SOUTH AFRICAN REVENUE SERVICE

DRAFT GUIDE TO THE EMPLOYMENT TAX INCENTIVE

(Issue 5)

Another helpful guide brought to you by the
South African Revenue Service

SARS
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Draft Guide to the Employment Tax Incentive

Preface

The employment tax incentive was introduced by the Employment Tax Incentive Act 26 of 2013 which was promulgated on 18 December 2013. This Act has since been amended on a number of occasions. This guide provides general guidance on the incentive.

While this guide reflects SARS's interpretation of the law, taxpayers who take a different view may use the normal avenues for resolving such differences.

This guide is not an "official publication" as defined in section 1 of the Tax Administration Act 28 of 2011 and accordingly does not create a practice generally prevailing under section 5 of that Act. It should, therefore, not be used as a legal reference. It is also not a binding general ruling under section 89 of Chapter 7 of the Tax Administration Act. Should an advance tax ruling be required, visit the SARS website for details of the application procedure.

All guides, interpretation notes, rulings, forms, returns and tables referred to are available on the **SARS website**. Unless indicated otherwise, the latest issues of these documents should be consulted.

Should you require additional information concerning any aspect on the interpretation and administration of the employment tax incentive legislation you may –

- visit the SARS website at **www.sars.gov.za**;
- contact the SARS National Contact Centre –
    - if calling locally, on 0800 00 7277; or
    - if calling from abroad, on +27 11 602 2093 (only between 8am and 4:30pm South African time); or
- have a virtual consultation with a SARS consultant by making an appointment via the **SARS website**;
- visit your nearest SARS branch, after making an appointment via the **SARS website**; or
- contact your own tax advisor or tax practitioner.

Comments or suggestions on this guide may be emailed to **policycomments@sars.gov.za**.

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Contents

Glossary

In this guide unless the context indicates otherwise –

- **"Basic Conditions of Employment Act**" means the Basic Conditions of Employment Act 75 of 1997;
- **"ETI"** means employment tax incentive;
- **"ETI Act"** means the Employment Tax Incentive Act 26 of 2013;
- **"Income Tax Act"** means the Income Tax Act 58 of 1962;
- **"Labour Relations Act"** means the Labour Relations Act 66 of 1995;
- **"Minister"** means Minister of Finance;
- **"National Minimum Wage Act"** means the National Minimum Wage Act 9 of 2018;
- **"Schedule"** means a Schedule to the Income Tax Act;
- **"section"** means a section of the ETI Act;
- **"SEZ"** means a "special economic zone" as defined under section 1(1);
- **"SEZ Act"** means the Special Economic Zones Act 16 of 2014;
- **"Skills Development Act"** means the Skills Development Act of 97 of 1998;
- **"TA Act"** means the Tax Administration Act 28 of 2011;
- **"VAT"** means value-added tax;
- **"VAT Act"** means the Value-Added Tax Act 89 of 1991; and
- any other word or expression bears the meaning ascribed to it in the ETI Act.

1. Background

The ETI Act has been introduced to provide an incentive in order to encourage employment creation.[1] The *Explanatory Memorandum on the Employment Tax Incentive Bill, 2013*, states that –

> "In response to the high rate of youth unemployment, Government wishes to implement an incentive mainly aimed at encouraging employers to hire young and less experienced work seekers.
>
> …
>
> Government's aim is that the incentive should assist in the generation of sustainable employment opportunities that enjoy protection under labour law legislation."

The ETI is an incentive that may be claimed by eligible employers and is aimed at encouraging such employers to employ young employees between the ages of 18 and 29, and employees of any age in SEZs and in any industry identified by the Minister by notice in the *Government Gazette*. The ETI commenced on 1 January 2014 and will end on 28 February 2029.[2]

1 Section 2(1).

2 Section 97(1) of the Taxation Laws Amendment Act 15 of 2016 and section 102 of the Taxation Laws Amendment Act 23 of 2018 have extended the initial period of three years.

The ETI will be subject to continuous review of its effectiveness and impact in order to determine the extent to which its core objective of reducing youth unemployment is achieved.

Payment of the incentive is effected by eligible employers being able to reduce the employees' tax due by them by the amount of the ETI that they may claim – provided of course they meet the requirements of the ETI Act. The ETI is administered by SARS through the employees' tax system that is deducted and withheld and accounted for to SARS (usually monthly) via the Pay-As-You-Earn (PAYE) system. During this period an eligible employer may claim the ETI for a maximum of 24 months per qualifying employee.

The ETI Act has since promulgation been amended on a number of occasions. One such amendment is the Taxation Laws Amendment Act 34 of 2019[3] which introduced section 7A with retrospective effect to enable the Minister, by way of an announcement in the national annual budget,[4] to alter the –

- amount in respect of the minimum wage requirement;[5]
- penalty imposed in the case an employee is displaced;[6]
- maximum monthly remuneration;[7] and
- amount of ETI that an eligible employer may claim in respect of a qualifying employee[8]

with effect from a date or dates mentioned in that announcement. These amendments will apply for a period of 12 months provided Parliament pass the necessary legislation giving effect to that announcement within that period of 12 months.[9]

The Disaster Management Tax Relief Act 13 of 2020[10] also introduced temporary amendments to various sections in the ETI Act. These amendments provided only temporary relief[11] and will not be considered in this guide.

In order to curb apparent abuse of the ETI, amendments to the definition of "employee", "monthly remuneration" and section 6 (qualifying employees) were introduced by the Taxation Laws Amendment Act 20 of 2021.[12] These amendments are effective from 1 March 2022 and applicable in respect of years of assessment commencing on or after that date.

3 Section 81(1) of the Taxation Laws Amendment Act 34 of 2019. This amendment is retrospective and came into operation on 20 February 2019.
4 As contemplated in section 27(1) of the Public Finance Management Act 1 of 1999.
5 Section 4.
6 Section 5.
7 Section 6.
8 Section 7.
9 Section 7A(2).
10 See sections 2, 3, 4, 5 and 6 of the Disaster Management Tax Relief Act 13 of 2020.
11 The period 1 April 2020 to 31 July 2020.
12 For further details on the ETI abuse, see the *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2021.*

2. Scope and definitions [section 1(1)]

The most important definitions are discussed below.

2.1 Associated person

> **"associated person"**, in relation to an employer—
>
> (*a*) where the employer is a company, means any other company which is associated with that employer by reason of the fact that both companies are managed or controlled directly or indirectly by substantially the same persons;
>
> (*b*) where the employer is not a company, means any company which is managed or controlled directly or indirectly by the employer or by any partnership of which the employer is a member; or
>
> (*c*) where the employer is a natural person, means any relative of that employer;

The definition of "associated person" is relevant in the calculation of the 24-month period for which the ETI is available (see **5.2**). The definition was included to prevent the redeployment of employees by employers with associated persons solely in order to obtain a benefit under the ETI.

The words "managed" and "controlled" in paragraphs (*a*) and (*b*) of the definition of "associated person" are not defined in the ETI Act. The use of the co-ordinating conjunction "or" between "managed" and "controlled" means that either term can apply. The expression is thus wider than "managed and controlled".

The word "management" has been defined as –[13]

> "the act or art of managing : the conducting or supervising of something (such as a business)".

The words "management" and, in context, "manage" are very broad and it is not possible to list activities which do (and in contrast, do not) constitute management. Instead, when assessing whether or not a particular person is managing a company it is necessary to consider all the facts of the particular case taking into account the activities for which the person is responsible, the person's level of seniority and the scope of the person's responsibilities.

In ITC 1741[14] the court held that "controlled" in the absence of a statutory definition or any other contrary indicators meant *de facto* control,[15] that is, control and not shareholder control. *De facto* control is generally, but not necessarily, held and exercised by the board of directors. However, the facts and circumstances of each case are critical in determining who is controlling a company because the presence and influence of controlling individuals can have a significant impact.

The word "substantially" in paragraph (*a*) of the definition of "associated person" is not defined in the ETI Act. *Cambridge Dictionary* defines "substantially" as –[16]

> "to a large degree".

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13 **www.merriam-webster.com/dictionary/management** [Accessed 30 March 2023].

14 (2002) 65 SATC 106 (EC).

15 In fact, whether by right or not.

16 **www.dictionary.cambridge.org/dictionary/english/substantially** [Accessed 30 March 2023].

Under paragraph (*c*) of the definition of "associated person" an employer that is a natural person will constitute an "associated person" in relation to any "relative" of the employer. The term "relative" includes in relation to any person –[17]

- that person's spouse;
- anybody related to that person within the third degree of consanguinity;[18]
- anybody related to that person's spouse within the third degree of consanguinity; and
- the spouse of anybody related within the third degree of consanguinity to that person or that person's spouse.

2.2 Employee

Since "employee" is defined in and for purposes of the ETI Act, it follows that the definition of "employee" in paragraph 1 of the Fourth Schedule will not apply for purposes of the ETI. In *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others*,[19] the Constitutional Court considered the interpretation of words in one Act with reference to words used in another Act. In this case it was stated that there is no principle of interpretation that requires a Court without more to interpret one piece of legislation with reference to another and that a special meaning given to a word or expression in one statute may not be assigned to the same word or expression in another statute which does not define that same word either at all or in the same terms.

The definition of "employee" in the ETI Act has been aligned with the definition of "employee"[20] in the Labour Relations Act[21] because the aim of the ETI is to assist in creating employment opportunities regulated by labour legislation.

An employer will only be able to claim the ETI for a "qualifying employee" as defined.[22] An employee will only be regarded as a "qualifying employee" if the employee meets all the criteria prescribed in section 6 (see **3.2**).

The definition of "employee" was amended twice, namely in 2018 and 2022. This guide considers the definition of "employee" at the date of publication of the guide. For a consideration of the definition of "employee" prior to the 2022 amendment, please refer to previous issues of this guide.

> **"employee"** means a natural person—
>
> (*a*) who works for another person and in any other manner directly or indirectly assists in carrying on or conducting the business of that other person;
>
> (*b*) who receives, or is entitled to receive remuneration, from that other person; and

17 A "relative" is defined in section 1(3) of the ETI Act.

18 See **Annexure A** for a diagram illustrating the rule for determining persons who are related within the third degree of consanguinity. See also Interpretation Note 67 "Connected Persons".

19 2020 (2) SA 325 (CC).

20 Section 213 of the Labour Relations Act.

21 *Explanatory Memorandum on the Draft Employment Tax Incentive Bill (2013)*, Clause-By-Clause Explanation.

22 Section 1(1).

(*c*) who is documented in the records of that other person as envisaged in the record keeping provisions in section 31 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997),

but does not include an independent contractor;

Under the definition of "employee", the person must –

- be a natural person (see **2.2.1**);
- work for another person [see **2.2.2(a)**] and in any other manner directly or indirectly assist in carrying on or conducting the business of that other person [see **2.2.2(b)**];
- receive or be entitled to receive remuneration from that person (see **2.2.3**);
- be documented in the records of that other person as envisaged in the record keeping provisions in section 31 of the Basic Conditions of Employment Act (see **2.2.4**); and
- not be an independent contractor (see **2.2.5**).

All the abovementioned requirements must be met for the person to be considered an "employee" as defined in section 1(1).

The respective requirements are considered below.

2.2.1 Must be a natural person

The definition of "employee" requires that an employee is a natural person. The phrase "natural person" is not defined in the ETI Act, and must therefore be given its ordinary legal meaning. A natural person is a human being and distinguished from a juristic person created by operation of law. *LAWSA*[23] states the following in this regard:

> "Modern law distinguishes between two classes of persons: (a) natural persons; and (b) juristic or artificial persons…All human beings, irrespective of their age, mental condition or intellectual ability, are recognised as legal subjects. Every human being therefore can have rights, duties and capacities although the content of these rights, duties and capacities may vary depending on factors such as the person's mental condition and age. To distinguish them from other juristic persons humans are referred to as 'natural persons'."

Accordingly, a natural person is a human being, and does not include a juristic or artificial person.

[23] DSP Cronje (updated by M Carnelley) "Different Kinds of Person" 20(1) (Second Edition Volume) *LAWSA* [online] (My LexisNexis: 30 November 2009) in paragraph 439.

2.2.2 Must work for another person and in any other manner directly or indirectly assist in carrying on or conducting the business of that other person

An "employee" must work for another person and in any other manner directly or indirectly assist in carrying on or conducting the business of that other person. These requirements are considered in more detail below.

(a) Meaning of "work for" another person

The word "work" is not defined in the ETI Act and should thus be interpreted according to its ordinary meaning as applied to the subject matter with regard to which it is used.[24]

Dictionary.com defines "work" as –[25]

> "**1** physical or mental effort directed towards doing or making something".

In *C: SARS v Terraplas South Africa (Pty) Ltd*[26] it was held that a dictionary meaning of a word cannot govern the interpretation. It can only afford a guide. The question arises as to what is the meaning applicable in the context of the particular document under consideration. The word "work" in the context of the definition of "employee" envisages more than just a contractual relationship between two parties involving the payment of an amount by one party to the other.

By the use of the word "work", it was envisaged that the person must provide services to the employer and must regularly assist the employer in carrying on or conducting the business of the employer for which the person is remunerated. The word "work" in this context, requires more than just a contractual relationship between two people that involves the payment of an amount by one person to the other. The employee must provide services to the qualifying employer and must assist the employer in carrying on or conducting the business of the employer.

Legally, the essential features required to make a specific contract one of employment are, amongst others, as follows:[27]

- The intention of the parties to conclude a contract of employment (true nature of relationship), also referred to as the reality test
- The existence of a relationship of authority
- The remuneration of the employee
- The rendering of personal services by the employee
- The employee being an integral part of the employer's organisation

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[24] EA Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* (1995) Butterworth's at 224.

[25] **www.dictionary.com/browse/work** [Accessed 30 March 2023].

[26] [2014] 3 All SA 11 (SCA); 76 SATC 377 at 385.

[27] F van Jaarsveld "Criteria to Distinguish Contracts of Employment from Related Contracts" 24(1) (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 30 November 2017) in paragraph 121.

In *State Information Technology Agency (SITA) (Pty) Ltd v CCMA and others*[28] the Labour Appeal Court confirmed that the focus has finally shifted from the formal contract of employment to the existence of an employment relationship. The Labour Appeal Court identified the following as the primary criteria for the employment relationship:[29]

- An employer's right to supervision and control.
- Whether the employee forms an integral part of the organisation with the employer.
- The extent to which the employee was economically dependent upon the employer.

