land or an immovable be regarded as having been permanently attached and consequently as having become part of the immovable property?

One of the important decisions under common law is that of MacDonald Ltd v Radin NO and Potchefstroom Dairies and Industries Co. Ltd (1915 AD454). In that case MacDonald Ltd had sold a refrigerating plant to one Jacobson, who was in possession as purchaser, of land belonging to the Potchefstroom Dairies Ltd. The land was purchased by Jacobson on deed of sale whereby the seller had the right of cancellation if the purchaser failed to meet the required instalments. The refrigeration plant was sold to Jacobson under a suspensive sale agreement which entitled the seller to repossess in the event of default. Jacobson did not meet his obligations under either agreements which were in both instances cancelled. Both MacDonald and Potchefstroom Dairies claimed the right to the plant as owner thereof. If the plant was found to be movable, MacDonald would have remained the owner; if found to be immovable it would become the property of Potchefstroom Dairies. The issue before the court was whether the plant had acceded to the soil or not. The nature of the plant and the method by which it had been affixed to the floor of the building were inconclusive and in those circumstances the intention with which the owner, MacDonald Ltd had affixed the plant to the floor of the building was the deciding factor. The following principle was laid down:
"As was pointed out in Olivier v Haarhof (TS 1906 at 497) each case must depend on its own facts; but the elements to be considered are the nature of the particular article, the degree and manner of its annexation and the intention of the person annexing it. The thing must be in its nature capable of acceding to realty, there must be some effective attachment (whether by mere weight or by physical connection) and there must be an intention that it should remain permanently attached. The importance of the first two factors is self evident from the very nature of the inquiry. But the importance of intention is for practical purposes greater still; for in many instances it is the determining element. Yet it is sometimes settled by the mere nature of the annexation. The article may be actually incorporated in the realty, or the attachment may be so secure that separation would involve substantial injury either to the immovable or its accessory. In such cases the intention as to permanency would be beyond dispute."

There were various other cases where the decision under the common law was based on the intention with which the movables were attached or affixed.

- Van Wessel v Van Wessel's Trustee 1924 AD 409
- Champions Ltd v van Staden Bros and Another 1929 CPD 330
- Gault v Behrmann 1936 CPD 38
- Caltex (Africa) Ltd v Director of Valuations 1961(1) SA 187(T)
- Standard Vacuum Refining Co v Durban City Council 1961 (2) SA 669(A)

Van Winsen AJA expressed himself as follows in Theatre Investments (Pty) Ltd v Butcher Brothers Ltd [1978 (3) SA 682 (AD) at 688]: "A generally accepted test [see the cases referred to in Standard-Vacuum Refining Co of SA
to be applied to determine whether a movable, capable of acceding to an immovable and which has been annexed thereto, becomes part of that immovable is to enquire whether the annexor of such a movable did so with the intention that it should remain permanently annexed thereto. Evidence as to the annexor's intention can be sought from numerous sources, inter alia, the annexor's own evidence as to his intention, the nature of the movable and of the immovable, the manner of annexation and the cause for and circumstances giving rise to such annexation. The ipse dixit of the annexor as to his intention is not to be treated as conclusive evidence thereof but, should such evidence have been given, it must be weighed together with the inferences derivable from the other sources of evidence abovementioned in order to determine what, in the view of the Court, was in fact the annexor's intention. In cases where no evidence is forthcoming from the annexor, a court will be constrained to determine the issue upon such inferences as may legitimately be drawn from the sources abovementioned. If a court on a consideration of all the evidence, direct and inferential, were to conclude on a balance of probabilities that the annexor intended a permanent annexation it would hold that the movable had become part of the immovable. If on the other hand it were to conclude on a balance of probabilities that, in the light of such evidence, the annexor's intention was not to effect a permanent annexation or if it found itself unable to draw any inference one way or other as to the annexor's intention then it would conclude that the annexed movable had not lost its character as such.

There is a similarity between the decisions under the common law and the decisions under the Income Tax Act. The following cases were decided under the Income Tax Act.
21.11 Weir

In the first reported case (Koffyfontein Estates Ltd v COT 1917 TPD 259) on the subject it was held that weirs in a stream did not qualify as machinery, implements, utensils and articles for the purposes of the Income Tax Act. The proviso limiting the application of the wear and tear allowance under the Act as it then stood applied only to buildings. It was held that the weir was a structure and must be classified under buildings.

