

**INTERPRETATION NOTE: NO. 17 (ISSUE 3)**

DATE: 31 MARCH 2010

**ACT : INCOME TAX ACT, NO. 58 OF 1962 (the Act)**  
**SECTION : THE FOURTH SCHEDULE**  
**SUBJECT : EMPLOYEES’ TAX: INDEPENDENT CONTRACTORS**

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### **Preamble**

Legislative references in this Note to sections are to sections of the Act and references to paragraphs are to paragraphs of the Fourth Schedule to the Act, unless the context indicates otherwise.

### **1. Purpose**

This Interpretation Note explains the statutory tests and the common law tests to assist officials of the South African Revenue Service (SARS) and employers to classify a worker efficiently and effectively. This Note has been updated to incorporate the latest amendments made, under section 54(1)(e)(g) of the Taxation Laws Amendment Act, No. 8 of 2007, effective from 1 March 2007, to the exclusionary subparagraph (ii) of the definition of the term “remuneration” as defined in paragraph 1 of the Fourth Schedule to the Act.

### **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 largely dependent on whether or not “remuneration” as defined in paragraph 1 the Fourth Schedule 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 liability 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 statutory tests. The statutory tests are conclusive in nature which, if they apply, means that a person is deemed not to be an independent contractor for purposes of determining employees’ tax. **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 or not a person is an independent contractor. An “overall” or “dominant impression” of the employment relationship must be formed.

Legally, the common law tests should be performed first in determining whether a person is an employee or an independent contractor. In practice, the statutory tests are considered first. If the statutory tests are not applicable in a particular situation, the common law tests are applied to finally determine whether the person is an independent contractor or an employee.

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. It is not intended to be a definitive and binding statement of SARS’ views and should not be relied upon to sustain a technical legal position. It must be accepted that this Note will be revised constantly in the light of public debate, court judgements and legislative reform.

The common law history (**Annexure C**) will provide 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 A**) and the dominant impression grid (**Annexure B**) will 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*.

There are two instances in the Fourth Schedule where it has to be determined whether an independent trade is being carried on, namely –

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

#### 3.1 Exclusionary subparagraph (ii) of the definition of the term “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 the term “remuneration” in the Fourth Schedule if that person is an independent contractor. 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 *Gazette* that they are employees [paragraph (d)]; and
4. Any personal service provider [paragraph (e)].

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.

Common law tests, as further developed by the South African Courts, are used to determine whether a person is an employee or an independent contractor. 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. If any one of these conclusive tests applies, the exclusion from “remuneration” does not apply.

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

### 3.2 Labour Brokers (Paragraph 2(5) of the Fourth Schedule)

“**labour broker**” means any natural person who conducts or carries on any business whereby such person for reward provides a client of such business with other persons to render a service or perform work for such client, or procures such other persons for the client, for which services or work such other persons are remunerated by such person;

Remuneration paid to any labour broker who is not in possession of an exemption certificate (IRP 30), 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 or not 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) of the Fourth Schedule are further discussed in Interpretation Note No. 35 (Issue 3) “Employees’ Tax: Personal Service Providers and Labour Brokers”, available on the SARS website [www.sars.gov.za](http://www.sars.gov.za).

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

As stated in **3**, there are two instances in the Fourth Schedule where it has to be determined whether a person is an employee as opposed to an independent contractor or *vice versa*.

Where the provisions of exclusionary subparagraph (ii) of the definition of the term “remuneration” are applicable, it is the responsibility of the employer to determine whether or not the 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 the term “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 Form IRP 30A, which is only intended for use in labour broker determinations). This is no longer done. **Annexure E** of this Note contains a letter that must be issued to these applicants.

An employer who 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 the term “remuneration” provides two statutory tests to conclusively deem a person not to be an independent contractor for employees’ tax purposes.

