



The taxation of 'Influencers' in South Africa and in an international context

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Abstract

Social media has changed as a result of the digital economy's explosive expansion, turning it into a powerful tool for both individuals and businesses alike. Influencer marketing, a product of this digital era, has achieved remarkable success. With their dynamic and multifaceted lives, social media Influencers have become an integral part of the digital economy. However, existing international tax rules lack specific provisions addressing Influencers, raising questions about their tax treatment and the potential for treaty abuse. This underscores the necessity of exploring how the Influencers are to be taxed within the current legal frameworks, both from a local and international point of view.

Following the introduction of fundamental concepts essential for understanding the activities and income generation means of Influencers, this document delves into an exploration of the local and international tax implications for these individuals. In the local context, an examination of current South African tax laws applicable to Influencers is undertaken. Additionally, in the international sphere, an in-depth analysis of their activities is conducted within the framework of the Organisation for Economic Co-operation and Development on Income and Capital Model Tax Convention (“OECD MTC”).

Upon examination of the activities and income streams of Influencers from both a South African and international perspective, it became evident that their taxation is guided by existing legislation rather than specific provisions tailored for them. In South Africa, the classification of Influencers as employees or independent contractors holds crucial implications for their tax treatment. Notably, the taxation of promotional gifts, whether received for consideration or not, emerges as a critical aspect, subjecting Influencers to taxation due to their provision of marketing or advertising services. On the international front, existing rules, with the exception of the debate around Article 17 of the OECD MTC, are deemed sufficient for encompassing Influencer activities. The choice between Article 7 and Article 17 depends on the nature of the Influencer's activities. The various income streams of Influencers, from commission income to fees for services rendered and the sale of goods, fall within the scope of Article 7. The examination of Influencer activities under Article 17 is particularly relevant when they entertain followers through live social media posts.

The conclusion underscores that Influencers face similar cross-border challenges as other taxpayers. Still, it emphasises the need for careful identification of their income streams to ensure proper application of double tax treaties and to avoid potential issues of double taxation or double non-taxation. The unique lifestyle of Influencers may lead to scenarios of double taxation, and them seeking visas in lower-tax jurisdictions since most of their income is subject to taxation in the Country where they are tax resident.



The ongoing discussions regarding the taxation of Influencers are of crucial importance, particularly in light of evolving dynamics within the digital economy and their substantial potential for tax collection. This underscores the importance for Tax Authorities to provide clear guidance in navigating this intricate landscape for Influencers.



List of Abbreviations

ARB	The South African Advertising Regulatory Board
BGR40	Binding General Ruling No.40
Code	Social Media Code of Conduct, South Africa
CPA	The Consumer Protection Act 68 of 2008, as amended
DTA	Double Tax Agreement
IN 17	Interpretation Note 17 (Issue 3): EMPLOYEES' TAX: INDEPENDENT CONTRACTORS
MTC	Model Tax Convention
OECD	Organisation for Economic Co-operation and Development
PR	Public Relations
SARS	The South African Revenue Service
The Income Tax Act	The Income Tax Act, No. 58 of 1962, as amended
VAT	Value-Added Tax
The VAT Act	The Value-Added Tax Act 89 of 1991, as amended



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1. Chapter 1 - Introduction

1.1 RESEARCH QUESTION

How should Influencers be taxed in a South African and in an international context?

1.2 RATIONALE OF TOPIC

We have witnessed significant growth in digital platforms over the last few years. Social media is one of the most popular activities used on these digital platforms. Social media has become increasingly important in our lives. Initially designed for individuals to share feelings, ideas, pictures, videos, etc., it has also become a tool for commercial companies and non-business entities to showcase and market their products and services.¹ Hence, the rise of Influencer marketing. There is no denying the success of Influencer marketing. In 2023, the Influencer marketing industry reached USD 21.1 billion, demonstrating a growth of over threefold since 2019.² It is projected to expand as more businesses raise their spending on it. Furthermore, imagining any company without a social media account is almost impossible.

Social media Influencers live complex and interesting lives. From keeping up with TikTok trends, to 'vlogging' their morning routines, and even live streaming their gaming habits. Influencers arose with social media and derived their attention through digital communication. The current international tax rules do not address the tax treatment of Influencers, and therefore, it is important to attempt to try and classify their activities for income tax purposes with an aim to provide guidance to Influencers themselves as well as tax authorities. Therefore, the aim of this research is to contribute to the discussion of how Influencers are taxed from a local and international tax perspective.

1.3. RESEARCH METHOD

This study uses a comprehensive desktop research to explore the taxation landscape of Influencers from both a South African and international point of view. The research for this dissertation is entirely conducted through desktop and library-based methods. By reviewing several sources, including books, policy papers, interpretation notes, case law, documents from

¹ Radvan, Michal, 1 July 2021, Taxation of Instagram Influencers. *Studia Iuridica Lublinensia*. Lublin: Faculty of Law and Administration, UMCS in Lublin, 2021, vol. 30, no. 2, pp. 339-356. ISSN 1731-6375. doi:10.17951/sil.2021.30.2.339-356., Available at SSRN: <https://ssrn.com/abstract=3878441> (accessed 12 February 2024).

² Valentina Dencheva, 18 December 2023, Influencer marketing worldwide - statistics & facts. Available at: <https://www.statista.com/topics/2496/influence-marketing/#topicOverview> (accessed 2 February 2024).

the South African Revenue Service (“SARS”), international treaties, journal articles, statutes, annual reports, as well newspaper articles and internet sources, this dissertation aims to present a thorough examination of both theoretical frameworks and practical considerations related to Influencer taxation.

