South African Revenue Service

INTERPRETATION NOTE 35 (ISSUE 5)

DATE: 14 March 2023

ACT : INCOME TAX ACT 58 OF 1962

SECTION : PARAGRAPHS 1, 2(1A) AND 2(5) OF THE FOURTH SCHEDULE AND SECTION 23(*k*)

SUBJECT : EMPLOYEES' TAX: PERSONAL SERVICE PROVIDERS AND LABOUR BROKERS

Preamble

In this Note, unless the context indicates otherwise –

- **"LRA"** means the Labour Relations Act 66 of 1995; and
- **"paragraph"** means a paragraph of the Fourth Schedule to the Act;
- **"Schedule"** means a schedule to the Act;
- **"section"** means a section of the Act;
- **"the Act"** means the Income Tax Act 58 of 1962; and
- any other word or expression bears the meaning ascribed to it in the Act.

All interpretation notes referred to in this Note are available on the SARS website at **www.sars.gov.za**. Unless indicated otherwise, the latest issues of these documents should be consulted.

1. Purpose

This Note discusses the employees' tax implications and the deductions that may be claimed by a personal service provider or a labour broker.

2. Background

Previously, it was a popular tax-saving method for employees to offer their services to their employers through the medium of private companies, close corporations or trusts, or by utilising labour brokers, none of which could be classified as "employees" as defined in paragraph 1. The use of labels such as "independent contractor" and "service company", and the perception that these were acceptable means of avoiding the deduction of employees' tax, necessitated the development of stronger anti-avoidance measures for employees' tax purposes. In order to discourage the use of corporate entities, trusts or labour brokers as intermediaries to provide personal services to a client that are, in essence, services provided under a contract of employment, the concepts of "personal service provider"[1] and "labour broker"[2] were included in the definitions in paragraph 1. Both were also included as employees in the definition of "employee" in paragraph 1. This required that the remuneration paid or

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1 Added by section 66(1)(*f*) of Act 60 of 2008.
2 Added by section 44(1)(*c*) of Act 101 of 1990.

payable to such personal service provider or labour broker[3] to be subject to the deduction or withholding of employees' tax. Deductions applicable to personal service providers and labour brokers without a certificate of exemption were simultaneously narrowed.

Over the years, various amendments have refined the scope of these provisions. This Note includes the latest amendments and amendments to the relevant rates of tax attributable to personal service providers and labour brokers.

3. The law

The relevant provisions of the law are quoted in **Annexure A**.

4. Application of the law

The deduction or withholding of employees' tax[4] is dependent on three elements, all of which are defined terms,[5] namely, an "employer", an "employee" and "remuneration". Employees' tax cannot be charged if one or more of these three elements are not present. If, for example, an "employee" is removed from the equation, then the person paying the remuneration has no obligation to deduct employees' tax. Similarly, if the term "remuneration" is removed from the equation, no employees' tax liability arises.

For the purpose of ensuring the correct deduction or withholding of employees' tax by an employer, it is crucial, therefore, to correctly classify a company, close corporation or a natural person providing labour brokering services, as a "personal service provider" or "labour broker".

4.1 Classification of employees

4.1.1 Personal service provider

Any company, close corporation or trust that meets the definition of "personal service provider" is an "employee", as defined in paragraph 1; and if it is in receipt of "remuneration" as defined in paragraph 1, is subject to the deduction or withholding of employees' tax.

In determining whether a company, close corporation or trust is a "personal service provider" and whether employees' tax must be deducted or withheld from amounts paid or payable to them, the following tests should be performed:

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3 Other than a labour broker that has been issued with a certificate of exemption – see the discussion in **4.1.2**.

4 Under paragraph 2(1).

5 In paragraph 1.

(a) Determine whether some or all of the receipts of the company, close corporation or trust consist of "remuneration"

If the receipts do not include "remuneration" as defined, no employees' tax is deductible. The definition of "remuneration" excludes payments made to independent contractors who are natural persons or trusts, but the exclusion does not apply to personal service providers.[6] There is no need, as a result, to determine whether the personal service provider is an "independent contractor" for purposes of the Fourth Schedule. If remuneration is paid or payable, then proceed to the next test.

