
SOUTH AFRICAN REVENUE SERVICE

GUIDE

ON THE TAXATION OF

ARTISTS/MODELS/CREW

IN THE FILM INDUSTRY

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



GUIDE ON THE EMPLOYEES' TAX RESPONSIBILITIES WITH REGARD TO ARTIST/MODELS/CREW IN THE FILM INDUSTRY

Foreword

This document is a general guide dealing with the Pay-As-You-Earn (PAYE) responsibility of production companies with regard to the agents and the PAYE status of the artists/models/crew.

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. If it does not address a specific issue, it must be taken up with the 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 in terms of Part IA of Chapter III of the Income Tax Act, No. 58 of 1962 (the Act).

This guide is based on the legislation as at 31 October 2007.

Should you require additional information, you may –

- contact your local South African Revenue Service (SARS) branch;
- visit SARS website at www.sars.gov.za;
- contact your own tax advisors;
- 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.

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CONTENTS

Foreword.....	i
1. PURPOSE.....	1
2. THE PAYE RESPONSIBILITY OF PRODUCTION COMPANIES WITH REGARD TO THE AGENT	1
2.1 How the industry operates	1
2.2 What the law says	2
2.3 How the law applies to the facts and the effect thereof	2
2.3.1 Whether the agent is a labour broker.....	2
2.3.2 Who is liable to deduct PAYE	4
2.4 Conclusion	4
3. THE PAYE STATUS OF ARTISTS/MODELS/CREW	4
3.1 The types of artists/models/crew	4
3.2 How the law currently determines the PAYE status of artists/models/crew	5
3.2.1 The common law general rules.....	5
3.2.2 The statutory rules	5
3.2.3 Interpretation Note No.17.....	5
3.3 How the law applies to the types of artists/models/crew in the film industry	5
3.3.1 The common law dominant impression test.....	5
3.3.2 The statutory test.....	6
3.3.3 United States of America (USA) model.....	8
3.3.4 Status of particular crew	8
(a) Key gaffer/lighting director.....	8
(b) Director of photography (DP)	9
(c) Key grip	10
(d) Location scout	11
(e) Art director.....	11
3.4 Artists/models/crew contracting through a medium of a legal entity.....	12
3.5 The IRP5 requirements in the case of:	12
3.5.1 Employees (common law).....	12
3.5.2 Independent contractors that are deemed not to be independent.....	13
3.5.3 Independent contractors that are deemed to be independent (i.e. those that remain independent even for PAYE purposes).....	13
3.5.4 Personal service companies or trusts	13
4. LIMITATION OF EXPENSES	14
5. SKILLS DEVELOPMENT LEVY.....	14
6. UNEMPLOYMENT INSURANCE CONTRIBUTIONS (UIF)	15
CONCLUSION.....	15

1. PURPOSE

The purpose of this brochure is to deal with the PAYE (Pay-As-You-Earn) responsibility of production companies in respect of the agents and also the PAYE status of crew/artists/models.

2. THE PAYE 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 suggest the actor for specific parts and will send him or her to applicable 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 an artist/model/crew (the agent has to ensure that the actor is properly contracted, treated fairly and that the actor 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 they provide, would invoice the production company on behalf of the artist/model/crew and the fees are 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). Where the former, applies, the agent will then deduct his or her fee (commission) payable by the artist/model/crew and the difference is paid to the artist/model/crew. The production company pays the employees' tax deducted over to SARS and issues an IRP5 employees' tax certificate to the artist/model/crew. However, where the latter applies, the agent will deduct his or her fee and employees' tax and the difference is paid to the artist/model/crew. The agent pays the employees' tax deducted over to SARS (under its PAYE reference number) and issues an IRP5 certificate.

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

The above arrangement (where the agent deducts or withholds employees' tax) creates uncertainty in the industry. That is, whether agents are labour brokers and who is liable to withhold employees' tax, in other words, who is the employer?

