

# Tax implications of changes to employer status

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Where a non-resident pays "remuneration" to an individual in South Africa for the services rendered, they are generally treated as an "employer" as defined in the Fourth Schedule to the Income Tax Act (ITA) on the basis that it pays or is liable to pay "remuneration" to the individuals. The meaning and scope of the term "employer" turn on the definition of "remuneration", and are not restricted to the meaning of "employee" in the context of the law of master and servant. "Remuneration" means an amount of income that is paid or is payable to a person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance, or stipend, whether in cash or otherwise, and whether or not for services rendered.



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## Who needs to pay taxes?

One then must establish whether the non-resident must register for employee taxes in South Africa and withhold and pay over employee taxes to Sars or if the obligation falls on the individuals to pay their taxes. Technically, there is an obligation to register as an employer. Paragraph 15 of the Fourth Schedule to the ITA requires registration unless the non-resident has no employees who are liable for normal tax.

However, one has to read the above in the context of paragraphs 2(1)(a) and (b) of the Fourth Schedule to the ITA, which provides that the liability for the deduction and payment of employees' tax is cast upon the "employer who is a resident" or a "representative employer in the case of any employer who is not a resident".

Foreign employers of local employees are, therefore, under no obligation to deduct and withhold employees' tax unless remuneration is paid or is liable to be paid by a resident representative employer, that is, by an "agent of such [foreign] employer having authority to pay remuneration".

This interpretation is based on the principle set out in paragraph 2(1), namely, that a resident employer or representative employer in the case of a non-resident employer - whether or not registered as an employer under paragraph 15 – who pays or becomes liable to pay remuneration to any employee must deduct or withhold employee's tax, unless SARS grants authority to the contrary.

What is apparent, therefore, is that there is no withholding obligation where the employer is not a resident and there is no representative employer available. Any "remuneration" paid directly to an individual would, therefore, not be subject to PAYE.



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### Changes coming

However, this will soon change, although there are some welcome adjustments to the draft initially issued by the National Treasury. In the Draft Tax Administration Laws Amendment Bill, 2023, released by the National Treasury on 31 July 2023, it is proposed that the distinction between resident and non-resident employers be removed and that parity be created between resident and non-resident employers from an employees' tax (PAYE), Skills Development Levies (SDL) and Unemployment Insurance Fund (UIF) contributions (ie. social security contributions in South Africa).

The impact thereof would have been that non-resident employers with employees in South Africa or those who employ South African tax residents to work outside South Africa would have new local payroll compliance obligations.

### Permanent establishment

However, after consideration of feedback from stakeholders, the National Treasury has provided some relief and proposed that the obligation to register will only fall on those non-resident employers that have a permanent establishment in South Africa. What it does mean is that one has to carefully consider what an employee can and cannot do, as this may result in a permanent establishment.

This is not a new type of analysis and must always be considered when operating in South Africa, as creating a permanent establishment in the country will create more problems than a simple employee tax registration.

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