

Employee tax considerations when contracting work to non-SA residents

By [Denny Da Silva](#)

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There are certain Pay-As-you-Earn (PAYE) tax considerations that apply when a South African employer employs a non-South African tax resident individual as an independent contractor (IC).



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It is generally well accepted that contracting a true IC absolves the "employer" from any employee tax obligations because there is no employer-employee relationship, and therefore "remuneration", as understood from a tax perspective, is not being paid to the IC. However, where a South African entity employs a non-South African tax resident IC, the lines become blurred because of the applicable definitions and their application, both from a domestic and "international" tax perspective.

In particular, the source basis of taxation applies to non-resident persons who derive income that is sourced or deemed to be sourced in South Africa. Accordingly, even if a foreign person is a non-South African tax resident, South African tax may be payable on income on the basis that the income in question has a source or deemed source in South Africa. When it comes to services, if those services are rendered in South Africa, then they will be regarded as being South African sourced.

Service providers would generally either be a natural person or a corporate. Here we are concerned with natural persons and whether they would be subject to South African PAYE despite being IC. The definition of "employee" is wide and encompasses any person that receives "remuneration" which, per the definition thereof, excludes any amounts paid for services rendered by an IC. Without going into the details of what an IC means, the takeaway here should be that a true IC should not be subject to PAYE, right?



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In the case of a South African tax resident natural person that is correct. But, the same does not, unfortunately, hold true for non-South African tax resident natural persons. In this instance, the legislation directs that they will always be treated as an employee, despite being an IC. The *prima facie* implication here is that PAYE must be withheld and paid over to Sars. What then needs to be established is where the person is a tax resident, whether South Africa has a double tax treaty with that country and which country - ie. South Africa or the country where the individual is a tax resident - has taxing rights, and whether the IC would be subject to tax in South Africa or not.

All this does though, is determine which country has taxing rights and not that PAYE must not be withheld. The only way this can be achieved is to apply to Sars for a directive confirming that PAYE need not be withheld.

South African corporates should therefore be aware that contracting a non-South African tax resident individual brings with it complex PAYE implications which should not be ignored, even if that individual is not ultimately subject to tax in South Africa.

ABOUT THE AUTHOR

Denny Da Silva, Director Designate, Tax Practice, Baker McKenzie

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