# FILM AND MEDIA TAX GUIDE

## 2009

"The only difference between a tax man and a taxidermist is that the taxidermist leaves the skin." – **Mark Twain**

## TABLE AND CONTENTS

## Introduction

The purpose of this guide is to accumulate and consolidate information that will be beneficial to companies that operate within the film and media industry. This will be an annual guide concerning various tax matters and complications that arise during the year. Our firm will also make a copy available on our website, which will be regularly updated.

This guide is compiled based on information obtained, which has been clarified by SARS wherever possible. It has been prepared from questions raised by various role players within the industry. We request that any questions you may have be sent to me to include in future editions of this guide. Our firm can be contacted at the following details:


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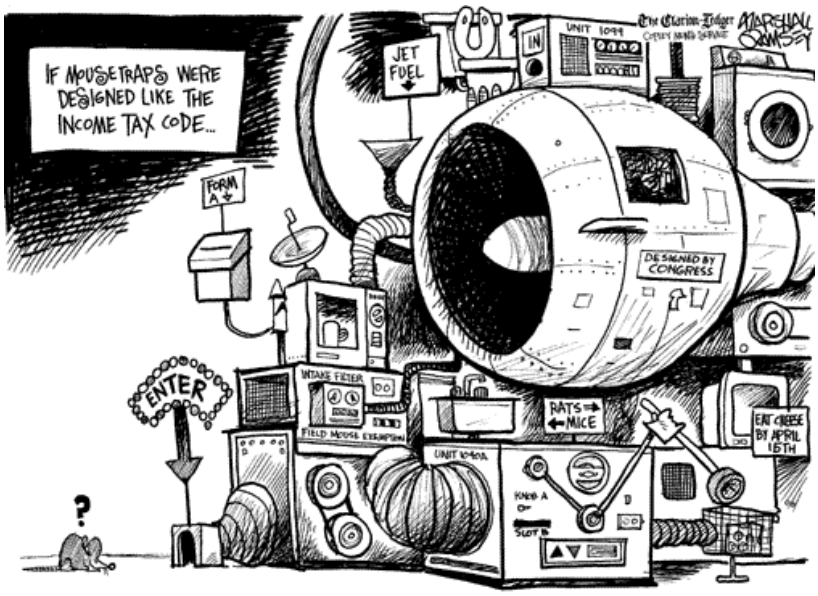
### About the Author

The guide has been compiled by myself, Michael Rushby. I am a practicing member of the South African Institute of Professional Accountants and I have also completed a post graduate higher diploma in Taxation through UNISA. I am currently a partner in the firm Galbraith Rushby, heading up the tax department.



## An Introduction to Employees' Tax

Income tax is governed by the Income Tax Act, which oversees the taxability of income and deductibility of expenditure. Employees' tax is not income tax but a provision that is made towards a person's annual income tax. If income is not subject to employees' tax it will, in most instances, be subject to income tax. All of this is generally governed by the Fourth Schedule and the Seventh Schedule to the Income Tax Act[1].

Employees' tax is the process whereby SARS collects taxes from people in the wider public through their employers. Where an employer pays remuneration to an employee, the employer has an obligation to deduct employees' tax from the remuneration and pay the tax deducted to SARS on a monthly basis. In most instances, the employer is obliged to issue each employee with an employees' tax certificate known as an IRP5 or IT3(a), which reflects, amongst other details, the employees' tax deducted. In addition, the employer is obliged to submit an annual reconciliation (EMP 501) to the SARS office.

Compliance is driven by a harsh and often costly penalty process. Penalties are imposed, to name just a few, for late submission, non-submission and under-declaration; and interest runs daily. An employer that fails to withhold employees' tax or fails to withhold the appropriate amount of employees' tax remains liable for the employees' tax. This problem is compounded by directors, trustees and members being held personally liable for this tax, and they are not protected by the incorporated nature of their businesses.

Skills Development Levy (SDL) is a compulsory levy scheme for the purposes of funding education and training, as envisaged in the Skills Development Act, 1998. This levy came into operation on 1 April 2000 and is payable by employers on a monthly basis.

Unemployment Insurance Fund contributions (UIF) is a compulsory contribution to fund unemployment benefits. The contributions deducted and payable by employers on a monthly basis have been collected by SARS since 1 April 2002 and are paid over to the UIF, which is managed by the UI Commissioner.

[1] (Act 58 of 1962)

## Registration

An employer must apply for registration with SARS within 14 days after he / she becomes an employer, unless none of the employees are liable for normal tax. Application to register as an employer must be made on an EMP 101 form.

Where an employer is liable to pay a skills development levy, the employer must register as an employer with SARS, and must indicate the jurisdiction of the SETA within which the employer must be classified. Although some employers are exempt from the payment of the levy, these employers are not absolved from registration.

Where an employer is liable to pay the UIF contribution, the employer must register with SARS or the UIF office (whichever is applicable to the employer) for the payment of the contributions.

## Determination of Employees' Tax

Employees' tax arises when there are three elements: an employer, an employee and remuneration. All three are defined in Paragraph 1 of the 4th Schedule of the Income Tax Act[2]. If any of these three elements are missing, there is no requirement to deduct employees' tax.

**Employer**

In most instances, the person making the payment is the employer. This is defined in Paragraph 1 (definitions to) the Fourth Schedule to the Act. A further specific inclusion that is relevant to the film and media industry is referred to as the representative employer. Part of the definition makes the appointment, or assumed appointment, of a South African representative employer when the deemed employer is foreign.

> *In the case of any employer who is not resident in the Republic, any agent of such employer having authority to pay remuneration;*

The term 'agent' or 'agency' is defined in the Income Tax Act, but only to the extent that it can be any corporate or incorporate type of entity or person. The term 'agent' originates from the Latin word *agree* or 'to do' and is defined in the Oxford English Dictionary as:

> A person who provides a particular service, typically liaising between two other parties

This would, therefore, include a South African production company that is assisting its foreign client to shoot commercials or films in South Africa; even if the payment of remuneration is being made directly between the foreign company and the South African (or foreign) crew, models or actors.

**Remuneration**

The definitions in the Fourth Schedule define 'remuneration' as any amount of income that is paid or payable to any person; whether in cash or otherwise, and whether or not in respect of services rendered. Examples of 'remuneration' are: salary, fee, bonus, wage, gratuity, pension, leave encashment, emolument, voluntary award, commission, annuity, stipend, remuneration for overtime, superannuation allowance, retirement allowance, lump sum payment, director's remuneration, etc.

[2] Income Tax Act, 1962 (Act 58 of 1962)

The definition of 'remuneration' also has various specific inclusions. There are often amounts of money paid to an employee that are seen as capital or as not being subject to employees' tax. Therefore, SARS have included these specifically into the definition. The most notable is Paragraph (c) of the definition of 'gross income'[3], which refers to any amount received by any person in respect of services rendered, or any amount received in respect of employment. This has been introduced to catch amounts that are linked to a person's employment but are not being taxed. This is discussed at greater length below, but this is the reason for a person's equipment to be included in the definition of remuneration, as it was received as a result of the employment relationship and, therefore, remuneration.

Paragraph (i) of the definition of 'gross income' refers to the cash equivalent of fringe benefits received from one's employer. The cash equivalent of fringe benefits is determined in the Seventh Schedule to the Act. The inclusion of fringe benefits in the definition of 'remuneration' requires that the employer must withhold employees' tax where fringe benefits are provided to employees. This aspect is detailed more completely further on.

A notable exclusion to the definition of 'remuneration' is:

- Amounts paid to common law independent contractors. This excludes amounts paid to independent contractors who are subject to the control or supervision of any person, as to the manner in which their duties are performed, or as to the hours of work, or if the amounts paid or payable to them are payable at regular daily, weekly, monthly or other intervals.

This means that if an independent contractor, who is not seen as an employee, receives remuneration, then the independent contractor will be deemed to be an employee in terms of the Fourth Schedule of the Act, and PAYE would need to be deducted. This is discussed at greater length under independent contractors vs. employees, but remuneration is the key determining factor.

**Employee**

Paragraph 1 of the 4th Schedule of the Act defines an employee as any natural person who receives any remuneration, or to whom any remuneration accrues. This includes directors of companies and members of close corporation. Therefore, an employee would generally be a natural person, but the

[3] Section 1 of the Income Tax Act, 1962 (Act 58 of 1962).

South African Revenue Services have specifically included personal service providers (trust, close corporation or company) and labour brokers, both of which are discussed at greater length below.

Remuneration is the key test of whether or not there is employees' tax. If one receives remuneration then one would be an employee.

## Calculation of Employees' Tax

**Tax Directives**

Once you have established that there is remuneration being paid, and such remuneration must be subject to employees' tax, the next test is whether or not that person has a valid tax directive. Paragraph 9(1) of the 4th Schedule prescribes that a tax directive (IRP 3) is issued by SARS to instruct the employer how to deduct employees' tax, and is generally issued as a fixed percentage.

Historically, SARS would only issue the directive to the employer that had to be specified on the directive application. As a freelancer, this often created complications, as several applications would need to be made each tax year creating a burdensome administrative nightmare.

In 2005, this nightmare ended with the introduction of an application, which SARS issued directly to the freelancer. They would then forward a copy, with their invoice or via their agent, to the production company. The application form is IRP3(pa), known as the 'Application for tax directive: Fixed percentage (freelance artist)'. A copy of this form is attached in a sample document under (*Sample Documents C*).

A tax directive is only valid for one tax year, and can generally be applied for six to eight weeks before the commencement of a tax year. An employer may not act upon a photocopied tax directive, and may not deviate from the percent instructed on the tax directive. This fixed rate percent must also be applied to all income and taxable fringe benefits.

The basic purpose of the tax directive is to either reduce or increase the amount of tax to be withheld. An increase in the tax rate is not very common, but is used when a person is generating two or more streams of remuneration, and wants to avoid having a large end of year tax liability. A reduction in the tax rate is far more common. The reason for wanting a reduction in the tax rate could be:

- The taxpayer has deductable costs that they have incurred to produce their commission or independent contractor income.
- The taxpayer is not working for a complete tax year.

A tax directive reduces the amount of employees' tax. Employees' tax is not a final tax, but a provision towards one's annual tax liability. An overpayment of PAYE would result in it being refunded; an underpayment of employees' tax would result in an income tax liability. Therefore, the risk with a tax directive is having a percent that is lower than ones annualized tax liability, causing the crew member or artist to become liable for the tax recovery.

The lowest rate that the tax directive can be applied for is 18%. All employees tax deducted must be allocated to PAYE and nothing to SITE.

**Standard Employment vs Non standard Employment**

Generally, an employee will be in standard employment. There have been a few examples of what standard employment is. They are:

- The employee is required to work for more than 22 hours per week.
- The employee is required to work for less than 22 hours a week, and the employee furnishes a written declaration that he / she will not render services to any other employer for the period that such employment is held.
- The employee works for at least five hours a day and receives less than R207 per day, such employee is deemed to be in standard employment.

Where an employee is required to work for less than 22 hours a week, and the employee furnishes a written declaration that he/she will not render services to any other employer for the period that such employment is held, such employment is regarded as 'standard employment'.

**Example 1**: A crew agency hires out employees to various production companies for short periods, and the relevant employees declare in writing that they have no other work; all will be deemed to be in standard employment.

Non standard employment (25% flat rate deduction) is more for the *ad hoc,* casual and once-off payments that are made. The duration of the employment period is the key test to whether or not a

- Workers not in standard employment employed on a daily basis who are physically paid daily.
- Casual commissions paid, such as spotter's fees.
- Casual payments to casual workers for irregular services rendered or occasional services.
- Fees paid to part-time lecturers.
- Honoraria paid to office bearers of organisations, clubs, etc.

The principal test in the film and media industry is the 22 hours a week, and whether or not there is a written declaration of other employment income in place. Currently, the industry sectors are operating within these two categories as follows:

- Standard employment – Film Crew
- Non-standard employment – Models, Talent and Extra's.

I would propose that film crew agencies possibly include a line in their invoice that states:

> *This crew member, as invoiced herein, declares that he/she does not render services to any other employer during the period employed with you and he/she should be regarded as being in standard employment.*

This would alleviate the complication of determination each time whether the crew member is in standard employment or non-standard employment. It would automatically make all crew in standard employment all the time.

The test on whether models, talent and extra's are in standard employment would then revert back to the duration of time spent employed or contracted with the production company. They could use the same wording as given above to force the situation where they are in standard employment or leave the determination based on time to the production company. This may cause some complication during the production companies payroll process, as variable rates of tax could be applied to the same model agency as a result of time spent.

**Example 2**: An extra is employed by a production company for a one-day shoot and is paid R400 through her agency. She would be in non-standard employment, as she has not given a written undertaking and works for less than 22 hours.

**Example 3**: Two models are employed from the same model agency and by the same production company. The proposed time for the shoot is two and a half days (or approximately 20 hours of work). The one works 20 hours and the other is asked to come back for another day due to weather complications. The one who worked the 20 hours would be in non-standard employment and taxed at 25%, whereas the other would be in standard employment and taxed according to tax tables as she worked more than the 22 hours.

Employees' tax is calculated based on the annually released income tax tables. We have included in this guide the tax tables for the past few years as an addendum. SARS release tax tables annually which can be obtained from www.sars.gov.za. The guidelines either have a weekly, fortnightly, monthly or annual table.

