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**SOUTH AFRICAN REVENUE SERVICE**

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**GUIDE ON THE  
EMPLOYERS' TAX  
RESPONSIBILITIES WITH  
REGARD TO  
ARTISTS/MODELS/CREW  
IN THE FILM INDUSTRY**

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Another helpful guide brought to you by the  
South African Revenue Service



# **GUIDE ON THE EMPLOYERS' TAX RESPONSIBILITIES WITH REGARD TO ARTISTS/MODELS/CREW IN THE FILM INDUSTRY**

## **Foreword**

This document is a general guide dealing with the responsibility of production companies to deduct employees' tax from the payments made to the agents and the employees' tax status of artists/models/crew employed by such production companies.

This guide does not attempt to reflect on every scenario that could possibly exist but does attempt to provide clarity on the majority of issues that are likely to arise in practice. Any uncertainty concerning any specific issue, must be taken up with the local South African Revenue Service (SARS) branch office.

This guide is not meant to deal with the precise technical and legal detail that is often associated with taxation and should, therefore, not be used as a legal reference. It is not a binding general ruling issued in accordance with section 76P of the Income Tax Act, No. 58 of 1962 (the Act).

Should you require additional information, you may –

- contact your local SARS branch;
- visit SARS website at **[www.sars.gov.za](http://www.sars.gov.za)**;
- contact your own tax advisor/tax practitioner;
- if calling locally, contact the SARS National Call Centre on 0860 12 12 18; or
- if calling from abroad, contact the SARS National Call Centre on +27 11 602 2093.

Comments and/or suggestions regarding this guide may be sent to the following e-mail address: **[policycomments@sars.gov.za](mailto:policycomments@sars.gov.za)**.

Prepared by

**Legal and Policy Division  
SOUTH AFRICAN REVENUE SERVICE**

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## **1. PURPOSE**

The purpose of this guide is to deal with the responsibility of production companies to deduct employees' tax from the payments made to agents and the PAYE status of artists/models/crew employed by such production companies.

## **2. THE EMPLOYEES' TAX RESPONSIBILITY OF PRODUCTION COMPANIES WITH REGARD TO THE AGENT**

### **2.1 How the industry operates**

It is a general practice in the film industry for artists/models/crew to approach agents to manage their careers. When an artist/model/crew chooses a particular agent, an agreement is signed and an administration fee (agency fee/commission) is agreed upon between the artist/model/crew and the agent.

The agent will promote the artist/model/crew to the best of his or her ability through media and printed materials. The agent will, for example, suggest an artist/model/crew for specific parts and will send him or her or the crew to relevant auditions (where applicable). Should the artist/model/crew be successful in getting a role or work, the agent's responsibility normally includes negotiating a fee with the production company on behalf of the artist/model/crew (the agent has to ensure that the artist/model/crew is properly contracted, treated fairly and that the artist/model/crew receives payment as agreed in the artist/model/crew's contract with the production company).

The production company will then enter into an agreement with the artist/model/crew to render the required service. The agent, as part of the wide range of administrative services he or she provides, would invoice the production company on behalf of the artist/model/crew and the fees would be paid directly into the agent's bank account. It is understood that some production companies would pay the fee due to the artist/model/crew net of tax into the agent's bank account (that is, the production company first deducts employees' tax) and some will pay the gross fee into the agent's bank account (in cases where the production company does not deduct employees' tax). In the event that the production company deducts employees' tax, the agent will deduct his or her fee (commission) payable by the artist/model/crew from the amount deposited by the production company and the difference is paid to the artist/model/crew. The production company pays the employees' tax deducted, over to SARS and issues an employees' tax certificate (IRP 5 certificate) to the artist/model/crew. However, if no employees' tax has been deducted by the production company, the agent will deduct his or her fee and employees' tax from the amount deposited by the production company and the difference is paid to the artist/model/crew. The agent pays the employees' tax deducted, over to SARS (under his or her PAYE reference number) and issues an IRP 5 certificate.

In addition to the agent's fee/commission charged by the agent to the artist/model/crew, the agent would charge a booking fee to the production company. In some instances, the agent issues a separate invoice to the production company for this fee and an inclusive invoice (artist/model/crew and agent's fees) in other instances.

The deduction or withholding of employees' tax by agents creates uncertainty in the film industry as it is unclear whether agents are labour brokers and who is liable to withhold

employees' tax. In other words, who is the employer, namely the production company or the agent?

## 2.2 The law

A “**labour broker**” is defined in paragraph 1 of the Fourth Schedule to the Income Tax Act, No. 58 of 1962 (the Act) as –

any natural person who conducts or carries on any business whereby such person for reward provides a client of such business with other persons to render services or perform work for such client, or procures such other persons for the client, for which services or work such other persons are remunerated by such person.

Based on the above definition, the following is required for a person to be regarded a labour broker:

- **That person must provide clients with other persons to render a service or perform work for such clients** – This means that the agreement between the client and a labour broker must be to provide persons to render a service or perform a work and not to render the service or to perform the work required by the client, itself.
- **That person providing other persons must be rewarded by the client** – The client must pay that person for providing other persons [the client has an obligation (created by the contract to be provided with other persons) to pay that person a fee].
- **That person providing other persons to the client must reward the other persons for their services rendered or work performed to the client** – That person must pay remuneration and deduct employees' tax from the amounts payable by that person to the other persons provided by that person to the client. The payment made by that person to the other persons provided to the client by that person is an obligation arising from the contract between that person and the other persons being provided to the client (normally an employment contract as indicated above).

All three above requirements must be present before that person can be regarded as a labour broker.

