

AN INVESTIGATION INTO THE TAX IMPLICATIONS
OF INDEPENDENT CONTRACTORS

By

RANESH MAHARAJH

Submitted in partial fulfillment of the requirements for the
degree of

MASTERS IN COMMERCE TAXATION

UNIVERSITY OF KWA ZULU NATAL

DURBAN

NOVEMBER 2004

Supervisor: Liaquat Ally

DECLARATION

This research has not been previously accepted for any degree and is not being currently submitted in candidature for any degree.

Signed.....*Raharajh*..... 096575

Date..... 23/02/2005.....

ACKNOWLEDGMENTS

Firstly I would like to thank Lord Saraswathi for giving me the strength and good health to study. Secondly I would like to thank my wife, Premilla, my daughter Kimira and my son Kiashen for their sacrifices and for putting up with me during my studies. Many hours of quality family time was sacrificed for my studies. For this I am very grateful. I would also like to thank my dad who persuaded me to continue with my studies and all the other members of my immediate family. Lastly I would like to thank my supervisor.

ABSTRACT

In some point in time, an employer would require the services of an independent contractor. Very often one would find that the employer does not have sufficient information in his possession to make a decision to either engage the services of an independent contractor or an employee.

Most employers would be aware of their requirements should they choose to engage the services of an employee, however the problem or lack of information arises when the employer decides to engage the services of an independent contractor. This might seem as a simple decision; however an investigation into the taxation of independent contractors proved otherwise.

Generally an employer would engage the services of an independent contractor to perform a specific task and pay him for that service. However there are various mechanisms in place that would deem that independent contractor to be an employee. Should this be the case, the employer would be faced with extra costs in the form of interest, penalties and additional levies if he did not deduct employees tax from the independent contractor and pay this over to the Commissioner for South African Revenue Services.. The other taxes that are effected by an independent contractor who is deemed to be an employee are, Pay As You Earn, Skills Development Levy, Unemployment Insurance Contributions, Regional Service Levies and the Labour Laws.

It is imperative that the employer understands the various laws in respect of the engagement of an independent contractor. Failure to do so or ignorance of the law would be a disadvantage for the employer. The investigation into the tax implications of independent contractor's would highlight the requirements and problem areas that one should be aware of. This would include how to identify if a contractor is truly and independent contractor or deemed to be an employee. This distinction is very important especially to the employer.

TABLE OF CONTENTS

DECLARATION	ii
ABSTRACT	iv
TABLE OF CONTENTS	v
1.1 INTRODUCTION.....	1
1.2 Background of the study	2
1.3 Motivation for the project	3
1.4 Value of research.....	3
1.5 Problem Statement.....	3
1.6 Objectives of the study.....	3
1.7 Limitations of the project.....	4
1.8 Structure of the study	4
1.9 Summary	7
CHAPTER TWO INTERPRETATION NOTE 17	8
2.1 Introduction	8
2.2 The Statutory Tests	13
2.3 The common Law dominant impression test.....	14
2.4 The near conclusive indicator	15
2.5 Persuasive Indicators	18
2.6 Resonant indicators.....	19
2.7 The decision process	24
2.8 Summary	26
CHAPTER THREE CASE LAW RELATING TO INDEPENDENT CONTRACTORS	27
3.1 Introduction	27
3.2 Income Tax Case 1174 34 SATC 135.....	27
3.3 Smith v Workmen’s Compensation Commissioner (1976) (1) SA 51 (A)	28
3.4 Liberty Life Association v Niselow (1996) 119(17) ILJ 673 (LAC).....	29
3.5 INCOME TAX CASE 1695 (2000) 63 SATC 133.....	29
3.6 INCOME TAX CASE 1718 (2000) 64 SATC 43.....	30
3.7 SABC V McKenzi (1999) 1 BLLR 1 (LAC)	30
CHAPTER FOUR OTHER TAXES	33
4.1 Introduction	33
4.2 VALUE ADDED TAX (VAT).....	33
4.2.1 Background.....	33
4.2.2 Applying the SARS Circular Minute	36
4.3 REGIONAL SERVICE COUNCIL LEVIES	37
4.3.1 Introduction	37
4.3.2 Liability for the payment of levies	37
4.3.3 Who is an employer?.....	38
4.3.4 What is an enterprise?	38
4.3.5 The Service levies.....	39
4.3.6 Summary	40
4.4 SKILLS DEVELOPMENT LEVY (SDL).....	40
4.4.1 Background.....	40
4.4.2 The Levi able amount as per SARS guideline is defined as:.....	41
4.4.3 Summary	41
4.5 UNEMPLOYMENT INSURANCE FUND (UIF)	42
4.5.1 Background.....	42

4.5.2	Exclusions of the UIF Contributions.....	42
4.5.3	Summary.....	43
4.6	LABOUR LAW AND EMPLOYEES TAX.....	44
4.6.1	Introduction.....	44
4.6.2	Employees Tax treatment.....	46
4.6.3	Presumption as to who is AN employee.	46
4.6.4	Independent Contractor.....	48
4.7	OBLIGATIONS OF THE EMPLOYER.....	49
4.7.1	Introduction.....	49
4.7.2	Registration.....	49
4.7.3	Employer's liability for payment of PAYE, SDL and UIF.....	50
4.7.4	Employer's liability for failure to deduct taxes.	51
4.7.5	When would an employer be absolved?	51
4.7.6	Employers right of recovery.....	51
4.7.7	Penalty for late payment.....	52
4.7.8	Record Keeping.....	52
4.7.9	Agreements not to deduct are void.	52
4.7.10	Offences.....	53
4.7.11	Obligation to issue employees tax certificates.....	54
4.8	Summary.....	54
	CHAPTER five RESIDENCE BASIS OF TAXATION.....	55
5.1	Introduction.....	55
5.2	RESIDENT.....	56
5.2.1	The ordinary resident test.....	56
5.2.2	Application of the Law.....	57
5.2.3	The physical presence test.....	59
5.3	The effect of the changes on a non-resident independent contractor.....	61
5.4	The effects on a South African independent contractor working overseas.....	62
5.5	What relief is there for an Independent Contractor?	63
5.6	DOUBLE TAXATION AGREEMENTS.....	68
5.6.1	Introduction.....	68
5.6.2	The purpose of the double taxation treaty is as follows:.....	69
5.6.3	Solutions to the double tax Problem.....	70
5.6.4	Article 14 – Independent personal service.....	71
5.6.5	Summary.....	71
	CHAPTER SIX COMPARISON WITH OTHER COUNTRIES.....	73
6.1	Introduction.....	73
6.2	UNITED STATES OF AMERICA.....	73
6.2.1	Independent contractor versus employee.....	73
6.2.2	Who is an Independent Contractor?	74
6.2.3	Who is a common law employee.....	75
6.2.4	Who is an employee.....	77
6.2.5	Statutory Employees.....	77
6.2.6	Statutory None employees.....	78
6.3	UNITED KINGDOM.....	79
6.3.1	Introduction.....	79
6.3.2	Deciding employment status.....	80
6.3.3	Control.....	80
6.3.4	The right to get a substitute or helper to do the job.....	80
6.3.5	Provision of equipment.....	81
6.3.6	Financial risk.....	81
6.3.7	Basis of payment.....	81
6.3.8	Opportunity to profit from sound management.....	82
6.3.9	Part and parcel of the organisation.....	82

6.3.10	Right of dismissal.....	82
6.3.11	Employee benefits.....	82
6.3.12	Length of engagement.....	83
6.3.13	Personal factors.....	83
6.3.14	Intention.....	83
6.3.15	The common indicators of employment are:.....	83
6.3.16	The common indicators of self-employment (independent contractor).....	84
6.4	AUSTRALIA.....	85
6.4.1	Introduction.....	85
6.4.2	Generally a worker is an employee if they.....	85
6.4.3	Independent Contractor Status.....	86
6.5	Conclusion.....	91
CHAPTER seven PROS AND CONS OF AN INDEPENDENT CONTRACTOR.....		92
7.1	Introduction.....	92
7.2	Pros of Hiring An Independent Contractor.....	92
7.3	Pros of Hiring An Employee.....	93
7.4	Cons of Hiring An Employee.....	93
7.5	Cons of Hiring An Independent Contractor.....	94
7.6	PROS AND CONS OF AN INDEPENDENT CONTRACTOR.....	95
CHAPTER EIGHT CONCLUSION.....		100
8.1	Introduction.....	100
8.2	Preserving Your Status as an Independent Contractor.....	100
8.2	Retain Control of Your Work.....	101
8.3	Show Opportunities for Profit and Loss.....	101
8.4	Look Like an Independent Business.....	102
8.5	Work Off Site.....	102
8.6	Make Your Services Widely Available.....	102
8.7	Have Multiple Clients.....	103
8.8	Use Written Agreements.....	103
8.9	Don't Accept Employee Status.....	104
8.10	Summary.....	104
BIBLIOGRAPHY.....		114

LIST OF TABLES

Table 6.1	Differentiation between employer and independent contractor.....	22
Table 6.2	Comparison of factors used in other countries.....	84
Table 8.1	Summary of findings.....	86

LIST OF FLOW DIAGRAM

Flow Diagram 2.1	Test to determine if payments are subjected to employees tax.....	24
Flow Diagram 5.1	Physical Presence Test.....	58

LIST OF AGREEMENT

Agreement 7.1	Sample of Independent contractors agreement.....	103
---------------	--	-----

CHAPTER ONE INTRODUCTION

1.1 INTRODUCTION

South Africa just like most other countries in the world, the lowly salaried employee bears the highest pro rata portion of the income tax. Compared to a self-employed person the salaried employees are heavily restricted in so far as their ability to claim a tax deduction for business related expenditure against their income. The salaried employee is subjected to a very efficient system of tax collection, whereby their employers deduct PAY AS YOU EARN (PAYE) or STANDARD INCOME TAX ON EMPLOYMENT (SITE) from their remuneration. The taxes deducted are paid by the employer to the Commissioner of the South African Revenue Services. It follows that a salaried employee would be in a most disadvantageous position because he will not be entitled to many deductions against his income.

There has been a trend in South Africa where tax planners are electing to contract their services to a client, even if it is their only client. In all other aspects they would be considered employees of that client. People do this so that they are given more freedom to structure their income so that they are allowed to claim various business related expenditure against the income. It has become quite fashionable for employees to resign from their employers and contract their services back to the employer. By doing this they would call themselves independent contractors and would not be subjected to employees' tax. This often suited the ex employer who would no longer be exposed to employee biased labour relations legislation.

This kind of tax planning became rife in South Africa with many individuals or a small group of persons would render services to one client. These services could be rendered through one-man close corporations and trusts. However my thesis will concentrate on the tax effect on individuals who prefer to call themselves independent contractors...If it were not for the legal contracts that made the

distinction of some kind of “independent” consultant arrangement, clearly the facts would show that in all other respects there was an employer-employee relationship and the independent contractor is an employee.

The question of when a person is an employee for tax purposes as opposed to an independent contractor is one that continues to cause difficulties and conflict for taxpayers and especially employers. The reason is that employee’s tax is deductible from remuneration paid to employees whereas payments to independent contractors are not subject to employees’ taxation. It therefore suits both parties to treat the relationship as being that between independent provider and recipient of a service.

The Commissioner for the South African Revenue Services (SARS) have for many years through changes in legislation, tried to make it more difficult for tax planners to achieve the above objectives. One of these mechanisms that were put in place was the introduction of Interpretation Note 17(South African Revenue Services, 2003), titled Employees Tax Independent Contractor. The main purpose for the introduction of this interpretation note was to assist employers in determining the correct status of independent contractor.

1.2 BACKGROUND OF THE STUDY

As a result of the contentious nature or status of an independent contractor, it was very informative to research the various tax effects of engaging the services of an independent contractor. This was no easy task because what seemed to be a simple topic of independent contractors, took my research in various other issues. This proved that there are other tax effects that the employers are not aware off. The other tax effects are Income Tax, Value Added Tax, Pay As You Earn, Skills Development Levy, Regional Service Council, Labour Relations and Double Taxation Agreements. A comparison of the taxation of independent contractors in United States of America (USA), United Kingdom (UK) and Australia is also included as part of this thesis.. The aim of this was to determine if similar principles were applied elsewhere in the world.

1.3 MOTIVATION FOR THE PROJECT

Due to the complexity of labour legislation in South Africa it has become increasingly important for the employer to be aware of the correct status of his employees or independent contractors. An incorrect classification or treatment of an employee as an independent contractor would cost the employer dearly. This would be in the form of additional taxes that must be payable to the Commissioner. Ignorance of the law would result in the employer being liable for more payments. It has become imperative for employers to know the correct treatment or effects of the engagement of independent contractors.

1.4 VALUE OF RESEARCH

The information obtained from this research is of value to me, as it will assist me when advising clients on the various tax implications on the engagement of an independent contractor. At the same time it will also assist me with the identification of other risk areas that the client is exposed to in respect of independent contractors and to correctly advise accordingly.

1.5 PROBLEM STATEMENT

What are the effects of an incorrect classification of a person as an independent contractor has on an employer?

1.6 OBJECTIVES OF THE STUDY

To determine the correct status of the independent contractor.

To establish what other taxes are affected by engaging the services of an independent contractor.

1.7 LIMITATIONS OF THE PROJECT

There was a lack of information available on the topic in South Africa. With the help of the World Wide Web, sufficient information was obtained. Difficulty was also experienced in obtaining an independent contractor agreement. As a result an interpretation of the agreement was not possible. Clients were reluctant to divulge information on their independent contractors.

1.8 STRUCTURE OF THE STUDY

Chapter Two

In this chapter the contents of Interpretation Note 17 are explained. This is a guideline that was issued by SARS that will assist in correctly identifying the status of an independent contractor.

Chapter Three

A few relevant cases are highlighted in this chapter. These cases have established some important principles and serves as a good guidance in determining the status of an independent contractor. The principles determined in the cases have been used in the SARS Interpretation Note 17

Chapter Four

The effects of other taxes on independent contractors are highlighted in this chapter. One does not consider the effects of other taxes. This chapter highlights some of the other tax implications and statutory obligations that the employer has to be aware of.

Chapter Five

The effects of Resident basis of taxation on South African and foreign nationals who are independent contractor are discussed in this chapter. The mechanisms of avoiding the double taxations are also highlighted.

Chapter Six

This chapter highlights how countries like the United States of America, United Kingdom and Australia, tax their independent contractors. Finally, a comparison of these countries to South Africa was also done with some interesting results.

Chapter Seven

The pros and cons of an independent contractor are stated in this chapter. This information is provided to assist in determining if it is better to engage the services of an independent contractor or an employee.

Chapter Eight

This is the conclusion chapter. The salient points of the topic and what have been concluded is included in this chapter.

As there is no definition of independent contractor in the Income Tax Act 58 of 1962, the courts have through various cases developed some guidelines for determining whether an individual is an employee or an independent contractor. Before going into the specifics of Interpretation Note 17, it is important to define an independent contractor.

The term independent contractor is not defined in the Act. The concise Oxford Dictionary defines independent as:

'not depending on authority, not depending on something else, for its validity, efficiency, value'. The SARS guideline makes the following distinction between an employee and an independent contractor.

The surrender of productive capacity whether it is for providing a service or producing things is the employment of an employee. The acquisition of an end result of productive capacity whether it is a produced thing or a provided service, is a contractor for the use of an independent contractor.

In other words an employee places his capacity to work that is his productive capacity at the disposal of another whereas an independent contractor provides or sells the end result of his productive capacities. A distinction must then be made between the surrender of a person's productive capacity on the one hand, and the sale of a product or the end result on the other. This is as per SARS Interpretation Note 17

Independent contractors are people who are in business for themselves. Independent contractors earn their livelihoods from their own independent businesses instead of depending upon an employer to earn a living. Independent contractors are sometimes called consultants, freelancers, self-employed, and even entrepreneurs and business owners.

The South African law refers to independent contractor contract as a contract of "locatio conduction operas" as stated in SARS Interpretation Note 17. Roman labour law used the term locatio conductio to include three types of transactions, which are as follows:

- locatio conduction rei, being the letting or hiring of things (hire purchase or lease contract)
- locatio conduction operarum, being the letting and hiring of services (the master servant or employer-employee relationship) or,
- locatio conduction operas, being the letting and hiring of work (independent contractor contract).

For the purposes of this thesis the discussion of the third type of transaction as mentioned above, the locatio conduction operas. Under Roman law, it constituted a contract of the result as a whole and not one for services. The conductor (controller of works) was responsible for producing the results and was not under the control and supervision of the locator (client). This is as per Interpretation Note 17 issued by SARS.

1.9 SUMMARY

SARS Interpretation Note 17 was introduced to assist employers in correctly identifying and taxing the independent contractor. If one uses the guidelines provided, it will definitely assist in arriving at the correct conclusion i.e. is the person an employee or an independent contractor. In the next chapter, the concepts of the SARS Interpretation Note 17 will be discussed.

CHAPTER TWO INTERPRETATION NOTE 17

2.1 INTRODUCTION

In today's complex and fast pacing world it is not uncommon that someone would require the services of an independent contractor. The problem a service-user is faced with is that someone one who is an independent contractor might in terms of common law be an employee. This being the case, PAYE must be deducted from the payment to him. Even if a service provider is an independent contractor in terms of common law, the payment to him can still be subjected to PAYE, due to the deeming provisions of paragraph (ii) of the definition of employee in the Income Tax Act 58 of 1962.

Interpretation Note 17 was issued by SARS to provide some guidelines for employers to correctly determine the tax status of independent contractors. When an employer or a client makes a payment to an independent contractor, the employer is faced with the problem of determining whether the service provider is an independent contractor in terms of statute and common law. This will determine if employee's tax must be deducted from the payment or not. The concept or status of an independent contractor or independent trader remains one of the more contentious issues of the Fourth Schedule to the Income Tax Act 58 of 1962.

An employer is faced with a huge responsibility of having to determine whether the service provider is by law an independent contractor when payments are made to them. If the service provider is an independent contractor then no PAYE is deducted from the payment to them. Paragraph 2 of the Fourth Schedule of the Income Tax Act 58 of 1962, requires every employer who is a resident and every representative employer of any non resident employer, who pays or becomes liable to pay remuneration to an employee, to withhold and pay over to the Commissioner of the South African Revenue Services the taxes deducted.

A service provider may become an employer for the purposes of the Fourth Schedule of the Income Tax Act 58 of 1962 if the service provider is not an independent contractor or if he is an independent contractor whose income is not excluded from the definition of remuneration because of the application of paragraph (ii) of that definition.

The remainder of this chapter is a summary of what is stated in Interpretation Note 17 issued by the South African revenue Services. SARS Interpretation Note 17 sets out two sets of tools that are available to determine whether a person is an independent contractor for employee's tax purpose.

- First is the statutory test and this test is conclusive. If they apply the person is deemed not to be an independent contractor for the purpose of determining employee's tax. Employee's tax will have to be deducted from payments to the contractor.
- The second is the common law tests. The common-law tests as they apply in South Africa do not permit a simple checklist and there is no hard and fast rule to determine if a person is an independent contractor. An overall or dominant impression test must be performed.

The statutory test is considered first. However if the statutory tests are not applicable in a particular situation, then the common-law test are applied to determine finally whether the person is an independent contractor or an employee. The purpose of SARS Interpretation Note 17 is to assist SARS officials and the employer to correctly determine the contractor's status of a service provider. Is the service provider an Independent contractor or an employee?