21.12 Railway lines

In a Zimbabwean case (Rhodesian Railways And Others v COT 1925 AD 438, 1 SATC 133) the court had to decide whether the owner of railway lines was entitled to the wear and tear allowance. The Zimbabwean Act was at the time very similar to section 11(e) in its present form. The court held at 148:

"In the case of the Newcastle Collieries (1916 AD 561) it was held that railway lines, which it was reasonable to suppose were laid in the same manner and with a like intention as were those in this case, were immovable property. It thus clearly followed that they were works of a permanent nature within the meaning of the proviso at the end of subsection (c) of S 14(1) which excludes any deduction for their diminished value". The court applied firstly the "immovability test" and secondly the "intention test". Relying of the authority of Newcastle Collieries (supra) the court held that the rails were immovable works of a permanent nature.

Another Zimbabwean taxpayer (ITC 271, 7 SATC 170) who was the owner of a siding claimed wear and tear on sleepers and rails, on the contention that they fall within the scope of "machinery, implements, utensils and articles"
used for the purposes of his trade. The court applied the tests laid down in the Rhodesian Railway case (supra) and the MacDonald case (supra), and found the railway line to be a permanent annexation to the soil. The court concluded at 172:

"If we come to look at it broadly we know that nothing is permanent, not even the rocks, and to a large extent we must be guided by the intention of the parties. The intention of the appellants clearly was that so long as they continued to trade there in this particular way, with the assistance of those sidings, the rails were laid down permanently. The intention clearly was that the sidings should remain there during the terms of the lease."

In ITC 855 (22 SATC 195) it was also contended by the taxpayer that rails fall within the scope of "machinery, implements, utensils and articles", for the purposes of the wear and tear allowance. The court again relied on the Rhodesian Railway case (supra) and found the rails to be works of a permanent nature:

- "The track is an integral part of the permanent way..."
- "Articles built into a structure, building or other works of a permanent nature lose their separate identity".

In ITC 905 (24 SATC 87) the taxpayer carried on the business of running a miniature railway for the amusement of children. The business was carried on on leased premises. The lease agreement provided that the lessee shall remove all structures erected upon termination of the lease, failing which the structures would become the ownership of the lessor. The business was transferred to a new site and the taxpayer claimed a scrapping allowance. The court followed the approach of the
Appellate Division in the Rhodesian Railway case (supra) and applied the "immovability test", and found that the track qualified for the scrapping allowance. It was held at 90: "It cannot be likened to the permanent way of a normal railway such as those of the railways referred to in decided cases. Tracks for this miniature railway have, at times, been laid for purely temporary purposes, eg, at a local fair. This track had no ballast and could not, on the evidence, be regarded in any sense as immovable".

21.13 Other structures

A general dealer in ITC 370 (9 SATC 313) carried on business in two branch stores, operated in wood and iron buildings. The taxpayer claimed depreciation on the contention that the intention was never to erect permanent buildings. The court found the building to be of a permanent nature for the following reasons:

(At 313 and 314) "It appears that the appellant still carries on business as a storekeeper in those buildings. He has been doing so for several years and there is nothing to show that he does not intend to continue to use the buildings in the same way".

"... (It) appears prima facie that these buildings are being used for permanent purposes..."

"... (These) buildings are attached to the soil. Business is being carried on in the buildings, so that one cannot assume that these buildings constitute a movable structure".

ITC 469 (11 SATC 261) did not concern wear and tear, but the court had to decide whether a "dummy" house erected on a showground for advertising purposes, was of a permanent nature. Applying the "intention test" it was held to be a structure of a permanent nature. Dr
Appellate Division in the Rhodesian Railway case (supra) and applied the "immovability test", and found that the track qualified for the scrapping allowance. It was held at 90: "It cannot be likened to the permanent way of a normal railway such as those of the railways referred to in decided cases. Tracks for this miniature railway have, at times, been laid for purely temporary purposes, e.g., at a local fair. This track had no ballast and could not, on the evidence, be regarded in any sense as immovable".