**Note:** A labour broker arrangement is comprised of three parties, namely, the client, a person (labour broker) and other persons being provided by the labour broker to the client. The client will enter into an agreement with the labour broker to provide persons at an agreed fee. On the other hand, the labour broker will enter into an agreement (mostly an employment contract) with the other person to be provided to the client. There will, therefore, be no agreement between the client and the other persons being provided by the labour broker to the client. The client must deduct employees' tax at the applicable rate from amounts payable to a labour broker who is not in possession of an IRP30 exemption certificate.

In terms of paragraph 2(1) of the Fourth Schedule to the Act, the employer who is liable to pay any amount by way of remuneration to any employee, shall, unless the Commissioner for SARS (the Commissioner) has granted authority to the contrary, deduct or withhold employees' tax from that amount. An “**employer**” is defined in paragraph 1 of the Fourth Schedule. In simply terms, an employer is any person who pays or is liable to pay remuneration.

## 2.3 Application of the law

### 2.3.1 Whether the agent is a labour broker

As stated under 2.2, all three requirements for a person to be classified as a labour broker must be present before that person can be regarded as a labour broker. The requirements as outlined above are as follows:

- **That person must provide clients with other persons to render a service or perform work for such clients** – As stated above, this requirement requires that a person who is a labour broker (person providing persons) must enter into an agreement with the client (person being provided with persons) to provide other persons to the client and not to render the service, required by a client, itself or perform the work, required by the client, itself. There is no agreement between the other persons being provided (employees of the labour broker) and the client.

The norm in the film industry, as outlined above, is that the agent introduces the artist/model/crew to the production company and facilitates an agreement between the artist/model/crew and the production company. The production company and the artist/model/crew will then enter into an agreement (artist/model/crew to provide specified services or performed specified work). The agent is not providing persons but merely introducing and facilitating the agreement between the production company and the artist/model/crew.

The agent is, therefore, playing a role of an employment agency. An employment agency's role is to introduce prospective employees to employers or to find employees for an employer. Once the introduction has been made, the employee is remunerated by the employer (as a result of the employment agreement entered into by the employer and the employee) and the employment agency is paid a once-off fee by the employer.

- **That person providing other persons must be rewarded by the client** – As stated above, the client must pay that person for providing other persons [the client has an obligation (created by the contract to be provided with other persons) to pay the that person a fee].

The norm in the film industry is that the production company's only obligation is to pay the booking fee to the agent. As stated above, the agent is not providing persons but merely playing a role of the facilitator between the production company and the artist/model/crew. Accordingly the booking fee is not a fee for providing persons.

Furthermore, the fact that the production company would pay the full fee to the agent who will in turn deduct employees' tax and his or her commission, does not change the fact that the fee for services rendered or work performed by the artist/model/crew is due to the artist/model/crew and not the agent. This is merely an arrangement between the parties.

- **That person providing other persons to the client must reward the other persons for their services rendered or work performed to the client** – In a labour broker arrangement, a labour broker has the obligation to pay the persons provided to the client and to withhold employees' tax from such amounts.

In the film industry scenario, the agent does not have an obligation to pay the artist/model/crew. Where the production company pays the full amount to the agent and

the agent deducts employees' tax, this is merely an arrangement between the parties. The production company has the obligation to pay remuneration to the artist/model/crew and to deduct employees' tax (the parties to the agreement are the production company and the artist/model/crew). If the agent received a full fee from the production company and then disappeared, the production company would still be liable for the payment of the fee to the artist/model/crew.

As stated above, all these requirements of the definition of "**labour broker**" must be met before a person could be classified to be a labour broker, which is not the case in this instance. The agent will, therefore, not be classified as a labour broker where the artist/model/crew has entered into an agreement with the production company.

### **2.3.2 Who is liable to deduct employees' tax**

As stated above, the employer who is liable to pay any amount by way of remuneration is required to deduct or withhold employees' tax from such remuneration. The parties to the service agreement are the production company and the artist/model/crew. Accordingly, it is the production company's obligation, and not that of the agent, to pay a fee to the artist/model/crew. In the event that the production company disappears without making payment to the artist/model/crew, the agent will not be held liable and would not need to make the payment to the artist/model/crew. Agents would fight for their artists/models/crew and try to assist them but would not pay them (the contract of service is between the artist/model/crew and the production company).

The fee payable to the artist/model/crew would be remuneration if the artist/model/crew is an employee or deemed not be independent. The production company, and not the agent, will be liable to pay remuneration and therefore has an obligation to deduct or withhold employees' tax.

However, where the agent enters into an agreement with the production company to provide artists/models/crew (that is, no relationship exists between the artist/model/crew and the production company), the agent will be regarded to be a labour broker. Accordingly, it will be the agent's obligation to pay the artist/model/crew and not that of the production company. In this instance, the provisions relating to labour brokers will apply as follows:

- The production company will deduct employees' tax on amounts payable to the agent for providing persons if the agent is not in possession of a valid IRP 30 exemption certificate.
- The artist/model/crew will be regarded to be an employee of the agent (under paragraph (b) of the definition of an "**employee**" in paragraph 1 of the Fourth Schedule to the Act). Accordingly, the agent will have an obligation to deduct or withhold employees' tax from the amount payable to the artist/model/crew by the agent.

#### **Note:**

With effect from 1 March 2009, the definition of "**labour broker**" in paragraph 1 of the Fourth Schedule to the Act is limited to natural persons. A company, close corporation or trust can no longer be a "**labour broker**" as defined in the Fourth Schedule to the Act with effect from this date. With effect from 1 March 2009, a definition of "**personal service provider**" was introduced into paragraph 1 of the Fourth Schedule to the Act (see **3.4**). This definition covers all companies, close corporations and trusts that provide a service (including the provision of persons). Therefore, with effect from 1 March 2009, where the

agent (operating as a company, close corporation or trust) has entered into an agreement with the production company to provide persons, the definition of “**personal service provider**” and not “**labour broker**” must be considered for the production company.