The three terms that are applicable in the application of the Fourth Schedule are 'employer', 'employee' and 'remuneration'. The requirement's to withhold PAYE arises when there is an interconnection of these terms that is, when an employer pays remuneration to an employee. The relevant definitions as per the Income Tax Act 58 of 1962 are as follows:

"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 company;
- f) any personal service trust; and
- 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, provident 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) any amount referred to in paragraph (a), (c), (cA), (d), (e), (eA) or (f) of the definition of "gross income" in section one of this Act;
- b) any amount required to be included in such person's gross income under paragraph (i) of that definition;
- bA) any allowance or advance, which must be included in the taxable income of that person in terms of section 8(1)(a)(i), other than-
 - i) an allowance in respect of which paragraph (c) applies; or
 - ii) an allowance or advance paid or granted to that person in respect of accommodation, meals or other incidental costs while that person is obliged to spend at least one night away from his or her usual place of residence in the Republic;
- c) 50 per cent of--
 - i) the amount of any allowance or advance in respect of transport expenses referred to in section 8(1)(b), other than any such allowance or advance contemplated in section 8(1)(b)(iii) which is based on the exceed the appropriate rate per kilometre fixed by the Minister of Finance under the said section 8(1)(b)(iii); and
 - ii) the amount of any allowance referred to in section 8(1)(d) granted to the holder of a public office contemplated in section 8(1)(e),

but not including--

- i) [Sub-para. (i) deleted by s. 34 of Act No. 36 of 1996];
- 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) (e) or (f) 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--

- aa) if he is subject to the control or supervision of any other person as to the manner in which his duties are performed or to be performed or as to his hours of work; or
- bb) if the amounts paid or payable for his services consist of or include earnings of any description which are payable at regular daily, weekly, monthly or other intervals;
- iii) any pension or additional pension under the Aged Persons Act 1967 (Act No. 81 of 1967), or the Blind Persons Act, 1968 (Act No. 26 of 1968), any disability grant or additional or supplementary allowance under the Disability Grants Act 1968 (Act No. 27 of 1968), or any grant or contribution under the provisions of section 89 of the Children's Act, 1960 (Act No. 33 of 1960);
- iv) Deleted by section 44 of Act 101 of 1990;
- v) Deleted by section 6 of Act 30 of 1984;
- vi) any amount paid or payable to any employee wholly in reimbursement of expenditure actually incurred by such employee in the course of his employment;
- vii) deleted by section 19 of Act 19 of 2001;
- viii) any annuity under an order of divorce or decree of judicial separation or under any agreement of separation;

There are two instances in the fourth schedule when it is necessary to determine whether a person is an employee or an independent contractor.

The first is when the provisions of exclusionary paragraph (ii) of the definition of remuneration apply. The employer is responsible to determine whether or not the payments are subjected to employee's tax. This responsibility is imposed in terms of the Fourth Schedule of the Income Tax Act 58 of 1962 and the employer is also in the best position to evaluate the facts of the situation. An employer who incorrectly determined that a worker is an independent contractor is liable for the employee's tax that should have been deducted and also the interest and penalties.

The second instance is in paragraph 2(5) of the Fourth Schedule where it may be necessary to decide whether a labour broker is exempt from employee's tax. When a labour broker makes an application for exemption certificate, it is statutory for SARS to evaluate the status of the labour broker.

2.2 THE STATUTORY TESTS

The exclusionary paragraph (ii) of the definition of remuneration in the Fourth Schedule to the Income Tax Act 58 of 1962 sets out three statutory tests that deem a person not to be an independent contractor. They are:

- He is subject to the control of any person as to the manner in which his duties are or will be performed, or as to his hours of work or,
- He is subject to the supervision of any other person as to the manner in which his duties are or will be performed, or as to his hours of work or
- The amounts paid or payable for his services consist of or include earnings of any description that are payable at regular daily, weekly, monthly or other intervals.

When any one of the tests applies the recipient of the remuneration is deemed not to be an independent contractor and the amount earned is not excluded from remuneration. The application of any one test triggers the deeming provisions. If one of the tests apply it is not necessary to use the common law dominant impression test to determine if the amount is excluded from remuneration. The income that is earned by the independent contractor will be subjected to PAYE. The taxes will be deducted from the independent contractor and paid to the commissioner for the South African Revenue Services.

2.3 THE COMMON LAW DOMINANT IMPRESSION TEST

The current position in South Africa is that the so-called dominant impression test must be applied to determine whether a worker is an independent contractor or employee. The test is designed to establish the dependence or independence of a person. If an independent contractor is an employee in terms of common law, then PAYE must be deducted from any payment in terms of the provisions of the Fourth Schedule of the Income Tax Act 58 of 1962.

A conclusion in favour of the independent contractor does not necessarily absolve the service user from the obligation to deduct PAYE, as it is possible that the independent contractor could still fall into the statutory definition of an employee.

In the dominant impression test the employment contract must be examined to ascertain whether the true intention of the parties is for the service user to acquire the workers productive capacity or the end result of that productive capacity. The Commissioner has identified the following indicators to be used as a guideline:

- Near conclusive indicators, being those relating most directly to the acquisition of a productive capacity.
- Persuasive, being those establishing the degree of control of the work environment.

- Resonant, of either an employer-employee relationship or an independent contractor-client relationship, which are relevant.

2.4 THE NEAR CONCLUSIVE INDICATOR

This category is nearly conclusive because the indicators are considered to be the deciding factors in distinguishing between the acquisition of the workers productive capacity (employee) and the result (independent contractor). The following are regarded as near conclusive indicators.

2.4.1 CONTROL OF MANNER

The employer controls the manner in which work is done either by detailed instructions, training, requesting that prior approval be sought or instituting disciplinary steps in the event of unacceptable performance by the worker.

Control of manner includes control as to which tools or equipment to use, which other workers to involve, which raw materials to use and where to obtain them, and which routines, patents to use. When an employer has a contractual power to control the manner of use of a worker productive capacity it is likely that the employer intended to acquire an employee.

2.4.2 PAYMENT REGIME

A worker can be paid for a result. Payment without reference to a result would indicate an employee status as the worker is being paid for effort. In the employee's situation the employer controls his effort to achieve the result. If the employer is dissatisfied he cannot reduce the employee's pay but he can increase his supervision and training of the employee. Whereas in an independent contractor situation, if the employer is dissatisfied with the service of the independent contractor he can refuse to pay the full contract price.

Payments at regular intervals whether a fixed rate per interval or an hourly rate, depending on the hours worked would indicate a payment for an effort. Regular payments are conclusive for purposes of exclusionary paragraph (ii)(bb) of the definition of remuneration.

As stated in a newsletter by Surtees (2003) the concept of regular payment has caused considerable confusion and uncertainty because there are many situations where an independent contractor receives regular payments and yet can by no means be described as an employee. Examples are such as auditors keeping the books of small enterprises, gardening services and legal retainers etc.

When the person receives regular payments the onus of showing independence increases and the control and supervision criteria obviously becomes very important, but regular payments do not of themselves condemn a relationship to the status of employer and employee. At the same time the absence of regular payments does not of itself determine that the relationship is not one of employment.

It is significant that regular payments is found on the grid only in near conclusive category indicating its importance. If the payments are made at regular intervals or by rate per time period and regardless of output or result, this is a strong indicator of employment status. On the other hand if they are made with reference to a result or output during the period, there is more chance of showing an independent relationship.

This reflects again the difference between providing time and providing results. An employer cannot withhold remuneration in response to poor performance but must instead have recourse to increased control or dismissal. In an independent contractor situation the employer can withhold payment or refuse to accept the results of the work done.

2.4.3 PERSON WHO MUST RENDER THE SERVICE

An employee contract is one of personal service i.e. he is at the beck and call of the employer. If there is no obligation to serve personally, the contract cannot be an employee contract. An obligation to provide personal service indicates that the object of the contract is the acquisition of that workers productive capacity or effort.

2.4.4 NATURE OF OBLIGATION TO WORK

A contract where the obligation to work is delineated by time and not result, indicates an employee relationship. The reason being is that it is the acquisition of a productive capacity or effort. An obligation to work full time indicates an employer-employee relationship because it means the exclusive acquisition of the workers productive hours. Here the intention is to exclusively acquire the workers productive capacity.

A typical independent contractor is free to seek out other business opportunities. He has a multiple client base and is not dependent on one employer. A typical employee is bound contractually with his employer and cannot work for another employer.

2.4.5 RISK, PROFIT AND LOSS

An exposure to risk may indicate a degree of economic independence or non-exclusive acquisition of productive capacity, which is consistent with an independent contractor relationship and inconsistent with an employee relationship.

When a person is not exposed to performance or market risk this will indicate an employee relationship. An employee generally gets paid regardless of the defective workmanship, while an independent contractor might not receive his full contract price if the work is not done properly. An employee receives a fixed salary regardless of poor quality of work, while an independent contractor will get

a reduced fee. An independent contractor is free to make decisions that directly affect his profitability while an employee does not make decisions of this nature.

2.5 PERSUASIVE INDICATORS

These indicators examine the extent of behavioural control and the purpose of acquiring control. Control enables management to convert productive capacity into productive activity. The following are examples of persuasive indicators:

2.5.1 INSTRUCTIONS OR SUPERVISION

An employer controls the work to be done and the environment it is to be done. Giving instructions as to location begin and ends are some examples which indicate an employment relationship. It may indicate that the employer measures to control what he has contractually acquired (productive capacity) or measures to coordinated work of the independent contractor.

The greater the degree of supervision would indicate in favour of an employee status. Independent contractors enjoy autonomy as regards the order of sequence of work. Any form of supervision must flow from a legal relationship (contract) itself and not from some extraneous source like the nature of trade. A restraint of trade can only exclude an employee from working for a specific class of employer for a specific period of time in a specific area. Restraint of trade can be imposed on an employee or an independent contractor. A restraint of trade would normally indicate an employee relationship.

2.5.2 REPORTS

An 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 where control of the manner in which work is done is sufficient to satisfy the control requirement in exclusionary paragraph (ii)(aa) of the definition of remuneration in the Fourth Schedule of the Income tax Act 58 of 1962.

2.5.3 TRAINING

An employer might provide training to his employees but not to an independent contractor. An independent contractor invests in his own training. Training relates to the quality of control where its purpose is to promote exclusive production technique or provision of service. This situation may amount to a near conclusive indicator and would be sufficient to satisfy the control requirement in exclusionary paragraph (ii)(aa) of the definition of remuneration in the Income Tax Act 58 of 1962. In some instance training may be given to an independent contractor for example, product training given to a broker house. In this instance, there is no employer-employee relationship.

2.5.4 PRODUCTIVE TIME

An employer's exclusive entitlement to all of the workers productive hours is a near conclusive indicator of an employer-employee relationship. Control over work periods and amount of time are examples of control over productive time.

2.6 RESONANT INDICATORS

The resonant is the last of the indicators in the dominant impression test and it creates an immediate or superficial impression of an employee or independent contractor relationship. This indicator may give insight into how the parties viewed their relationship. It must be considered in forming the dominant impression test. It is likely that these indicators are either susceptible to deceptive contractual manipulation. Examples of these are:

2.6.1 TOOLS, MATERIALS AND STATIONERY.

An independent contractor has his own tools, materials and stationery. The provision by the employer of equipment, tools, materials and stationery, tends to indicate a degree of independence and lack of investment, hence the existence of an employer-employee relationship.

2.6.2 OFFICE OR WORKSHOP

An independent contractor normally operates from his own office or workshop and works only temporarily at the client's premises. When the employer provides the independent contractor with an office or workshop or the independent contractor continually works at the client premises, there is an indication of dependence. This would give an indication of an employee-employer relationship.

2.6.3 INTEGRATION OR EMPLOYER'S USUAL WORK PREMISES.

When the independent contractor is integrated into and operates from the client's usual place of business there is a degree of dependence. This is inconsistent with an independent contractor relationship. Integration into the employer's workplace will normally indicate an employer-employee relationship.

2.6.4 INTEGRATION OR USUAL BUSINESS OPERATIONS

An independent contractor that is engaged in the activities that are integral, accessory or ancillary to the employers business may indicate an employer-employee relationship. This is so if the independent contractors business is critical to the employer's survival.

2.6.5 INTEGRATION OR HIERARCHY AND ORGANOGRAM

When a person has a job description and a position in the employer's organogram, this will indicate an employee status and an indication of how the parties perceive the relationship.

2.6.6 DURATION OF RELATIONSHIP

When parties have an open-ended or indefinite relationship, this would indicate an employee relationship. Employment contracts are usually indefinite and can be terminated with a notice. While an independent contractors contract is terminated on achievement of a result or production of an item.

2.6.7 TERMINATION AND BREACH OF CONTRACT

When an employer has a right to dismiss a person or the person has a right to resign before the completion of any task without being in breach, this is an indication of an employer-employee relationship.

2.6.8 SIGNIFICANT INVESTMENT

When conducting a business one requires significant investment while an employee has no significant investment in any of these inputs. In the same token an independent contractor normally has a significant investment in his business.

2.6.9 BONA FIDE BUSINESS EXPENSES AND BONA FIDE STATUTORY COMPLIANCE

An employee does not bear the cost for any business expense. He is reimbursed on any expenditure incurred on behalf of the business. The independent contractor will incur business expenditure, which will be recovered in the contract price that he has quoted to his client. An employee might register with a trade or professional association but would not have to register with SARS for VAT or employees tax.

Where an amount paid to an independent contractor is deemed to be remuneration as envisaged by paragraph (ii)(aa) and (bb) of the definition of remuneration in the Fourth Schedule in the Income Tax Act 58 of 1962, the amount is subjected to both VAT and employees tax. The following to be noted:

2.6.9.1 STEREO-TYPICAL LABELS

Headings, labels or terminology, should sound legal and factual and their presence should be consistent with the manner in which the parties conduct their relationship. The existence of headings and labels, are resonant of an independent contractor contract and does not necessarily mean that there is an independent contractor relationship.

2.6.9.2 STEREOTYPICAL CLAUSES OR STATUTORY COMPLIANCE.

The insertion of typical clauses or the fact of statutory compliance or membership of a professional authority may be intended to deceive. These indicators should be consistent with the manner in which the parties conduct their relationship. An example would be is that an independent contractor provides for his own retirement and insurance. If he were provided with typical employee benefits this would indicate an employer-employee relationship.

2.6.9.3 STEREO-TYPICAL EXPENSES

Like labels the claiming of deductions may be intended to deceive. These expenses should be actually incurred and should be consistent with the manner in which the parties actually conduct their relationship.

2.6.10 VIABILITY ON TERMINATION

A person who is not viable on the termination of his current contractual relationship may be regarded as being an employee. This factor may be persuasive or even nearly conclusive in favour of non-independence for the purposes of paragraph 2(5) of the Fourth Schedule of the Income Tax Act 58 of 1962.

2.6.11 INDUSTRY NORMS AND CUSTOMS

It may be a norm or custom in the industry that a person be an independent contractor. It may be less likely that he would contract in the form of an employee.

The table below, Table 2.1 was extracted from the SARS Interpretation Note 17 and it is a summary of all the items discussed above.

TABLE 2.1 COMMON LAW DOMINANT IMPRESSION TEST GRID

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 at <u>regular intervals</u> by a rate x time-period, but regardless of output or result.	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, <i>even if there is no work to be done</i>	Person only present and performing work if actually required, and chooses to
	Employer (client) base	Person bound to an exclusive relationship <i>with one employer</i> (Particularly for independent business test)	Person free to build a multiple concurrent client base (<i>esp. if tries to build client base - advertises etc</i>)
	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, stationary, 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 of labour broker to obtain new work (particularly for independent business test).	Has other clients, continues trading. Was a labour broker or independent contractor prior to 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

Obtained from SARS Interpretation Note 17 dated 28 March 2003

2.7 THE DECISION PROCESS

As stated in an article by Surtees (2003), the first step in the process is to determine under which paragraph of the definition of employee the person falls. Then certain questions follow depending on which paragraph applies. This process of the decision tree is as appearing in flow diagram 2.1 which was obtained from SARS

The following is a brief summary of the flow diagram 2.1, which helps determine if employees tax is deductible or not.

Is the person other than a company in receipt of any remuneration?

If yes, is the person under the control or supervision as envisaged by paragraph (ii)(aa) of the definition of remuneration.

If yes, employee's tax is deductible.

If no, is the person in receipt of regular payments as envisaged by paragraph (ii)(bb) of the definition of remuneration?

If yes, no employee's tax is deductible

If no apply the dominant impression test.

Is the dominant impression that of an independent contractor?

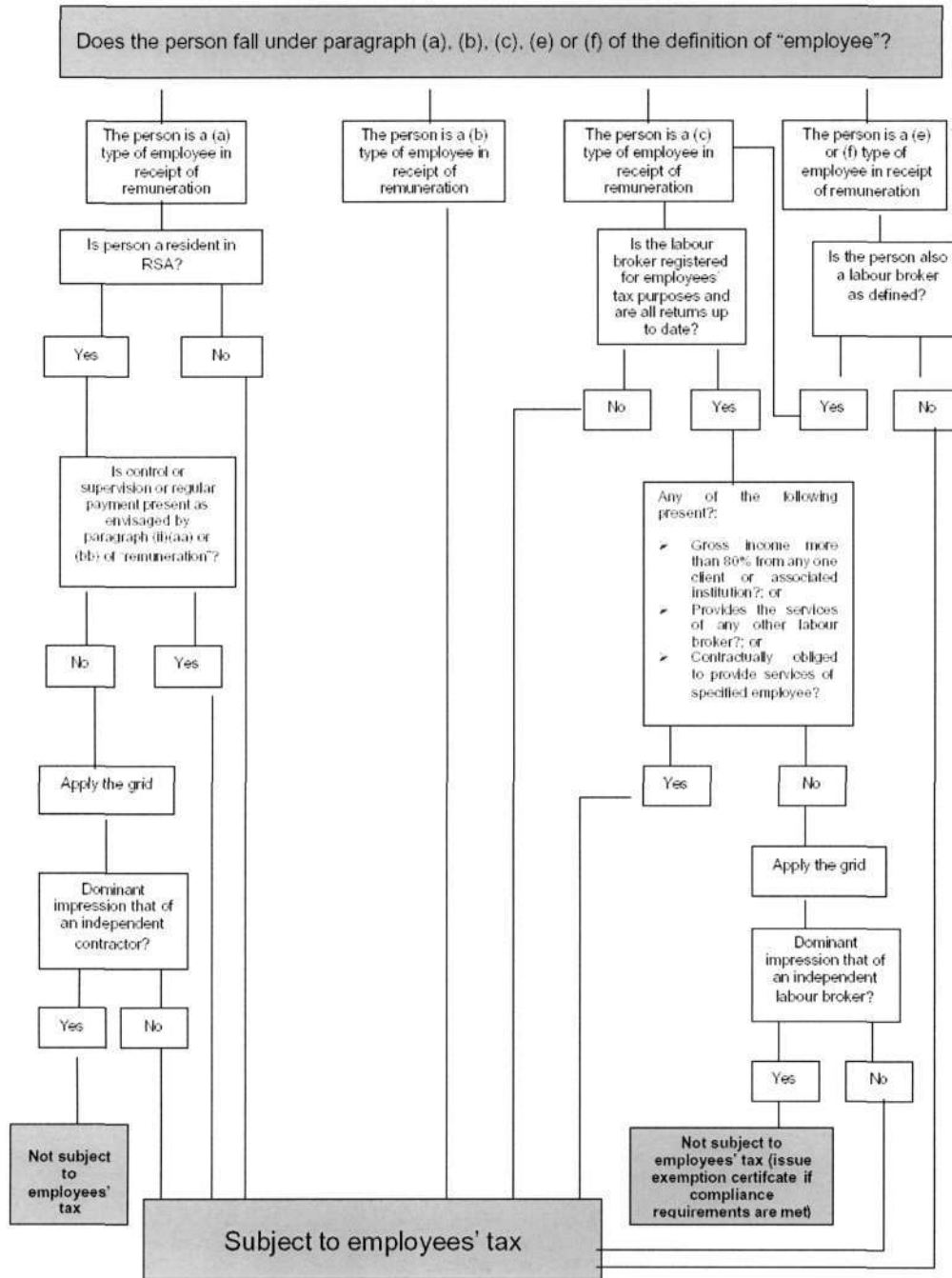
If yes, no employees tax deductible.