The research design adopted for this study is a qualitative research approach, emphasising an in-depth exploration of the subject matter. Extensive searches across various databases will be conducted to gather relevant literature published.

The search will be guided by specifics such as:

- Influencers
- Social media Influencers
- Models
- Tiktokers
- Instagram Influencers
- YouTubers
- The YouTube Partner Program
- Copyright
- Bloggers
- Vloggers
- Taxation of social media Influencers etc.

Furthermore, the primary reference for the analysis in the international tax domain is the Organisation for Economic Co-operation and Development on Income and Capital Model Tax Convention (“OECD MTC”), specifically focusing on Articles 7 (business profits), 12 (royalty income), and 17 (income derived from entertainers) including the relevant commentary on these Articles.

1.4 *LIMITATION OF SCOPE*

This study centres exclusively on the income tax implications for individual taxpayers. While Influencers may often opt for business structures where they operate through companies, this research concentrates explicitly on the intricacies of individual taxation. The comprehensive examination of corporate taxation and Value Added Tax (“VAT”) implications is beyond the scope of this document. Additionally, the exploration of the term "permanent establishment" holds significance within the context of Article 7 of the OECD MTC. However, a detailed

assessment of whether an Influencer's activities establish a permanent establishment in another jurisdiction is beyond the intended focus of this document. Furthermore, the research will not deal with domestic relief from double taxation.

1.5 *BRIEF OVERVIEW OF CHAPTERS*

This document is organised into five chapters. The first chapter serves as an introductory chapter of this analysis. The second chapter provides background to comprehend the nature of Influencers, detailing with their activities and methods of income generation. The ultimate goal of this chapter is to categorise their income in order to assess the tax consequences in the following chapters. The third chapter delves into the tax consequences of Influencers' activities and income, focusing on the South African tax perspective. The fourth chapter scrutinises the implications from an international tax point of view. The fifth and final chapter concludes the overall analysis.

2. **Chapter 2: Defining the term “Influencer” and characterising their income**

Influencers now play a significant role in influencing customer behaviour in the digital era. These people, referred to as Influencers, have become well-known for their knowledge in various fields, including fashion, make-up, travel, cuisine, health, and more. They actively share their expertise and experiences on numerous social media sites, gaining committed followers who connect with their material voraciously. This chapter describes the special characteristics of an “Influencer”, as generally understood, in order to narrow down the scope of the type of income they would be earning. This enables the further characterisation of the income in order to determine how it should be taxed.

2.1 *WHAT ARE INFLUENCERS?*

Influencers are individuals who have made a name for themselves for their expertise in a particular topic, for example, fashion choices, makeup products, traveling, food recipes, health and wellness, etc. They frequently post about that topic on their preferred social media platforms, where they accumulate sizable followings of enthused individuals who pay close attention to their posts.

They begin by posting a few pictures or videos on a well-known social media platform such as Instagram or TikTok. Over time, they gradually attract the attention of more and more followers, growing in popularity. As a result of their expertise, popularity and relationship with their

followers, they attract the interest of several businesses, who identify these people as having the ability to promote their goods or services and influence people's purchasing decisions.³

The most popular digital platforms on which social media is currently used include Facebook, YouTube, Instagram, TikTok, LinkedIn, Tumblr, Pinterest, Snapchat, Twitter, and Twitch. Social media platforms revolutionise human communication and present opportunities for users to express themselves, but some people make a living, or even a fortune, by doing so. These individuals are broadly referred to as Influencers.⁴

2.2 TYPES OF INFLUENCERS

Influencers can be grouped by follower numbers, content types, level of influence, and niche. Mega-Influencers and celebrities often lack expertise in a specific niche, while micro and nano-Influencers can have a significant impact due to having a deeper connection with their audience. This chapter will discuss the different types of Influencers.

2.2.1 Influencers by follower numbers⁵

Nano-Influencers

Nano-Influencers typically have a follower count of between 1000 to 10,000. They are advantageous to companies that produce highly specialised and niche goods since they typically have expertise in an obscure or highly specialised field. However, given their small following, their influence is limited. Nano-Influencers may be inexpensive and powerful among a small group of people, but to effectively reach a larger audience, they would require collaborative efforts with micro or macro-Influencers.

Micro-Influencers

Micro-Influencers typically have between 10,000 and 100,000 followers. They are well-known for being experts in a certain field. These Influencers establish sizeable social media followings among followers within their niche, cultivating relatability and creating strong connections with their audience. Utilising micro-Influencers proves advantageous when businesses seek focused

³ Wener Geyser, 30 January 2024, *What is an Influencer? – Social Media Influencers Defined [Updated 2024]*. Available: <https://influencermarketinghub.com/what-is-an-influencer/> (accessed 12 February 2024).

⁴ S. Kostikidis, *Influencer Income and Tax Treaties*, 74 Bull. Intl. Taxn. 6 (2020), *Journal Articles & Opinion Pieces IBFD* (accessed 28 March 2023).

⁵ Jacinda Santora, 26 January 2024, *12 Types of Influencers You Can Use to Improve Your Marketing*. Available: <https://influencermarketinghub.com/types-of-influencers/#toc-0> (accessed 12 February 2024).



marketing initiatives, like elevating product reviews of the latest product release, or when the goal is for the product to reach a larger audience.⁶

Macro-Influencers

Macro-Influencers are people on a social network with followers in the range of 100,000 to 1 million. They are either B-grade celebrities⁷ or people who have earned their fame on social media networks, making them valuable resources for businesses engaging in Influencer marketing initiatives. Macro-Influencers have a significant online presence and can, therefore, be excellent at raising awareness. Macro-Influencers are more common than mega-Influencers, making them more accessible to brands. Furthermore, businesses that form partnerships with macro-Influencers gain a sense of exclusivity as they are capitalising on the Influencers' internet celebrity status. They charge extremely high rates because of the size of their audience and popularity.