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Manfred Nathan KC said at 261: "This structure is intended, as long as it remains standing to serve for advertisement purposes at the show ground from year to year whenever the show is on".

A lessee in ITO 722 (17 SATC 490) sought to deduct a wear and tear allowance in respect of buildings occupied by him on the contention that it was never intended for the buildings in question to remain permanently. In terms of the lease agreement the lessee had to, within a stipulated period after the termination of the lease, remove any buildings erected by it upon the site. Any buildings not so removed would become the property of the lessor. The court held that the buildings in question acceded to the land and formed part of it, and were therefore "buildings of a permanent nature". The claim of the wear and tear allowance was refused.

A farmer in ITC 225 (6 SATC 158) claimed wear and tear on fences (in a year prior to amendments allowing deductions of certain capital expenses including fences). The court classified fences as works of a permanent nature. In a Zimbabwean case (ITC 1047, 26 SATC 223) the court also decided that fencing was of a permanent nature and could not be regarded as "buildings". In an unreported special court case in August 1954, it was held that strongroom doors form part of the building.

A hotelkeeper (ITC 251, 7 SATC 47) claimed depreciation on immovable property. It was held that buildings or structures of a permanent nature are specifically excluded. A similar decision was reached by the court in the case of a taxpayer who claimed a wear and tear allowance on a block of flats (ITC 1011, 25 SATC 283).
21.14 Carports

As a storage facility for clients a Zimbabwean taxpayer in *ITC 1313* (42 SATC 197), who was engaged in the travel industry, erected carports. The Zimbabwean Act at the time provided for an allowance of wear and tear in respect of "articles, implements, machinery and utensils belonging to and used by the taxpayer for the purposes of his trade". Under another provision no allowance was deductible "in respect of any buildings, structures or works of a permanent nature". The taxpayer claimed the wear and tear allowance, contending that due to the fact that the lease of the ground on which the carport was erected could be terminated at short notice, the carports were not intended to have any degree of permanence. Confirming the view of the court in Charkay's case (C21.16 infra), carports were held to qualify as "articles". The court had then to consider whether those articles (carports) were permanent structures, and approached the problem by -

- examining the nature of the structure; and
- if there was still uncertainty, establishing the intention of the person who erected it.

Applying the "immovability test" the court found the carports to be movable. But because some carports stood for a considerable period, the court concluded that this aspect was not conclusive as to whether the carports were of a permanent nature or not. On the facts of the case it was found that the intention was not to erect the carport as a permanent structure. The carports were held not to be permanent structures.
21.15 Subject matter attached or affixed to buildings or structures of a permanent nature

The taxpayer in ITC 410 (10 SATC 232) carried on the business of manufacturers and suppliers of gas. Piping was laid for new customers from the taxpayer's mains to the supply point. The pipes were laid over the customer's property. This case did not concern wear and tear. The issue was whether the pipes were structures of a permanent nature. On the facts of the case the pipes were found to be permanent fixtures. They adhered to the soil and the taxpayer's intention was that they should remain in the soil.

In ITC 773 (19 SATC 308) a manufacturer who kept his stock on leased premises, erected a partitioning wall and claimed wear and tear thereon. It was held that "(This) structure is manifestly of a permanent nature; we know it has already lasted for four years and may last for a longer time." (At 310)

Another case which did not concern wear and tear was that of CIR v Le Sueur [1960(2) SA 709(AD), 23 SATC 261]. The court had to decide whether batteries which were fixed to the floor of a building formed part of the building for the purposes of deduction of the cost of buildings in farming operations. The batteries consisted of rows of cages which in order to give rigidity were fixed into the concrete floor of the building housing the batteries. The elements chiefly considered by the special court were