All income tax is worked out based on these annual tax tables. The annual tax tables can be broken down to daily, weekly or monthly computations. The following is the method by which to calculate, and some examples.

Below is a table of some examples and answers:

| | **YES** | **NO** |
|---|---|---|
| Is required to work for at least 22 hours per completed week | Is in standard employment and tax must be deducted according to the applicable tables | Is in non-standard employment and tax must be deducted at a rate of 25% |
| Declares that he/she has no other employment | Is in standard employment and tax must be deducted according to the applicable tables | Is in non-standard employment and tax must be deducted at a rate of 25% |
| Is ordinarily employed for less than 22 hours per week | Is in standard employment and tax must be deducted according to the applicable tables | Is in non-standard employment and tax must be deducted at a rate of 25% |
| Is employed for one day at less than R207 per day on an occasional basis (not more than 22 hours per week) | Is in non-standard employment and tax must be deducted at a rate of 25% | Is in standard employment and tax must be deducted according to the applicable tables |
| Is employed for one day at less than R207 per day on an occasional basis (not more than 22 hours per week), and declares that he/she has no other employment during that period | Is in non-standard employment and tax must be deducted at a rate of 25% | Is in standard employment and tax must be deducted according to the applicable tables |

## Monthly tax tables

Monthly employees' tax tables are used when an employee works for a complete month and is paid monthly. An incomplete month does not constitute a month, even if the person would ordinarily be paid monthly. This is the case if a person's contract of employment is terminated during the course of the month.

**Example**: A director or photographer working on a feature is paid at the completion of the project which takes three weeks. Would the monthly tax tables be used?

Answer – No, the requirement for monthly tax tables to be used is only if the person completes work for a full month. If they only worked for part of the month, then weekly or daily rates and methods must be used.

**Calculation example**: A full-time receptionist earns a monthly salary of R9 000. The tax calculation would be done as follows:

Monthly income (R9 000) x 12 month = R108 000 (annual equivalent)
Annual income (R108 000) x 18% = R19 440 (annual tax before rebate)
Annual tax (R19 440) – annual rebate (under 65) (R9 756) = R9 684 (annual tax)
Monthly tax = R9 684 / 12 months = R807

## Weekly tax tables

Weekly employees' tax tables are used when an employee works for a complete week and is paid weekly. A complete tax week is normally seven days. If it is normal practice to operate a business where staff have Saturday and Sunday off, then the period Monday to Friday is deemed a complete week.

**Example**: An extra is provided to a production company through an agency. The extra works for three days and the agency informs the production company that it is the only source of income for the extra and that he does not work for any other employer. The production company should use monthly tax tables or, at the worst, weekly tax tables, as it is fairer on the extra who would overpay tax otherwise. Would the monthly or weekly tax tables be used?

Answer – No, the requirement for weekly tax tables to be used is only if the person completes work for a full week. There is no regard paid to what that person does before or after the employment period with the production company, as the relationship ends on the last day of work. Taxation must be applied using the daily tax method.

**Calculation example**: A full time receptionist earns a weekly salary of R2 500. The tax calculation would be done as follows:

Weekly income (R2 500) x 52 weeks = R130 000 (annual equivalent).
Annual income (R130 000) x 18% = R 23 400 (annual tax before rebate)
Annual tax (R23 400) – annual rebate (under 65) (R9 756) = R 13 644 (annual tax)
Weekly tax = R 13 644 / 52 weeks = R 262.38

**Daily tax tables**

Daily tax tables are used when a person is employed for a short period of time and is in standard employment. SARS have not issued daily tax tables so one needs to work up to the weekly earnings equivalent and then compute the tax. The tax tables must be used without regard to the person's relationship before or after the contract of employment begins or ends.

**Calculation example** A chaperone earns a daily rate of R1 000 and works for three days. The total earnings for the three days is R3 000. The tax calculation would be done as follows:

Obtain the weekly equivalent = R3 000 / 3 days x 7 days = R7 000

Weekly income (R7 000) x 52 weeks = R 364 000 (annual equivalent).

Annual income (R 364 000) (R364 000 – R290 000) x 35% + R67 260 = R 93 160 (annual tax before rebate)

Annual tax (R 93 160) – annual rebate (under 65) (R9 756) = R 83 404 (annual tax)

Weekly tax = R 83 404 / 52 weeks = R 1 603.92

Daily equivalent = R1 603.92 / 7 days x 3 days = R 687.40

## SITE AND PAYE

Before we get too entangled in the concept of SITE, I must mention that in the February 2009 budget speech, Trevor Manual mentioned that consideration was being given to discontinuing the SITE system by 2010/11. However, this will be applicable for the 2010 tax season.

During the year, employees' tax is deducted from an employee. At the close of the financial year, employees' tax is split between SITE and PAYE. SITE is the portion of employees' tax that is applicable only on the annualised net remuneration (up to R60 000) which an employee earns. SITE is the abbreviation for Standard Income Tax on Employees. The determination of SITE is done at the end of the tax period and may represent only a portion of the employees' tax deducted during the year. The balance of employees' tax after excluding the SITE portion and including employees' tax on remuneration other than net remuneration represents PAYE. PAYE is the abbreviation for pay-as-you-earn.

SITE represents nothing more than payments towards an employee's normal tax liability and, in cases of employee's subject only to SITE, the tax actually deducted from their remuneration by their employers equates to their normal tax liability.

The SITE liability of an employee must be determined by the employer at the end of the employees' tax period, or at the end of the tax year. The employer is obliged to refund the excess deducted to the employee where the employees' tax required to be deducted at the end of a tax period consists solely of SITE, and the total amount of tax actually deducted exceeds such SITE required to be deducted. However, where the employees' tax required to be deducted does not consist solely of SITE, the excess deducted must be shown as PAYE on the IRP 5 / IT 3(a), and the employer is not permitted to refund the PAYE to the employee.

SARS may, at their discretion, rework the SITE on an IRP5 once the return has been submitted to SARS. This is often the case when the employee has things like income protection policies, retirement annuities or medical related costs that are deductable and not included as part of their salary package.

What is crucial to note is that SITE is not refundable by SARS and can only be refunded by the employee's employer. This is quite prevalent in the film and media industry, which has various independent contractors that may file expenditure claims with the South African Revenue Services, and, if there are errors with the split between SITE and PAYE, may request their employer or the

production company to either reissue the IRP5 or refund the PAYE; either way exposing the production company to risk of increased administration or liability.

There have been no guidelines on how to treat SITE and PAYE when it comes to independent contractors. The logical approach would be to have all employees' tax that is allocated to PAYE withheld to allow for the deductibility of business costs. Currently, the legislation does not support that logic, and there is no mention of how this treatment should be made. Commission is a similar type of income where the recipient may have deductable expenditure. I would advise people to follow the same principals on how to split SITE and PAYE as one would with commission income.

If an employee works for commission only and is in possession of a tax directive, the employer must deduct employees' tax according to the instructions on the tax directive. The employees' tax deducted must also be reflected as PAYE on the IRP 5 certificate. If the employee is not in possession of a tax directive, the employer must deduct employees' tax according to the applicable tax deduction tables. A SITE calculation must also be done at the end of the tax year or tax period.

If a person works for a period less than one year, the value of SITE must be proportionate to the time period worked. The same formula must be used to determine the SITE portion of the income, as would be used to calculate the employees' tax.

**Calculation example** A chaperone earns a daily rate of R1 000 and works for three days. Total earnings for the three days is R3 000. The chaperone has no tax directive and is seen to be in standard employment.

<u>The tax calculation of the employees' tax would be done as follows:</u>

Obtain the weekly equivalent = R3 000 / 3 days x 7 days = R7 000
Weekly income (R7 000) x 52 weeks = R 364 000 (annual equivalent).
Annual income (R 364 000) (R364 000 – R290 000) x 35% + R67 260 = R 93 160 (annual tax before rebate)
Annual tax (R 93 160) – annual rebate (under 65) (R9 756) = R 83 404 (annual tax)
Weekly tax = R 83 404 / 52 weeks = R 1 603.92
Daily equivalent = R1 603.92 / 7 days x 3 days
Total employees tax = R 687.40

<u>The tax calculation of the SITE portion of the employees' tax would be done as follows:</u>

The employees' tax on R60 000 would be:

R60 000 x 18% - R9 756 = R 1 044

If the person was employed for the full year, the first R1 044 of his employees' tax would be SITE. As there are no strict daily tables, one would first need to work out the weekly then the annual totals.

The number of days in a tax week is seven and the number of tax weeks in a year is 52. Therefore the total number of tax days is 364 (7 x 52). The person worked for three days out of the 364 days so the calculation would be made thus:

3 days / 364 days x R1 044 = R8.60

The first R8.60 of the chaperone's R687.40 employees' tax would be SITE, and the balance would be PAYE.

## EMPLOYEES VS INDEPENDENT CONTRACTOR

The concept of independent contractors and employees has been reworked and discussed at length over the past several years culminating in the release of, I believe, version 4 of the still draft guide on the employers' tax responsibilities, with regard to artists/models/crew in the film industry. A newer version circulated a few months ago and there is one available on the SARS website and the August 2008 version of the guide.

I am not going to go into too much detail on employees and independent contractors but I thought I should mention the more salient points in their determination.

There are two principle tests in determining whether a person is or is not an independent contractor, for both labour legislation and employees' tax legislation. The labour test is what is often referred to as the 'common law general rule', which has in its arsenal the dominant impression test. The test is a matrix of varying relevance indicators that are used and applied to a person to establish their independence from an employer. This test has its roots in labour court cases and not in the income tax regulations for reasons explained below. The common law rule is used to determine whether or not a person is or is not an independent contractor.

The tax legislation adopted what it viewed as the critical aspects of the dominant impression test; and referred to these critical aspects as the statutory rules. The statutory rule is not used to determine whether a person is or is not an independent contractor. Rather, they are used to determine whether a person is an employee in terms of the Fourth Schedule, for employees' tax purposes only.

Herein is the key confusion, as a person can be an independent contractor and an employee for employees' tax purposes.

I have included the dominant impression test under (Sample documents 2). The test sets out 20 of the more common indicators, which try to establish whether the production company is acquiring the productive capacity of a person, irrespective of whether there is work to be done, whereas, an independent contract commits himself only to deliver a product, or end result of his or her productive capacity[4]. None of the tests in the grid are conclusive and must all be read together and an overall evaluation performed. The salient point herein is that the employee is available regardless of whether

[4] *Liberty Life Association of Africa Ltd v. Niselow*, Nugent J (sitting as a judge of the Labour Appeal Court)

there is work or not. There is little or no regard paid to the result where an independent contractor is available for a specific task and the contract ends on its conclusion or fulfillment, and the contract is more about the end result.

The statutory rules are rules to determine whether the person (employee or independent contractor) is receiving remuneration (as defined above) and whether there is an employees' tax obligation on the employer. The test is a bit simpler than the dominant impression test grid, and revolves around two key tests, both of which must be applicable:

- The services are required to be performed mainly at the premises of the person by whom the remuneration is paid / payable or of the person to whom such services were or are to be rendered; and
- The person who renders or will render the service is subject to the control and supervision of any other person as to the manner in which his / her duties are performed, or to be performed, or as to his / her hours of work.

A key addition to the definition is "*of any other person*", which has only recently been introduced.

It is quite clear and accepted that the majority of the crew and talent are all common law independent contractors. It is also quite clear and accepted that the majority of the crew and talent possibly fail the statutory test and, therefore, employees as defined in the Fourth Schedule.

There is one rare exclusionary provision and that is if he / she throughout the year of assessment employs three or more employees (other than any employee who is a connected person in relation to such person) who are on a full-time basis and engage in the business of persons rendering any such service; this person would not have employees' tax deducted.

If a crew member or model are deemed to be common law independent contractors and employees' tax is deducted, an IRP5 should be issued and the income should be coded 3616. The 3616 code is given specifically to those people.

**Areas of risk**

The risk aspects of the above are more if no employees' tax is deducted and less on the coding (though there are risks). If a production company fails to deduct employees' tax from a person, and it was found by SARS that they should have, they can be held accountable and will have to pay that money over to SARS. This is a more obvious risk and it appears most employers in the film industry are taxing when in doubt rather than not.

There is a smaller risk and that revolves around the use of the incorrect code. The current guide issued on this topic by SARS is in draft format and has been for some time. If SARS about face on this guide, it could leave most production companies on the wrong side of the code. But I am of the opinion that the majority of the guide is accurate.

Neither of the above pose, I feel, significant risks to any production company that conducts their payroll operations with care; nor if adequate information is maintained to substantiate the decision process. In this case, there should be no major risk from independent contractor determination.

**Deductibility of expenses**

The test of an independent contractor came to a head with the introduction of the much despised Section 23(m). Up to about 2005, any person could deduct expenditure they incurred in the production of their income (with reference to various specific inclusions and exclusions), but simplistically provided it was not private expenditure. Section 23(m) was introduced and this removed the ability for an employee to deduct expenses they incurred to produce their income.

For several years, SARS was enforcing this requirement without fully understanding the legislation that they'd introduced. Section 23(m) makes reference to employees but there is no definition in the act as to what an employee is. The Fourth Schedule defines an employee but that is for employees' tax, which does not form part of the Income Tax Act. The result is that an independent contractor, who is independent in terms of the dominant impression test, is excluded from the catch net of section 23(m) regardless of whether he is an employee for employees' tax purposes.

