GUIDE ON THE EMPLOYEES' TAX RESPONSIBILITIES REGARDING CREW IN THE BROADCAST, TECHNICAL PRODUCTION & LIVE EVENTS INDUSTRY

GALBRAITH | RUSHBY

Foreword

This document is a general guide dealing with the PAYE responsibility of production companies working in the broadcast, technical production and live events industry.
This guide is prepared by Galbraith Rushby in conjunction with the Southern African Communications Industries Association (SACIA) as a discussion document and should not be used as a legal reference. This guide is based on SARS guidelines used in the film industry as at 1 March 2016.

Should you require additional information, you may
• contact your local South African Revenue Service (SARS) branch;
• visit SARS website at **www.sars.gov.za;**
• contact your own tax advisors.

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1 How the industry operates

It is estimated that about 65% of people working in the broadcast, technical production and live events industry work on a freelance basis. In many instances, experienced crew will approach agents to manage their careers. When a crew member chooses an agent, an agreement is signed and an administration fee (agency fee/commission) is agreed upon between the individual and the agent. The agent will promote the crew member to the best of his or her ability. Should the crew member be successful in getting work, the agent's responsibility normally includes negotiating a fee with the production company.
The agent, as part of the wide range of administrative services they provide, would invoice the production company on behalf of the crew member and the fees are paid either directly or indirectly to the crew member.

- Some production companies pay the fee due to the crew member directly to the crew member without deducting PAYE
- Some production companies pay the fees due to the crew member directly to the crew member after deducting PAYE
- some production companies pay the fee due to the crew member net of tax into the agent's bank account (that is, the production company first deducts employees' tax)
- some will pay the gross fee into the agent's bank account (in cases where the production company does not deduct employees' tax)

SARS has indicated that unless agents are registered as labour brokers as defined in paragraph 1 of the Fourth Schedule to the Income Tax Act (1962), employers should deduct or withhold employees' tax from any remuneration paid to agents. The term "employer" is defined in paragraph 1 of the Fourth Schedule but in simple terms, the employer is any person who pays or is liable to pay remuneration.

2 Who is a labour broker?

According to the Income Tax Act, the following is required for a person to be regarded a labour broker:

- 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 being 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 - 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 could be regarded as a labour broker Where a person is classified as a labour broker and such 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. Only natural persons who are labour brokers are required to obtain an IRP30 certificate. Companies, close corporations or trusts do not require an IRP30 certificate and no PAYE is deductible.

In terms of paragraph 2(1) of the Fourth Schedule to the Act, the employer who is liable to pay any amount by way of remuneration to any employee shall, unless the Commissioner for SARS has granted authority to the contrary, deduct or withhold employees' tax from that amount.

As stated above, all the requirements for a person to be classified as a labour broker must be present before a person could be regarded as a labour broker. According to the SARS interpretation, crewing agents are not regarded as labour brokers because:

- The norm in the technical production community is that the agent introduces and facilitates an agreement between the crew member and the production company. The production company and the crew member will then enter into an agreement to provide specified services. The agent is not providing persons but merely introducing and facilitating the agreement between the production company and the crew member.
  The agent is, therefore, playing a role of the employment agency. The employment agency role is to introduce prospective employees to employers or to find employees for an employer. Once the introduction has been made, the employee is remunerated by the employer (as a result of the employment agreement entered into by the employer and the employee) and the employment agency is paid a once-off fee by the employer.

- The norm in the technical production and live events industry is that the production company's only obligation is to pay the booking fee to the agent. As stated above, the agent is not providing persons but merely playing a role of the facilitator between the production company and the crew member.
  Furthermore, the fact that the production company may pay the full fee to the agent who will in turn deduct employees' tax and his or her commission, does not change the fact that the fee for services rendered by the crew member is due to the crew member and not the agent. This is merely an arrangement between the parties

- In a labour broker arrangement, a labour broker has the obligation to pay the persons provided to the client and to withhold employees' tax from such amounts.
  In the technical production and live events industry, the agent does not have an obligation to pay the crew member. Where the production company pays the full amount to the agent and the agent deducts employees' tax, this is merely an arrangement between the parties. The production company has the obligation to pay remuneration to the crew member and to deduct employees' tax (the parties to the agreement are the production company and the crew member). If the agent received a full fee from the production company and then disappeared, the production company would still be liable for the payment of the fee to the crew member.

