

The tax implications of contracting as an independent contractor and or a labour broker

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Abstract

The provisions in the Income Tax Act ("the Act") relating to independent contractors and labour brokers are limited to a few paragraphs in the Fourth Schedule to the Act. These provisions as well as the South African Revenue Services' official opinion in this regard is not sufficient to address the numerous cases where the facts are not really clear with respect to the capacity in which a person render services.

The writer attempts to address the risks of contracting as an independent contractor or labour broker, give distinguishing factors in order to ease the process of applying the provisions of the Act and discuss practical problems which the contracting parties may encounter.

Income Tax provisions, South African Revenue Services practices and principles, as established by the courts and case law pertaining to the common law is analysed in order to make conclusions in this regard.

Key words

Employee

Independent contractor

Labour broker

Remuneration

Employees' tax

1 Introduction

The provisions of the now amended Labour Relations Act caused several

employers to revise their current employer-employee relations in order to limit their liabilities. This is mostly achieved by contracting a former employee as an independent contractor in his own name or through a close corporation or private company. Not only is the employer's risk reduced, but the former employee's net monthly salary is considerably higher than previously as no employees' tax is deducted by the contracting party. As the tax risks of these structuring methods are numerous, the employees' tax risks and implications for both the contracting parties should be considered before and not after an agreement is concluded. The issue of whether a person is employed as an employee or an independent contractor is one of the grey areas in the Income Tax Act, no 58 of 1962 ("the Act"). This article endeavours to clarify when a person render services as an independent contractor and/or labour broker and what the employees' tax implications of such engagements are.

2 Employees' tax

2.1 Provisions of the Act

Employees' tax is an amount of tax which an employer must deduct from remuneration paid or which becomes due to an employee (Danziger & Stack 1998: 339).

The definition of an employee in the Fourth Schedule to the Act includes the following:

- "(a) any person (other than a company) who receives any remuneration or to whom any remuneration accrues;*
- (b) any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker;*
- (c) any labour broker; and*
- (d) any person or class or category of person whom the Minister of Finance by notice in the Gazette declares to be an employee for the purpose of this definition;"*

In order to determine whether a person falls within the ambit of paragraph (a) above one should examine the definition of remuneration in order to

determine whether a person is an employee in terms of the Act.

The definition of remuneration in the Fourth Schedule to the Act (Danziger & Stack 1998: 340), specifically excludes any amount paid or payable, in respect of services, rendered or to be rendered to any person in the course of any trade carried on by him independently of the person by whom such amount is paid. The provision, however, further states that a person shall not be deemed to carry on an independent trade in the following circumstances:

- "(aa) if he is subject to control or supervision of any other person as to the manner in which his duties are performed or to be performed or as to his hours of work; or*
- (bb) if the amounts paid or payable for his services consist of or include earnings of any description which are payable at regular daily, weekly, monthly or other intervals;"*

Labour brokers and persons rendering services to or on behalf of a labour broker have, however, specifically been deemed not to carry on a trade independently from the person making the payment for employees' tax purposes (Department of Finance 1998c : 75).

2.2 Employees' tax risk for the employer

If an employer/employee relationship is found to exist, the remuneration paid to the person will be subject to employees' tax.

The risk in this regard as far the employer is concerned, is that the Act places full responsibility for the deduction and administration of employees' tax on the employer. Should the employer therefore not deduct tax or fail to adhere to other administrative requirements, the South African Revenue Services ("the SARS") may collect the tax, including penalties according to paragraph 6 of the Fourth Schedule to the Act (currently 10%) and interest in terms of section 89*bis*(2) (as from 1 December 1998 19%), from the employer (Danziger & Stack 1998 : 343 and 295). The employer is therefore placed in a very difficult position and to avoid the mentioned risks, it must be able to confidently assert that an employer/employee relationship does not exist.