Having regard to the definition of "employee" in the ETI Act, it does not suffice that there is a contract between the parties creating an employer-employee relationship. The factual question is whether the employee works for the employer.

In some instances, taxpayers become party to composite arrangements which are arguably aimed at abusing the incentive. These composite arrangements typically involve a learning institution, an organisation, and a person for a limited period of either 12 or 24 months. Under the arrangement, the organisation is responsible for paying an agreed-upon training fee to the learning institution, on behalf of that person. Contractually the parties refer to this training fee as the person's basic remuneration. The learning institution is responsible for providing the person with training, mostly in the form of an accredited SETA[30] training course, as well as all the lectures, and training facilities for the duration of the arrangement. In some cases, practical field training is included. Notwithstanding that an employment contract may have been entered into under this composite arrangement, no work is carried out by the person for the organisation.

Under these arrangements, the person generally does not render any services to the organisation and does not obtain practical work experience. The person receives accredited education in the form of training courses through an accredited learning institution. Under some arrangements, the person may be exposed to work-based exercises and activities by another organisation (not the primary organisation) which pays only a fixed monthly fee. These fees are paid to the learning institution and not to the person.[31] The number of persons contracted are often more than what is reasonably necessary to conduct the organisation's business. Under such arrangements the requirements of the definition of "employee" will not be met.

The facts and circumstances of each case must be considered to determine whether an employment relationship as envisaged by the ETI Act between the parties exists.

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28 [2008] 7 BLLR 611 (LAC).

29 At 615.

30 A sector education and training authority established under section 9(1) of the Skills Development Act.

31 See *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2021.*

(b) Must in any other manner directly or indirectly assist in carrying on or conducting the business of that other person

The recent amendment to the definition of "employee" effective from 1 March 2022 requires that the employee must *in any other manner directly or indirectly assist in carrying on or conducting the business of that other person*.

The words "directly" and "indirectly" are not defined in the ETI Act. *Dictionary.com* defines "directly" as "in a direct line, way, or manner; straight"[32] and defines "indirectly" as "by a connection that is not immediate".[33] The words "directly or indirectly" should, however, not be interpreted in isolation in its application, but regard must be had to the context and purpose of the provision.[34] The requirement is that the employee must assist "directly or indirectly" in carrying on or conducting the business of "that other person", in other words the person for whom the employee works and who must remunerate the employee.

An employee should assist the employer in conducting its business. According to its ordinary dictionary meaning, the word "assist" means "If you assist someone, you help them to do a job or task by doing part of the work for them.".[35]

Although the phrase "carrying on or conducting the business" is not defined in the ETI Act, the courts have provided useful guidelines in clarifying its meaning.

In *Estate G v COT*, Beadle CJ made the following comments on what constitutes "carrying on business":[36]

> "The sensible approach, I think, is to look at the activities concerned as a whole, and then to ask the question: Are these the sort of activities which, in commercial life, would be regarded as 'carrying on business'? The principal features of the activities which might be examined in order to determine this are their nature, their scope and magnitude, their object (whether to make a profit or not), the continuity of the activities concerned, if the acquisition of property is involved, the intention with which the property was acquired. This list of features does not purport to be exhaustive, nor are any one of these features necessarily decisive, nor is it possible to generalize and state which feature should carry most weight in determining the problem. Each case must depend on its own particular circumstances."

The question whether an employee assists in carrying on or conducting the business of the employer is a factual question. In this regard one can, amongst others, consider the activities undertaken as a whole. The question is whether these activities are regarded in commercial life as assisting in the carrying on of business. The principal features of the activities must be examined in order to determine whether they are in nature, scope and magnitude, contributing to the object and the continuity of the activities concerned.[37] The facts and circumstances of each case must be considered to determine whether an employee assists in carrying on or conducting the business of the employer.

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32 **www.dictionary.com/browse/directly** [Accessed 30 March 2023]

33 **www.dictionary.com/browse/indirectly** [Accessed 30 March 2023].

34 *Chisuse and others v Director-General, Department of Home Affairs and another* 2020 (6) SA 14 (CC).

35 **www.collinsdictionary.com/dictionary/english/assist** [Accessed 30 March 2023].

36 1964 (2) SA 701 (SR), 26 SATC 168 at 173 and 174.

37 *Estate G v COT* (above). See also *CIR v Stott* 1928 AD 252, 3 SATC 253 at 257 and ITC 1283 (1978) 41 SATC 36 (SW) at 43.

Example 1 – Definition of "employee" not met

Facts:

On 1 September 2022, Company A entered into an employment contract with Mr T, aged 19 years, for a limited period of 12 months. Company A and Mr T agreed to a monthly remuneration of R3 500. Mr T enrolled at an accredited learning institution, College Z, from 1 September 2022 for a period of 12 months at a monthly training fee of R3 500. Company A paid Mr T's monthly remuneration of R3 500 directly to College Z as payment of the training fee. Company A complied with payroll-related statutory requirements namely payments of PAYE, unemployment insurance fund contributions and skills development levies.

Company A, Mr T and College Z entered into a composite arrangement. According to the agreements entered into, College Z was responsible for providing Mr T with full time training in the form of an accredited training course and all the lectures and training facilities for the duration of the skills and training agreement together with practical field training. Mr T carried on no work for Company A who was paying his remuneration.

Result:

Notwithstanding the fact that an employment contract was entered into between Company A and Mr T, no work (as required by the ETI Act) was carried on by Mr T for Company A. Mr T only received accredited education in the form of training courses through College Z. Mr T did not assist directly or indirectly in carrying on or conducting the business of Company A for the 12-month period. Mr T therefore does not meet the requirement of the definition of "employee" for purposes of the ETI Act. Company A therefore does not qualify to claim the ETI in respect of Mr T.

2.2.3 Must receive or be entitled to receive remuneration from that person

The term "remuneration" is not separately defined in the ETI Act. Having regard to section 1(2) and read together with the definition of the term "monthly remuneration" (see **2.4**) it suggests that the term should bear the meaning ascribed to it in paragraph 1 of the Fourth Schedule.[38]

The word "remuneration" is defined in the Fourth Schedule as any amount of income *paid or 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, paid in cash or otherwise, and is not dependent on whether the amount is paid or payable for services rendered. The definition is subject to a number of inclusions and exclusions.

For a more detailed explanation of the inclusions and exclusions contained in the definition of "remuneration" as defined in the Fourth Schedule, see **Annexure B**.

[38] See section 1(2) which states that for the purposes of the definition of "monthly remuneration" in subsection (1), "remuneration" has the meaning ascribed to it in paragraph (1) of the Fourth Schedule.

2.2.4 Must be documented

The amendment to the definition of "employee" effective from 1 March 2022 requires that the natural person is documented in the records of that other person as envisaged in the record keeping provisions in section 31 of the Basic Conditions of Employment Act.[39] The amendment is applicable in respect of years of assessment commencing on or after that date.

Section 31 of the Basic Conditions of Employment Act provides that every employer must keep a record containing at least the following information:

- the employee's name and occupation;
- the time worked by each employee;
- the remuneration paid to each employee;
- the date of birth of an employee under 18 years of age; and
- any other prescribed information.

These records must be kept by the employer for a period of three years from the date of the last entry in the record.[40] No person may make a false entry in these records.[41] An employer that keeps a record as prescribed in section 31 of the Basic Conditions of Employment Act is not required to keep any other record of time worked and remuneration paid as required by any other employment law.[42]

Example 2 – Definition of "employee" not met

Facts:

On 1 March 2022, Company D entered into an employment contract with Y, aged 21 years, for a limited period of 12 months. Company D and Y agreed on a monthly remuneration of R3 500. Y is working for Company D and directly assists in carrying on Company D's business. Y is documented in the records of Company D as per the record keeping provisions in section 31 of the Basic Conditions of Employment Act, however the time worked by Y is not included in this documentation.

Result:

Company D did not meet the requirement to document Y as per the requirements under section 31 of the Basic Conditions of Employment Act since the time worked by Y was not recorded. Y therefore does not meet the requirement of the definition of "employee" for purposes of the ETI Act. Company D therefore does not qualify to claim the ETI in respect of Y.

39 Section 58(1)(*a*) of the Taxation Laws Amendment Act 20 of 2021.
40 Section 31(2) of the Basic Conditions of Employment Act.
41 Section 31(3) of the Basic Conditions of Employment Act.
42 Section 31(4) of the Basic Conditions of Employment Act.

2.2.5 Exclusion of independent contractors

An independent contractor is specifically excluded from the definition of "employee" for purposes of the ETI. The ETI Act does not contain a definition of "independent contractor" but some useful guidance can be obtained from Interpretation Note 17 "Employees' Tax: Independent Contractor".[43]

2.3 Employees' tax

> **"employees' tax"** means the amount deducted or withheld and that must be paid over to the Commissioner for the South African Revenue Service by virtue of paragraph 2(1) of the Fourth Schedule to the Income Tax Act;

Paragraph 2(1) of the Fourth Schedule requires every employer to deduct or withhold employees' tax from the amount of "remuneration" paid or payable to an employee.

The employer must pay the employees' tax over to SARS within seven days after the end of the month during which the amount was deducted or withheld or such longer period as the Commissioner may approve.[44]

2.4 Monthly remuneration

The definition of "monthly remuneration" was amended on a number of occasions. The latest amendment in the Taxation Laws Amendment Act 20 of 2021 introduced a proviso to the definition and became effective on 1 March 2022.[45] For consideration of the previous versions of the definition of "monthly remuneration", please refer to previous issues of this guide.

One of the requirements in the definition of "monthly remuneration" is that an employer must employ a qualifying employee. The word "employ" is defined in *Dictionary.com* as "to engage or make use of the services of (a person) in return for money; hire".[46] Thus the employer must give work to a qualifying employee and pay remuneration to that qualifying employee in respect of the work done. This requirement under the definition of "monthly remuneration" corresponds to the requirement under the definition of "employee" (see **2.2**), that the employee must work for another person and receive or are entitled to receive remuneration from that other person.

The term "remuneration" for purposes of the definition of "monthly remuneration" in section 1(1) of the ETI Act has the meaning ascribed to it in paragraph 1 of the Fourth Schedule.[47]

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43 The Note discusses the statutory and the common law tests used to assess whether a person is an independent contractor.

44 For more details see the *Guide for Employers in respect of Employees' Tax, 2023*.

45 Section 58(1)(*b*) of the Taxation Laws Amendment Act 20 of 2021.

46 **www.dictionary.com/browse/employ** [Accessed 30 March 2023].

47 Section 1(2) of the ETI Act.

The word "remuneration" is defined in the Fourth Schedule as 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, paid in cash or otherwise and is not dependent on whether the amount is paid or payable for services rendered. The definition is subject to a number of inclusions and exclusions.[48]

Importantly, it is only an amount of remuneration that is "*paid or is payable*" to an employee in the particular month that will constitute "remuneration", and therefore "monthly remuneration", in that month. Since the definition of "remuneration" in the Fourth Schedule refers to amounts of income which is "*paid or is payable*", and an employer is only required to account for employees' tax when the employer "*pays or becomes liable to pay any amount by way of remuneration*" (i.e. the remuneration is "payable"),[49] it is evident that an eligible employer is only entitled to claim the ETI in the month in which the relevant remuneration ("monthly remuneration") is "paid or payable" to the qualifying employee. The employer would usually also be required to account for employees' tax in relation to the relevant remuneration in that same month.

The then Appellate Division was called upon to consider the meaning of "payable" in *Singh v Commissioner for the South African Revenue Service*[50] in the context of the VAT debt recovery provisions of the VAT Act. Olivier JA noted[51] the following:

> "The word 'payable' can have at least two different meanings, *viz* '. . . (*a*) that which is due or must be paid, or (*b*) that which may be paid or may have to be paid . . . The sense of (*a*) is a present liability – due and payable – . . . (*b*) . . . a future or contingent liability'…*Depending on the context of the statute involved*, the word payable may refer to '. . . what is eventually due, or what there is a liability to pay'; '. . . 'payable at a future time', or 'in respect of which there is liability to pay' ".
>
> (Emphasis added)

In the context of the VAT recovery provisions, the learned Judge held that " '(p)ayable' *in order to distinguish it from 'due'* must be given the meaning of a '. . . future or contingent liability'." (emphasis added). However, in the context of the definition of "remuneration" in the Fourth Schedule and the definition of "monthly remuneration" in section 1(1), referring to "paid" – in contradistinction to "due" – the view is held that "payable" means that the employer has an unconditional liability to pay the relevant remuneration, although actual payment thereof may take place sometime in the future. In essence, an amount of remuneration that is "payable" to an employee will also be regarded as having accrued to the employee since the employee in these circumstances will have an unconditional entitlement to the remuneration. This approach will ensure alignment of the ETI and employees' tax provisions.

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48 See **Annexure B** for a more detailed explanation of the inclusions and exclusions contained in the definition of the term "remuneration" as defined in the Fourth Schedule.

49 Paragraph 2(1) of the Fourth Schedule.

50 65 SATC 203.

51 At page 216.

Variable remuneration

As regards "variable remuneration" as contemplated in section 7B of the Income Tax Act, such income is deemed to *accrue* to an employee, and is therefore only included as part of an employee's remuneration, when it has actually been *paid* to the employee. The term "variable remuneration" is defined in section 7B(1) of the Income Tax Act as overtime pay, bonus, commission, certain allowances or advances paid for transport expenses,[52] leave pay,[53] night shift allowance,[54] standby allowance[55] or a reimbursement for business related expenses.[56] It follows that "remuneration" for purposes of calculating the "monthly remuneration" of a qualifying employee who is in receipt of variable remuneration will only include variable remuneration that has been *paid* to the employee in the relevant month and not variable remuneration that is merely *payable* to the employee.

Allowances (other than for transport)

Any allowance or advance paid to an employee must be included in that employee's taxable income. These amounts are in turn included in the definition of "remuneration" under paragraph 1 of the Fourth Schedule.[57] This will apply to all allowances (subject to the exceptions discussed below) such as a cellular telephone allowance, network connectivity allowance, a computer allowance, a taxable uniform allowance, etc. The full amount of these allowances are "remuneration" as defined, and are accordingly "monthly remuneration" for ETI purposes.