3 Who is liable to deduct PAYE?

As stated above, the employer who is liable to pay any amount by way of remuneration is required to deduct or withhold employees' tax from such amount. The parties to the service agreement are the production company and the crew member. Accordingly, it is the production company's obligation to pay a fee to the crew member and not that of the agent. If the production company disappears without making payment to the crew member, the agent will not be held liable and would not need to make the payment to the crew member. Agents would fight for their crew and try to assist them, but would not pay them (the contract of service is between the crew member and the production company).

Where the crew member is an employee or deemed not be independent, the fee payable to the crew member would be remuneration. The production company will be liable to pay remuneration and therefore has an obligation to deduct or withhold employees' tax and not the agent. However, where the agent enters into an agreement with the production company to provide crew members (that is, no relationship exists between the crew member and the production company), the agent will be regarded to be a labour broker. Accordingly, it will be the agent's obligation to pay the crew member and not that of the production company.

Where such an arrangement exists, the provisions relating to labour brokers will apply as follows:

- The production company will deduct employees' tax on amounts payable to the agent for providing persons if the agent is not in possession of a valid IRP30 exemption certificate.
- The crew member will be regarded to be an employee of the agent (in terms of paragraph (b) of the definition of "employee" in paragraph 1 of the Fourth Schedule to the Act). Accordingly, the agent will have an obligation to deduct or withhold employees' tax from the amount payable to the crew member by the agent.

Conclusion

It is evident from the above that where the crew member contracts directly with the production company to render services (contract in their personal capacity), the production company is the employer (agents are not regarded as labour brokers). The production company must deduct or withhold employees' tax where applicable (where the crew member is deemed not be independent either by reason of the statutory test or common law test).

4 The PAYE status of technical crew

There are two main laws that deal with crew, income tax legislation which deals with the tax implications of employment and Labour Laws which deal with rights of both employee and employer. The common law dominant impression test grid is from labour legislation and assess whether a person is an Independent Contractor or Employee. That determination gives that person rights or no rights in terms of Labour legislation.

The Income Tax Act defines an employee in a much simpler way. That test of whether a person is deemed to be an employee is referred to as the statutory test (the Test) Irrespective of whether the person is an independent contractor or employee in terms of labour law, if they are deemed to be receiving remuneration in terms of the statutory test then that person is required to have employees tax deducted from their earnings.

5 The statutory rules

The statutory rules operate independently from the common law rules and provide for a deeming provision that a person who carries on his or her trade independently (that is, a person deemed to be an independent contractor in terms of common law rules) shall be deemed not to be carrying on a trade independently if he or she meets any of the statutory test provisions.

Interpretation Note No.17
Interpretation Note No 17 issued by SARS deals with the common law and statutory rules) in detail and can be accessed through the SARS website **www.sars.gov.za**

How the law applies to the types of crew working in the technical production and live events industry

How to apply the statutory tests in determining whether the statutory test applies, the following steps should be taken:

a) Determine whether the independent contractor, in terms of the common law tests, employs throughout the tax year of assessment three or more employees who are on a full- time basis engaged in the business of the independent contractor of rendering services and who are not connected persons in relation to the independent contractor. If this is not the case, proceed to the next test. If this is the case, the statutory test does not apply.

b) Determine whether or not the services are required to be performed mainly at the premises of the client. If the services are required to be performed mainly at the premises of the client, proceed to the next test. If this is not the case, the statutory test does not apply.

c) Determine whether one of the following is true:

- The person who rendered or will render the services is subject to the control of the client as to the manner in which his or her duties are performed or to be performed or as to his or her hours of work.

- The person who rendered or will render the services is subject to the supervision of the client as to the manner in which his or her duties are performed or to be performed or as to his or her hours of work.

If any of the above two tests apply (that is, control or supervision), the independent contractor is deemed not to be independent for purposes of the Fourth Schedule and is therefore, subject to employees' tax. An independent contractor who is deemed not to be an independent contractor for purposes of the Fourth Schedule is not, however, also deemed to be an employee. The independent status under common law of an independent contractor that is deemed not to be independent remains unaffected.

A constant theme of the Interpretation Note 17 is that it is the responsibility of the employer to determine whether or not the payments are subject to employees' tax. In this regard it should be borne in mind that a wrong decision can be costly in terms of interest and penalties, not to mention the practical difficulty of recovering employees' tax from an employee from whose remuneration employees' tax ought to have been deducted.