2.2 What the law says

A “labour broker” is defined in paragraph 1 of the Fourth Schedule to the Income Tax Act, 1962 (the Act) as –

“any 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, the following is required for a person to be regarded a labour broker:

- **The 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 and not to render a service or to perform the work required by the client. In a labour broker arrangement, there are three parties involved being the client, a person providing persons (labour broker) and a person being provided 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 agreement) with a person to be provided to the client. There will, therefore, be no agreement between the client and the person being provided.
- **The person providing other persons (labour broker) must be rewarded by the client** – the client must pay the labour broker for providing other persons (the client has an obligation (created by the contract to provide persons) to pay the labour broker a fee).
- **The person providing other persons to the client must reward the other persons for their services or work performed to the client** – The labour broker must pay remuneration and deduct employees’ tax from amounts payable by the labour broker to the persons provided by the labour broker to the client. The payment made by the labour broker to other persons provided to the client of the labour broker by the labour broker is an obligation arising from the contract between the labour broker and the person being provided to the client (normally an employment contract as indicated above).

All the requirements for a person to be classified as a labour broker must be present before a person could be regarded as a labour broker. Where a person is classified as a labour broker and such person does not possess an IRP30 exemption certificate, the client must deduct employees’ tax from the amounts payable to that person at the applicable rate.

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 has granted authority to the contrary, deduct or withhold employees’ tax from that amount. The term “employer” is defined in paragraph 1 of the Fourth Schedule. In simple terms, the employer is any person who pays or is liable to pay remuneration.

2.3 How the law applies to the facts and the effect thereof

2.3.1 Whether the agent is a labour broker

As stated above, all the requirements for a person to be classified as a labour broker must be present before a person could be regarded as a labour broker. The requirements as outlined above are as follows:

- **The person must provide clients with other persons to renders 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 such persons (not to render the service required by a client). There is no agreement between the person being provided (employee of the labour broker) and the client.

The norm in the film industry, as outlined above, is that the agent introduces 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). 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 the employment agency. The employment agency 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.

- **The person providing other persons (labour broker) must be rewarded by the client** – as stated above, the client must pay the labour broker for providing other persons (the client has an obligation (created by the contract to provide persons) to pay the labour broker 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 by the artist/model/crew is due to the artist/model/crew and not the agent. This is merely an arrangement between the parties.

- **The person providing other persons to the client must reward the other persons for their services 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 the 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 labour broker where the artist/model/crew has entered into an agreement with the production company.

2.3.2 Who is liable to deduct PAYE

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 amount. The parties to the service agreement are the production company and the artist/model/crew. Accordingly, it is the production company's obligation to pay a fee to the artist/model/crew and not that of the agent. If 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).

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

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. Where such an arrangement exists, 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 IRP30 exemption certificate.
- The artist/model/crew will be regarded to be an employee of the agent (in terms of paragraph (b) of the definition of "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.

2.4 Conclusion

It is evident from the above that where the artist/model/crew contracts directly with the production company to render services (contract in their personal capacity), the production company is the employer (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 paragraph 3.2 below).

Where the agent meets the definition of "labour broker", the labour broker provisions as outlined above will apply. 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 PAYE STATUS OF ARTISTS/MODELS/CREW

3.1 The types of artists/models/crew

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

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

3.2 How the law currently determines the PAYE 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 issued by SARS deals with the above two rules (common law and statutory rules) in detail and can be accessed through the SARS website 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.

It is important to 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.

Where a person is regarded as an employee, based on the common law test, the person will be regarded as an employee in terms of 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 IRP5 certificate. The provisions of section 23(m) of the Act will apply (limitation of deductions).

However, where a person is regarded as an independent contractor, based on the common law dominant impression test, the person 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 in respect of 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 however 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 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).