Transport related allowances

There are exceptions to the rule that the full amount of an allowance is included in "remuneration" as defined. As regards allowances or advances in respect of transport expenses, only 80% of the amount of any fixed allowance or advance paid or payable to an employee constitutes "remuneration" as defined[58] and will therefore also form part of an employee's "monthly remuneration" for ETI purposes. In instances where an employer is satisfied that more than 80% of the use of the motor vehicle is for business purposes, then only 20% of the allowance is included in "remuneration"[59] as defined, and in "monthly remuneration" for ETI purposes. These rules apply to any allowance or advance in respect of transport expenses, other than an allowance or advance contemplated in section 8(1)(*b*)(iii). An employer that pays an allowance or advance under section 8(1)(*b*)(iii), that ***exceeds*** the applicable rate per kilometre fixed by the Minister by notice in the *Government Gazette*, the full amount (that is, 100%) of the excess above the fixed rate also constitutes "remuneration" and therefore also "monthly remuneration" for ETI purposes.[60] If the section 8(1)(*b*)(iii)

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52 The allowance or advance referred to in section 8(1)(*b*)(ii) and (iii) of the Income Tax Act. Section 3(1)(*a*) of the Taxation Laws Amendment Act 34 of 2019 amends section 7B(1)(*b*) to include section 8(1)(*b*)(iii) of the Income Tax Act. This amendment came into operation on 1 March 2020.

53 Section 7B(1)(*c*) of the Income Tax Act.

54 Section 7B(1)(*d*) of the Income Tax Act.

55 Section 7B(1)(*e*) of the Income Tax Act.

56 Section 7B(1)(*f*) of the Income Tax Act that includes any amount paid or granted in reimbursement of any expenditure as contemplated in section 8(1)(*a*)(ii) of the Income Tax Act. Sections 7B(1)(*d*), (*e*) and (*f*) of the Income Tax Act inserted by section 3(1)(*b*) of the Taxation Laws Amendment Act 34 of 2019. The amendment came into operation on 1 March 2020.

57 Paragraph (*b*A) of the definition of "remuneration" in paragraph 1 of the Fourth Schedule.

58 Paragraph (*c*A) of the definition of "remuneration" in paragraph 1 of the Fourth Schedule.

59 Proviso to paragraph (*c*A) of the definition of "remuneration" in paragraph 1 of the Fourth Schedule.

60 Section 8(1)(*c*) of the Tax Administration Laws Amendment Act 13 of 2017 inserted paragraph (*c*C)into the definition of "remuneration" under paragraph 1 of the Fourth Schedule. This amendment came into operation on 1 March 2018.

allowance or advance does not exceed the prescribed rate per kilometre, it will not constitute "remuneration" or "monthly remuneration".

2.4.1 The definition of "monthly remuneration" on or after 1 March 2022

> **"monthly remuneration"—**[61]
>
> (*a*) where an employer employs and pays remuneration to a qualifying employee for at least 160 hours in a month, means the amount paid or payable to the qualifying employee by the employer in respect of a month; or
>
> (*b*) where an employer employs a qualifying employee and pays remuneration to that employee for less than 160 hours in a month, means an amount calculated in terms of section 7(5);
>
> Provided that in determining the remuneration paid or payable, an amount other than a cash payment that is due and payable to the employee after having accounted for deductions in terms of section 34(1)(*b*) of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), must be disregarded;

If an employer employs and pays remuneration to a qualifying employee for at least 160 hours in a month, the remuneration for that month will include amounts paid or payable to the employee irrespective of whether paid or payable on a monthly, weekly, daily or hourly basis.

Should an eligible employer employ and pay remuneration to a qualifying employee for less than 160 hours in a month, the employee's equivalent "monthly remuneration" has to be calculated under section 7(5). Remuneration paid or payable to a qualifying employee for less than 160 hours in a month is first grossed up under section 7(5) to determine the equivalent full month's "monthly remuneration".

That amount is then apportioned such that the ETI is only available in relation to the remuneration attributable to the actual number of hours that the qualifying employee was employed and paid remuneration for in that month. This outcome is achieved by dividing the number of hours that the qualifying employee was employed and paid remuneration for in the relevant month by 160 hours and multiplying that ratio by the value of the incentive (see **5.3** and Example 17 and 18).

The amendments to the ETI Act with effect from 1 March 2022 were necessary to curb the abuse of the ETI.[62]

The proviso to the definition of "monthly remuneration" aims to exclude non-cash payments and salary sacrifices made by an employee. Monthly remuneration is therefore limited to cash amounts paid to the employee plus any amount that the employer has legally deducted under section 34(1)(*b*) of the Basic Conditions of Employment Act.

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[61] Section 93(1) of the Taxation Laws Amendment Act 15 of 2016. This amendment came into operation on 1 March 2017.

[62] *Explanatory Memorandum on the Taxation Laws Amendment Bill*, 2021.

Section 34(1)(*b*) of the Basic Conditions of Employment Act provides for deductions required or permitted in terms of a law, collective agreement, court order or arbitration award. Examples of such deductions are employees' tax,[63] unemployment insurance fund contributions,[64] garnishee orders[65] and union membership fees[66].

This interpretation will apply to "monthly remuneration" used throughout the ETI Act.

2.5 Qualifying employee

The ETI can only be claimed by an "eligible employer" (see **3.1**) that employs a "qualifying employee". Section 6 prescribes requirements that must be met before an employee is considered a "qualifying employee" as defined (see **3.2** for a detailed discussion).

2.6 Special economic zone

SEZs promote targeted economic activities, supported through special arrangements and support systems, including incentives, business support services, streamlined approval processes and infrastructure.[67]

The ETI and other tax incentives applicable to SEZs were developed to attract investors to the SEZs.[68] The tax incentives are provided by Government to ensure SEZs' growth, revenue generation, creation of jobs, attraction of foreign direct investment and international competitiveness, which also include income tax, VAT and customs related incentives.

The definition of "special economic zone" is relevant for the purpose of the age requirement under section 6. Section 6(*a*)(i) requires that the employee must be between the age of 18 and 29. However, under section 6(*a*)(ii) the age requirement does not apply to an employee employed by an eligible employer that is a qualifying company as contemplated in section 12R of the Income Tax Act, and that employee renders services to that employer mainly within the special economic zone in which the employer carries on a trade.

The Taxation Laws Amendment Act 34 of 2019 amended the definition of "special economic zone" with effect from 1 March 2020. For the sake of completeness, a discussion of the previous version and current version of the definition of "special economic zone" is set out separately below.

63 A deduction in terms of a law, specifically the Income Tax Act.
64 A deduction in terms of a law, specifically the Unemployment Insurance Contributions Act 4 of 2002.
65 A deduction in terms of a court order.
66 A deduction in terms of a collective agreement.
67 See *Brochure on the Special Economic Zone Tax Incentive* published by SARS on 6 November 2018.
68 See *Policy on the development of Special Economic Zones in South Africa (2012),* paragraphs 6.5.1 and 7.6.

2.6.1 The position before 1 March 2020

For the period before 1 March 2020, a "special economic zone" was defined in section 1(1) as follows:

> **"special economic zone"** means a special economic zone designated by the Minister of Trade and Industry pursuant to an Act of Parliament;

The Minister of Trade and Industry had designated various SEZs prior to 1 March 2020, however this definition must be read with section 6(*a*)(ii) that required these SEZs also be designated by the Minister in a *Gazette* (see **3.2.1**). Thus, the qualifying SEZs for purposes of the ETI Act will only be those that have been designated by both the Minister of Trade and Industry **and** the Minister in a *Gazette*.

The following six SEZs were designated by the Minister by notice in the *Government Gazette*[69] for purposes of section 6(*a*)(ii) effective from 1 August 2018:

- Coega Special Economic Zone
- Dube Transport Special Economic Zone
- East London Special Economic Zone
- Maluti-a-Phofung Special Economic Zone
- Richards Bay Special Economic Zone
- Saldanha Bay Special Economic Zone

2.6.2 The position on or after 1 March 2020

From 1 March 2020, a "special economic zone" is defined in section 1(1) as follows:[70]

> **"special economic zone"** means a special economic zone as defined in section 12R(1) of the Income Tax Act;

Section 12R(1) of the Income Tax Act defines a "special economic zone" as a special economic zone as defined in the SEZ Act that is approved for purposes of section 12R of the Income Tax Act by the Minister under section 12R(3) of the Income Tax Act.

Section 1 of the SEZ Act defines a "special economic zone" as an area designated in terms of section 23(6) of the SEZ Act. Section 23(6) of the SEZ Act provides that the Minister of Trade and Industry, after considering the recommendation of the Advisory Board and after consultation with the Minister –

- may designate an area as a special economic zone by notice in the *Gazette* with or without conditions; and
- must issue the applicant with a special economic zone licence if the area is so designated.

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69 Government Notice 700 in *Government Gazette* 41759 of 6 July 2018.

70 Section 78(1) of the Taxation Laws Amendment Act 34 of 2019. This amendment came into operation on 1 March 2020.

The SEZs designated under section 23(6) of the SEZ Act must then be approved by the Minister for the purpose of section 12R of the Income Tax Act under section 12R(3) of the Income Tax Act. Section 12R(3) requires the Minister to take into account the financial implications for the State should a special economic zone be approved under that section.

The six SEZs listed under **2.6.1** are currently the only SEZs designated by the Minister for purposes of section 6(*a*)(ii) (see **3.2.1**).

2.7 Wage

The term "wage" means "wage" as defined in section 1 of the Basic Conditions of Employment Act, which is –

> the amount of money paid or payable to an employee in respect of ordinary hours of work or, if they are shorter, the hours an employee ordinarily works in a day or week;

The definition of the term "wage" in the ETI Act is of application in determining whether an employer has complied with wage regulating measures in order to be eligible for the ETI (see **4.1**).

The amount of money paid or payable must be "in respect of *ordinary hours of work*".[71] It follows that payments that are not paid by reference to the "ordinary hours" worked by the employee do not constitute a "wage" as defined in section 1(1) of the ETI Act, read with the definition of that term in the Basic Conditions of Employment Act.

The Basic Conditions of Employment Act defines "ordinary hours of work" as "the hours of work permitted in terms of section 9 or in terms of any agreement in terms of sections 11 or 12".[72] Section 9 of the Basic Conditions of Employment Act regulates the maximum ordinary hours that an employee is required or permitted to work while sections 11 and 12 of the Basic Conditions of Employment Act regulate the allowable variations of "ordinary hours of work" that an employee may be required to work (that is, compressed working week or averaging of hours of work).

The concept of "ordinary hours of work" may however differ from industry to industry and whether an amount constitutes a "wage" must thus be determined on a case-by-case basis. In most circumstances amounts paid in the form of a bonus, overtime or car and subsistence allowances will not constitute amounts paid "in respect of ordinary hours of work" and as such would not form part of the employee's "wage" for purposes of the ETI.

The purpose of the Basic Conditions of Employment Act is to give effect to and regulate the right to fair labour practices conferred by section 23 of the Constitution.[73] The Basic Conditions of Employment Act applies, with limited exclusions not relevant for present purposes, to all employees and employers.

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71 See definition of "wage" in section 1 of the Basic Conditions of Employment Act.

72 Section 1 of the Basic Conditions of Employment Act.

73 Constitution of the Republic of South Africa, 1996.

A wage paid to an employee for services rendered will constitute remuneration irrespective of the nature of the work performed. In addition, the basis upon which an employee may be compensated for "ordinary hours" worked is not limited to amounts payable to employees that are computed on an hourly rate basis. As to whether an amount paid to an employee will constitute an amount paid "in respect of ordinary hours of work", will be determined in accordance with the employee's employment contract.

The fact that a qualifying employee is paid a "wage", in contradistinction to a "salary", does not disqualify the eligible employer from claiming the ETI as wages are specifically included in the definition of "remuneration" (see **2.4**).

3. Qualifying criteria for the employment tax incentive

3.1 Eligible employers (section 3)

An employer is only eligible to receive the ETI if the employer meets the requirements prescribed in section 3.

Paragraph 15 of the Fourth Schedule requires every person who is an "employer" as defined for employees' tax purposes[74] to apply to the Commissioner for registration in accordance with Chapter 3 of the TA Act.

The term "employer" is defined in paragraph 1 of the Fourth Schedule and includes amongst others, any person who pays or is liable to pay any person an amount by way of "remuneration" as defined in paragraph 1 of the Fourth Schedule (see **Annexure B**), and excludes any person not acting as a principal.

Section 22 of the TA Act provides that every person who is obliged to register under a tax Act, or every person who voluntarily registers under such an Act, must apply for registration within 21 business days (excluding a voluntary registration) or a further period as SARS may determine.

While the word "employer" is not defined in the ETI Act, the fact that an employer will only be eligible to receive the ETI if the employer is registered for purposes of withholding and paying over to SARS employees' tax under paragraph 15 of the Fourth Schedule,[75] suggests that in order to qualify the relevant employer must be an "employer" as defined for employees' tax purposes. However, certain employers are specifically excluded and will not be eligible to receive any ETI notwithstanding that they are registered employers for employees' tax purposes.[76] The exclusions are dealt with below.

Section 3(*b*) provides that the following employers (even if registered for employees' tax purposes) will not be eligible to claim the ETI:

- The government of the Republic in the national, provincial or local sphere.
- A public entity that is listed in Schedule 2 or 3 of the Public Finance Management Act 1 of 1999, other than those public entities that the Minister may designate by notice in the *Government Gazette* on such conditions as the Minister may prescribe by regulation.[77]

[74] Paragraph 1 of the Fourth Schedule.
[75] Section 3(*a*).
[76] Section 3(*b*) and (*c*).
[77] Currently no public entities have been designated by the Minister.

- A “municipal entity” defined in section 1 of the Local Government Municipal Systems Act 32 of 2000.[78]

In addition to the above exclusions, under section 3(*c*) the ETI will also not be available to employers that have been disqualified by the Minister –

- by reason of the displacement of employees (see **4.2**); or
- by virtue of not meeting such conditions as the Minister, after consultation with the Minister of Labour, may prescribe by regulation, including conditions based on –
  - requirements for the training of employees; and
  - the classification of trade in the most recent Standard Industrial Classification Code issued by Statistics South Africa.