Therefore, models and crew can, if they are independent contractors, deduct costs they incur to produce their income. These costs are now not limited to whether they are employees or not, but rather (as they should be) to their validity and to the extent that the costs have been incurred in their trade.

Some simple examples of deductible costs could be:

- Travel costs incurred by a model in Cape Town to fly to a shoot (at her expense) in Joburg
- Advertising costs in various publications
- Commission paid to one's agent, which has been paid to the agent after the deduction of employees' tax
- Communication and information technology costs

# ALLOWANCES AND FRINGE BENEFITS

This section deals with the various forms of payment that can be made to crew and talent; and the tax consequences thereto. Before we go into the specifics, there is often some concern over how this is calculated. I have been asked whether the restructuring to include a vehicle rental and reducing the day rate is an attempt to reduce or avoid employees' tax. This is similar to what is known as salary sacrifice schemes and SARS have made it clear that while salary sacrifice schemes do not have their blessing, they accept that it is entirely legal for an employer and an employee to enter into an agreement, in terms of which the employee's cash remuneration is adjusted for other benefits.

However, the basis on which SARS can legally attack salary sacrifice schemes is:

- Either in terms of section 103 of the Income Tax Act or;
- In terms of the so-called 'substance over form' principle which goes to the intention of the parties to the transaction (Seventh Schedule to the Act).

Section 103 - Tax Avoidance

Section 103 of the Income Tax Act imposes penalties for schemes which result in tax avoidance. On this basis, SARS can argue that the contributions made by the employer to, for example, box rental were part of the employees' gross income and hence employees' tax. In respect of such, contributions should have been deducted, withheld and paid by the employer in terms of the Fourth Schedule.

The 'substance over form' principle

Our courts have applied the 'substance over form' principle in a number of tax cases to determine the real intention of the parties to a scheme of tax avoidance.

SARS requirements for a salary sacrifice scheme

In terms of a notice by SARS, dated 14 July 1995, they advised that salary sacrifice arrangements should not be challenged by the various receiver's offices, provided their terms are duly reflected in an agreement, preferably a written one, between employer and employee.

According to the notice, SARS will take the following factors into account to determine whether a true salary sacrifice arrangement has been entered into:

i. Any change to the remuneration structure must be reflected by way of a change to the contract of service.

ii. The change to the contract of service must be preceded by extensive negotiations between the employer and the employee, and not merely by way of a notice by the employer to the employee.

iii. It is essential that either one or both of the parties of a salary sacrifice arrangement understand the arrangement.

The fundamentally important aspect, if there is such an arrangement, is that the arrangement is agreed to by both parties in writing. Such a structure will not be seen to purposefully evade tax or be outside of normal business practice and is, therefore, reasonable.

**Hiring of a car (Travel allowance)**

This treatment has been confirmed with the new guide (draft) released by SARS. There are affectively two ways to treat the rental of a motor vehicle; the determination is based on whether the person is an independent contractor or an employee.

Employee

Section 8(1)(*b*)(iv) of the Act requires that where an employee rents a vehicle to an employer, such rental would be deemed to be a travel allowance and taxed in accordance with the regulations relating to travel allowances. The current regulations are that 60% of the amount is included as remuneration and employees' tax is withheld, and the remaining 40% is not subject to employees' tax but included on the IRP5 and subject to income tax at the end of the year. The vehicle can either be owned by the employee indirectly through a connected person (family member) or in a legal entity that he has an interest.

The use of a lease agreement is not relevant as this section specifically deems the rental of a thing (vehicle) an allowance and taxable. This inclusionary provision has been in the Act for many years. I am uncertain if a production company had previously coded crew 3601 (employees) and if the company had failed to withhold employees' tax on vehicle rentals, whether they would attract a possible employees' tax liability if audited. The requirement is that it must be an employee.

Independent Contractor

The rental of a motor vehicle (lease agreement) is not deemed remuneration as it is not income received by an employee but income received for a thing. It is only included in remuneration by deeming provisions, section 8(1)(*b*)(iv) and possible paragraph c to the definition of 'gross income'. Both of these inclusionary provisions are dependent and use the word 'employee'.

Rental income paid to a common law independent contractor (who is carrying on an independent trade) has no inclusionary provision for it to be deemed remuneration and, therefore, it will not be subject to employees' tax. It will be included in his gross income with his annual tax submission and subject to income tax.

**Cell phone and telephone allowances**

Interpretation Note No.14 dated 27 March 2003 interpreting Section 8(1)(a) and 8(1)(c), allowances, advances and reimbursements defines an allowance as:

> *An allowance is typically an amount of money granted by an employer to an employee in circumstances where the employer is certain that the employee will incur business-related expenditure on behalf of the employer, but where the employee is not obliged to prove or account for the business expenditure to the employer. The amount of the allowance is based on the expected business-related expenditure.*

The definition of remuneration includes allowances. A cell phone "allowance" must be included in an employees' gross remuneration and taxed accordingly.

Interpretation Note No.14 dated 27 March 2003 interpreting Section 8(1)(a) and 8(1)(c), allowances, advances and reimbursements defines a reimbursement as:

> *A reimbursement of business expenditure generally occurs when an employee incurred business-related expenses on behalf of an employer out of his or her own pocket (i.e. without having had the benefit of an allowance or advance) and is subsequently reimbursed for his expenditure by the employer after having proved and accounted for the expenditure to the employer.*

Section 8(1)(a)(ii) of the Act excludes from table income reimbursements or advances for expenditure incurred or to be incurred on the instruction of the "principal" (or employer) if the recipient submitted proof and accounted for the expenditure to the principal. The expenditure must be for the furtherance of the principal's business and must be wholly or mainly used or expended for business purposes.

If the production company retains proof of the expenditure, and such expenses were wholly or mainly for the furtherance of the production companies business, and wholly or mainly business calls, and the person was required to expend such amounts, then the cell phone payment would be seen as a reimbursement of costs actually incurred by the crew member, and there would be no employees withholding obligation. If there is any doubt to the above, employees' tax would be withheld. Proof of cost does not necessitate a reimbursement.

**Hiring of equipment**

This treatment has been confirmed with the new guide (draft) released by SARS. There are affectively two ways to treat the rental of equipment; the determination is based on whether the person is an independent contractor or an employee.

Employee

The new draft guide issued by the SARS on tax within the film industry requires that employees' tax be withheld from a person who is seen or deemed to be an employee. We are uncertain as to why this has been done. We can only assume that it has been viewed in terms of Paragraph (c) of the definition of 'gross income'. This means that the amount paid to the person is linked to a person's employment and, therefore, deemed to be part of their remuneration and subject to employees' tax.

Independent Contractor

The rental of a motor vehicle (lease agreement) is not deemed remuneration, as it is not income received by an employee, but income received for a thing. It is only included in remuneration by deeming provisions possible by paragraph c to the definition of 'gross income', which refers to an employee.

Rental income paid to a common law independent contractor, who is carrying on an independent trade, has no inclusionary provision for it to be deemed remuneration and, therefore, it will not be subject to employees' tax. It will be included in his gross income with his annual tax submission and subject to income tax.

**Per Diems or Subsistence Allowances**

There is new legislation tabled that will introduce a variety of international subsistence allowances, which vary from country to country. This has been introduced as there is concern over the disparity in living costs in each country. The cost of living in Mozambique would probably be substantially lower than, say, Hong Kong, and the substance allowance rates will reflect this.

Where the allowance does not meet the requirements, it is deemed to be taxable subsistence allowance.

a) The allowance must be paid so that the employee can meet the expenses of accommodation, meals or incidental costs. Therefore, an allowance paid to compensate the person for inconvenience suffered is not excluded from remuneration and is subject to employees' tax.
b) The person must also be obliged to spend at least one night away from his usual place of residence. Therefore, if the employee sleeps at home at night, and is in receipt of an allowance for meals and incidental costs, that allowance is subject to employees' tax.

<u>Taxable and non-taxable subsistence</u>

Subsistence is not subject to employees' tax regardless of the amount paid to the employee. The code used by employers for 'non-taxable subsistence' (3705) refers to the situation where the employer pays more than the amounts prescribed by regulation.

Where the employer pays the same or less than the amounts prescribed in the regulation, the employee does not have to prove on assessment that he or she had actually incurred any expenses. The employee will get an automatic deduction against the allowance.

- Meals and incidental costs R240.00 per day
- Incidental costs only R73.50 per day
- Business travel outside South Africa: US$215.00 per day

Where the employer pays more than the stated amounts, the allowances must be reflected on the IRP5 certificates as 'taxable subsistence' (code 3704), but it is important to note that these amounts will still not be subject to employees' tax but will be subject to income tax if the employee cannot substantiate that he had incurred those costs.

**Schedule Overview Showing When Employees' Tax Is Deductable**

| | **Employees** | **Common Law Independent Contracts subject to control and supervision** | **Common Law Independent Contractors** |
|---|---|---|---|
| Day rates | ✓ | ✓ | X |
| Motor vehicle hire | ✓ | X | X |
| Cell phone | ✓ | ✓ | X |
| Computer rental | ✓ | X | X |
| Equipment | ✓ | X | X |
| Meals | X | X | X |
| *Per Diems* | X | X | X |

## WORKMEN'S COMPENSATION (COIDA)

At the outset of drafting this document I had a basic understanding of COIDA. On conclusion of this document, I think I still have a basic understanding of COIDA but now with several concerns. This is not an area that I specialize in so I am only giving my understanding of COIDA.

COIDA stands for compensation for occupational injuries and disease act, which is governed by the Compensation for Occupational Injuries and Diseases Act[5]. It replaced the old Workmen's Compensation Act[6].

COIDA provides for compensation for occupational injuries, or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases. All persons who employ one or more persons in connection with their business have an obligation to register with the commissioner and provide the commissioner details of employees, wages paid and time worked. The commissioner will then assess how much needs to be paid by the employer, and the employer will make an annual payment to the compensation fund.

COIDA defines an employee as – a person who has entered into, or works under, a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes--

i. A casual employee;
ii. A director or member of a body corporate;
iii. A person provided by a labour broker.

But does not include--

i. Persons performing military service;
ii. Members of the SANDF and SAPS;
iii. Domestic workers in a private household;
iv. Independent contractor engaging a subcontractor to perform the work.

[5] Compensation for Occupational Injuries and Diseases Act, 1993 (No. 130 of 1993)
[6] the Workmen's Compensation Act**,** 1941 (Act 30 of 1941)

This is quite critical as the act does not exclude independent contractors but only independent contractors that have employees. The reason for this is that it is assumed that an independent contractor who has employees would be registered with COIDA. Section 89 of COIDA takes it one step further:

a) If a person (the mandator or employer) in the course of, or for the purposes of his business, enters into an agreement with any other person (the contractor) for the execution by, or under, the supervision of the contractor of the whole, or any part of any work undertaken by the mandator, the contractor shall, in respect of his employees employed in the execution of the work concerned, register as an employer in accordance with the provisions of this Act and pay the necessary assessments.

b) If a contractor fails to register or pay any assessment, the said employees of the contractor shall be deemed to be the employees of the mandator, and the mandator shall pay the assessments in respect of those employees.

What the above means is that the production company must contribute to the workmen's compensation fund for all its employees, as well as independent contractors that it has employed on its productions. The production company must also ensure that subcontractors that it employs, which in turn have employees, are registered for workmen's compensation. If the subcontractor is not registered, all of those subcontractors employees are the responsibility of the production company, and the production company must contribute towards the fund on the subcontractor's behalf. The production company can recover this cost from the subcontractor.

## Skills Development Levy

Skills development levies are levied in terms of the Skills Development Levies Act[7]. Every employer must pay a skills development levy at a rate of 1% on the leviable amount. The leviable amount means the total remuneration paid, or payable, in terms of the definition of 'remuneration'. There are a few minor exclusions to this definition but in principal, if there is remuneration to either an employee or an independent contractor, there would be a skills development levy imposed.

## Unemployment Insurance Contributions (UIF)

UIF contributions are levied in terms of the Unemployment Insurance Contributions Act Development Levies Act[8]. This act requires all employers and employees to make UIF contributions. The determination of whether there is UIF is not a question of remuneration but a question of employee. In terms of section one of the UIF Act, **'**employee**'** means:

> *Any natural person who receives any remuneration or to whom any remuneration accrues in respect of services rendered or to be rendered by that person, but excludes an independent contractor.*

Employees, as defined above, specifically exclude independent contractors, and accordingly independent contractors will not be required to make UIF contributions, even though they are deemed not to be independent for employees' tax purposes.

[7] No. 9 of 1999

[8] No. 4 of 2002

## Labour Brokers

Included in the definition of an employee in the Fourth Schedule is a labour broker. A person who meets the requirements of a labour broker must apply for an exemption certificate, an IRP30A. If a person meets the definition of a labour broker, and is unable to provide the deemed employer with this certificate, they must have 33% (2008: 34%) employees' tax deducted from their invoice.

The requirements before an exemption certificate may be issued to a labour broker are:

- The labour broker must conduct an independent trade;
- The labour broker must be registered for employees' tax;
- The labour broker must register as a provisional tax payer; and
- The labour broker must have submitted all returns as required by the Income Tax Act, Employees Tax Act, Skills Development Levies Act and Value Added Tax Act.

