

INTERPRETATION NOTE 17 (Issue 5)

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ACT : INCOME TAX ACT 58 OF 1962
SECTION : THE FOURTH SCHEDULE
SUBJECT : EMPLOYEES' TAX: INDEPENDENT CONTRACTORS

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Preamble

In this Note unless the context indicates otherwise –

- “**paragraph**” means a paragraph of the Fourth Schedule to the Act;
- “**section**” means a section of the Act;
- “**the Act**” means the Income Tax Act 58 of 1962; and
- any other word or expression bears the meaning ascribed to it in the Act.

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

1. Purpose

This Note explains the statutory tests and the common law tests to assist SARS officials and employers to classify a worker efficiently and effectively. This Note has been updated to incorporate the latest amendments made under section 5(1)(d) of the Tax Administration Laws Amendment Act 16 of 2016, effective from 1 March 2017, to the exclusionary subparagraph (ii) of the definition of “remuneration” as defined in paragraph 1.

Binding General Ruling 40 “Remuneration Paid to Non-Executive Directors” and the *Non-Executive Directors FAQs on BGRs 40 and 41* address the independent contractor status of non-executive directors. This Note therefore does not apply to non-executive directors.

2. Background

The concept of an “independent trader” or “independent contractor” (synonymous for practical purposes) still remains one of the more contentious features of the Fourth Schedule. A decision in favour of either independent contractor or employee status impacts on an employer’s liability to deduct employees’ tax.

The liability of an employer to deduct employees’ tax is dependent on whether “remuneration” as defined in paragraph 1 is paid. Subject to certain conditions, amounts paid to an independent contractor for services rendered are excluded from “remuneration” as defined, in which case an employer has no obligation to deduct employees’ tax from the amounts paid.

Two sets of tools are available to determine whether a person is an independent contractor for employees’ tax purposes. The **first tool** is referred to as the statutory tests. There are two statutory tests, and they are both conclusive in nature.

- If the first test is met, the person is deemed *not to be* carrying on a trade independently, with the result that the amount paid is deemed to be “remuneration” and will be subject to employees’ tax, unless the second test is met.
- In the event that the second test is satisfied, the person will be deemed *to be* carrying on a trade independently, and the amount earned will not be “remuneration” as defined and will consequently not be subject to employees’ tax.

It is possible that a person could meet the first test, and be deemed *not to be* carrying on an independent trade, but meet the second test and then be deemed *to be* carrying on an independent trade. The second test overrides the first test.

The **second tool** is the common law tests, used to determine whether a person is an independent contractor or an employee. Unfortunately, the common law tests as they apply in South Africa do not permit a simple “checklist” approach. There are no hard and fast rules in determining whether a person is an independent contractor. An “overall” or “dominant impression” of the employment relationship must be formed.

In practice, the statutory tests are considered first. The common law tests are applied to finally determine whether the person is an independent contractor or an employee only if the statutory tests are not applicable in a particular situation.

This Note includes the interpretation of the relevant legislation, an explanation of the statutory tests, an explanation of the common law tests as captured in the dominant impression test, a flow diagram explaining the structure of the legislation, the dominant impression test grid for quick reference and a historical overview of the common law principles. This Note is not intended to be exhaustive of all scenarios which may occur in practice, and may not deal with certain issues based on specific facts. It must be accepted that this Note will be revised periodically in the light of public debate, court judgements and legislative reform.

The common law history (**Annexure D**) provides a more in-depth analysis of the concept by making reference to Latin and legal terms often used by lawyers and tax consultants. The flow diagram (**Annexure B**) and the dominant impression grid (**Annexure C**) provide a useful summary and quick reference guide of the detailed content.

3. Interpretation of the Fourth Schedule

The Fourth Schedule requires the presence of three elements before employees' tax can be levied, namely, an *employer* paying *remuneration* to an *employee* (**Annexure A**).

The determination of whether an independent trade is being carried on must be made in two instances under the Fourth Schedule, namely in –

- exclusionary subparagraph (ii) of the definition of “remuneration”; and
- paragraph 2(5)(a)(i), it is necessary to decide whether a labour broker qualifies for an employees' tax exemption certificate.

3.1 Paragraph (ii) of the special exclusions from the definition of “remuneration”

Amounts (that would otherwise be remuneration) paid to a person as contemplated in paragraph (a) of the definition of an “employee” in the Fourth Schedule are excluded from the definition of “remuneration” if that person carries on an independent trade. Also excluded are persons who are not resident in South Africa. The exclusion would therefore in general only be applicable to natural persons or trusts (who are not personal service providers) that are resident in South Africa.

The exclusion does not apply to payments made to the following categories of “employees” as defined:

1. Any person who receives remuneration by reason of services rendered to a labour broker [paragraph (b) of the definition of “employee”];
2. Any labour broker [paragraph (c) of the definition];
3. Any persons declared by the Minister of Finance in the *Government Gazette* that they are employees [paragraph (d)]; and
4. Any personal service provider [paragraph (e)].

The law governing the test to determine whether a person carries on an independent trade under the common law is complex, is commonly misunderstood, and is often incorrectly applied. The relevant legislation is set out in paragraph (ii) of the special exclusions from the definition of remuneration. To simplify the discussion of this part of the law, the wording is set out below. “Remuneration” as defined excludes –

“any amount paid or payable in respect of services rendered or to be rendered by any person ... in the course of any trade carried on by him independently of the person by whom such amount is paid or payable and of the person to whom such services have been or are to be rendered.”

(Emphasis added.)

The word “and” where it appears in this paragraph means the test comprises dual elements. The test requires that the person must be independent of both the person –

- (i) by whom the amount is paid or payable; **and**
- (ii) to whom such services are rendered or will be rendered.

The law recognises that the person paying an amount for the services rendered, and the person to whom those services are rendered, could be different persons, and addresses that situation by requiring the person rendering the services must be independent of **both** parties in order to fall outside of the employees’ tax net. In the majority of instances, the person paying the amount in respect of the services rendered and the person to whom those services are rendered, is one and the same person. In those instances, the application of the common law test is straightforward.

However, it is not uncommon that the person to whom services are rendered, and the person making payment, are different. The following two examples of situations that often occur, and where the law is incorrectly applied, will demonstrate the correct application of the law.

- a) In labour broking arrangements, labour brokers supply their own employees to clients, to perform work for the clients. These employees render their services under the direct control and supervision of the client. The amounts payable to the employees for the services they render to the client are, under the agreement between the labour broker and the employee, payable by the labour broker.

In this situation, the employee is not independent of both the person who makes the payment (the labour broker) *and* the person to whom the services are rendered (the client). The amounts paid or payable to these employees are therefore not excluded from remuneration.¹

- b) Certain businesses offer incentive rewards to the employees of other business. For example, a manufacturer of a product may offer incentives to the sales employees of retail stores or outlets, in order to encourage those employees to sell a specific manufacturer’s products in preference to a competitor’s product. The employees of the retail store or outlet are not employed by the manufacturer under the common or labour law, but are employees of the retail store or outlet, and the products of the manufacturer are sold in the ordinary course of their employment with their employer. In most instances, the employees participating in the incentive programme must register in some way, in order to reap the benefits under the scheme. Employers often also register as participants.

Under schemes of this nature, there is no service rendered by the employee of the retail store or outlet to the payer of the incentive (in the example above, the manufacturer). By selling the employer’s merchandise to the employer’s customers, the employees are employment services only to their employer, and not the payer of the incentive.

¹ See the discussion under the heading “Labour brokers and their employees” in Interpretation Note 35 “Employees’ Tax: Personal Service Providers and Labour Brokers”.