Currently no conditions have been prescribed by the Minister.

3.2 Qualifying employees (section 6)

An employee is a “qualifying employee” if the employee meets the requirements discussed below.

The following are the key categories to consider in determining if the employee meets the set requirements:

- The employee’s age[79] (see **3.2.1**)
- Identity documentation[80]
- Connected person relationship[81]
- Domestic workers[82]
- Date of employment[83]
- The employer’s compliance with the minimum wage requirement[84]
- Amount of the remuneration[85]
- The employee is not mainly involved in the activity of studying[86] (see **3.2.3**)

[78] The Local Government Municipal Systems Act 32 of 2000 defines a “municipal entity” as meaning (a) private company referred to in section 86(B)(1)(*a*) of that Act, (b) a service utility; or (c) a multi-jurisdictional service utility.
[79] Section 6(*a*).
[80] Section 6(*b*).
[81] Section 6(*c*).
[82] Section 6(*d*).
[83] Section 6(*e*).
[84] Section 6(*f*).
[85] Section 6(*g*).
[86] Proviso to section 6.

3.2.1 The employee's age [section 6(a)]

The employee must be aged from 18 to 29 at the end of the month in which the ETI is claimed. An employee will therefore be a "qualifying employee" in the month that the employee turns 18 years old and will cease to be a "qualifying employee" in the month in which the employee turns 30 years old.

Example 3 – Age requirement

Facts:

Employee X was employed by an eligible employer, Employer Y, on 1 March 2022. Employee X turned 30 years old in October 2022.

Result:

Employer Y can claim the ETI for Employee X only from the month commencing 1 March 2022 until 30 September 2022 as Employee X turned 30 years old in October 2022 subject to Employee X meeting all the other requirements of a qualifying employee provided for under section 6 during the relevant period.

No age limit applies, however, if the relevant employee is employed by an employer –

- that is a qualifying company as contemplated in section 12R of the Income Tax Act and carrying on a trade within an SEZ [section 6(*a*)(ii) see below]; **or**
- in an industry designated by the Minister [section 6(*a*)(iii)]. The Minister has not yet designated any industry for purposes of section 6(*a*)(iii).

The Taxation Laws Amendment Act 34 of 2019 amended section 6(*a*)(ii) with effect from 1 March 2020. For the sake of completeness, a discussion of the previous version and current version of section 6(*a*)(ii) is set out separately below.

Employees employed within an SEZ before 1 March 2020 [section 6(a)(ii)]

Under section 6(*a*)(ii) for the period prior to 1 March 2020, an employee must –

- have been employed by an eligible employer operating through a fixed place of business located within an SEZ designated by the Minister;[87] and
- rendered services to that employer mainly within that SEZ.[88]

The ETI Act does not define a "fixed place of business" and as such the ordinary dictionary meaning should be considered.

The *Oxford Dictionary* defines "fixed" as follows:[89]

> "Definitely and permanently placed or assigned, stationary or unchanging in relative position, definite, permanent, lasting."

[87] See **2.6.1** for a discussion on the definition of a "special economic zone" under section 1(1) before 1 March 2020.

[88] Section 6(*a*)(ii).

[89] Lesley Brown *The New Shorter Oxford English Dictionary* 4 ed (1993) Oxford University Press in vol 1.

The *Merriam-Webster Dictionary* defines "place of business" as –[90]

> "a place, such as a store, bank, etc., where business is done".

A "fixed place of business" should thus be interpreted as a place where, amongst others –

- that business is conducted through one or more offices, shops, factories, warehouses or other structures;
- that fixed place of business is suitably staffed with on-site managerial and operational employees of that company who conduct the primary operations of that business; and
- that fixed place of business is suitably equipped for conducting the primary operations of that business.

The employer itself must have a physical presence within the designated SEZ meeting at least the above criteria.

Section 6(*a*)(ii) further required that the employee renders services to that employer *mainly* within that SEZ. The word "mainly" has been considered in a number of court cases[91] and should be interpreted to mean more than 50%.

In the context of section 6(*a*)(ii), in order for the eligible employer to have been entitled to claim the ETI for the period before 1 March 2020, the employee must have rendered more than 50% of his or her services physically within that SEZ to that employer operating through a fixed place of business located within that designated SEZ. For example, a sales representative who is required to be mostly seeing clients outside of the office, would have had to conduct more than 50% of this work within the SEZ to be able to qualify under section 6(*a*)(ii).

Businesses often have branches in numerous locations across the country. A branch operating through a fixed place of business within a designated SEZ would have been entitled to claim ETI for qualifying employees (irrespective of their age) that rendered services to that employer mainly within that SEZ provided that all of the requirements under the ETI Act were met.

Employees employed within an SEZ on or after 1 March 2020 [section 6(a)(ii)]

The Taxation Laws Amendment Act 34 of 2019 amended section 6(*a*)(ii) with effect from 1 March 2020. Under the current version of section 6(*a*)(ii), an employee must –

- be employed by an eligible employer that is a qualifying company as contemplated in section 12R of the Income Tax Act; and
- renders services to that employer mainly within the SEZ[92] in which the qualifying company that is the employer carries on a trade.[93]

The definition of a "qualifying company" in section 12R(1) of the Income Tax Act must be considered and any specific requirements under this definition must be met for an eligible employer to be a "qualifying company" for purposes of section 6(*a*)(ii).

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90 **www.merriam-webster.com/dictionary/place%20of%20business** [Accessed 30 March 2023].

91 *Glen Anil Development Corporation Ltd v SIR* 1975 (4) SA 715(A), 37 SATC 319 and *SBI v Lourens Erasmus (Edms) Bpk* 1966 (4) SA 434(A), 28 SATC 233.

92 See **2.6.2** for a discussion on the definition of a "special economic zone" under section 1(1) on or after 1 March 2020.

93 Section 80(1)(*a*) of the Taxation Laws Amendment Act 34 of 2019. This amendment came into operation on 1 March 2020.

A discussion of the definition of "qualifying company" under section 12R(1) falls outside the scope of this guide. See **Annexure C** for the definition of "qualifying company" under section 12R(1).

Section 6(*a*)(ii) further requires that the employee renders services to that employer *mainly* within that SEZ in which the qualifying company that is the employer carries on a trade. As discussed above the word "mainly" should be interpreted to mean more than 50%.

The qualifying company must carry on a trade within the SEZ. The phrase "carry on a trade" is not defined in the ETI Act. In *Burgess v CIR*[94] the court held that in the context of the Income Tax Act the phrase "carry on a trade" should be given a wide interpretation. Whether a company is carrying on a trade will depend on the facts and circumstances of the particular case and much will depend on the scale and nature of its activities.[95]

In the context of section 6(*a*)(ii), in order for the eligible employer to be entitled to claim the ETI on or after 1 March 2020, more than 50% of the employee's services must physically be rendered within that SEZ in which the qualifying company, that is the employer, carries on a trade.

3.2.2 Other requirements [section 6(*b*) – (*g*)]

In addition to the age requirement under section 6(*a*) (detailed above) and the proviso (considered below in **3.2.3**), the employee must –

- be in possession[96] of either:
  - an identity card or a green identity book,[97]
  - an asylum seeker permit,[98] or
  - a refugee identity document;[99] [100]
- not be a connected person[101] in relation to the employer;
- not be a domestic worker as defined in section 1 of the Basic Conditions of Employment Act;[102]

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94 55 SATC 185.

95 See Interpretation Note 33 "Assessed losses: Companies: The "trade" and "income from trade" requirements".

96 Defined in Cambridge Dictionary as "the fact that you have or own something". www.dictionary.cambridge.org/dictionary/english/possession [Accessed 30 March 2023].

97 Section 14 of the Identification Act 68 of 1997.

98 Section 22(1) of the Refugees Act 130 of 1998.

99 Section 30 of the Refugees Act 130 of 1998.

100 Section 80(1)(*b*) of the Taxation Laws Amendment Act 34 of 2019. This amendment is retrospective and came into operation on 1 March 2019. For the maximum monthly remuneration requirement under section 6(*g*) prior to this amendment, please refer to issue 3 of this guide.

101 See the diagram in **Annexure A**. For a detailed discussion on the meaning of a "connected person", see Interpretation Note 67 "Connected Persons".

102 " **'[D]omestic worker'** means an employee who performs domestic work in the home of his or her employer and includes—
(*a*) a gardener;
(*b*) a person employed by a household as driver of a motor vehicle; and
(*c*) a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker;"

- be employed by the employer or an associated person (see **2.1**) on or after 1 October 2013;
- not be an employee for whom an employer is ineligible to receive the ETI by virtue of section 4 (see **4.1** below); and
- receive monthly remuneration of less than R6 500.[103]

Domestic workers are excluded as qualifying employees owing to the private nature of the cost of their wages. The definition of "domestic worker" does not include a farm worker. A farmer who is eligible and employs a qualifying employee will therefore be able to claim the ETI.

3.2.3 Employee is not mainly involved in studying [Proviso to section 6]

The proviso[104] to section 6 was introduced to curb the abuse of the ETI. This proviso must be read with the amendments to the definition of "employee" and "monthly remuneration". It provides that the employee is not, in fulfilling the conditions of their employment contract during any month, mainly involved in the activity of studying and in determining the time spent studying in proportion to the total time for which the employee is employed, the time must be based on actual hours spent studying and employed. This determination need not be done if an employer and employee have entered into a learning programme as defined in section 1 of the Skills Development Act.

The word "mainly" is interpreted to mean more than 50%[105] and is thus determined by having regard to the time spent studying in proportion to the total time for which the employee is employed. The time must be based on actual hours spent studying and employed. The facts of each case must be considered.

A learning programme as defined in section 1 of the Skills Development Act is, however, excluded from the training envisaged under the proviso to section 6. Section 1 of the Skills Development Act defines a "learning programme" to include –

> "a learnership, an apprenticeship, a skills programme and any other prescribed learning programme which includes a structured work experience component".

Only the learnership programmes within the said definition will qualify for the exclusion stated in the proviso to section 6. In this regard the context, purpose and interpretation of the Skills Development Act must be considered. Section 3 of this Act provides that any person applying this Act must interpret its provisions to give effect to –

(a) its purposes; and

(b) the objects of the National Qualifications Framework Act 67 of 2008.

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[103] This amount was previously R6 000. Section 6(*g*) was amended by section 80(1)(*b*) of the Taxation Laws Amendment Act 34 of 2019 and was deemed to have come into operation on 1 March 2019.

[104] Section 59(1) of the Taxation Laws Amendment Act 20 of 2021. This amendment was effective 1 March 2022 and applicable in respect of years of assessment commencing on or after that date.

[105] See *SBI v Lourens Erasmus (Edms) Bpk* 1966 (4) SA 434(A), 28 SATC 233.

Reference to “any other prescribed learning programme” in the said definition must therefore be interpreted in its context. The application of the *ejusdem generis*-rule is sometimes expressed by the maxim *noscitur a sociis*, that is the measuring of a word may be ascertained by reference to those associated with it. In other words, where two or more words which are susceptible of analogous meaning are coupled they are understood to be used in their cognate sense. They take, as it were, their colour from each other. The more general is restricted to a sense analogous to the less general.

General words following upon and connected with specific words are more restricted in their operation than if they stood alone. Their meaning is cut down so as to comprehend only things of the same kind as those designed by the specific words unless of course, there is something to show that a wider sense was intended. The words “any other prescribed learning programme” can thus not be interpreted to mean any form of a training programme not meeting the requirements of the relevant legislation.

The facts and circumstances of each case must be considered to determine whether the programme meets the definition of a “learning programme” as defined in section 1 of the Skills Development Act.

Example 4 – Employee does not meet requirement of not mainly studying

Facts:

Company F entered into an employment contract with G, aged 25 years, for a limited period of 12 months from 1 August 2022. Company F and G agreed to a monthly remuneration of R3 500. G enrolled at an accredited learning institution, College H, from 1 August 2022 at a monthly training fee of R3 500 for a period of 12 months. Company F paid G’s monthly remuneration of R3 500 directly to College H as payment of the training fee. The course enrolled by G is not a learning programme as defined under section 1 of the Skills Development Act.

G is employed for 160 hours in a month and in August 2022 spent 140 hours of this time studying at College H.

Result:

Since G studies for 140 hours of the 160 hours, this means that G studies for 87,5% (140 / 160 × 100) of the time employed. Thus G mainly (more than 50%) studied during August 2022 and did not meet the requirement of the proviso to section 6 that the person must not be mainly studying. Company F therefore does not qualify to claim the ETI in respect of G for August 2022.

3.3 Qualifying period

The ETI will operate for a period of fifteen years and two months commencing on 1 January 2014 and ending on 28 February 2029.[106] An eligible employer can, however, only claim the ETI for a maximum of 24 months *per qualifying employee.*[107] The 24 months need not be consecutive.

It follows that an eligible employer will be able to claim the ETI for 24 months per qualifying employee during the period 1 January 2014 up to and including 28 February 2029. The ETI will not be available on or after 1 March 2029. Thus, for example, if a qualifying employee is employed on 1 March 2028, the eligible employer will only be allowed to claim the ETI for 12 months for that qualifying employee (if the employee is a qualifying employee in each month) as the ETI will no longer be available from 1 March 2029.

The 24-month period is determined with reference to the period that a qualifying employee is employed and not the periods during which the ETI are actually claimed for that employee. If, for example, an employer does not claim the ETI for a qualifying employee in a month, that month still counts towards the 24 qualifying months that an employer may claim the ETI in respect of that qualifying employee (see **5**).

The ETI is claimable only on monthly remuneration paid on or after 1 January 2014 for qualifying employees who commenced employment with an eligible employer on or after 1 October 2013.

Example 5 – Calculation of qualifying periods

Facts:

Employee C was employed by an eligible employer, Employer D, on 1 January 2022. Employee C met all the requirements of a qualifying employee as provided for under section 6 from 1 January 2022 to 31 December 2022. Employer D was entitled to claim the ETI for Employee C during this period but claimed the ETI only for Employee C for 5 months during this 12-month period.