It is the responsibility of the employer (production company in the case of the film industry or any other person in the industry engaging the services of the artist/model/crew) to determine whether the statutory test applies. The employer is in the best position 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 the artist/model/crew who is an independent contractor in terms of common law rules, the following step must be followed:

- **Determine whether an independent contractor employs throughout the tax year of assessment 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 IT3(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 IT3(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 IRP5 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, 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 under the USA model as outlined in paragraph 3.3.3. These persons will not be subject to employees' tax deduction 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 under the USA model as outlined in paragraph 3.3.3. They do most if not all of their duties at the shoot location. If they are not subject to control or supervision as to the manner of work or hours of work, these persons will not be subject to employees' tax deduction.
 - ii. Control or supervision**

These independent contractors fall under category two and three under the USA model as outlined in paragraph 3.3.3. They do most if not all of their duties at the shoot location. If they are subject to control or supervision as to the manner of work or hours of work, these persons will be subject to employees' tax deduction. Code 3616 should be used on their IRP5 certificate. Artists/models 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 United States of America (USA) model

The Internal Revenue Service in the United States of America developed a Guide for the Television Commercial Production and Professional Video Communication Industries. This 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 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 this 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 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 following 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. They 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. They supervise the console operator and will liaise with the gaffer to achieve the desired lighting effects throughout the production. They 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 status of the key gaffer/lighting director the following 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 a person in his or her stead. They have 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. Where the answer is yes, the key gaffer/lighting director will be deemed to be independent and will accordingly not be subject to employees' tax deduction. Where the answer is no, proceed to the next step.
 - **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 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 are a smaller percentage of their total responsibilities. Based on this guide, the answer to the above question will be yes and will, therefore, have to proceed to the next step. Where it can be proved that this crew performs his or her duties mainly outside the shoot location, the key gaffer/lighting director will be deemed to be independent and accordingly not subject to employees' tax deduction.
 - **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 not subject to employees' tax deduction. 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 employees' tax deduction. The remuneration would be coded 3616 on the IRP5 certificate.

(b) Director of photography (DP)

The DP is responsible for capturing of the creative idea of the production, as interpreted by the director, on film or video. 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 defer to the determination of the DP, subject to budgetary constraints.

In determining the PAYE status of the DP the following 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 a person in his or her stead. They have 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. Where the answer is yes, the DP will be deemed to be independent and will accordingly not be subject to employees' tax deduction. Where the answer is no, proceed to the next step.
 - **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 this 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 this guide, the answer to the above question will be no. Accordingly, the DP will be deemed to be independent and will not be subject to employees' tax deduction.

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 (prior to the shoot) the key grip loads in the equipment and sets up the stand 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 any heavy equipment and loads in and out.

In determining the status of the key grip the following 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 a person in his or her stead. They have 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. Where the answer is yes, the key grip will be deemed to be independent and will accordingly not be subject to employees' tax deduction. Where the answer is no, proceed to the next step.
 - **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 this guide, the crew falling under category two, often has some responsibilities away from the location, but these are a smaller percentage of their total responsibilities. Based on this guide, the answer to the above question will be yes and will, therefore, have to 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 not subject to employees' tax deduction. Please 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 employees' tax deduction. The remuneration would be coded 3616 on the IRP5 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 PAYE status of the location scout the following 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 location for which he may not receive payment. He or she can elect to employ a person in his or her stead. They have 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. Where the answer is yes, the location scout will be deemed to be independent and will accordingly not be subject to employees' tax deduction. Where the answer is no, proceed to the next step.
 - **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 this 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 this guide, the answer to the above question will be no. Accordingly, the location scout will be deemed to be independent and will not be subject to employees' tax deduction.

(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 PAYE status of the art director the following 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 (props, office equipment, vehicle and computers) and develops additional props that may be required for future productions. He or she can elect to employ a person in his or her stead. They have 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. Where the answer is yes, the art director will be deemed to be independent and will accordingly not be subject to employees’ tax deduction. Where the answer is no, proceed to the next step.
 - **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, Art Director falls under category one. In terms of this 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 this guide, the answer to the above question will be no. Accordingly, the art director will be deemed to be independent and will not be subject to employees’ tax deduction.