As the person to whom services are rendered (the employer) and the person who is making payment (the incentive scheme operator) are different persons, the recipient of the payment needs to carry on an independent trade of both of those persons in order for the amount to be excluded from remuneration. Employees in these scenarios do not carry on a trade independent of their employers, and these amounts are therefore not excluded from remuneration. The person paying the incentive must deduct or withhold employees' tax from such amounts.

In order to determine whether a person is carrying on a trade independent of the person to whom services are rendered and from whom payment is received, the common law tests, as further developed by the South African Courts, are used. The common law prescribes the use of certain tests to form a dominant impression of a relationship. There is no conclusive test under the common law. The Legislator has, however, under its powers elevated two of these tests to form conclusive tests. These conclusive tests are referred to as statutory tests. Should any one of these conclusive tests apply, the exclusion from "remuneration" does not apply.

The common law tests (see **7**) are still used to determine whether a person is an independent contractor if the statutory tests (see **5**) for deeming a person to be an independent contractor are not applicable.

3.2 Labour Brokers [paragraph 2(5) of the Fourth Schedule]

Remuneration paid to any labour broker who is not in possession of an exemption certificate (IRP30), is subject to employees' tax. This is an anti-avoidance measure and must be applied strictly. The exemption certificate will be issued only if the labour broker carries on an independent business and if certain other requirements have been met. The common law tests (see **7**) are used to determine whether a labour broker is carrying on an independent business. An independent business can, in general terms, be described as one that is an entrepreneurial enterprise, enjoying such a degree of independence that it can survive the termination of the relationship with its client.

The provisions of paragraph 2(5) are further discussed in Interpretation Note 35.

4. When is it required of SARS to determine the status of a person?

It is the responsibility of the employer to determine whether the provisions of exclusionary subparagraph (ii) of the definition of "remuneration" are applicable and whether payments are subject to employees' tax. Not only is this responsibility set by the provisions of the Fourth Schedule, but it is also the employer that is in the best position to evaluate the facts and the actual situation.

A SARS branch office is not permitted to consider applications from persons, apparently falling into paragraph (a) of the definition of an "employee", for confirmation as an independent contractor under exclusionary subparagraph (ii) of the definition of "remuneration". In the past certain branch offices were issuing a "Letter of Independence" based on the face-value of a written application (often inappropriately made on the IRP30A form that is only intended for use in labour broker determinations). This is no longer done.

SARS's practice of rejecting applications of this nature has now been codified into the law. Under the Tax Administration Act,² SARS may reject an application for an advance tax ruling if the application requests an opinion, conclusion or determination regarding whether a person is an independent contractor.³ The *Comprehensive Guide to Advance Tax Rulings* states that the reason why such applications may be refused is that the issue is both fact and resource intensive; and only the employer has full knowledge of the relevant facts,⁴ and continues to state that there are no exceptions to this rule.

SARS generally does not issue non-binding private opinions on issues if an advance tax ruling would be rejected. For this reason, no opinions are issued on this topic.

An employer that has incorrectly determined that a worker is an independent contractor is liable for the employees' tax that should have been deducted, as well as the concomitant penalties and interest. The employer has the right to recover the tax paid from the employee.

5. The statutory tests

The exclusionary subparagraph (ii) of the definition of "remuneration" provides a statutory test to conclusively deem that a person will not be carrying on a trade independently, and consequently will be earning "remuneration", and a statutory test to conclusively deem a person to be carrying on a trade independently and not to be earning "remuneration".

5.1 The first test

The first test is a provision deeming that a person will *not* carry on a trade independently if *both parts* of the test are satisfied. Note that if the second test discussed in 5.2 applies, it overrides the first test.

The first part

The first element is that the services or duties are required to be performed mainly (which is a quantitative measure of more than 50%)⁵ at the premises of the client. The "client" referred to must be carefully considered. The statutory tests refer to the premises of either the person –

- (i) by whom the amount is paid or payable; or
- (ii) to whom such services are rendered or will be rendered.

This means that if the services are rendered mainly at the premises of either of these parties, who are not necessarily the same persons, this part of the statutory test is satisfied. This type of arrangement may, for example, occur with tripartite arrangements such as waitrons receiving tips,⁶ or with labour brokers.

² Act 28 of 2011.

³ Section 80(1)(a)(vii).

⁴ Paragraph 3.1.1(g).

⁵ *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Eiendoms) Bpk* 1966 (4) SA 434 (A).

⁶ See Interpretation Note 76 "The Tax Treatment of Tips for Recipients, Employers and Patrons".

The second part

The second element of the test is whether the worker is subject to the –

- (i) **control** of any other person as to the manner that the worker's duties are or will be performed, or as to the hours of work **(for purposes of this test the comments relating to “control” under 8.1.1 would be relevant)**; *or*
- (ii) **supervision** of any other person as to the manner that the worker's duties are or will be performed, or as to the hours of work **(for purposes of this test the comments relating to “supervision” under 8.2.1 would be relevant)**.

This control-or-supervision part of this test refers to “any” person. This is wide, and could include the payer of the amount, the recipient of the service or any other person who has a contractual right to control or supervise the person in respect of those specific services.

If either (i) or (ii) above applies (that is, control *or* supervision), the second element of the first test is satisfied. It is not necessary for both to be applicable in a particular situation.

Effect of both parts of the first test applying

Should both elements of this test apply positively, the recipient is deemed not to be carrying on a trade independently, subject to test two not applying. The amount so received by him or her is, therefore, not excluded from remuneration and is subject to employees' tax.

This does not mean that the person is also deemed to be an employee. The independent status under common law of an independent contractor that is deemed not to be carrying on an independent trade and subject to employees' tax deductions remains unaffected. This means that an independent contractor will not be affected by section 23(m).

5.2 The second test

A person who employs three or more full-time employees, who are not connected persons in relation to him or her and are engaged in his or her business throughout the particular year of assessment, is deemed to be carrying on a trade independently.

This test is the overriding test in subparagraph (ii) of the exclusions from remuneration. It will take precedence over the first test, even if the requirements of the first test have been satisfied, and over the common law position.

A “connected person” in relation to a natural person means any relative and any trust that the natural person or the relative is a beneficiary of. “Relative” in relation to any natural person means the spouse of the person or anybody related to him or her or his or her spouse within the third degree of consanguinity, or any spouse of anybody so related. For the purpose of determining the relationship between any child referred to in the definition of a “child” in section 1(1) of the Act and any other person, the child is deemed to be related to its adoptive parent within the first degree of consanguinity.

The amounts received by the independent contractor will be coded 3616 on the IRP5 certificate, if employees' tax has been withheld, ensuring that the limitation of deductions under section 23(m) will not apply on assessment. The independent contractor must request the trade income and expenditure field when completing the annual ITR12 income tax return wizard.

Example 1 – Applying the statutory tests

Facts:

Z is an independent contractor, under the common law test, who provides services mainly at the clients' premises and is subject to control or supervision. Z does not employ three or more qualifying employees.

Result:

Z will be deemed not to be carrying on an independent trade for the purposes of the Fourth Schedule (the statutory test applies). Accordingly employees' tax will be deducted from the amounts paid or payable to Z by Z's clients. However, because Z is independent under the common law test, the remuneration will be coded 3616 on the IRP5 certificate and the limitation of deductions under section 23(m) will not apply. **If Z was not regarded to be independent under the common law test, the remuneration would be coded 3601 on the IRP5 certificate and section 23(m) would apply.**

6. The common law dominant impression test

The current South African common law position is that the so-called "dominant impression test" (the Test) must be applied to determine whether a worker is an independent contractor or an employee. The Test makes use of several indicators, of differing significance or weight that have to be applied in the relevant context. At common law, no single indicator is conclusive or a determinant of a person's status. The Test is essentially an analytical tool that is designed for application in the employment environment to establish the dependence or independence of a person. The person that is tested can be an individual worker or a business.