If no, employee's tax is deductible.

FLOW DIAGRAM 2.1 TEST TO DETERMINE IF PAYMENT IS SUBJECTED TO EMPLOYEES TAX

FLOW DIAGRAM

ANNEXURE A



SARS interpretation Note number 17 Dated 28 March 2003.

Whichever test is utilised it is essential for employers to evaluate every potential independent contractor relationship by assessing all the factors in an attempt to establish whether the relationship has been determined. In future attempts by employers to evade the various obligations set out above will be lessened by the willingness of the courts to enquire into the true nature of the relationship rather than simply to accept the parties' arrangements at face value.

An independent contractor should not be confused with a labour broker. A labour broker is defined in the Labour Relations Act and refers to a business whereby a labour broker, for reward, provides a client with persons to do work for the client and for which work those persons are paid by the labour broker. The persons provided to the company by a labour broker such as temporary workers would therefore be in the employment of the labour broker and not in the employment of the client. However an employee employed by a labour broker does have recourse against both the labour broker and the client in the event of an unfair labour practice.

2.8 SUMMARY

From the above it is evident that the use of independent contractors by employers has some definite benefits. However the relationship between the independent contractor and employer is not one that should be used lightly and employers must ensure that these types of relationships are correctly entered into so as to avoid any implication that a relationship between the employer and employee actually exists.

As note previously, there is no definition of an independent contractor and we have to therefore rely on the courts to establish a definition. The courts have established this through the various cases which will be discussed in the following chapter.

CHAPTER THREE CASE LAW RELATING TO INDEPENDENT CONTRACTORS

3.1 INTRODUCTION

The concept of independent contractor or definition of independent contractor is not defined in the Income Tax Act 58 of 1962. An independent contractor is a term for a small time sub contractor. The Independent contractor refers to independence in respect of employer's organisation as well as control.

An independent contractor must be distinguished from an employee. An increase in technology and education has made control of certain jobs more indirect. This has resulted in a common term being used by individuals as independent contractor. The courts have given us some guidance regarding the independent contractor status. The following is a summary of a few relevant cases relating to independent contractors by Arendse (2003) which appeared in a journal.

3.2 INCOME TAX CASE 1174 34 SATC 135

In ITC 1174 the appellant an employee of a subsidiary in a group of companies, was approached by a senior manager to carry out certain work for another subsidiary in South Africa. Whilst he rendered the service to the South African subsidiary he remained employed by the Zimbabwe subsidiary. The work in South Africa was carried out in his own time. The issue was whether the appellant rendered his service as an employee of the Zimbabwe Company or as an independent contractor. It was held by the judge that the appellant was an independent contractor based on the following:

- The nature and extent of control over the person performing the service. The appellant retained control over the manner in which he carried out the task. This supported the argument that he was an independent contractor.

- Whether the person is required to perform a continuous or once off service. The once off service by the appellant supported the existence of an independent contractor.
- The terms and conditions of contract. The appellant was not entitled to any benefits of the company.
- The contract requires the appellant to carry out a specific task, indicating the existence of independent contractor.
- The appellant's remuneration was fixed on a monthly basis, indicating an employee relationship. This was however outweighed by the factors that indicated an independent contractor.

3.3 SMITH V WORKMEN'S COMPENSATION COMMISSIONER (1976) (1) SA 51

(A)

In *Smith v Workmen's Compensation Commissioner* the issue was whether an insurance agent was an employee or an independent contractor. The judge made the following distinction between a contract of service (indicating an employee) and a contract of work or service (indicating an independent contractor)

- In a contract of service the employee renders personal service and the service is a focus of the contract. In contrast the object of a contract of work is the performance of specified work, the focus being the product or end result.
- An employee is at the beck and call of the employer. An independent contractor is not obliged to do the work or produce the result himself, but may use the service of others.
- An employee renders the service at the discretion of an employer whereas an independent contractor must perform certain work within a specified time.
- An employee is a subordinate to his employer whereas an independent contract is on an equal footing and regards the employer as a third party.
- A contract of service terminates on the death of an employee whereas the death of an independent contractor does not necessarily terminate the contract.

- The contract of service terminates on the expiry of the period of service, whereas a contract of work terminates upon the production of a specified result.

3.4 LIBERTY LIFE ASSOCIATION V NISELOW (1996) 119(17) ILJ 673 (LAC)

The case of Liberty Life Association v Niselow concerned the definition of an employee in the Labour Relations Act. The judge made the following distinction between an employee and an independent contractor

- An employee places his productive capacity at the disposal of another while an independent contractor only commits himself to deliver a product.
- An independent contractor is more concerned about his own business rather than that of the employer.

There is no single test to distinguish between an employee and an independent contractor, but there are characteristics if present may indicate the employment relationship. It was held that in terms of the contract the employer acquired the fruits of the individual labour, rather than the productive capacity which remained within his own power to use as he saw fit. The individual was not an employee. This finding was later upheld by the Supreme Court of appeal based on the following:

- The continuation of a contract was based on the individual producing a certain result.
- The individual was only entitled to commission.
- The manner in which the individual was to achieve the required result was not prescribed in the contract and he was not subordinate to the other contracting party.

3.5 INCOME TAX CASE 1695 (2000) 63 SATC 133

In ITC 1695, the issue was whether the subcontractors were employees and whether payments to them constituted remuneration that was subjected to the deduction of PAYE in terms of the Fourth Schedule of the Income Tax Act 58 of 1962.

The terms of the agreements between the appellant and the subcontractors contained many ambiguities that clouded the distinction between an independent contractor and an employee. The subcontractors continued to work for the same organisation before. They used the same tools and were paid at regular intervals. These factors supported the findings that although the employer intended to change the relationship from employment to subcontracting, he failed to discharge the onus of showing that the relationship had in fact been restructured to fall outside the scope of the Fourth Schedule of the Income Tax Act 58 of 1962.

3.6 INCOME TAX CASE 1718 (2000) 64 SATC 43

In ITC 1718 an individual was employed on a probationary period of three months and on a trial basis for the rest of the year. A fixed amount was paid to him together with a bonus. The appellant contended that the individual was an independent contractor and a fixed monthly payment was a retainer rather than a salary. It was held that the requirements for an independent contractor were not met.

- He had a single source of income.
- He did not have his own office or carried out work at home.
- He did not use his own equipment.
- His remuneration was not based on work done.
- It was held that the individual was not carrying on a trade independently but working for the appellant.

3.7 SABC V MCKENZI (1999) 1 BLLR 1 (LAC)

This is a more recent case and was reported in 1999. The court had highlighted most important aspects that distinguish an employment contract and a contract of work. The following points relate to an employee status:

3.7.1 EMPLOYEE STATUS

- 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.
- According to a contract of service, the employee will typically be at the beck and call of the employer to render his personal services at the request of the employer.
- Service to be rendered in terms of a contract of service is at the disposal of the employer who may at his own discretion decide whether or not he wants to have them rendered.
- The employee is subordinate to the employer. He is bound to obey the rules and instructions of the employer.
- The contract of service is terminated by the death of the employee.
- The contract of service terminates on the expiration of a period of service entered into.

3.7.2 INDEPENDENT CONTRACTOR STATUS

- The object of the contract of work is the performance of a certain specified work or the production of a certain specified result.
- The independent contractor is not obliged to perform the work himself or to produce the result himself, unless otherwise agreed upon. He may avail himself of the labour of others as assistants or employees to perform the work or to assist him in the performance of the work.
- The independent contractor is bound to perform a specified work or produce a specified result within a specified time or a reasonable time where no time is specified.
- The independent contractor is on the same footing as the employer. He is bound to produce on the contract of work and not on the employer's orders. He is not under the supervision and control of the employer and is not obliged to obey the orders of the employer.
- The death of the parties to a contract of work does not necessarily terminate it.
- The contract terminates on the completion of a specified work.

3.8 SUMMARY

The above cases have given us some important guidance in terms of distinguishing between an employee and an independent contractor. Any service user when having to determine the legal nature of a service provider should use these guidelines to assist them.

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. In this test one cannot have a strict checklist approach. In today's world an entrepreneur is busy ensuring that his business is surviving, that he does not have the time to keep up to date with the administrative changes. One often forgets that there are various other tax implications of engaging the services of an independent contractor.

CHAPTER FOUR OTHER TAXES

4.1 INTRODUCTION

In this chapter the tax implications of other taxes on the independent contractor will be discussed. In this busy business world, one sometimes only thinks that PAYE is the only taxes that effect the engagement of an independent contractor. Very few clients are aware that other taxes also have an impact in the engagement of an independent contractor's service. Such an oversight or ignorance of the law could cost the company dearly. The following is a list of other taxes or levies to consider that have a direct effect on the engagement of an independent contractor:

- Value Added Tax.
- Regional Service levies.
- Skills development levy and
- Unemployment Insurance fund
- Labour Relations Act.

The following is a brief summary of the impact of the above taxes on independent contractors. The aim is not to discuss each of the taxes in detail but only the relevant sections that have an impact will be discussed. However to achieve this, a short summary of the different taxes and levies will be highlighted.

4.2 VALUE ADDED TAX (VAT)

4.2.1 BACKGROUND

VAT was introduced in 29 September 1991 to replace the old General Sales Tax (GST). VAT was initially introduced at a rate of 10% and is currently 14%. VAT is payable to SARS by the 25th of every second month for those vendors that are

registered on a two monthly return. Should one have taxable supplies in excess of R300 000 per year, it is compulsory to register for VAT.

This discussion will only concentrate on the applicable sections of the VAT Act that pertains to independent contractors. Before the effects of VAT on independent contractors is explained, it is necessary to look at some of the more important definitions in the VAT Act 89 of 1991, which are set out below.

“enterprise”

- a) in the case of any vendor other than a local authority, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, fanning, fishing or professional concern or any other concern of a continuing nature or in the form of an association or club;

Provided that-

iii)

- aa) the rendering of services by an employee to his employer in the course of his employment or the rendering of services by the holder of any office in performing the duties of his office, shall not be deemed to be the carrying on of an enterprise to the extent that any amount constituting remuneration as contemplated in the definition of “remuneration” in paragraph 1 of the Fourth Schedule to the Income Tax Act is paid or is payable to such employee or office holder, as the case may be;
- bb) subparagraph (aa) of this paragraph shall not apply in relation to any employment or office accepted by any person in carrying on any enterprise carried on by him independently of the employer or concern by whom the amount of remuneration is paid or payable;

The rendering of a service by an employee to an employer is, in terms of proviso (iii)(aa) of the definition of “enterprise” in section 1 of the Value Added Tax Act (the Act), deemed not to be the carrying on of an enterprise for VAT purposes if the amount paid to the employee for the services rendered constitutes “remuneration” as defined in the Fourth Schedule of the Income Tax Act 58 of 1962.

This does not, in terms of proviso (iii)(bb) of the definition of “enterprise” in section 1 of the Act, apply in relation to any employment accepted by a person in carrying on an enterprise independently of the employer or concern paying the remuneration.

As per SARS issued Circular Minute 3/1999, amounts paid to independent traders do not form part of remuneration as defined and are therefore excluded from proviso (iii)(aa) of the definition of “enterprise” in section 1 of the VAT Act 89 of 1991.

The exclusion from remuneration in the case of an independent trader is valid unless the amount paid to the independent trader is deemed to be remuneration as envisaged by paragraph (ii)(aa) and (bb) of the definition of remuneration as defined. If either one or both of the requirements of paragraph (ii) (aa) and (bb) are met, the amount will constitute remuneration and PAYE will be recoverable. The person receiving the deemed remuneration remains an independent trader and the person is carrying on an enterprise as defined in the Act.

There is therefore a situation where both VAT and PAYE is calculated on the same amount, i.e. where the exemption provided for by proviso (iii)(aa) to the definition of “enterprise” in section 1 of the Act does not apply and where the independent trader is also subject to employees’ tax.

4.2.2 APPLYING THE SARS CIRCULAR MINUTE

VAT is payable on the supply of goods or services by a registered vendor in the course or furtherance of his enterprise. A person does not carry on an enterprise when he renders services in performing the duties of his office when remuneration as contemplated in paragraph 1 of the Fourth Schedule of the Income Tax Act 58 of 1962, is paid or payable to him. Therefore, remuneration which is normally subject to PAYE/SITE is not subject to VAT, and in general salaries, wages, allowances, bonuses, overtime pay, medical-aid and pension fund contributions will therefore not be subject to VAT.

Example: A directors' fee paid to a partnership, of which the director is a partner, does not attract VAT, as it constitutes remuneration as contemplated in the Fourth Schedule to the Income Tax Act 58 of 1962 and is not deemed to be the carrying on of an enterprise.

However VAT is payable in addition to PAYE when the services are rendered by e.g. an independent contractor as opposed to an employee, who is, or is required to be registered as a vendor in terms of proviso (iii)(bb) of the definition of an enterprise in section 1 of the VAT Act.

In summary VAT is not levied if the amount is considered to be remuneration as defined. However there could be a situation where an independent contractor who is registered for VAT and subject his services to VAT. As a result of the statutory provisions he will be deemed to be an employee because he is either subject to control and supervision or he receives regular payments. The payments that he receives will be subjected to PAYE as per the Interpretation Note 17. In this situation he pays both VAT and PAYE on the service that he renders.

4.3 REGIONAL SERVICE COUNCIL LEVIES

4.3.1 INTRODUCTION

The Regional Service Councils were established throughout South Africa. Each council sets the date for registration and for the payment of levies. The former RSC councils are subject to the laws of the province and no longer to a national law. The amount payable for both levies is calculated by the application of a rate to a specified amount and is governed by the Regional Service Councils Act No 109 of 1985.

4.3.2 LIABILITY FOR THE PAYMENT OF LEVIES.

As per Solomon (1997) the following are the two requirements for the liability of levies. The levies are payable as follows:

- An employer who employs or is deemed to employ employees within a region must pay the service levy
- Any person carrying on or is deemed to be carrying on an enterprise within a region must pay the establishment levy.

The levies are broken down into two components. The first is the Establishment levies and the second is the Service levy. For our purposes it is only important to look at what effect an employer paying an independent contractor has on the Service levy. For purposes of this thesis I will only be discussing the levies that are due under the Service levies.

4.3.3 WHO IS AN EMPLOYER?

An employer is defined in the fourth Schedule to the Income Tax Act 58 of 1962. The definition of an employer and remuneration is stated in chapter 2 of this thesis.

Remuneration embraces, salaries, leave pay, allowances, wages, overtime, bonuses, commission, fees, emoluments, pensions superannuation, allowances, retirement allowances, and stipends, whether in cash or otherwise

4.3.4 WHAT IS AN ENTERPRISE?

In terms of the definition of enterprise

“enterprise”
means-

- a) in the case of any vendor other than a local authority, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, fanning, fishing or professional concern or any other concern of a continuing nature or in the form of an association or club;
- b) without limiting the applicability of paragraph (a) in respect of any activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing or professional concern-
- i) the making of supplies by any public authority or any national public entity or provincial public entity listed in Part A or C of Schedule 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999), respectively, of goods or services which the Minister, having regard to the circumstances of the case, is satisfied are of the same kind or are similar to taxable supplies of goods or services

which are or might be made by any person other than such public authority or such public entity in the course or furtherance of any enterprise, if the Commissioner, in pursuance of a decision of the Minister under this subparagraph, has notified such public authority or such public entity that its supplies of such goods or services are to be treated as supplies made in the course or furtherance of an enterprise;

- ii) the activities of any welfare organisation as respects activities referred to in the definition of "welfare organisation" in this section;
- iii) the activities of any share block company (other than the services in respect of which section 12(f) applies) where such company has applied for registration as a vendor under the provisions of section 23(3) and has been registered as such;
- iv) the activities of any person who continuously or regularly supplies telecommunication services to any person who utilises such services in the Republic;

4.3.5 THE SERVICE LEVIES

In terms of the Regional Services Councils Act No 109 of 1985, the levy must be calculated on

- The amount of any remuneration that is paid or becomes payable by an employer to the employees employed or deemed to be employed by him within a region and
- Any drawing that takes place by a person carrying on or deemed to be carrying on an enterprise within a region as contemplated in paragraph (b) of the definition of regional service levy.
- The levy is payable on remuneration and certain drawings. The term employee is not defined and therefore bears its ordinary common law meaning.

4.3.6 SUMMARY

From the above it is apparent that the payment's to the independent contractor will not be subjected to the service levy, if he is indeed an independent contractor. This would be the case where he passes the statutory test and he is not subjected to the control and supervision or receives regular payments. However if the independent contractor is deemed to be an employee, the payments to him will be deemed to be remuneration. Therefore the amount paid to him will be included in the calculation of the service levy. This would result in an additional cost to the client as he now has to pay over to the regional council a levy for the payment of an amount that is deemed to be remuneration.

4.4 SKILLS DEVELOPMENT LEVY (SDL)

4.4.1 BACKGROUND

The SDL is a compulsory levy that is imposed in terms of the Skills Development Levies Act, No 9 of 1999. The purpose of the levy is to assist with the funding of education and training. The levy is payable with effect from 01 April 2000 and is payable to the Commissioner of the South African Revenue Service. The SDL is a levy payable by employers and is calculated at the prescribed percentage of the leviable amount. As per Section 3(1)(a) of the Skills Development levies Act No 9 of 1999, the SDL is payable by the employer and is currently 1% of the leviable amount from 1 April 2001 (previously 0,5% of the leviable amount from 1 April 2000).

The levy must be paid to the Receiver of Revenue with whom the employer is registered and must be paid by the 7th of the following month. If payment is not made within the prescribed period, interest at the prescribed rates will be charged and also a 10 % penalty will be imposed. This is as per Section 11 & 12 of the Skills Development Levies Act and Section 89(ter)(1A) of the Income Tax Act 58 of 1962.

4.4.2 THE LEVIABLE AMOUNT AS PER SARS GUIDELINE IS DEFINED AS:

The total amount of remuneration paid or payable, or deemed to be paid or payable by an employer to its employees during any month as determined for the purposes of determining employee's tax in terms of the Fourth Schedule of the Income Tax Act 58 of 1962, whether or not such employer is liable to deduct or withhold such employee's tax.