Paragraph 30(1)(a) of the Fourth Schedule further provides that an employer who fails to deduct employees' tax from remuneration or to pay the

tax to the SARS within the prescribed period, shall be guilty of an offence and liable on conviction to a fine or to imprisonment or to both (Danziger & Stack 1998 : 363).

2.3 Circumstances in which the employer is not obliged to deduct employees' tax

If the person rendering the services, could provide the employer with a written confirmation or directive from the SARS which indicates that the person is in fact an independent contractor, the employer is not obliged to deduct employees' tax from amounts payable to such a person (Kington & van Ryswyck 1998: 22).

Employers will be required to deduct employee's tax from all payments made to persons (including companies/close corporations) who render services to or on behalf of a labour broker *and* from all payments made to a labour broker unless such labour broker is in possession of a valid IRP 30 exemption certificate issued by the SARS (Department of Finance 1998c : 75).

2.4 Summary

As an employer is not obliged to deduct employees' tax from payments made to an actual independent contractor or a labour broker in possession of an exemption certificate, he should determine the capacity in which a person render services before any payments are made to him. The distinguishing factors of independent contractors and labour brokers are discussed in paragraph 3 and 4.

3 Independent contractors

3.1 General principles

According to the SARS (Department of Finance 1998c : 79), a contractor carrying out an independent trade, provides a service and not specific labour.

"Payments for these services can not be seen as remuneration and is therefore not subject to employees' tax deduction. An employer/employee relationship between an independent

trader and the person paying him does not exist (his hours of service in relation to the payment are not determined, the work he does is not subject to supervision and control and nor is he paid on a regular basis)."

However, the issue of whether a person is employed as an employee or an independent contractor is to be found in the definitions of "employer", "employee" and "remuneration" in the Act. The question to be answered is whether that which is paid to the individual is to be regarded as "remuneration", in other words, whether an employer/employee relationship exists.

In terms of the definition of "remuneration" in the Fourth Schedule to the Act, an individual will not be regarded as an independent contractor if he satisfies any one of the following three tests (Danziger & Stack 1998 : 340).

- if the individual is subject to the control or supervision of any other person as to the manner in which his duties are performed;
- if the individual is subject to the control or supervision of any other person as to his hours of work; or
- if the amounts paid for his services consists of earnings of any description which are payable at regular daily, weekly, or other intervals.

It is clear that these tests are very comprehensive and that it is in fact not easy to satisfy the test of qualifying as an independent contractor. In applying the aforesaid tests in terms of the Act, the SARS has indicated that they intend to adopt an approach whereby numerous factors will be considered when determining the nature of the agreement between the employer and the individual. Such an approach will therefore entail a consideration of all relevant facts relating to the relationship including not only the terms of the agreement but also the underlying intention of the parties. It is therefore clear that each case will be decided by the SARS on its own merits according to its own particular facts and circumstances.

3.2 The independent contractor tests

The point of departure is always to apply the tests as contained in the definitions above when analysing the nature of the agreement between the parties. It is also acceptable practice to seek guidance by proceeding to look outside the Act.

Both case law pertaining to the common law and case law relating to income tax matters should therefore be utilised in assisting with the application of the test for an independent contractor as contained in the definition of "remuneration".

The question as to the nature of the agreement in existence between the parties is primarily a legal question. A thorough analysis of case law in general indicates that the courts in the past usually applied three tests in determining the nature of the agreement existing between the employer and the individual. These were:

3.2.1 The control test

In *Colonial Mutual Life Assurance Society Ltd v Mac Donald* (1931 AD 412) the Court adopted the so-called supervision and control test of English Law in determining whether an agent was the employee of a life assurance society or an independent contractor (*Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51(A) at 61).

This test is whether there is control not only in respect of what work must be done by the individual but also as to the manner in which that work must be carried out (*R v Feun* 1954(1) SA 58(T) at 61; *Rodrigues and Others v Alves and Others* 1978(4) SA 834 (A) at 842).