Result:

Even though Employer D claimed the ETI only for 5 months during the period 1 January 2022 to 31 December 2022, the 7 months that Employer D was entitled to claim the ETI for Employee C but did not claim the ETI must still be included in the calculation of the 24 qualifying months. In December 2022, Employee C would be in the 12th qualifying month.

[106] See section 12 and section 102 of the Taxation Laws Amendment Act 23 of 2018.

[107] Section 7.

4. Disqualification

An eligible employer will be disqualified from claiming the ETI in the circumstances discussed below.

4.1 Compliance with wage regulating measures and minimum wage requirement (section 4)

An employer who is otherwise an eligible employer because it meets the requirements of section 3 is nevertheless not eligible to receive the ETI if the wage paid to a qualifying employee is less than the prescribed minimum amounts – the actual prescribed minimum is dependent on whether or not the wage is paid under a wage regulating measure or the National Minimum Wage Act.[108]

Section 4(3) defines a "wage regulating measure" as –

> (*a*) a collective agreement as contemplated in section 23 of the Labour Relations Act;
>
> (*b*) a sectoral determination as contemplated in section 51 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997); or
>
> (*c*) a binding bargaining council agreement as contemplated in section 31 of the Labour Relations Act, including where such agreement is extended by reason of a determination of the Minister of Labour in terms of section 32 of that Act.

Section 4 prescribes the minimum wage payable to a qualifying employee before an employer will be eligible for the ETI. For a detailed discussion on the term "wage" see **2.7**.

The preamble to section 4(1) refers to the wage **paid** to an employee for a month and section 4(1)(*a*) refers to this wage not being less than the wage payable by virtue of a wage regulating measure or the National Minimum Wage Act. In the context of section 4(1)(*a*), the use of the word "paid" requires that an employee must receive in that month, a wage that is not less than the regulated minimum wage applicable to that employer.

The term "wage" for purposes of section 4(1)(*a*) should not include amounts payable in a month following the month under consideration, for example if the employee will be paid a "back pay" owing to a wage regulating measure applying retrospectively. The same principle applies to the minimum wage under section 4(1)(*b*). Furthermore, the employer cannot claim the ETI on the wage paid including the "back pay" in the month that the increased wage is implemented since the amount of "back pay", even though it is paid in that month, is not *in respect of* that month. See Example 10.

[108] Section 4(1)(*a*) was amended by section 79(1)(*a*) of the Taxation Laws Amendment Act 34 of 2019 to include the amount contemplated in section 4(1) or Schedule 2 of the National Minimum Wage Act with effect from 1 August 2019.

4.1.1 Employer subject to wage regulating measures [section 4(1)(*a*)]

The minimum wage requirement under section 4(1)(*a*) was amended by the Taxation Laws Amendment Act 34 of 2019[109] with effect from 1 August 2019 to include the national minimum wage prescribed in the National Minimum Wage Act. A discussion of the previous version and current version of section 4(1)(*a*) is set out separately below.

(a) The position before 1 August 2019

An employer that is subject to a wage regulating measure is not allowed to claim the ETI for an employee if the wage paid to that employee for that month is less than the wage prescribed by the relevant wage regulating measures. Although section 4(1) refers to the wage paid in respect of a month, the wage regulatory measure does not only apply to payment on a monthly basis, but also to payment on an hourly or weekly basis. It is, however, important that the hourly, weekly or monthly wage paid to the employee is not less than that prescribed under the wage regulating measure.

In order to determine whether an hourly, daily, weekly or monthly rate is to be used it is necessary to refer to the employment contract and the wage measure used in the contract. If more than one measure is used any of the measures in the contract is acceptable.

An employee who takes unpaid leave and as a result is ***paid*** less than the monthly minimum wage prescribed by a wage regulating measure in a particular month will not meet the requirements of section 4(1)(*a*) and the employer will not be allowed to claim the ETI for that employee for that month. In such instances, the employee is employed for the full month and the employer may therefore not apply the "gross-up" calculation as discussed in **5.3**.

Employers occasionally have more than one wage regulating measure applicable to them. These wage regulating measures may overlap and can differ in the prescribed minimum wage. For this reason, an employer must consider the Acts that govern those wage regulating measures to determine which wage regulating measure takes precedence and which minimum wage should be applied for purposes of section 4(1)(*a*).

Example 6 – A wage which does not comply with wage regulating measures

Facts:

Employee A was employed by Employer B. A collective agreement entered into between Employer B and the trade unions representing the employees stipulated that each new employee joining the company had to be remunerated at a minimum monthly wage of R3 000. Employer B paid Employee A an amount of R2 900 in March 2019.

Result:

The wage amount payable to the employee was subject to the wage regulating measure which provided that employees had to be remunerated at a minimum monthly wage of R3 000. Since Employer B paid Employee A less than the prescribed minimum wage, Employer B was not be eligible to claim the ETI for Employee A for March 2019.

[109] Section 79(1)(*a*) of the Taxation Laws Amendment Act 34 of 2019. This amendment came into operation on 1 August 2019.

Example 7 – A wage which complies with wage regulating measures

Facts:

Employee C was employed by Employer D. A sectoral determination provided that employees employed in that sector had to be remunerated at a minimum wage of R1 800 a month. Employer D paid a wage of R1 900 to Employee C for the month of March 2019.

Result:

Since Employer D remunerated Employee C at the rate of R1 900 a month, which was more than the prescribed minimum monthly rate of R1 800, Employer D complied with the minimum prescribed wage requirements as required by the sectoral determination for that specific sector. Employer D could accordingly claim the ETI despite the monthly wage being less than R2 000 (see **4.1.2**) since the employer was subject to and complied with a wage regulating measure.

Example 8 – A wage which does not comply with a wage regulating measure owing to the employee taking unpaid leave

Facts:

Employee X was employed by Employer Y. A sectoral determination provided that employees employed in that sector had to be remunerated at a minimum wage of R1 800 a month. While Employer Y usually paid a wage of R1 900 to Employee X, since Employee X took four days unpaid leave during March 2019, Employer Y paid Employee X only R1 500 for that month.

Result:

Although Employer Y usually remunerated Employee X at the rate of R1 900 a month, which was more than the prescribed minimum monthly rate of R1 800, Employer Y did not comply with the minimum prescribed wage requirements for March 2019 since Employee X was paid only R1 500 for that month. As a result, Employer Y could not claim the ETI for the wage paid to Employee X despite the usual monthly wage paid to Employee X being more than the minimum wage prescribed by the relevant sectorial wage regulating measure.

Example 9 – A wage which complies with a wage regulating measure

Facts:

Employee G was employed by Employer H. According to the employment contract entered into between Employee G and Employer H, the prescribed minimum hourly wage for their sector would be paid. A sectoral determination provided that employees employed in that sector had to be remunerated a minimum hourly wage of R15 and a minimum monthly wage of R2 400 (R15 × 160 standard hours). Employee G however only worked 140 hours in April 2019 and therefore received wages of only R2 100 for that month.

Result:

Employer H would be entitled to claim the ETI for the wage paid to Employee G despite the minimum monthly wage of R2 400 not being met since the wage paid to Employee G complied with the minimum prescribed hourly wage requirements as required by the sectoral determination for that specific sector.

Example 10 – A wage which does not comply with a wage regulating measure owing to the employee only receiving the prescribed wage increases in a subsequent month

Facts:

Employee V was employed by Employer W. According to the employment contract entered into between Employee V and Employer W, the prescribed minimum hourly wage under the particular sectoral determination would be paid. The sectoral determination provided that employees had to be remunerated a minimum hourly wage of R15 from 1 February 2018 and a minimum hourly wage of R18 from 1 February 2019. Employee V worked 160 hours in February 2019 and March 2019. Employer W however, only implemented the wage increase per the sectoral determination for employees with effect from 1 April 2019 and as a result Employee V received a wage back pay of R960 (R3 × 160 hours × 2 months) for February 2019 and March 2019 in the April 2019 pay cycle.

Result:

Employer W would not be entitled to claim the ETI for the wage paid to Employee V for the February 2019 and March 2019 periods since Employee V was not paid the minimum hourly wage of R18 as prescribed by the sectoral determination for these two months. Employer W will also not be allowed to claim the ETI on the back pay portion of R960 paid in April 2019 since this amount was not in respect of April 2019 but in respect of February and March 2019.

(b) The position on or after 1 August 2019

From 1 August 2019, section 4(1)(*a*) applies to an eligible employer that is subject to either –

- a wage regulating measure;
- the national minimum wage prescribed under section 4(1) of the National Minimum Wage Act; or
- Schedule 2 of the National Minimum Wage Act.

Such an eligible employer is not allowed to claim the ETI for an employee if the wage paid to that employee in respect of that month is less than the higher of the amount –

- payable by virtue of a wage regulating measure applicable to that employer;
- contemplated in section 4(1) of the National Minimum Wage Act; or
- contemplated in Schedule 2 of the National Minimum Wage Act.

The discussion on wage regulating measures under **(a)** above is still applicable after 1 August 2019. The amendment to section 4(1)(*a*) provides only for an additional minimum wage as prescribed under the National Minimum Wage Act to ensure alignment with Government policies.

Example 11 – An employer subject to a wage regulating measure and the national minimum wage

Facts:

Employee A was employed by Employer D in March 2022. According to the employment contract entered into between Employee A and Employer D, remuneration to the amount of R23.50 per hour would be paid. Employee A worked 160 hours in March 2022 and therefore received a wage of R3 760 for that month. The national minimum wage prescribed under section 4(1) of the National Minimum Wage Act in March 2022 was R23.19 per hour. The employer is subject to a sectoral determination that provided for employees employed in that sector to be remunerated at a minimum hourly wage of R25.

Result:

Despite the employer paying the employee more than the national minimum hourly wage of R23.19 prescribed under section 4(1) of the National Minimum Wage Act for March 2022, Employer D would not be entitled to claim the ETI for the wage paid to Employee A in March 2022 since the wage paid to Employee A was less than the prescribed minimum hourly wage of R25 under the applicable sectoral determination for March 2022.

Employer D was not entitled to claim the ETI in this case since Employee A was paid less than the higher of the amount prescribed by a wage regulating measure or the amount contemplated under section 4(1) of the National Minimum Wage Act.

4.1.2 Employer not subject to wage regulating measures [section 4(1)(*b*)]

An employer that is not subject to a wage regulating measure has to meet the minimum wage requirements prescribed in the ETI Act. The minimum wage requirements under section 4(1)(*b*) were amended several times[110] respectively effective from 1 March 2015, 1 January 2016 and 1 March 2017 to align them with the changes made to the definition of "monthly remuneration". Section 4(1)(*b*) was further amended with effect from 1 August 2019 to align it to the National Minimum Wage Act.[111] Only the position from 1 March 2017 is considered below. For a consideration of the position before 1 March 2017, please refer to issue 3 of this guide.

An employee that takes unpaid leave and as a result is paid less than the prescribed monthly minimum wage as required by section 4(1)(*b*) in a particular month, will not meet the minimum wage requirement and the employer will not be allowed to claim the ETI for that employee for that month.

[110] Section 113(1) of the Taxation Laws Amendment Act 43 of 2014, section 141(1) of the Taxation Laws Amendment Act 25 of 2015 and section 94(1) of the Taxation Laws Amendment Act 15 of 2016.

[111] Section 79(1)(*b*) of the Taxation Laws Amendment Act 34 of 2019. This amendment came into operation on 1 August 2019.

(a) The position on or after 1 March 2017

The previous minimum wage requirements under section 4(1)(*b*) were amended with effect from 1 March 2017.[112]

An employer that is not subject to a wage regulating measure will only be allowed to claim the ETI for an employee who is employed and paid remuneration for at least 160 hours in a month if the wage paid to that employee for that month is at least R2 000 [section 4(1)(*b*)(i) as amended].

In the event that an employee is employed and paid remuneration for less than 160 hours in a month, the prescribed minimum wage of R2 000 a month is apportioned by the ratio of hours that the employee is actually employed and paid remuneration[113] for to 160 hours [section 4(1)(*b*)(ii) as amended]. This apportionment determination may be expressed by way of the following formula:

$$\frac{\text{Actual number of hours the employee was employed and paid remuneration}}{\text{160 hours in a month}} \times \text{R2 000}$$

The hours that should be taken into account in the 160 hours, are the ordinary working hours. Overtime hours or hours other than ordinary hours of work should not be included in the 160 hours. For a detailed discussion, see the Binding General Ruling 44 "Meaning of 160 hours for purposes of section 4(1)(*b*)".

From 1 March 2018 the Taxation Laws Amendment Act 17 of 2017 defines "hours" for purpose of section 4 to mean "ordinary hours" as defined in section 1 of the Basic Conditions of Employment Act.[114] For a discussion on "ordinary hours of work" see **2.7**.

Example 12 – Wage not subject to wage regulating measures: Employee employed for less than 160 hours in a month

Facts:

Employee A was employed by Employer X in March 2018. There was no wage regulating measure that applied to the employer. Employee A was employed and remunerated for 150 hours in March 2018 and was paid a wage of R1 900 for this month. Employee A also worked 20 hours of overtime and was paid R400 for these hours.

Result:

For purposes of the 160 hours calculation, the 20 hours of overtime should be excluded. Similarly, the R400 paid for the overtime hours should be excluded from the amount of remuneration. Since Employee A was employed and remunerated for less than 160 hours in the month (ordinary hours of work = 150 hours), the minimum monthly wage of R2 000 prescribed by section 4(1)(*b*)(i) must be apportioned under section 4(1)(*b*)(ii) so as to arrive at the applicable minimum monthly wage. The applicable minimum monthly wage had to be calculated as follows:

150 / 160 × R2 000= R1 875.

[112] Section 94(1) of the Taxation Laws Amendment Act 15 of 2016.

[113] Section 91(1)(*a*) of the Taxation Laws Amendment Act 17 of 2017 inserted the words "and paid remuneration" in section 4(1)(*b*)(ii) with effect from 1 March 2018.

[114] Section 91(1)(*b*) of the Taxation Laws Amendment Act 17 of 2017 inserted section 4(4) to clarify the meaning of "hours".

Since the actual wage paid to Employee A (R1 900) for March 2018 was greater than the determined minimum monthly wage of R1 875, the eligible employer was not prohibited from claiming ETI in relation to Employee A under section 4.

