

TAX & EXCHANGE CONTROL ALERT

24 AUGUST 2023



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Remote working in jeopardy? Or is Caesar (SARS) securing what is due to Caesar?

It is no secret that the COVID-19 pandemic has radically changed our thinking towards how and where we work. Since 2020, many companies have adjusted and sometimes overhauled their working models to fit into the 'new way of working' and meet the global demand for remote and hybrid work arrangements in order to stay competitive and retain the best talent.



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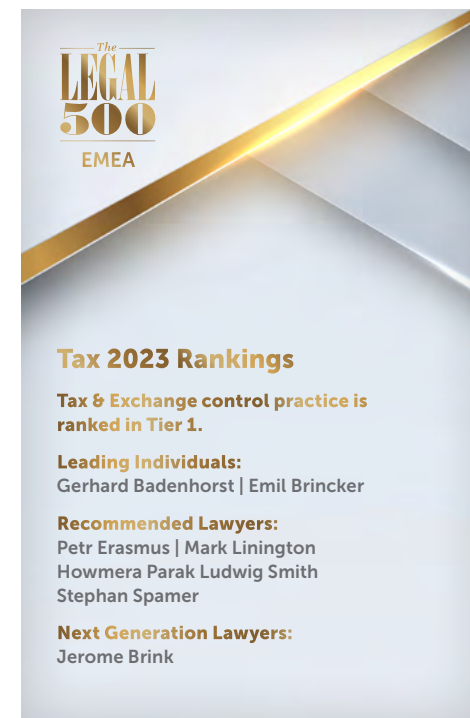
You may be wondering how this new way of working will affect the collection of taxes by revenue authorities in various countries? In this article, we briefly consider a tax amendment that is being proposed by National Treasury and the South African Revenue Service (SARS) which may have been inspired by this very question.

In our 2023 [Special Edition Budget Speech Alert](#), we unpacked some of the notable tax amendments that were proposed in Finance Minister Enoch Godongwana's (Minister) 2023 Budget.

On 31 July 2023, National Treasury and SARS published the 2023 draft Taxation Laws Amendment Bill and draft Tax Administration Laws Amendment Bill (2023 Draft TALAB) for comment (due 31 August 2023) which will give effect to some of these proposals.

Among the main tax administration amendments that found their way from the Budget into the 2023 Draft TALAB is the proposal related to the registration of non-resident employers for employees' tax.

As you may remember from the 2023 Budget Speech Alert, in terms of this proposed amendment, National Treasury had proposed that it would amend various provisions in the Income Tax Act 58 of 1962 (Act) to ensure that non-resident employers who pay remuneration to employees who render services in South Africa register as such in South Africa, notwithstanding the fact that they may not have a representative or agent in South Africa.



The graphic features a gold diagonal stripe across a light blue background. At the top left, it reads 'The LEGAL 500 EMEA'. Below this, the text 'Tax 2023 Rankings' is displayed in a bold, gold font. Underneath, it states 'Tax & Exchange control practice is ranked in Tier 1.' in bold black text. This is followed by 'Leading Individuals: Gerhard Badenhorst | Emil Brincker' and 'Recommended Lawyers: Petr Erasmus | Mark Linington | Howmera Parak Ludwig Smith | Stephan Spamer' in bold black text. Finally, it lists 'Next Generation Lawyers: Jerome Brink' in bold black text.

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Proposed change

In this context, National Treasury has proposed the following change (amongst others) to paragraph 2 of the Fourth Schedule to the Act be changed from:

"(1) Every—

(a) employer who is a resident; or

(b) representative employer in the case of any employer who is not a resident..."

so that it now reads as follows:-

"(1) Every employer or representative employer..."

The explanatory memorandum to the 2023 Draft TALAB notes that the proposed change seeks to remove the distinction between resident and non-resident employers by requiring any employer (resident or foreign) to deduct employees' tax (PAYE).

Levelling the playing field

According to the explanatory memorandum to the 2023 Draft TALAB, the proposed amendment has been inserted to level the playing field between resident and non-resident employers and ensure alignment with skills development levies and unemployment insurance contributions that are required to be paid by registered employers and which ultimately benefit South African employees.

If the amendment becomes effective in current form, the registration obligation in paragraph 15 of the Fourth Schedule to the Act will now potentially also apply to non-resident employers.

A question on everyone's mind is how this proposed amendment will affect remote workers, specifically people who reside in South Africa and render employment services to employers situated outside of South Africa, for which they earn remuneration.

As a point of departure, it will be necessary to determine whether an employer-employee relationship exists between the remote worker and the person compensating the worker for services rendered.

In this context, an **employer** is defined in the Fourth Schedule to the Act as: *"any person ... who pays or is liable to pay to any person any amount by way of remuneration"*.

In turn, an **employee** is defined in the Fourth Schedule as:

"(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;

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(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 purposes of this definition; or

(e) any personal service provider.”

From these definitions, it is clear that the compensation received for services rendered must constitute remuneration in order for the amount to be subject to employees' tax.

The term “**remuneration**” is widely defined in the Fourth Schedule to the Act to include 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.

The definition in the Fourth Schedule to the Act further specifically includes items such as annuities, restraint of trade payments, fringe benefits, allowances and advances, amounts received from the vesting of equity instruments, dividends etc.

The only amounts that are specifically excluded from the definition of remuneration are amounts paid or payable for services rendered or to be rendered by a person in the course of a trade carried on by them independently of the person by whom the amount is paid or payable and of the person to whom the services have been or are to be rendered. Therefore, independent contractors (including freelancers) should not be affected by the proposed amendment. However, depending on whether the amendment comes into effect in current form, it may be

prudent for independent contractors (including freelancers) to review their contractual agreements to ensure that the wording and substance is consistent with what is required for an independent contractor relationship..

Given the wide definition attributable to the term “**remuneration**” it will be important for individuals rendering services to non-resident persons to interrogate their working relationships and ensure compliance with the Act.

Potential impact

The impact that this proposed amendment will have on the ‘new way of working’ will only be revealed over time. However, it is not unlikely that it may discourage foreign employers from employing the services of South African residents, bearing in mind the administrative burden that is likely to accompany this proposed

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amendment. Prior to this amendment, foreign employers would have also run the risk of creating permanent establishments in South Africa and becoming liable for income tax in South Africa, which is less than ideal. While the permanent establishment risk always existed, the additional employees' tax burden adds another potential level of complexity.

Whether SARS will be able to effectively administer the proposed amendment is also something that will become clearer over time.

Notwithstanding that the obligation to deduct PAYE rests on the employer, it is important to note that the income tax liability is ultimately for the account of the employee. If the proposed amendment comes into effect, it would thus be prudent for employees earning remuneration in South Africa to ensure compliance by their non-resident employers and payment of the correct amount of PAYE to SARS, to avoid the employees and employers from being prejudiced.

Puleng Mothabeng



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2018 - 2023
ranked our Tax & Exchange Control
practice in **Band 1: Tax**.

Emil Brincker ranked by
Chambers Global 2003 - 2023
in **Band 1: Tax**.

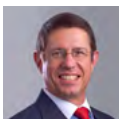
Gerhard Badenhorst was awarded
an individual spotlight table ranking in
Chambers Global 2022 - 2023 for
Tax: Indirect Tax.

Mark Linington ranked by
Chambers Global 2017 - 2023
in **Band 1: Tax: Consultants**.

Stephan Spamer ranked by
Chambers Global 2019-2023
in **Band 3: Tax**.

OUR TEAM

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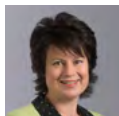
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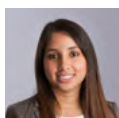
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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