The Test can **be** applied in the two situations mentioned under 3.

7. How to apply the common law dominant impression test

The "common law dominant impression grid" (the Grid), in **Annexure C**, sets out 20 of the more common indicators in tabular form and is not meant to be exhaustive. The indicators are interrelated as it will be found that some are subcategories of others or only differ marginally from others. Depending on the circumstances, some indicators may become irrelevant, while others may become more relevant, in time. The indicators point to whether there has been the "acquisition of productive capacity" (that is, of labour power, capacity to work, or simply effort). They have been classified into three categories, namely –

- **near-conclusive** (those relating "most directly to the acquisition of productive capacity");
- **persuasive** (those establishing "the degree of control of the work environment"); and

- **resonant** of either an employer-employee relationship or an independent contractor or client relationship, whichever is relevant.

This classification or weighting is intended to assist auditors in making the determination. The weightings are based on SARS's assessment as to what is appropriate and fair to an employee vs independent contractor determination for the purposes of withholding employees' tax.

The Grid breaks the employee vs independent contractor *spectrum* into 20 *sub-spectra*. The typical employee and the typical independent contractor represent the polar opposites of a *spectrum*. The Grid is a guide and should not be used as a checklist to determine a certain "score" to come to a conclusion. Each indicator must in itself be analysed with due regard to the particular context (type of industry, type of business, type of customer, type of worker), and how the business actually operates. The auditor must analyse the employment relationship in the light of all the indicators and their relative weightings, and arrive at a dominant impression, in favour of either the acquisition by the employer of the worker's productive capacity (effort), or of the result of the worker's productive capacity. This dominant impression will be the basis for classification of the relationship as either an employee relationship or an independent contractor relationship.

The keys to the exercise are **flexibility**, practicality, and gathering as much information as possible through thorough investigation. The client and the worker (or business) must be required to provide a detailed motivation (preferably an affidavit) as to why any particular indicator does not indicate what it apparently does. The auditor should interview (and take affidavits from) not only the parties to the contract, but also closely connected third parties (any labour brokerage, employment agency, immediate supervisors, co-workers, trade union organisers and shop stewards active in the workplace, any works committee, bargaining council, and so on). The auditor's conclusion must be supported by the information gathered. It is not sufficient to record a mere "gut feeling".

8. The common law dominant impression indicators (the indicators)

8.1 Near-conclusive indicators of the acquisition of productive capacity (of employee status or non-independent business status)

The indicators in this category provide **insight** into the quality of control, the nature of financial relations and the degree of exclusivity of the relationship. This category of indicator is nearly conclusive because the indicators are considered to be the deciding factors in distinguishing between the acquisition of the worker's productive capacity (employee) as opposed to the result (independent contractor). These indicators are set out below.

8.1.1 Control of manner

This indicator examines the quality (that is, whether intended to acquire control of productive capacity or not), rather than the degree or extent, of control. The employer controls the manner that work is done either by detailed instructions, by training, by requesting that prior approval be sought, or by instituting disciplinary steps for unacceptable performance by the worker. In this regard:

- Control of manner means control as to which tools or equipment to use, which other workers to involve or employ, the raw materials to use and where to obtain them, the routines, patents or technologies to use. All of these are

elements of commanding and directing an operation to render a particular business result.

- It is likely that the employer intended to acquire (and the worker acquiesced to the surrender of) productive capacity if the employer has the contractual power to control the manner of use of a worker's productive capacity. However, the absence of this form of control does not mean that there can be no employee relationship. Control is typically present in most employee contracts because control of a person's manner of working is usually indicative of the right to exercise control over the employee's productive capacity (whether labourers, blue collar workers, tradesmen on the shop floor or construction site, white collar workers in large open plan offices, and even of professionals).
- Employment contracts are unlikely to explicitly refer to the acquisition of control of manner. This has to be inferred from the contract as a whole. Any form of control must flow from the legal relationship (the contract) itself and not from some extraneous source (for example, the nature of the trade or profession, of the workplace, or market conditions). It is sufficient if the right of control is contractually present, even if it is not exercised in practice. It is the right to control manner, not the practical ability that is relevant (for example, a businessman cannot practically control or supervise the manner of working of a specialised professional although the right to do so is retained).
- A right to control "manner" is sufficient to satisfy the statutorily conclusive "control" requirement in exclusionary subparagraph (ii) of the definition of "remuneration". An actual exercise of this right is not necessary.

8.1.2 Payment regime

A worker can be paid with reference to a result (if the manner of use is not controlled) or to effort (the use of productive capacity in a specific manner for the payment period). Payment without material reference to result indicates employee status, because the worker is then being paid for effort. It should be noted that:

- The reference to payment for a "result" in a contract may sometimes be misleading. Any employer (business) incurs employment expenses to achieve "results". An employer expects results from both the employees and the independent contractors it employs. In the case of an employee, the employer controls the employee's effort to achieve the employer's result. Generally, the employer cannot apply financial sanctions (reduce remuneration) if dissatisfied with the employees' results but can increase control through supervision, training or dismissal for incapacity. In the case of an independent contractor, the employer does not control the independent contractor's effort, but purchases the independent contractor's result. The employer, if dissatisfied, can apply financial sanctions through accepting the result but paying a portion of the contract price, or by refusing to pay or accept the result.
- Payment at regular intervals (whether at a fixed rate per time interval or at a fixed rate per hour) that fluctuates depending on the hours actually worked, but without material reference to output or result for that interval, indicates that there is an acquisition of a worker's effort (productive capacity), as opposed to a result of effort (productive capacity deployed).

- Payment by time-periods (that is, payment for a result but with the reward merely calculated by time-periods worked) or payment for a service (in the sense of a result) must be distinguished from payment for time (payment for the worker's effort over time, often measured in hours worked). An employer that is, for example, entitled to a worker's services for all normal business or working hours, has effectively acquired exclusive use of the productive capacity of the worker, which is indicative of an employee status.

8.1.3 Person who must render the service

An employment contract is one of personal service (that is, the employee is at the "beck and call" of the employer). Where the employer has a contractual right to insist on the personal service of a worker or to object to substitution (for example, the worker substitutes his or her own employee for him or herself), or if the worker may not freely hire, fire, pay or supervise his or her own assistants, an employer-employee relationship is usually prevalent. A contractual right to substitute is usually indicative of an independent contractor status.

8.1.4 Nature of obligation to work

A contract stipulating the obligation to work is delineated by time and not result, and indicates an employer-employee relationship because it amounts to the acquisition of productive capacity or effort. An obligation to work "full-time" indicates an employer-employee relationship as it means the exclusive acquisition of the worker's productive hours or capacity. The existence of an obligation to be present and available to work, regardless of whether work is available, indicates that the acquisition of productive capacity was the employer's foremost consideration, for example, the shop assistant who must be present behind the counter at all times, even if no customers enter the store, is entitled to remuneration until the employment contract is lawfully terminated.