Mega-Influencers

Mega-Influencers are people with followers exceeding 1 million on their social networks. They often consist of celebrities who have gained their fame offline or trendsetters with a loyal fan base. Due to the high cost of their services, prominent businesses are the only ones approaching them for Influencer marketing. However, their influence is undeniable as they have the power to create a significant demand for products or services, effectively boosting a business's brand visibility.

2.2.2 Influencers by types of content or niche⁸

1. Fashion Influencers: Focus on clothing, style, and fashion trends.
 2. Health and wellness Influencers: Share expertise on nutrition, fitness, mental health, etc.
- These types of Influencers' audiences trust them to provide reliable product recommendations to keep themselves healthy and fit.

⁶ Rochi Zalani, 7 October 2022, The 26 Types of Influencers You Need to Know for Your Brand [With Examples]. Available: <https://www.kynship.co/blog/types-of-Influencers#Rich-text-2> (accessed 12 February 2024).

⁷ Shivam, 22 January 2024, Top 50 Most Popular B-List Celebrities. Available: <https://www.entoin.com/entertainment/b-list-celebrities#:~:text=A%20B%2Dlist%20actor%20is,in%20the%20world%20of%20entertainment> (accessed 13 December 2023).

⁸ Rochi Zalani, 7 October 2022, The 26 Types of Influencers You Need to Know for Your Brand [With Examples]. Available: <https://www.kynship.co/blog/types-of-Influencers#Rich-text-2> (accessed 12 February 2024).



3. Beauty Influencers: Specialise in makeup, haircare, skincare, and beauty product reviews. They often review cosmetic products and have an impact on what their followers purchase.
4. Lifestyle Influencers: Post diverse content about their personal routines, fashion choices, and life in general.
5. Food Influencers: Influence people's eating habits and share recipes and restaurant reviews. These types of Influencers can be dieticians sharing how to lose weight or local restaurant reviewers rating the new cafe.
6. Pet Influencers: Share content about pets, their care, and pet-related products.
7. Sports and Fitness Influencers: Cover various fitness niches, workouts, nutrition, etc. These types of Influencers usually talk about how to remain fit and endorse products in the same industry.
8. Travel Influencers: Offer travel tips, destination recommendations, and product reviews.
9. Parenting Influencers: Provide parenting advice, product recommendations for parents etc.
10. Gaming Influencers: Stream games, offer tutorials, and talk about gaming content. Gaming Influencers often live stream their games on Twitch or YouTube, garnering millions of fans looking to learn more about gaming.
11. Technology Influencers: Review the latest tech products and services, like mobiles, laptops, iPads, and more. Their audience values their opinion, influencing their purchase decisions.
12. Entertainment Influencers: Entertain through comedy and other content, catering to a broad audience.
13. B2B Influencers: Influence decision-makers in large organisations and are thought leaders in their industry.

2.2.3 Influencers by social media network

Bloggers and Vloggers:

The most genuine and involved relationships with their followers are those that bloggers and social media Influencers (mostly micro-bloggers) have. Brands are acknowledging and promoting this. Because there are so many hugely influential blogs online, blogging has long been associated with Influencer marketing. Participating in guest posting is an alternative to



paying a blogger to write about your goods. You might be able to purchase a sponsored post on a blog's website if it's popular and large enough. As a result, you can either compose a post yourself or exert intense pressure on the blogger to do so.

YouTubers

Of course, blogs aren't the only widespread form of online publishing. Video is another popular form of content. In this instance, the majority of video creators build a YouTube channel rather than each having their own website. Companies frequently partner with well-known YouTube video producers.

Podcasters

A relatively new type of web entertainment that is gaining popularity is podcasting. To put it simply, a podcast is a digital format made up of audio (or video) episodes with a common topic. A podcast's hosts are referred to as "podcasters."⁹

Social Posts Only

Podcasters, YouTubers, and bloggers rarely rely on their current audiences to visit their websites and hope there is fresh content. They frequently heavily advertise new Articles or videos on social media, which establishes the majority of these bloggers and content producers as micro-Influencers. In actuality, social media is where the vast majority of Influencers nowadays gain notoriety. While Influencers can be found on all the major social media platforms, Instagram has emerged as a standout platform in recent years since so many Influencers build their posts around beautiful images on this platform.

2.3 *HOW DO INFLUENCERS EARN MONEY?*

While Influencers can earn money in several ways, sponsored posts are by far the most popular and lucrative.¹⁰ Influencers may bargain prices depending on the size and sector of their following or charge brands a predetermined fee. Furthermore, Influencer rates are generally

⁹ Intuit Mailchimp, What Is a Podcast and How Does it Work?. Available: <https://mailchimp.com/resources/what-is-a-podcast/> (accessed 11 November 2023).