In essence the leviable amount is the total amount of remuneration paid or payable or deemed to be paid and payable by an employer to its employees as determined for employees tax purpose. Included in leviable amount are payments to employees that are below the tax threshold. From the definition of leviable amount the important definitions that need to be discussed further are remuneration, employer and employee. These definitions have been mentioned before in chapter two of this thesis.

The definition of remuneration is wide and covers almost all payments to employees. It is important to take note of the exclusions of remuneration. One of the exclusions are payments to independent contractors who are not subject to the control or supervision of any person as to the manner in which their duties are performed or as to the hours of work or if the amounts paid or payable to them are not payable at regular daily, weekly, monthly or other intervals.

4.4.3 SUMMARY

Payments to genuine independent contractors fall out the definition of remuneration and are not subjected to the SDL. However, should the independent contractor be subjected to any one of the conditions, i.e. supervision and control, regular payments etc, the payments to them will fall into the definition of remuneration and will be included in the leviable amount subjected to the SDL at a rate of 1%. This will result in the employer having to incur additional costs, because the employer will be liable for the SDL payable to SARS.

4.5 UNEMPLOYMENT INSURANCE FUND (UIF)

4.5.1 BACKGROUND

The Unemployment Insurance Act No.63 of 2001 and the Unemployment Insurance Contributions Act No.4 of 2002, provides for the imposition and collection of contributions from employers. The Commissioner for the South African Revenue Service is responsible for the collection of the UIF contributions. The UIF had been established of the purpose of providing short-term relief when workers are unemployed due to various reasons. The UIF contributions is a compulsory contribution that is payable to SARS. The information on the UIF was extracted from a SARS Unemployment Insurance Contributions guideline to employers.

4.5.2 EXCLUSIONS OF THE UIF CONTRIBUTIONS

The Unemployment contributions Act applies to employers and employees other than the following:

- Employees employed less than 24 hours a month with a particular employer.
- Employees who receive remuneration under a learnership agreement registered in term of the Skills Development Act.
- Employers and employees in the National and provincial spheres of government and
- Employees who enter the Republic for purpose of carrying out a contract of service, apprenticeship or learner ship and are required on termination of that contract to leave the Republic.

The UIF contributions are payable by the employee and the employer, both paying 1% each of the remuneration paid or payable by the employer during any month. The contributions are based on the remuneration as calculated for PAYE

purposes. The maximum contribution payable is based on a salary of R 8099 per month.

The following payments are excluded from remuneration and no UIF is payable:

- Any amount paid or payable to common law independent contractors (which does not include contractors) who are subject to the control or supervision of any person as to the manner in which their duties are performed or as to the hours of work or if the amounts paid or payable to them are payable at regular daily, weekly, monthly or other intervals.
- Any pension or allowance in terms of the following Acts:
 - Aged Persons Act
 - Blind Persons Act
 - Disability Grants Act
 - Children's Act.
- Amounts paid to an employee to reimburse him for actual business expenses
- Any allowance or advance in terms of an order of divorce or decree of judicial separation or agreement of separation.

4.5.3 SUMMARY

It is quite clear from the above that payment to independent contractors who pass the test of being independent, i.e. there is no supervision or control, payments are not regular, will not be subjected to UIF contributions. However if an independent contractor is deemed to be an employee because of the supervision and control and regular payments, then that payment to the independent contractor will be subjected to UIF and contributions will have to be paid by the employer and the employee (independent contractor). The employer will contribute one percent and

the employee another one percent. One again, this is an additional cost to the employer that he has not previously budgeted for. At the same time the independent contractor who is deemed to be an employee will also contribute 1 percent. It is very important to correctly determine before work commences that the individual is an independent contractor. Should this not be done a client would possibly be liable for UIF on the payments to the independent contractor.

4.6 LABOUR LAW AND EMPLOYEES TAX

4.6.1 INTRODUCTION

The following information was obtained from the South African Labour guide which is available from the website address www.labourguide.co.za. What is the status of your employees? Are they employees, fixed term contractors, independent contractors, temporary employees, or indeed, even probationers in disguise?

"The dilemma continues, what category are your employees under? Furthermore, is the status of your employees fair and legal?

Or are you "bucking the system?"

The employer says the working relationship is that of an independent contractor, and such persons don't qualify for annual leave or sick leave, no 13th Cheque and any pension or medical aid or he says the relationship is that the employee is a 'temp.' The employer is the agency from which the employee is hired.

Firstly it must be understood that this dilemma applies only to those persons who earn below the threshold income of R115572-00 per annum as per the Basic Conditions of Employment Act section 83A(2). There is as yet no definition of an employee or no presumption as to who is an employee in the Basic Conditions of

Employment Act or the Labour Relations Act, No 66 of 1995 applicable to persons earning more than the threshold amount.

There are however other tests such as the dominant impression test and other methods that can be applied to determine whether a person of that category is an employee or not. Persons earning below the threshold amount may if necessary approach the CCMA for an advisory award as to whether that person is an employee or not. (See section 148 LRA). In other words to establish whether the relationship is a Contract of Employment or a Contract of Work. This is in terms of the BCEA section 83A(3).

Effective 1 August 2002, a new section, 200A of the Labour Relations Act (LRA) became operative. The effect of this amendment is that, until the contrary is proved, an independent contractor earning at a rate equivalent to R115 572pa or less, is presumed to be an employee if any one of the following apply:

- The manner in which the person works is subject to control or direction.
- The person's hours of work are subject to control or direction;
- In the case of a person who works for an organisation, the person forms part of that organisation;
- The person has worked for an average of at least 40 hours per month over the last 3 months;
- The person is economically dependent on your business;
- The person is provided with tools of trade or work equipment; or
- The person only works for or renders services to one client.

As an employee he/she will receive the protection of our labour laws including the right to lodge a dispute in the event of an unfair dismissal or unfair discrimination and the right to basic conditions of employment.”

4.6.2 EMPLOYEES TAX TREATMENT

Until now a person recognised in terms of common law and labour law as carrying on a trade independently of a client could still be treated as an “employee” for employee tax purposes where:

- he is subject to the control or supervision of the client as to the manner in which his duties are performed or are to be performed or as to his hours of work; or
- the amounts paid or payable for his services consist of or include earnings, which are payable at regular daily, weekly, monthly or other intervals.

The LRA amendment effectively aligns the employees’ tax treatment and labour law treatment of independent contractors.

4.6.3 PRESUMPTION AS TO WHO IS AN EMPLOYEE.

The Basic Conditions of Employment Act section 83A and the Labour Relations Act section 200A both provide the following “Presumption as to who is an employee”

- [1] A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of contract, if any one or more of the following factors is present:
 - [a] the manner in which the person works is subject to the control or direction of another person
 - [b] the person’s hours of work are subject to the control or direction of another person.
 - [c] in the case of a person who works for an organisation, the person is a part of that organisation
 - [d] the person has worked for that other person for an average of at least 40 hours per month over the last 3 months
 - [e] the person is economically dependant on the other person for whom that person works or renders services
 - [f] the person is provided with tools of trade or work equipment by the other person; or

[g] the person only works for or renders services to one person.

In section 1 of the BCEA "Definitions", the Act gives the definition of an employee as follows:

"employee" means –

- [a] any person, excluding an independent contractor, who works for another person or for the State, and who receives or is entitled to receive, any remuneration; and
 - [b] any other person who, in any manner, assists in carrying on or conducting the business of an employer.
- and 'employed' and 'employment' have a corresponding meaning.

From the above, it is blatantly clear just what an 'employee' is, and just who is classed as an 'employee' for the purposes of the Basic Conditions of Employment Act and the Labour Relations Act. This extends to matters such as PAYE, U.I.F. and so on.

The definition contained in the two Acts will be enforceable on all of the unscrupulous class of employers. Temporary and Independent contractors who recognise their own unenviable situation above must not be frightened to "take on" the employer. After all it is not the 'temporary' or independent contractor who is guilty.

It is the employer who has perpetrated the fraud and thus it is the employer who must pay up and smile. Considering the above definition in the Act, it is almost certain that by far the greater percentage of 'temps' and 'independent contractors' will find that they are in fact employees for the purposes of labour legislation, and are fully entitled to all the benefits and protection offered by the BCEA and the LRA.

Presently, those who earn more than R115572-00 per annum do have a problem of sorts they are not employees in terms of the Act, therefore the first hurdle to overcome at the CCMA is to establish that the relationship between employer and 'temp' or 'independent contractor' is in fact a relationship of employment and not a relationship of work.

4.6.4 INDEPENDENT CONTRACTOR

This type of contract is another method used by that certain class of employers to escape their legal obligations and to defraud the employee of his/her legal entitlement. The true independent contractor is not a Contract of Employment at all; it is a contract of Work.

An example of a true independent contractor is the plumber you call in when your hot water geyser bursts, he comes in, quotes for the job, the quote is accepted (thus enter into a Contract of Work) he replaces your old geyser, you pay his invoice and the contract is ended.

A true independent contractor:

- will be a registered provisional taxpayer
- will work his own hours
- runs his own business
- will be free to carry out work for more than one employer at the same time
- will invoice the employer each month for his/her services and be paid accordingly
- will not be subject to usual "employment" matters such as the deduction of PAYE or UIF from his invoice, will not receive a car allowance, annual leave, sick leave, 13th Cheque and so on.

Employers who outsource their labour requirements to a Labour Broker are not in contravention of the Act, but they must realise that they are not hiring "Independent Contractors." The Labour Broker must provide the benefits provided for in the BCEA to these workers.

More and more employers are going the route of outsourcing labour requirements. It solves a lot of problems, and in many cases can prove to be far more economical than employing labour. For example, the employer does not have to provide pension or medical aid, can easily reduce staff requirements during “valley” periods, and increase staff during peak periods and level out staff requirements for the plateau periods.

The increasing or decreasing of staff can be done without the employer becoming involved in any expensive retrenchment exercises or subsequent visits to the CCMA.

4.7 OBLIGATIONS OF THE EMPLOYER

4.7.1 INTRODUCTION

As highlighted above that a simple payment to an independent contractor, might have a direct effect on the employer’s liability for UIF, SDL and RSC levies. It is therefore important to highlight some of the more important obligations of the employer so that one does not become liable to more penalties and interest due to non-compliance.

4.7.2 REGISTRATION

Every employer must apply for registration with SARS within 14 days after he has become an employer as per paragraph 15(1) of the Fourth Schedule to the Income Tax Act 58 of 1962. An employer does not have to register, as an employer if he has employees who are not liable for normal tax. Where the employer is liable to pay the Skills Development Levy (SDL), the employer must register with SARS. Where an employer is liable for Unemployment Insurance Contribution (UIF), he must register with SARS or the UIF office for the payment of the contribution.

The application for registration must be made on a prescribed form. The Commissioner will provide the employer with a registration number and acknowledge this registration. Whenever registered details have changed, the employer must notify SARS. Failure to do so will result in a fine or imprisonment.

A client can be faced with a position that a payment to an independent contractor will be subject to employee's tax because of the statutory test. Where the client was previously not an employer but, because of the payment to the independent contractor now meets the requirements of the statutory test, this client will now become an employer for PAYE purposes. By becoming an employer, he will have to register with SARS for employee's tax purposes, if not already registered. As a result of the employer will also have to be registered for SDL, RSC and UIF.

Applicable sections of the various legislations relating to registrations are as follows:

Para 15(1) and (3) of the Fourth Schedule of the Income Tax Act 58 of 1962
Paragraph 11B(1) of the Fourth Schedule, definition: "tax period"
Section 3(1), 5 and 6 of the Skills Development Levies Act
Section 4, 9 and 10(1) of the Unemployment Insurance Contributions Act

4.7.3 EMPLOYER'S LIABILITY FOR PAYMENT OF PAYE, SDL AND UIF

Payments of employee's tax must be made in accordance with the provisions of the Fourth Schedule. Para 2 of the Fourth Schedule imposes upon an employer the obligation to deduct and pay over employees tax. Every employer or representative employer who is not a resident, whether or not he is registered as an employer, who pays or becomes liable to pay an amount of remuneration must deduct and withhold employees tax.

The employee's tax deducted must be paid to SARS on the 7th of the month following the month which the employee's tax was deducted. If the 7th day falls on a Saturday, Sunday or a public holiday the payment must be made to SARS on the last working day before such day. An EMP201 is the form used to disclose the PAYE, UIF and SDL payments to SARS. An EMP201 is automatically sent to the employer every month. Should an employer not receive an EMP201 in time, it

will not absolve him from the payment of employee's tax. A 10% penalty will be imposed on the late payment. Payments of employee's tax, SDL, and UIF, must be shown correctly in the EMP201 form. This will avoid incorrect allocation of payments.

4.7.4 EMPLOYER'S LIABILITY FOR FAILURE TO DEDUCT TAXES.

An employer who become liable to make a payment of remuneration and fails to deduct or withhold from it an amount of employees tax, and pay such amount to the Commissioner will be guilty of an offence. He would be liable on conviction to a fine and imprisonment for a period not exceeding twelve months or to both a fine and imprisonment. An employer who fails to deduct the full amount of the employee's tax will be personal liable for the shortfall. An employer will also be liable for UIF, SDL and RSC levies. This is as per paragraph 16(1) of the Fourth Schedule to the Income Tax Act 58 of 1962.

4.7.5 WHEN WOULD AN EMPLOYER BE ABSOLVED?

If an employer has failed to deduct the employees tax and the Commissioner is satisfied that the employer's failure to deduct employee's tax was not due to intent to postpone payment of employee's tax or to evade the employer's obligations under the schedule, the Commissioner may absolve the employer from this liability.

4.7.6 EMPLOYERS RIGHT OF RECOVERY

If the employer has not been absolved from liability the employer has a right of recovery against the employee for the amount paid to the Commissioner in respect of that employee.

4.7.7 PENALTY FOR LATE PAYMENT

If an employer fails to pay an amount for employee's tax, he will be liable for a penalty of 10% imposed on the late payment and also be liable for interest on the outstanding amount. An additional penalty not exceeding an amount equal to twice the amount of employee's tax, SDL or UIF contributions may be imposed.

The applicable sections pertaining to the various legislations are as follows:

Paragraphs 6(1) and 6(2A) of the Fourth Schedule, Section 89 bis(2)
Section 11 and 12 of the Skills Development Levies Act
Section 12 and 13 of the Unemployment Insurance Contributions Act

4.7.8 RECORD KEEPING

Every employer must keep adequate records indicating the employee's remuneration paid and employee's tax on this amount. Similar information must be kept for SDL and UIF. The records must be maintained for a period of five years from the date of last entry. This information must be available for inspection by SARS. Information that is kept in an electronic medium must also be kept for the same period of time.

The applicable sections pertaining to the various legislations are as follows:

Paragraphs 14(1), 14(4) and 30(1)(i) of the Fourth Schedule
Section 74(1) of the Income Tax Act 58 of 1962
Section 13 of the Skills Development Levies Act
Section 10 and 14 of the Unemployment Insurance Contributions Act

4.7.9 AGREEMENTS NOT TO DEDUCT ARE VOID.

Where an employer and the employee have an agreement not to deduct employee's tax, such agreement is void in terms of Paragraph 7 of the Fourth Schedule of the Income Tax Act 58 of 1962. Under no circumstance the employer is permitted to undertake such an agreement.

4.7.10 OFFENCES

The following is a list of offences that the employer should avoid in terms of Paragraph 30 of the Fourth Schedule of the Income Tax Act 58 of 1962:

- Fails to deduct employee's tax or pays the tax to the Commissioner.
- Uses the employee's tax deducted for other purposes other than payment to the Commissioner.
- Permits a false certificate to be issued or is in possession of a false certificate.
- Alters an IRP5 certificate issued by another person.
- Not being an employer and without authority from an employer, issues a document purporting to be an IRP5 certificate.
- Fails to comply with the income tax directive issued by the Commissioner.
- Furnishes false information or misleads the employer regarding the taxes to be deducted.
- Fails to deliver the IRP5 certificates to employees within the prescribed period.
- Fails to comply with any condition prescribed by SARS as to the manner in which IRP5 certificates must be used.
- Fails to comply with the conditions for printing of IRP5 certificates.
- Fails to maintain adequate records for remuneration paid and employee's tax deducted.
- Fails to apply for registration as an employer.
- Fails to notify SARS of the change in address.
- Fails to notify SARS that he has ceased to be an employer
- Fails to comply with a written request for information.
- Defaults in rendering a return.

If an employer is found to be guilty of an offence, he may be fine or sentenced to imprisonment for a period not exceeding twelve months.

4.7.11 OBLIGATION TO ISSUE EMPLOYEES TAX CERTIFICATES

Like any other employee when PAYE is deducted from an independent contractor because the requirements of the statutory tests are met, an employee's tax certificate must be issued to the contractor. An employer must furnish employees to whom remuneration was paid and where employee's tax was deducted, an IRP5 certificate. The independent contractor will submit this IRP 5 certificate with his tax return to obtain a credit of the taxes paid to SARS.

4.8 SUMMARY

One can see from the above list of information and requirements that it is quite an erroneous task to meet with the requirements of the various legislations. It is also quite difficult to keep up to date with the changes. Never the less these are statutory obligations that the employer has to comply with and failure to do so will result in interest and penalties or even worse imprisonment. Having discussed the obligations that an employer has to adhere to, in the next chapter the residence basis of taxation and its effects on independent contractors will be highlighted.

CHAPTER FIVE RESIDENCE BASIS OF TAXATION

5.1 INTRODUCTION

The purpose of this chapter is not to discuss the full tax implications of resident basis of taxation in South Africa, but to highlight the salient points that effect an independent contractor. The investigation will highlight the effects on the independent contractor who is not a resident of South Africa i.e. how will he be taxed in South Africa on the income earned in South Africa. On the other hand the tax implications of a South African resident who is an independent contractor and working overseas will also be discussed. However to achieve this one has to explain a few of the basic principles which are discussed below.

South Africa's change from a source basis of taxation to a residence basis of taxation has resulted in the worldwide income of South African residents being subject to Income Tax in South Africa. The effect of this is that residences are taxed on their worldwide income that is from a source within or deemed to be within South Africa. The residence basis of taxation is applicable to years of assessment commencing on or after 1 January 2001. Since the year of assessment of a natural person commences on 1 March, natural persons will only be affected by the residence basis of taxation with effect from 1 March 2001.

The most important reasons for changing to the new basis of taxation are:

- To place the income tax system on a sounder footing thereby protecting the South African tax base from exploitation;
- to bring the South African tax system more in line with international tax principles;
- the relaxation of exchange control and the greater involvement of South African companies offshore;
- to more effectively cater for the taxation of e-commerce.

5.2 RESIDENT

In determining a person's liability in South Africa, one has to first establish if that person is a resident as defined in the Income Tax Act 58 of 1962. For individuals it means a natural person who is either an ordinary resident (the ordinary resident test) in South Africa or a natural person who is physically present in South Africa for a specified period (the physical presence test).

The gross income definition had to be changed and is now the following as per Section of the Income Tax Act 58 of 1962:

"Gross income" is defined as meaning in the case of a resident " the total amount, in cash or otherwise, received by or accrued to or in favour of such resident" or in the case of a non-resident "the total amount received or accrued to or in favour of such person from a source within or deemed to be within the Republic during such year or period of assessment, excluding receipts or accruals of a capital nature, but including...[various special inclusions]".

In other words two tests are applicable to determine whether or not a person is a resident of South Africa that is the ordinary resident test and the physical presence test. The Income Tax Act 58 of 1962 does not define ordinary residence, and therefore the interpretation is given by the courts must be followed.