In this respect the requirement is not that there should be actual control. The requirement relates to the power or the right to control. When a person who has to perform a certain task is allowed a certain amount of discretion, that does not indicate that he is not a servant (*Rodrigues and Others v Alves and Others* 1978(4) SA 834 (A) at 842).

3.2.2 The organisation test

This test was formulated as a new yardstick to distinguish between a contract of service and a contract for service by Denning LJ in *Stevenson, Jordan and Harrison Ltd v Mac Donald and Evans* ((1952) 1 TLR 100 at 111):

“One feature which seems to run through the instances is that, under a contract of service a man is employed as part of the business, and his work is done as an integral part of the business, whereas, under a contract for services, his work, although done for the business is not integrated into it but is only accessory to it.”

This test was, however, dismissed by the Appellate Division in *Smit v Workmen’s Compensation Commissioner* (1979 (1) SA 51 (A) at 63 and 64).

3.2.3 The dominant impression test

Where a relationship reveals both elements of an employee relationship and independent contractor, the test is to determine which sort of relationship most strongly appears from all the facts or what the “dominant impression” is which the contract makes upon a person (*Ongevalle Kommissaris v Onderlinge Versekerings- genootskap AVBOB* 1976(4) SA 446 (A) at 457).

However, as is concluded by Joubert JA in *Smit v Workmen’s Compensation Commissioner* (1979 (1) SA 51 (A) at 62), no single factor in determining the nature of an agreement can be isolated. The method is to weigh up all the factors and indications tending to show the existence of employment of an independent contractor as opposed to that of an employee.

3.3 Distinguishing factors of independent contractors

It is submitted that proof of the existence of the following factors will be material in influencing the SARS’s decision in classifying an agreement as one for the employment of an independent contractor (*Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD at 412; *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A) and *ITC 1215* (1974) 36 at 185):

- 3.3.1 There is no agreement as to the right and measure of control and supervision as to how, when and in what manner the individual must perform his or her duties;
- 3.3.2 The individual is bound by his contract, not by the orders of the contracting party;
- 3.3.3 The object of the contract is the performance of a certain specific work or the production of a certain specific result based on the individuals specialised skills;

- 3.3.4 The individual is in no way prohibited from contracting with other parties or entities during the subsistence of this particular agreement;
- 3.3.5 As a result of paragraph 3.3.4 above, the individual's source of income is not only limited to this particular agreement but may be numerous;
- 3.3.6 The individual has his own offices or conducts all working activities from his home;
- 3.3.7 The individual in performing his specialised skills utilises his own equipment, stationery, etc.;
- 3.3.8 The individual may avail himself of the labour and services of other workmen as assistants or employees to perform the work or to assist him in the performance thereof;
- 3.3.9 The individual is registered for Value Added Tax (VAT) purposes;
- 3.3.10 The individual does not belong to the pension fund and medical aid fund as provided by the employer;
- 3.3.11 The employer is only interested in the result of an individual's activities, and is in no way concerned with the time spent by the individual in bringing about that result, nor with the means adopted to bring it about;
- 3.3.12 individual does not receive a salary but is paid upon completion of the work or payment could be calculated according to the measure of work done.
- 3.3.13 The death of one of the parties to the contract does not necessarily terminate the contract as opposed to a contract with an employee where the contract is terminated by death.
- 3.3.14 A contract with an independent contractor terminates on completion of the specified work or on production of the specified result and not on expiration of the period of service entered into.

If evidence is presented supporting the existence of any or all of the above factors, the SARS may be more inclined to construe the agreement as one for the employment of an independent contractor. In the case of a written contract between the parties, any provision contrary to the aforesaid provisions will not be conducive for arguing that a relationship of an independent contractor exists.