(b) Determine whether the service is rendered personally by any person who is a connected person in relation to the company, close corporation or trust

The term "connected person" is defined in section 1(1) and must be applied accordingly.[7] The word "service" includes the provisions of a person to render a service or work for a client (including, for example, companies, close corporations and trusts operating as labour brokers). If the service is rendered personally by any person who is a connected person in relation to the company, close corporation or trust, then proceed to the next test below. If this is not the case, the company, close corporation or trust is not a "personal service provider", and it is not subject to the deduction or withholding of employees' tax.

(c) Determine whether the company, close corporation or trust employs (or is likely to employ) three or more full-time employees throughout the particular year of assessment who are, on a full-time basis, engaged in the business of rendering the service, and who are not holders of shares or members of the company or close corporation, nor settlors or beneficiaries of a trust, nor connected persons in relation to such persons

The phrase "engaged in the business…of rendering any such service" mean that the employees must be directly involved in the service activities of the personal service provider. Taking this into consideration, auxiliary staff such as cleaning staff do not enable the service delivery business and, therefore, do not qualify under the legislation for purposes of determining the "three or more full-time employees" requirement.

It is not possible to define precisely who could be regarded as being engaged in the business on a "full-time" basis. The facts and circumstances of each case must be evaluated to determine whether an employee will qualify as being engaged on a full-time basis for purposes of the exclusion.

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6 Paragraph (ii) of the exclusions to the definition of "remuneration" in paragraph 1 do not apply to a person who is not a resident, or to a person referred to in paragraphs (*b*), (*c*), (*d*) or (*e*) of the definition of "employee" in paragraph 1.

7 See Interpretation Note 67 "Connected Persons" for a discussion on the meaning of this term.

Example 1 – Classification of a personal service provider

Facts:

X is the only member of ABC Close Corporation (the CC). X provides information technology consulting services. The CC employs two other consultants, and an administrative assistant who is responsible for account maintenance and customer queries etc. All are employed on a full-time basis for the full year of assessment and none are connected persons in relation to X.

Result:

Given that the CC employs three full-time employees for the full year of assessment, who are not members of the CC or are not connected persons in relation to X, the CC will not be classified as a personal service provider.

If this test is satisfied, the company, close corporation or trust is not a personal service provider. If this test is not satisfied, then proceed to the next test below.

(d) Determine whether one (or more) of the following criteria applies:

Would the person who is personally rendering the service have been regarded as an "employee" of the client if the service was rendered directly to the client and not through the company, close corporation or trust?

It is necessary to determine whether the person would have been an "employee" as defined in paragraph 1. For example, if the person would have been a person in receipt of remuneration or to whom remuneration accrues as described in paragraph (*a*) of the definition of an "employee", the company, close corporation or trust is a "personal service provider". Following the example through, the test must also include a reference to the definition of the term "remuneration" (because of the reference in paragraph (*a*) to the definition of "employee"), that excludes payments made to common law independent contractors. If the person rendering the service would have been regarded as an independent contractor under common law, then the person would not have been regarded as an "employee" in the absence of the company, close corporation or trust.[8]

Must the person who is personally rendering the service, or the company, close corporation or trust, perform the duties mainly at the premises of the client, and if so, is that person subject to the control or supervision of the client as to the manner in which the duties are performed or are to be performed?

The test is the same as the one used in paragraph (ii) of the exclusions to the definition of "remuneration" in paragraph 1. If the services are rendered mainly at the premises of the client and the client supervises or controls the activities of the person rendering the service or the activities of the company, close corporation or trust, then the test is positive.

[8] Unless the statutory test in the proviso to paragraph (ii) of the exclusions from the definition of "remuneration" in paragraph 1 applies. See Interpretation Note 17 "Employees' Tax: Independent Contractors" for further information.

Does more than 80% of the income of the company, close corporation or trust from services rendered consist (or is likely to consist) of amounts received from any one client, or from any associated institution in relation to the client?

If more than 80% of the income of the company, close corporation or trust consists (or is likely to consist) of income from only one client, the test is positive. The reference to "income" in the test is a reference to "income" as defined in section 1(1). It is necessary to isolate the income received for the services rendered from the income received for other activities of the company, close corporation or trust.