- the nature of the thing attached;
- the degree and nature of its annexation; and
- the intention of the person annexing it.
The special court found the batteries to be movable and
the manner of annexation not by itself conclusive. In
the light of the taxpayers intention the batteries were
found to be immovable. The Appellate Division did not
agree with this line of reasoning. Ramsbottom JA held at
266:
"The question which the special court had to decide was
not whether the batteries were movable or immovable, but
was whether or not they were part of the structures in
which they were housed". He further held that the issue
in this case was entirely different to the MacDonald's
case. (See C21.9 supra). The question whether the
batteries have * acceded to the soil and have thus become
the property of the owner did not arise. The issue in
point was whether the cost of the batteries formed part
of the cost of the building, and the question should have
been approached in a different way. The learned Judge of
Appeal reasoned as follows on p267 and 268: "I think
that one test - there may be others - of whether a thing
is part of a building for the purpose of para 17(1)(f) of
Schedule 3 is whether it has become part of the fabric of
the building. Everything which goes into the erection of
a building is originally simply an article - a piece of
building material. Manufactured articles such as window
frames and windows, door frames and doors are built into
the fabric of a building. A strong room may be part of a
bank building and a built-in cupboard may be part of the
fabric of a dwelling house. Things which are brought
into a building and which form no part of the fabric
thereof, even though they may be fastened to the floor or
the walls do not, in my opinion, form part of the
building for the purpose of para 17(1)(f) of Schedule
3." He then applied the test to the facts of the case
and found that the batteries were not part of the
building.
In ITC 866 (22 SATC 397) the taxpayer was the owner of a building which was let to a company carrying on the business of a nursing home therein. The building was equipped with a sterilising plant fed with steam pipes and also with a heating installation consisting of heaters or radiators similarly fed by steam pipes. The steam generated by the boilers was diverted into two streams. One stream was carried through pipes and passed into sterilisers, autoclaves and heaters. The other stream passed through pipes for the hot water system and through radiators. The taxpayer sought to deduct wear and tear on the pipes, heaters and radiators. The Commissioner allowed wear and tear in respect of the boilers, sterilisers, autoclaves and heaters but not in respect of the pipes connecting the boilers with the sterilisers, autoclaves and heaters. A claim for wear and tear in respect of the radiators which hung on brackets was disallowed. The court held at 398:

"Viewing the building as a whole it is apparent that the hot water installation would be regarded as a normal integral part of the building in the same way as the cold water or electric light installation. Viewed as a nursing home building it is equally apparent that the steam installation would be regarded as part of the building structure. There could be no doubt that even if one were to regard any of the items as being movable in their original form they were annexed by the appellant to and in the building with the intention that they should be there permanently. Of course, permanent does not mean everlasting and in the instant case the intention clearly was and is that the systems should remain in the building for the foreseeable future and that any worn parts should be repaired or replaced". The court relied on the decision of the MacDonald case (see C21.9 supra) and confirmed the disallowance of the deduction claimed. The fact that the radiators were hung on brackets and easily
removable was not considered a factor. The court viewed
the system as a whole. This case was decided before the
Charkay Properties case (see C21.16 infra). The
principle laid down in the latter case was: before an
article attached to a building of a permanent nature can
be said to form part of it, it must be structurally
integrated or otherwise physically incorporated into the
building permanently in such a way that it had lost its
own separate identity and character. Perhaps the
decision in ITC 866 (supra) would have been different if
the court had had the benefit of the decision in the
Charkay's case (see C21.16 infra).

A Zimbabwean taxpayer in ITC 1046 (26 SATC 217) derived
income from the sale of advertising space on litter bins
which were affixed to buildings and posts. The litter
bins were supplied free of charge. The court held that
although the bins were fixed to the buildings and posts,
they could not be considered buildings or property
similar in nature to buildings. This appears to be a
correct decision as the bins did not form part of the
fabric of the building so as to lose its separate
identity. (See Charkay's case, C21.16 infra).

In ITC 1149 (33 SATC 98) a farmer built a milking shed
into which he installed a milking machine. The bulk milk
tank was a heavy structure of stainless steel, the
supports of which were embedded in the concrete floor of
the milking shed. The tank was first placed in position
before the adjoining wall was built. In order to remove
the tank it would have been necessary to break down at
least one wall of the milking shed. This case did not
concern wear and tear. The issue was whether the cost of
the milk tank formed part of the cost of the shed. The
court referred to L. Sucur's case (supra) and agreed
that the approach was that the question how firmly the
thing is attached to the floor or the walls was irrelevant. The tests applied were -

- whether the thing had "become part of the fabric of the building"; and

- "can the thing be called building material? If so, and it is built in, it would be part of the building. In some cases, such as a water pipe which could also be laid in the garden, the answer would be: not necessarily. But when built in, it could certainly become part of the building".