5.2.1 THE ORDINARY RESIDENT TEST

The term ordinary resident is not defined in the Income Tax Act and the courts had to rely on the cases for the interpretation of a resident. In CIR v Kuttel 1992 54 SATC 298, the judge stated that ordinary resident was that a person must be habitually and normally resident in South Africa apart from temporary or occasional absence of long or short duration.

In *Cohen v CIR* 1946 AD 174 13 SARC 362, the judge stated that ordinary residence would be the country where a person would return from his wanderings. The courts have established some guidelines, which are, are follows:

- Living in a place of some degree of continuity apart from accidental or temporary absence. If it is part of a persons ordinary regular course of life to live in a particular place with a degree of permanence he or she must be regarded as ordinarily resident;
- The place where his permanent place of abode was, where his belongings were stored, which he or she left for temporary absences and to which he or she regularly returned after such absence,
- A residence that is settled and certain and not temporary and casual.
- Where a person normally resides, apart from his temporary/occasional absence.

5.2.2 APPLICATION OF THE LAW

The question whether a person is ordinary resident in a country is one of fact and each case must be decided on its own facts having regard to principles established by case law. It is not always possible to lay down hard and fast rules. The concept must also not be confused with the term 'domicile', 'nationality' and the concept of emigrating or immigrating for exchange control purposes.

The physical presence at all times is not a requisite to be ordinarily resident in the Republic. The following two requirements need to be present:

- An intention to become ordinarily resident in a country and
- Steps indicative of this intention having been or being carried out.

A person's mode of life may be such that it cannot be said that he or she has a real home anywhere. A common feature of multinational corporations is that certain staffs are virtually permanent wanderers. In such a case the burden would be on the taxpayer to discharge the onus that he or she is not ordinarily in the Republic. It is not possible to lay down any clearly define role or period to determine ordinarily residence.

The effect of the above is that a natural person may be a resident in South Africa even if that person was not physically present in South Africa during the relevant year of assessment. The purpose, nature and intention of the taxpayer's absence must be established to determine whether the taxpayer is still ordinarily resident. The following factors will be relevant in considering the above two requirements as per De Koker (1995):

- Most fixed and settled place of residence
- Habitual abode, that is present habits and mode of life
- Place of business and personal interest
- Status of individual in the country that is immigrant, work permit periods and conditions etc,
- Location of personal belongings
- Nationality
- Family and social relations (school, church etc.)
- Political, cultural or other activities
- Application for permanent residence
- Period abroad, purpose and nature of visits
- Frequency of and reasons of visits.

The above list is not intended to be exhaustive or specific, but is merely a guideline. The circumstance of the person must be examined as a whole and the personal acts of the person must receive special attention.

5.2.3 THE PHYSICAL PRESENCE TEST

This rule is time based and is not applicable to a person who was not at any stage during the relevant year of assessment ordinarily a resident in South Africa. A day includes a part of the day. The test must be done annually to determine whether the person is a resident for the year of assessment. The three requirements for the test i.e. the person must be physically present in South Africa for a period or periods exceeding:

- 91 days in aggregate during the year of assessment under consideration;
- 91 days in aggregate during each of the three years of assessment preceding the year of assessment under consideration and
- 549 days in aggregate during the three preceding years of assessment.

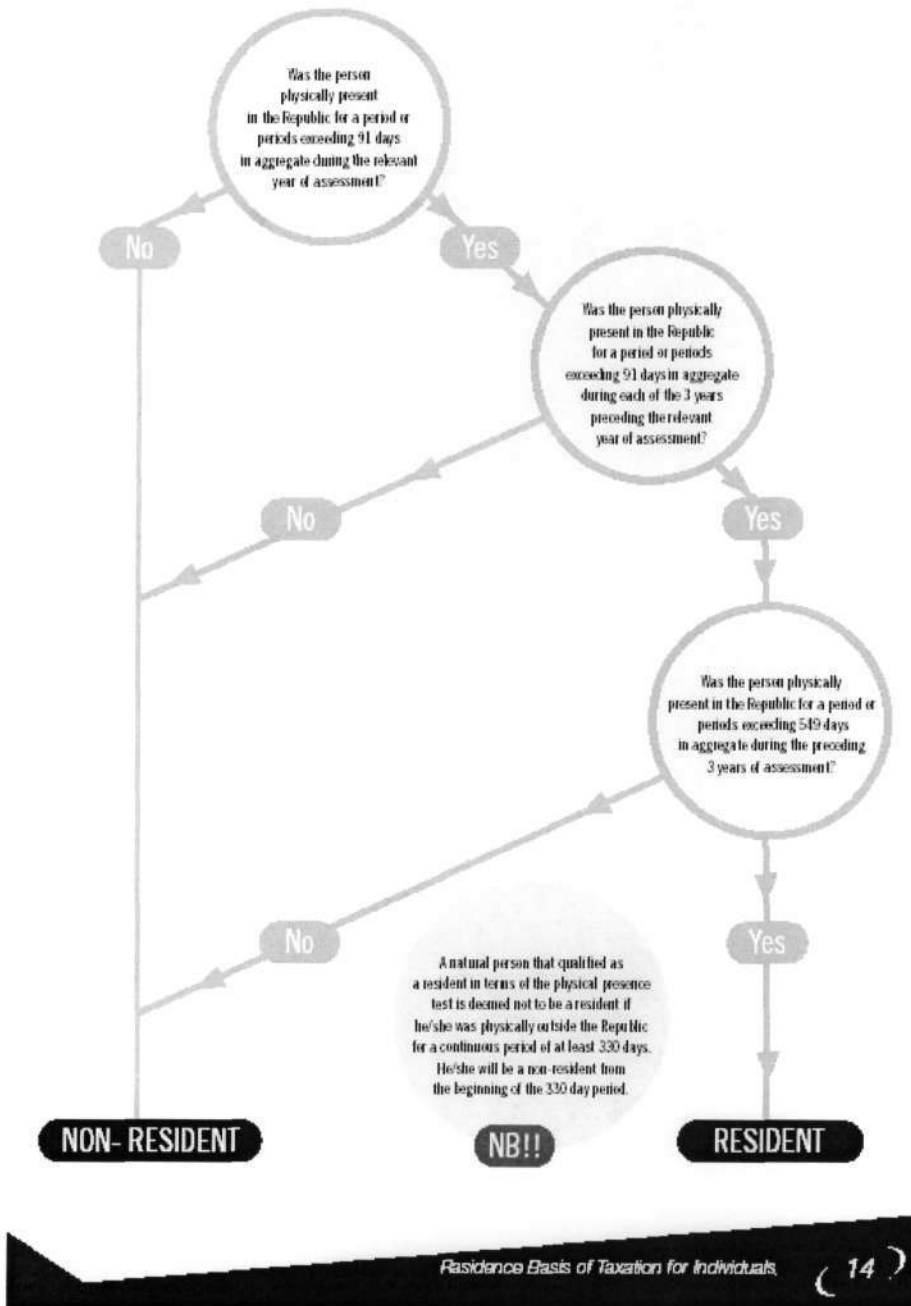
A natural person has to meet all three requirements before he or she will be regarded a resident. A natural person's year of assessment starts on the 1st March and ends on the last day of February in the subsequent year.

It is important to note that a day includes a part of the day. Both the day of arrival and departure are included in the count. A day begins at 00:00. Therefore a person who arrives in the Republic at 23:55 would be regarded to be present in the Republic for a full day. The effect of the definition is that a person who is not ordinarily resident in the Republic can in terms of the physical presence test only become a resident in the Republic in the Fourth year of assessment after having been physically present in the Republic for the first time.

The following flowchart will help explain the physical presence test. Refer to flowchart 5.1 below.

FLOW DIAGRAM 5.1 PHYSICAL PRESENCE TEST

ANNEXURE A: PHYSICAL PRESENCE TEST



A South African resident's income earned from employment, is subjected to tax in South Africa subject to the provisions contained in section 10(1)(o) of the Income Tax Act 58 of 1962 which exempt remuneration of:

- An employee of a ship engaged in the international transportation of passengers or goods, if such a person is outside South Africa for periods exceeding 183 days in aggregate during the year of assessment.
- Individuals who rendered services outside South Africa on behalf of any employer if such a person was outside South Africa for periods exceeding 183 full days in aggregate during the 12 month period commencing or ending during the year of assessment and for a continuous period exceeding 60 full days during that 13 month period.

5.3 THE EFFECT OF THE CHANGES ON A NON-RESIDENT INDEPENDENT CONTRACTOR

Individuals who are non-residents in South Africa are only taxable on amounts received or accrued from sources within South Africa as per the gross income definition in the Income Tax Act 58 of 1962. The tax position of non-residents may be effected by an agreement for the avoidance of double taxation entered into with a foreign country. In terms of that agreement, the non-residents remuneration earned in South Africa may not be taxable in South Africa where specific requirements are met.

As a general rule, salary income earned by a person in South Africa who is not a resident will be taxable in South Africa unless a double taxation agreement between the country of residence and South Africa stipulates otherwise. This is as stated in the gross income definition in Section 1 of the Income Tax Act 58 of 1962

In summary the income of the contractor would be of a South African source and would be taxed in South Africa despite the person being a non-resident as the amount would be included in his/her gross income in terms of the definition of gross income in the Income Tax Act 58 of 1962.

In cases where a contractor receives payment in respect of carrying on an independent trade, the amounts will not be considered to be remuneration and so employee's tax need not be withheld. However this would not apply here as the contractor is a non-resident., as per the definition of gross income in the Income Tax Act 58 of 1962. Also, a contractor will not be considered to be independent if the contractor is supervised and controlled by the "employer" as to the manner in which, or the hours in which work is performed, and there is regularity of payments to the contractor.

Therefore, the income that the contractor receives will be taxable and the employer must deduct employee's tax. The income will be taxable because of the definition of gross income. The definition states that a non-resident will be taxed on the total amount received or accrued from a source within or deemed to be within South Africa. The employee will pay tax at the marginal rate applicable to individuals, but may deduct certain business expenditure in the determination of taxable income.

5.4 THE EFFECTS ON A SOUTH AFRICAN INDEPENDENT CONTRACTOR WORKING OVERSEAS

Any person who is a South African resident as defined, is taxed on all income received or accrued from anywhere in the world. This was effective for years of assessment commencing on or after 1 January 2001. An independent contractor who derives income (business income), from any business or trading activities carried on outside South Africa will be subjected to tax on that income in South Africa as stated in the gross income definition in the Income Tax Act 58 of 1962.. This will result in the business income being subjected to tax in South Africa as well as the country where the trading activities are carried out.

The income received from the foreign business will have to be converted into South African rands in terms of S25D of the Income Tax Act 58 of 1962. However in terms of S9A of the Income Tax Act 58 of 1962, the foreign income will not be subjected to tax in South Africa if such income may not be remitted to South Africa in terms of the laws of that country. Should the South African independent contractor's foreign trade result in an assessed loss, such loss may only be offset against foreign trade income. The foreign trade loss may not be used to offset against any income from carrying on a trade in South Africa. This is in terms of S20 and S20A of the Income Tax Act 58 of 1962.

However there is a remedy for the independent contractor who is taxed in a foreign country on his income as well as in South Africa. The Income Tax Act 58 of 1962 was intended not to double tax any income. The solution is in the form of a rebate in terms of Section 6quat of the Income Tax Act 58 of 1962. The following is a discussion of the rebate and what criteria the independent contractor must be aware of to be able to utilise this rebate.

5.5 WHAT RELIEF IS THERE FOR AN INDEPENDENT CONTRACTOR?

The relief is in the form of a rebate being offered in terms of Section 6quat of the Income Tax Act 58 of 1962. This section allows a rebate against South African tax, any foreign tax paid in respect of that income. The purpose of this note is to explain the provisions of section 6quat as it applies to a resident who is a natural person and who derives income from sources outside the Republic. The rebate is limited to the South African tax arising from that foreign income.

5.5.1 CONDITIONS GOVERNING THE GRANTING OF THE REBATE

The sum of foreign taxes payable may qualify for a rebate against the normal tax payable by a resident if the following conditions are met:

- The taxes must be taxes payable on income.
- Internationally taxes payable on capital gains are regarded as taxes on income. Thus any reference to taxes payable on income includes taxes payable on capital gains. A liability for interest fines, penalties or any other similar obligation imposed in terms of the laws of a foreign country is not regarded as a tax on income and does not qualify for a rebate.
- The taxes must be payable to a foreign government. A government has many different levels for example; national, state, provincial, local or any other level of government will be regarded as taxes payable to a foreign government.
- The taxes should be proved to be payable in respect of an existing foreign tax liability. The rebate is not only granted for foreign taxes actually paid but also in respect of taxes in which a legal obligation to pay exist.
- The taxes must be payable without any right of recovery by any person. The taxpayer or any other person must not be able to recover the taxes proved to be payable.
- The taxes must be payable in respect of amounts included in that residents taxable income.

The section allows for a rebate to be determined in terms of S 6quat(1A). The rebate shall be an amount equal to the sum of any taxes on income proved to be payable to any sphere of government of another country other than South Africa without the right of recovery by any person by such resident in respect of any income contemplated in subsection (1)(a).

5.5.2 THE LIMITATION OF THE REBATE

Section 6quat (1B) of the Income Tax Act 58 of 1962 provides that:

- The rebate or rebate of any tax proved to be payable to the government of any other country or countries,
- Shall not in aggregate
- Exceed an amount, which bears to the total normal tax payable the same ratio as the total taxable income from foreign countries bear to total taxable income. Provided that any deductions in terms of RAF contributions, medical expenses, and donations to PBO's, must be deemed to be incurred proportionately in respect of income derived from sources within the republic and outside the republic.

5.5.3 THE CARRY FORWARD OF AN EXCESS AMOUNT OF FOREIGN TAX CREDIT

When the sum of foreign taxes payable exceeds the amount of the rebate the excess amount may be carried forward to the immediately succeeding year of assessment to rank as a foreign tax credit available for set off against the normal tax payable on foreign income in that year of assessment. This is as per the Proviso (ii)(aa) to section 6quat (1B)(a) of the Income Tax Act 58 of 1962.

The amount of the foreign tax credit which relates to the taxable foreign income derived during a year of assessment must firstly be utilised against the normal tax payable in that year before the balance of excess foreign taxes brought forward from the preceding year may be utilised against the remaining balance of normal tax payable in term of Proviso (ii)(bb) to section 6quat(1B)(a).

An excess amount may not be carried forward for more that 7 years calculated from the year of assessment when it was for the first time carried forward in terms of Proviso (iii) to section 6quat(1B)(a).

5.5.4 RIGHT IN TERMS OF RELIEF UNDER SECTION 6QUAT OR A TREATY

A rebate may be granted in substitution but not in addition to any relief to which a resident is entitled under a treaty concluded with the foreign country concerned. Some treaties specifically provide that relief may be granted for foreign taxes. A taxpayer may elect not to claim a rebate in terms of section 6quat but rather the relief provided for by the treaty. Where the relief provided for in a treaty is chosen none of the other relief granted in terms of section 6quat, for example the carry forward of the excess credit, will be applicable. If no elections are made, the provisions of section 6quat of the Income Tax Act 58 of 1962 will be applied.

5.5.5 THE CONVERSION OF FOREIGN TAX CREDITS TO RANDS

Section 25D of the Income Tax Act 58 of 1962 provides that the taxable income derived by a resident from a source outside South Africa must be determined in a foreign currency. This section stipulates that the foreign currency that a resident should use in order to calculate the amount of taxable income derived from a foreign source, during a particular year of assessment of a resident will depend on the actual circumstances of each specific case.

In instances where the income derived from a foreign source relates to a permanent establishment outside the Republic the taxable income must be determined in the currency used by that establishment for purposes of its financial reporting. Otherwise the calculation must be done in the currency in which the relevant income or expenditure is denominated.

The taxable income calculated in the relevant foreign currency must be translated in to rands at the average exchange rate as determined for that year of assessment. A resident who derives taxable income from a foreign source in any year of assessment must in translating the taxable income to rands, make an election between either

- The time based average rate or
- The weighted average of spot rates.

The rate chosen for any year of assessment must be applied consistently within that year of assessment. Any foreign taxes proved to be payable in respect of any income derived from a foreign source which is included in the taxable income of a resident during a particular year of assessment shall be converted to rands on the last day of that year of assessment. This is done by applying the average exchange rate elected by the resident to translate the amount of taxable income derived by him or her from that foreign source for that year in terms of Section 6quat(4) of the Income Tax Act 58 of 1962.

5.5.6 RECALCULATION OF THE REBATE

There will be situations where a resident has claimed a rebate in terms of section 6quat in a previous year of assessment and subsequently it is proved that the actual foreign taxes payable are

- More than the amount initially claimed, or
- Less than the amount initially claimed.

If this is the case a revised assessment which takes into account the correct amount may be issued within 6 years from the date of the assessment in terms of which the rebate was first allowed, unless the Commissioner is satisfied that the amount of tax proved to be payable was incorrectly reflected due to fraud or misrepresentation or nondisclosure of material facts. [Section 6quat(5)]. In this case the general prescription periods provided for in sections 79 and 81(5) would not apply. [section 6quat(5)].

5.5.7 PROOF OF FOREIGN TAXES PAID

Section 6quat of the Income Tax Act 58 of 1962 provides that a taxpayer is entitled to claim a rebate in respect of foreign taxes paid for income that is taxed in South Africa. However in order to claim the rebate in respect of taxes paid a taxpayer must substantiate the amount of tax paid or payable in the foreign country. A taxpayer might experience difficulties in respect of tax year-ends for the different countries and a self-assessment basis utilised in other countries.

The following is a guideline in respect of the difficulties:

□ Different tax years

The practical difficulty is the fact that the taxpayer can potentially receive the certificate of earnings several months after the end of the South African tax year. This would mean that the taxpayer would be obliged to apply for extension of time within which to submit his South African income tax return.

□ Adequate proof of payment

Where the foreign tax has not been withheld at source an assessment or receipt is issued by the relevant tax authority. Where the taxpayer is not in receipt of an assessment from the foreign tax authority because the foreign jurisdiction has a self-assessment system, a copy of the tax return submitted to the relevant tax authority will be acceptable.

5.6 DOUBLE TAXATION AGREEMENTS

5.6.1 INTRODUCTION

It is practice in most countries for income tax to be imposed both on worldwide income derived by the residents of the country and on income derived by non residents which arises in that country. The effect of this is that income derived by a

resident of one country from a source in another country is subjected to tax in both countries.

The problem of international double tax arises because of different ways in which different countries levy taxes. Double taxation may arise in the following ways:

- One country taxes the income on a source basis and the other taxes the income on a residence basis.
- Both countries tax the income on a resident basis, but have a different definition of a resident.
- Both countries tax the income on source, but have different versions of source.
- Both countries tax on a resident basis for residents, but on a source basis for non-residents.

The model OECD (Organisation for Economic Co-operation and Development) treaty is drafted on the presumption that both parties to the tax treaty tax on a residence basis and have recognised the need to clarify, standardise and guarantee the tax position of each state. This has resulted in a standard treaty known as the OECD model treaty. This is as per Huxham & Haupt Notes on South African Income Tax, chapter on residence and non residence.