3.4 Substance over form

In this regard, sufficient consideration should also be given to the common law doctrine of substance over form. Under this doctrine, an agreement will not be recognised if it does not reflect the true intention of the parties. In the recent case of *Erf 3183/I Ladysmith (Pty) Ltd v CIR* 1996 3 SA 942 the Court held that the mere existence of documents does not mean that they reflect the true intention of the parties. If the agreements were entered into merely to avoid tax being levied, and the parties never intended to give effect to them, as written, effect would not be given to them by the courts.

3.5 Summary

In order to qualify as an independent contractor a considerable amount of factors should be present. A written agreement between parties usually contains relevant information in determining whether the requirements are met. However, the parties must realize that their true intention and not merely the existence of documents will be decisive in determining whether a person does in fact render services as an independent contractor.

4 Labour brokers

4.1 General principles

An employee for employees' tax purposes includes a labour broker (irrespective whether the labour broker is a natural person or a legal entity), notwithstanding the fact that the labour broker may conduct an independent trade (definition of employee and remuneration in paragraph 1 of the Fourth Schedule to the Act) (Danziger & Stack 1998 : 338 and 340).

A labour broker in the Fourth Schedule to the Act was defined as "any person who conducts or carries on a labour broker's office as defined in

section 1 of the Labour Relations Act, 1956 (Act No.28 of 1956), whether or not such office is registered under section 63 of that Act" (Huxham & Haupt 1998 : 502). The Labour Relations Act, 1956, was repealed by the Labour Relations Act, 1995, and it was proposed that the Act should contain a definition of "labour broker" without reference to another Act (Department of Finance, 1998a : 24).

A labour broker is defined as (Department of Finance, 1998b : 46):

"any person who conducts or carries on any business whereby such person for reward provides a client of such business with other persons (other than any person who qualifies as a labour broker under this definition) 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 amendment to the Act shall be deemed to have come into operation as from the commencement of years of assessment ending on or after 1 January 1999 (Department of Finance, 1998b :94).

In practice a person can be a labour broker in spite of the fact that they have a contract indicating that they are rendering a service.

The Commissioner of Inland Revenue (CIR) was successful in a tax case (*Housecalls Projects CC v Minister of Finance* 1995 (3) SA 589 (T)) where the CIR claimed that a contract to provide electrical services between the Close Corporation (CC) and the client was a contract between a labour broker and the client. The CC was engaged in the installation, repair and maintenance of electrical and mechanical equipment. The taxpayer was the sole member of the CC who entered into an agreement with South African Breweries Ltd ("SAB") in terms whereof the CC was to perform work and furnish services to SAB for an initial period of six months at a specified monthly fee. It was agreed that the taxpayer was to perform the work and furnish the services required by the contract. This contract had been negotiated and concluded by the taxpayer on behalf of the CC. No other agent or broker other than the taxpayer acted in such negotiations.

The court held that the CC fell within the purview of a business such as described in the definition of a labour broker's office as the CC for reward provided SAB with a person, the taxpayer, to render services or perform work. It was further stated that although a labour broker was nowhere defined, anyone who carried on or conducted a labour broker's office (which

fitted the description of the business of the CC), was inevitably a labour broker.

In practice the client (principal) is the person or the enterprise who generally, but not necessarily, requires a worker (not an employee) to perform a specific task. He may or may not supervise and control the worker. Payment for the worker's services is normally made direct to the labour broker and not to the worker. Any contract of service will be between the client and the labour broker and *not* between the client and the worker (Department of Finance 1998c : 77).

The worker performs the services required by the client. He may be available to the labour broker for placement with a client, on a full-time basis or be recruited (procured) by the labour broker to satisfy the client's particular needs. Although remunerated by the labour broker, he renders the services directly to the client (Department of Finance 1998c : 77).

The labour broker either makes available his own employees (including members of a close corporation and directors of a company) to perform work for a client or he obtains (procures) workers for a client. Note that it is the provision or procurement of *workers* (i.e. persons) and not *the provision of services* that is the distinguishing factor between what a labour broker does and a business that provides goods or services (Kington & van Ryswyck 1998:20).