(b) The position on or after 1 August 2019

The minimum wage requirements under section 4(1)(*b*) were amended with effect from 1 August 2019 to provide for employees or employers that are exempt from the national minimum wage prescribed under the National Minimum Wage Act.[115]

Section 4(1)(*b*) applies to an eligible employer that is –

- not subject to a wage regulating measure;
- not subject to section 3 of the National Minimum Wage Act; or
- exempt under section 15 of the National Minimum Wage Act.

Section 3 of the National Minimum Wage Act provides that that Act applies to all workers and their employers but excludes members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service.

Section 15 of the National Minimum Wage Act provides that an employer or an employers' organisation[116] may, in the prescribed form and manner, apply for an exemption from paying the national minimum wage.

An employee who is employed by an eligible employer and paid remuneration for at least 160 hours in a month will, under section 4(1)(*b*)(i), only be allowed to claim the ETI for that employee if the wage paid to that employee for that month is at least R2 000.

If an employee is employed and paid remuneration for less than 160 hours in a month, the same situation applies as described in **(a)** above.

The discussion under **(a)** above with regards the hours that should be taken into account for purposes of calculating the 160 hours, is still applicable on or after 1 August 2019.

Example 13 – Employer exempt from paying national minimum wage: Employee employed for less than 160 hours in a month

Facts:

Employee S was employed by Employer Q in February 2022. The employer was exempt under section 15 of the National Minimum Wage Act. Employee S was employed for 120 hours in February 2022 and was paid a wage of R1 800 for this month.

[115] Amended by section 79(1)(*b*) of the Taxation Laws Amendment Act 34 of 2019.

[116] Registered under section 96 of the Labour Relations Act, or any other law, acting on behalf of a member.

Result:

To determine the prescribed minimum wage for Employee S for February 2022, the prescribed minimum wage of R2 000 per month must be apportioned since Employee S worked less than 160 hours in that month.

Formula: 120 / 160 × R2 000 = R1 500

Employer Q was permitted to claim the ETI for Employee S because the wage paid to Employee S was more than the prescribed minimum wage of R1 500.

4.2 Displacement [section 5(2)]

An employer that is deemed to have displaced the employee –

- is liable to pay a penalty of R30 000 to SARS for that displaced employee; and
- may be disqualified by the Minister from receiving the incentive by notice in the *Government Gazette* (see **6.2.2**).

While "displacement" is not defined in the ETI Act, an employer is deemed to have displaced an employee in the circumstances prescribed in section 5(2).

Section 5(2) stipulates that an employee is deemed to have been displaced if –

- the resolution of a dispute,[117] whether by agreement, order of court or otherwise, reveals that the dismissal of that employee constitutes an automatically unfair dismissal under section 187(1)(*f*)[118] of the Labour Relations Act; *and*
- the employer replaces that dismissed employee with an employee for which the employer is eligible with the intention of unjustly benefiting from the ETI.

4.3 Non-compliance with tax obligations (section 8)

In order to be eligible for claiming the ETI, it is crucial that the employer complies with all its tax obligations. This applies to all tax types that the employer has registered, or is required to register for under the applicable tax Act.

An employer will not be eligible to claim the ETI in a month if the employer has –

- any outstanding tax returns;[119] or
- an outstanding tax debt.

[117] A dispute will be regarded as having been resolved if the final decision has been reached and the matter is not subject to appeal.

[118] "(*f*) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

[119] The term "return" is defined in section 1 of the TA Act.

The term “tax debt” is defined in section 1 of the TA Act to mean an amount referred to in section 169(1) of the TA Act which stipulates that a tax debt is an amount of tax due by a person under a tax Act. This would, for example, include income tax, employees’ tax, VAT, skills development levy, unemployment insurance fund contributions and so forth. “Tax” is also defined in section 1 of the TA Act to include a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act. A taxpayer will therefore owe a tax debt even if it is only an amount of interest or penalty outstanding.

A tax debt for purposes of the ETI does not, however, include –

- an amount due under an instalment payment agreement or which has been compromised under the TA Act;
- any amount that has been suspended by a senior SARS official pending an objection or appeal; or
- an amount below R100.[120]

5. Determining the amount of the employment tax incentive (section 7)

The eligible employer is required to perform a monthly calculation to determine the amount of the ETI that it may claim *per qualifying employee*. The calculation takes into account the monthly remuneration paid to the qualifying employee, the period for which the qualifying employee is employed and the amount or percentage that may be claimed. The employer must add any amounts rolled over from previous months to the amount of the ETI for the current month, but subject to the limitation under section 9(4) (see **7**).

5.1 Determination of the employment tax incentive [section 7(1), (2) and (3)]

5.1.1 The position on or after 1 March 2017

The table below illustrates how the ETI will be calculated in relation to the remuneration received by a qualifying employee during the period 1 March 2017 to 28 February 2019.[121] For a consideration of the position before 1 March 2017, please refer to issue 3 of this guide.

Monthly remuneration	**ETI per month during the first 12 months[122] in which the employee qualified**	**ETI per month during the next 12 months[123] in which the employee qualified**
R0 – R1 999	50% of monthly remuneration	25% of monthly remuneration
R2 000 – R3 999	R1 000	R500
R4 000 – R5 999	Formula: R1 000 − [0,5 × (monthly remuneration − R4 000)]	Formula: R500 − [0,25 × (monthly remuneration − R4 000)]

[120] Under section 169(4) of the TA Act, SARS need not recover a tax debt if it is less than R100.
[121] Sections 95(1)(*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) and (*i*) of the Taxation Laws Amendment Act 15 of 2016.
[122] The 12 months need not be consecutive (see **3.3**).
[123] The 12 months need not be consecutive (see **3.3**).

Example 14 – Determination of ETI if an employee is employed for less than 160 hours and works overtime

Facts:

Employee B was employed by Employer Y in April 2018. There was no wage regulating measure that applied to the employer. Employee B was employed for 140 hours in April 2018 and was paid a wage of R1 800 for this month. Employee B also worked 30 hours of overtime and was paid R400 for these extra hours.

Result:

Since Employee B was employed and paid remuneration for less than 160 hours in the month (ordinary hours of work = 140 hours), the minimum monthly wage of R2 000 prescribed by section 4(1)(*b*)(i) had to be apportioned under section 4(1)(*b*)(ii) so as to arrive at the applicable minimum monthly wage. The applicable minimum monthly wage had to be calculated as follows:

R2 000 × 140 / 160 = R1 750.

As the actual wage paid to Employee B (R1 800) was greater than the determined minimum monthly wage of R1 750, the eligible employer was not prohibited from claiming the ETI in relation to Employee B under section 4.

Employee B's monthly remuneration for April 2018 is R2 200 (R1 800 + 400) and was paid remuneration for at least 160 hours (140 + 30 hours) and thus no gross up is required under section 7(5) (see **5.3**).

Because Employee B earned R2 000 or more but less than R4 000 during the first 12-month period, the incentive amount was R1 000. The eligible employer was therefore entitled to claim an ETI of R1 000 for Employee B for April 2018.

5.1.2 The position on or after 1 March 2019

The table below illustrates how the ETI will be calculated in relation to the remuneration received by a qualifying employee from 1 March 2019.[124]

Monthly remuneration	**ETI per month during the first 12 months[125] in which the employee qualified**	**ETI per month during the next 12 months[126] in which the employee qualified**
R0 – R1 999	50% of monthly remuneration	25% of monthly remuneration
R2 000 – R4 499	R1 000	R500
R4 500 – R6 499	Formula: R1 000 − [0,5 × (monthly remuneration − R4 500)]	Formula: R500 − [0,25 × (monthly remuneration − R4 500)]

[124] Section 7 was amended by sections 5(1)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), and (*h*) of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 32 of 2019. This amendment was retrospective and came into operation on 1 March 2019.

[125] The 12 months need not be consecutive (see **3.3**).

[126] The 12 months need not be consecutive (see **3.3**).

Example 15 – Determination of ETI after 1 August 2019 by employer exempt from paying national minimum wage

Facts:

Employee C was employed by Employer Q in September 2019. The employer was exempt (under section 15 of the National Minimum Wage Act) from paying the national minimum wage prescribed under the National Minimum Wage Act. Employee C was employed for 170 hours in September 2019 and was paid a wage of R6 200 for this month.

Result:

Since Employee C was employed and paid remuneration for more than 160 hours in the month, the minimum monthly wage of R2 000 prescribed by section 4(1)(*b*)(i) did not have to be apportioned under section 4(1)(*b*)(ii).

Employee C earned between R4 500 and R6 500 a month. The incentive amount available to the eligible employer was calculated according to the following formula: R1 000 − [0,5 × (R6 200 − R4 500)] = R150.

The eligible employer was therefore entitled to claim an ETI of R150 for Employee C for September 2019.

5.1.3 The position on or after 1 March 2022

The table below illustrates how the ETI will be calculated in relation to the remuneration received by a qualifying employee from 1 March 2022.[127]

Monthly remuneration	**ETI per month during the first 12 months[128] in which the employee qualified**	**ETI per month during the next 12 months[129] in which the employee qualified**
R0 – R1 999	75% of monthly remuneration	37,5% of monthly remuneration
R2 000 – R4 499	R1 500	R750
R4 500 – R6 499	Formula: R1 500 − [0,75 × (monthly remuneration − R4 500)]	Formula: R750 − [0,375 × (monthly remuneration − R4 500)]

[127] Section 7 was amended by sections 6(1)(*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 19 of 2022. This amendment was retrospective and came into operation on 1 March 2022.

[128] The 12 months need not be consecutive (see **3.3**).

[129] The 12 months need not be consecutive (see **3.3**).

5.2 Associated persons [section 7(4)]

In claiming the ETI an eligible employer must take into account periods during which a qualifying employee was employed by an "associated person" as defined in section 1(1) (see **2.1**). The period during which a qualifying employee was employed by an associated person will be considered in calculating the 24 qualifying months.

Example 16 – Calculation involving an associated person

Facts:

Company X and Company Y formed part of the same group of companies and were managed by the same holding company.

On 1 March 2021 a qualifying employee, Employee C, was employed by an eligible employer, Company X. On 1 July 2021 Employee C left the employment of Company X and signed an employment contract with Company Y. Employee C's monthly remuneration was R4 600. Employee C was a qualifying employee in each month of employment at both Company X and Company Y.

Result:

Company Y was an associated person in relation to Company X since they were managed by the same holding company.

The ETI is available for 24 months per qualifying employee. The ETI for the second 12 months is lower than the ETI for the first 12 months. In determining an employee's qualifying months for the purposes of the ETI, the qualifying months with associated persons must be taken into account.

In this instance Employee C was employed by Company X for four months (1 March 2021 to 30 June 2021) and by Company Y for eight months (1 July 2021 to 28 February 2022). Company X was allowed to claim the higher ETI during the first four months of Employee C's qualifying months. Company Y could claim the higher ETI only for the remaining eight months of the first 12-month period. From 1 March 2022 Company Y had to claim the ETI at the lower rate applicable to the second 12-month period.

Employee C earned between R4 500 and R6 500 during the second 12-month period. The incentive amount available for that period commencing on 1 March 2022 was therefore calculated according to the following formula: R500 − [0,25 × (R4 600 − R4 500)] = R475.

Based on the information provided, Company Y was entitled to claim an amount of R475 per month as part of the ETI commencing on 1 March 2022.

5.3 Employee employed for part of a month [section 7(5)]

Section 7(5) was amended[130] effective from 1 March 2015 and 1 March 2017. For a consideration of the position before 1 March 2017, please refer to issue 3 of this guide.

With effect from 1 March 2017, in determining the ETI amount for an employee who is employed for less than 160 hours in a month, the "monthly remuneration" paid or payable to the qualifying employee for the month is determined by grossing up the actual remuneration earned by the employee for hours that the employee was employed and paid remuneration for in respect of those hours (i.e. calculated as if the employee had worked for 160 hours in a month) and the corresponding ETI calculated on the grossed up amount, as if the employee was employed and paid remuneration for 160 hours in a month (see **2.4**).

Once this grossed-up amount of remuneration has been determined, the basic calculation or formula can be applied depending on the level of monthly remuneration that has been received and how many months the qualifying employee has been employed with the eligible employer. The tables in **5.1.1** and **5.1.2** illustrate the applicable calculation or formula which must be applied depending on the qualifying employee's monthly remuneration and how many months the qualifying employee has been employed.

The resultant ETI amount from the calculation or formula which is based on the grossed-up monthly remuneration is then apportioned by taking into account the number of hours the employee is employed and paid remuneration for in respect of those hours divided by 160 hours in the month. The result of this calculation will determine the ETI amount available to the eligible employer for that month for that qualifying employee.

The formula to apportion the number of hours in this scenario is as follows:

$$\frac{\text{Number of hours the employeee was employed and was paid remuneration for}}{\text{160 hours in a month}} \times \text{ETI determined by applying the table}$$

Example 17 – Employee employed for less than 160 hours in a month (post 1 March 2017)

Facts:

On 15 May 2018 an eligible employer appointed a qualifying employee, Employee H. Employee H was employed for 70 hours in May 2018. The employer was not subject to a wage regulating measure as contemplated in section 4.

Employee H's employment contract provided for remuneration of R25 per hour. Employee H was remunerated a total of R1 750 for the hours worked in May 2018.

Result:

Since Employee H was employed and paid remuneration for less than 160 hours in the month, the minimum monthly wage of R2 000 prescribed by section 4(1)(*b*)(i) must be apportioned under section 4(1)(*b*)(ii) so as to arrive at the applicable minimum monthly wage. The applicable minimum monthly wage was calculated as follows:

R2 000 × 70 / 160 = R875

[130] Section 116(1) of the Taxation Laws Amendment Act 43 of 2014 and section 95(1)(*j*) of the Taxation Laws Amendment Act 15 of 2016.

Since the actual wage paid to Employee H (R1 750) was greater than the determined minimum monthly wage of R875, the eligible employer was not prohibited from claiming ETI in relation to Employee H under section 4.

Employee H's monthly remuneration for May 2018 was arrived at by grossing up the actual remuneration to 160 hours in the month (R1 750 × 160 / 70 = R4 000).