The exemption certificate would not be provided for when:

- More than 80% of the gross income of the labour broker during the year of assessment consists of, or is likely to consist of, amounts received from any one client of the labour broker, or from an associated institution of the client, unless the person is a labour broker who throughout the year of assessment employs more than three full-time employees, who are on a full-time basis engaged in the business of the labour broker (i.e. of providing persons to or procuring persons for clients of the labour broker), who are not connected persons in relation to the labour broker;
- The labour broker provides to any of its clients the services of another labour broker; and
- The labour broker is contractually obliged to provide a specified employee of the labour broker to the client.

Section 66(1) of the Revenue Laws Amendment Act, No. 60 of 2008 introduced a limitation to the definition of a 'labour broker' to natural persons. This has had the effect that any close corporation, private company, or trust cannot be a labour broker, and cannot receive an IRP30A exemption certificate. Therefore, there is no withholding of employees' tax obligation on the employer.

This has limited the employers risk when it comes to determining whether or not employees' tax is to be deducted from an invoice being rendered by a trust, close corporation or private company. If an invoice is rendered from one of these forms of entities, the only test to be reviewed would be whether

they are a personal service provider or not and whether or not they are no longer a labour broker. The labour broker test is a rather complicated one and often extremely time consuming and onerous. This test must only now be undertaken for suspected individual natural persons who may be labour brokers. The key tests are drawn from the definition, which, in terms of the Income Tax Act, defines a labour broker as:

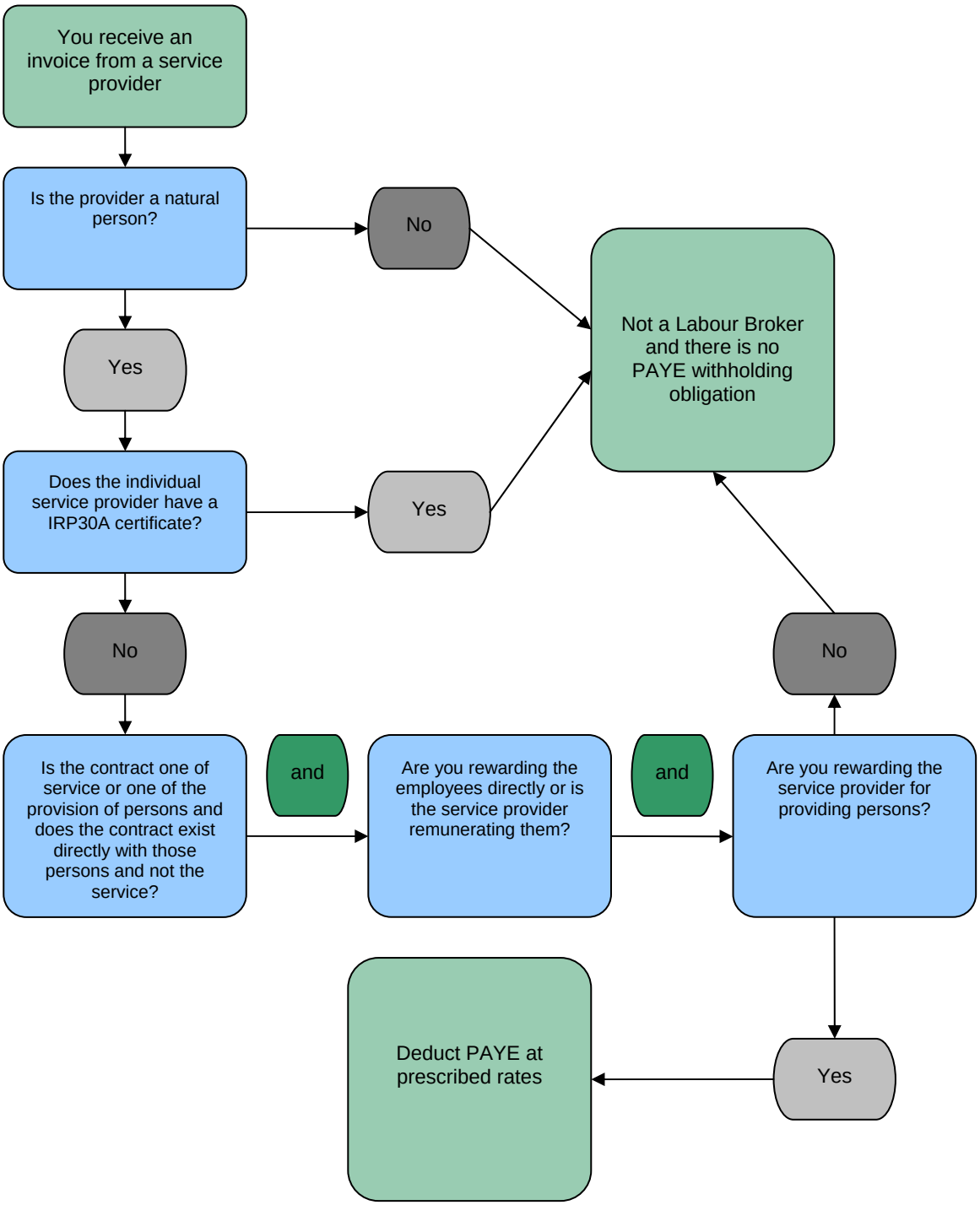
> *"….any person who conducts or carries on any business whereby such person for reward provides a client of such business with other persons to render a service or perform work for such client, or procures such other persons for the client, for which services or work such other persons are remunerated by such person."*

The key areas of the definition are:

- The person must provide clients with other persons to render a service or perform work for such clients. This means that the agreement between the client and a labour broker must be to provide persons, and not to render a service or to perform the work required by the client. In a labour broker arrangement, there are three parties involved: the client, a person providing persons (labour broker) and a person being provided to the client. The client will enter into an agreement with the labour broker to provide persons at an agreed fee. On the other hand, the labour broker will enter into an agreement (mostly an employment agreement) with a person to be provided to the client. There will, therefore, be no agreement between the client and the person being provided.
- The person providing other persons (labour broker) must be rewarded by the client, and the client must pay the labour broker for providing other persons (the client has an obligation (created by the contract to provide persons) to pay the labour broker a fee).
- The person providing other persons to the client must reward the other persons for their services or work performed to the client. The labour broker must pay remuneration and deduct employees' tax from amounts payable by the labour broker to the persons provided by the labour broker to the client. The payment made by the labour broker to other persons provided to the client of the labour broker by the labour broker is an obligation arising from the contract between the labour broker and the person being provided to the client (normally an employment contract as indicated above).

All the requirements for a person to be classified as a labour broker must be present before a person can be regarded as a labour broker. Where a person is classified as a labour broker, and such a person does not possess an IRP30 exemption certificate, the client must deduct employees' tax from the amounts payable to that person at the applicable rate.

The flow chart shows the system to follow in determining whether there is employees' tax to be deducted from a suspected labour broker.



VAT treatment of labour broker transactions

A registered Value Added Tax (VAT) vendor must charge VAT on its taxable supply. The risk of VAT is not on the recipient of the invoice but the issuer of the invoice. The recipient of the invoice can only claim the VAT (under various conditions) that is reflected on the invoice.

A labour broker would add VAT on the invoice total that was rendered as the contract existed between the labour broker and the client, and the income received by the labour broker would be its taxable supply. An individual who is a labour broker, with or without a valid IRP30A certificate, must therefore add VAT (if they are a registered VAT vendor) on the invoice total.

The VAT treatment of anyone else other than a labour broker (as defined) is largely dependent on the specific terms of the contract. A VAT vendor must charge VAT at prescribed rates on its taxable supply. In brief, a table supply is defined in the Value Added Tax[9] as:

> *Any supply of goods or services which is chargeable with tax under the provisions of section 7(1)(a), including tax chargeable at the rate of zero per cent under section 11.*

Supply is defined as:

> *Includes performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of "supply" shall be construed accordingly*.

If the contract exists between a close corporation and a production company to provide persons, and there is a direct contract between the production company and the underlying persons that are being provided. The close corporation would not be a labour broker as it is specifically excluded from the definition because it is not an individual and there is no direct contract of responsibility. Its supply would also not be persons, as there is no direct contract for the supply of those persons. Its contract would be that of agency, and it would only levy VAT on its agency fee and any booking fee or similar type charge. This may often be the case with a model agency.

[9] Act, 1991 (Act 89 of 1991)

If the contract exists between a close corporation and a production company to provide persons, and there is no contract between the production company and the underlying persons that are being provided. The close corporation would not be a labour broker as it is specifically excluded from the definition, as it is not an individual. The test is who is the deemed employer and who is at risk for employees tax. If the production company is the employer of the underlying people being provided by the close corporation agency, then VAT must be charged on only the agency fee and booking fee as described above. If the close corporation is the employer, then its supply would be those persons, and VAT should be levied on the total invoice value. This may often be confused if the close corporation deducts and pays over the PAYE to SARS and not the production company. This may be more common with an extra's agency.

## Personal Service Provider

A personal service provider is the reworked and spruced up old Personal Service Company and Personal Service Trust. The old definitions of these cast such a large net that often unintended complications arise out of its anti-avoidance provision. The definition of 'a personal service trust and company' was introduced as an anti-avoidance measure to curb the growing use of trusts and corporations to avoid employees' tax between employers and employees.

Recent amendments to the definition of 'personal service companies and trusts' have had their effective date of implementation being backdated to 1 January 2007; certain entities may no longer be personal service companies under the new rules. The definitions and rules around personal service companies have been relaxed, where previously there was a rigid requirement for corporations that may have met the definition to have a 33% employees' tax withholding obligation on their 'employer'. Personal service companies also do not qualify as small business corporations, which are entitled to lower tax rates and accelerated depreciation allowances.

There is currently a misconception in the market that if a person is registered for VAT there is no employees' tax as VAT denotes a business. This has also been extended to corporations that are registered for employees' tax saying that they are registered for employees' tax and, therefore, there should be no employees' tax withheld. Neither of these statements or requirements is true and neither of these forms part of the test of whether a corporation or trust meets the requirements of a personal service provider. Employees' tax can be withheld from a corporation (or individual) that is a VAT vendor.

A personal service company means any company where any services are rendered on behalf of that company to a client of such company by a connected person in relation to that company. A connected person includes the shareholder of a company, any member of a close corporation and family members, with a few further inclusions. In addition, <u>any one</u> of the following three conditions must apply:

- The person rendering the service would be regarded as an employee of the client if the service was rendered by that person directly to the client; or
- The person rendering the service is subject to the control and supervision of the client as to the manner in which the duties are performed in rendering such service, and must be mainly performed at the premises of the client; or

- More than 80% of the income of the company during the tax year from services rendered must consist of amounts received from any one client.

There is an exclusionary clause in that if the corporation, or company, employs three or more fulltime employees (other than any employee who is a shareholder or member of the company, or is a connected person in relation to a shareholder or member) to render the same service that the company is engaged in; they will not be a personal service company.

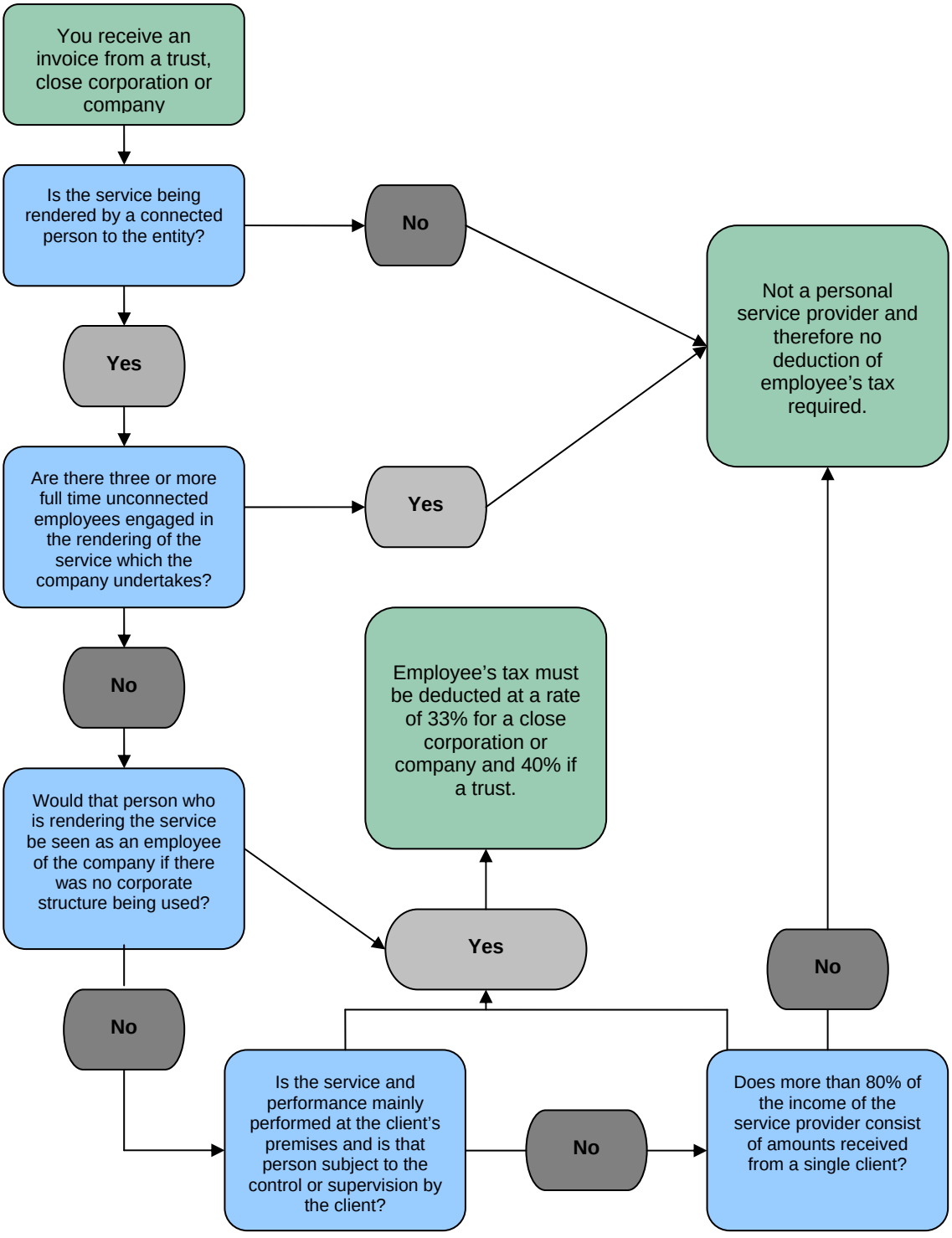
The above requirements are onerous on the person, or company, who engages with small business to perform tasks. This is especially prevalent in the media and film industry where often small business is being established and automatically falls fowl of the definition, as they are often a small business where the business owner is rendering the service personally and being controlled, or supervised, by a client. The person making payment for these various services is now faced with the requirement to test each and every third party supplier to ascertain if they are a personal service company and if there is an employees' tax withholding obligation on them.