¹⁰ Colleen Christison, 3 October 2022, How Much Do Influencers Make in 2024? Available: <https://blog.hootsuite.com/how-much-do-Influencers-make/#:~:text=Sponsored%20posts%20are%20one%20of,for%20Influencers%20to%20make%20money> (accessed 10 October 2023).

based on their follower count and engagement rate. Typically, Influencers have rate sheets for the content they are willing to produce.¹¹

Influencers have diverse sources of earning income, with the most common methods encompassing:

1. Sponsored posts: Influencers collaborate with companies to produce sponsored content, in which they advertise goods or services in return for cash. Their follower count, engagement rate, and niche are just a few examples of variables influencing how much they may charge for a sponsored post. While smaller Influencers with specialised audiences may collaborate with companies on a tight budget, more prominent Influencers with millions of followers may charge more outstanding fees for sponsored posts. Brands frequently look for Influencers whose audiences match their target market to maximise their return on investment.
2. Brand ambassador: In a brand ambassador relationship, Influencers continuously promote the business's goods and services on an ongoing basis. As Influencers commit to promoting the brand, these long-term relationships give both sides security, and companies gain from continuing exposure and loyalty. Brand ambassadors may receive compensation in the form of a flat rate income, a percentage of sales, or even a per-post charge.
3. Affiliate marketing: Influencers advertise goods or services through affiliate marketing, where they are paid a commission, known as a "referral commission", for each person they recommend to the business. Influencers frequently provide unique URLs or discount coupons to their followers to encourage them to make purchases and monitor the sales they bring in. Although the commission rate might change, it normally falls between 5% and 30%. Due to their increased impact and reach, more prominent Influencers may be able to negotiate higher commission rates.
4. Off-Site Website Advertising: Some Influencers make money from their websites by monetising their platforms with advertisements. Brands may compensate Influencers to display banner advertisements, sponsored content, or connections to their goods or services. The number of clicks, views, or conversions that these adverts produce can determine how much money the Influencers can make. Influencers may expand their income sources outside social media platforms by using off-site website advertising.

¹¹ By Spotify Staff, 5 December 2022, Influencer Pricing: How Much Should You Pay. Available: [https://www.shopify.com/za/blog/Influencer-pricing#:~:text=Micro%20Influencers%20\(10%2C000%20%2D%2050%2C000%20followers,followers\)%3A%20%2410%2C000%2B%20per%20post](https://www.shopify.com/za/blog/Influencer-pricing#:~:text=Micro%20Influencers%20(10%2C000%20%2D%2050%2C000%20followers,followers)%3A%20%2410%2C000%2B%20per%20post) (accessed 23 January 2023).



5. Merchandising: Influencers that have a large fan base frequently produce and sell their own goods, such as apparel, accessories, or digital goods. Fans may directly support their favourite Influencers through merchandise, which presents a special chance to interact with their audience in a more personal way. Influencers' sale of goods can become a substantial source of revenue, particularly for those who have established brands.
6. Image or Name Rights: Influencers who become well-known and well-recognised may license their names or images to be used in branding, ads, or promotional efforts. Companies may pay an Influencer to utilise their likeness to promote their products or to profit from their notoriety and reputation.
7. Event participation: Influencers frequently participate in events, product launches, or marketing campaigns. Companies could pay for their costs, provide them with free goods or services, or pay them for their time and labour. Influencers may increase buzz and visibility by participating in events, showcasing their business relationships, and sharing their experiences with their followers.
8. Promotional gifts¹²: Business entities frequently give promotional gifts, product samples, and free test items to Influencers in the world of Influencer marketing. This is known as “PR” packages. A PR or Public Relations package is a carefully curated assortment of a brand's latest products or services sent to Influencers. These packages are crafted as thoughtful gifts to make a lasting impression and initiate conversations online. The primary goal is for Influencers to experience and share their feedback with their online audience authentically. Unlike formal marketing agreements, Influencers are not obligated to post about the products. These PR packages are crucial in marketing strategies, aiming to enhance brand awareness and drive sales by leveraging the Influencer's social media reach. Ultimately, they serve as innovative tools for collaboration, ensuring the brand gains visibility and becomes a topic of conversation among the Influencer's audience.¹³ Influencers may also be invited on getaways or to events overseas where they are given access to services either for free or at a reduced cost. Unboxing videos are among the most popular videos on social media and a very efficient form of Influencer marketing. Influencers use unboxing videos to document the

¹² KPMG, Tax challenges in working with Influencers

Companies should consider legal and tax issues in the overall concept of cooperation. Available: <https://kpmg.com/de/en/home/insights/2021/03/tax-challenges-in-collaboration-with-Influencers.html> (accessed 17 June 2023).

¹³ Blog Marketing Collateral Packaging Products, 23 August 2023, PR Packages for Influencers: Amplify Your Brand and Grow Your Audience. Available: <https://dandreavisual.com/pr-packages-for-Influencers/#:~:text=The%20primary%20goal%20is%20for,across%20as%20authentic%20and%20spontaneous> (accessed 28 August 2023).



thrilling process of opening brand-new consumer products in front of the camera for the first time. The Influencer interacts with the audience while delivering insights about the features, branding, packaging, and other pertinent information of the product. This kind of video has been quite popular because it can pique viewers' curiosity and anticipation while letting them practically share in the excitement of unpacking and discovering new things with their favourite Influencers.¹⁴

Although there may be other ways to earn money through Influencer activities, my research will only examine the tax implications of the revenue sources discussed above.

Influencers have a range of revenue streams, and the size, engagement, and nature of their audience may all have an impact on how much money they earn. They play a significant part in digital marketing by linking firms with their target audience and using their influence to promote goods and services. Earning money and paying taxes requires careful consideration and adherence to the applicable tax laws. Influencer marketing presents both Influencers and companies with intriguing potential, but it also has intricate tax implications, particularly for Influencers who operate on a global scale. Influencer income may be subject to taxation in many tax jurisdictions, which might result in double taxation. In order to ensure correct tax treatment, Influencers and businesses must carefully evaluate the tax laws around the treatment of Influencer income.