6 The common law dominant impression test

The common law dominant impression test sets out 20 of the more common indicators (not exhaustive) which point to whether or not there has been the "acquisition of productive capacity" (that is, labour power, capacity work or simply effort). The indicators are classified into three categories, namely -

- **near conclusive** - those relating "most directly to the acquisition of productive capacity";
- **persuasive** - those establishing "the degree of control of the work environment"; and
- **Resonant** - of an employee/ employer relationship or an independent contractor/ client relationship, which are relevant.

It is important to note that this is a guide and should not be used as a checklist according to which certain scores are determined to come to a conclusion. Each indicator must be analysed with due regard to the context of the technical production and live events industry.

Where a person is regarded as an employee, based on the common law test, the person will be regarded as an employee in terms of paragraph (a) of the definition of "employee" in paragraph 1 of the Fourth Schedule to the Act Accordingly, the amounts payable to him or her by his or her clients will be subject to employees' tax and must be coded 3601 on the IRP5 certificate. The provisions of section *23(m)* of the Act will apply (limitation of deductions).
However, where a person is regarded as an independent contractor, based on the common law dominant impression test, the person will be carrying on his or her trade independently. The next step will be to apply the statutory test to determine whether or not the common law independent contractor is deemed not to be independent for the purposes of the Fourth Schedule to the Act.

The statutory test provisions are found in the exclusionary subparagraph (ii) of the definition of "remuneration" in paragraph 1 of the Fourth Schedule to the Act. This paragraph states that any amount paid or payable in respect of services rendered or to be rendered by any person (excluding non-residents) in the course of any trade carried on by him or her independently of the person by whom such amount is paid or payable or of the person to whom the services have been or are to be rendered (that is, amount payable to a common law independent contractor) is excluded from the definition of "remuneration" (the amount is not subject to employees' tax but however forms part of gross income of that person). This paragraph further provides that such a person (common independent contractor) will be deemed not to carry on a trade independently for the purposes of the Fourth Schedule to the Act:

- if the services are required to be performed mainly at the premises of the client; and
- if the person who rendered or will render the services is subject to the control or supervision of any other person as to the manner in which his or her duties are performed or are to be performed or to his or her hours of work.

This paragraph provides further that a person (common law independent contractor) will be deemed to be carrying on an independent trade if he or she, throughout the year of assessment, employs three or more employees who are on a full-time basis engaged in the business of such person of

rendering any such service (excluding any employee who is a connected person in relation to such person).
It is the responsibility of the employer (production company in the case of the technical production and live events industry) to determine whether the statutory test applies. The employer is in the best position to evaluate the facts and the actual situation (the production company understand the terms of the agreement and the actual working relationship better).
Furthermore, when determining whether or not a person is subject to control or supervision, it is important to make sure that industry requirements are not confused to be control or supervision. For example, if the crew is told to be at the event venue by 08h00 in order to start work, that does not amount to control or supervision. However, if during the build or show, the crew is given instructions on how to do the work or get to the desired result (for example, the sound engineer is given instruction to tweak the sound in a certain way) this will amount to control or supervision.

Based on the above, the employment status of crew members can vary per their contractual agreements and functions:

A. Common law independent contractors employing three or more qualifying employees.
The production company must establish this fact on signing of the agreement and must retain the relevant proof. As stated above, these persons are not subject to employees' tax.

B. **Common law independent contractors not employing three or more qualifying employees and performing their duties mainly outside the event location**.
These independent contractors will not be subject to employees' tax deduction because their duties will not be performed mainly at the event location.

C. Common law independent contractors not employing three or more qualifying employees and performing their duties mainly at the event location without control or supervision.
These independent contractors do most of their duties at the event location. If they are not subject to control or supervision these persons will not be subject to employees' tax deduction

D. **Common law independent contractors not employing three or more qualifying employees and performing their duties mainly at the event location with control or supervision.**
These independent contractors do most if not all their duties at the event location. If they are subject to control or supervision, these persons will be subject to employees' tax deduction. Code 3616 should be used on their IRP5 certificate.

E. **Employee in terms of common law** - these are crew members who have entered an employment agreement with the production company (that is, employer-employee relationship which is a master-servant relationship). For example, a technician working with a production company on a touring show will fall under this category.