If any of the three criteria under (d) above apply, the test will be positive.

Example 2 – Determination of income (more than 80%) derived from services rendered

Facts:

Company A is in receipt of R100 000 for the year of assessment, of which R90 000 is "income" as defined in section 1(1). R50 000 of the R90 000 represents income for services rendered. Of the R50 000, R42 000 was earned from services rendered to one client.

Result:

More than 80% of Company A's income (R42 000 of R50 000, that is, 84%) was earned from services rendered to one client. The test is therefore positive for the company.

4.1.2 Labour broker

As of 1 March 2009, a labour broker[9] is any **natural** person who conducts or carries on any business whereby such person, for reward, provides a client with his or her own employees to perform work for the client or procures workers for a client, but does not personally provide the services required by the client. A company, close corporation or trust that provides such services is not classified as a labour broker.

An employer is not required[10] to deduct or withhold employees' tax from any remuneration paid or payable by it to a labour broker who produces a valid certificate of exemption[11] (known as an IRP 30) issued by the Commissioner. The certificate of exemption must be issued by SARS if –

- the labour broker conducts an independent trade and is a provisional taxpayer;[12]
- the labour broker is registered as an employer for employees' tax purposes;[13] and
- the labour broker has submitted[14] all returns required to be submitted under the Act.[15]

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9 As defined in paragraph 1.
10 Paragraph 2(5)(*c*).
11 Under paragraph 2(5)(*a*).
12 Paragraph 2(5)(*a*)(i).
13 Paragraph 2(5)(*a*)(ii).
14 Unless an extension has been granted by the Commissioner.
15 Paragraph 2(5)(*a*)(iii).

A certificate of exemption may not be granted when –[16]

(a) 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[17] of the client, **unless** the labour broker employs three or more full-time employees who are on a full-time basis engaged in the business of that labour broker and who are not connected persons in relation to the labour broker. The rule relating to the three or more employees does not apply to persons engaged in other activities of the labour broker – the employees must be directly involved in the labour broking activities of the labour broker to provide or procure persons for clients of that labour broker; or

(b) the labour broker provides to any of its clients the services of another labour broker. This requirement does, however, not preclude a labour broker from acquiring an employee from another labour broker for purposes of providing the employee to a client. For example, if Labour Broker A is requested by a client to provide a particular type of employee that it does not possess, and Labour Broker A acquires this employee from Labour Broker B to become an employee of Labour Broker A, and forwards the employee to the client in the normal way, then Labour Broker A would not be penalised by this requirement because the employee is provided to the client as an employee of Labour Broker A. This requirement is applicable when, for example, a client is permitted to hire an employee of Labour Broker B through Labour Broker A; or

(c) the labour broker is contractually obliged to provide the services of a specified employee to the client. This requirement is applicable when, for example, the client prescribed or required Employee A to render the service. This requirement is not applicable if an employee of the labour broker was chosen by name as a result of a *bona fide* selection process based on the requirements of the client, and specified as such in the eventual contractual agreement.

Example 3 – Determination of a labour broker

Facts:

A client requires an information technology auditor. Labour Broker A conducts a selection process to determine the most suitable employee to render services to the client. B is selected by Labour Broker A and, in the contract between the client and Labour Broker A, it is specified that B will render services to the client.

Result:

In this case the selection process was not influenced by the client and the exclusion is therefore not applicable.

The requirements for granting a certificate of exemption still include the requirement that the labour broker be conducting an independent trade. From a practical point of view, however, it is easier to test the labour broker against the requirements listed above before attempting to classify the labour broker as either dependent or independent.

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16 Since 7 February 2007, in terms of the proviso to paragraph 2(5)(*a*).

17 As defined in paragraph 1 of the Seventh Schedule.

Labour brokers and their employees

Many labour brokers and companies performing labour broking activities contend that they merely act as agents for their clients, and the ultimate responsibility for the deduction or withholding, and paying over to SARS, of employees' tax, skills development levy (SDL)[18] and Unemployment Insurance Fund contributions (UIF)[19] vests in the labour broker's client. Relying on the authority of *NUMSA v Assign Services*,[20] it is argued that under the LRA the client is in certain circumstances deemed to become the employer of the employees after the expiry of a period of three months.