According to the Department of Finance (1998c : 78) the workers can be any persons including:

- members and/or employees of a close corporation;
- directors and/or employees of a company;
- trustees and/or employees of a trading trust;
- proprietors and/or employees of a business; and
- partners and/or employees of a partnership.

4.2 Distinguishing factors of labour brokers

The following factors might indicate that an entity which has contracted an organisation constitutes a labour broker (Kington & van Ryswyck 1998 : 20):

- 4.2.1 where the workers are provided by an entity to render services to the organisation;
- 4.2.2 the organisation specifies the particular workers that are required;
- 4.2.3 the conditions of the service of the workers provided are governed by a service contract, whether written or verbal, between the organisation and the relevant entity providing the workers;
- 4.2.4 payment for the worker's services is made to the entity providing the workers;
- 4.2.5 it is a condition of the contract that the work in question must be done by a particular person (i.e. not simply any person employed by the company); and
- 4.2.6 the contract stipulates that the person is to fill a particular position within the organisation (for example, company secretary).

4.3 The labour broker exemption certificate

For employees' tax purposes a labour broker will be deemed to be an employee. Unless the close corporation/company/individual presents the client with a valid exemption certificate (IRP 30), employees' tax need to be deducted from the payments to the entity (Department of Finance 1998c : 75). If the labour broker is a close corporation/company, employees' tax (which only represents PAYE) must then be deducted at the corporate tax rate (currently 35%) (paragraph 2(1) of the Fourth Schedule to the Act).

For a labour broker to qualify for an exemption certificate (application is made on a IRP30(a) form), the following conditions (must be met) and issues are important:

- 4.3.1 He must show that the business is independent of the company or companies which business is conducted with;
- 4.3.2 He must be registered as a provisional taxpayer;
- 4.3.3 If the business is a labour broker, it must be registered as an employer (should the circumstances require such registration);

- 4.3.4 All tax returns required to date, must have been submitted or extension granted for;
- 4.3.5 The workers provided to the client may not be restricted to being the proprietor, partner, member or director of the enterprise;
- 4.3.6 The enterprise must have sufficient capital and investment in facilities, and not be dependent on any one client;
- 4.3.7 The enterprise must function from its own premises.

Conditions 4.3.1 to 4.3.4 are provided for in terms of paragraph 2(5)(a) of the Fourth Schedule to the Act (Danziger & Stack 1998 : 366), (De Koker 1996 : 20-24-2). Paragraphs 4.3.5 to 4.3.7 represent issues which SARS considers in evaluating the application for an exemption certificate (IRP30(a) application form requirements).

4.4 Labour Law risks for the client

When an employer considers to appoint a person other than an employee with the sole objective to limit his liabilities, employees' tax is not the only factor to be considered. In terms of section 198(1) of the Labour Law Relations Act, 66 of 1995, as amended (LRA) temporary employment services include:

"any person who for reward, procures or provides to a client other persons-
 (a) *who render services to, or perform work for, the client; and'*
 (b) *who are remunerated by the temporary employment service."*

Paragraph 2 of such section provides that the temporary employment service is the employer of the person whose services have been procured for or provided to the client.

Irrespective of the above-mentioned, paragraph 4 of the section provides that:

"(4) The temporary employment service and the client are jointly and severally liable if the temporary employment services, in respect of any of its employees, contravenes-
 (a) *a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;*

- (b) *a binding arbitration award that regulates terms and conditions of employment;*
- (c) *the Basic conditions of the Employment Act; or*
- (d) *a determination made in terms of the Wage Act."*

Considering the above, the employer/client may be successful in avoiding the deduction of employees' tax by appointing a labour broker who in turn provide workers to the employer/client. However, the employer/client may still be jointly and severally liable in respect of the employees of the labour broker in terms of the provisions of the LRA.

4.5 Labour brokers in practice

The definition of "employee" specifically includes any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker.