In an international context, the lack of clear guidance may potentially lead to non-compliance with tax laws. The subsequent chapter of this dissertation will delve into the specific tax implications and regulations for taxing Influencers in South Africa. Following that, the focus will shift to exploring the complexities of taxing Influencers operating on a global scale. Special attention will be given to determining the appropriate Articles of the OECD MTC that govern the taxation of Influencer income in cross-border scenarios

2.4 *INFLUENCER CONTRACTS*

An Influencer contract is a legal agreement between a company and an Influencer, that details their social media engagement. The agreement on the payment is included in this contract, along

¹⁴ Manu Sheen, 24 March 2022, Unboxing Videos: Tips for Brands on What Makes an Unboxing Video Successful (with Examples). Available: <https://insense.pro/blog/unboxing-videos#:~:text=An%20unboxing%20video%20is%20when,packaging%2C%20and%20other%20relevant%20details> (accessed 24 January 2024).



with the content or products they want the Influencer to promote. The agreement governs all parties' legal protection.¹⁵

2.5 CATEGORIES OF INCOME

When analysing all the various revenue sources discussed in this chapter, Influencers' income can be grouped into the following categories:

1. Commission income;
2. Fees for services rendered that could be either in the form of business income or employment income including tips and subscriptions;
3. Sale of goods;
4. Promotional gifts;
5. Royalty income; and
6. Income from entertainment.

These categories will be the main focus for the purposes of this dissertation. The next chapter will outline the framework for taxing Influencers in a South African context.

3. Chapter 3: Determining how South Africa should tax Influencers

This chapter aims to determine how Influencers' income should be taxed in South Africa. Given that the concept of Influencers is relatively new and there is no specific guidance by SARS as to how Influencers should be taxed, it becomes crucial to establish a clear framework for taxation in this evolving digital landscape.

3.1 UNDERSTANDING THE INFLUENCER LANDSCAPE IN SOUTH AFRICA

South Africa's Influencer marketing landscape has witnessed significant growth and transformation in recent years. Influencers and content creators have evolved from being seen as non-traditional job roles to becoming highly skilled production experts. They play a vital role in building brands through their dedicated and engaged followers. South African Influencers often have substantial followings on platforms like Instagram, YouTube, and TikTok.¹⁶

Disclosure and Transparency:

¹⁵ Contracts Counsel, Influencer Contract. Available: <https://www.contractsounsel.com/t/us/Influencer-contract> (accessed 24 February 2023).

¹⁶ Marketing Spread, 22 December 2022, The current state of Influencer marketing in South Africa. Available: <https://marketingspread.co.za/the-current-state-of-influencer-marketing-in-south-africa/> (accessed 16 June 2023).



There is a Social Media Code of Conduct (“code”) that has been published by the South African Advertising Regulatory Board (“ARB”)¹⁷ requiring Influencers to disclose sponsored content transparently. The code mandates that Influencers clearly disclose their partnerships with brands by labelling any sponsored content or endorsements with the words “sponsored”, “ad”, or “paid partnerships”. Failing to do so can result in fines or legal consequences since the Consumer Protection Act 68 of 2008 (“CPA”) states that advertising must not contain deceptive, false or misleading content, including deceptive claims, offers or business practices.¹⁸

Contracts:

A clear and comprehensive contract should govern every Influencer marketing partnership. These contracts should outline the scope of work, compensation, content ownership, disclosure requirements, and dispute resolution mechanisms. A well-written contract reduces the likelihood of legal conflicts and serves to safeguard the interests of both parties. The contract should stipulate as a minimum, the following:

- Duration;
- List Social Media platforms;
- Details on the desired type of social media engagement;
- Remuneration and terms thereof;
- The obligation of the Influencer to disclose that it is a paid advertising campaign;
- If content is not self-created, content rights, including the ownership of content;
- Grounds of termination.

Recent trends in South African Influencer marketing include the rise of micro-Influencers with smaller but highly engaged audiences, the growing importance of video content on platforms like TikTok and Instagram Reels, and a heightened focus on diversity and inclusion in Influencer partnerships.¹⁹ The Influencer marketing industry in South Africa has become a significant economic force, with Influencers earning substantial incomes and brands increasingly using Influencer collaborations to reach their target audiences on social media. This dynamic landscape continues to evolve, shaping the digital marketing landscape in the country.

¹⁷ Advertising Regulatory Board, Appendix K – Social Media Code. Available: [https://www.arb.org.za/assets/appendix-k-social-media-\(2022\).pdf](https://www.arb.org.za/assets/appendix-k-social-media-(2022).pdf) (accessed 28 November 2023).

¹⁸ Nicolene Schoeman-Louw, 2 October 2023, The legal landscape of Influencer marketing in South Africa. Available <https://www.golegal.co.za/Influencer-marketing-law/> (accessed 12 February 2024).

¹⁹ Simple Influence Ninja, 21 April 2023, What is South African Influencer Marketing? Available: <https://app.simpleinfluence.co.za/Influencer-sa-faq/> (accessed 23 April 2023).



Additionally, the South African Social Media Landscape Report 2021²⁰ revealed that 90% of South African marketers believe that Influencer marketing is effective in achieving their objectives.²¹

3.2 TAX PRINCIPLES IN SOUTH AFRICA

The fundamental structure for computing an individual's taxable income begins with gross income. From there, exempt income is subtracted, followed by deductions and allowances, ultimately yielding the taxable income that will be subject to tax

Gross income:

The Income Tax Act, No. 58 of 1962²² is the primary legislation governing individuals' taxation in South Africa. The starting point in calculating a person's taxable income is to determine the person's 'gross income'. The term is defined in section 1 of the Act as follows:

“gross income, in relation to any year or period of assessment, means—

- (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or*
- (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic, during such year or period of assessment, excluding receipts or accruals of a capital nature.”*

Therefore, according to the definition of gross income, any income earned by an Influencer, in cash or otherwise, on whatever basis earned, will be included in the Influencer's taxable income.