The recent amendments to the definition are that the payment of fees at regular intervals to a company, and the control by the client of the hours of work, no longer result in that company being a personal service company, subject to the other requirements being met. In addition, any control or supervision by the client as to the manner of work is only relevant if the services are rendered mainly at the client's premises. Often small business base their fee structure on time spent and, therefore, it was often seen that their hours were being controlled by their clients.

The second important amendment is that if a company engages with small business, and those small businesses could be regarded as personal service companies based on the 80% of their income from one source, the company engaging such services could rely on an affidavit from the supplier that 80% of its income is not generated from one source, and if the client relies on such affidavit, it cannot be held liable for not withholding employees' tax on the payments to the supplier.

The above give some relief to *bone fide* small business. It was previously hoped that the affidavit approach would be taken on each test, but the above is a step in the right direction.

Below is a flow chart to follow when determining if, or when, there is a personal service company, or trust, and accordingly an employees' tax obligation.




The rental amount paid by the production company for a vehicle, or equipment, leased by a **'**personal service provider**'** to the production company, will be regarded as a rental income in the hands of the leaser (personal service provider). The rental amount received is not for services rendered, as required by the definition of 'personal service provider'. Accordingly, the rental amount received by the personal service provider will not be subjected to employees' tax. On assessment, the rental

amount received by, or accrued to, the personal service provider will be regarded as gross income, and will also be subjected to normal tax. Furthermore, the provisions of section 23(*k*) (limitation of expenses) will apply.

**Example 1**: An invoice is received from a stunt company, which is a close corporation. The owner of the company, Peter Smith, does the administration and sends the invoices, but does not personally take part in the stunt service. There is no fulltime staff and the stunts are conducted by subcontractors. Would employees' tax be deducted from the invoice?

Answer – The first test is as to whether there is a connected person rendering the service. Peter Smith is the owner but does not render the service of the provision of stunt services. As there is no connected person rendering the service, no further tests need be applied.

**Example 2**: ABC Productions (Pty) Ltd receives an invoice from a graphic design company, Clark Design CC, for the creation of a corporate logo and stationary. The design company is owned by two brothers, Tim and Tom Clark, and they are the only employees of the company and they do the design work from their studio. Would employees' tax be deducted from the invoice?

Answer – The first test is as to whether there is a connected person rendering the service. The only employees are connected people so the first answer would be yes; a connected person is rendering the service. The next test is whether there are three or more fulltime employees. There are not so they do not pass that test. Would they be seen as the employees of ABC Productions (Pty) Ltd if there was no close corporation in place? The answer is no, and, therefore, they would not be a personal service company.

The reason they would not be seen as the employees of ABC Productions (Pty) Ltd is that ABC Productions (Pty) Ltd did not acquire their production capacity, but rather the product that they were producing.

**Example 3**: Mr. Andy Williams, a key grip, forms a close corporation on the advice of his tax consultant. The corporation is called AW Gripping CC, and he and his wife are the only members.

His wife is a stay-at-home mom and, previously, a pharmacist. The corporation also employs a domestic worker, a garden boy and a trainee grip (on a part time basis). The corporation registers as a VAT vendor and for employees' tax. AW Gripping CC issues an invoice to ABC Productions (Pty) Ltd for work on a commercial Andy did at a rate of R2 000 per day for six days. The invoice is issued through his agent. Would employees' tax be deducted from the invoice?

Answer – The first test is as to whether there is a connected person rendering the service. Mr. Andy Williams is a connected person, as he is also part owner of AW Gripping CC, so the first answer would be yes; a connected person is rendering the service. The next test is whether there are three or more fulltime employees rendering the service. There are three employees but two are not rendering the service of gripping, and the other is not fulltime and only on a contract basis so they do not pass that test. The fact that the corporation is a registered VAT vendor has no bearing on the test. As to whether there should be employees' tax deducted and that it is registered for employees' tax also has no bearing on the test, both must be disregarded. Would he be seen as the employee of ABC Productions (Pty) Ltd if there was no close corporation in place, the answer is yes, as ABC Productions is acquiring his productive capacity over the duration of the shoot? AW Gripping CC would therefore be seen as a personal service provider, and employees' tax at a rate of 33% should be withheld from the invoice.

## USAGE – ROYALTIES

The current situation with usage is more of uncertainty and risk aversion than actual fact. The current stance is that usage is not a royalty, and, based on a letter issued from SARS on 22 August 2005 (attached under Sample Documents 4), is being treated as remuneration and employees' tax is being withheld.

From a few discussions we have had with SARS Pretoria, the above is still the current position SARS has on usage and they are still under the opinion that it is not a royalty. I disagree with usage being included as remuneration and being subjected to employees' tax. Under the current circumstances with the letter that has been issued, I agree that the process (albeit incorrect) should be followed and the employees' tax be deducted. I agree that the net step to follow would be to file a request for clarity on this with SARS and request they give you guidance, or recall the letter, but until such time as that happens, employees' tax should continue to be deducted.

This is probably one of the more technical topics discussed in this guideline and for this reason I feel it needs greater dissemination than the other topics previously discussed. I have tried to make it as comprehensive as possible to give substance to applications for clarity.

I have a draft request for guidance on this topic to try create some clarity. The complete application is available on request for comment before submission.

Below is my opinion and understanding of the topic of usage.

The current cause of the complication is that SARS, in the letter, views the payment to the artist/model as remuneration resulting from their performance and not a purchase of rights, or royalty, based on the use of rights. I am first going to explore existing principals and rebuild the topic on factual information.

The current letter that is being circulated (Sample Documents 4) quotes the following:

> *A 'usage fee' is typically defined in a contractual agreement as a payment to the performer/actor/model for the use of the performance. According to your letter, the 'usage fee'*

*is invoiced and fully paid for at the time of recording and is not based on the number of times that the recording is broadcast. Such a payment is included in the definition of 'remuneration'.*

There is, unfortunately, not much substance to debate the above. The statement though has placed reliance on a letter received ('*according to your letter*') to which we have no copy. It is a bit problematic as the above should have at least indicated some reference to the contract, or agreement, or a bit more substance but has instead placed reliance on a letter. The second uncertainty with the above is that there is no reason given for why it must be seen as remuneration. There is no factual findings referenced to any Act, and it appears to have skipped to a result without explanation. The third is that usage, from my understanding, is often not known upfront. Even if it is known upfront, it does not alter its form as a result of this knowledge. For example, an author may sell the rights to distribute his book before he starts writing the book. The nature of the payment does not become remuneration because he could quantify its value early and not wait until its completion.

The key thought process herein is to try, firstly, to identify what type of income the usage payment is, and, secondly, whether each of those types of income would be seen as remuneration and, therefore. subject to employees' tax.

**Is usage a royalty?**

It is important to note that there is no definition of a royalty in the Income Tax Act. This means that the term must have an acceptable meaning in another Act, or reference material, and SARS have applied that meaning when using it in the Income Tax Act. The OECD articles of the model convention in respect to taxes on income and capital, the foundation for most international double tax agreements, defines a royalty in Article 12 as:

*Payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patents, trademark, design or model, plan, secret formula or process, of for information concerning industrial, commercial or scientific experience.*

The OECD model is the global standard model for double tax agreements between countries. The term 'royalty' in most double tax agreements held within South Africa follow a similar, or exact, definition as stated in the OECD model.

A definition, and more detailed explanations of a royalty, is also detailed to in the Performers' Protection Act[10] and Copyright Act[11]. They both give similar definitions and more substance to the OECD definition, but I would like to keep more within the tax-based literature definitions.

A usage is defined in the International Performer's Agreement (IPA) as 'the fee paid to the performer for the use of the performance in the commercial for the specified usage period'. The usage payment is calculated with reference to the period of time, number or territories and variety of mediums. If the produced product is not used, or cancelled, there is generally no usage fee.

Payments for services rendered and work done are not royalties unless the services are ancillary to, or part and parcel of, enabling relevant information, know-how or copyright to be transferred or used. Whether the payment is a royalty payment or a payment for services depends on the nature and purpose of the arrangement giving rise to the payment. Only those payments which are for the use of, or the right to use, property or a right belonging to another person are 'royalties' within the definition.

Most commonly, it is the distinction between payments for services rendered and payments for the creation of a product (including images, film stock etc.) that causes concern. The general characteristics of usage are not dissimilar to know-how payments. Australian tax authorities have described them in a few cases[12] as follows:

a. Not property in the usual sense;
b. An asset, but not necessarily a capital asset; and
c. Something which can be disposed of for value.

Three important elements emerge which can be used as a basis for distinguishing between a contract for the supply of usage rights and one involving the rendering of services. These are that under a contract for the supply of usage rights:

i) A 'product' which has been created, or developed, or is already in existence is transferred;

[10] no. 11 of 1967

[11] NO. 98 OF 1978

[12] Moriarty v. Evans Medical Supplies Ltd (1957) 3 All ER 718, Rolls Royce v. Jeffrey (1962) 1 A11 ER 801 and J. Gadsden & Co Ltd v. Commr of I.R. (N.Z.) (1964) 14 ATD 18

ii) The product, which is the subject of the contract, is transferred for use by the buyer (i.e. it is supplied); and

iii) Except in the case of a disposition, where the seller divests himself completely of any further interest in the rights, the property in the product remains with the seller. All that is obtained by the buyer is the right to use the product. Subject to the terms of the contract, the seller retains the right to use the product himself and to transfer it to others.

By contrast, in a contract involving the performance of services:

i. The model undertakes to perform services which will result in the creation, development or the bringing into existence of a product, which may or may not result in a usage receipt;

ii. In the course of creating a product, the model would apply existing knowledge, skill and expertise. There is not a transfer (i.e. supply) of know-how from the model to the buyer, but a use by the model of her knowledge for her own purposes;

I have identified three areas that are all seen, or being classed as, 'usage', but there are distinct differences which may be part of the confusion SARS has with this topic.

**Usage** - The OECD model defines a 'royalty' as the consideration for the use of, or the right of use, of an image (for example), and most usage agreements are for the use of the image, and a matrix formula for the fee to be paid for that image. The payment is not being made as a result of the service (creation of the rights), but for the use of the rights, and it is, therefore, clearly a royalty, as it is a payment for use. This would not be included as part of the definition of 'remuneration' (in most instances) for more reasons detailed below.

***Buy out*** - A 'buy out' agreement is a payment being made for the sale, or cession, or transfer of rights from one person to another. 'A royalty payment' is a payment for the right to use an image but a 'buy out' is for the purchase of those rights to the image. A 'buy out' in an agreement would generally classify the income not as a royalty (the rights have been transferred), but Section One of the Act's definition to 'gross income' and, in rare occasions, 'capital income'. Neither of these would fall within the definition of 'remuneration' (in most instances) for more reasons detailed below.

**Featured artist** - A 'featured artist' is defined in the talent guidelines as generally someone who, on completion of the work, is recognised during the performance in some way. The person would

receive additional income because they have been 'featured', which is separate from additional usages that they may have received. The aspect of being 'featured' is linked not to any rights, or for the use of rights, but to the initial service rendered, and should, therefore, be included as remuneration and taxed accordingly.

**Is usage remuneration?**

Remuneration is defined in paragraph one of the Fourth Schedule as:

> 'Remuneration' means any amount of income which is paid, or is payable to, any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise, and whether or not in respect of services rendered, including--
>
> a) Any amount referred to in paragraph (a), (c), (cA),(d), (e), (eA) or (f) of the definition of 'gross income' in section one of this Act;
>
> b) Any amount required to be included in such person's gross income under paragraph (i) of that definition.