The tests provide for a deeming provision that a person shall *not* carry on a trade independently if the services or duties are required to be performed mainly at the premises of the client and –

- the worker is subject to the **control** of any other person as to the manner in which 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 9.1.1 would be relevant**); *or*
- the worker is subject to the **supervision** of any other person as to the manner in which 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 9.2.1 would be relevant**).

Where any of these tests apply positively, the independent contractor is deemed not to be an independent contractor and the amount so received by him or her is, therefore, not excluded from remuneration.

It is not necessary for both tests to be applicable in a particular situation. The application of only one of them would trigger the deeming provision.

Where any of these tests apply positively it is not necessary to consult the common law dominant impression test for purposes of determining whether an amount is excluded from or included in “remuneration”.

Notwithstanding the above, an independent contractor 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, will be deemed to be carrying on a trade independently. “A connected person” in relation to a natural person means any relative and any trust of which the natural person or the relative is a beneficiary. “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, and for the purpose of determining the relationship between any child referred to in the definition of a “child” in section 1 of the Act and any other person, the child shall be deemed to be related to its adoptive parent within the first degree of consanguinity.

## 6. How to apply the statutory tests

In determining whether the statutory test applies, the following steps should be taken:

- a) Determine **whether the independent contractor, in terms of the common law tests, employs throughout the tax year of assessment three or more employees who are on a full-time basis engaged in the business of the independent contractor of rendering services and who are not connected persons in relation to the independent contractor.** If this is not the case, proceed to the next test. If this is the case, the statutory test does not apply.
- b) **Determine whether or not the services are required to be performed mainly at the premises of the client.** If the services are required to be performed mainly at the premises of the client, proceed to the next test. If this is not the case, the statutory test does not apply.
- c) **Determine whether one of the following is true:**
  - **The person who rendered or will render the services is subject to the control of the client as to the manner in which his or her duties are performed or to be performed or as to his or her hours of work.**
  - **The person who rendered or will render the services is subject to the supervision of the client as to the manner in which his or her duties are performed or to be performed or as to his or her hours of work.**

If any of the above two tests apply (that is, control or supervision), the independent contractor is deemed not to be independent for purposes of the Fourth Schedule and is therefore, subject to employees' tax. An independent contractor who is deemed not to be an independent contractor for purposes of the Fourth Schedule is not, however, also deemed to be an employee. The independent status under common law of an independent contractor that is deemed not to be independent remains unaffected. This means that the independent contractor will not be affected by section 23(m). The remuneration of this independent contractor will be coded 3616 on the IRP 5 certificate and the limitation of deductions under section 23(m) will not apply.

### **Example 1 – Applying the statutory tests**

*Facts:*

A is an independent contractor, in terms of the common law test, who provides his or her services mainly at the clients' premises and is subject to control or supervision. A does not employ three or more qualifying employees.

*Result:*

A will be deemed not to be an independent contractor for the purposes of the Fourth Schedule (the statutory test applies). Accordingly employees' tax will be deducted from the amounts paid or payable to him or her by his or her clients. However, because A is independent in terms of the common law test, the remuneration will be coded 3616 on the IRP 5 certificate and the limitation of deductions under section 23(m) will not apply. **Please note that if A was not regarded to be independent in terms of the common law test, the remuneration would be coded 3601 on the IRP 5 certificate and the provisions of section 23(m) would apply.**

## 7. 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, which 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.

## 8. How to apply the common law dominant impression test

The “common law dominant impression grid” (the Grid), in **Annexure B**, 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 or not 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 employee/employer relationship or an independent contractor/client relationship, whichever is relevant.

This classification and weighting is intended to assist assessors and auditors in making the determination. The weightings are based on SARS’ 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 for the particular context (kind of industry, kind of business, kind of customer, kind of worker), and how the business actually operates. The assessor 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

assessor/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 assessor's/auditor's conclusion must be supported by the information gathered. It is not sufficient to record a mere "gut feeling".