NUMSA v Assign Services dealt with the correct interpretation of section 198A(3)(*b*) of the LRA. That section provides as follows:

> "(3) *For the purposes of this Act*, an employee—
>
> (*b*) not performing such temporary service for the client is—
>
> (i) deemed to be the employee of that client and the client is deemed to be the employer; and
>
> (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client."

(Emphasis added)

The deeming rule under the LRA thus applies only for the purposes of the LRA. This is supported by the reasoning of Tlaletsi DJP in *NUMSA v Assign Services*:[21]

> "In order to ascertain who the employer of the placed worker in that position *for the purposes of the LRA* is, one is enjoined to resort to the provisions of s198A (3)(b). Such a worker is therefore deemed to be the employee of the client and the client deemed to be the employer of the worker."[22]

(Emphasis added)

Once the requirements of the LRA are triggered in this regard, the employees are deemed to become employees of the client for purpose of the LRA, and enjoy the various protections granted by that statute, such as for example, the right to fair labour practices, protection against unfair dismissals, the right to collective bargaining etc.

However, the position under the Act is determined by a different test to that under the LRA. For purposes of employees' tax, SDL and UIF, the test is whether the amounts paid by the labour broker or company performing labour broking activities constitute remuneration. As the amounts in question will undoubtedly constitute paragraph (*c*), (*d*) or (*i*) of "gross income", the only question is whether the amounts qualify to be excluded from remuneration under sub-paragraph (ii) of the exclusions from the definition of remuneration (the so-called independent trade exclusion).

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18 Under the Skills Development Levies Act 9 of 1999.
19 Under the Unemployment Insurance Contributions Act 4 of 2002.
20 NUMSA v Assign Services and Others [2017] 10 BLLR 1008 (LAC).
21 Paragraph 37 of the judgment.
22 The Labour Appeal Court's decision was confirmed by the Constitutional Court in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* 2018 (5) SA 323 (CC); 2018 (11) BCLR 1309 (CC).

The requirements for exclusion are discussed in detail in Interpretation Note 17 "Employees' tax: Independent Contractors". For present purposes, it is sufficient to state that the employees are required to be independent of both –

(i) the person by whom the amount is paid or payable; and

(ii) the person to whom the services are rendered or will be rendered.

This will not be the case in labour broking scenarios, and the labour broker or company conducting labour broking activities will be obliged to deduct or withhold employees' tax, SDL and UIF.

4.1.3 Decision chart

The legislation relating to the definition of "employee" in paragraph 1 is illustrated by the chart in **Annexure B**. The process flow to determine whether an entity is a personal service provider is illustrated by the chart in **Annexure C**.

4.2 The effect of the law

Certain consequences flow from being classified as a personal service provider or a labour broker without a certificate of exemption. These are explained in more detail below.

4.2.1 Applicable tax rates

Personal service providers, as with all other companies and close corporations, pay tax on taxable income at the rate of 28%[23, 24] and trusts pay tax at the rate of 45%.[25]

A labour broker will not be granted a certificate of exemption if any one of the prohibitions mentioned in **4.1.2** applies. A labour broker without a certificate of exemption is subject to income tax at the rates applicable to individuals.[26]

4.2.2 Deduction of expenses

Section 23(*k*) limits the deductions available to personal service providers and labour brokers without a certificate of exemption.

Both personal service providers and labour brokers without a certificate of exemption may claim amounts paid to employees for services rendered, which amounts are taken into account in the determination of the taxable income of the employee. The phrase "taken into account" does not mean that such amount must be included in taxable income, only considered. For example, a labour broker without a certificate of exemption could pay a travel allowance to an employee. The full travel allowance might not be included in the employee's taxable income, as the employee may claim travel

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[23] Paragraph 3(*a*) of the draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, in force under section 5(2) following the national annual budget announced by the Minister of Finance on 23 February 2022.