However, the gross income definition distinguishes between resident and non-resident individuals' taxation. Persons who are residents in South Africa are taxed on their worldwide income, subject to specific exclusions. Persons who are not residents for tax purposes in South Africa, are only taxed on their income from a source within South Africa. It is, therefore, important to understand when the source of income earned from social media platforms will be from South Africa. This discussion on the source rules will be explored in greater detail in chapter 4.

²⁰ SA Social Media Landscape Report 2021. Available: <https://website.ornico.co.za/wp-content/uploads/2021/06/The-SA-Social-Media-Landscape-Report-2021.pdf> (accessed 15 June 2023).

²¹ Digital Marketing, 10 July 2023, Marketing Tech Trends Heading for South Africa. Available: <https://adclickafrica.com/marketing-tech-trends-heading-for-south-africa/> (accessed 14 July 2023).

²² Hereinafter referred to as “the Income Tax Act”.

Employees' Tax

The framework for assessing the employment status of an Influencer relies on the definitions provided in the Fourth Schedule to the Income Tax Act. The terms 'employee', 'employer' and 'remuneration' are widely defined in the Fourth Schedule to the Income Tax Act for PAYE withholding purposes. Additionally, the gross income definition specifically includes all types of employment income, including benefits in kind.²³ Three components must be present for the Fourth Schedule to be in effect before an employee's tax can be levied, namely an *employer* paying *remuneration* to an *employee*. However, part-time, casual and temporary employees are not in standard employment. The Income Tax Act does not contain a definition for 'standard employment', but the Guide for Employers in respect of Employees Tax' issued by SARS still indicates that the term refers to employment where the employee is required to render services to one employer for at least 22 hours per week. An employee who works for less than 22 hours per week and declares in writing that they have no other employment is in 'standard employment' and must be treated in the same way as an employee paid weekly or monthly.

Part-time, casual and temporary employees:

The employees' tax to be deducted from the remuneration payable to employees who are not in standard employment and receive part-time remuneration is not calculated in terms of the normal rules. A flat rate of 25% is used instead of the normal tax tables and rebates. This rate applies whether these employees are paid on a daily, weekly or monthly basis, if they derive part-time remuneration.²⁴

Examples of part-time remuneration are casual commission paid, such as 'spotter's fees' and casual payments to casual workers for irregular or occasional services rendered.

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'.

Independent contractors:

In the context of Influencers, it is paramount to dissect the classification of these individuals within the definition of 'Remuneration' as stipulated in subparagraph (ii) of section 1 of the Fourth Schedule.

²³ Paragraphs (c) and (n) of the definition of 'gross income'.

²⁴ par 13.4 of the Guide for Employers in respect of Employees' Tax issued by SARS (2023 tax year).



'Independent contractors' being left out of the definition of 'Remuneration' underscores that payments made to Influencers for services rendered independently fall outside the scope of 'remuneration.' Consequently, such payments are not subject to employee's tax. The accurate determination of Influencers as either 'independent contractors' or 'employees' assumes particular significance, as it dictates the obligation of employers to deduct employees' tax.

It is crucial to note that, within the definition of 'remuneration,' Paragraph (ii) specifically excludes non-resident individuals from being labelled as independent contractors. However, the legislative framework introduces a complexity, implying that non-resident individuals may consistently be classified as employees, even when operating as independent contractors. This suggests an ongoing obligation to deduct PAYE from payments to non-resident Influencers providing services in their personal capacities in South Africa.

Local companies engaging non-resident Influencers in their independent capacities to deliver services in South Africa, need to be compliant with PAYE regulations.

3.3 *EMPLOYEES AND INDEPENDENT CONTRACTORS*²⁵

This section explores the criteria for distinguishing an Influencer's employment status, referring to guidelines and legal rulings provided by SARS. SARS has, in an effort to clarify the distinction between employees and independent contractors, issued two documents: Binding General Ruling No.40 ("BGR40") and Interpretation Note 17 (Issue 5) ("IN 17"). These documents will serve as references in the evaluation of the employment status of Influencers, aiding in the determination of whether they qualify as employees or independent contractors, or potentially a combination of both roles. According to IN 17, two methods are utilised to distinguish independent contractors from employees. The first entails certain statutory tests, which end up in a conclusive assessment, and the second method is common law tests, which the courts have developed. The common law tests are not a straightforward checklist. IN 17 goes on to state that there are no hard and fast rules in determining whether a person is an employee or independent contractor. Instead, the process relies on forming an overall impression of the employment relationship. In practice, the statutory tests are applied first. If they are inconclusive,

²⁵ Chelle Law, Is a Social Media Influencer an Employee? | Influencers as Employees. Available: <https://www.chellelaw.com/Influencer-management-contract-attorney/social-media-Influencer-independent-contractor/is-a-social-media-Influencer-an%20employee/#:~:text=As%20an%20Influencer%20using%20social,agreements%20go%20beyond%20a%20year> (accessed 12 February 2024).



the common law tests are considered to establish whether the individual is an independent contractor or an employee in the end.

