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Should social media influencers register for VAT in South Africa?

Are you a social media influencer ("Influencer") earning R1million or more per annum in South Africa? You could be required to register for Value-Added-Tax (VAT)!

According to Ignite Visibility globally businesses pay 1000 USD per post/per 100 000 followers. A 2019 weekend Argus article puts the figure between R500 and R60,000 per post in South Africa. If you charge +/-R60 000 per post you only need +/-16 posts to reach your mandatory VAT registration revenue!

Liability of Influencers to register for VAT

The criteria for compulsory VAT registration are detailed in section 23 of the VAT Act No.89 of 1991 ("the VAT Act"). In terms of that section, generally you are required to register for VAT in the Republic of South Africa (also referred to as "RSA" or the "Republic" from here on) if you carry an enterprise, your revenue earned from that enterprise is R1 million or more for any consecutive 12-month period.

In order to determine whether an Influencer must register for VAT we must determine whether they **carry on an enterprise in the Republic, whether the revenue earned from such enterprise exceed the compulsory VAT registration threshold of R1million in any consecutive 12-month period as provided in section 23(1) of the VAT Act.** This rule applies whether the Influencer is an ordinary resident of the Republic or not.

An Influencer may also choose to register for VAT voluntarily under section 23(3) of the VAT Act if the value of her/his fees does not exceed the compulsory VAT registration threshold prescribed in section 23(1). On this publication we do not consider the benefits and costs of voluntary VAT registration.

Do Influencers carry on an enterprise?

Proviso (iii)(aa) to the definition of "enterprise" in section 1 of the VAT Act excludes services rendered by a person (employee) to an employer under an *employment contract* from the definition of enterprise. This is a reference to the services of a so-called "common law employee". The effect is that such services can never qualify as an enterprise activity. As such, an Influencer that meets the definition of an employee in relation to the "customer" (customer being the person that contracted the influencer) cannot register for VAT and will not charge VAT on any salary, wages, commission or similar amount which is paid or payable by the customer in that regard.

Proviso (iii)(bb) to the definition of "enterprise" refers to the services rendered by an "independent contractor" to the recipient under a contract for services in circumstances where such *enterprise is carried on independently of the recipient (Our emphasis)*. In other words, the activities of the service provider show the hallmarks of an independent business (enterprise) activity carried on by that person as opposed to the services rendered by an employee under an employment contract. This is discussed in detail below.

This therefore implies that should an influencer be regarded as an independent contractor; they may be liable to register for VAT if their fees for services rendered exceed the VAT registration threshold of R1 million in any consecutive period of 12 months.

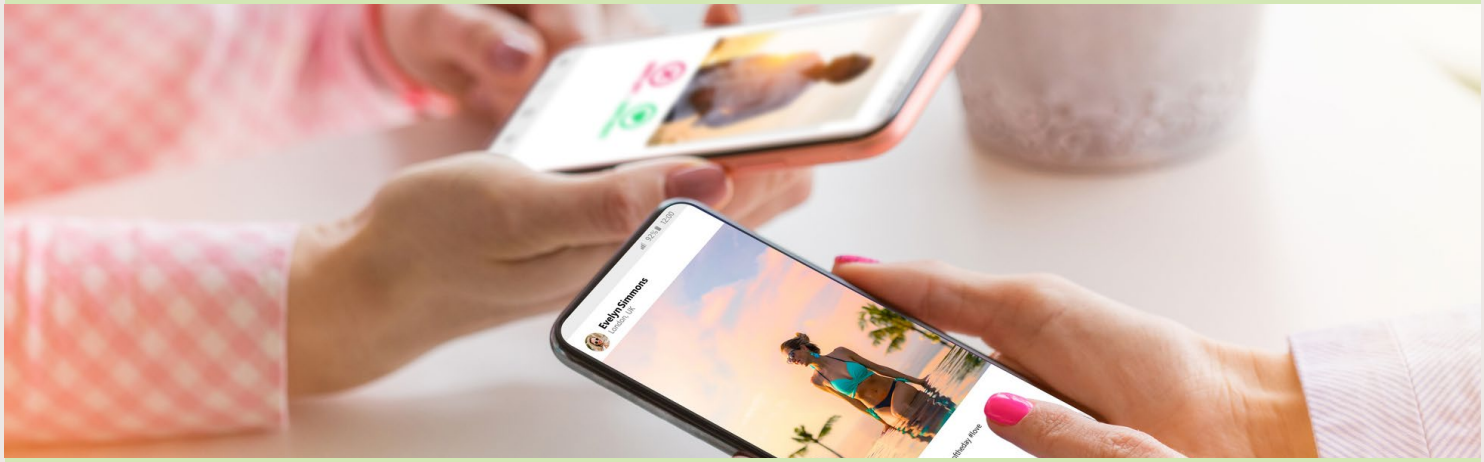
Employee or independent contractor?
SARS has issued out a Binding General Ruling No.40 (BGR40) wherein it discussed in detail whether a person can be seen as an employee or an Independent contractor. SARS has again issued out an Interpretation Note 17 (issue 3) dealing with "Employees Tax: Independent Contractors".