[24] For companies with a year of assessment ending on or after 1 March 2023, the tax rate is 27% – see paragraph 4(*a*) of the draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, in force under section 5(2) following the national annual budget announced by the Minister of Finance on 23 February 2022.

[25] Paragraph 2 of the draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, in force under section 5(2) following the national annual budget announced by the Minister of Finance on 23 February 2022.

[26] Paragraph 1 of the draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, in force under section 5(2) following the national annual budget announced by the Minister of Finance on 23 February 2022.

expenses.[27] However, subject to all other requirements for deductibility being met, the full travel allowances will be deductible by the labour broker.

The opening words of section 23(*k*) prohibit a personal service provider or a labour broker without a certificate of exemption from deducting any ***expense incurred***, other than those specifically permitted by section 23(*k*). For the reasons that follow, a wear-and-tear allowance claimable under section 11(*e*) is not an *expense incurred*, and so is not prohibited from being deducted by section 23(*k*).

Expense

An "expense" may be defined as a financial cost or outlay[28] and is "the money that something costs you or that you need to spend in order to do something".[29] An "expense" as contemplated in the introductory words of section 23(*k*), therefore, entails some form of spending of money by the personal service provider or labour broker.

Section 11(*e*) entitles a taxpayer to an *allowance* which is based on the value of the asset and does not arise from expenditure in the form of the spending of money. Although a taxpayer would originally have expended money to purchase the capital asset on which the wear-and-tear allowance is claimed, that is not what is being claimed under section 11(*e*). The section 11(*e*) allowance is a notional amount representing the value by which an asset has diminished during a year of assessment due to depreciation or wear-and-tear. It has no relation to what was actually spent, other than to determine the value of the asset for purposes of quantifying the allowance.

Incurred

An expense is "incurred" when there is an "*undertaking of an obligation to pay or (which amounts to the same thing) the actual incurring of a liability*".[30] Thus, for an expense to be prohibited from being deducted under section 23(*k*), the personal service provider or labour broker must have had a legal obligation to part with a sum of money or property.

A wear-and tear-allowance claimed under section 11(*e*) does not entail a taxpayer undertaking an obligation to pay anything, or to incur any actual liability. An obligation may have arisen when the original asset was acquired, but the cost that was attached to that original obligation is not what is being claimed under section 11(*e*). A wear-and-tear allowance is what is claimed, which is a notional amount based on the asset's value. Nothing is *incurred* when claiming a wear-and-tear allowance.

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27 See Interpretation Note 14 "Allowances, Advances and Reimbursements" for more detail.

28 Definition of "expense" in the Merriam-Webster Dictionary. **www.merriam-webster.com/dictionary/expense** [Accessed 13 March 2023].

29 Definition of "expense" in the Collins Dictionary Online. **www.collinsdictionary.com/dictionary/english/expense** [Accessed 13 March 2023].

30 *Ackermans Ltd and another v Commissioner for the South African Revenue Service and another* 2011 (1) SA 1 (SCA) in paragraph 8.

Accordingly, a wear-and-tear allowance under section 11(*e*) is not an "expense incurred" by a personal service provider or labour broker, as contemplated in section 23(*k*),[31] and is not prohibited.[32]

Other expenses not prohibited for personal service providers

The additional expenses that may be claimed as a deduction by a personal service provider are limited to the following:

- Legal expenses[33]
- Bad debts[34]
- Contributions to a pension fund, provident fund or retirement annuity fund for the benefit of employees[35]
- Any amount received or accrued for services rendered or by virtue of employment or the holding of any office that was included in the taxable income of the personal service provider and was refunded[36]
- Any amount contemplated in paragraph (*c*A) of the definition of "gross income" in section 1(1) (that is, any restraint of trade payment) received by or accrued to the labour broker that was refunded[37]
- Expenses for premises, finance charges, insurance, repairs and fuel and maintenance cost for assets if the premises or assets are used *wholly and exclusively* for the purposes of trade[38]

Under section 23(*k*), any expenses incurred by a personal service provider or a labour broker without a certificate of exemption, other than the expenses mentioned above, are not permitted as deductions for purposes of calculating taxable income. The Act does not provide for the apportionment of deductions if a personal service provider or labour broker is in receipt of more than one type of income. The provisions of section 23(*k*) will apply if a company, close corporation or trust falls within the definition of personal service provider, or a natural person falls within the definition of "labour broker" and does not have a certificate of exemption.