## 2.4 Conclusion

It is evident from the above, that where **the artist/model/crew contracts directly with the production company** to render services or perform work (contract in their personal capacity), **the production company is the employer** (and the agents are not regarded as labour brokers). The production company must deduct or withhold employees’ tax where applicable (where the artist/model/crew is deemed not be independent either by reason of the statutory test or common law test – see 3.2 below).

The labour broker provisions as outlined above will apply if the agent meets the definition of “**labour broker**”. This arrangement does exist in the film industry (that is, where agents actually act as labour brokers and this may be the case, generally, with extras).

## 3. THE EMPLOYEES’ TAX STATUS OF ARTISTS/MODELS/CREW

### 3.1 The types of artists/models/crew

Artists/models/crew will generally fall under the following categories:

- **In front of the camera** consisting of artists/models (including characters, extras).
- **Behind the camera** consisting of crew (art director, sound technician, camera operator etc).

### 3.2 How the law currently determines the employees’ tax status of artists/models/crew

#### 3.2.1 The common law general rules

The current position is that the “**dominant impression test**” (the Test) must be applied to determine whether a person is independent or an employee. The Test makes use of several indicators, of differing significance or weight, which have to be applied in the relevant context. No single indicator is conclusive. The Test is more of an analytical tool that is designed to establish the independence of a person.

#### 3.2.2 The statutory rules

The statutory rules operate independently from the common law rules. The statutory rules provide for a deeming provision that a person who carries on his or her trade independently (that is, a person deemed to be an independent contractor in terms of common law rules) shall be deemed not be carrying on a trade independently if he or she meets any of the statutory test provisions.

#### 3.2.3 Interpretation Note No. 17

Interpretation Note No.17 “*Employee’s tax: Independent contractors*” issued by SARS deals with the common law and statutory rules in detail and can be accessed through the SARS website **[www.sars.gov.za](http://www.sars.gov.za)**.



### 3.3 How the law applies to the types of artists/models/crew in the film industry

#### 3.3.1 The common law dominant impression test

The common law dominant impression test sets out 20 of the more common indicators (not exhaustive) which point to whether or not there has been the “acquisition of productive capacity” (that is, labour power, capacity work or simply effort). The indicators are classified into three categories, namely –

- **near-conclusive** – those relating “most directly to the acquisition of productive capacity”;
- **persuasive** – those establishing “the degree of control of the work environment”; and
- **resonant** – of either an employee/employer relationship or an independent contractor/client relationship, which are relevant.

Note that this is a guide and should not be used as a checklist according to which certain scores are determined to come to a conclusion. Each indicator must be analysed with due regard to the context of the film industry.

A person who is regarded as an employee, based on the common law test, will be regarded as an employee under paragraph (a) of the definition of “**employee**” in paragraph 1 of the Fourth Schedule to the Act. Accordingly, the amounts payable to him or her by his or her clients will be subject to employees’ tax and must be coded 3601 on the IRP 5 certificate. The provisions of section 23(m) of the Act will apply (limitation of deductions).

However, a person who is regarded as an independent contractor, based on the common law dominant impression test, will be carrying on his or her trade independently. The next step will be to apply the statutory test to determine whether or not the common law independent contractor is deemed not to be independent for the purposes of the Fourth Schedule to the Act.

#### 3.3.2 The statutory test

The statutory test provisions are found in the exclusionary subparagraph (ii) of the definition of “**remuneration**” in paragraph 1 of the Fourth Schedule to the Act. This paragraph states that any amount paid or payable for services rendered or to be rendered by any person (excluding non-residents) in the course of any trade carried on by him or her independently of the person by whom such amount is paid or payable or of the person to whom the services have been or are to be rendered (that is, amount payable to a common law independent contractor) is excluded from the definition of “**remuneration**” (the amount is not subject to employees’ tax but forms part of gross income of that person). This paragraph further provides that such a person (common independent contractor) will be deemed not to carry on a trade independently for the purposes of the Fourth Schedule to the Act –

- if the services are required to be performed mainly at the premises of the client; and
- the person who rendered or will render the services is subject to the control or supervision of any other person as to the manner in which his or her duties are performed or are to be performed or to his or her hours of work.

This paragraph provides further that a person (common law independent contractor) will be deemed to be carrying on an independent trade if he or she throughout the year of assessment (tax year) employs three or more employees who are on a full-time basis engaged in the business of such person of rendering any such service (excluding any employee who is a connected person in relation to such person).

The employer (production company in the case of the film industry or any other person in the industry engaging the services of an artist/model/crew) is responsible to determine whether the statutory test applies. The employer is best positioned to evaluate the facts and the actual situation (the production company understand the terms of the agreement and the actual working relationship better).

Furthermore, when determining whether or not a person is subject to control or supervision, it is important to make sure that industry requirements are not confused to be control or supervision. For example, if the crew is told to be at the shoot location by 08:00 (because the shoot starts at 08:00), that does not amount to control or supervision. However, if during the shoot the crew is given instructions on how to do the work or get to the desired result (for example, instruction to the camera-man to tape/shoot in a certain way etc) this will amount to control or supervision.

