

Gig economy puts focus on taxation of independent contractors

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With the gig economy growing and the “real” economy slowing, the government will be on the lookout to make sure it gets its slice of the pie when people make money literally anywhere in the age of the internet.

The gig economy is the ability to work more than one job in less formal employment circumstances. These people work for more than one employer or do part-time work to supplement their main source of income. In a gig economy, temporary, flexible jobs are commonplace, and companies tend to hire independent contractors and freelancers instead of full-time employees.

All signs are there that this trend will continue to grow. More than 80% of executives in South Africa see a future where the workforce is trending towards contractual, temporary and *ad hoc* employees rather than full-time, permanent workers, according to a Deloitte survey.

The problem is that this type of work — usually performed from a remote place through the internet — might make it more difficult for the South African Revenue Service (SARS) to get these individuals in the tax net and determine if they should potentially pay tax or not.

Other countries, and specifically the UK, are looking at new forms of legislation, based on certain cases that have been heard, for the gig economy. Though the gig economy is not addressed specifically and has not been highlighted by SARS, in SA there are numerous different rules relating to how employment is taxed.

The important word is “remuneration”. When someone receives remuneration, as defined, there is an obligation on the employer to deduct employees’ tax. Remuneration is widely phrased and can include a wide range of activities. It is defined to include “any amount of income which is paid or is payable to any person whether in cash or otherwise (eg fringe benefit) and whether or not in respect of services rendered”. This will include items such as salary, wage, gratuity, leave pay, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retirement allowance or stipend, and director’s remuneration.

It is the responsibility of the employer to determine if remuneration is paid, whether employing someone on a regular or *ad hoc* basis, but here the concept of “independent contractor” still remains contentious, according to SARS, because a decision in favour of either independent

contractor or employee status impacts on an employer's liability to deduct employees' tax.

Subject to certain conditions, amounts paid to an independent contractor for services rendered are excluded from "remuneration" as defined, in which case the employer does not have an obligation to deduct employees' tax. There are two sets of tools available to determine whether a person is an independent contractor for employees' tax purposes. There are two statutory tests, and both are conclusive in nature. The common law tests are used to determine whether a person is an independent contractor or an employee.

The test for remuneration will have to be considered with regard to the specific factual circumstances. It is clear that in SA, from an employer's perspective, SARS is more likely to be concerned that employees' tax is not being deducted. It would therefore be better, from SARS's perspective, to rely on the employer as opposed to the individual, because they are more likely to be registered and on record at SARS.

At the very least, the employer would be obliged to register the individual with SARS, even if nonstandard employment applies. Nonstandard employment applies where individuals that offer casual work are paid casual commissions.

SA has a tight tax net and if an individual earns above the tax threshold there is a good chance SARS will be able to identify those individuals in order to get them to file their tax returns and fulfil their obligations.

Employers should err on the side of caution and deduct employees' tax on the remuneration they pay to the individual who performs "gig" work for them. From their perspective, there is a statutory obligation to automatically deduct employees' tax and employers would not want to fall foul of that position.

The individuals concerned can raise the issue if an incorrect amount has been deducted, or if they have a directive from SARS that stipulates the percentage tax to be deducted, they can direct that to the employer. The individual can subsequently complete his or her tax form, deduct certain expenses from the income received during the year and be assessed on that information each year.

Tax systems, however, are never perfect, and there may be legislative developments as the gig economy and these informal activities expand and continue to grow. Although the nature of any legislative amendments is not known, it is possible there could be changes in interpretation to who will constitute an independent contractor and what will constitute remuneration.

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