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31 See also SARS and National Treasury: Responses to Written Representations by Organisations to the Portfolio Committee on Finance on the Draft the Revenue Laws Amendment Bill, 2006 dated 31 October 2006 at paragraph 3.67 on page 40, where this objective of section 23(*k*) is confirmed.

32 See Interpretation Note 47 (Issue 5) "Wear-and-Tear or Depreciation Allowance" for more information on the remaining requirements that must be satisfied before a section 11(*e*) allowance may be claimed.

33 Under section 11(*c*).

34 Under section 11(*i*).

35 Under section 11(*l*).

36 Under section 11(*n*A).

37 Under section 11(*n*B).

38 Under section 11(*a*).

4.2.3 Employees' tax

A personal service provider and a labour are employees for purposes of employees' tax, and payments to them are subject to the deduction or withholding of employees' tax. Employees' tax must be deducted at the following rates:

- Personal service providers that are companies: 28%[39]
- Personal service providers that are trusts: 45%
- Labour brokers: the tax tables applicable to natural persons

It may only become apparent during the year of assessment that a personal service provider or a labour broker will earn more than 80% of its income from one source. To avoid the situation where an employer did not deduct employees' tax when it should have done, employers must ensure at the outset that this situation is anticipated and that the applicable employees' tax is deducted.

In instances when the first two tests in **4.1.1(d)** do not apply and a company, close corporation or trust provides a client with an affidavit or solemn declaration[40] stating that it will not derive more than 80% of its income from one client, the client may rely on the affidavit or solemn declaration, *provided* the client relies on it in good faith. If it later emerges that the company, close corporation or trust is, in fact, a personal service provider, then employees' tax will not be recoverable from the client. However, the prohibition of deductions under section 23(*k*) will apply as far as that personal service provider is concerned.

The employees' tax that must be deducted or withheld from payments to personal service providers may result in a tax credit that exceeds the personal service provider's final actual net tax liability, due to the expenses, deductions or contributions listed above that could be claimed as deductions. Paragraph 11(*a*) therefore provides that a personal service provider may apply to SARS for a tax directive to allow for a rate of employees' tax that will more closely match the final tax liability.

4.2.4 Additional considerations

A personal service provider does not qualify as a "small business corporation"[41] and will thus not qualify for the lower tax rates applicable to small business corporations. Both a personal service provider and a labour broker without a certificate of exemption do not qualify as a micro business[42] for the purposes of turnover tax payable by micro businesses.

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39 For companies with a year of assessment ending on or after 1 March 2023, the tax rate is 27% – see paragraph 4(*a*) of the draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, in force under section 5(2) following the national annual budget announced by the Minister of Finance on 23 February 2022.

40 Under paragraph 2(1A).

41 As defined in section 12E.

42 As defined in paragraph 1 of the Sixth Schedule.

5. Conclusion

The term “personal service provider” is only applicable to a “company” and “trust” as defined in section 1(1). This means that the term is not applicable to a natural person. The effect of the legislation can therefore be eliminated by rendering the services through a natural person directly to the client. By rendering the services directly as a natural person, the normal rules relating to the status of an independent contractor or common law employee, as explained in previous guidelines issued by SARS, become relevant.

Not all companies are affected by the legislation relating to a personal service provider. Only companies that fall within the definition of a “personal service provider” are affected by the definition, and also only when those that fall within the definition are in receipt of “remuneration” as defined.

It is recommended that all users of services (employer or client) from potential labour brokers and personal service providers should have policies and systems in place to correctly identify and withhold employees’ tax from these entities and individuals. A possible solution would be a questionnaire or an affidavit (including an affidavit or solemn declaration for a personal service provider indicating that not more than 80% of its income is derived or is likely to be derived from one client) that could be used by the service-user at the start of the engagement or contract and regularly thereafter. This will enable the client to determine whether employees’ tax should be deducted or not.