In determining whether or not the statutory test applies to an artist/model/crew who is an independent contractor in terms of common law rules, the following steps must be followed:

- **Determine whether an independent contractor employs throughout the tax year three or more employees who are on a full-time basis engaged in the business of the independent contractor of rendering services and who are not connected persons in relation to the independent contractor** - If this is not the case, proceed to the next step. If this is the case, the independent contractor is deemed to be carrying on a trade independently and accordingly the amounts payable to him or her by the production company is not subject to employees' tax. The production company will not be required to issue an IT 3(a) certificate.
- **Determine whether the services are required to be performed mainly at the premises of the client (shoot location)** - If this is the case, proceed to the next step. If this is not the case, the independent contractor is carrying on a trade independently and accordingly the amount payable to him or her by the production company is not subject to employees' tax. The production company will not be required to issue an IT 3(a) certificate.
- **Determine whether one of the following is true:**
  - **The person who rendered or will render the services is subject to the control of the client as to the manner in which his or her duties are performed or to be performed or as to his or her hours of work.**
  - **The person who rendered or will render the services is subject to the supervision of the client as to the manner in which his or her duties are performed or to be performed or as to his or her hours of work.**

If any of the above two tests apply (that is, control or supervision), the independent contractor is deemed not to be independent for the purposes of the Fourth Schedule to the Act. Accordingly, the amounts payable to him or her by the production company is subject to employees' tax. Since this is a common law independent contractor deemed not to be

carrying on a trade independently for the purposes of the Fourth Schedule to the Act only, the remuneration must be coded 3616 on the IRP 5 certificate. Furthermore, the limitation of deductions in terms of section 23(m) of the Act will not apply.

Based on the above, the artists/models/crew may fall under the following categories, depending on their contractual agreement and functions:

**A. Common law independent contractors employing three or more qualifying employees** – The production company will have to establish this fact on signing of the agreement and must retain the relevant proof. As stated above, the amount payable to these persons are not subject to employees' tax.

**B. Common law independent contractors not employing three or more qualifying employees and performing their duties mainly outside the shoot location** – These independent contractors fall under category one of the United States of America (USA) model as outlined in 3.3.3 (below). The amount payable to these persons will not be subject to the deduction of employees' tax because their duties will not be performed mainly at the shoot location [that is, they perform more than 50% of their duties (functions) outside the shoot location].

**C. Common law independent contractors not employing three or more qualifying employees and performing their duties mainly at the shoot location** –

***i. No control or supervision***

These independent contractors fall under category two and three of the USA model as outlined below. They do most, if not all, of their duties at the shoot location. The amounts payable to these persons will not be subject to the deduction of employees' tax if they are not subject to control or supervision as to the manner of work or hours of work.

***ii. Control or supervision***

These independent contractors fall under category two and three of the USA model as outlined below. They do most, if not all, of their duties at the shoot location. The amount payable to these persons will be subject to the deduction of employees' tax if they are subject to control or supervision as to the manner of work or hours of work. Code 3616 should be used on their IRP 5 certificate. Artists/models/crew not falling under category D (employees in terms of common law), will always fall under this category.

**D. Employee in terms of common law** – These are artists/models/crew who have entered into an employment agreement with the production company (that is, employer-employee relationship which is a master-servant relationship). For example, a camera-man or an actor who has entered into an employment agreement with the production company (master-servant relationship) will fall under this category. The soapies are the common productions where the main actors or maybe camera-man would enter into an employment agreement because they run for a lengthy period of time (for example, Generations, 7de Laan etc).

### 3.3.3 The United States of America (USA) model

The Internal Revenue Service in the USA developed a *Guide for the Television Commercial Production and Professional Video Communication Industries* (the Guide). The Guide is founded on 20 common law factors to determine a persons' classification as an employee or independent contractor. Furthermore, the Guide categorises the persons into three categories, namely:

- **Category one** – Jobs involving planning or implementation of the commercial and/or video production (for example, art director, casting director, location scout etc.). These persons typically have substantial responsibilities in addition to appearing at the shoot (these are often performed away from the location). In terms of the statutory test, these would be persons who do not perform their work mainly at the premises of the client (that is, at the shoot location).
- **Category two** – Jobs involving planning, design or implementation of specific aspects of the commercial and/or video production and jobs involving both problem-solving and technical skills (for example, audio technician, costume designer, lighting director etc.). These persons often have responsibilities away from the shoot location, but these responsibilities are a smaller percentage of their total responsibilities.
- **Category three** – Other jobs not mentioned above (for example, boom operator, camera assistant, generator operator etc.). These persons would do most, if not all, of the work at the shoot location.

In terms of the Guide, the greater the percentage of time spent at the shoot location, the more likely it is that the person is subject to detailed instructions about how to perform his or her work (indicative of employee status). It is important to note that these categories merely indicate relative individual autonomy, without being indicative of a given person's status. However, in practice, the probability that a person is an independent contractor will be greater in category one than in category three.

### 3.3.4 Status of particular crew

It is evident from the above that the crew may fall under different categories depending on the nature of the agreement and their functions (as stated above, the artists/models will always fall under Category C(ii) or D (see 3.3.2) depending on whether or not they are employees or independent contractors in terms of common law). An understanding of the functions of crew and the knowledge of the industry is required for the correct categorisation of crew for tax purposes. The crew is categorised as follows:

#### (a) Key gaffer/lighting director

The lighting director is responsible for the creative, effective and efficient design and delivery of lighting for films, television productions, of all programme types, both in studios and on outside broadcasts/locations shoots. He or she will work closely with the director and production designer to establish the mood, setting and period of each scene, and the corresponding lighting effects desired or required at each stage of the production. This role may also be performed by the director of photography, and has many overlaps with the camera grades. Tasks will include designing lighting layouts, organising lighting effects and monitoring pictures to meet production requirements. The lighting director supervises the console operator and will liaise with the gaffer to achieve the desired lighting effects throughout the production. He or she will also have health and safety responsibility for the lighting team, and must be aware of all potential risks affecting the crew. The lighting director

is also responsible for the lighting budget, the hiring of sub-contractors and the management of the lighting crew.