Because Employee H earned R4 000 but less than R6 000 during the first 12-month period, the incentive amount had to be calculated as follows:

Formula: R1 000 − [0,5 × (R4 000 − R4 000)] = R1 000

Apportionment according to the number of hours employed and paid remuneration for:

70 / 160 × R1 000 = R437,50

The eligible employer was therefore entitled to claim the ETI of R437,50 for Employee H for May 2018.

Example 18 – Employee employed for less than 160 hours in a month (post 1 March 2019)

Facts:

On 10 June 2022 an eligible employer appointed a qualifying employee, Employee F. Employee F was employed for 85 hours in June 2022. The employer was not subject to a wage regulating measure as contemplated in section 4.

Employee F's employment contract provided for remuneration of R22 per hour. Employee F was remunerated a total of R1 870 for the hours worked in June 2022.

Result:

Since Employee F was employed and paid remuneration for less than 160 hours in the month, the minimum monthly wage of R2 000 prescribed by section 4(1)(*b*)(i) must be apportioned under section 4(1)(*b*)(ii) so as to arrive at the applicable minimum monthly wage. The applicable minimum monthly wage was calculated as follows:

R2 000 × 85 / 160 = R1 062,50

Since the actual wage paid to Employee F (R1 870) was greater than the determined minimum monthly wage of R1 062,50 the eligible employer was not prohibited from claiming ETI in relation to Employee F under section 4.

Employee F's monthly remuneration for June 2022 was arrived at by grossing up the actual remuneration to 160 hours in the month (R1 870 × 160 / 85 = R3 520).

Because Employee F earned more than R2 000 but less than R4 500 during the first 12 month period, the incentive amount was R1 000.

Apportionment under section 7(5) according to the number of hours employed and paid remuneration for:

85 / 160 × R1 000 = R531,25

The eligible employer was therefore entitled to claim the ETI of R531,25 for Employee F for June 2022.

5.4 Employment tax incentive and the learnership allowance

In addition to the ETI, an employer may be eligible for a deduction of a learnership allowance during a year of assessment if the requirements of section 12H of the Income Tax Act are met.[131]

6. Process for claiming the employment tax incentive

6.1 Submitting the monthly employees' tax return (EMP201) and payment of liability

The Fourth Schedule requires every employer to submit a monthly return to SARS declaring, amongst others, the amount of employees' tax that was deducted or withheld from employees' remuneration during that month. The return must be accompanied by payment of the employees' tax deducted or withheld. The return and payment must reach SARS by no later than seven days after the end of the month in which the employees' tax was deducted or withheld, or, if the seventh day falls on a Saturday, Sunday or public holiday, the last business day before that Saturday, Sunday or public holiday.

In essence, the ETI is paid to the eligible employer through the employees' tax system by allowing the eligible employer to reduce the employees' tax that the eligible employer must pay over to SARS every month. The ETI is in essence deductible from the total employees' tax payable by the eligible employer for the relevant month – regardless of whether the employees' tax was deducted or withheld from qualifying employees or non-qualifying employees. In other words, the eligible employer's total employees' tax liability for the month is simply reduced by the total ETI that the employer qualifies for during that month.

Example 19 – Claiming the ETI

Facts:

ABC (Pty) Ltd, an eligible employer, employed both qualifying and non-qualifying employees under the ETI Act. The total employees' tax deducted or withheld from all employees during April 2022 equalled R32 800. ABC (Pty) Ltd was entitled to an ETI of R3 500 for qualifying employees for April 2022.

Result:

The total amount of employees' tax to be paid by ABC (Pty) Ltd to SARS by Friday, 6 May 2022 (since the seventh day after the end of the month in which the employees' tax was withheld fell on a Saturday, employees' tax was payable by the last business day before the Saturday, i.e. Friday), was R29 300 (R32 800 − R3 500).

[131] See Interpretation Note 20 "Additional Deduction for Learnership Agreements".

The ETI does not affect the remuneration received by the employee, or the employees' tax deducted or withheld from that employee. The employees' tax certificate (IRP5) that the qualifying employee is entitled to receive must disclose the total remuneration, as well as the total employees' tax deducted or withheld, disregarding the ETI. The employer may be entitled to roll over the ETI if the ETI amount exceeds the employees' tax payable in any particular month. For details on this, see **7**.

6.2 Penalty

A penalty under the ETI Act can be levied in two instances, namely, non-compliance and displacement of employees.

6.2.1 Non-compliance

Under section 4(2) an employer that pays a qualifying employee less than the monthly wage prescribed in section 4(1) is ineligible for the ETI. Should the employer nevertheless claim ETI in these circumstances, the employer must pay a penalty to SARS of 100% of the ETI received for that employee.

Although the ETI Act does not address the repayment of the ETI amount incorrectly claimed in consequence of the qualifying employee earning less than the minimum wage prescribed under section 4(1), such incorrectly claimed ETI will be recoverable by SARS under Chapter 11 of the TA Act.

The ETI incorrectly claimed will be disallowed and a penalty will be levied by issuing an additional assessment under section 92 of the TA Act.

6.2.2 Displacement of employees

An employer that is found to have unfairly dismissed an employee in order to obtain a benefit under the ETI must pay a penalty of R30 000 for each employee so displaced.[132] In addition, such an employer may be disqualified by the Minister by notice in the *Government Gazette* from receiving any future incentive.[133]

In determining the disqualification, the Minister may take into account –

- the number of employees that have been displaced by an employer; and
- the effect that the disqualification may directly or indirectly have on the employees of the employer.

SARS will issue an additional assessment to levy the penalty and thereafter follow the collection process under the TA Act. SARS is not afforded any discretion to raise a displacement penalty lower than the R30 000 imposed under section 5(1)(*a*).

[132] Section 5(1)(*a*).
[133] Section 5(1)(*b*).

6.3 Late payment penalty and interest

An employer who has incorrectly claimed the ETI would not have been entitled to reduce the monthly employees' tax payment due by the employer. That employer will have accordingly underpaid employees' tax, and must pay a "percentage-based penalty" levied under Chapter 15 of the TA Act. Paragraph 6 of the Fourth Schedule prescribes that the penalty payable is equal to 10% of the unpaid employees' tax.

Section 89*bis*(2) of the Income Tax Act provides for the payment of interest at the prescribed rate if employees' tax payable is not paid in full within the prescribed period of seven days. It follows that interest will be payable when the ETI has been wrongly claimed since the amount of employees' tax paid will be less than that which was properly payable.

6.4 Understatement Penalty

Section 222(1) of the TA Act provides that an understatement penalty is payable in the event of an "understatement" by a taxpayer in addition to the "tax" payable for the relevant period. The understatement penalty is determined under section 222(2) of the TA Act unless the "understatement" results from a bona fide *inadvertent error*.

Section 222(2) of the TA Act provides that the understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in section 223 of the TA Act to each shortfall determined under sections 223(3) and 223(4) of the TA Act to each "understatement".

The term "understatement" is defined in section 221 of the TA Act as any prejudice to SARS or the *fiscus* as a result of –

- failure to submit a return required under a tax Act or by the Commissioner;
- an omission from a return;
- an incorrect statement in a return;
- the failure to pay the correct amount of tax[134] when a return is not required; or
- an impermissible avoidance arrangement.[135]

The definition of "tax" in section 221 of the TA Act was amended by the Tax Administration Laws Amendment Act 16 of 2022[136] to include an ETI as referred to in section 2(1) for purposes of Part A of Chapter 16 of the TA Act.

This amendment was deemed to have come into operation on 1 September 2022, and applies to any return, for purposes of paragraph 14(2) of the Fourth Schedule, submitted on or after that date.

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[134] Section 221 of the TA Act defines "tax" as "tax as defined in section 1, excluding a penalty and interest". Section 1 defines "tax" as "for purposes of administration under this Act, includes a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act".

[135] Defined in section 221 of the TA Act to mean "an arrangement in respect of which Part IIA of Chapter III of the Income Tax Act is applied and includes, for purposes of this Chapter, any transaction, operation, scheme or agreement in respect of which section 73 of the Value-added Tax Act or any other general anti-avoidance provision under a tax Act is applied".

[136] Section 26(1) of the Tax Administration Laws Amendment Act 16 of 2022.

Prior to the amendment, the definition referred to the definition of "tax" in section 1(1) of the TA Act but excludes penalties and interest. The term "tax" in section 1(1) of the TA Act includes a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act.

An employer that reduces the employees' tax payable[137] with an ETI amount to which the employer is not legally entitled or wrongly calculated will therefore be subject to an understatement penalty.

Any penalty imposed under section 222(2) of the TA Act must be reduced by any penalty imposed under section 4(2) in respect of the same employment tax incentive amount.[138]

Example 20 – Determination of understatement penalty

Facts:

In January 2023, SARS conducted an audit on the ETI claims made by Company A for the periods September 2022 to December 2022. The audit was finalised and the findings were that Company A had paid some of their employees less than the minimum wage prescribed in section 4(1). A penalty under section 4(2) of R500 000 was imposed by SARS.

The findings also included that these same employees did not in any other manner directly or indirectly assist in carrying on or conducting the business of Company A. Therefore, these employees did not meet the requirement of the definition of "employee" for purposes of the ETI Act and Company A was not entitled to claim the ETI in respect of these employees. A penalty under section 222(2) of the TA Act (before taking into consideration section 222(6) of the TA Act) of R1,5 million was calculated by SARS.

Result:

Since a penalty under section 4(2) and section 222(2) of the TA Act were both imposed in respect of the same ETI amount, section 222(6) of the TA Act provides that the penalty imposed under section 222(2) of the TA Act must be reduced by any penalty imposed under section 4(2).

Thus, the total penalties to be imposed by SARS will be as follows:

	R
Section 4(2)	500 000
Section 222(2) of the TA Act (1 500 000 – 500 000)	1 000 000
Total penalties imposed by SARS	1 500 000

[137] Section 2(2) of the ETI Act.

[138] Section 27(1) of the Tax Administration Laws Amendment Act 16 of 2022.

6.5 Objection and appeal

Under section 104 of the TA Act, "a taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment".

The non-compliance penalty (see **6.2.1**), the displacement penalty (see **6.2.2**) and the understatement penalty (see **6.4**) are levied by raising an additional assessment under section 92 of the TA Act. If an employer is aggrieved by such an assessment, an objection may be lodged under section 104 of the TA Act. If SARS disallows the objection, the employer may follow the appeal route under section 107 of the TA Act, read with the rules made by the Minister.[139]

7. Roll-over amounts (section 9)

The ETI Act provides for three instances when the ETI may be rolled over and claimed in a succeeding or future period, but may be subject to certain limitations.

Firstly, if the ETI amount exceeds the employees' tax due for a particular month, the excess must be added to the ETI available in the succeeding month and is accordingly available for deduction in the succeeding month – subject to the refund of such excess under section 10(3) (see **8**).

Secondly, section 9(2) provides that if the employer does not reduce the employees' tax due by the employer in the relevant month by the ETI, despite the ETI being available to that employer, the ETI not claimed must similarly be added to the ETI available for deduction in the first month that the employer reduces employees' tax by any available ETI. With effect from 1 March 2017, section 9(4) was inserted and provides that the amount contemplated in section 9(2) must be deemed to be nil for each qualifying employee employed by the employer on the first day of the month following the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(*a*) of the Fourth Schedule (these reconciliation returns are normally submitted for the six month periods ending August and February) (see Example 23).

Thirdly, if the employer was not allowed to reduce the employees' tax payable by the employer because of the employer's tax returns being outstanding or the employer having a tax debt due to SARS, the relevant ETI must be carried forward and may be claimed in the first month that the employer becomes compliant [section 9(3)]. With effect from 31 July 2020, section 9(4) was amended[140] and provides that the amount contemplated in section 9(3) must be deemed to be nil for each qualifying employee employed by the employer on the first day of the month following the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(*a*) of the Fourth Schedule (these reconciliation returns are normally submitted for the six month periods ending August and February) (see Example 24).

It follows that the monthly ETI may consist of the ETI pertaining to that month as well as any excess ETI that the employer has carried forward from previous months as considered above but subject to the limitation under section 9(4).

[139] Government Notice 550 in *Government Gazette* 37819 of 11 July 2014.

[140] See section 70 of the Taxation Laws Amendment Act 23 of 2020.

The Tax court recently held in IT 45585[141] that it "is not intended at the end of the period that the employer loses the benefit of the excess amount entirely and whilst an employer is precluded from rolling over that benefit, it is not precluded from recovering such benefit as a payment of an excess amount".[142] It is important to note that the judgments of the Tax Court do not create legal precedent and are not binding on other courts although they may be of persuasive value. The judgement in IT 45585 therefore does not create precedent and SARS still holds the opinion based on the wording of the legislation that if an employer does not claim the ETI in the respective reconciliation period, the amount is deemed to be nil on the first day of the month following the reconciliation period.

Example 21 – Excess roll-over of ETI [section 9(1)]

Facts:

In April 2022 Company Z had 30 employees in service, of which 22 were qualifying employees. Company Z was eligible to claim an ETI of R1 000 per qualifying employee based on their remuneration earned in April 2022 and their qualifying periods. The total ETI claimable for Company Z for April 2022 was accordingly R22 000 (22 qualifying employees × R1 000). A total amount of R20 000 employees' tax was due by Company Z to SARS for April 2022.

Result:

Company Z had to carry over the excess ETI of R2 000 (R22 000 ETI limited to employees' tax of R20 000) in April 2022 to May 2022.

Example 22 – Excess roll-over of ETI [section 9(2)]

Facts:

In June 2022 Company X had 40 employees in service, of which the employer claimed ETI for 15 qualifying employees against the employees' tax for that month. In August 2022 Company X established that it was entitled to claim for an additional 10 qualifying employees for June 2022 but failed to do so. Company X was eligible to claim an ETI of R1 000 per the 10 qualifying employees based on their remuneration earned in June 2022 and their qualifying periods.

Result:

The excess ETI claimable by Company X for June 2022 is accordingly R10 000 (10 qualifying employees × R1 000). Company X must claim the excess ETI of R10 000 in August 2022.

141 Case 45585, Johannesburg Tax Court, 14 January 2022, unreported. This judgement was not taken on appeal due to other considerations.