'Gross income' is defined in section one of the Act, paragraph (a), (c), (cA),(d), (e), (eA) or (f) to the definition of 'gross income' are, in summary – annuity income, personal service companies and labour brokers, loss of office payments and retirement lump sum benefits. Paragraph (c) is the important inclusionary paragraph.

> *c) Any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered or any amount (other than an amount referred to in section 8(1)) received or accrued in respect of or by virtue of any employment or the holding of any office: Provided that--*
>
> *i) The provisions of this paragraph shall not apply in respect of any benefit or advantage in respect of which the provisions of paragraph (i) apply;*
>
> *ii) Any amount received by or accrued to or for the benefit of any person in respect of services rendered or to be rendered by any other person shall for the purposes of this definition be deemed to have been received by or to have accrued to the said other person.*

Paragraph (c) of the definition of 'gross income' was introduced as an inclusionary provision to the definition of 'gross income'. An example of this was a voluntary award for loss of office (termination package), and it was often contended that it was not part of a person's remuneration and also capital in nature and, therefore, fell outside the definition of 'gross income'. Paragraph (c) was, therefore, introduced to catch amounts that were linked to a person's employment but not being taxed. If the payment of usage is a payment that meets the requirement of paragraph (c) of the definition, regardless of its nature it would be remuneration and subject to employees' tax.

An amount received in respect of services rendered is deemed to have been received by the person who rendered the service. What gives rise to the gross income is the rendering of the services, i.e. there must be a casual relationship between the services and the amount paid[13].

The definition can be broken down into three component parts:

- Any amount
- Received or accrued in respect of services rendered
- By virtue of any employment

Any amount

For the purposes of this section, all payments would constitute an amount.

Received or accrued in respect of services rendered

The meaning of 'in respect of' has been defined with more substance in a few local tax cases. It has been defined as:

- Requiring to have a direct relationship to the subject matter[14]; or
- Casual relationship[15]; or
- a direct relationship of cause and effect, or origin and product[16]".

[13] De Villiers v CIR 1929 AD, 4 SATC 86

[14] Commissioner for Inland *Revenue v Crown Mines Ltd* (1923 AD 121)

[15] ITC 1683 (62 SATC 406)

In the Stander's case[17] judgement, J. Friedman stated that:

> *….. the service rendered would have to have constituted the causa causans of the award. By causa causans is meant 'the provisional or actual or effective cause.'*

Usage is the payment for the use of or the acquisition of rights and not for the rendering of the service to produce the material. The artist would receive a usage payment for the use of his rights to a specific image. The effective and direct cause of the payment was the use of rights and not the relationship to the services rendered.

By virtue of employment

Models and artists in many instances are not employees but independent contractors. There is, in many instances, employees' tax but this is not as a consequence of employment but rather that they have received remuneration. They are common law independent contractors that, as a result of some form of control or supervision, receive remuneration.

The distinction must again be made between the Fourth Schedule and the body of the Income Tax Act. The Fourth Schedule is in the determination of employees' tax and the Income Tax Act deals with income tax. Gross Income as defined in section one of the Income Tax Act, when referencing to employment or employee in the body of the Income Tax Act, in the absence of a definition one must place reliance on the Labour regulations, or the Dominant impression test grid. If a person is an independent contractor, in terms of the dominant impression test grid, they will not be in an employment relationship or an employee.

Paragraph (c) is, therefore, not applicable to independent contractors. It is this same reasoning on why the rental of equipment from an employee is included as remuneration and from an independent contractor it is not.

[16] *Commissioner for Inland Revenue v Cowley* 23 SATC 276

[17] Stander v CIR 59 SATC 212

**Example 1** – A model is approached by her agency to have stock footage taken which would be used in a stock footage library. She is paid for the day and such amount is included in remuneration as it was for a service rendered. The product produced would be images that are placed effectively for sale. The income generated at a future date has little to no relationship with the originating service rendered, but as a result of one of sale of rights or 'rental' of rights and cannot be seen as accrued in respect of services rendered and is, therefore, excluded from the paragraph (c) of the definition of gross income and not taxed.

**Example 2** – A model does a two day shoot and receives remuneration for her service amounting to R10 000. The product that was produced is sent to the European Ad agency and they approach the model to use the images in a new perfume advertising catalogue. They negotiate a rate for the use of the images for a limited period of two years for an annual payment of R80 000.

Tax treatment – The payment received would be seen as a royalty as it is for the use of a product as defined in the OECD model. The amount received as the royalty was not as a result of the service rendered but as a result of the use of the image. The model is also an independent contractor and, therefore, the payment being received is gross income, as defined (subject to income tax), but not included as remuneration, as defined in the Fourth Schedule, and not subject to employees' tax.

**Conclusion**

In summation of the above, I would propose that the attached application (application A) be reviewed and comments sent through to me. If all parties are in agreement with the contents, the application is made for further guidance. Until such time as a ruling is issued or the current letter, albeit contrary to my above opinion, employees' tax should continue to be withheld on usage fees.

# AGENCY COMMISSION AND AGENCY FEE/ BOOKING FEES

The current concerns on the agency fees / booking fees / placement fees (agency fees) and agency commission are the tax treatments thereof, and what risks are associated with pursuing that treatment. The current concerns are the variety of ways in which the artist and model agents are rendering their invoices to the production companies, and the variety in the rates of these agency fees.

Generally, a film agency or agent who represents artists is not a labour broker. An agent, more specifically, a personnel placement agent, who introduces prospective employees to his client for a once-off fee, says The South African Revenue Services, is in fact conducting an independent trade distinctly different from that associated with a labour broker.

The principals are relatively easy. Agency fees are a charge to the production company for the agents work in sourcing the person, placing the person and facilitating the process of having the person on set for the production company. Agency commission is a charge to the artist / model / crew (artist) from the agent for services the agent renders to the artist.

## COMMISSION

The concept of commission is a bit simpler than that of an agency fee and, therefore, dealt with first. Commission is a charge that exists between the artist and his agent and is computed after the calculation of remuneration has been made. The value of the commission the artist is paying his agent does not need to be disclosed in any way to the production company. Commission is a contractual right that the agent has with his artists to withhold a percentage, or fixed rate, of their earnings on jobs that the artist does through their agent.

The treatment is clear. The amount of commission deducted must not be used in any way to alter the remuneration calculation of the artist, and VAT must be added to the commission. The production company cannot claim the VAT on the commission as that is charged to the artist.

The employee and employer relationship exists between the production company and the artist. The payment of remuneration is determined by the employer (Production Company). Agency commission

is a deduction between the agent and the artist and therefore not included in the computation of remuneration and not a deduction for employees tax purposes.

**Example**: Samantha Smile's is represented by XYZ Model Agency. XYZ Model Agency issues an invoice to ABC Productions (Pty) Ltd for Samantha Smiles and the invoice total is R10 000. It is accepted that Samantha Smile's is in nonstandard employment and taxed at 25%. The agency has an agreement with Samantha that she pays them 20% commission on the work that they source.

Treatment –The production company is liable as the employer to pay over the employees' tax. The remuneration that has accrued to Samantha is R10 000 and, therefore, the tax that is to be deducted is R10 000 x 25% = R2 500. ABC Productions (Pty) Ltd will pay R7 500 to XYZ Model Agency and the employees' tax to SARS. XYZ Model Agency would deduct their R2 000 (R10 000 x 20%) agency fee from her earnings and she would receive R5 500.

If in the above example, the production company paid the full invoice total to the agency, and requested the agency to do all the deductions on its behalf, it would still remain liable for any under deductions, but the basis for the calculation does not change. The agency cannot now include the commission as a deduction, as it is only facilitating the relationship that remains in existence between the production company and the artist. Commission cannot be used to reduce the artist's remuneration and, thereby, reducing the employees' tax liability.

## AGENCY FEE (BOOKING FEE)

The agency fee in isolation from commission is also relatively simple. The agency fee is a charge that exists between the agency and the production company, and does not form part of the artist's remuneration, which would be subject to employees' tax.

The treatment is clear. The amount of agency fee is excluded from remuneration, as the agency fee is a separate obligation that exists between the production company and the agent. The production company pays the agency fee to the agent free of deduction. The agency fee is the same as a placement fee levied by a placement agency.

**Example**: ABC Productions (Pty) Ltd requests Big Blue Crew Agents to provide them with a key grip for an upcoming commercial. Big Blue sends them Andrew Williams. His earnings come to R10 000 and Big Blue Crew Agents charges a booking fee of R500.

Treatment –The production company is liable as the employer to pay over the employees' tax on all remuneration. The remuneration exists between the production company and Andrew Williams and, therefore, employees' tax is deducted on the R10 000. The booking fee of R500 is paid to the agent and not included in the remuneration calculation of Andrew Williams.

## COMPLICATIONS

Agency commissions in isolation from agency fees are easily identifiable and agency fees in isolation from agency commission are likewise. Mix the two together, add creative accounting, alternative wording and complex invoices creates a minefield of complications.

The agency commission is a relationship between the agent and their artists; and this cannot be investigated too deeply as the production company may not have sight of the contract and has no rights to review the contract. The production company's obligation is determining remuneration and making the payment of the agency fee and a distinction must be established between these two. The starting point would be to review the contract.

The current contracts have the two items that are trying to be established as one amalgamated entry on the contract. The contract stipulates "remuneration (including booking fee)" which I found rather strange. It would be much simpler to rely on the contract as the basis for determining the split between agency fee and artist's remuneration, and I would strongly advise amending the contracts to reflect the split.

Next in line in the source document list is the invoice received from the agency. Reliance must now be placed on the agency invoices received. The agency invoice must clearly show remuneration to artist and agency fees on two separate line items. VAT should only be charged on the agency fee and not on the artist's remuneration. If there is any sort of amalgamation of agency fee and

remuneration on the invoice, one should probably, to be cautious, withhold employees' tax on the combined total of the two.

There are also some concerns over the size of the agency fee, and often people assume that this could be done as a way of reducing the artist's remuneration, and thus saving the artist money. One must bear in mind that the fluctuation in rates of commission and agency fees has no net effect on the taxable income (as apposed to remuneration) of any of the parties. The risk only lies with the determination of remuneration and whether to include a component of the agency fee or not. This illustration is shown in the below example.

**Example 1**: A model agency issues an invoice on behalf of one of its models. The value of the invoice is R10 000 and the agency charges a booking fee of R2 000 on top and a commission at a rate of 20% (or R2 000).

Answer – The models remuneration would be the R10 000 that was subject to employees' tax and the model could claim back the commission she paid her agent with the submission of her annual income tax return. Her taxable income would, therefore, be the R10 000 remuneration received less the R2 000 agency commission. Taxable income is therefore R8 000

**Example 2**: A model agency issues an invoice on behalf of one of its models. The value of the invoice is R8 000 and the agency charges a booking fee of R4 000 on top and a commission at a rate of 0% (or R 0).

Answer – The models taxable income would be the R8 000 gross income that was subject to employees' tax.

Both of the above result in the same overall tax recovery that SARS has, but there remains the risk on the employer as their obligation is to withhold employees' tax on the remuneration due to the artist, and there is no regard to circumstances that happen further down the line, or on an annual basis.

One must also be weary of the substance of a contract over its form. Agency fees and agency commission cannot be amalgamate as this is the avoidance of employees' tax and if it has been amalgamated may not pass the substance over form testing and be in contravention of the anti-avoidance measures in place. The anti-avoidance measures are defined in section 80A as:

> *An avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and—*
>
> *a) In the context of business—*
>
> *i) It was entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit; or*
>
> *ii) It lacks commercial substance, in whole or in part, taking into account the provisions of section 80C.*

The consequences to the parties involved, knowing or unknowingly are detailed in section 80B.

> *1) The Commissioner may determine the tax consequences under this Act of any impermissible avoidance arrangement for any party by—*
>
> *a) Or re-characterising any steps in or parts of the impermissible avoidance arrangement;*
>
> *b) Disregarding any accommodating or tax-indifferent party or treating any accommodating or tax-indifferent party and any other party as one and the same person;*
>
> *c) Deeming persons who are connected persons in relation to each other to be one and the same person for purposes of determining the tax treatment of any amount;*
>
> *d) Reallocating any gross income, receipt or accrual of a capital nature, expenditure or rebate amongst the parties;*
>
> *e) Re-characterising any gross income, receipt or accrual of a capital nature or expenditure; or*
>
> *f) Treating the impermissible avoidance arrangement as if it had not been entered into or carried out, or in such other manner as in the circumstances of the case the Commissioner deems appropriate for the prevention or diminution of the relevant tax benefit.*

Prudence dictates that one must look at the substance of the relationship over and above the form of the contract. If there appears that the booking fee has been inflated with the purpose of reducing any tax (in this case employees' tax on the artist), then the employer at his discretion should include that component of the booking fee as remuneration in the hands of the artist.

The key question is what is reasonable and what is not. This is a difficult thing to determine and especially for me to recommend. Based on the current industry and the various invoices and structures I have been privy to, I would recommend adopting a ceiling approach with the following areas:

| | |
|---|---|
| Model agents | 30% |
| Crew agents | 15% |
| Extra's agents | 30% |
| Artist/actor agencies | 20% |

The above rate should be the percent of the artist's remuneration and agency fee combined (invoice total).