8.1.5 Employer (client) base

The contractual right to deny a worker the opportunity to service other clients amounts to acquisition of exclusive use of the worker's productive capacity (a form of the "economic reality" test as referred to in **Annexure E**). In the absence of a contractual right to exclusivity, the absence of a multiple and concurrent client base may be a persuasive indicator or merely another relevant indicator, depending on the context and the reasons for there not being a multiple concurrent client base. It should be noted that:

- The typical independent contractor is free to seek out business opportunities, is entrepreneurial (seeks out new business opportunities or sources of income), has a multiple and concurrent client base, and is not economically dependent on one employer.
- The typical employee (or non-independent "business") is bound contractually (at least in his or her job function and during business hours) to an exclusive relationship with the employer, and may not work for a competitor or any other employer. The employee is restricted in developing a client base, and typically has no client base. The fact that the employer turns a blind eye to night or weekend work (for example, within the employee's field of expertise but not in competition with the employer) may mean that the worker is both an employee (in relation to that employer), and an independent contractor in relation to other employers (clients). This may affect the availability of

deductible expenses, but not the obligation to withhold Pay-As-You-Earn (PAYE) by the main employer.

8.1.6 Risk, profit and loss

An exposure to risk (opportunity to enjoy profit or suffer loss) may indicate a degree of economic independence or non-exclusive acquisition of productive capacity, that is consistent with an independent contractor (independent business) and inconsistent with an employer-employee relationship (a form of the “economic reality” test as described in **Annexure D**). In this regard:

- An employee’s remuneration, like the income of most independent contractors, is not directly dependent on the employer’s sales (except for a commission agent), cash flow or profitability (although employees rank before independent contractors on insolvency of the employer). Risk related to the employer’s profitability or solvency is, therefore, not relevant.
- A person (worker or business) who is not directly exposed to performance or market risks may indicate an employee relationship. An employee is generally paid regardless of defective workmanship, while an independent contractor may only be entitled to a reduced fee or no fee in similar circumstances. An employee receives a fixed salary irrespective of incompetence, inefficiency, wastefulness or “cost or time over-runs” occasioned by him or her, while an independent contractor might typically agree on a fee or price and bear the risk of loss if performance costs exceed that fee or price. Employees do not bear the risk of increases in raw material prices, while the owner of the stock or inventory would ordinarily be an independent contractor.
- An independent contractor is free to make business decisions that directly affect profitability [levels of inventory, pricing, staffing, financing (purchase or lease)] while an employee does not make these decisions, unless mandated to do so by and on behalf of the employer.

8.2 Persuasive indicators of the acquisition of productive capacity (of employee status or non-independent business status)

This category of indicators examines the degree or extent of behavioural control, as well as the purpose of acquiring control. The existence of this category of indicator, depending on the extent and purpose of control acquired, is persuasive in coming to a decision. These indicators are persuasive because of their relationship to the extent of control, and the relationship of the extent of control to the acquisition of labour power. Control enables management to convert productive capacity into productive activity. Some examples are:

8.2.1 Instructions or supervision

The employer controls the work done and the environment in which the work is done by giving instructions as to the location, when to begin or stop, pace, order or sequence of work. “Supervision” is typical of most workplaces or employment relationships, and may indicate employer measures to control what it has contractually acquired (productive capacity), or measures to co-ordinate the work of independent contractors, or measures to co-ordinate the work of both types of workers. It should be noted that:

- The greater the degree of supervision (that is, the scope or extent of instructions, or the sanctions for non-compliance), the greater the indication in favour of employee status. The degree of supervision required by the

employer may differ depending on the nature of the business or of the worker, and supervision is not an essential feature of an employee contract (for example, it may be largely absent in the case of certain tradesmen or professionals). The degree of control must be measured against that level of supervision that the nature of the work requires.

- Independent contractors usually enjoy autonomy as regards the order or sequence of work. Supervision in the sense of mere monitoring of performance (without the right to intervene) is unlikely to be relevant. Unless imperatives inherent in the nature of the employer's premises (for example, the need for safety or co-ordination with employees), or the task, profession, trade or industry, dictates that the employer control the order or sequence of work (for example, relevant legislation or the nature of technology), then the control would be persuasive in favour of an employee relationship.
- Any form of supervision must flow from the legal relationship (the contract) itself and not from some extraneous source like the nature of the trade, profession, workplace or market conditions. It is sufficient for the right of control to be contractually present, even if it is not exercised in practice.
- A restraint of trade involves control of the future use of productive capacity, and is intended to prevent unfair competition by protecting sensitive business information, as well as to promote stability of employment. A restraint can only exclude a worker from working for or as a specific class of employer for a specific period and in a specific area. However, since future employment is restricted while the maintenance of the current employment relationship is promoted, some degree of control (for example, of the entrepreneurial development of the worker's potential client base) is present. Although a restraint of trade can be imposed on an employee or an independent contractor, independent contractors would ordinarily be subject to a "secrecy clause". A restraint of trade would tend to indicate an employee relationship. Any restraint of trade payment made on or after 23 February 2000 to a natural person, or a "labour broker" (other than a labour broker in possession of a current exemption certificate), or a "personal service provider" constitutes "remuneration", and means that employees' tax must be withheld from the payment.

8.2.2 Reports

A reporting regime indicates that a measure of supervision exists, albeit indirect and historic in nature. The existence of a reporting regime, depending on factors such as content, detail, regularity, and obligation, can be persuasive in favour of an employer-employee relationship. A reporting regime that amounts to control of the manner that work is done, is sufficient to satisfy the "control" requirement in exclusionary subparagraph (ii) of the definition of "remuneration".

8.2.3 Training

The typical independent contractor invests in his or her own training, and is free to choose his or her own production techniques. Typically, an employer might provide training to an employee but not to an independent contractor. Training can serve as a technique of supervision (ensuring co-ordination), or of control (ensuring that the employer's techniques are followed to control the manner of working).

Training relates to the degree or extent of control (for example, supervision) if it is intended to improve productivity by increasing technical competence, productivity and goodwill by promoting uniformity of production techniques and procedures, knowledge of employer administrative and IT systems.

Training relates to the quality of control (for example, control of manner) if its purpose is to promote an exclusive production technique or form of service provision (for example, client etiquette). In that case, it may amount to a near-conclusive indicator, and would be sufficient to satisfy the statutorily conclusive “control” requirement in exclusionary subparagraph (ii) of “remuneration”.

In some cases, training may not necessarily indicate an employee relationship, for example, “product training” given to a broker-house or a commercial traveller, who may still be independent contractors.

8.2.4 Productive time (control of working hours, the working week)

Should the worker contract away his or her right to control his or her time, even for only a portion of his or her productive hours, there is at least a persuasive indicator in favour of an employee contract. It may also be sufficient to satisfy the statutory conclusive “control” requirement in exclusionary subparagraph (ii) of the definition “remuneration”, and actual exercise of this right is not necessary. An employer’s exclusive entitlement to all of a worker’s productive hours is a near-conclusive indicator of an employer-employee relationship. Examples of control over productive time are:

- **Control of work periods**

Ordinarily, an independent contractor can choose the client or employer he or she services on a particular day or in a particular period of a day. Therefore, clauses controlling “work periods” (hours of work, working days, sick or annual leave) reflect the acquisition of control of the period that work is done.

- **Amount of time**

An independent contractor can choose the client or employer he or she services at a particular time of the day. Therefore, a clause indicating that the worker works part-time for a specific daily time slot would be at least persuasive in favour of an employee relationship. While control of “work hours” is normally associated with an employee relationship, this indicator is not decisive and may depend on the purpose of acquisition of control, namely:

- Control can be acquired for purposes of co-ordination of a mixed employee or independent contractor workforce, and its existence is incidental to the independent contractor’s contract.
- Control can be acquired for the purpose of ensuring that the productive capacity of the true employee is optimally used, and its existence is intrinsic to the employee’s contract. It may also indicate acquisition of exclusive use of productive capacity. Ordinarily, the greater the amount of time so controlled, the greater the impression of employee status should be.