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Annexure A – The law

Paragraph 1 – Definitions

"employee" means—

(*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;

(*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;

(*e*) any personal service provider; or

(*f*) ……

(*g*) any director of a private company who is not otherwise included in terms of paragraph (*a*);

"labour broker" means any natural 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;

"personal service provider" means any company or trust, where any service rendered on behalf of such company or trust to a client of such company or trust is rendered personally by any person who is a connected person in relation to such company or trust, and—

(*a*) such person would be regarded as an employee of such client if such service was rendered by such person directly to such client, other than on behalf of such company or trust; or

(*b*) where those duties must be performed mainly at the premises of the client, such person or such company or trust is subject to the control or supervision of such client as to the manner in which the duties are performed or are to be performed in rendering such service; or

(*c*) where more than 80 per cent of 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 directly or indirectly from any one client of such company or trust, or any associated institution as defined in the Seventh Schedule to this Act, in relation to such client,

except where such company or trust throughout the year of assessment employs three or more full-time employees who are on a full-time basis engaged in the business of such company or trust of rendering any such service, other than any employee who is a holder of a share in the company or settlor or beneficiary of the trust or is a connected person in relation to such person;

Paragraph 2(1A) – Affidavit in respect of 80% rule

(1A) Notwithstanding the provisions of subparagraph (1), a person shall not be required to deduct or withhold employees' tax in respect of any year of assessment of a company or trust solely by virtue of paragraph (*c*) of the definition of "personal service provider" where the company or trust has in respect of such year of assessment provided that person with an affidavit or solemn declaration stating that the relevant paragraph does not apply and that person relied on that affidavit or declaration in good faith.

Paragraph 2(5) – Certificate of exemption for a labour broker

(5)(*a*) The Commissioner shall on application made to him by any person who is a labour broker or who is an employee by reason of the provisions of paragraph (*d*) of the definition of "employee" in paragraph 1, issue to such person a certificate of exemption if—

(i) such person carries on an independent trade and is registered as a provisional taxpayer under the provisions of paragraph 17;

(ii) in the case of any such labour broker, he is registered as an employer under the provisions of paragraph 15; and

(iii) such person has, subject to any extension granted by the Commissioner, submitted all such returns as are required to be submitted by him under this Act:

Provided that the Commissioner shall not issue a certificate of exemption if—

(*aa*) more than 80 per cent of the gross income of such person during the year of assessment consists of, or is likely to consist of, an amount or amounts received from any one client of such person, or any associated institution as defined in the Seventh Schedule to this Act in relation to such client, unless that person is a labour broker who throughout the year of assessment employs three or more full-time employees—

(A) who are on a full-time basis engaged in the business of that labour broker of providing persons to or procuring persons for clients of that labour broker; and

(B) who are not connected persons in relation to that labour broker;

(*bb*) such labour broker provides to any of its clients the services of any other labour broker; or

(*cc*) such labour broker is contractually obliged to provide a specified employee of such labour broker to render any service to such client.

(*b*) The certificate of exemption referred to in item (*a*) shall be issued in such form as the Commissioner may decide and shall be valid for such period as the Commissioner may indicate thereon.

(*c*) An employer shall not be required to deduct or withhold employees' tax from any remuneration paid or payable by him to any person who produces to the employer a valid certificate of exemption issued by the Commissioner under item (*a*).

Section 23(*k*) – Limitation of allowable deductions

23. Deductions not allowed in determination of taxable income.—No deductions shall in any case be made in respect of the following matters, namely—