142 Paragraph 52.

Example 23 – Excess roll-over of ETI subject to limitation under section 9(4)

Facts:

In March 2022 Company Y established that it could have claimed the ETI for five qualifying employees in January 2022 but did not claim same. The ETI that Company Y was entitled to claim for these five qualifying employees was R1 000 each based on their remuneration earned in January 2022 and their qualifying periods.

Result:

Company Y would have been entitled to an excess ETI of R5 000 (five qualifying employees × R1 000) for January 2022 under section 9(2). However, Company Y could not carry over the excess ETI for these five qualifying employees for January 2022 since section 9(4) deems this excess ETI to be nil on 1 March 2022 (the first day of the month following the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(*a*) of the Fourth Schedule). Company Y consequently is not entitled to the excess ETI amount of R5 000.

Example 24 – Excess roll-over of ETI due to non-compliance subject to limitation under section 9(4)

Facts:

Company W could have claimed the ETI for 20 qualifying employees in January 2022 and February 2022 but did not claim as the company was not tax compliant during January 2022 and February 2022 since the employer had an outstanding tax debt of R100 000 during these months. The ETI that Company W was entitled to claim for these 20 qualifying employees was R1 000 each based on their remuneration earned in January 2022 and February 2022, as well as taking into consideration their qualifying periods. In April 2022 Company W paid SARS the outstanding tax of R100 000. Company W became tax compliant after making this payment.

Result:

Company W would have been entitled to an excess ETI of R40 000 (20 qualifying employees × R1 000 × 2 months) for January 2022 and February 2022 under section 9(3). However, Company W could not carry over the excess ETI for these 20 qualifying employees for January 2022 and February 2022 since section 9(4) deems this excess ETI to be nil on 1 March 2022 (the first day of the month following the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(*a*) of the Fourth Schedule). Company W consequently is not entitled to the excess ETI amount of R40 000 in respect of January 2022 and February 2022.

8. Refund (section 10)

A refund contemplated in section 9(1) (see **7**) that must be carried forward and deducted from employees' tax due by the employer in a subsequent month that has not been deducted at the end of the period for which a return must be submitted under paragraph 14(3)(*a*) of the Fourth Schedule (these reconciliation returns are normally submitted for the six month periods ending August and February), may be claimed from SARS. The employer must submit an EMP501 declaration in respect of each reconciliation period to claim a refund.

A refund of such excess ETI will however be made by SARS only if an employer is tax compliant. If an employer is not tax compliant (see **4.3**) and subsequently becomes compliant, the excess ETI must be refunded to the employer in the first month during which the employer becomes tax compliant. However, in order to claim a refund of the ETI that was not paid to the employer owing to the employer being non-compliant, the employer must become tax compliant in the reporting period subsequent to the reporting period in which the employer's entitlement to claim the refund arose. If the employer fails to become tax compliant before the end of the subsequent reconciliation period then the refund will be deemed to be nil at the end of that reconciliation period[143].

Example 25 – Refund of excess ETI to tax compliant employer

Facts:

An eligible employer had an excess ETI amount of R20 000 at the end of the six month reconciliation period ending 28 February 2023 and was tax compliant.

Result:

SARS had to refund the eligible employer the excess ETI amount of R20 000 for the reconciliation period ending 28 February 2023.

Example 26 – Refund of excess ETI once employer becomes tax compliant

Facts:

An excess ETI amount of R50 000 was available to the eligible employer at the end of the six month reconciliation period ending 28 February 2022. The employer claimed the refund at 28 February 2022 by submission of the EMP501 for this period, but the refund was not paid by SARS because the employer was not tax compliant at that date since the employer had outstanding VAT returns. The employer subsequently submitted the outstanding VAT returns and became tax compliant on 30 June 2022.

Result:

SARS should refund the eligible employer the excess ETI amount of R50 000 for the reconciliation period ending 28 February 2022 since the employer became tax compliant in the subsequent reconciliation period ending 31 August 2022.

[143] Section 118(1) of the Taxation Laws Amendment Act 43 of 2014. This amendment was retrospective and came into operation on 1 January 2014.

Example 27 – No refund of excess ETI if employer is not tax compliant

Facts:

An excess ETI amount of R30 000 was available to an eligible employer at the end of the six-month reconciliation period ending 28 February 2022. The eligible employer claimed the refund at 28 February 2022, but the refund was not paid by SARS because the employer was not tax compliant at that date since the employer had an outstanding income tax return for the 2019 year of assessment. At the end of the subsequent reconciliation period, 31 August 2022, the employer was still not tax compliant because the employer's income tax return for the 2019 year of assessment was still outstanding.

Result:

At 31 August 2022 (the subsequent reconciliation period) the employer was still not tax compliant. As a result, the refund of R30 000 from the reconciliation period ending 28 February 2022 was deemed to be nil at 31 August 2022.

9. Cessation of the employment tax incentive

The incentive will not be available to employers on or after 1 March 2029.

10. Implications for other taxes

10.1 Value-added tax

The ETI is a tax incentive that is available to eligible employers by allowing them to reduce their liability for employees' tax under the Income Tax Act. Any excess ETI that the eligible employer is unable to recover from any employees' tax due by the eligible employer is, subject to certain limitations, payable by SARS from the National Revenue Fund (see **8**).

The ETI amount retained by the employer from the total employees' tax liability is regarded as an appropriation, grant-in-aid subsidy or contribution transferred by a public authority as contemplated in the definition of "grant".[144] As such, any ETI claimed by an eligible employer that is a VAT vendor will be treated as consideration received in respect of a deemed supply made to a public authority under section 8(5A). As such, the ETI grant amount will be subject to VAT at the zero rate under section 11(2)(*t*) of the VAT Act to the extent that it is in respect of the taxable activities conducted by the enterprise.

For further guidance as regards the meaning of "grant" for VAT purposes, see Interpretation Note 39 "VAT Treatment of Public Authorities, Grants and Transfer Payments".

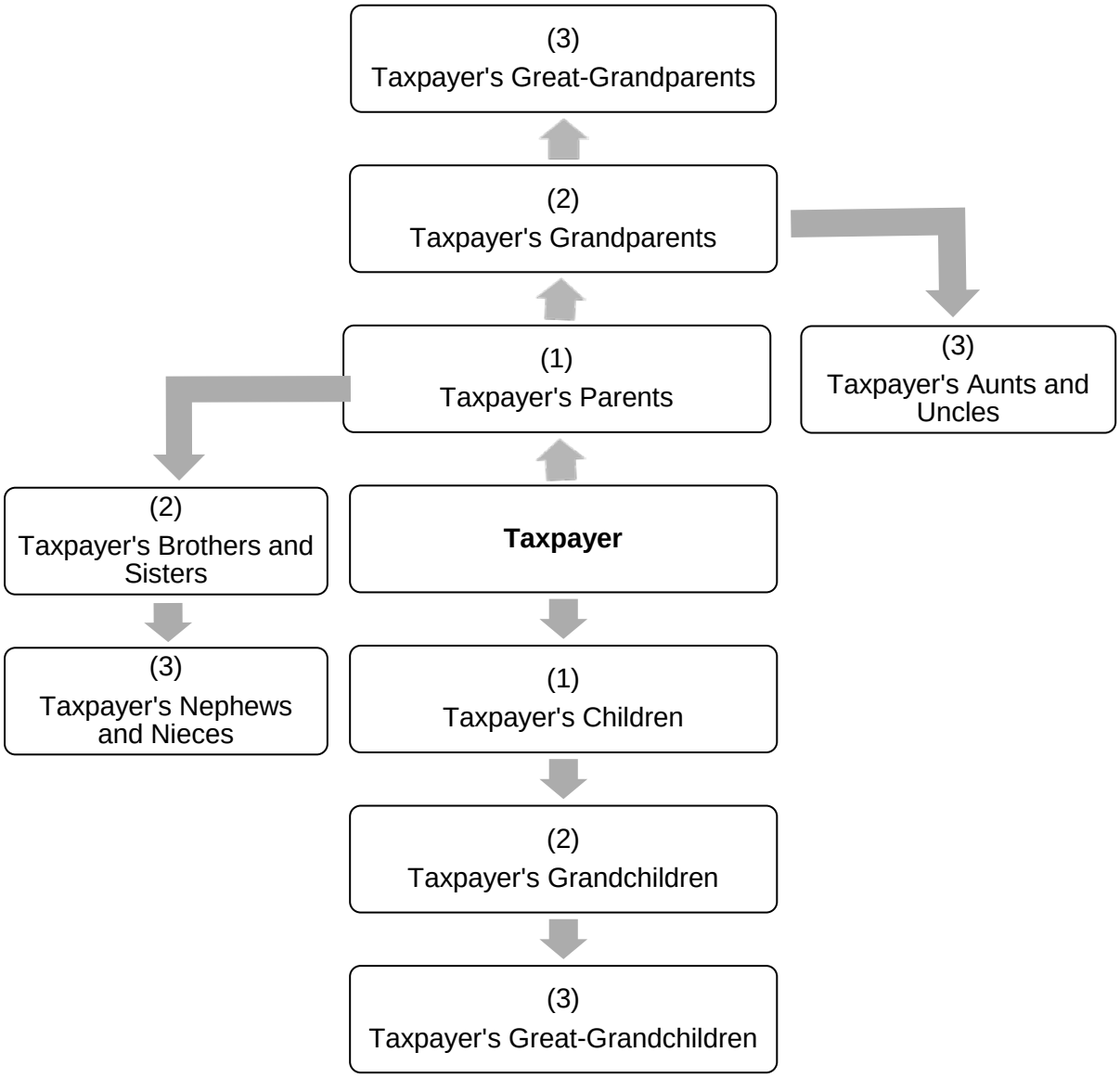
10.2 Income tax

With effect from 1 January 2014, any amount of ETI received by an eligible employer under the ETI Act that reduces the employee's tax payable by that employer is exempt from income tax under section 10(1)(*s*) of the Income Tax Act.[145]

[144] Section 1(1) of the VAT Act.

[145] As inserted by section 13 of the ETI Act with effect from 1 January 2014.

Annexure A – Diagram illustrating the rule for determining who are related within the third degree of consanguinity in the case of natural persons



Annexure B – The meaning of "remuneration" in paragraph (1) of the Fourth Schedule to the Income Tax Act

The term "remuneration" for employees' tax purposes is defined as 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 for services rendered, including –

- any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered, or in respect of employment or the holding of any office;
- restraint of trade payments;
- an amount, including a voluntary award, received or accrued in commutation of amounts due in terms of a contract of employment or service;
- an amount received or accrued for the relinquishment, termination, loss, repudiation, cancellation or variation of an office or employment or of an appointment;
- an allowance or advance paid to an employee for accommodation, meals or other incidental costs while the employee is by reason of the duties of the employee's office obliged to spend at least one night away from the employee's usual place of residence in the Republic is deemed to become payable to the employee in the following month for services rendered. This deeming provision applies when such an allowance or advance was paid to an employee during any month for a night away from the employee's usual place of residence and that employee has not by the last day of the following month either spent the night away from that employee's usual place of residence or refunded that allowance or advance to the employer;
- 50% of an allowance paid to a holder of a public office;
- 80% of an allowance or advance for the expense of travelling for business purposes (excluding an allowance paid based on actual distance travelled for business purposes);
- 100% of an allowance or advance for the expense of travelling for business purposes as exceeds the amount determined by applying the rate per kilometre by the Minister in the *Government Gazette* to the actual distance travelled;
- the cash equivalent of the value of taxable benefits (fringe benefits) received, as determined under the Seventh Schedule to the Income Tax Act (other than a company car);
- 80% of the cash equivalent of the value of the taxable benefit arising from the use of a company, car as determined under the Seventh Schedule to the Income Tax Act;
- a gratuity received by or accrued to a person from that person's employer because such person obtained a university degree or diploma or has been successful in an examination;
- any gain determined under section 8B, which must be included in that person's income under that section (broad-based equity share plan); and
- any amount determined under section 8C which is required to be included in the income of that person;
- certain dividends received from restricted equity instruments that do not qualify for an income tax exemption and are taxable on assessment of the directors and employees;

but not including –

- any pension or additional pension under the Social Assistance Act 59 of 1992;
- any disability grant or additional or supplementary allowance under the Social Assistance Act 59 of 1992;
- any grant or contribution under section 89 of the Children's Act 33 of 1960;
- amounts paid to an employee, wholly in reimbursement of expenditure actually incurred by such employee in the course of employment; and
- any annuity in terms of an order of divorce or decree of judicial separation or agreement of separation; and
- amounts paid to common law independent contractors, but excluding amounts paid to common law independent contractors who do not employ three or more qualifying employees and are required to render services mainly at the premises of the client and are subject to the control or supervision of any person as to the manner in which their duties are performed or as to the hours of work.

The last exclusion does not apply to –

- 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;
- any labour broker;
- any personal service provider;
- a person who is not ordinarily resident in South Africa.

Annexure C – Definition of "qualifying company" under section 12R(1)

12R. Special economic zones.—(1) For the purposes of this section—

"qualifying company" means a company—

(*a*) (i) incorporated by or under any law in force in the Republic or in any part thereof; or

(ii) that has its place of effective management in the Republic;

(*b*) that carries on a trade in a special economic zone designated by the Minister of Trade and Industry in terms of the Special Economic Zones Act and approved by the Minister of Finance after consultation with the Minister of Trade and Industry for the purposes of this section by notice in the *Gazette*;

(*c*) if the trade contemplated in paragraph (*b*) is carried on from a fixed place of business situated within a special economic zone;

(*d*) if not less than 90 per cent of the income of that company is derived from the carrying on of a trade within one or more special economic zones; and

(*e*) that—

(i) was carrying on any trade before 1 January 2013 in a location that is subsequently approved for the purpose of this section as a zone in terms of subsection (3);

(ii) commenced, on or after 1 January 2013 the carrying on, in a location that is approved or subsequently approved for the purpose of this section as a zone in terms of subsection (3), of any trade not previously carried on by that company or any connected person in relation to that company in the Republic; or

(iii) commenced, on or after 1 January 2013 the carrying on, in a location that is approved or subsequently approved for the purpose of this section as a zone in terms of subsection (3), of any trade and that trade—

(*aa*) comprises of the production of goods not previously produced by that company or any connected person in relation to that company in the Republic;

(*bb*) utilises the use of new technology in that company's production processes; or

(*cc*) represents an increase in the production capacity of that company in the Republic.