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

Where the artist/model/crew contracts with the production company through a medium of a legal entity (that is, company, close corporation or trust) the common law and statutory rules will not apply. The production company will, therefore, have to determine whether the provisions relating to the “personal service company” or “personal service trust” apply. A “personal service company” or “personal service trust” is defined in paragraph 1 of the Fourth Schedule to the Act (see Interpretation Note No. 35 available on the SARS website www.sars.gov.za for a detailed discussion on personal service companies or trusts).

Where the provisions relating to “personal service company” or “personal service trust” apply, the company or close corporation or trust will be subject to employees’ tax deduction. The personal service company is subject to tax at a rate of 34% while the personal service trust is subject to tax at a rate of 40%. Furthermore, the personal service companies or trusts are subject to the provisions of section 23(k) of the Act (limitation of deductions).

3.5 The IRP5 requirements in the case of:

3.5.1 Employees (common law)

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 IRP5 employees’ tax certificate. In terms of paragraph 13(2) of the Fourth Schedule to the Act, the IRP5 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.

Where the remuneration payable by the employer to the employee is below the “tax threshold” as defined in paragraph 1 of the Fourth Schedule to the Act, the employees’ tax will not be deducted or withheld from such remuneration. The employer will then be required to issue an IT3(a) certificate instead of an IRP5 certificate. In both the IRP5 and IT3(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 employees’ tax deduction. Accordingly the production company must furnish such a person with an IRP5 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 IRP5 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 IRP5 certificate in respect of an artist/model/crew instead of issuing an IRP5 certificate within 14 days every time after which the services have been rendered. This will reduce the administrative burden of issuing more than one IRP5 certificate where an artist/model/crew has been used more than once by the production company. As stated in paragraph 3.3.2 above, the remuneration must be coded 3616 on the IRP5 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 IRP5 certificates from various production companies on behalf of the artist/model/crew.

3.5.3 Independent contractors that are deemed to be independent (i.e. those that remain independent even for PAYE 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 is not subject to employees’ tax deduction. Accordingly the production company will not have an obligation to issue any certificate (including an IT3(a) certificate) to such 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 IT3(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 IT3(a) certificate, should such certificate be issued.

3.5.4 Personal service companies or trusts

As stated above, the personal service companies or trusts are subject to employees’ tax deduction. The production company will, therefore, have to issue an IRP5 certificate to the personal service company or trust and the remuneration must be coded 3601 on the IRP5 certificate.

SARS's discretion, as outlined in paragraph 3.5.2 above, may also apply in respect of personal service companies or trusts where the production company has used a personal service company or trust more than once.

4. LIMITATION OF EXPENSES

Section 23(m) of the Act prohibits the deduction of certain expenditure, losses and allowance 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). Please see Interpretation Note No. 13 issued by SARS for 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 PAYE 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 IRP5 certificate, as indicated in paragraph 3.3.2 above.

5. SKILLS DEVELOPMENT LEVY

In terms of the Skills Development Levy Act, 1999, every employer must pay a skills development levy at a rate of 1% of the "leviable amount", as defined in paragraph 1 of 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;
- 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 the definition of "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 the definition of "leviable amount" and accordingly subject to skills development levy.

Accordingly, an amount payable to any person falling under category A, B or C(i) under paragraph 3.3.2 above, will not be subject to skills development levy. However, an amount payable to any person falling under category C(ii) and D in paragraph 3.3.2 above, will be subject to skills development levy.

6. UNEMPLOYMENT INSURANCE CONTRIBUTIONS (UIF)

The Unemployment Insurance Contributions Act, 2002 (the UIF Act) requires all employers and employees (excluding employers and employees which are exempt in terms of section 4 of the UIF Act) to make UIF contributions. In terms 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 paragraph 4 above, 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 PAYE purposes. Accordingly, such independent contractors will not be required to make UIF contributions even though they are deemed not to be independent for PAYE purposes.

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

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 employer’s responsibility with regard 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 or can be obtained from SARS offices.