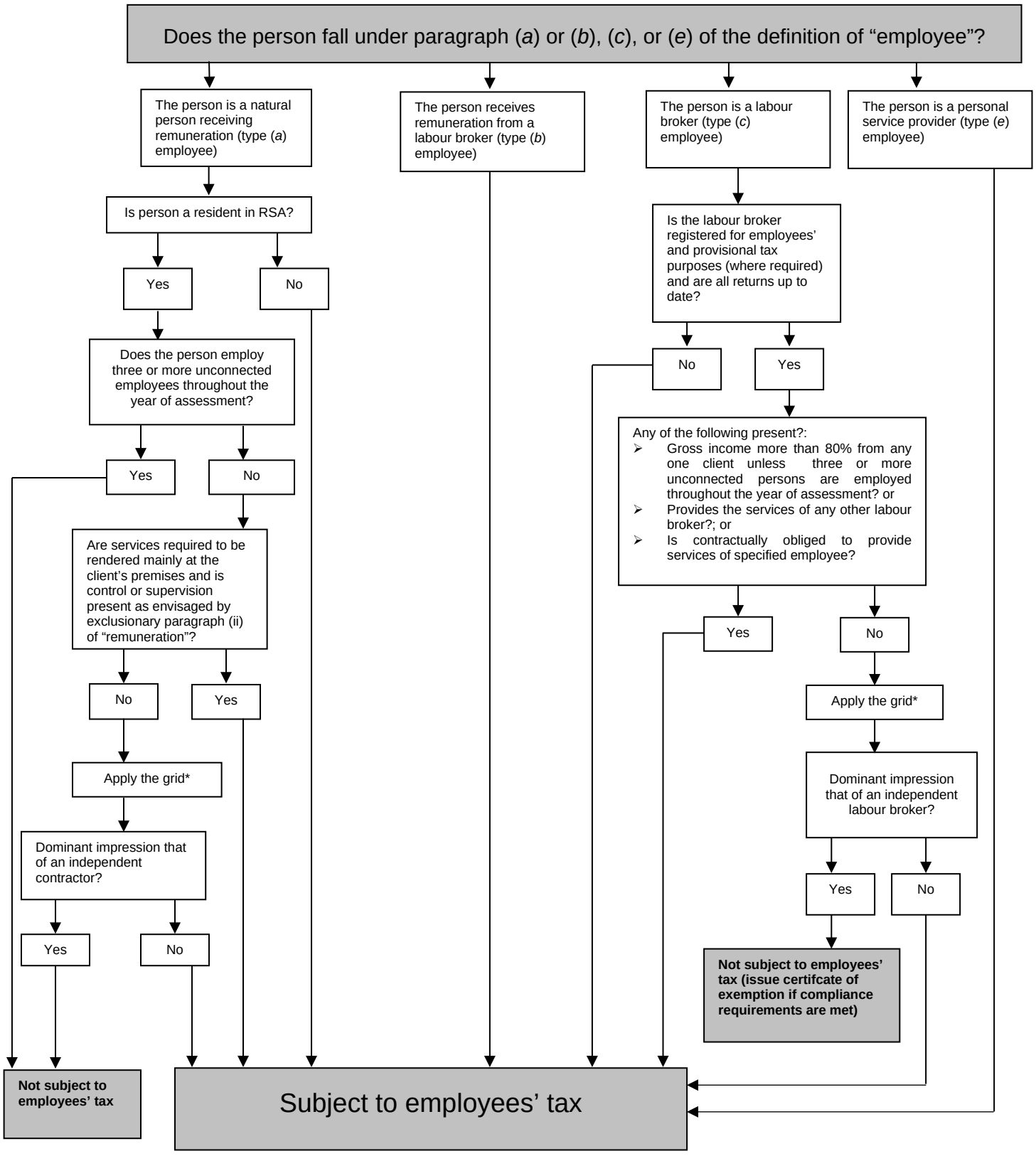
(*k*) any expense incurred by—

(i) a labour broker as defined in the Fourth Schedule, other than a labour broker in respect of which a certificate of exemption has been issued in terms of paragraph 2 (5) of the said Schedule; or

(ii) a personal service provider as defined in the said Schedule,

other than any expense which constitutes an amount paid or payable to any employee of such labour broker, or personal service provider for services rendered by such employee, which is or will be taken into account in the determination of the taxable income of such employee and, in the case of such personal service provider, any expense, deduction or contribution contemplated in paragraphs (*c*), (*i*) (*l*), (*n*A) or (*n*B) of section 11, expenses in respect of premises, finance charges, insurance, repairs and fuel and maintenance in respect of assets, if such premises or assets are used wholly and exclusively for purposes of trade;

Annexure B – Flow diagram



*See Annexure C to Interpretation Note 17 – Common law dominant impression test grid

Annexure C – Personal service provider process flow