8.3 Indicators resonant (creating an immediate or superficial impression of) of an employee relationship or an independent contractor relationship

This category of indicator (when *bona fide*) may give insight into how the parties viewed their relationship. The existence of a term containing this indicator or of an aspect of the employer or worker relationship embodying this indicator, would be regarded as relevant one way or the other, and must be considered in forming a dominant impression. However, it is likely that these indicators are either susceptible to deceptive contractual manipulation or relate tenuously to the essence of the distinction between the two contracts. Some examples are:

8.3.1 Tools, materials, stationery etc

An independent contractor characteristically possesses (that is, has invested in) his or her own tools or equipment, production or office materials, business stationery etc and provides other necessary raw materials. Therefore, provision by the employer of office equipment or tools, stationery etc tends to indicate a degree of dependence and lack of investment, hence the existence of an employer-employee relationship.

8.3.2 Office or workshop

An independent contractor characteristically operates from his or her premises (owned or leased), and is only temporarily and sporadically present at the client's premises. Where the client provides an office or workshop or the work continually and invariably occurs at the usual place of business of the employer, there is an indication of dependence, control, lack of investment, and hence, an employer-employee relationship. The usual place of business of the employer may be understood to comprise all those places where the employer enterprise conducts any business-related activity.

8.3.3 Integration or employer's usual work premises

There is a degree of dependence and symbiosis that is inconsistent with an independent contractor relationship, if the person (worker or business) is integrated into and operates in or from the employer's usual place of business, (particularly if the person cannot sustain his or her activities other than at the employer's usual work premises).

8.3.4 Integration or usual business operations

An independent contractor is in essence another employer running a separate business. Therefore, if the person (worker or business) is engaged in activities that are integral, accessory or ancillary to the employer's business operations, this may indicate an employer-employee relationship, particularly if economic survival of the person as an "entrepreneurial entity" is not possible outside of the employer's normal business operations, or if the person's function is ordinarily and continually critical to the employer's survival.

8.3.5 Integration or hierarchy and organogram

An independent contractor is characteristically independent, and therefore not integrated into any one client's organisation, nor reflected on any one client's organogram. It may be an indication of employee status and an indication of how the parties perceive the relationship if the person (worker or "business") has a job description (as opposed to a general professional capacity), and a position in the employer's hierarchy or organogram.

8.3.6 Duration of relationship

Generally, where the parties contemplate an open-ended or indefinite relationship (rather than one limited to a result) an employee relationship may be indicated. An employee contract is usually indefinite and can be terminated on notice, while an independent contractor contract is terminated on achievement of a result or production of the item.

8.3.7 Termination and breach of contract

The threat of termination is a form of control normally associated with an employee relationship. It may be an indication of an employer-employee relationship if the employer has the right to dismiss (Labour Relations Act aside) or the person (worker or “business”) has the right to resign (Basic Conditions of Employment Act aside), before completion of any task or before any result is achieved, without being in breach.

8.3.8 Significant investment

Where the conducting of an enterprise requires investment, it is normally the employer who makes this investment (an employer of an employee normally provides the employee with the premises, tools, raw materials, training, support services and other inputs), while the employee normally has no significant investment in any of these inputs. On the other hand, the typical independent contractor normally has made a significant investment in his, her or its business.

8.3.9 *Bona fide* business expenses, *bona fide* statutory compliance

Typically, an employee incurs no “business expenses” and is reimbursed or granted allowances for expenses on behalf of the employer, while an independent contractor incurs business expenses (for example, advertising, entertaining, bookkeeping, wages, travel) and builds these into the fee or contract price. Similarly, an employee might (or might have to) register with a trade or professional association, but would not have to register with the Department of Labour (as a labour broker or employer) or with SARS for value-added tax (VAT) (as an enterprise) or for PAYE (as an employer). An amount is subject to both VAT (if registered as a vendor) and PAYE if the amount paid to an independent contractor is deemed to be remuneration as envisaged by paragraph (ii) of the definition of “remuneration”, Note, however, that the amount of VAT must be excluded when determining the employees’ tax to be deducted. The following should be noted:

(a) Stereo-typical labels

Headings, labels or terminology may be intended to deceive. Not only should a sound legal and factual (business purpose) basis exist for their presence, but their presence should be consistent with the manner that the parties actually conduct their relationship. The mere presence of headings, labels, or terminology resonant of an independent contractor contract does not necessarily mean that there is an independent contractor relationship.

(b) Stereo-typical clauses and statutory compliance

Like labels, the insertion of typical clauses or the fact of statutory compliance or membership of a professional or trade regulatory authority may be intended to deceive. Not only should a sound legal and factual basis (business purpose) exist for the expenses claimed, but these indicators should also be consistent with the manner that the parties actually conduct their relationship. For example:

- An independent contractor characteristically makes provision for his or her own insurance and retirement. Therefore, the provision of typical employee benefits would tend to indicate an employer-employee relationship.
- Either the independent contractor or employer may insist on certain clauses (invoicing, labour law recourse, risk insurance, cancellation and damages), or on compliance with certain fiscal (VAT, PAYE) or labour statutes. The mere presence of clauses, or the fact of compliance, though resonant of an independent contractor contract, does not necessarily mean that there is an independent contractor relationship.

(c) Stereo-typical expenses

Like labels, the claiming as deductions of typical expenses may be intended to deceive. Not only should a sound legal and factual basis (business purpose) exist for the expenses claimed, but these expenses should have actually been incurred, and should be consistent with the manner that the parties conduct their relationship. Just as employee status does not automatically disqualify all expenses, so too does independent contractor status not mean that all expenses should not be scrutinised. The provisions of the Fourth Schedule should be applied in determining whether employees' tax should be deducted but do not apply in determining whether deductions claimed are allowable or not when an assessment is raised following the receipt of an income tax return.

The appropriate provisions of the Act [sections 11(a), (b), (d), (e)] are applicable independently of the employees' tax deeming provisions of the Fourth Schedule. A common law independent contractor who is deemed not to be independent as a result of exclusionary subparagraph (ii) of the definition of "remuneration" may therefore still claim expenses that would have been allowed had he or she not been deemed not to be independent (see also Circular Minute No. 40 of 1995).

8.3.10 Viability on termination

A person (worker or "business") who is not viable on termination of that person's current contractual relationship may be regarded as being an employee (a form of the "economic reality" test). This factor may be persuasive or even nearly conclusive in favour of non-independence for purposes of paragraph 2(5). In this regard:

- A person (worker or "business") may be said to be "viable on termination" when the person is economically independent of the client in that the person can survive the termination of the contractual relationship with that particular client without being obliged to approach an employment agent or labour broker (at least in the medium term). This indicator might be less significant in the case of a person with prior activity as an independent contractor, or a person regarded by prevailing norms and customs as an independent contractor.

- Where a person seeking to be classified as an independent contractor has a prior history in business circles as being an independent contractor, then indicators such as the lack of a multiple concurrent client base, or economic dependency on the current employer, would possibly be less significant.

8.3.11 Industry norms and custom

There may be a norm or custom in the industry that the person (worker or “business”) is an independent contractor, and it may be less likely that that person would contract in the form of an employee. Norms or customs might create a “trading climate” that either militates against or promotes economic viability.

9. Summary

The flow diagram in **Annexure B** should be followed when a determination is to be made under either exclusionary subparagraph (ii) of the definition of “remuneration” in the Fourth Schedule or paragraph 2(5) of the Fourth Schedule.