7 Status of particular crew

It is evident from the statutory rules and the dominant impression test that the crew may fall under different categories depending on the nature of the agreement and their functions.
An understanding of the functions of crew and the knowledge of the industry is required for the correct categorisation of crew for tax purposes.

8 Crew contracting through a medium of a legal entity

Where the crew member contracts with the production company through a medium of a legal entity (company, close corporation or trust) the common law and statutory rules will not apply.
The production company will, therefore, have to determine whether provisions relating to the "personal service company" or "personal service trust" apply.
A "personal service company" or "personal service trust" is defined in paragraph 1 of the Fourth Schedule to the Act (see Interpretation Note No. 35 available on the SARS website www.sars.gov.za for a detailed discussion on personal service companies or trusts).
Where the provisions relating to "personal service company" or "personal service trust" apply, the company or close corporation or trust will be subject to employees' tax deduction. The personal service company is subject to tax at a rate of 28% while the personal service trust is subject to tax at a rate of 41%. Furthermore, the personal service companies or trusts are subject to the provisions of section *23(k)* of the Act (limitation of deductions)

The easy way to test this in practise is if a person invoices you via a company and you would have ordinarily deducted PAYE off that person had they not invoiced you via a company, you probably have a personal service company situation and there would probably be an obligation to deduct PAYE.

9 The IRP5 requirements in the case of employees

An employer must, in terms of paragraph13(1) of the Fourth Schedule to the Act, furnish an employee to whom remuneration has been paid or become due and from which employees' tax has been deducted or withheld during the year of assessment, with an IRP5 employees' tax certificate.
In terms of paragraph 13(2) of the Fourth Schedule to the Act, the IRP5 certificate must be issued as follows:

- Where the employer has not ceased to be an employer in relation to the employee concerned, within 60 days after the end of the tax year (that is, 60 days after 28/29 February of each year)
- Where the employer has ceased to be an employer in relation to the employee concerned but has not ceased to be an employer in relation to other employees, within 14 days of the date on which the employer has so ceased

- Where the said employer has ceased to be an employer (in respect of all the employees), within seven days on which the employer has so ceased.
- Where the remuneration payable by the employer to the employee is below the "tax threshold" as defined in paragraph 1 of the Fourth Schedule to the Act, the employees' tax will not be deducted or withheld from such remuneration. The employer will then be required to issue an IT3 (a) certificate instead of an IRP5 certificate. In both the IRP5 and IT3 (a) certificates, the remuneration for common law employees must be coded 3601, certificates for independent contractors must be coded 3616.

10 Independent contractors that are deemed not to be independent

As stated above, a crew member who is a common law independent contractor deemed not to be independent for the purposes of the Fourth Schedule to the Act, is subject to employees' tax deduction. Accordingly the production company must furnish such a person with an IRP5 certificate. The production company will cease to be an employer to such crew member once the services have been rendered. Accordingly the production company must furnish the IRP5 certificate to the crew member within 14 days of the date on which the production company ceased to be an employer in respect of the crew concerned. However, SARS has discretion to direct otherwise (that is, deem the employer not to have ceased to be an employer) in respect of casual employees who are likely to be re-employed from time-to-time by such employer.

Based on the above, SARS will exercise its discretion to deem the production company not to have ceased to be an employer to the crew member after the services have been rendered.
The production company may then issue one IRP5 certificate in respect of a crew member instead of issuing an IRP5 certificate within 14 days every time after which the services have been rendered. This will reduce the administrative burden of issuing more than one IRP5 certificate where a crew member has been used more than once by the production company. As stated above, the remuneration must be coded 3616 on the IRP5 certificate and accordingly the provisions of section *23(m)* of the Act will not apply.
The agent, as part of his or her administrative services offered to the crew member, may collect these IRP5 certificates from various production companies on behalf of the crew member.
Although production companies (or other principals) are liable to deduct employees' tax and issue IRP5 certificates (and all other employer-related obligations under the Fourth Schedule to the Act) in respect of these crew members, SARS has no objection should an agent and a production company (or other principal) agree that the agent deducts employees' tax and fulfils the related administrative duties (for example issue IRP5 certificates) on behalf of the production company. Such an arrangement must, however, include all payroll deductions and the agent must, therefore, also deduct the skills development levy (please see paragraph 5 below on the payment of skills development levy). The arrangement must also ensure that employees' tax is withheld and paid to SARS under the name and employees' tax number of the production company, and that IRP5 certificates are also issued under the name and employees' tax number of the production company.
The agent must also ensure that the production company is able to complete its monthly and annual employees' tax declarations, returns and reconciliations. Despite the aforementioned arrangement, any non-compliance with the requirements of the Fourth Schedule to the Act remains a failure of the production company for which the production company remains responsible towards SARS.