The tests were applied to the facts of the case and it was found that the cost of the milk tank did not form part of the cost of the shed.

A Zimbabwean taxpayer in ITC 1248 (38 SATC 35) constructed certain structures within two warehouses in order to provide additional storage space. These structures were described as mezzanine floors and were referred to as storage platforms. The initial inquiry before the court was whether the mezzanine floors had an identity or existence separate from that of the buildings in which they stood or whether they were part and parcel of such building. The court held that the mezzanine floors lacked identity of their own, and were therefore part of the buildings for the following reasons:

- It was constructed of conventional building materials. (This was a test applied for the first time in ITC 1149 (supra).

- There was a degree of structural integration with the buildings which housed them.

- There was a common identity of purpose between the buildings and the mezzanine floors. The object of the latter being to afford storage space additional to that available on the floor of the building.

- The visual impact was that the structures were an integral part of the buildings.
The respondent taxpayer in SIR v Charkay Properties (Pty) Ltd [1976 (4) SA 872 (AD), 38 SATC 159] derived its income from letting business premises and offices. The company sought to deduct a depreciation allowance under section 11(e) in respect of demountable partitions used in a building which was let as offices. The court first examined the nature of the partitions as "articles" for the purposes of section 11(e). The next issue was whether the partitions formed part of the building for the purposes of the second proviso to section 11(e). Trollip JA pointed out that the Le Sueur's case (see para 66 supra) dealt with a similar problem and said at 168:

"Hence for an article to form part of such a building for the purpose of proviso(ii), I think that it must have been permanently incorporated or integrated into it. (I use 'permanently' there in its comparative or practical sense as meaning indefinitely or not temporarily.) The issue of its permanency or otherwise, will often also be objectively determined by applying the factors mentioned in paras 1 and 2 above (whether it has become part of the fabric of the building or whether it has been so structurally integrated or otherwise physically incorporated into the building that it loses its own separate identity) - or other factors, for those were not intended to be exhaustive - but if there is any uncertainty about whether the attachment is part of the building, I see no reason why the subjective factor, the owner's intention in attaching the article to the building should not also be taken into account. To sum up: before an article attached to a building of a permanent nature can be said to form part of it for the purposes of proviso(ii) to 11(e) of the Act, it must have been structurally integrated or otherwise physically incorporated into the building permanently in such a way that it had lost its own, separate identity and character; the question whether or not that has occurred
Holmes JA, in deciding whether the partitions were part of the building was less convinced and said at 172: "This is a question of fact and degree. In deciding this, it is first necessary to think one's way through the particular facts of the case, before turning to the 'tests'". He indicated that had he been a member of the court a quo he might have perhaps shared the conclusion of the accountant member who dissented. He concluded by saying at 172: "As to the permanency of the installed inner walls, so long as the shell exists, you must have these inner walls (even if not always in precise the same position) otherwise you do not have a completed office block. In that sense they might be said to be part of the building. However, having said all that, I remind myself that this is an appeal concerning facts; and on that footing I cannot interfere with the finding of the majority of the court a quo unless I am persuaded that their decision is one which could not reasonably have been reached. On all the facts, I cannot conscientiously go that length in this borderline case". The partitions were held not to be of a permanent nature. The Commissioner had his own answer to this case - he pegged the wear and tear allowance at 2% based on the "diminishing balance" method. He has, however, subsequently increased this percentage to 7.5%. An aggrieved taxpayer who considers that the Commissioner has not exercised his discretion properly in granting such a low rate based on the "diminishing balance" method may seek a review of the Commissioner's decision. The decision may be considered unreasonable in the light of the words of Trollip JA who delivered the judgement: "A partition can survive no more than three to six removals, the number depending upon the skill (and presumably the care) exercised by those doing the moving. The life of a partition left in position is shorter than that of an
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inner brick wall or of the building itself. It is subject to wear and tear when in position through being bleached by the sun, bumped by chairs and other objects, damaged by water spilt on it, and by being moved or removed. (See also "Commissioner's discretion", C21.2 supra).