3.3.1 The Statutory Tests

BGR40 introduces the concept of 'statutory tests' to determine whether Influencers should be subject to employees' tax, also known as PAYE. The statutory tests are contained in exclusionary subparagraph (ii) of the definition of 'remuneration' in section 1 of the Fourth Schedule to the Income Tax Act. Subparagraph (ii) states the following:

“(ii) ... a person shall be deemed not to carry on a trade independently as aforesaid if the services are required to be performed mainly at the premises of the person by whom such amount is paid or payable or of the person to whom such services were or are to be rendered 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 to be performed or as to his or her hours of work: Provided further that a person will be deemed to be carrying on a trade independently as aforesaid if he 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, other than any employee who is a connected person in relation to such person;”

These tests operate as follows:

The First Statutory Test consists of two components. First, the services must be conducted mainly at the client's premises, with 'mainly' being quantitatively defined as being more than 50%²⁶. The second component is whether the employee's manner of work or hours of work is under the control or supervision of anyone. The first statutory test is only met if both these elements apply for an individual to be recognised as not carrying on a trade independently.

The Second Statutory Test stipulates that a person is considered to be carrying on a trade independently if they employ three or more full-time workers who are not 'connected persons' with regard to the natural person. The Second Statutory Test takes precedence over the First Statutory Test, even if the requirements of the first test have been satisfied. Therefore, it is an exclusionary measure in the sense that when a person employs three or more unconnected persons, the person is seen as an independent contractor, and the income for the services rendered is not subject to PAYE.

²⁶ *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Eiendoms) Bpk 1966 (4) SA 434 (A).*



There may be several circumstances, in which Influencers' services are performed at the client's premises, for example:

- **In-Store Promotions:** An Influencer may be hired by a retail brand or a specific store and be obliged to visit the physical store and generate content or promotions there. They could be requested by the client to engage with customers, promote the store's merchandise, or record videos and create posts about their experiences. In this instance, their services are mainly performed on the client's premises.
- **Restaurant Reviews:** Restaurants may ask Influencers to dine at their facilities so they may post about the eating experience. Therefore, they would be primarily working at the client's premises.
- **Event Coverage:** Influencers would need to be physically present at the event location in order to provide their services if they were paid to cover events like product launches, conferences or trade exhibitions. For Influencers who cover live events through social media postings, live broadcasts, or interviews, they need to be physically at the client's premises.

There are also instances where an Influencer's manner of work or hours of work may be under the control or supervision of a client:

- **Sponsored Content Creation:** In some cases, a brand or client might have specific requirements or guidelines for the content an Influencer is creating. They may dictate the style, format, or specific messaging that the Influencer must adhere to. This can be a form of control over the Influencer's manner of work.
- **Content Approval Processes:** Brands may require Influencers to submit their content for review and approval before it's published. This means the Influencer's work is subject to the client's scrutiny and changes may be requested, impacting the Influencer's creative control and work hours.
- **Scheduled Posts:** Clients might have a say in when content is posted, especially for coordinated marketing campaigns. Influencers may need to adhere to specific posting schedules, which can affect their work hours and timing.
- **Live Stream Events:** When Influencers are engaged for live events, they may need to follow a strict schedule, including specific start and end times, as well as content topics. The event organisers or clients may supervise the Influencer during the live broadcast.

- **Product Endorsement Details:** If Influencers are endorsing products or services, clients may have precise requirements about how the products should be presented, demonstrated, or discussed. This level of direction can influence how the Influencer conducts their work.
- **Exclusive Contracts:** In some cases, Influencers may enter into exclusive contracts with brands or agencies, limiting their ability to work with competing companies. This could control the Influencers' manner of work by restricting who they can collaborate with.

Due to the complexity of Influencers' type of work arrangement and in reality, applying statutory criteria to them may be challenging. Influencers participate in a variety of activities and offer a wide range of products and content to different companies and customers. Under some control and supervision on the client's property, they may be engaged by a range of businesses for a number of objectives, such as content development, promotion, event coverage, and product endorsements. It is difficult to categorise them using the statutory requirements provided by SARS due to the variety of Influencer positions and client expectations. In the end, it should be reviewed on a case-by-case basis and therefore the Statutory Tests may not prove to be conclusive to determine if the Influencer is a regular employee or an independent contractor.

3.3.2 Common Law dominant impression test

In the event the Statutory Tests are inconclusive, the Common Law dominant impression test is used. In essence, this is an analytical instrument intended for use in the workplace to determine an individual's level of dependence or independence. The common law dominant impression test makes use of several indicators, of differing significance or weight, which have to be applied in the relevant context. The indicators are interrelated and point to whether or not there has been the 'acquisition of productive capacity' (that is, of labour power, capacity to work, or simply effort). Annexure B to the IN 17 contains a flow diagram that should be followed when a determination is to be made whether or not an Influencer should be categorised as an employee or independent contractor.

The 'common law dominant impression grid' is contained in Annexure C to Interpretation Note No 17 (Issue 5) and guidance on how to apply the common law dominant impression test is set out in point 7 of this interpretation note. The interpretation note and Annexures and common law tests do not refer to Influencers at all. The author has therefore extracted the information where it would relate to Influencers and in what way it would or could be applicable.