11 Independent contractors that are deemed to be independent (i.e. those that remain independent even for PAYE purposes)

As stated above, an independent contractor who is deemed to be carrying on an independent trade even for the purposes of the Fourth Schedule to the Act is not subject to employees' tax deduction. Accordingly, the production company will not have an obligation to issue any certificate (including an IT3(a) certificate) to such crew because the amount payable to him or her is not "remuneration" as defined in the Fourth Schedule to the Act.
However, the production company may issue an IT3 (a) certificate to such an independent contractor if the contractor requires such a certificate (this is, however, not compulsory) The amount must be coded 3616 on the IT3 (a) certificate, should such certificate be issued.

12 Limitation of expenses

Section *23(m)* of the Act prohibits the deduction of certain expenditure, losses and allowance that relate to any employment of, or office held by, any person (other than an agent or representative who normally derives his or her income in a form of commission).
It is evident from the above that the limitation of deductions in terms of section *23(m)* of the Act is only in respect of common law employees (employment) or office holders.
As indicated above, common law independent contractors who are subject to the statutory test are deemed not to be independent for purposes of the Fourth Schedule to the Act only. The effect of this is that these independent contractors retain their common law independent contractor status even though they are treated as if they are employees for PAYE purposes.
Section *23(m)* of the Act is, therefore, not applicable to common law independent contractors who are deemed not to be independent for purposes of the Fourth Schedule to the Act. Accordingly, the remuneration payable to these contractors must be coded 3616 (and not 3601) on the IRP5 certificate.

13 Skills Development Levy

In terms of the Skills Development Levy Act (1999), every employer must pay a skills development levy at a rate of 1% of the "leviable amount", as defined in paragraph 1 of the Fourth Schedule to the Act, but excluding any amount:

- paid or payable to a labour broker or 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 the definition of "an employee" in paragraph 1 of the Fourth Schedule to the Act, to whom a certificate of exemption has been issued;
- paid or payable to any person by way of any pension, superannuation allowance or retiring allowance;
- contemplated in paragraphs (a), (d), (e) or (eA) of the definition of "gross income" in section 1 of the Act;
- payable to a learner in terms of a contract of employment contemplated in section 18(3) of the Skills Development Act;
- deemed to be payable to the director of a private company in terms of paragraph 11C of the Fourth Schedule to the Act

Based on the above, therefore, any amount of remuneration not excluded from the definition of "leviable amount" (as outlined above) will be subject to the skills development levy. An amount payable to a common law independent contractor deemed not be independent for the purposes of the Fourth Schedule to the Act, is not excluded from the definition of "leviable amount" and accordingly subject to skills development levy.
Accordingly, an amount payable to any person falling under category A, B or C under chapter 6 above, will not be subject to the skills development levy However, an amount payable to any person falling under category D and E in chapter 6 above, will be subject to the skills development levy.

14 Unemployment Insurance Contributions (UIF)

The Unemployment Insurance Contributions Act, 2002 (the UIF Act) requires all employers and employees (excluding employers and employees which are exempt in terms of section 4 of the UIF Act) to make UIF contributions in terms of the UIF Act. An employee is "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". The term "independent contractor" above refers to a common law independent contractor. As stated, common law independent contractors deemed not to be independent for the purposes of the Fourth Schedule to the Act, retain their common law independent contractor status even though they are treated as if they are employees for PAYE purposes. Accordingly, such independent contractors will not be required to make UIF contributions even though they are deemed not to be independent for PAYE purposes.
Based on the above, therefore, any person falling under category A, B, C or D under chapter 6 above will not be required to make UIF contributions. However, any person falling under category E in chapter 6 above will be required to make UIF contributions.

15 Conclusion

It is trusted that this Guide will contribute to greater clarity regarding the application and interpretation of the provisions of the Act pertaining to employers' responsibility regarding crew working in the broadcast, technical production and live events industry. Further information concerning taxation can be obtained from the SARS offices.