According to the BGR 40, the only way that an Influencer would be subject to employees' tax is if the so-called **statutory tests** apply. These tests provide that, notwithstanding that an amount may have been paid in respect of services rendered to a person carrying on an independent trade, the recipient is deemed to be an employee if two requirements have been satisfied: the **"premises" test;** and the **"control or supervision" test.** The tests operate as follows:

1. the "premises" test, the services must be performed mainly at the premises of the client. "Mainly" in this context means a quantitative measure of more than 50%.

2. Under the "control or supervision" test, either control or supervision must be exercised over one of the following:

    - The manner in which the duties must be performed; or
    - The hours of work.



It is only if both tests are satisfied, (that is, both the premises test, and the control or supervision test) that the Influencer is deemed to not be carrying on an independent trade, and will thus be receiving "remuneration" for employees' tax purposes. If only one of these tests is satisfied, or neither, the deeming rules will not apply. If an Influencer is not deemed to be an employee, and is not a common law employee, the amounts payable to such Influencer will not be "remuneration".

The courts have highlighted several factors to be considered to distinguish between an employment contract **(common law employee)** and a contract for services **(independent contractor).**

In a judgement by Joubert JA in the case of Smit v Workmen's Compensation Commissioner (Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Eiendoms) Bpk 1966 (4) SA 434 (A)).The Appellate Division rejected the crude "control" test, stating that the employer's right of supervision and control is merely one out of several indicators (albeit an important one) in favour of a contract of service (an employee contract) (Brassey, M: The Nature of Employment, 1990 (11) ILJ 889).

In Liberty Life Association of Africa Ltd v Niselow ([1996] 17 ILJ 673 (LAC).), Nugent J (sitting as a judge of the Labour Appeal Court) stated that an employee performs by making his or her productive capacity available to the employer, irrespective of whether there is work to be done, while the independent contractor commits him or herself only to deliver a product or end-result of his or her productive capacity. He stressed that central to the inquiry was whether the relationship was one in which the worker placed his or her productive capacity at the disposal of the employer. The inquiry should be directed towards the worker's obligations rather than his or her rights, and the extent to which the other party (employer) acquired rights relating to the use to be made of his or her productive capacity.

A decision must be made considering all the relevant facts (indicators), to form a dominant impression in favour of one or other contract. No single indicator is necessarily decisive, although facts that indicate the acquisition of the worker's productive capacity might carry more weight. Nugent J's views were subsequently approved by the Supreme Court of Appeal and have been followed by the "new" Labour Court as well.

In SABC v McKenzie ([1999] 1 BLLR 1 (LAC)), the court extracted from earlier case law more important characteristics of an employment contract that distinguish it from a contract for work. They are:

Employee	Independent Contractor
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.	The object of the contract of work is the performance of a certain specified work or the production of a certain specified result
According to a contract of service the employee will typically be at the beck and call of the employer to render his or her personal services at the behest of the employer	The independent contractor is not obliged to perform the work him or herself or to produce the result him or herself, unless otherwise agreed upon. He or she may avail him or herself of the labour of others as assistants or employees to perform the work or to assist him or her in the performance of the work.
Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his or her own discretion decide whether he or she wants to have them rendered.	The independent contractor is bound to perform a certain specified work or produce a certain specified result within a time fixed by the contract o work or within a reasonable time where no time has been specified.
The employee is subordinate to the will of the employer. He or she is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervision and controlling him or her by prescribing to him or her what work he or she has to do as well as the manner that it has to be done.	The independent contractor is notionally on a footing of equality with the employer. He or she is bound to produce in terms of his or her contract of work, not by the orders of the employer. He or she is not under the supervision or control of the employer. Nor is he or she under any obligation to obey any orders of the employer in regard to the manner that the work is to be performed. The independent contractor is his or her own master.
A contract of service is terminated by the death of the employee	The death of the parties to a contract of work does not necessarily terminate it.
A contract of service terminates on expiration of the period of service entered into.	A contract of work terminates on completion of the specified work or on production of the specified result.