However, as the worker (provided by a labour broker) is usually subject to the control or supervision of the client as to the manner in which his duties are performed and his hours of work, it may be argued that the worker is in fact also an employee of the client (definition of remuneration in the Fourth Schedule to the Act).

As the Fourth Schedule makes provisions for the deduction of employees' tax in cases where an employee has two or more employers, the above-mentioned scenario is not at all unusual.

According to the SARS (Department of Finance 1998c : 76) the labour broker will be required to deduct employee's tax from all payments (as agreed upon in the agreement between the client and the labour broker) made to persons who render services to or on behalf of him.

Therefore, if the client pays the worker directly (within the provisions of the service contract) and not through the labour broker, the labour broker will still be liable to deduct and pay employees' tax to the SARS with respect to such amount.

In practice, however, it has occurred that the client pays a gratuity / voluntary amount related to services rendered, not agreed to in the service contract, directly to the worker (i.e. a special bonus). In such case the

client, and not the labour broker, will be liable to deduct employees' tax from remuneration and pay such tax to the SARS within the prescribed period, as remuneration was paid to an employee in terms of paragraph (a) of the definition of employee of the Fourth Schedule to the Act.

Considering the above, difficulties may arise in circumstances where the worker does not receive any additional payment for services rendered from the client (in this case not a related party to the labour broker), but are a member of the client's retirement fund. The client contributes to the fund for the benefit of the worker. Such contributions are not provided for in the service contract between the labour broker and the client. As the worker is an employee of the client for employees' tax purposes, no taxable benefit arises. The deductibility of such contributions for the employer should, however, be tested against the percentage limit provided for in section 11(l) of the Act with regard to employer contributions for the benefit of his employees to a pension fund, provident fund or benefit fund (which includes a medical aid fund). Contributions to a medical aid fund may pose even greater problems if the client's (employer's) contributions exceed two-thirds of the total contributions to the fund. In such a case a taxable benefit will arise, but the client (employer) will have difficulty in paying the employees' tax on such taxable benefit to the SARS if the employee does not receive any additional cash remuneration from the client. If the client pays the employees' tax on behalf of the worker, another taxable benefit arises as the employer pays a debt on behalf an employee.

5 Conclusion

The tax implications of contracting as an independent contractor and or a labour broker are complicated. Many employers have entered into agreements with so called independent contractors which is considered employees in terms of the Act. In may cases these independent contractors provide workers and not services as labour brokers.

For the employer there is the ever-present employees' tax risk that should be considered. As the obligation to deduct and administrate employees' tax rests on the employer, he should determine the capacity in which the person render services before entering into agreements. If the distinguishing factors of an independent contractor are present, the employer will not be liable to deduct any tax. If uncertain, the employer should require the person to

obtain a written confirmation or directive from the SARS to confirm that he is in fact an independent contractor. If the person has the distinguishing qualities of a labour broker, employees' tax should be deducted, unless the labour broker can provide the employer with a valid IRP30 exemption certificate. An employer should further think twice before any payments are made directly to a worker of a labour broker, as there is definite employees' tax consequences to such payments.

For the person classified as an independent contractor or labour broker there is the responsibility to apply at the SARS to acquire the relevant confirmations, directives and exemption certificates. Registration for VAT, provisional taxes, regional services council levies are other administrative tasks to be considered. In many instances the person is not qualified to handle his personal tax matters, and a tax consultant or accountant are appointed (at a cost) to calculate and submit provisional tax returns as well as his annual tax return for the year of assessment.

In the past the provisions of the Act have, in very few cases, been met with respect to independent contractors and labour brokers. The reasons may be that the provisions of the Act and the guidelines provided by SARS were insufficient and that the contracting parties did not understand the ramifications of contracting as an independent contractor or labour broker. It is speculated that the SARS may, therefore, consider to provide more definite guidelines and in addition penalties to ensure that requirements in this respect are being met.

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