## **9. The common law dominant impression indicators (the indicators)**

### **9.1 Near-conclusive indicators of the acquisition of productive capacity (i.e. 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:

#### **9.1.1 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 in which work is done either by detailed instructions, by training, by requesting that prior approval be sought by, or by instituting disciplinary steps in the event of unacceptable performance by the worker etc. In this regard:

- Control of manner means control as to which tools or equipment to use, which other workers to involve or employ, which raw materials to use and where to obtain them, which routines, patents or technologies to use etc. All of these are elements of commanding and directing an operation to render a particular business result.
- Where the employer has the contractual power to control the manner of use of a worker's productive capacity, it is likely that the employer intended to acquire (and the worker acquiesced to the surrender of) 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, which 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 the term “remuneration”. An actual exercise of this right is not necessary.

### **9.1.2 Payment regime**

A worker can be paid with reference to a result (in which 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. If dissatisfied, the employer can only 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) which 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). If the employer is, for example, entitled to a worker’s services for all normal business or working hours, the employer has effectively acquired exclusive use of the productive capacity of the worker, which is indicative of an employee status.

### **9.1.3 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.

### **9.1.4 Nature of obligation to work**

A contract where the obligation to work is delineated by time and not result, 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.

### 9.1.5 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 D**). 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.

### 9.1.6 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, which 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 C**). 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.
- Where a person (worker or business) is not directly exposed to performance or market risks, this 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 which 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 the employer on behalf of the employer.

## **9.2 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 to which and purpose for which control is 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:

### **9.2.1 Instructions/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 etc. "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 which 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", which means that employees' tax must be withheld from the payment.

### **9.2.2 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 in which work is done, is sufficient to satisfy the "control" requirement in exclusionary subparagraph (ii) of the definition of the term "remuneration".

### **9.2.3 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) where 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 etc.
- Training relates to the quality of control (for example, control of manner) where its purpose is to promote an exclusive production technique or form of service provision (for example, client etiquette), in which 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.

### **9.2.4 Productive time (control of working hours, the working week)**

Where the worker has contracted 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 which client/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 in which work is done.

- **Amount of time**

An independent contractor can choose which client/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/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.

### **9.3 Indicators resonant of (i.e. creating an immediate or superficial impression 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/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:

#### **9.3.1 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.

#### **9.3.2 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/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.

### **9.3.3 Integration/employer's usual work premises**

Where 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) there is a degree of dependence and symbiosis that is inconsistent with an independent contractor relationship.

### **9.3.4 Integration/usual business operations**

An independent contractor is in essence another employer running a separate business. Therefore, where the person (worker or business) is engaged in activities which 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.

### **9.3.5 Integration/hierarchy & 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. Where 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, this may be an indication of employee status and an indication of how the parties perceive the relationship.

### **9.3.6 Duration of relationship**

Generally, where the parties contemplate an open ended or indefinite relationship (rather than one limited with regard 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.

### **9.3.7 Termination and breach of contract**

The threat of termination is a form of control normally associated with an employee relationship. Where the employer has the right to dismiss (Labour Relations Act aside) and/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, this may be an indication of an employer-employee relationship.

### **9.3.8 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.

### **9.3.9 *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 (advertising, entertaining, bookkeeping, wages, travel etc) 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). Where an amount paid to an independent contractor is deemed to be remuneration as envisaged by paragraph (ii) of the definition of the term “remuneration” in the Fourth Schedule, the amount is subject to both VAT (if registered as a vendor) and PAYE. 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 in which 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 in which 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 etc), or on compliance with certain fiscal (VAT, PAYE etc) 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 in which 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) etc) 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 paragraphs (ii) of the definition of the term “remuneration” may therefore still claim expenses that would have been allowed had he/she/it not been deemed not to be independent (see also Circular Minute No. 40 of 1995).

### 9.3.10 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) of the Fourth Schedule. 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.