5.6.2 THE PURPOSE OF THE DOUBLE TAXATION TREATY IS AS FOLLOWS:

- Resolve conflict arising from source and residence.
- Determine the taxing rights of the parties.
- Set the maximum level of double tax permitted.

5.6.3 SOLUTIONS TO THE DOUBLE TAX PROBLEM

Relief to the double tax problem is achieved in one of two ways, firstly unilateral relief and secondly bilateral relief.

5.6.3.1 UNILATERAL RELIEF

This is where it is granted by one jurisdiction without any link with another jurisdiction. Unilateral relief is provided in one of the following measures:

- A credit for taxes suffered in another country.
- An exemption from domestic taxes on foreign income;
- A deduction as an expense of taxes paid on foreign income or
- A reduced rate of tax on foreign income.

Example

In the case of the United States, provisions exist for the granting of credits in respect of foreign tax paid on income, which is subject to United States tax.

Similarly, Section 108 of the Income Tax Act 58 of 1962 provides for a rebate in respect of foreign taxes paid on foreign sourced income, which is deemed to be from a South African source. Unilateral relief can also take the form of a total exemption from tax granted by one exemption or a qualified exemption.

5.6.3.2 BILATERAL RELIEF

Section 108 of the Income Tax Act 58 of 1962 provides that South Africa may enter into an agreement with the government of another country to regulate the taxation of income, profits, gains and donations, which may be taxable in both countries. As soon as an agreement is ratified the provisions of the agreement are effective. The agreement cannot impose more taxes than is provided for in the Income Tax of

that country. The above was extracted from Huxam & Haupt, Notes on South African Income Tax chapter on residence and non residence

The State President has, in the exercise of these powers, entered into a number of agreements, which fall into two classes:

- Comprehensive agreements, covering a number of different types of income, and
- Restricted agreements, dealing only with income from shipping and aircraft business.

Remuneration for services rendered are dealt with in the tax treaty under two different articles, the one dealing with the services of an independent contractor (article 14) and the other dealing with employer employee relationships (article 15). For the purpose of this thesis the discussion will be on article 14 and its effects on independent contractor.

5.6.4 ARTICLE 14 – INDEPENDENT PERSONAL SERVICE

This article is now deleted. It provided that where a person rendering an independent service was a resident of one country and had a fixed base from which he operated in the other country, he may have been taxed in the other country on the income attributable to that fixed base. Independent personal services are now included in article 7 of the double taxation agreements.

5.6.5 SUMMARY

There is light at the end of a tunnel for an independent contractor that has been subjected to South African taxes because of the change in legislation to tax individuals on residence basis of taxation. In the same token, if one had a situation where there was an independent contractor who is a non resident and was subject

to tax in South Africa, that individual will be entitled to some relief in his country of residence for the taxes that he has paid to South Africa. This is the purpose of a double taxation agreement.

CHAPTER SIX COMPARISON WITH OTHER COUNTRIES

6.1 INTRODUCTION

In the prior chapters the South African tax implications on the independent contractor had been explained in detail. In this chapter, a summary of the tax implications of independent contractors in other countries namely, United States of America, United Kingdom and Australia will be discussed. It would be interesting to see how these countries determine the status of independent contractors and at the same time tax the independent contractors. Finally at the end of the chapter a comparison is done between these other countries and South Africa.

6.2 UNITED STATES OF AMERICA

The information on independent contractors in the United States of America was obtained from the Internal Revenue Service website www.irs.gov. The following is a summary of how independent contractors are treated in American and what factors are used to determine their independent status.

6.2.1 INDEPENDENT CONTRACTOR VERSUS EMPLOYEE

Before determining how to treat payments for services, one must first know the business relationship that exists between the client and the person performing the services. The person performing the services may be the following:

- An independent contractor
- A common-law employee (Employee)
- A statutory employee

- A statutory none employee

In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.

It is critical that the employer, correctly determine whether the individuals providing services are employees or independent contractors. Generally one must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. One does not generally have to withhold or pay any taxes on payments to independent contractors.

Caution must be exercised because an incorrect classification of an employee as an independent contractor could end up in the client being held liable for employment taxes for that worker, plus a penalty. This is as per the website www.irs.gov/business.

6.2.2 WHO IS AN INDEPENDENT CONTRACTOR?

The general rule is that the payer has the right to control or direct only the result of the work done by an independent contractor, and not the means and methods of accomplishing the result.

Example: Vera Elm, an electrician, submitted a job estimate to a housing complex for electrical work at \$16 per hour for 400 hours. She is to receive \$1,280 every 2 weeks for the next 10 weeks. This is not considered payment by the hour. Even if she works more or less than 400 hours to complete the work, Vera Elm will receive \$6,400. She also performs additional electrical installations under contracts with other companies that she obtained through advertisements. Vera is an independent contractor.

6.2.3 WHO IS A COMMON LAW EMPLOYEE

Under common-law rules, anyone who performs services for an employer is your employee if the employer can control what will be done and how it will be done. This is so even when the employee is given freedom of action. What matters is that the employers have the right to control the details of how the services are performed.

To determine whether an individual is an employee or independent contractor under the common law, the relationship of the worker and the business must be examined. All evidence of control and independence must be considered. In an employee-independent contractor determination, all information that provides evidence of the degree of control and degree of independence must be considered.

Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties.

6.2.3.1 BEHAVIORAL CONTROL

The facts show whether the business has a right to direct and control how the worker does his job. A worker is an employee when the business has a right to direct and control the worker. The business does not have to actually direct or control the way the work is done, as long as the employer has the right to direct and control the work. These would include:

Instructions - an employee is generally told:

- When, where, and how to work
- What tools or equipment to use
- What workers to hire or to assist with the work
- Where to purchase supplies and services

- What work must be performed by a specified individual
- What order or sequence to follow

Training – an employee may be trained to perform services in a particular manner.

6.2.3.2 FINANCIAL CONTROL

Facts that show the financial control include:

- Facts that show whether the business has a right to control the business aspects of the worker's job include:
 - The extent to which the worker has un reimbursed expenses
 - The extent of the worker's investment
 - The extent to which the worker makes services available to the relevant market
 - How the business pays the worker
 - The extent to which the worker can realise a profit or loss

6.2.3.3 TYPE OF RELATIONSHIP

Facts that show the type of relationship include:

- *Written contracts describing the relationship the parties intended to create*
- Whether the worker is provided with employee-type benefits
- The permanency of the relationship
- How integral the services are to the principal activity

6.2.4 WHO IS AN EMPLOYEE

A general rule is that anyone who performs services for an employer is your employee. If the employer can control what will be done and how it will be done.

Example: Donna Lee is a salesperson employed on a full-time basis by Bob Blue, an auto dealer. She works 6 days a week, and is on duty in Bob's showroom on certain assigned days and times. She appraises trade-ins, but her appraisals are subject to the sales manager's approval. Lists of prospective customers belong to the dealer. She has to develop leads and report results to the sales manager. Because of her experience, she requires only minimal assistance in closing and financing sales and in other phases of her work. She is paid a commission and is eligible for prizes and bonuses offered by Bob. Bob also pays the cost of health insurance and group-term life insurance for Donna. Donna is an employee of Bob Blue.

6.2.5 STATUTORY EMPLOYEES

If workers are independent contractors under the common law rules, such workers may nevertheless be treated as employees by statute (statutory employees) for certain employment tax purposes if they fall within any one of the following four categories and meet the three conditions described under Social security and Medicare taxes, below.

A driver who distributes beverages (other than milk) or meat, vegetable, fruit, or bakery products; or who picks up and delivers laundry or dry cleaning, if the driver is your agent or is paid on commission.

A full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contracts, or both, primarily for one life insurance company.

An individual who works at home on materials or goods that are supplied by the client and that must be returned to the client or to a person the client specifies, if the client also furnish specifications for the work to be done.

A full-time traveling or city salesperson who works on your behalf and turns in orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. The goods sold must be merchandise for resale or supplies for use in the buyer's business operation. The work performed for you must be the salesperson's principal business activity.

6.2.6 STATUTORY NONE EMPLOYEES

There are two categories of statutory none employees: direct sellers and licensed real estate agents. They are treated as self-employed for all Federal tax purposes, including income and employment taxes, if:

- Substantially all payments for their services as direct sellers or real estate agents are directly related to sales or other output, rather than to the number of hours worked and
- Their services are performed under a written contract providing that they will not be treated as employees for Federal tax purposes.

The above is a summary of how the USA determines the status of independent contractors. One must not confuse the information highlighted above to the South African independent contractor situation. The next country that will be discussed is the United Kingdom.

6.3 UNITED KINGDOM

The information on independent contractors in the United Kingdom was obtained from the government website, Inland Revenue www.inlandrevenue.gov.uk. The following is a summary of how independent contractors are treated in the United Kingdom and what factors are used to determine their independent status.

6.3.1 INTRODUCTION

Whether a worker would have been an employee if engaged directly by the client depends on a range of factors. But the final decision is not reached by adding up the number of factors pointing towards employment and comparing that result with the number pointing towards self-employment. The Courts have specifically rejected that approach.

In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through a checklist to see whether they are present in, or absent from, a given situation. It is a matter of evaluation of the overall effect which is not necessarily the same as the sum total of all the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.

When the detailed facts have been established the right approach is to stand back and look at the picture as a whole, to see if the overall effect is that of a person in business on his own account or a person working as an employee in somebody else's business. If the evidence is evenly balanced the intention of the parties may then decide the issue.

6.3.2 DECIDING EMPLOYMENT STATUS

There is no statutory definition of "employment". However, the question of employment status has come before the Courts on numerous occasions. The approach taken by the Courts has been to identify factors, which help to determine if a particular contract is a 'contract of service' (employment) or a 'contract for services' (self-employment). Relevant factors are:

6.3.3 CONTROL

A worker will not be an employee unless there is a right to exercise 'control' over the worker. This may be a right to control 'what' work is done, 'where' or 'when' it is done or 'how' it is done. Actual control of this sort is not necessary. It is the right of control that is important.

Where a client has the right to determine 'how' the work is done this is a strong pointer to employment. But it is not an essential feature of employment. Many 'experts' who are employees are not necessarily subject to such control (for example, ship's captain, consultant brain surgeon, etc).

Equally a right to determine 'what' work is carried out is a strong pointer to employment. It will normally be a feature whenever a client needs a worker to undertake whatever tasks are required at any particular time or where the worker is required to work as part of a co-ordinated team.

6.3.4 THE RIGHT TO GET A SUBSTITUTE OR HELPER TO DO THE JOB.

A person who has the freedom to choose whether to do the job himself or hire somebody else to do it for him, or who can hire someone else to provide substantial help is probably self-employed. However, this must be viewed in the context of the arrangements overall. For example, a worker may choose to pay a helper to take phone messages and deal with invoicing and general bookkeeping work for the intermediary. But this would not be directly relevant when considering an engagement where the worker is engaged to lay bricks for a client.

6.3.5 PROVISION OF EQUIPMENT

A self-employed contractor generally provides whatever equipment is needed to do the job (though in many trades, such as carpentry, it is common for employees as well as self-employed workers to provide their own hand tools). The provision of significant equipment (and/or materials), which is fundamental to the engagement is of particular importance. For example, where an IT consultant is engaged to undertake a specific piece of work and must work exclusively at home, using the worker's own computer equipment that will be a strong pointer to self-employment. But where a worker is provided with office space and computer equipment that points to employment. The fact that a worker might occasionally choose to do some of the work at home using his or her own computer does not change that (many employees do just that).

6.3.6 FINANCIAL RISK

An individual, who risks his own money by for example, buying assets needed for the job and bearing their running costs and paying for overheads and large quantities of materials, is almost certainly self-employed. Financial risk could also take the form of quoting a fixed price for a job with the consequent risk of bearing the additional costs if the job overruns. Another example of a financial risk is where a skilled worker incurs significant amounts of expenditure on training to provide himself with a skill, which he uses in subsequent engagements. This can be treated in the same way as investment in equipment to be used in a trade, as a pointer to self-employment, if there is a real risk that the investment would not be recovered from income from future engagements..

6.3.7 BASIS OF PAYMENT

Employees tend to be paid a fixed wage or salary by the week or month and often qualify for additional payments such as overtime, long service bonus or profit share. Independent contractors on the other hand tend to be paid a fixed sum for a

particular job. Payment "by the piece" (where the worker is paid according to the amount of work actually done) or by commission can be a feature of both employment and self-employment.

6.3.8 OPPORTUNITY TO PROFIT FROM SOUND MANAGEMENT

A person whose profit or loss depends on his capacity to reduce overheads and organise his work effectively may well be self-employed. People who are paid by the job will often be in this position.

6.3.9 PART AND PARCEL OF THE ORGANISATION

Establishing whether a person becomes 'part and parcel' of a client's organisation can be a useful indicator in some situations. For example, someone taken on to manage a client's staff will normally be seen as part and parcel of the client's organisation and is likely to be an employee.

6.3.10 RIGHT OF DISMISSAL

A right to terminate an engagement by giving notice of a specified length is a common feature of employment. It is less common in a contract for services, which usually ends only on completion of the task, or if the terms of the contract are breached.

6.3.11 EMPLOYEE BENEFITS

Employees are often entitled to sick pay, holiday pay, pensions, expenses and so on. However, the absence of those features does not necessarily mean that the worker is self-employed - especially in the case of short-term engagements where such payments would not normally feature.

6.3.12 LENGTH OF ENGAGEMENT

Long periods working for one engager may be typical of an employment but are not conclusive. It is still necessary to consider all the terms and conditions of each engagement. Regular working for the same engager may indicate that there is a single and continuing contract of employment. Where an engagement is covered by a series of short contracts or an initial short contract subsequently extended for a longer period, it is the length of the engagement that is relevant, rather than the length of each contract.

6.3.13 PERSONAL FACTORS

In deciding a person's employment status it may sometimes be necessary to take into account factors which are personal to the worker and which have little to do with the terms of the particular engagement being considered. For example, if a skilled worker works for a number of clients throughout the year and has a business-like approach to obtaining his engagements (perhaps involving expenditure on office accommodation, office equipment, etc) this will point towards self-employment. Personal factors will usually carry less weight in the case of an unskilled worker, where other factors such as the high level of control exercised by the contractor are likely to be conclusive of employment.

6.3.14 INTENTION

It is the reality of the relationship that matters. It is not enough to call a person "self-employed" if all the terms and conditions of the engagement point towards employment. However, if other factors are neutral the intention of the parties will then be the decisive factor in deciding employment status.

6.3.15 THE COMMON INDICATORS OF EMPLOYMENT ARE:

- The contractors have the right to control what the worker has to do. When and where done, even if the contractor rarely uses that control.
- The worker only supplies his or her own small tools.
- The worker does not risk his or her money as there is no possibility that he will suffer a financial loss.
- The worker has no business organisation, for example, yard, stock materials etc.
- The worker is paid by the hour, day, week or month.

6.3.16 THE COMMON INDICATORS OF SELF-EMPLOYMENT (INDEPENDENT CONTRACTOR)

- Within an overall deadline, the worker has a right to decide how and when the work is done.
- The worker supplies materials, plant or heavy equipment needed for the job.
- The worker bids for a job and will bear the additional costs if his or her bid is unsuccessful.
- The worker has a right to hire other people who answer to him or her.
- The worker is paid an agreed amount regardless of how long it takes.

The above information was obtained from the website www.inlandrevenue.gov.uk

The last country that will be discussed is Australia. Once again the above information although similar must not be confused to the position in South Africa.

6.4 AUSTRALIA

6.4.1 INTRODUCTION

The information on independent contractors in Australia was obtained from the government website Australian Government www.ato.gov.au. It is important to determine whether the workers are employees or independent contractors. The payer (employer) have different tax obligations when the engage an employee or independent contractor.

There are a number of factors that determine if the worker is an employee or independent contractor. However no one factor is conclusive. A key factor in determining if a worker is an employee is the degree of control that can be exercised over the worker. Should the payee have a right to direct, how, when, where and who performs the work, would indicate that the worker is an employee.

Another key factor is whether the worker is being paid for the time they work, or being paid for a result. The workers that are paid for the time that they work are an indication of an employee. The worker that is paid for a result is more likely to be independent contractors.

6.4.2 GENERALLY A WORKER IS AN EMPLOYEE IF THEY

- Are paid for time worked
- Receive paid leave
- Are not responsible for providing the materials or equipment for doing the job
- Must perform the duties of their position
- Agree to provide their personal service
- Work hours set by an agreement or reward

- Are recognised as part and parcel of the business
- Takes no commercial risk and cannot make a profit or loss from the work performed.

If the worker is an employee the payer (employer) must withhold taxes from the payment to the worker. The employer determines the amount of taxes to be withheld by using the tax tables and information provided by the employee.

6.4.3 INDEPENDENT CONTRACTOR STATUS

An independent contractor is an entity that agrees to produce a result for an agreed price. The following will indicate an independent contractor status:

- Is paid for results achieved
- Provides most of the materials and equipment to complete the work
- Is free to delegate work to other entities
- Has freedom in the way the work is done
- Provides services to the general public and other businesses
- Is free to accept or refuse work
- And is in a position to make a profit or a loss.

Should there be payments made to an independent contractor, the employer is required to withhold taxes only where the contractor:

- Has entered into a voluntary agreement with the payer to have amounts withheld.
- Provides their work or services for a client of the payer under a labour hire agreement or
- Has not quoted their Australian business number (ABN) to the payer.

Most independent contractors provide for their tax obligation through the PAYG (Pay as you go) instalment system.

In summary the following is a differentiation between an employee and independent contractor as per the Australian office.

TABLE 6.1 DIFFERENTIATIONS BETWEEN EMPLOYER AND INDEPENDENT CONTRACTOR

Factors to consider	Employee	Contractor
Control over work	The employer has an implied right to control the work of an employee. The employee works in the business of the employer.	The employer has a right to specify how the contracted services are to be performed. Such control must be specified in the agreement; otherwise the contractor is free to exercise their discretion.
Independence	Work is performed by the employee in terms of employment contract	Contractor performs services as specified in the contract and provides additional services by agreement.
Payment	Payment is based on the period of time worked.	Payment is dependent on the performance of the contract.

Commercial risk	Employee bears no risk. The employer is responsible for any work performed by the employee.	The contractor bears legal risk in respect of the work. The have a potential to make a profit or loss.
Ability to delegate	Employee does the work personally and cannot subcontract the work	Unless specified in the Act, the contractor can subcontract or delegate the work.
Tools & equipment	Employer provides the tools and equipment	Contractor provides the tools and equipment.

Table obtained from Australian Tax office www.ato.gov.au.

Now that I have highlighted how the other countries tax and determine the independent contractor's status, I will compare this to the factors used in South Africa. The table is an indication of the common factors.