In determining the employees' tax status of the key gaffer/lighting director the steps as outlined below will be followed:

- **Common law test** – It is understood (from the submissions made by the industry to SARS) that the key gaffer/lighting director uses his or her own equipment (camera equipment, vehicle and computers) and that he or she can elect to employ persons in his or her stead. He or she has numerous clients (generally production companies). That being the case, this is a typical common law independent contractor. The next step, therefore, is to determine whether the statutory test applies.
- **Statutory test** – The steps outlined below will be followed in determining whether the statutory test applies:
  - **Does the key gaffer/lighting director employ three or more qualifying employees?** – This is a question of fact. Should the answer be “yes”, the key gaffer/lighting director will be deemed to be independent and the amount payable to him or her will accordingly not be subject to the deduction of employees' tax. Proceed to the next step if the answer is “no”.
  - **Does the key gaffer/lighting director perform his or her duties mainly at the premises of the client (shoot location)?** – In terms of the Guide issued by the Internal Revenue Service in the USA, the key gaffer/lighting director falls under category two. In terms of this guide, the crew falling under category two, often has some responsibilities away from the location, but these responsibilities are a smaller percentage of their total responsibilities. As the answer to the above question will be yes based on the Guide, proceed to the next step. In the event that it can be proved that the crew performs his or her duties mainly outside the shoot location, the key gaffer/lighting director will be deemed to be independent and accordingly the amount payable to him or her will not subject to the deduction of employees' tax.
  - **Is the key gaffer/lighting director subject to control or supervision as to the manner of work or hours of work?** – It is understood (from the submissions made by the industry to SARS) that the key gaffer/lighting director is at no time subject to control or supervision of the production company. That being the case, the key gaffer/lighting director is deemed to be independent and accordingly the amount payable to him or her is not subject to the deduction of employees' tax. Please note that if at any stage the key gaffer/lighting director is subject to control or supervision, he or she will be deemed not to be independent and would be subject to a deduction of employees' tax. The remuneration should be coded 3616 on the IRP 5 certificate.

#### **(b) Director of photography (DP)**

The DP is responsible for capturing of the creative idea of the production on film or video, as interpreted by the director. The DP is retained on the basis of his or her unique talents for filming the type of commercial or programme to be produced. The DP is both a technician and an artist. Thus, while the director explains his or her vision to the DP, the DP must decide the best manner in which to transfer that vision to film or video. This requires the DP to make creative decisions as to items such as camera lenses, lens filters, shutter speed,

film speed and lighting. The production company will rely on the DP to determine what equipment needs to be obtained for the project and will refer to the determination of the DP, subject to budgetary constraints.

In determining the employees' tax status of the DP the steps as outlined below will be followed:

- **Common law test** – It is understood (from the submissions made by the industry to SARS) that the DP uses his or her own equipment (camera equipment, vehicle and computers) and that he or she can elect to employ persons in his or her stead. He or she has numerous clients (generally production companies). That being the case, this is a typical common law independent contractor. The next step, therefore, is to determine whether the statutory test applies.
- **Statutory test** – The steps outlined below will be followed in determining whether the statutory test applies:
  - **Does the DP employ three or more qualifying employees?** – This is a question of fact. Should the answer be “yes”, the DP will be deemed to be independent and will accordingly the amount payable to him or her will not be subject to the deduction of employees' tax. Proceed to the next step if the answer is “no”.
  - **Does the DP perform his or her duties mainly at the premises of the client (shoot location)?** – In terms of the Guide issued by the Internal Revenue Service in USA, the DP falls under category one. In terms of the Guide, the crew falling under category one typically has substantial responsibilities in addition to appearing at the shoot location and these responsibilities are often performed away from the shoot location. Based on the Guide, the answer to the above question will be “no”. Accordingly, the DP will be deemed to be independent and the amount payable to him or her will not be subject to the deduction of employees' tax.

Furthermore, it is understood (from the submissions made by the industry to SARS) that the DP is at no time subject to control or supervision of the production company. That being the case, the DP would still be deemed to be independent even if he or she was performing his or her duties mainly at the shoot location.

### **(c) Key grip**

On the prelate (before the shoot) the key grip loads the equipment and sets up stands to support lights or any other hanging elements, sets up dollies and tracks, cranes, sets etc. On the shoot, the key grip operates the dolly and/or crane, and moves and loads (in and out) any heavy equipment.

In determining the employees' tax status of the key grip the steps as outlined below will be followed:

- **Common law test** – It is understood (from the submissions made by the industry to SARS) that the key grip uses his or her own equipment and that he or she can elect to employ persons in his or her stead. He or she has numerous clients (generally production companies). That being the case, this is a typical common law independent contractor. The next step, therefore, is to determine whether the statutory test applies.

- **Statutory test** – The steps outlined below will be followed in determining whether the statutory test applies:
  - **Does the key grip employ three or more qualifying employees?** – This is a question of fact. Should the answer be “yes”, the key grip will be deemed to be independent and the amount payable to him or her will accordingly not be subject to the deduction of employees’ tax. Proceed to the next step if the answer is “no”.
  - **Does the key grip perform his or her duties mainly at the premises of the client (shoot location)?** – In terms of the Guide issued by the Internal Revenue Service in USA, the key grip falls under category two. In terms of the Guide, the crew falling under category two often has some responsibilities away from the location, but these responsibilities are a smaller percentage of their total responsibilities. As the answer to the above question will be “yes” based on the Guide, proceed to the next step.
  - **Is the key grip subject to control or supervision as to the manner of work or hours of work?** – It is understood (from submission made by the industry to SARS) that the key grip is at no time subject to control or supervision of the production company. That being the case, the key grip is deemed to be independent and accordingly the amount payable to him or her is not subject of to the deduction of employees’ tax. Note that if at any stage the key grip is subject to control or supervision, he or she will be deemed not to be independent and would be subject to a deduction of employees’ tax. The remuneration should be coded 3616 on the IRP 5 certificate.