### 9.3.11 Industry norms and custom

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

## 10. Summary

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

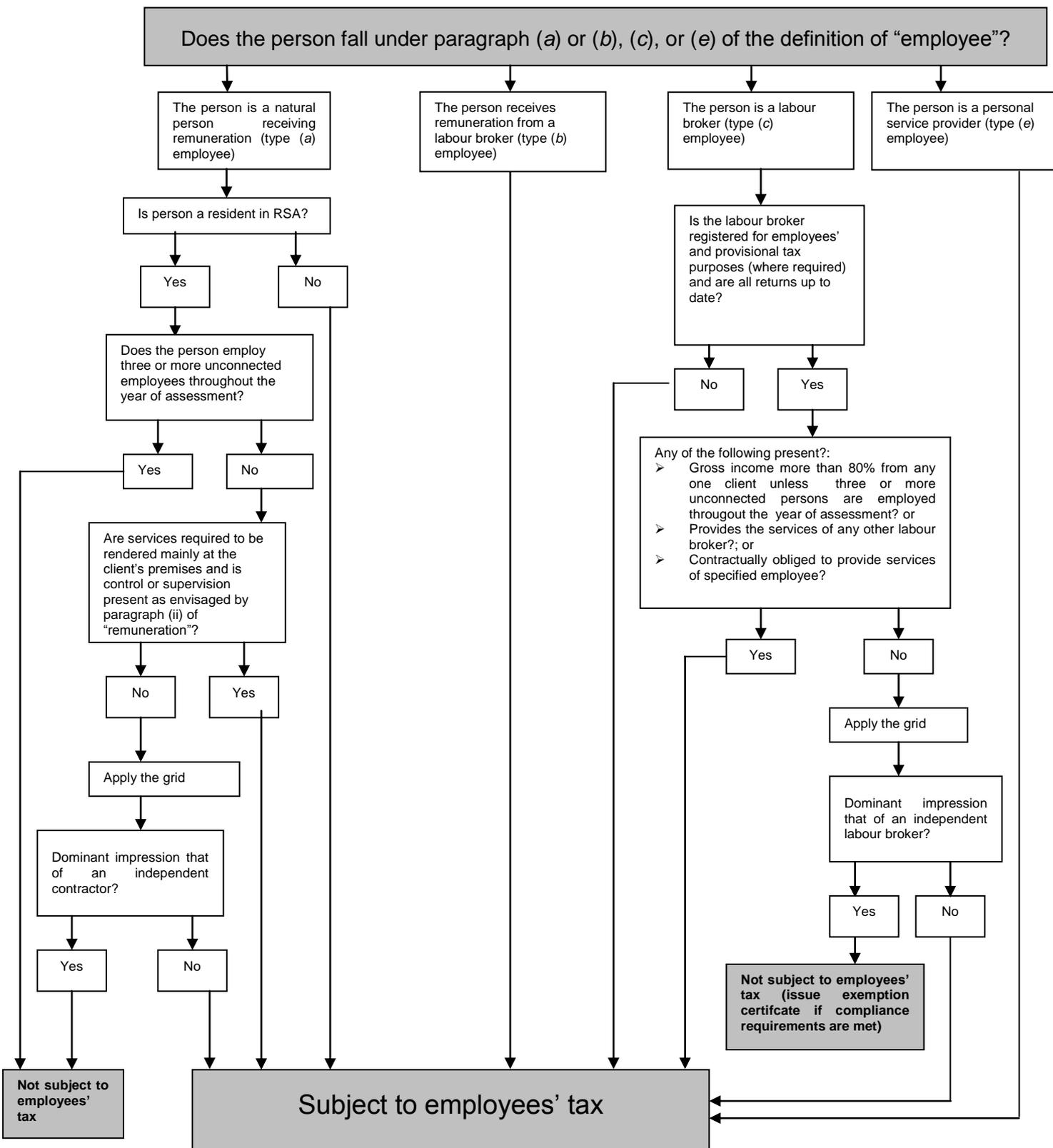
### Legal and Policy

#### **SOUTH AFRICAN REVENUE SERVICE**

Date of first issue : 28 March 2003

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**Annexure A – Flow diagram**