In COT v C [1981(2) SA 298(ZA), 43 SATC 9] an insurer let office accommodation in a building of which he was the owner. In lieu of internal walls, demountable partitions were employed to create whatever internal arrangement was required from time to time. This was a Zimbabwean case and the court had to decide whether the partitions were "articles" and whether they formed part of the building. In deciding whether the articles lost their identity when they were installed in the building the following factors were considered -

- the method of installation;
- the intention of the taxpayer;
- whether something new came into existence by reason of the combination of the partitions and the shell of the building.

On the facts of the case it was found that the method of installation did not result in the articles having lost their separate identification. The intention was for flexible accommodation and they were not fixed in permanent positions. On the last point Fieldsend CJ said at 14: "It was not a question of turning a shell of a building into an office block, but of having a building in which dividable floor space could be let". The final point the court had to decide was whether the partitions were used for the purposes of the taxpayer's trade. The test which was suggested by the President of the court a quo (ITC 1323, 42 SATC at 287) was whether there was a causal link between the use of the partitions and the
generation of income. They were found not to be different from carpets or decorative blinds, ie not part of the building.

21.16 Improvements

In ITC 1007 (25 SATC 251) the taxpayer was a hotelier. This case concerned the annual and investment allowances. The court had to decide whether the following structures which were erected on the premises were buildings or improvements to buildings -

- open air swimming bath and paddling pond;
- shelters for bathers;
- shower cubicles; and
- four garages built into one of the banks of the swimming pool.

The court examined the various judicial interpretations of the word "building" (See C21.6 supra). Applying those interpretations to the facts of the case, the court concluded that the swimming pool and paddling pond were not buildings. As regards the test applied in the Le Sueur's case (see C21.15 supra) the court was of the opinion that if the swimming pool was built into the building in such a way that it became part of the fabric of the building, it would itself be regarded as a building or as an improvement thereto.

In another case [SIR v African Detinning Works (Pty) Ltd 1982(1) SA 797(AD), 42 SATC 134] which did not concern wear and tear, the court had to decide whether improvements made by a taxpayer amounted to either a building or an improvement thereto. The taxpayer was a producer of tin-free steel from processing tinplate scrap. The building was surrounded by concrete aprons. These aprons were extended and the Commissioner disallowed the annual and investment allowances, on the
grounds that the extended aprons were not buildings. The court first examined whether the original aprons were part of the building. The following tests were then applied -

. whether the improvements were a substantial structure, more or less of a permanent nature, consisting of walls, a roof, and the necessary appurtenances thereto;
. whether the extension of the apron (and therefore the original apron) became part of the fabric of the building; and
. whether the extension had been structurally integrated or otherwise physically incorporated into the building permanently in such a way that it had lost its own separate identity and character.

The tests were applied to the facts of the case and it was held that the main factory building and the aprons were separate structures, and the aprons did therefore not form part of the building.

It is therefore clear that the tests applied in the various cases are only a useful guide to the problem. The courts have repeatedly held that each case must be decided on its own circumstances. The important dicta to keep in mind when dealing with this problem is that of Holmes JA in the Charkey Properties case at 172 (supra): "This is a question of fact and degree. In deciding this, it is first necessary to think one's way through the particular facts of the case, before turning to 'tests'."

21.17 Used by the taxpayer for the purposes of his trade

The taxpayer must use the machinery, implements, utensils and articles for the purposes of his trade [Section 11(e)].
The court held in a special court case (ITC 295, 7 SATC 350) that no allowance could be granted in respect of plant and machinery which stood idle during the year of assessment.

In *Rex v Berg* (6 SATC 320) (a case concerning the Motor Vehicle Ordinance) it was held that the words "used for the purposes of" could hardly have been meaning "capable of being used". The ordinary meaning and not the extended meaning of "used by" must therefore be applied.

In *ITC 840* (21 SATC 424) a lessor in terms of a lease agreement provided the lessee with certain fixtures and fittings which cost him R10 000. These fixtures and fittings were to revert to the lessee after the expiry of the lease. It was held that the lessor being the owner of the fixtures and fittings was entitled to a wear and tear allowance.