TABLE 6.2 COMPARISONS OF FACTORS USED IN OTHER COUNTRIES

ITEMS/COUNTRY	SOUTH AFRICA
UNITED STATES OF AMERICA	
Behavioral control, instructions,	✓
When, where and how to work	✓
What tools and equipment to use	✓
What workers to hire or to assist with the work	✓
Where to purchase supplies and services	✓
What work must be performed	✓
What order or sequence to follow.	✓
Training	✓
Financial control- The extent which the worker has unreimbursed expenses	
The extent of the workers investment	
The extent to which the worker makes services available to the relevant market	✓
How the business pays the worker	✓

The extent which the worker can realize a profit or loss	✓
Type of relationship	✓
Whether the worker is provided with employee benefits	✓
The permanency of the relationship	✓
How integral the services are to the principal activities	✓
UNITED KINGDOM	
Control – right to control	✓
Right to substitute helper to do the job	✓
Provision of equipment	✓
Financial risk	✓
Basis of payment	✓
Opportunity to profit from sound management	✓
Part and parcel of organization	✓
Right of dismissal	✓
Employee benefits	✓
Length of engagement	✓
Personal factors	✓

Intention	✓
AUSTRALIA	
Control over work	✓
Independence	✓
Payment	✓
Commercial risk	✓
Ability to delegate	✓
Tools and equipment	✓

Source own

6.5 CONCLUSION

The above table depicts the various countries on the left and what criteria are used to determine an independent contractor status. On the right, the tick indicates if that criteria is also used in South Africa to determine the status of an independent contractor. One can see from the above that it seems from the countries chosen it is evident that all countries use more or less the same factors to help determine the status of an independent contractor. There is definitely more factors in place in the South African legislation that will help determine an independent status than in any other country chosen in my sample. South Africa is in par with the three countries in my sample. The Legislation in South Africa is similar to the other countries.

CHAPTER SEVEN PROS AND CONS OF AN INDEPENDENT CONTRACTOR

7.1 INTRODUCTION

It is a dilemma one is faced at some point during the life of your small business. The company is growing nicely but there is only so much that can be done. Adding to your human resources can result in additional revenue and less chaos in your business life. Should one hire a new employee or an independent contractor?

Hiring an independent contractor or new employee is an important business decision. To assist in arriving at the best possible decision, consider the pros and cons of hiring an employee or an independent contractor:

7.2 PROS OF HIRING AN INDEPENDENT CONTRACTOR

- **Reduced Overhead**

The attraction of hiring an independent contractor is the reduced costs in: expenses, payroll, benefits, and other overhead. Lower overhead means less stress to bring in new business revenue to cover costs.

- **No medical aid benefits**

This one deserves separate mention. A burden on small business is the uncontrollable costs of employee medical benefits.

- **Work On Demand**

Hiring independent contractor offers flexibility to the changing work demands of your company. You have the ability to take added opportunities as they arise and during slow periods have greater cost control. Your contract workforce often comes fully trained and highly specialised.

7.3 PROS OF HIRING AN EMPLOYEE

- **Dedicated Loyalty**

Making the commitment to hire an employee can result in having an individual with stronger loyalty than an independent contractor. Added loyalty can result in more productivity. Your loyal staff will be ready to take on additional roles to help your company grow.

- **Multiple Roles**

Staff in small organisations will often perform a variety of roles. This provides various learning opportunities for staff and a flexible diverse workforce for the company.

- **Improved Work Flow**

With a steady stream of business having an employee can be much easier to coordinate projects. Trying to juggle multiple freelancers to meet project deadlines can be a challenge.

7.4 CONS OF HIRING AN EMPLOYEE

- **Added Responsibility**

The burden of your small business providing for your family becomes even greater as you have to make payroll for your staff and help them provide for their families.

- **Extra Overhead**

Not only are there the costs of employee benefits and payroll to consider, one must not forget that the tiny home business or small office will probably have to move to a bigger space, sign a lease, and purchase equipment.

- **Becoming A Manager**

As the small business grows in staff, one becomes less involved in practicing trade and more involved in people management issues. The company will be exposed to worker-related lawsuits. Independents will often require less management due to more motivation from being self-employed.

7.5 CONS OF HIRING AN INDEPENDENT CONTRACTOR

- Lack of Control

Part of what makes a contractor independent is their ability to choose the control over the work performed. Contractors may have additional projects and may have less commitment than an employee.

- No Fixed Rates

Your small business may find the perfect independent contractor to work with but the rates charged can vary by project and overall market demand. With an employee the pay rate can be set until the next review date.

- Misclassification Penalty

If one makes an error in classifying an employee as an independent contractor, one would be liable for employment tax, interest, and a penalty. Use caution and keep current with the legalities.

The distinction between these two worker groups is important because the status of a worker defines his or her rights and remedies in various situations, including, most importantly for the Commissioner, whose obligation it is to pay unemployment, income withholding and other taxes. An independent contractor is responsible for filing and paying his or her own taxes whereas the employer must do this on behalf of an employee.

Because tax revenue is at stake the Commissioner constantly checks business firms to see whether workers listed as independent contractors should really be treated as employees. The tax treatment of the two groups is quite different. The Commissioner prefers to collect taxes on employees from companies because employers are seen as more efficient and reliable taxpayers and easier to control, compared to independent contractors who are on their own and virtually unchecked (and uncheckable) by the Commissioner. Rather than trying to reclassify millions of independent contractors one by one, the Commissioner takes the easier route of attacking the employment status of workers for the thousands of companies who employ independent contractors.

Having stated the options that are available, i.e. the hiring of an independent contractor or an employee the following is a discussion of the pros and cons of working as an independent contractor. The information was adapted from an article written by Fishman (2004).

7.6 PROS AND CONS OF AN INDEPENDENT CONTRACTOR

An independent contractor is a person who contracts to perform services to others without having the legal status of an employee. Most people who qualify as independent contractors follow their own trade, business or profession. This is the reason why they are in business for themselves. This is also why they are called independent contractors. They earn their lively hood from their independent business and do not rely on their employer for a pay cheque.

While independent contracting is common in highly specialised or technical fields such as computer programming, engineering or accounting, there are hardly any jobs that independent contractors do not perform.

7.6.1 ADVANTAGES OF WORKING AS AN INDEPENDENT CONTRACTOR.

□ You are your own boss

Once, you are your own boss with all your risk and rewards that entails. Most independent contractors bask in the freedom that comes from being in business for themselves. They can choose how and where to work, for as much or little time as they want. Independent contractors are masters of their economic fate. The amount of money made is directly related to the quantity and quality of your work. This is not necessarily the case for employees.

Independent contractors do not have to ask their bosses for raises. If they want to earn more, they just have to go out and find more work. Since your livelihood are normally not dependent upon a single company, the hiring or firing decisions of any one company do not impact you as they do employees.

- You may earn more than employees.

Often one earns more as an independent contractor than as an employee in someone else's business. How much fees are received is a matter of negotiations between the independent contractor and your clients. Independent contractors whose skills are in demand may receive far more than employees doing the same work.

- Payment of lower income taxes

Being an independent contractor also entitles one to many tax benefits that employees don't have. For example, no taxes are withheld from your payments, as they must be for employees (this is only the case if you are an independent contractor and not deemed to be an employee). Instead, independent contractor normally pay estimated taxes (provisional taxes) directly to the Commissioner three times a year. This means you can hold on to your hard-earned money longer before paying it over to the Commissioner. Moreover, it's up to the independent contractor to decide how much estimated tax to pay (but there are penalties should there be an underpayment). This flexibility gives Independent contractor more control over the money they earn.

Even more important, one can take advantage of many business-related tax deductions that are not available to employees. When you're an independent contractor, one can deduct from your income tax any necessary expenses related to your business, as long as they are reasonable in amount and ordinarily incurred by businesses of your type. This may include, for example, office expenses including those for home offices, travel expenses, entertainment and meal expenses, equipment and insurance costs and more.

In contrast to the numerous deductions available to independent contractors, an employee's work-related deductions are severely limited. Some deductions available to independent contractor may not be available

to employees. Because of these tax benefits, Independent contractor often pay less tax than employees who earn similar incomes.

7.6.2 DISADVANTAGES OF WORKING AS AN INDEPENDENT CONTACTOR

Despite the advantages, being an independent contractor is no bed of roses. Here are some of the major drawbacks.

□ No job security

As discussed above one of the best things about being an independent contractor is that you're on your own. But this can be one of the worst things about it as well. When you're an employee you must be paid as long as you have your job even if your employer's business is slow. This is not the case when you're an independent contractor. If there is no business you don't make any money. As one independent contractor says, "If I fail, I don't eat. I don't have the comfort of punching a time clock and knowing the check will be there on payday."

□ No employer-provided benefits

Although not required to by law employers usually provide their employees with medical aid, paid leave and paid sick leave. More generous employers may also provide retirement benefits, bonuses and even employee profit sharing. When you're an independent contractor there are no such benefits. You must pay for your own medical aids often at higher rates than employers are able to pay. Time lost due to vacations and illness comes directly out of your bottom line. And provision must be made for your own retirement. If you don't earn enough money as an independent contractor to purchase these items yourself, one will have to do without them.

□ No unemployment insurance benefits

Independent contractor also don't have the safety net provided by unemployment insurance. Hiring firms do not pay unemployment insurance

for independent contractors, and Independent contractor can't collect unemployment when their work for a client ends.

- No employer-provided workers' compensation

Employers must generally provide workers' compensation coverage for their employees. Employees injured on the job are entitled to collect workers' compensation benefits even if the injury was their own fault. Hiring firms do not provide workers' compensation coverage for independent contractors. If a work-related injury is an independent contractor fault, he or she has no recourse against the hiring firm.

- Few or no labor law protections

A wide array of laws protects employees from unfair exploitation and discrimination by employers. Very few of these laws apply to independent contractors.

- Risk of not being paid

Employees normally have no problem being paid on time by their employers. This is not always the case when you're an independent contractor. Some independent contractors have great difficulty getting their clients to pay on time or at all. When you're an independent contractor one has to bear the risk of loss from deadbeat clients.

- Liability for business debts

Finally, an independent contractor is personally liable for your business debts. Employees are not liable for the debts incurred by their employers. An employee may lose his or her job when the employer's business fails, but will owe nothing to the employer's creditors. An independent contractor whose business fails could lose most of what he or she owns. Despite the drawbacks more or more people are becoming independent contractors,

and the trend is expected to continue. Indeed, some experts predict that the number of independent contractor will double in 10 years.

7.7 SUMMARY

The above list of pros and cons of hiring an independent contractor and pros and cons of an independent contractor's life, is not a conclusive list, but will assist in deciding what option to take. As one can see, the decision is a difficult one.

CHAPTER EIGHT CONCLUSION

8.1 INTRODUCTION

In this chapter the important points or findings that have come about in the research of independent contractors will be summarised. Something that looks simple like the engagement of an independent contractor, will definitely lead to other issues that need to be taken into account. An employer might find himself with more obligations than he had previously. Not every employer thinks of the ramifications of the engagement of an independent contractor. The Commissioner is getting very strict in applying the provisions of the Income Tax Act 58 of 1962. Non-compliance or ignorance will be costly to the employer. Having discussed the above, it is important to preserve your status of an independent contractor.

8.2 PRESERVING YOUR STATUS AS AN INDEPENDENT CONTRACTOR

When the Commissioner conduct audits of hiring firms, they often seek to reclassify independent contractors as employees of the firm. After all the Commissioner gets more money from employees than from contractors, who can deduct business expenses from their incomes. The government gets its money faster from employees, who have to pay taxes right away through payroll withholding, standard income tax on employees (SITE) and pay as you earn (PAYE)

If you're reclassified as an employee, one has to suffer some consequences. For example, the hiring firm may decide not to use your services any more because it doesn't want to pay the additional expenses of treating you as an employee. And reclassification as an employee could create additional tax burdens for yourself, if you have to forego some of the deductions, which you were entitled as an independent contractor.

So how does one make sure that the Commissioner classifies you as an independent contractor? If the guidelines are followed below, you'll have a good chance of surviving an audit with your contractor status intact.

8.2 RETAIN CONTROL OF YOUR WORK

The most fundamental difference between employees and independent contractors is that employers have the right to tell their employees what to do and how to do it. Never permit a hiring firm to supervise or control you as if you were one of its employees. It's perfectly okay for the hiring firm to give you detailed guidelines or specifications for the results it expects from you. But how you go about achieving those results should be entirely up to you.

Following these guidelines will help show that you are the one in charge:

- don't ask for or accept instructions or orders from the hiring firm about how to do your job
- don't ask for or receive training from the hiring firm
- although a hiring firm may give you a deadline for completing your work, you should generally establish your own working hours
- unless the work has to be performed on the hiring firm's premises, decide on your own where you will do the work, and
- decide whether to hire assistants to help you. If you hire workers pay and supervise them yourself.

8.3 SHOW OPPORTUNITIES FOR PROFIT AND LOSS

Because an independent contractor is in business for himself, independent contractors have the opportunity to earn profits or suffer losses. If you run absolutely no risk of loss you're probably not really an independent contractor. The best way to meet this test is to have recurring business expenses, such as office rent, equipment and salaries for assistants.

096575

This demonstrates that one could face a loss if you don't find enough work. You can also show an opportunity for profit or loss by charging your clients a set price for a specific project, rather than billing by the hour or day. If the project price exceeds your expenses, you'll make money. If you charge too little you'll run a loss.

8.4 LOOK LIKE AN INDEPENDENT BUSINESS

Take steps to make yourself look like an independent business person. Here are a few things you can do to cultivate this image:

- don't accept employment benefits such as health insurance, paid vacations or pension benefits from your clients; instead charge your clients enough to purchase these items yourself
- use a business name instead of your own name
- obtain all necessary licenses and permits for your profession
- carry business insurance, and
- maintain a separate bank account for your business.

8.5 WORK OFF SITE

There are some types of work that you will have to do at the hiring firm's business premises. For example, if you are hired to lay a carpet or paint an office you will have to work at the client's workplace. However if your work can be done anywhere, do it anywhere but at the client's premises. This shows that the independent contractor is not subjected to the client's control.

8.6 MAKE YOUR SERVICES WIDELY AVAILABLE

Independent contractors usually offer their services to the general public, not just to one person or company. Government auditors will be impressed if an independent contractor markets his services to the public by, for example:

- obtaining a business card and letterhead
- advertising your services

- maintaining listings in business and telephone directories
- attending trade shows and similar events
- joining professional organisations
- advertising in newspapers, trade journals and magazines
- mailing brochures or other promotional materials to prospective clients, and
- phoning potential clients to drum up business.

8.7 HAVE MULTIPLE CLIENTS

Government auditors will rarely question the status of an independent contractor who works for three or four clients at a time. If the nature of your work requires one to work full time for one client at a time, try to work for more than one client over the course of a year. For example, one might work for one client for six months, then work for another client for the rest of the year.

8.8 USE WRITTEN AGREEMENTS

Use written independent contractor agreements for all but the briefest, smallest projects. Among other things, the agreement should make clear that you are an independent contractor and that the hiring firm does not have the right to control the way you do your work. A written agreement alone won't make you an independent contractor, but it will help convince government auditors of your intent.

Using a written agreement avoids disputes by providing a written description of the services you're supposed to perform, when they are to be performed, and how much you will be paid.

A written independent contractor agreement can also help establish your independent contractor status. Although an agreement by itself is never enough to make a worker an independent contractor, it will help show the Commissioner and other agencies that both you and the hiring firm intended to create a hiring firm-independent contractor relationship, not an employer-employee relationship.

But remember, an independent contractor agreement is only useful if the parties involved follow it. It will be useless if one acts and is treated like an employee.

At the end of this chapter is a sample of an agreement that can be used by independent contractors refer to agreement 7.1.

8.9 DON'T ACCEPT EMPLOYEE STATUS

Some clients will only hire you as an employee not as an independent contractor. This is a particularly common problem for those who work for high technology companies. One may be tempted to let one hiring firm classify you as an employee, particularly if other firms are willing to hire you as an independent contractor. But this is a bad idea because it will encourage the Commissioner to classify you as an employee for all of your jobs. The above information was extracted from an article by Fishman (2004)

8.10 SUMMARY

The following can be concluded: An employee who signs an independent contracting agreement will not necessarily be considered to be an independent contractor. Although there is scope in many working environments for having some work done by independent contractors rather than by employees, this fact is more likely to be challenged in future. The onus to prove that the person is not an employee would in many circumstances be on the "employer". Bogus arrangements may very well backfire.

It has become important that the employer knows the implications of other taxes on independent contractors. The reason being is that if there is non-compliance, one could be faced with additional costs that will have to be borne by the employer. Changes in legislation have placed the task on the employer to correctly determine the status of an independent contractor.

The following is a summary of the different taxes that effect the independent contractor.

TABLE 8.1 SUMMARY OF FINDINGS

	PAYE	SDL	RSC	UIF
Payments to an independent contractor	No	No	No	No
Payments to an independent contractor who is deemed to be an employee because of statutory or dominant impression test	Yes	Yes	Yes	Yes

In the first column are the two types of individuals. The one is the genuine independent contractor and the other an independent contractor who is deemed to be an employee.

As one can see from the above it is important for the employer, that should he engage the services of an independent contractor, he must ensure that the individual is a genuine independent contractor. The only way he can do this is to ensure that that independent contractor pass the statutory test and the dominant impression tests.

Should an employer decide to engage the services of a contractor who does not pass the *statutory test and the dominant impression test*, the employer will incur other costs such as payments for SDL, UIF and RSC levies. It is of utmost importance that employers know the legislation and to determine the correct status of independent contractors.

AGREEMENT 7.1 SAMPLE OF INDEPENDENT CONTRACTORS AGREEMENT

SAMPLE

Insert
Company
and Address

your
Name

Insert your
company
Logo

To use your company stationery, delete the header and footer.

CONTRACTORS AGREEMENT

(This can be used where you make use of the services of a Contractor to fulfill your obligations to a client. You must, however, modify this Contract to suite your own requirements.)

Agreement for the use of the Services of a Contractor

Entered into

and

between

YOUR COMPANY

Registration Number: _____

(who shall be referred to hereinafter as "**the Company**")

of

Address

and

(Hereinafter referred to as "**THE CONTRACTOR**")

of

WHEREAS

the Company conducts business as a contract house and seeks and makes available to other persons, having specialised knowledge and skills, opportunities to perform agreed prescribed services as independent contractors:

AND WHEREAS

THE CONTRACTOR is an independent contractor carrying on business as a supplier of services in the field of _____. **THE CONTRACTOR** has agreed to render the services specified in Annexure A hereto to the **CLIENT** referred to therein on behalf of **the Company** in terms of this Agreement.

NOW THEREFORE IT IS AGREED –

1. DEFINITIONS

The headings of the clauses in this Agreement are for the purpose of convenience and reference only and shall not be used in the interpretation of, nor modify, nor amplify, the terms of this Agreement nor any clause thereof.

- Unless a contrary intention appears:
- Words importing any one gender shall include any other gender;
- Words importing the singular shall include the plural and vice versa;
- Words importing natural persons shall include created entities (incorporated and unincorporated) and vice versa.
- "**CLIENT**" means the person referred to as such in Annexure A hereto, and/or, if consistent with the context in which it is used in this Agreement, any person to whom **the Company** has given a quotation for the supply of the **Prescribed Services** or to whom **the Company** has introduced **THE CONTRACTOR** with a view to concluding an agreement for the supply of the **Prescribed Services**.
- "**Prescribed Services**" means the services to be rendered by **THE CONTRACTOR** to the **CLIENT** on behalf of **the Company** in terms of this Agreement read with Annexure A hereto

2. WARRANTY AND DURATION

THE CONTRACTOR warrants that he has the ability, skill and experience properly to render the

Prescribed Services and to perform all related functions.

This Agreement shall commence on the date set out in Annexure A hereto and shall continue for the period set out therein unless it is terminated prior thereto in accordance with the Termination clause herein.