## Annexure B – 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, <b>but regardless of output or results</b>	Payment by a rate x time-period but <b>with reference to results</b> , 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 (esp. 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 C – 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 in respect of the employer’s organisation, as well as in respect of 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 assessors to determine 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 the term “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 or not 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*, which 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*, which 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 which 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, which roughly means 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 that result which he or she had contracted to produce, whether or not he or she made use of other persons (his or her own employees) to do the work, and whether or not 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 D – 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 in which the employee/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 which the services 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 which 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, which includes features of all previous tests, 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*.<sup>1</sup> 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).<sup>2</sup>

In *Liberty Life Association of Africa Ltd v. Niselow*,<sup>3</sup> 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 or not 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 which 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.<sup>4</sup>

More recently, in *SABC v McKenzie*<sup>5</sup> the court extracted from earlier case law more important characteristics of an employment contract that distinguish it from a contract for work. They are:

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<sup>1</sup> 1979 (1) SA 51 (A)

<sup>2</sup> See *Brassey, M: The Nature of Employment*, 1990 (11) ILJ 889

<sup>3</sup> [1996] 17 ILJ 673 (LAC)

<sup>4</sup> Compare *Niselow v Liberty Life Association of SA Ltd v Niselow*, 1998 (4) SA 163 (SCA)

<sup>5</sup> [1999] 1 BLLR 1 (LAC)

<b>Employee</b>	<b>Independent Contractor</b>
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 or not 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 in which 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 in which 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.

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 which one must establish 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 in which 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 assessor investigates in this fashion, the more effectively the assessor contests the evidential terrain (and discovers whether or not the written contract is a sham) and prevents the taxpayer from one-sidedly determining a false but favourable factual matrix according to which his or her case is then assessed.

While words such as "employment" and "employer" are ambiguous and can describe either an employer/employee relationship or an employer/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.”<sup>6</sup>

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<sup>6</sup> Quoted from *Barnett v Brabyn* (HM Insp. of Taxes) (1996) STC 716, 69 TC 133 at 134

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)
- *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 993 (LAC)

**Annexure E – Letter to paragraph (a) applicants**

“Dear

**EMPLOYEES’ TAX: APPLICATION TO BE RECOGNISED AS AN INDEPENDENT CONTRACTOR**

I refer to your application to be classified as an independent contractor in terms of exclusionary subparagraph (ii) of the definition of the term “remuneration” in the Fourth Schedule to the Income Tax Act, 1962.

The amounts paid or payable to you will only be exempt from the deduction of employees’ tax by virtue of the exclusionary paragraph (ii) of the definition of the term “remuneration” in the Fourth Schedule if –

1. You are an independent contractor under common law;
2. You are **not** required to perform services and duties mainly at the client’s premises, and
3. You are not subject to the control or supervision of any other person as to the manner in which your duties are performed or to be performed or to your hours of work.

The responsibility to deduct employees’ tax from remuneration paid or payable to an employee lies with the person paying the remuneration. It is, therefore, the employer/client who is responsible for determining whether or not the amounts paid or payable to you are subject to the deduction of employees’ tax.

The substance of the contractual relationship between you and your employer or client is crucial in the determination of your status as either an independent contractor or an employee. Your employer or client, being a party to the contract, is in the best position to determine whether or not you are an independent contractor and whether or not you are subject to control or supervision. It is for this reason that the responsibility to determine your status is on your employer or client.

You are, therefore, requested to approach your employer or client for a decision in this regard. Note, however, that your employer or client will be held liable for the employees’ tax should an investigation reveal that he/she/it made an incorrect decision. The employer will then have the right to recover the employees’ tax from you.

Sincerely”