#### (d) Location scout

The location scout is responsible for finding the location at which a particular production will be filmed, based on the director’s creative desires and production logistics, such as whether a location will accommodate a particular camera angle. Knowledge of geography, climatic conditions and restrictions of local ordinances is essential. The location scout is also responsible for initiating rate negotiations with the owner of a location, drawing maps for the crew and securing parking. On set, the location scout acts as a liaison between the owners of the location and the production staff.

In determining the employees’ tax status of the location scout the steps as outlined below will be followed:

- **Common law test** – It is understood (from the submissions made by the industry to SARS) that the location scout uses his or her own equipment and develops databases of locations for which he may not receive payment. He or she can elect to employ persons in his or her stead. He or she has numerous clients (generally production companies). That being the case, this is a typical common law independent contractor. The next step, therefore, is to determine whether the statutory test applies.
- **Statutory test** – The steps outlined below will be followed in determining whether the statutory test applies:
  - **Does the location scout employ three or more qualifying employees?** – This is a question of fact. Should the answer be “yes”, the location scout will be deemed to be independent and the amount payable to him or her will

accordingly not be subject to the deduction of employees' tax. Proceed to the next step if the answer is no.

- **Does the location scout perform his or her duties mainly at the premises of the client (shoot location)?** – In terms of the Guide issued by the Internal Revenue Service in USA, the location scout falls under category one. In terms of the Guide, the crew falling under category one typically has substantial responsibilities in addition to appearing at the shoot location and these are often performed away from the shoot location. Based on the Guide, the answer to the above question will be no. Accordingly, the location scout will be deemed to be independent and the amount payable to him or her will not be subject to the deduction of employees' tax.

#### **(e) Art director**

The art director is responsible for transferring the artistic requirements of a film or video production into the design and constructions of a set. After discussing the project with the director and perhaps researching the proper look for it, the art director will then create sketches and drawings to provide the director with several options for the look of the set. After a choice is made, the art director will present a bid and master plan for set construction, contract with an appropriate set construction company, select a suitable stage to decorate the set and arrange for the removal of the set after filming.

In determining the employees' tax status of the art director the steps as outlined below will be followed:

- **Common law test** – It is understood (from the submissions made by the industry to SARS) that the art director uses his or her own equipment (props, office equipment, vehicle and computers) and develops additional props that may be required for future productions. He or she can elect to employ persons in his or her stead. He or she has numerous clients (generally production companies). That being the case, this is a typical common law independent contractor. The next step, therefore, is to determine whether the statutory test applies.
- **Statutory test** – The steps outlined below will be followed in determining whether the statutory test applies:
  - **Does the art director employ three or more qualifying employees?** – This is a question of fact. Should the answer be "yes", the art director will be deemed to be independent and the amount payable to him or her will accordingly not be subject to the deduction of employees' tax. Proceed to the next step if the answer is "no".
  - **Does the art director perform his or her duties mainly at the premises of the client (shoot location)?** – In terms of the Guide issued by the Internal Revenue Service in USA, the art director falls under category one. In terms of the Guide, the crew falling under category one typically has substantial responsibilities in addition to appearing at the shoot location and these are often performed away from the shoot location. Based on the Guide, the answer to the above question will be "no". Accordingly, the art director will be deemed to be independent and the amount payable to him or her will not be subject to the deduction of employees' tax deduction.



### 3.4 Artists/models/crew contracting through a medium of a legal entity

An artist/model/crew who contracts with the production company through a medium of a legal entity (that is, company, close corporation or trust) will not be subject to the common law and statutory rules. The production company will, therefore, have to determine whether the provisions of “**personal service provider**” as defined in paragraph 1 of the Fourth Schedule to the Act apply (see Interpretation Note No. 35 (Issue 3) “*Employees’ tax: Personal service providers and labour brokers*”, which was published for comment on 30 March 2009 available on the SARS website [www.sars.gov.za](http://www.sars.gov.za) for a detailed discussion on personal service providers).

In the event that the provisions relating to “**personal service provider**” apply, the company or close corporation or trust will be subject to the deduction of employees’ tax deduction. A personal service provider trading as a company or close corporation is subject to normal tax at a rate of 33% while a personal service provider, trading as a trust, is subject to normal tax at a rate of 40%. Furthermore, the personal service provider is subject to the provisions of section 23(k) of the Act (limitation of deductions).

### 3.5 The IRP 5 requirements in the case of:

#### 3.5.1 Common law employees

An employer must, in terms of paragraph 13(1) of the Fourth Schedule to the Act, furnish an employee to whom remuneration has been paid or become due and from which employees’ tax has been deducted or withheld during the year of assessment, with an IRP 5 certificate. In terms of paragraph 13(2) of the Fourth Schedule to the Act, the IRP 5 certificate must be issued as follows:

- Where the employer has not ceased to be an employer in relation to the employee concerned, within 60 days after the end of the tax year (that is, 60 days after 28/29 February of each year).
- Where the employer has ceased to be an employer in relation to the employee concerned but has not ceased to be an employer in relation to other employees, within 14 days of the date on which the employer has so ceased.
- Where the said employer has ceased to be an employer (in respect of all the employees), within seven days on which the employer has so ceased.

Employees’ tax will not be deducted or withheld from remuneration payable by the employer to the employee below the “**tax threshold**” as defined in paragraph 1 of the Fourth Schedule to the Act. The employer will then be required to issue an IT 3(a) certificate instead of an IRP 5 certificate. In both the IRP 5 and IT 3(a) certificates, the remuneration must be coded 3601. The provisions of section 23(m) of the Act will apply accordingly.