Legal Counsel

SOUTH AFRICAN REVENUE SERVICE

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Annexure A – The law

Paragraph 1 of the Fourth Schedule

“**employee**” means—

- (a) any person (other than a company) who receives any remuneration or to whom any remuneration accrues;
- (b) any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker;
- (c) any labour broker;
- (d) any person or class or category of person whom the Minister of Finance by notice in the *Gazette* declares to be an employee for the purposes of this definition;
- (e) any personal service provider; or
- (f)
- (g) any director of a private company who is not otherwise included in terms of paragraph (a);

...

“**employer**” means any person (excluding any person not acting as a principal, but including any person acting in a fiduciary capacity or in his capacity as a trustee in an insolvent estate, an executor or an administrator of a benefit fund, pension fund, pension preservation fund, provident fund, provident preservation fund, retirement annuity fund or any other fund) who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds (including the funds of any provincial council or any administration or undertaking of the State) or out of funds voted by Parliament or a provincial council;

...

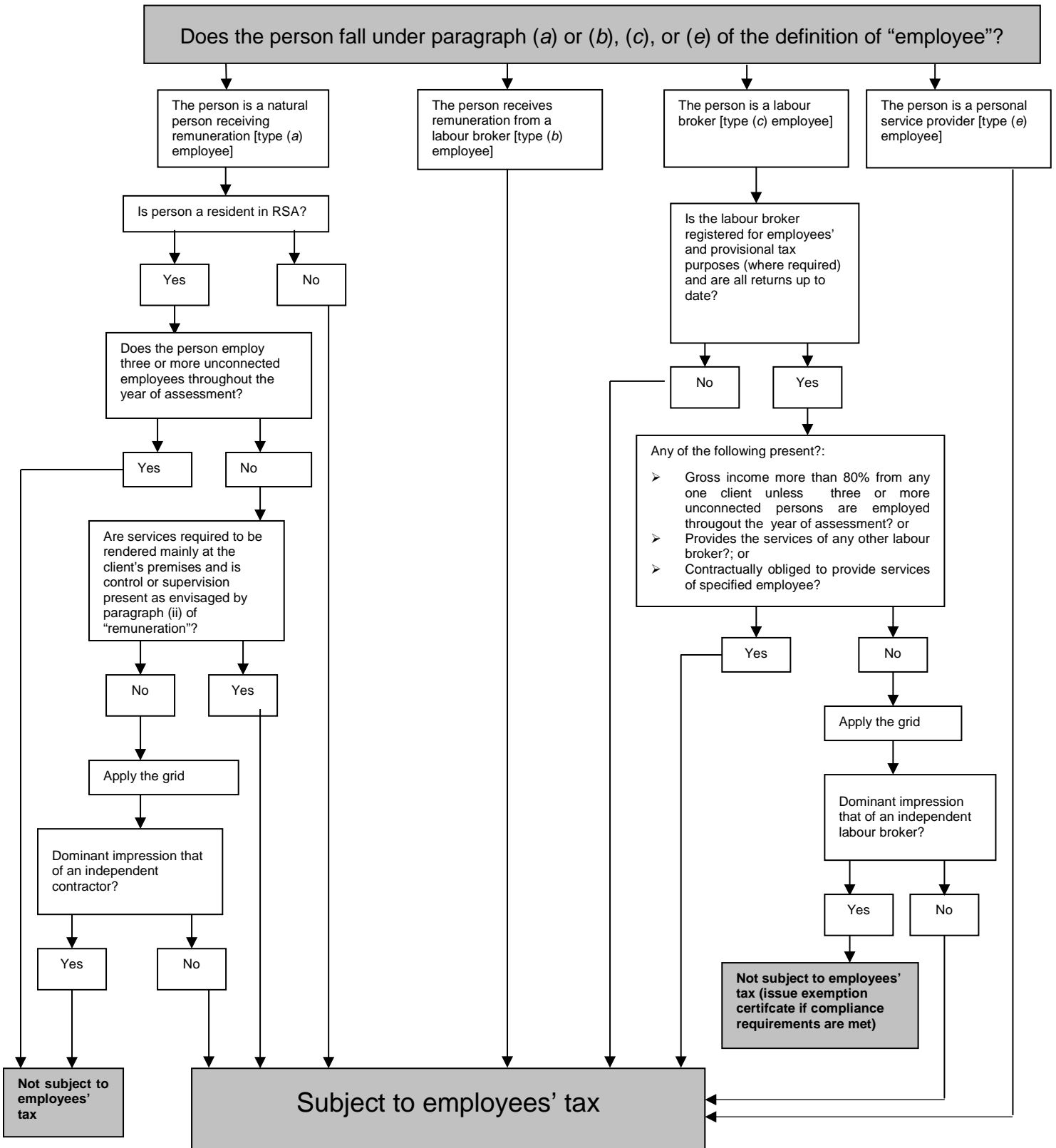
“**remuneration**” means any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered, including—

(a) – (g)...

but not including—

- (i)
- (ii) any amount paid or payable in respect of services rendered or to be rendered by any person (other than a person who is not a resident or an employee contemplated in paragraph (b), (c), (d) or (e) of the definition of “employee”) in the course of any trade carried on by him independently of the person by whom such amount is paid or payable and of the person to whom such services have been or are to be rendered: Provided that for the purposes of this paragraph a person shall not be deemed to carry on a trade independently as aforesaid if the services are required to be performed mainly at the premises of the person by whom such amount is paid or payable or of the person to whom such services were or are to be rendered and the person who rendered or will render the services is subject to the control or supervision of any other person as to the manner in which his or her duties are performed or to be performed or as to his hours of work: Provided further that a person will be deemed to be carrying on a trade independently as aforesaid if he throughout the year of assessment employs three or more employees who are on a full time basis engaged in the business of such person of rendering any such service, other than any employee who is a connected person in relation to such person;

Annexure B – Flow diagram



Annexure C – Common law dominant impression test grid

	INDICATOR	SUGGESTS EMPLOYEE STATUS	SUGGESTS INDEPENDENT CONTRACTOR STATUS
NEAR-CONCLUSIVE Control Manner/Exclusive Acquisition.	Control of manner of working	Employer instructs (has right to) which tools/equipment, or staff, or raw materials, or routines, patents, technology	Person chooses which tools/equipment, or staff, or raw materials, or routines, patents, technology
	Payment regime	Payment by a rate x time-period, but regardless of output or results	Payment by a rate x time-period but with reference to results , or payment by output or "results in a time period"
	Person who must render the service	Person obliged to render service personally, hires & fires only with approval	Person, as employer, can delegate to, hire & fire own employees, or can subcontract
	Nature of obligation to work	Person obliged to be present, even if there is no work to be done	Person only present and performing work if actually required, and chooses to
	Employer (client) base	Person bound to an exclusive relationship with one employer (particularly for independent business test)	Person free to build a multiple concurrent client base (especially if tries to build client base – advertises etc)
	Risk/Profit & loss	Employer bears risk (pays despite poor performance/slow markets) (particularly for independent business test)	Person bears risk (bad workmanship, price hikes, time over-runs)
PERSUASIVE Extent of Control	Instructions/Supervision	Employer instructs on location, what work, sequence of work etc or has the right to do so	Person determines own work, sequence of work etc. Bound by contract terms, not orders as to what work, where etc
	Reports	Control through oral/written reports	Person not obliged to make reports
	Training	Employer controls by training the person in the employer's methods	Worker uses/trains in own methods
	Productive time (work hours, work week)	Controlled or set by employer/person works full time or substantially so	At person's discretion
RELEVANT Labels, clauses, compliance, economic circumstances, "resonant" of	Tools, materials, stationery etc	Provided by employer, no contractual requirement that person provides	Contractually/necessarily provided by person
	Office/ workshop, admin/ secretarial etc	Provided by employer, no contractual requirement that person provides	Contractually/necessarily provided by person
	Integration/Usual premises	Employer's usual business premises	Person's own/leased premises
	Integration/Usual business operations	Person's service critical/integral part of employer's operations	Person's services are incidental to the employer's operations or success
	Integration/Hierarchy & organogram	Person has a job designation, a position in the employer's hierarchy	Person designated by profession or trade, no position in the hierarchy
	Duration of relationship	Open ended/fixed term & renewable, ends on death of worker	Limited with regard to result, binds business despite worker's death
	Threat of termination/ Breach of contract	Employer may dismiss on notice (LRA equity aside), worker may resign at will (BCEA aside)	Employer in breach if it terminates prematurely. Person in breach if fails to deliver product/service
	Significant investment	Employer finances premises, tools, raw materials, training etc	Person finances premises, tools, raw materials, training etc
	Employee benefits	Especially if designed to reward loyalty	Person not eligible for benefits
	<i>Bona fide</i> expenses or statutory compliance	No business expenses, travel expenses and/or reimbursed by employer. Registered with trade/professional association	Over-heads built into contract prices. Registered under tax/labour statutes & with trade/professional association
	Viability on termination	Obligated to approach an employment agency or labour broker to obtain new work (particularly for independent business test).	Has other clients, continues trading. Was a labour broker or independent contractor before this contract
	Industry norms, customs	Militate against independent viability Make it likely person is an employee	Will promote independent viability Make it likely person is an independent contractor or labour broker

