

Ref: #775377

2 February 2024

South African Revenue Service

Per email:

Dear

REQUEST FOR THE COMMISSIONER'S DISCRETION IN POSTPONING A NON-RESIDENT EMPLOYER'S OBLIGATION TO WITHHOLD EMPLOYEES' TAX

1. The SAICA Employees Tax Sub-committee, on behalf of SAICA's National Tax Committee, wishes to engage with the South African Revenue Service ("SARS") on some of the practical challenges that will make it exceptionally difficult for non-resident employers with permanent establishments ("PE") in South Africa to comply with the recent legislative requirement to withhold employees' tax ("PAYE") from remuneration payable to South African resident employees.
2. This recent requirement was brought about by the amendment to paragraph 2(1) of the Fourth Schedule to the Income Tax Act, which was effected by the 2023 Tax Administration Laws Amendment Act (TLAA) as promulgated on **22 December 2023**.
3. The difficulty experienced by these non-resident employers centres around the effective date of the amendment, which is the date of promulgation of the TLAA1.
4. Given that the amendment came into effect on **22 December 2023**, it is our understanding that it will apply to any remuneration paid on or after 22 December 2023 by said non-resident employers. On this basis, these non-resident employers thus already have a PAYE withholding obligation with respect to remuneration already paid in December 2023 after the 22nd or which is still payable in January 2024.
5. It is submitted that January 2024 is extremely short notice for non-resident employers to comply with the withholding obligation for the reasons stated below.
6. The National Treasury ("NT") workshops on the draft tax bills were first held in early September 2023, with most commentators having requested that the amendment have a PE requirement, as opposed to applying to all non-resident employers. This was to

¹ S31. "(1) This Act is called the Tax Administration Laws Amendment Act, 2023. (2) Save in so far as is otherwise provided for in this Act, or the context otherwise indicates, the amendments effected by this Act come into operation on the date of promulgation of this Act."



create a relevant nexus between the operations of the foreign employer and any obligation to withhold and pay employees' tax in South Africa.

7. However, it was not certain at that time whether the PE proposal would be accepted by SARS/NT. The PE requirement was only confirmed in late October 2023 when SARS/NT published the Response Document to the draft tax bills, which was promptly followed by the updated bills published on 1 November 2023.
8. At that stage, it is unlikely that the majority of non-resident employers would have been aware of the amended draft amendment until January 2024 when most people would return, even in many foreign countries, from their December break.
9. Foreign employers would now have to take advice how to implement the PAYE withholding in their payroll systems that were designed for foreign payroll withholding, register with SARS for employees' tax, possibly appoint a local payroll administrator and from an HR perspective, communicate with affected staff.
10. Foreign employers would also have to take legal advice to determine which persons are "dependent contractors" (in terms of the unique SA definitions of "employee" and "remuneration") as opposed to employees in the normal sense, are now subject to PAYE withholding.
11. This unfortunately does take time and, depending on the employer's specific circumstances, could amount to very significant changes not merely limited to the simple process of registering as a South African employer for PAYE purposes. As with the exercise of obtaining legal advice, the cost/administrative considerations dictate that an entity changes its systems only after legislation is finalised.
12. We submit that the majority of affected foreign employers are only now becoming aware of the provision and currently seeking the appropriate tax advice and payroll administration support, whereafter they will begin the process of implementing the necessary payroll system changes. The latter is not a brief process and could itself take up to a month.
13. Of concern is that technically, if the employer did a payroll run on 23 December 2023, there could be argument that they were already non-compliant as the law was amended with effect from 22 December 2023, which would be a very harsh application and outcome of the law.
14. We therefore request that the Commissioner exercise his discretion and postpone the PAYE withholding obligation for such foreign employers to ensure a fair transition.
15. It should be noted that SARS would not be out of pocket as any South African resident receiving employment or contract income to which this provision applies, would in any event have to pay provisional tax on 28 February 2024 in respect of that foreign income.



16. The discretion sought is in terms of paragraph 2(1) of the Fourth Schedule to the Income Tax Act:

“(1) Every—

- (a) employer that is a resident; or
- (b) employer that is not a resident and conducts business through a permanent establishment in the Republic; or
- (c) representative employer,

...who pays or becomes liable to pay any amount by way of remuneration to any employee shall, **unless the Commissioner has granted authority to the contrary**, deduct or withhold from that amount..., by way of employees' tax an amount which shall be determined as provided in paragraph 9, 10 or 11 or section 95 of the Tax Administration Act...”

[own emphasis]

17. We believe that the best solution is to have the provision apply to remuneration payable from 1 March 2024, in respect of the employees' tax return (EMP201) due for submission on 7 April 2024.

18. This perfectly also aligns with the 2025 year of assessment for individuals.

We are happy to have any further engagements necessary to clarify our request.

Yours sincerely

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