21.18 By reason of wear and tear

The cause of the diminution in value of machinery, implements, utensils and articles must be due to ordinary use. This is best illustrated in the case (*ITC 240*, 6 SATC 363) of a taxpayer who owned a law library. The library was moved to four different places of business, as a result of which damage was caused to the books. The taxpayer claimed an allowance in respect of depreciation. The court held at 364 that the section [now 11(e)] refers to "wear and tear through ordinary use, but where injury is caused through accident or through some external or violent means, that cannot be said to be ordinary wear and tear, and consequently we do not think we are entitled to interfere with the discretion which the Commissioner has under that section".
In another special court case (ITC 50, 2 SATC 123) certain fixtures were damaged as a result of moving the taxpayer's business to new premises. The taxpayer was unsuccessful in his claim for an allowance in respect of depreciation. The damage was not caused by use but by the removal from one set of premises to another.

In ITC 215 (6 SATC 133) a cartage contractor sold his business. The selling price of the assets exceeded the book value of those assets. The Commissioner refused to allow an amount in respect of wear and tear in the year of sale. The court held that the fact that the assets were disposed of at a profit did not alter the fact that they had been used up to the date of the sale.

On "diminished value" an English court (Caledonian Railway Co v Banks 1880, 18 SLR 85, I TC 487 at 496) expressed the following view: "The allowance (for depreciation) is to compensate for the loss of earning capacity of the article. It is its value as an income producing asset which has to be considered. Diminished value can have no reference to the value of the plant as merchandisable or marketable articles, because its capacity to earn income constitutes its sole value to the taxpayer and is the only quality contemplated under the status relating to the taxation of income". This was confirmed in the case (ITC 150, 4 SATC 294) of a taxpayer who suffered a loss of R440 as a result of trading in his old vehicle for a new one. He unsuccessfully claimed this loss as a deduction contending that the amount represented depreciation. The Commissioner in this case was not concerned with the fact that the taxpayer, because of some other reason, bought a new car. He was only concerned with the vehicle in regard to its diminished earning capacity.
It was contended by the taxpayer in ITCA 164, 5 SATC 79 that the basis of calculation should take into consideration the probable life of the article used in the trade. The court laid down -

1. the article must be used for the purposes of the taxpayer's trade;
2. the earning capacity of that article in that trade during the year of assessment must be established;
3. it should be enquired whether the earning capacity has been impaired, and if so, to what extent; and
4. the fact that the article may be used for a further number of years does not affect the calculation.

It was held at 81: "Impaired earning capacity is a question of fact, and a question of fact which generally speaking is confined to the year in which the depreciation allowance is claimed by the taxpayer". The court had no quarrel with the taxpayer's calculation from a point of view of business, but did not accept the basis of calculation. An allowance based on a rate of 25%, calculated on the "reducing balance method" was allowed (See C21.3 supra).

A university lecturer in ITCA 593 (16 SATC 510) claimed depreciation on "old scientific books". The court found that the depreciation was due to -

1. the effect of time; and
2. wear and tear;

and concluded "There is no provision in our Act for the effect of lapse of time (obsolescence) on the value of the books".

In ITCA 146 (4 SATC 278) a taxpayer, claimed as a deduction the cost of the replacement of motor cars used in his business, when traded in for new cars. The "cost of replacement" was the amount paid for the new cars over
and above the value of the cars traded in. The taxpayer argued that had he used the old cars he would have had to incur heavy and expensive repairs. These repairs, he reasoned, would have been allowed as a deduction. Instead of doing repairs he bought better and newer motor cars and saved the repair bill. The taxpayer was unsuccessful. The court held at 280 that "(All) that can be allowed is compensation for the loss of earning capacity of the motor cars".

Diminished earning capacity is a question of fact. In ITC 91 (3 SATC 235) the taxpayer was a hotelier. There was considerable wastage each year of crockery, linen, cutlery, etc. To meet this wastage, a large stock was carried. Issues were made from the stock and were written off as "replacements" which was allowed. The facts of the case satisfied the court that the taxpayer was carrying on a considerable business and was therefore using up rather rapidly such things as linen, crockery, cutlery, brooms, etc.

In ITC 247 (6 SATC 379) a jockey was allowed the replacement of saddlery, breeches and boots as a deduction. "The wear and tear in the case of such matters as saddlery, breeches and boots is not only large but rapid". (At 380)

21.19 During the year of assessment

The wear and tear of machinery, implements, utensils and articles must occur during the year of assessment in which the allowance is claimed. Section 11(e) specifically states - "diminished by reason of wear and tear during the year of assessment".