#### 3.5.2 Independent contractors that are deemed not to be independent

As stated above, an artist/model/crew who is a common law independent contractor deemed not to be independent for the purposes of the Fourth Schedule to the Act, is subject to the deduction of employees’ tax deduction. Accordingly the production company must furnish such a person with an IRP 5 certificate.

The production company will cease to be an employer to such artist/model/crew once the services have been rendered. Accordingly the production company must furnish the IRP 5 certificate to the artist/model/crew within 14 days of the date on which the production

company ceased to be an employer in respect of the artist/model/crew concerned. However, SARS has a discretion, in terms of paragraph 13(3) of the Fourth Schedule to the Act, to direct otherwise (that is, deem the employer not to have ceased to be an employer) in respect of casual employees who are likely to be re-employed from time-to-time by such employer.

Based on the above, SARS will exercise its discretion to deem the production company not to have ceased to be an employer to the artist/model/crew after the services have been rendered. The production company may then issue one IRP 5 certificate in respect of an artist/model/crew instead of issuing an IRP 5 certificate within 14 days every time after which the services have been rendered. This will reduce the administrative burden of issuing more than one IRP 5 certificate where an artist/model/crew has been used more than once by the production company. As stated in paragraph 3.3.2, the remuneration must be coded 3616 on the IRP 5 certificate and accordingly the provisions of section 23(m) of the Act will not apply.

The agent, as part of his or her administrative services offered to the artist/model/crew, may collect these IRP 5 certificates from various production companies on behalf of the artist/model/crew.

Although production companies (or other principals) are liable to deduct employees' tax and issue IRP 5 certificates (and all other employer-related obligations under the Fourth Schedule to the Act) in respect of these artists/models/crew, SARS has no objection should an agent and a production company (or other principal) agree that the agent deducts employees' tax and fulfils the related administrative duties (for example, issue IRP 5 certificates) on behalf of the production company. Such an arrangement must, however, include all payroll deductions and the agent must, therefore, also deduct the skills development levy (please see 6 on the payment of skills development levy). This arrangement must also ensure that employees' tax is withheld and paid to SARS under the name and employees' tax number of the production company, and that IRP 5 certificates are also issued under the name and employees' tax number of the production company. The agent must also ensure that the production company is able to complete its monthly and annual employees' tax declarations, returns and reconciliations.

Despite the above arrangement, any non-compliance with the requirements of the Fourth Schedule to the Act remains a failure of the production company for which the production company remains responsible towards SARS.

### **3.5.3 Independent contractors that are deemed to be independent (i.e. those that remain independent even for employees' tax purposes)**

As stated above, an independent contractor who is deemed to be carrying on an independent trade even for the purposes of the Fourth Schedule to the Act the amount payable to him or her is not subject to the deduction of employees' tax. Accordingly the production company will not have an obligation to issue any certificate (including an IT 3(a) certificate) to such artist/model/crew because the amount payable to him or her is not "**remuneration**" as defined in the Fourth Schedule to the Act.

However, the production company may issue an IT 3(a) certificate to such an independent contractor if the contractor requires such a certificate (this is, however, not compulsory). The amount must be coded 3616 on the IT 3(a) certificate, should such certificate be issued.

### 3.5.4 Personal service providers

As stated above, the amount payable to a personal service provider is subject to the deduction of PAYE. The production company will, therefore, have to issue an IRP 5 certificate to the personal service provider and the remuneration must be coded 3601 on the IRP 5 certificate.

SARS's discretion, as outlined in 3.5.2, may also apply in respect of personal service providers where the production company has used a personal service provider more than once.

## 4. TAX IMPLICATION ON LEASING OF EQUIPMENT/VEHICLE BY THE ARTIST/MODEL/CREW TO THE PRODUCTION COMPANY

It is a regular practice in the film industry that, in some instances, the production company will hire equipment/vehicle from the artist/model/crew for use by the production company. Accordingly, the production company will enter into a lease agreement with the artist/model/crew in addition to the service agreement. For example –

- a key grip will lease his or her grips-truck to the production company, which the production company would use to house and transport equipment; or
- a chaperone hires a microbus to the production company, which it uses to transport crew and cast; or
- a set dresser from the art department leases a “bakkie” to the production company to transport props to and from the set; or
- the production manager leases his or her vehicle to the production company for the use of transportation between the office and set production.

In the event that the production company entered into an equipment/vehicle lease agreement with the artist/model/crew for use by the production company, the employees' tax status of the artist/model/crew will be determined as follows:

### 4.1 Common law employees

The rental amount received by or accrued to the lessor (common law employee) for any equipment (other than vehicles) leased to the production company will be regarded as gross income. However, the rental amount will **not be subjected** to employees' tax but will be subjected to normal tax on assessment. The provisions of section 23(m) of the Act will apply accordingly with regards to the limitation of expenses.

The sum of the rental amount paid by the production company for a vehicle leased to the production company which is owned or leased by an artist/model/crew, whether directly or indirectly by virtue of an interest in a company or trust, shall be deemed to be an allowance (a travel allowance) paid to the artist/model/crew in respect of transport expenses under section 8(1)(b)(iv) of the Act. The rental amount is deemed to have not been received by or accrued to the lessor (the artist/model/crew) of that vehicle. The travelling allowances **will be subject** to the deduction of employees' tax.