**Example 1** – A model company issues an invoice on behalf of a model with her earnings being R10 000 and the agency fee being R2 000. The agency fee is therefore R2 000 / R12 000 (total combined) or 16.67%. This seems to be reasonable and in line with standard business practice, employees' tax would only be deducted from the remuneration (R10 000).

**Example 2** – A model agency issues an invoice on behalf of a model with her earnings being R3 000 and the agency fee being R3 000. The agency fee is therefore R3 000 / R6 000 (total combined) or 50%. This appears to be excessive and inclusive of commission that should be a charge to the extra and not included in agency fees. A portion of the booking fees should probably be included in the artist's remuneration and subject to employee's tax.`

# PROPOSED NEW IRP5 REQUIREMENTS

The current drive with SARS is to modernise the tax system through the use of eFiling and e@syFile. The focus has been on accurate, timely submissions, reducing non-compliance and errors in the submission process. This has reduced cost burdens on SARS as the taxpayer.

The focus in 2008 shifted on the employers as SARS was now reliant on their submissions of accurate IRP5 information to prepare the income tax returns for the individuals. This process was strengthened in the 2009 submission with the introduction of hefty penalties for late submission. SARS have issued thousands of penalty letters to non-compliant employers.

**Proposed amendments - 2010 filing season**

The proposed amendments and new requirements for the 2010 filing season (March 2009 to February 2010) have been issued and are available on the SARS website for detailed scrutiny. The new proposed amendments are:

- Certain information will become mandatory on the files that employers submit to SARS. This was introduced from a policy perspective in 2009, but it will be enforced from a system validation perspective in 2010.
- Enhancing the employees' tax certificate [IRP5/IT3(a)] to include significantly more data – the complete break down of mandatory and optional information is as follows:

| | Mandatory | Optional |
|---|---|---|
| Certificate number | ✓ | |
| Type of certificate | ✓ | |
| Nature of person | ✓ | |
| Year of assessment | ✓ | |
| Employee surname | ✓ | |
| First two names | ✓ | |
| Initials | ✓ | |
| ID Number | ✓ | |
| Passport number | ✓ | |
| Country of issue | ✓ | |
| Date of birth | ✓ | |

| | | |
|---|---|---|
| Income tax reference number (*) | ✓ | |
| Contact e-mail | | ✓ |
| Home telephone number | | ✓ |
| Business telephone number (*) | ✓ | |
| Fax number | | ✓ |
| Cell number | | ✓ |
| Business address (*)<br>- All details including postal code and city | ✓ | |
| Home address<br>- All details including postal code and city | ✓ | |
| Employee number | ✓ | |
| Date employed from | ✓ | |
| Date employed to | ✓ | |
| Pay periods in year of assessment | ✓ | |
| Pay periods worked | ✓ | |
| Directive number | ✓ | |
| Employee bank account details (*)<br>- Bank<br>- Branch<br>- Account number<br>- Branch code | ✓ | |

The new and important mandatory items have been marked with a (*) above. Unfortunately we are almost half way through the tax year and the above information should have been gathered and retained from March 2009 which may create some complications. SARS have also proposed a penalty for non-compliance. Currently employers are faced with the following penalties (excluding interest)

- 10% penalty for late submission or late payment of employees' tax (form EMP201)
- 10% of annual employees' tax for late submission or non submission or IRP5's
- Up to 200% penalty for non compliance or misrepresentations on EMP201 return submissions

There is no written information on the new proposed penalties that are to be introduced for non-compliance. In January 2009, SARS gazetted their new administrative penalties, which dealt with IRP5's, and introduced a penalty based on the employer's net profit for various non-compliance acts. Recently there was information circulated, not from SARS, but through a VIP payroll course that the proposed penalty for the exclusion of any mandatory fields above would be a penalty of R200 per mandatory field per IRP5. To give some value to this penalty that may come into operation, a production company has 200 independent contractors working throughout the year and forgets their

income tax number and bank details from their IRP5's. The penalty could be R200 x 200 x 2 omissions = R80 000. There is nothing concrete yet, and this is not yet in force, but gather the required information to be compliant.

**Proposed amendments - 2011 filing season**

In 2011, another key change proposed is for payroll systems to produce XML files of employees' tax certificates, rather than CSV files. These can be submitted directly to SARS and need not be put on a disc – as with CSV files – as XML is the format that SARS uses. It is also the format that SARS intend to use to eventually administer the social security system.

Another key change for 2011 is that employers will be required to submit their reconciliations bi-annually and not once a year. This is also part of our preparation for administering the social security system.

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# SARS CONTACT DETAILS

**National Call Centre numbers:**

(086) 012 1218
(080) 000 7277
(011) 602 2093

| Query Type | Telephone | Fax | e-mail |
|---|---|---|---|
| Income Tax | 0800 00 7277 | 031 328 6011<br>021 413 8901 | it.cc@sars.gov.za<br>it.wc@sars.gov.za |
| Value Added Tax (VAT) | 0800 00 7277 | 021 413 8902 | vat.wc@sars.gov.za |
| Pay As You Earn (PAYE) | 0800 00 7277 | 031 328 6013 | paye.cc@sars.gov.za |
| Tax Clearance Certificates | 0800 00 7277 | 031 328 6048<br>021 413 8928 | tcc.kzn@sars.gov.za<br>tcc.wc@sars.gov.za |
| Customs: General | 0800 00 7277 | 031 328 6017<br>021 413 8909 | customs.qry.cc@sars.gov.za |
| Tax Practitioners | 0860 12 12 19 | 011 602 5049 | pcc@sars.gov.za |

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| Ceniel Bosch<br>**Auditor**<br>Telephone: (011) 602 2963<br>Fax No.: 086 610 2151<br>Email: cbosch@sars.gov.za | Kenneth Kwape<br>**Auditor**<br>Telephone: (011) 602 3020<br>Fax No.: 086 610 2191<br>Email: kkwape@sars.gov.za | Dinah Morobane<br>**Auditor**<br>Telephone: (011) 602 2968<br>Fax No.: 086 610 2192<br>Email: dmorobane@sars.gov.za |

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| Office | Contact | Fax | Physical address |
|---|---|---|---|
| **Paarl Revenue** | 021 872 2181 | 021 872 7063 | 19/20 Market Street<br>Paarl<br>7646 |
| **Cape Town Revenue** | 021 417 1400 | 021 413 8900 | 17 Lower Long Street<br>Cape Town<br>8076 |
| **Bellville Revenue** | 0860 12 12 18 | (021) 943 8110 | Teddington Street<br>Bellville<br>7530 |

# USEFUL INFORMATION

### South African Income Tax Rates from 2004 to 2010 Individuals – Rates

| 2003/2004 | |
|---|---|
| 0 - 70 000 | 18% |
| 70 001 - 110 000 | R12 600 + 25% of the amount above R70 000 |
| 110 001 - 140 000 | R22 600 + 30% of the amount above R110 000 |
| 140 001 - 180 000 | R31 600 + 35% of the amount above R140 000 |
| 180 001 - 255 000 | R45 600 + 38 % of the amount above R180 000 |
| 255 001 and above | R74 100 + 40% of the amount above R255 000 |
| Primary rebate (R5 400) secondary rebate (R3 100) | |

| 2004/2005 | |
|---|---|
| 0 - 74 000 | 18% |
| 74 001 - 115 000 | R13 320 + 25% of the amount above R74 000 |
| 115 001 - 155 000 | R23 570 + 30% of the amount above R115 000 |
| 155 001 - 195 000 | R35 570 + 35% of the amount above R155 000 |
| 195 001 - 270 000 | R49 570 + 38 % of the amount above R195 000 |
| 270 001 and above | R78 070 + 40% of the amount above R270 000 |
| Primary rebate (R5 800) secondary rebate (R3 200) | |

| 2006/2007 | |
|---|---|
| 0 - 100 000 | 18% |
| 100 001 - 160 000 | R18 000 + 25% of amount above R100 000 |
| 160 001 - 220 000 | R33 000 + 30% of amount above R160 000 |
| 220 001 - 300 000 | R51 000 + 35% of amount above R220 000 |
| 300 001 - 400 000 | R79 000 + 38% of amount above R300 000 |
| 400 001 and above | R117 000 + 40% of amount above R400 000 |
| Primary rebate (R7 200) secondary rebate (R4 500) | |

| 2007/2008 | |
|---|---|
| 0 - 112 500 | 18% |
| 112 501 - 180 000 | R20 250 + 25% of amount above R112 500 |
| 180 001 - 250 000 | R37 125 + 30% of amount above R180 000 |
| 250 001 - 350 000 | R58 125 + 35% of amount above R250 000 |
| 350 001 - 450 000 | R93 125 + 38% of amount above R350 000 |
| 450 001 and above | R131 125 + 40% of amount above R450 000 |
| Primary rebate (R7 740) secondary rebate (R4 680) | |

| 2008/2009 | |
|---|---|
| 0 - 122 000 | 18% |
| 122 001 - 195 000 | R21 960 + 25% of the amount above R122 000 |
| 195 001 - 270 000 | R40 210 + 30% of the amount above R195 000 |
| 270 001 - 380 000 | R62 710 + 35% of the amount above R270 000 |
| 380 001 - 490 000 | R101 210 + 38% of the amount above R380 000 |
| 490 001 and above | R143 010 + 40% of the amount above R490 000 |
| Primary rebate (R8 280) secondary rebate (R5 040) | |

| 2009/2010 | |
|---|---|
| 0 - 132 000 | 18% |
| 132 001 - 210 000 | R23 760 + 25% of the amount above R132 000 |
| 210 001 - 290 000 | R43 260 + 30% of the amount above R210 000 |
| 290 001 - 410 000 | R67 260 + 35% of the amount above R290 000 |
| 410 001 - 525 000 | R109 260 + 38 % of the amount above R410 000 |
| 525 001 and above | R152 960 + 40% of the amount above R525 000 |
| Primary rebate (R9 756) secondary rebate (R5 400) | |

## PERSONAL SERVICE COMPANY WARRANTY

### SERVICES RENDERED BY A COMPANY, CLOSE CORPORATION OR TRUST

The Income Tax Act defines a "personal service provider" as any company or trust, which is not a labour broker, and where:

1. Any service rendered on behalf of such company or trust to _____ is rendered personally by any person who is a connected person in relation to such company or trust.

2. A connected person in relation to a company will generally mean any person who individually or jointly with other connected persons in relation to himself holds, directly or indirectly, at least 20 per cent of the company's equity share capital or voting rights. Where the company is a close corporation, a connected person will include any member of the close corporation or any relative of such member. In relation to a trust, a connected person includes any beneficiary of such trust or any connected person in relation to such beneficiary.

3. In addition to point 1 above, any of the following must also be met:
   - The person rendering the service would be regarded as an employee of _____ had the service not been rendered through such company or trust; or
   - The person rendering the service is subject to the supervision and control of _____ as to the manner in which or hours during which the duties are performed; or
   - More than 80 per cent on the income of such company or trust during the year of assessment, from services rendered, consists of or is likely to consist of amounts received from any one client of such company or trust.

4. Even where the condition in point 1 and any one of the conditions in point 3 are met, a company or trust will not fall within the respective definitions where, through the year of assessment, it employs more than three full-time employees who are on a full-time basis engaged in the business of such company or trust in rendering such service to _____. Any person who is a shareholder or member of the company or otherwise a connected person in relation to such company or trust will not count as an employee for purposes of this section.

Any payment that _____ makes to a "personal service provider" is subject to an employees' tax withholding obligation as imposed by the Fourth Schedule to the Income Tax Act. Therefore, it is imperative that you confirm your status by signature of the below declaration and based on information that is only known to the contracting party.

I hereby declare that I am / am not (delete as appropriate) a "personal service provider" as defined in the Fourth Schedule to the Income Tax Act (as amended).

…… ……..