As can be seen from the above Case Law, there is no absolute test which can be applied to distinguish between the two types of contract. For the purposes of this article and proviso (iii) to the definition of "enterprise" we will summarise the above-mentioned determinants as follows: -

- an employee is a person who commits his or her productive capacity to another person (the employer) in terms of an *employment contract*; and
- an independent contractor is a person who commits his or her labour to the recipient (employer) to produce a given result in terms of a *contract* for services.

Based on the factors mentioned by the South African courts highlighted above, it appears Influencers cannot be regarded as common law employees but as Independent contractors due to the following factors, amongst others:

- their services are not performed mainly at the premises of the client. Their services are performed anywhere, anytime. We agree that this requirement may be debatable considering the current Covid 19 Pandemic and the fact that most employees are now working from anywhere. In South Africa, most companies are even considering making this "new normal" permanent, which implies that the courts may again have to re-consider this test.
- There is no control or supervision that is exercised as to manner in which their duties must be performed or are performed. There is also no control or supervision as to the hours of work put in in order to meet a specific result.
- Once the specific result has been met, the Influencers contract of service is terminated. Should his or her services be required at a later stage, a new contract should be entered into.

Therefore, if an Influencer is not deemed to be an employee, and is not a common law employee, the amounts payable to such Influencer will not be "remuneration" **and thus not subject to the deduction of employees' tax.**

"Remuneration" as defined excludes – "any amount paid or payable in respect of services rendered or to be rendered by any person … 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:"

It therefore follows that because the amounts received by an Influencer are not "remuneration", the prohibition under section 23(m) of the Income Tax Act 58 of 1962 will not apply in respect of such fees. Section 23(m) prohibits the deduction of certain expenses for employees and office holders. Two of the important triggers for this section to come into operation, are that –

- the expenditure, loss or allowance must relate to an office held; and
- the taxpayer must derive "remuneration" in respect of that office.

Accordingly, as we have concluded that Influencers do not receive remuneration, section 23(m) will not apply and the ordinary rules for the deductibility of expenditure, losses or allowances will apply *(Interpretation Note 13 (Issue 3) dated 15 March 2011 "Deductions: Limitations of Deductions for Employees and Office Holders" for more information)*.

VAT treatment of employees vs. independent contractors

The VAT implications of employees and independent contractors are dealt with in proviso (iii) to the definition of "enterprise" in section 1(1).

Payment to independent contractors can be deemed to be remuneration in terms of the Fourth Schedule to the Act - this does not affect the independent nature of that person's activities for VAT purposes. It will therefore be incorrect to conclude that an independent contractor must be regarded as an employee for VAT purposes merely because that person's income is deemed to be "remuneration" which is subject to employees' tax under the Fourth Schedule to the Act.

This principle is the same whether the influencer is a South African Resident or non-resident providing the services in the South African Republic. A non-resident Influencer will be carrying on an enterprise if the services are physically performed in the Republic on a continuous or regular basis, or if the services are conducted on a continuous or regular basis through a fixed or permanent place in the Republic.

VAT treatment of Influencers

As discussed above, it is our view that an Influencer is not considered to be a common law employee. This is based on the view that the services must be supplied independently and personally by the Influencer. Any fees paid or payable to an Influencer for services rendered in that capacity is therefore not regarded as "remuneration". It follows that for VAT purposes an Influencer is treated as an independent contractor as contemplated in proviso(iii)(bb)to the definition of "enterprise" in section1(1) in respect of those Influencer activities.

If you are an influencer and not an employee as detailed above and you are carrying on an enterprise in RSA, your revenue is R1 million or higher in any 12 month period you are required by law to register for VAT.

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