3. COMPANIES AND CLOSE CORPORATIONS

If **THE CONTRACTOR** is a juristic person the **Prescribed Services** shall be rendered in person by the authorised representative whose name appears in Annexure A hereto, who, by his signature hereto, shall also be bound by the terms of this Agreement.

4. OBLIGATIONS OF THE CONTRACTOR

THE CONTRACTOR shall –

- render the **Prescribed Services** with due skill and proper care, maintaining the highest professional standard at all times.
- perform such **Prescribed Services** at the **CLIENT**'s premises or other locations as are agreed to between himself and the **CLIENT**, which agreement shall not be unreasonably withheld.
- While on the **CLIENT**'s premises adhere to such standard health and safety and security measures as may reasonably be required by the **CLIENT**.
- While rendering the prescribed services, maintain professional standards of conduct in relation to the representatives and employees of the **CLIENT** with whom he has contact.
- During the currency of this Agreement, accept only such other assignments as will not impede his ability or conflict with his obligation to render the **Prescribed Services** within the time period specified in Annexure A hereto.
- Refrain from any action, which may prejudice or be adverse to the business interests of any **CLIENT** or the **Company**.
- Not, for a period of 12 (twelve) months from the date on which **THE CONTRACTOR** was introduced to the **CLIENT** by the **Company**, or the last date on which **THE CONTRACTOR** rendered the **Prescribed Services** to the **CLIENT**, whichever is the later, regardless of any cancellation of this Agreement, and whether for reward or not, directly or indirectly, render to the **CLIENT** services of the same or similar nature to the **Prescribed Services** or similar to the services supplied by the **Company** or furnish any information or advice (whether written or oral) to the **CLIENT** or use any other means or take any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in such **CLIENT** terminating its association with the **Company** or accepting the rendering of the aforementioned services from any person other than the **Company**, or attempt to do so.
- In the event that **THE CONTRACTOR** is requested to render services to the **CLIENT** other than in terms of an agreement between him and the **Company**, to advise the **Company** of that request and take such steps as may be necessary to procure that the services be rendered to the **CLIENT** in terms of an agreement with the **Company**. If **THE CONTRACTOR** fails to notify the **Company** of such a request, he shall be liable to the **Company** for such loss as it may suffer as a result thereof, including, but not limited to, the payment of any placement fee which may have been payable had **THE CONTRACTOR** been placed in the employment of the **CLIENT** by the **Company**.
- Submit to the Directors or principals of the **CLIENT** or any person nominated by them such information and reports as may be reasonably required of him in connection with the rendering of any **Prescribed Services** in terms hereof and Annexure A hereto.
- On completion of the **Prescribed Services** and on cancellation of this Agreement for whatever reason, return to the **CLIENT** all reports, manuals, research papers, letters and/or other documents or information stored electronically or remotely or in any other form and all copies thereof which were created, compiled or brought into being by **THE CONTRACTOR** or came into his possession during the course of the rendering by him of the **Prescribed Services**.

- Have means of transport available to provide for his own transport.
- Ensure that at all times he has access to such facilities and equipment as he may require for the purpose of rendering the **Prescribed Services**.
- Be solely responsible for the administration of his own **business affairs**.
- Not accept any fee or gift from the **CLIENT** without the written permission of **the Company**. Warrant that he will comply with all laws, by-laws and regulations, and to obtain whatever permits and licenses necessary to fulfil its obligations in terms of this Agreement.
- Be liable to the **CLIENT** for any loss that the **CLIENT** may suffer as a result of any theft, fraud, breach of confidentiality or other criminal act of **THE CONTRACTOR**.
- Be required to sign a "Confidentiality and Non-Disclosure contract" between the **CLIENT** and **THE CONTRACTOR**, if so required by the **CLIENT**.
- Be required to complete time sheets, which must be signed and accepted by the **CLIENT**. The time sheets must accurately record work duration and activities.
- Work hours acceptable to **the Company** or to the **CLIENT**, in line with accepted business practices.
- Adhere to specific delivery times to that of the **CLIENT** and ensure that its performance will meet the specifications / requirements of the **CLIENT**.
- Adhere to the terms and conditions of contracts entered into between **the Company** and its clients and / or customers.
- Be responsible for obtaining whatever permits and licenses are necessary to enable **THE CONTRACTOR** to carry out **THE CONTRACTOR's** obligations under this Agreement.

5. CONFIDENTIALITY

THE CONTRACTOR shall not during the operation of this Agreement or thereafter use for his own benefit or for the benefit of any other person or divulge or communicate to any person except to those officials of **the Company** or the **CLIENT** whose province it is to know same, the secrets of **the Company** or the **CLIENT** or any other information which he may receive or obtain in relation to **the Company's** or the **CLIENT's** affairs or those of its customers or of the working of any process or invention or marketing technique which is carried on or used by **the Company** or the **CLIENT** and shall sign all reasonable confidentiality clauses that the **CLIENT** may require him to sign. **THE CONTRACTOR** shall further cooperate with **the Company**, its **CLIENT** and any other persons **the Company** or the **CLIENT** may designate to obtain such security clearance as the **CLIENT** requires. This applies to **THE CONTRACTOR** and all persons who assist **THE CONTRACTOR** in rendering the **Prescribed Services** in whatsoever capacity.

6. INVENTIONS, DISCOVERIES AND COPYRIGHT

THE CONTRACTOR shall, if and when required by the **CLIENT**, apply or join the **CLIENT** at the **CLIENT's** expense in applying for Letters Patent or other equivalent protection in the Republic of South Africa or in any other part of the world for any discovery, invention, process or improvement made in the course and scope of rendering the **Prescribed Services** and shall at the **CLIENT's** expense execute all instruments and do all things necessary for the vesting of the said Letters Patent or other equivalent intellectual property right protection in the name of the **CLIENT** as sole beneficial owner or in the name of such other persons as the **CLIENT** may nominate. No additional consideration shall be payable to **THE CONTRACTOR** either by the **CLIENT** or **the Company** in respect of such transfer of intellectual property rights.

Insofar as may be necessary **THE CONTRACTOR** hereby assigns to the **CLIENT** the copyright (including any moral rights thereto) in all works eligible for copyright, including, without limitations, literary or artistic works or software programs of which he may be the author, which works are created or compiled, devised or brought into being by **THE CONTRACTOR** in the course and scope of the rendering by him of the **Prescribed Services** to the **CLIENT** in terms of this Agreement. No additional consideration shall be

payable to **THE CONTRACTOR** by either the **CLIENT** or **the Company** in respect of such assignment of copyright.

The provisions of this Clause 6 constitute a stipulatio alteri by **THE CONTRACTOR** in favour of the **CLIENT** capable of acceptance by the **CLIENT** at any time.

7. CONSIDERATION

THE CONTRACTOR shall be paid the amount calculated in accordance with Annexure A hereto for the rendering of the **Prescribed Services** on the following conditions:

THE CONTRACTOR shall record all hours spent by him in rendering the **Prescribed Services** on a timesheet approved by **the Company** and countersigned by an authorised representative of the **CLIENT** in confirmation of such hours.

THE CONTRACTOR shall present **the Company** with a formal invoice for hours worked, in accordance with timesheets authorised by the **CLIENT**. The timesheets shall be delivered to **the Company** simultaneously with the invoice referred to herein.

- **the Company** does not guarantee a minimum monthly contract fee.
- **the Company** will not pay **THE CONTRACTOR** a retainer.
- **the Company** shall pay to **THE CONTRACTOR** monthly, on or before the last business day of the same calendar month, the fees set out in the invoice referred to in clause 7.1.2 above, subject to same being verified by the timesheet referred to in Clause 7.1.1 above. No payment shall be due without the authorisation specified in Clause 7.1.1 and presentation of invoice as specified in 7.1.2.

THE CONTRACTOR shall be liable for any taxes or duties (and any interest and penalties in relation to any taxes or duties) which may become payable in relation to any amounts paid by **the Company** to **THE CONTRACTOR** in terms hereof (including VAT, if applicable) and **THE CONTRACTOR** hereby indemnifies **the Company** and holds it harmless against such liabilities.

THE CONTRACTOR reserves the right to proceed on either planned or sick absence, at no cost to **the Company**, provided that, in the case of planned absence, at least two weeks advance notice is given to **the Company** and such absence is agreed to by **THE CLIENT**. No fee shall be chargeable in respect of any absence due to illness, voluntary absence or public holidays.

8. LIABILITY

The Company shall not be liable for any damage arising out of injury to **THE CONTRACTOR** suffered whilst such person is on any premises owned by **the Company** or the **CLIENT** arising out of damage to or loss of any property belonging to such person on such premises or property, whether such injury or damage or loss is caused by negligence of **the Company**, the **CLIENT** or any of their employees or agents or by any other cause. **THE CONTRACTOR** hereby indemnifies **the Company** and the **CLIENT** against such claim or liability.

THE CONTRACTOR indemnifies **the Company** against any claims of the Receiver of Revenue, (PAYE, VAT) Workmens Compensation Board, Regional Council Board or Unemployment Insurance Fund (UIF).

9. ACKNOWLEDGEMENTS BY THE CONTRACTOR

THE CONTRACTOR is an independent contractor and nothing in this Agreement should be construed as constituting an employment relationship between **THE CONTRACTOR** and **the Company**. **THE CONTRACTOR** acknowledges that this Agreement is not subject to any employment law or statute.

That the representatives of **THE CONTRACTOR** are not the employees of **the Company** and that **the Company** shall have no liability in respect of any breach by **THE CONTRACTOR** of any of the terms of any of his agreements with his representatives. **THE CONTRACTOR** acknowledges that its relationship with its representatives in no way constitutes a temporary employment service and the provisions of

Section 198 of The Labour Relations Act 66 of 1995 do not apply.

The Company is a customer of **THE CONTRACTOR** and this Agreement does not constitute and shall not be deemed to create a principle/agent relationship or joint venture or partnership between **the Company** and **THE CONTRACTOR**.

10. TERMINATION

Subject to clauses 10.2 and 10.3 hereof, should either party commit any breach of his obligations in terms hereof and fail to remedy that breach within 7 (SEVEN) days after receipt of written notice to do so, whether sent by post, delivered by hand or sent by fax (subject to proof of delivery), the other party shall be entitled to terminate this Agreement.

The Company shall be entitled to cancel this Agreement with immediate effect in the event that the **CLIENT** cancels its agreement with **the Company** for the supply by it of the **Prescribed Services** by **THE CONTRACTOR** and in such event **the Company** will have no further obligation to **THE CONTRACTOR**.

In the event of **the Company** not receiving payment from the **CLIENT** on due date, **the Company** reserves the right to withdraw **THE CONTRACTOR** from the **CLIENT** without further notice. In the event of such non-payment taking place, **the Company** reserves to itself the right to cancel this Agreement immediately and in such event **the Company** will have no further obligation to **THE CONTRACTOR**.

11. CESSION AND ASSIGNMENT

THE CONTRACTOR shall not cede any of his rights nor assign any of his obligations hereunder without the prior written consent of **the Company**.

12. AUTHORITY TO REPRESENT THE COMPANY

Notwithstanding anything to the contrary contained herein, **THE CONTRACTOR** acknowledges that he has no authority whatsoever to represent **the Company** in any capacity whatsoever. In particular, but without limiting the generality of the foregoing, **THE CONTRACTOR** shall not be entitled to conclude any contracts on behalf of **the Company** nor to sign any document on behalf of **the Company**.

13. INDULGENCE

No relaxation or indulgence granted by **the Company** to **THE CONTRACTOR** shall be deemed to be a waiver of any of **the Company's** rights in terms hereof nor shall any relaxation or indulgence be deemed to be a notation of any of the terms and conditions of this Agreement.

14. ENTIRE CONTRACT

This document, together with Annexure A supersedes all prior agreements between **the Company** and **THE CONTRACTOR** and constitutes the entire agreement between the parties hereto and no agreement at variance with the terms and conditions of this Agreement shall be of any force of effect unless in writing and signed by **the Company** and **THE CONTRACTOR**.

15. DOMICILIUM

The parties hereto choose domicilium citandi et executandi for all notices and processes to be given and served in pursuance hereof at their respective addresses as detailed in Annexure A. Any notice of change in such addresses shall be given in writing by the party concerned and delivered by hand or sent by registered mail or fax to the other party and upon notification of which the address so notified will serve as

the new domicilium citandi et executandi as aforesaid.

16. WARRANTY OF AUTHORITY

If **THE CONTRACTOR** is not a natural person, the person who signs this Agreement on its behalf bind themselves jointly and severally as sureties and co-principal debtors in solidum for the performance by **THE CONTRACTOR** of its obligations in terms of this Agreement.

17. GOVERNING LAW

This Agreement shall be governed by the laws of the Republic of South Africa and the declaration of any clause or part of a clause herein as invalid shall not affect the validity of the remainder hereof.

THUS DONE AND EXECUTED AT _____ on this ____ day of _____.

FOR AND ON BEHALF OF **THE CONTRACTOR** who by signature hereof warrants his authority to so sign.

_____ SIGNATURE	_____ NAME (Type or Print)	_____ TITLE
1. _____		
2. _____		

THUS DONE AND EXECUTED AT _____ on this ____ day of _____.

FOR AND ON BEHALF OF **the Company** who by signature hereof warrants his authority to so sign.

_____ SIGNATURE	_____ NAME (Type or Print)	_____ TITLE
1. _____		
2. _____		

ANNEXURE A

Name of THE CONTRACTOR : _____

Identity Number of THE CONTRACTOR : _____

1. Services to be provided by THE CONTRACTOR :

2. Rates to be paid to THE CONTRACTOR :

Basic Rate : _____

Overtime Rate : _____

Weekend / Holiday Rate : _____

Travel Rate : _____

Stand-By Allowance : _____

3. Name of CLIENT where services will be rendered by THE CONTRACTOR :

BIBLIOGRAPHY

ACT

Double Taxation Agreements between South Africa and the United Kingdom, Government Gazette No 24335 dated 31 January 2003.

Meyerowitz. Income Tax Act 58. 1962. Section 15(1) and (3) of the Fourth Schedule. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Fourth Schedule. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Paragraph 7 of the Fourth Schedule. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Paragraphs 14(1), 14(4) and 30(1)(i) of the Fourth Schedule. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 1 definition. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 10. Exemption. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 20. Set-off of assessed loss. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 20A. Ring-fencing of assessed loss from certain trade. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 25D. Determination of taxable income in a foreign currency. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 74(1). Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 81(5) Objection against an assessment. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 9A. Net income of controlled foreign companies. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 108. Prevention of or relief from double taxation. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 6quat. Rebate in respect of foreign taxes on income. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Section 79. Additional assessments. Cape Town. The Commissioner

Meyerowitz. Income Tax Act 58. 1962. Paragraph 11B(1) of the Fourth Schedule, definition: "tax period". Cape Town. The Commissioner

Public Finance and Management Act (1999)

Regional Services Councils Act No. 109 of 1985. Durban. Butterworths

Skills Development Levies Act No.9 of 1999. Section 13. Durban . Butterworths

Skills Development Levies Act No 9 of 1999, Section 3(1), 5 and 6. Durban. Butterworths

South Africa. VAT Act No 89 of 1991, Section 1. Definitions. Durban. Butterworths

The Unemployment Insurance Act No.63 of 2001, Durban Lexis Nexis

Unemployment Insurance Contributions Act No 4 of 2002. Section 10 and 14. Durban. Lexis Nexis.

Unemployment Insurance Contributions Act No 4 of 2002. Section 4,6 and 10(1). Durban.
Lexis Nexis

Unemployment Insurance Contributions Act No 4 of 2002. Section 4, 9 and 10(1). Durban.
Lexis Nexis

CASES

Cohen v CIR 1946 AD 174,13 SATC 362

H v COT 24 SATC 738

CIR v Kuttel 54 SATC 298, 1992(3) SA 242(A)

ITC 1174(1972) 34 SATC 135

ITC1695 (2000) 63 SATC 133.

ITC1718 (2000) 64 SATC 43.

Liberty Life Association v Niselow (1996)119(17) ILJ 673 (LAC)

SABC v Mckenzi (1999) 1 BLLR 1 (LAC)

Smith v Workman's Compensation Commissioner 1979 (1) SA 51 (A)

GOVERNMENT PUBLICATIONS

Office of the Commissioner for South African Revenue Services.1999.Employees Tax and Value Added Tax.Circular Minute 3/1999 Pretoria.

The South African Revenue Services, 2003. Interpretation Note 17.Employees Tax Independent Contractor. Pretoria.

The South African Revenue Services. 2004. Guidelines for employers. EMP10. Volume 45.

The South African Revenue Services.2004. Residence Basis of Taxation for Individuals

INTERNET

Australian Tax Office,2004. Available from: www.ato.gov.au/ (Date Accessed 26 July 2004)

Basic Conditions of Employment Act section 83A(2) Available from http://www.labourguide.co.za/employee_status.htm (date Accessed 4 October 2004)

Deneys, Reitz Attorneys,2004.Tax Update No 15. Available from: <http://www.deneysreitz.co.za/publications/pdf/Tax> (Date Accessed 23 September 2004)

Inland revenue Service,2004a. Available from: <http://www.irs.gov/businesses/small/article/0,,id=99921,00.html> (Date Accessed 20 July 2004)

Inland revenue Service,2004b. Available from: <http://www.irs.gov/fslg/article/0,,id=110344,00.html> (Date accessed 26July 2004)

Inland revenue,2004. Available from:

<http://www.inlandrevenue.gov.uk/ir35/taxbulart.pdf> (Date Accessed 20 July 2004)

Inland Revenue Service,2004. Available from: <http://www.irs.gov/> (Date Accessed 26 July 2004)

Inland Revenue,2004. Available from: www.inlandrevenue.gov.uk/ (Date Accessed 26 July 2004)

The Labour Guide,2004. Available from:
http://www.labourguide.co.za/employee_status.htm (date Accessed 4 October 2004)

Labour Relations Act, No 66 of 1995
http://www.labourguide.co.za/employee_status.htm (date Accessed 4 October 2004)

<http://www.nolo.com/lawcentre/ency/article.cfm/ObjectID/22iFE3AA-D933-4595-B...>
(Accessed 23September 2004) Attorney Stephan Fishman.

South African revenue Services,2004. Resident Basis of Taxation for Individuals.
Available from : <http://www.sars.gov.za/it/brochures> (Date Accessed 26 July 2004)

South African Revenue Services,2004. Interpretation Note 17. Available from:
http://www.sars.gov.za/it/interpretation_notes/interpretation_note_17.pdf (Date Accessed 26 July 2004)

South African revenue Services,2004 Skills Development levy Guideline. Available from:
http://www.sars.gov.za/sdl/guidelines/guidelines_to_employers_seta.pdf (Date Accessed 26 July 2004)

South African revenue Services,2004. Unemployment Insurance Fund Guideline.
Available from:
http://www.sars.gov.za/uif/guidelines/uif_brochure.pdf (Date Accessed 26 July 2004)

PERIODICAL/JOURNAL ARTICLES

Arendse,J.(2003) Independent Contractor II. Tax planning corporate and personal. Volume 17 No 6. P124

TEXT BOOKS

De Koker,A. (1995) Silke on South African Income Tax Volume 2.Butterworths Tax Publishing. Durban

Huxham.Keith, Haupt.Phillip.2004.Notes on South African Income Tax. H&H Publications. Roggebaai.

Solomon,David. 1997.Regional Levies Manual. Service issue 3.Durban,Butterworths.