Duly Signed on behalf of the company or trust Witness

……

Date

# COMMON LAW DOMINANT IMPRESSION TEST GRID (page 1 of 2)

| | INDICATOR | SUGGESTS EMPLOYEE STATUS | | SUGGESTS INDEPENDENT CONTRACTOR STATUS | |
|---|---|---|---|---|---|
| | | Requirement | Yes | Requirement | Yes |
| **NEAR CONCLUSIVE** Control manner/Exclusive Acquisition. | Control of Manner of working | Employer instructs (has right to) which tools/equipment, or staff, or raw materials, or routines, patents, technology | | Person chooses which tools / equipment, or staff, or raw materials, or routines, patents, technology | |
| | Payment Regime | Payment at regular intervals/by a rate x time period, but regardless of output or result. | | Payment by a rate x time-period but with reference to results, or payment by output or "results in a time period". | |
| | Person who must render the service | Person obliged to render service personally, hires & fires only with approval | | Person, as employer, can delegate to, hire & fire own employees, or can subcontract | |
| | Nature of obligation to work | Person obliged to be present, even if there is no work to be done | | Person only present and performing work if actually required, and chooses to | |
| | Employer (client) base | Person bound to an exclusive relationship with one employer (Particularly for independent business test) | | Person free to build a multiple concurrent client base (esp. if tries to build client base - advertises etc) | |
| | Risk/Profit & Loss | Employer bears risk (pays despite poor performance/slow markets) (particularly for independent business test) | | Person bears risk (bad workmanship, price hikes, time over-runs) | |
| | | | | | |
| **PERSUASIVE** Extent of Control. | Instructions/Supervision | Employer instructs on location, what work, sequence of work, etc. or has the right to do so | | Person determines own work, sequence of work, etc. Bound by contract terms, not orders as to what work, where, etc | |
| | Reports | Control through oral/written reports regardless of output or result. | | Person not obliged to make reports payment by output or "results". | |
| | Training | Employer controls by training the person in the employer's methods | | Worker uses/trains in own methods | |
| | Productive time (Work hours, work week) | Controlled or set by employer/Person works full time or substantially so | | At person's discretion | |
| | | | | | |

## COMMON LAW DOMINANT IMPRESSION TEST GRID (page 2 of 2)

**RELEVANT** Labels, clauses, compliance, economic circumstances, "resonant" of

| INDICATOR | SUGGESTS EMPLOYEE STATUS | | SUGGESTS INDEPENDENT CONTRACTOR STATUS | |
|---|---|---|---|---|
| | Requirement | Yes | Requirement | Yes |
| Tools, materials, stationery, etc | Provided by employer, no contractual requirement that Person provides | | Contractually/necessarily provided by Person | |
| Office/ Workshop, Admin/ secretarial, etc | Provided by employer, no contractual requirement that Person provides | | Contractually/necessarily provided by Person | |
| Integration/Usual premises | Employer's usual business premises | | Person's own/leased premises | |
| Integration/Usual business operations | Person's service critical/integral part of employer's operations | | Person's services are incidental to the employer's operations or success | |
| Integration/Hierarchy & Organogram | Person has a job designation, a position in the employer's hierarchy | | Person designated by Profession or Trade, no position in the hierarchy | |
| Duration of Relationship | Open ended/fixed term & renewable, ends on death of worker | | Limited with regard to result, binds business despite worker's death | |
| Threat of termination/ Breach of contract | Employer may dismiss on notice (LRA equity aside), worker may resign at will (BCEA aside) | | Employer in breach if it terminates prematurely. Person in breach if fails to deliver product/service | |
| Significant Investment | Employer finances premises, tools, raw materials, training, etc | | Person finances premises, tools, raw materials, training, etc | |
| Employee Benefits | Especially if designed to reward loyalty | | Person not eligible for benefits | |
| *Bona fide* expenses or statutory compliance | No business expenses, travel expenses and/or reimbursed by employer. Registered with trade/professional Association | | Over-heads built into contract prices.<br>Registered under Tax/Labour Statutes & with trade/professional Association | |
| Viability on Termination | Obliged to approach an Employment agency of labour broker to obtain new work (particularly for independent business test). | | Has other clients, continues trading. Was a labour broker or independent contractor prior to this contract | |
| Industry Norms, Customs | Militate against independent viability Make it likely Person is an employee | | Will promote independent viability<br>Make it likely Person is an independent contractor or labour broker | |
| | | | | |

INCOME TAX
INKOMSTEBELASTING

**IRP3(pa)**

# Application for tax directive: Fixed percentage
**(Freelance artist)**

# Aansoek om belasting aanwysing: Vaste persentasie
**(Vryskut kunstenaar)**

**Income Tax reference number**
**Inkomstebelastingverwysingsnommer**

This application must be completed in capital letters
Hierdie aansoek moet in hoofletters voltooi word

**Year of assessment ended on**
**Jaar van aanslag geëindig op**
CE CE YJ YJ – MM – DD

**For official use - Application number**
**Vir kantoor gebruik - Aansoeknommer**

**Taxpayer current details**
**Belastingpligtige se huidige besonderhede**

Surname
Van

Initial(s)
Voorletter(s)

First name(s)
Voorname

Date of birth
Geboortedatum CE CE YJ YJ – MM – DD

Identity number
Identiteitsnommer

Residential address
Woonadres

Postal code
Poskode

Postal address
Posadres

Postal code
Poskode

**Additional details of application**
**Addisionele besonderhede van aansoek**

Was a fixed percentage directive issued to you for the previous year of assessment?
Was 'n aanwysing teen 'n vasgestelde persentasie in die vorige jaar van aanslag aan u uitgereik? YES JA / NO NEE

Fixed percentage deduction now applied for. (Furnish your summarised calculations in the space provided on the application form and attached a detail income and expenditure statement)*
Vasgestelde persentasie aftrekking waarvoor u nou aansoek doen. (Voorsien u basiese berekeninge in die spasie voorsien op die aansoekvorm en heg 'n gedetaileerde inkomste- en uitgawestaat aan)* %

**Calculation**
**Berekeninge**

This must be based on the particulars of your latest year of assessment. The necessary adjustment must be made to take into account any possible increase in income.
Dit moet gebasseer word op die laaste jaar van aanslag se besonderhede. Voorsiening moet gemaak word vir die moontlike verhoging van inkomste.

| | |
|---|---|
| Estimated Gross income for year applied for*<br>Geskatte Bruto inkomste vir die jaar waarvoor aansoek gedoen word* | R , |
| Less: Estimate admissible expenditure<br>Min: Geskatte toelaatbare uitgawes | R , |
| Estimated taxable income<br>Geskatte belasbare inkomste | R , |

Fixed percentage directives will be issued for a maximum period of 12 months (limited to a tax year) and must be renewed thereafter.
Vastekoers persentasie aanwysings word uitgereik vir 'n maksimum tydperk van 12 maande (beperk tot 'n belastingjaar) en moet daarna hernu word.

**Declaration**
**Verklaring**

I hereby certify that the information furnished above is true and correct.
Hiermee verklaar ek dat die bogenoemde besonderhede die korrekte en ware gegewens weergee.

Signature of applicant/Handtekening van aansoeker

CE CE YJ YJ – MM – DD
Date/Datum

Law Administration:
Direct Taxes

Reference
18/13/5

Enquiries
D Govender

Telephone
(012) 422-5074

Facsimile
(012) 422-4952

E-mail
nmoodley@sars.gov.za

Room
Block A-Ground Floor

Date
22 August 2005

Ms. Noelene Lesley
Intertalent (Pty) Ltd
93 Blairgowrie Drive
**BLAIRGOWRIE**
2194

South African Revenue Service

Pretoria Head Office
299 Bronkhorst Street,
Nieuw Muckleneuk, 0181
P O Box 402, Pretoria, 0001
Telephone (012) 422-4000

Dear. Ms. Lesley

**USAGE FEES**

I refer to your letter addressed to Mr. Vlok Symington dated 16 August 2005. Thank you for the clarification in respect "usage fees".

This office wishes to reiterate the contents of the letter issued to Ms. Keyser dated 22 July 2004. However, the view held in the above mentioned letter does not necessarily apply to "usage fees" paid to performers/ actors/ models.

A "usage fee" is typically defined in a contractual agreement as a payment to the performer/ actor/ model for the use of the performance. According to your letter, the "usage fee" is invoiced and fully paid for at the time of recording and is not based on the number of times that the recording is broadcast. Such a payment is included in the definition of "remuneration" in paragraph 1 of the Fourth Schedule to the Income Tax Act No. 58 of 1962 for employees' tax purposes and PAYE (Pay as you Earn) should therefore be collected on these fees and other similar payments.

An IRP5 must be issued in respect of the "usage fees" and the applicable employees' tax must be deducted accordingly.

Sincerely

Ms. D. Govender
**for COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**

**SOUTH AFRICAN REVENUE SERVICE**

# - Income tax on Royalties (Income Tax Act, Number 58 of 1962, as amended) Return by person tendering payment

**1. This return must be rendered and the tax paid by -**
**(a) any person who incurs a liability to make royalty or similar payments or payments for the use of "know-how" foreign residents or companies; and**
**(b) any person who receives a royalty or similar payment or payment for the use of " know-how" on behalf of any foreign resident or company.**

**2. The tax is payable within 14 days after the end of the month during which the liability to pay the royalty, etc., is incurred or the royalty, etc. ,is received.**

## A. DETAILS OF PAYMENTS MADE OR RECEIVED

(i) Full name and address of payer or of South African agent receiving payment on behalf of foreign owner of patent, copyright of similar property:

.....
.....
.....
.....

(ii) Full name and address of foreign recipient of the royalty, etc.:

.....
.....
.....
.....

(iii) Date on which liability was incurred for the payment of the royalty, etc., on which tax is now tendered, or where tax is tendered by an agent, date on which such royalty, etc., was received by him:

...../...../20.....

## B DETERMINATION OF TAXABLE INCOME AND TAX PAYABLE

| | | R | C |
|---|---|---|---|
| (i) Gross amount of royalty, etc..... | (a) | ..... | ..... |
| (ii) Tax due.....% | (b) | ..... | ..... |
| (iii) Interest on (b) at the prescribed rate of ..... for ..... completed months | ( c) | ..... | ..... |
| Total Payable..... | (b) + (c ) | ..... | ..... |

## C. DECLARATION

I declare that the above is a true and correct statement of the royalty, etc., *payable/ received by me on *to/on behalf of the above-named recipient, and of the tax deducted.

| ..... | ..... | ..... | ..... |
|---|---|---|---|
| Date | Code | Telephone number | Payer/agent for recipient |

* Delete whichever is inapplicable

Receipt Number .....

Amount R .....

Date .....

INCOME TAX

**NR 01**

# Notification of performance of foreign entertainer or sportsperson

**Notes:**

1. This notification must reach SARS within 14 days after concluding the agreement to organise / promote the event.
2. Section C must be completed if you are not the organiser / promoter.
3. Please attach a schedule with the relevant information and breakdown of apportionment of gross receipt if there is more than one member or person in the party (team / group) visiting South Africa.
4. Should any information in this notification not be available on submission of this form, arrangement should be made with SARS to submit outstanding information at a later stage.

## A Details of organiser / promoter

Surname / Registered name

First names

Relationship to entertainer or sportsperson

PAYE reference no

Income Tax reference no

Registered address

Postal code

Postal address

Postal code

E-mail address

Contact number(s)

Telephone number CODE NUMBER

Cellular number NUMBER

Fax number CODE NUMBER

Name of contact person

Activities: Start date C C Y Y — M M — D D End date C C Y Y — M M — D D

Location of event

## B Details of entertainer(s) / sportsperson(s)

Surname / Registered name

First names

Country of origin

Activities: Start date C C Y Y — M M — D D End date C C Y Y — M M — D D

Activity

☐ Sport (e.g. Soccer, Golf, Swim, etc.)

☐ Entertainment (e.g. Comedy, Music, Film, etc.)

**C Details of representative of entertainer(s) / sportsperson(s)**

Surname / Registered name

First names

Relationship

Registered address

Postal code

Postal address

Postal code

E-mail address

Contact number(s)

Telephone number CODE NUMBER

Cellular number NUMBER

Fax number CODE NUMBER

**D Requirement list**

Tick the box to indicate if the requirement is attached to this notification.

- ☐ Signed copies of the contracts between entertainer(s) / sportsperson(s) and organiser / promoter.
- ☐ Copies of passports
- ☐ A copy of your calculation of the withholding tax (i.e. foreign amounts converted to SA Rand at the spot rate on which date the amount was withheld)
- ☐ Confirmation of all other income earned by virtue of performance in SA (e.g. sponsorship, appearance fees, prizes, etc.)
- ☐ Confirmation of any other income earned from SA

**E Completed by**

| Signature | Printed Name | Capacity | Date |
|---|---|---|---|
| | | | CCYY—MM—DD |

INCOME TAX

**IT 3(b)**

# Certificate of income from investments, property, rights and royalties

Year of assessment

Information supplied by / Name of payer

**Paid / Accrued to**

Surname

Initials

Postal Address

Postal Code

**Personal particulars**

Surname

First names

Income tax reference number

Identity number

Residential address

Postal Code

**(a) All Interest and dividends received / accrued from Property Trusts**

| Nature of investment | Capital invested or balance of savings or current account on last day of February | Interest |
|---|---|---|
| | | |
| | | |

**(b) Foreign dividends received / accrued**

Number of shares held

Dividends **R** ,

**(c) Other local dividends**

Number of shares held

Dividends **R** ,

**(d) Rental:**

Gross rental paid as tenant or collected as agent for another person in respect of the property described

Description of property

Dividends **R** ,

**(e) Moneys paid for the right of use of property**

Nature of rights

Dividends **R** ,

**(f) Royalties or fees paid for the use of a patent, design, trademark or copyright or for the imparting of knowledge connected with the use of a patent in the Republic or for "knowhow"** **R** ,

N.B. - In the case of INTEREST and / or ROYALTIES which accrued to foreign creditors state whether TAX ON INTEREST and / or TAX ON ROYALTIES has been collected.

YES ☐ NO ☐

If "Yes", to which SARS office was the tax paid? - Please Select -

**NOTES**

1. Do not include interest on contributory shares paid to persons not resident nor carrying on business in the Republic on current account for goods supplied.
2. In the event of any distribution to shareholders otherwise than in cash, full particulars must be furnished.
3. If persons to whom dividends are paid are known to be nominees of shareholders the names and addresses of the nominators must be provided.
4. No reports will be required for amounts of R700 or less where all of the client's accounts have been consolidated into one account, or R350 or less, where accounts have not been consolidated.
5. These certificates, when completed, must be returned in alphabetical order of surnames.