Annexure D – The concept of “independent contractor” at common law

An independent contractor, as envisaged in this Note, is a colloquial term for a small-time sub-contractor. An independent contractor is merely another word for “entrepreneur”, or perhaps, “employer” (or potential employer). The word “independent” in the concept “independent contractor” refers to independence from the employer’s organisation, as well as from the employer’s control. An independent contractor must be distinguished from its counterpart, the employee. Legally, the two terms (independent contractor and employee) are mutually exclusive and are direct opposites. Many pieces of legislation (the Income Tax Act, the Compensation for Occupational Injuries and Diseases Act, the Unemployment Insurance Act), and many discrete bodies of common law (delict, vicarious liability, employment law), are based on this notion of mutual exclusivity. However, this notion of mutual exclusivity is itself no longer easily reconcilable with social and economic reality due to technological advances and global integration. This Annexure attempts to assist in determining where to draw the line in each particular case.

The Fourth Schedule statutory concept of an “independent trader” is similar to the common law concept of an “independent contractor”. The main difference between the two terms is that the definition of “remuneration”, through exclusionary sub-paragraphs (ii)(aa), mentions two of many possible indicators as a strict test to deem common law independent traders not to be independent for tax purposes.

South African law traditionally refers to the independent contractor contract as a contract of *locatio conductio operis*. Roman labour law used the term *locatio conductio* to include three types of transactions, namely –

- (i) *locatio conductio rei*, which is the letting and hiring of **things** (hire-purchase or lease contract);
- (ii) *locatio conductio operarum*, which is the letting and hiring of **services** (the master/servant or employer-employee contract); or
- (iii) *locatio conductio operis*, which is the letting and hiring of **work** (independent contractor contract).

It is the concept of *locatio conductio operis*, and the distinction from *locatio conductio operarum* that need to be studied. The differences between the two concepts, as derived from South African common law, will supply the guiding principles needed to determine whether a person is in receipt of “remuneration” as defined in the Fourth Schedule.

Before turning to the *locatio conductio operis* (the contract **for** work or services, that is, the independent contractor), it is necessary to analyse the term *locatio conductio operarum* (the contract *of* service, that is, the employer/employee) more specifically.

- (i) The contract **of** service is a bilateral, consensual contract between two parties agreeing typically to at least two things, namely, the services to be rendered and the remuneration to be paid. The focus is on effort and personal service (*operae suae*, roughly meaning “personal service”) to be rendered and not on a specific result (*opus*, roughly meaning “a work” or “a product”) to be achieved. The employer (in this case the *conductor*, that roughly means “the controller” or the one who brings together) could avail him or herself of the *actio conducti* to enforce due performance of the services promised, while the employee (in this case the *locator*, that roughly means “the person placing or locating his or her **productive capacity** in the market” or “for making his or her services available”) can rely on the *actio locati* to enforce payment of the promised remuneration. The question of risk and liability plays an important distinguishing role and was, in Roman law, settled in a finely balanced

manner. As far as risk is concerned, the question is whether counter-performance (in this case payment of the remuneration) still has to be made even though rendering of the performance has become impossible. An employee does not, as a rule, lose his or her claim to remuneration, except if it is due to the employee's fault. It follows that a person who is party to a contract of service will, generally, continue to be entitled to claim remuneration from his or her employer even when he or she cannot, by no fault of his or her own, render the service to the employer. This aspect can, naturally, be changed by way of a provision in the contract (for example, limiting sick leave) or by retrenchment.

- (ii) The term *locatio conductio operis* (contract for work or services, that is, the independent contractor), on the other hand, under Roman law, constituted a contract in terms of which it was not the services as such that were the object of the contract, but the result as a whole. One person undertakes to perform or execute a particular piece of work, and he or she promises to produce a certain specific result. This person is called the *conductor operis* (meaning contractor of works, roughly meaning the "controller of works" or the "controller of results"). The person commissioning the work (the customer or client) is the *locator* (meaning "the person placing or locating a **job** on the market") who places out the work to be done. The decisive feature of contracts for work or services under Roman law was that the customer was not interested in the personal services or the labour (productive capacity) as such, but in the product or result of labour. The *conductor* was responsible for producing the result that he or she had contracted to produce, whether he or she made use of other persons (his or her own employees) to do the work, and whether he or she did so personally. In other words, the *conductor* is responsible for the success of the work. He or she has to face the problem of liability for defects under the contract of work. He or she, generally, would not be under the control and supervision of the *locator* (the customer or client).

Annexure E – The current common law position in South Africa

The historical development of employee/independent contractor tests

Over time, the courts have developed a variety of tests to assist in determining the object of an employment contract, but all of them may be divided into two main categories:

1. The “control” test

As a single indicator test, control used to be conclusive. Employment used to be based more transparently on obvious class distinctions and hierarchies, and was described as a master/servant relationship. Control was crude, and therefore an obvious, conclusive criterion, focusing on the power to dismiss, to supervise or control the manner of working, or to control the productive capacity itself.

The doctrine of “vicarious liability” (from the common law of delict or negligence), based on the premise that the employer is liable for his or her worker’s negligence because he or she should have exercised his or her contractual right of control so as to prevent the negligent act, led to conflation of the control requirement with an employee status requirement, and consequently to the over-emphasis of control in other branches of the law that the employee or independent contractor distinction was relevant.

The notion of control remains important, although it has undergone substantial refinement over the years.

2. The “intuitive” tests

Improvements in production technology together with mass secondary education and tertiary education, made control in certain job categories more indirect and diffuse. The courts were obliged to develop more sophisticated tests. This was accompanied by the gradual realisation that the essence of the distinction was not control but whether the employer had acquired the worker’s productive capacity or the result of the worker’s productive capacity. The following intuitive tests have been alternatively invented and discarded by the courts:

- The “it’s what you think it is” test, based on the question “what would the man in the street, or a co-worker, characterise this worker as?”
- The “economic reality” test, based on the question “is the person performing the services in business on his or her own account?” Another form of this test is based on the question “is the person performing the services economically dependent on or independent of the business for the services that are being performed?” A substantial body of jurisprudence holds that the “economic reality” test is particularly appropriate for tax and social security legislation, where it is applied to promote a characterisation that advances the purposes of the law.
- The “organisation” test, a multi-factor test with no conclusive indicator, based on the question “is the person part of the commercial or industrial organisation?” Similar to this is the “integration” test, or a multi-factor test with no conclusive indicator, based on the question “is the person integral to or accessory to the organisation?”