#### 4.2 Independent contractors that are deemed not to be independent

The rental amount paid by the production company to the independent contractor for equipment/vehicle from an artist/model/crew who is an independent contractor will be regarded as rental income in the hands of the lessor (independent contractor). An independent contractor who is deemed not to be independent for the purposes of the Fourth Schedule to the Act will retain his or her independent status where he or she enters into an equipment/vehicle lease agreement with the production company. Generally, independent contractors deemed not to be independent for the purposes of the Fourth Schedule are **subjected** to employees' tax; the rental income received for the leasing of vehicle/equipment will **not be subject** to employee's tax because the amount received does not form part of proviso (ii) of the definition of "**remuneration**" paragraph 1 of the Fourth Schedule to the Act. On assessment the rental income will be regarded as gross income and be subjected to normal tax.

#### 4.3 Independent contractors that are deemed to be independent (i.e. those that remain independent even for employees' tax purposes)

The rental amount received for a vehicle/equipment that is leased to the production company by an artist/model/crew who is a common law independent contractor, who is carrying on an independent trade, will be regarded as rental income and therefore, be included in his or her gross income. The amounts received will be considered to be rental income, even if the independent contractor is deemed to be an employee for the purposes of deduction of employees' tax in terms of the Fourth Schedule to the Act. On assessment, the rental income received will be considered to be gross income and **subjected** to normal tax.

#### 4.4 Personal service providers

The rental amount paid by the production company for a vehicle/equipment leased by an artist/model/crew who renders services as a "**personal service provider**" (as defined in paragraph 1 of the Fourth Schedule to the Act) to the production company, will be regarded as a rental income in the hands of the lessor (personal service provider). The rental amount received is not for services rendered, as required by the definition of "**personal service provider**". Accordingly, the rental amount received by the personal service provider **will not be subjected** to employees' tax. On assessment the rental amount received by or accrued to the personal service provider will be regarded as gross income and will also **be subjected** to normal tax. Furthermore, the provisions of section 23(k) (limitation of expenses) will apply.

### 5. LIMITATION OF EXPENSES

Section 23(m) of the Act prohibits the deduction of certain expenditure, losses and allowances that relate to any employment of, or office held by, any person (other than an agent or representative who normally derives his or her income in a form of commission). Interpretation Note No. 13 "*Deductions: Limitation of deductions for employees and office holders*" issued by SARS provides a detailed discussion on this section. It is evident from the above that the limitation of deductions in terms of section 23(m) of the Act is only in respect of common law employees (employment) or office holders.

As indicated above, common law independent contractors who are subject to the statutory test are deemed not to be independent for purposes of the Fourth Schedule to the Act only. The effect of this is that these independent contractors retain their common law independent contractor status even though they are treated as if they are employees for employees' tax purposes.

Section 23(m) of the Act is, therefore, not applicable to common law independent contractors who are deemed not to be independent for purposes of the Fourth Schedule to the Act. Accordingly, the remuneration payable to these contractors must be coded 3616 (and not 3601) on the IRP 5 certificate, as indicated in **3.3.2**.

## 6. SKILLS DEVELOPMENT LEVY

In terms of the Skills Development Levies Act, No. 9 of 1999 every employer must pay a skills development levy at a rate of 1% of the **leviable amount** (see sections 3(4) and (5) of the Skills Development Levies Act, 1999), which means the total remuneration paid or payable to its employees during any month as determined in the Fourth Schedule to the Act, but excluding any amount –

- paid or payable to a labour broker or 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 the definition of an “**employee**” in paragraph 1 of the Fourth Schedule to the Act, to whom a certificate of exemption has been issued;
- paid or payable to any person by way of any pension, superannuation allowance or retiring allowance;
- contemplated in paragraphs (a), (d), (e) or (eA) of the definition of “**gross income**” in section 1 of the Act;
- payable to the a learner in terms of a contract of employment contemplated in section 18(3) of the Skills Development Act, No. 97 of 1998; and
- deemed to be payable to the director of a private company in terms of paragraph 11C of the Fourth Schedule to the Act.

Based on the above, therefore, any amount of remuneration not excluded from **leviable amount** (as outlined above) will be subject to skills development levy. An amount payable to a common law independent contractor deemed not be independent for the purposes of the Fourth Schedule to the Act, is not excluded from **leviable amount** and accordingly subject to skills development levy.

Accordingly, an amount payable to any person falling under category A, B or Ci (see **3.3.2**), will not be subject to skills development levy. However, an amount payable to any person falling under category Cii and D in **3.3.2**, will be subject to skills development levy.

## 7. UNEMPLOYMENT INSURANCE CONTRIBUTIONS (UIF)

The Unemployment Insurance Contributions Act, No. 4 of 2002 (the UIF Act) requires all employers and employees (excluding employers and employees which are excluded under section 4 of the UIF Act) to make UIF contributions. In terms section 1 of the UIF Act, “**employee**” means –

any natural person who receives any remuneration or to whom any remuneration accrues in respect of services rendered or to be rendered by that person, but excludes an independent contractor.

The term “**independent contractor**” above refers to a common law independent contractor. As stated in **4**, common law independent contractors deemed not to be independent for the

purposes of the Fourth Schedule to the Act, retain their common law independent contractor status even though they are treated as if they are employees for employees' tax purposes. Accordingly, such independent contractors will not be required to make UIF contributions even though they are deemed not to be independent for employees' tax purposes.

Based on the above, therefore, any person falling under category A, B or C (see **3.3.2**) above, will not be required to make UIF contributions. However, any person falling under category D (see **3.3.2**) will be required to make UIF contributions.

## **8. CONCLUSION**

It is trusted that this guide will contribute to greater clarity regarding the application and interpretation of the provisions of the Act pertaining to employers' responsibility with regard to the deduction of employees' tax relating to artists/models/crew in the film industry. Further information concerning taxation and about SARS are available on the SARS website [www.sars.gov.za](http://www.sars.gov.za) or can be obtained from SARS offices.