- The “dominant impression” test, a multi-factor test with no conclusive indicator amounts to saying, “take cognisance of all the facts before you decide, and arrive at a dominant impression to which effect must be given. Further improvements in production technology together with wide-spread tertiary education, and the decline of smokestack industries together with the rise of service industries, led, in certain job categories, to control becoming even more indirect and diffuse, and less distinct. At the same time, employer aversion to vicarious liability suits, unionisation, employment related social legislation and tax legislation, together with worker’s wishes for increased income, led employers and workers to collaborate to avoid the employer-employee relationship, and sometimes, to collaboration in simply obfuscating the features of the employer-employee relationship. The dominant impression test includes features of all previous tests and is presently the test sanctioned by the Supreme Court of Appeal.

The dominant impression test first emerged in South Africa, in a judgement by Joubert JA in the case of *Smit v Workmen’s Compensation Commissioner*.⁷ The Appellate Division rejected the crude “control” test, stating that the employer’s right of supervision and control is merely one out of several indicators (albeit an important one) in favour of a contract of service (an employee contract).⁸

In *Liberty Life Association of Africa Ltd v Niselow*,⁹ Nugent J (sitting as a judge of the Labour Appeal Court) stated that an employee performs by making his or her productive capacity available to the employer, irrespective of whether there is work to be done, while the independent contractor commits him or herself only to deliver a product or end-result of his or her productive capacity. He stressed that central to the inquiry was whether the relationship was one in which the worker placed his or her productive capacity at the disposal of the employer. The inquiry should be directed towards the worker’s obligations rather than his or her rights, and the extent to which the other party (employer) acquired rights relating to the use to be made of his or her productive capacity. A decision must be made taking into account all the relevant facts (indicators), so as to form a dominant impression in favour of one or other contract. No single indicator is necessarily decisive, although facts that indicate the acquisition of the worker’s productive capacity might carry more weight. Nugent J’s views were subsequently approved by the Supreme Court of Appeal, and have been followed by the “new” Labour Court as well.¹⁰

⁷ 1979 (1) SA 51 (A).

⁸ See *Brassey, M: The Nature of Employment*, 1990 (11) ILJ 889.

⁹ [1996] 17 ILJ 673 (LAC).

¹⁰ Compare *Niselow v Liberty Life Association of SA Ltd v Niselow*, 1998 (4) SA 163 (SCA).

More recently, in *SABC v McKenzie*¹¹ the court extracted from earlier case law more important characteristics of an employment contract that distinguish it from a contract for work. They are:

Employee	Independent Contractor
The object of the contract of service is the rendering of personal services by the employee to the employer. The services are the object of the contract.	The object of the contract of work is the performance of a certain specified work or the production of a certain specified result.
According to a contract of service the employee will typically be at the beck and call of the employer to render his or her personal services at the behest of the employer.	The independent contractor is not obliged to perform the work him or herself or to produce the result him or herself, unless otherwise agreed upon. He or she may avail him or herself of the labour of others as assistants or employees to perform the work or to assist him or her in the performance of the work.
Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his or her own discretion (subject, of course, to questions of repudiation) decide whether he or she wants to have them rendered.	The independent contractor is bound to perform a certain specified work or produce a certain specified result within a time fixed by the contract of work or within a reasonable time where no time has been specified.
The employee is subordinate to the will of the employer. He or she is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him or her by prescribing to him or her what work he or she has to do as well as the manner that it has to be done.	The independent contractor is notionally on a footing of equality with the employer. He or she is bound to produce in terms of his or her contract of work, not by the orders of the employer. He or she is not under the supervision or control of the employer. Nor is he or she under any obligation to obey any orders of the employer in regard to the manner that the work is to be performed. The independent contractor is his or her own master.
A contract of service is terminated by the death of the employee	The death of the parties to a contract of work does not necessarily terminate it.
A contract of service terminates on expiration of the period of service entered into	A contract of work terminates on completion of the specified work or on production of the specified result.

¹¹ [1999] 1 BLLR 1 (LAC).

The current South African position remains that the “dominant impression” test must be applied. However, in distinguishing between an **employee** and an **independent contractor**, one must commence with an analysis of the written employment contract. The object of the contract (acquisition of productive capacity or result) must be established. The object of the contract is not a mere indicator, but determines the legal nature of the contract, because it determines the respective parties’ rights and obligations under the contract. The parties’ rights and obligations under the contract in turn determine the nature of the contract. The object that must be established is the pre-eminent object.

If the object is the placing of one person’s labour power or productive capacity (whether capacity to provide a service or to produce things) at the disposal of another, enabling the acquisition of that productive capacity itself and not simply the results of that productive capacity, then the contract is one for employment of an employee (*locatio conductio operarum*, a contract of service). The essence of an employee contract is the acquisition of productive capacity by the employer, and the concomitant surrender of productive capacity by the employee.

If the object is the acquisition of the **result** of deployed productive capacity (of a produced thing or of a provided service), then the contract is for the employment of an independent contractor. The essence of an “independent contractor” contract (*locatio conductio operis*, contract for services or work) is that the independent contractor only commits him or herself to deliver the product or end-result of that capacity.

The object of the contract must be determined by an analysis of the terms of the contract.

To the extent that the written contract is in any way insufficient for this purpose (if there is no written contract, or if the written contract (the form) is a sham), the object of the overall (oral) contractual relationship may be determined from an analysis of the parties’ own perception of their relationship (loosely, the oral contract), and the manner the contract is carried out in practice (the substance of the relationship). Even if a written contract does exist, one should always interview the other parties to the contract, and related third parties. The more widely the auditor investigates in this fashion, the more effectively the auditor contests the evidential terrain (and discovers whether the written contract is a sham) and prevents the taxpayer from one-sidedly determining a false but favourable factual matrix according to his or her case is then assessed.

While words such as “employment” and “employer” are ambiguous and can describe either an employer or employee relationship or an employer or independent contractor relationship, the word “employee” is unambiguous and cannot be used to describe an independent contractor. However, in determining the true relationship, labels (whether at the head of or in the body of the contract, whether written or oral) are not decisive, but if the labels used are not set out to deceive, they are an important indicator of what the intended object was. By parity of reasoning, mere invoicing, registration with a professional or trade association, and statutory compliance (for example, VAT registration, any LRA, UIA (UIF) or COIDA (WCA) registration), should not be decisive (unless *bona fide*).

The current South African position is similar to that of the USA, Australia, and the UK. For example, while English law used to place heavy emphasis on the supervision and control test, it now holds that:

“There is no one test which is conclusive for determining whether services are performed by an employee under a contract of service or by a person carrying on business on his own account: There are a number of badges of one or other of the relationships and those badges, depending on the context, may carry greater or lesser weight, an overall view must be formed.”¹²

Other relevant and interesting cases are –

- *Medical Association of SA & others v Minister of Health & another* [1997] 5 BLLR 562 (LC);
- *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & another* [2001] 3 BLLR 329 (LC); and
- *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 993 (LAC).

¹² Quoted from *Barnett v Brabyn* (HM Insp. of Taxes) (1996) STC 716, 69 TC 133 at 134.