3.2.2.1 *Near-conclusive indicators*

This set of indicators is highly decisive, as these factors are deemed crucial in differentiating whether the employer is obtaining the worker's ability to perform tasks (indicative of an employee) or merely the outcome (indicative of an independent contractor). The specific indicators are detailed below:

a) Control of Manner:

An Influencer might be considered an employee if the brand or client exerts significant control over how the Influencer creates and shares content. This could include detailed instructions, specific content guidelines, or a contractual obligation to follow certain routines or themes.

b) Payment Regime:

If an Influencer is paid at regular intervals without a direct correlation to the performance or results of their content, it could suggest an employee-like relationship. However, Influencers often receive compensation based on engagement, which aligns more with an independent contractor status.

c) Person Who Must Render the Service:

If an Influencer is contractually obligated to exclusively work for one brand or client, with restrictions on collaborating with others, it leans towards an employee relationship. Independent contractors typically have the freedom to work with multiple clients simultaneously.

d) Nature of Obligation to Work:

If an Influencer is contractually bound to work full-time for a client, it indicates an employer-employee relationship. On the other hand, independent contractors usually have more flexibility in deciding when and how much they work.

e) Employer (Client) Base:

If a brand restricts an Influencer from collaborating with other clients, it suggests exclusive use of the Influencer's services, aligning with an employee relationship. Independent contractors typically have multiple clients.

f) Risk, Profit, and Loss:

Influencers who bear the risk of performance or market fluctuations, have the opportunity to enjoy profits, and may incur losses, are more aligned with an independent contractor status.



3.2.2.2 *Persuasive indicators*

In the realm of Influencers, these indicators analyse the extent and purpose of behavioural guidance. Their significance in decision-making lies in how extensively and for what purpose control is exerted. These indicators carry persuasive weight as they are linked to the level of control and its impact on acquiring the Influencer's creative and promotional abilities. Control serves as a pivotal factor in translating an Influencer's potential into effective and purposeful promotional activities. Here are some specific instances:

a) Instructions or Supervision:

Detailed instructions from a brand on how content should be created, and constant supervision could indicate an employee relationship. Independent contractors often have more autonomy in deciding the order and style of their work.

b) Reports:

Regular reporting requirements, especially if it extends to controlling how the work is done, might suggest an employer-employee relationship.

c) Training:

Brands providing extensive training to Influencers, especially to control the manner of content creation, may lean towards an employer-employee relationship.

d) Productive Time (Control of Working Hours):

If Influencers have limited control over when and how long they work for a specific client, it could suggest an employer-employee relationship.

3.2.2.3 *Indicators resonant*

In the context of Influencers, this category of indicators offers a glimpse into the perspectives of the involved parties regarding their collaboration. The presence of a clause containing this indicator or any facet of the Influencer-client relationship embodying this indicator holds significance in shaping a prevailing impression. However, it is crucial to acknowledge that these indicators may be vulnerable to manipulative contractual practices or may only loosely connect to the core distinction between the two types of agreements. Here are a few illustrations:

a) Tools, Materials, Stationery, etc.:

If a brand provides Influencers with tools, equipment, or materials for content creation, it might indicate a degree of dependence, aligning with an employee relationship.

b) Office or Workshop:



If Influencers predominantly operate from a brand's premises and use provided resources, it could suggest an employer-employee relationship.

c) Integration or Employer's Usual Work Premises:

If Influencers are integrated into a brand's usual work premises, it may indicate an employer-employee relationship.

d) Integration or Usual Business Operations:

If Influencers engage in activities integral to a brand's business operations, it might suggest an employer-employee relationship.

e) Integration or Hierarchy and Organogram:

If Influencers have a specific position in a brand's hierarchy or organogram, it could indicate an employer-employee relationship.

f) Duration of Relationship:

If Influencers enter into open-ended relationships rather than task-specific contracts, it may suggest an employee relationship.

g) Termination and Breach of Contract:

If there are provisions for termination before completion of a task, it might suggest an employer-employee relationship.

h) Significant Investment:

If a brand provides significant investments (e.g., tools, training) to Influencers, it might suggest an employer-employee relationship.

i) Bona Fide Business Expenses, Bona Fide Statutory Compliance:

If Influencers do not incur significant business expenses and are subject to the brand's statutory compliance, it leans towards an employee relationship.

j) Viability on Termination:

If Influencers are not economically viable without the brand and need immediate employment, it might suggest an employee relationship.

k) Industry Norms and Custom:

If there is an industry norm treating Influencers as employees rather than independent contractors, it may influence the determination.

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).

The classification of individuals as either employees or independent contractors is a critical distinction with significant tax implications. In the context of Influencer arrangements, the South African courts have outlined several factors to consider when making this determination.

In the case of *Smit v Workmen's Compensation Commissioner*²⁷, the Appellate Division rejected the simplistic 'control' test and emphasised that the employer's right of supervision and control is just one of many indicators. This decision was further reinforced by Nugent J in *Liberty Life Association of Africa Ltd v Niselow*²⁸, where it was articulated that an employee commits their productive capacity to the employer. In contrast, an independent contractor commits to delivering a specific result. Nugent J underscored that the pivotal aspect of the inquiry is whether the worker places their productive capacity at the disposal of the employer, focusing on the worker's obligations rather than their rights.

These factors are not exhaustive, and no single indicator is necessarily decisive in determining an Influencer's employment status. It is necessary to assess all relevant facts to form a dominant impression in favour of either an employment contract or a contract for services. The Supreme Court of Appeal subsequently endorsed the views of Nugent J and have been consistently followed by the 'new' Labour Court.

In the case of *SABC v McKenzie*²⁹, additional characteristics were identified to differentiate an employment contract (common law employee) from a contract for services (independent contractor). They include the following distinctions:

- An employee's contract of service is characterised by the rendering of personal services to the employer. In contrast, an independent contractor's contract pertains to performing specified work or producing a specific result.
- Employees are generally at the beck and call of the employer to render personal services. In contrast, independent contractors are not obliged to perform the work personally and may employ others or assistants to fulfil their contractual obligations.
- Services under an employment contract are at the disposal of the employer, who decides when and how they should be rendered. In contrast, independent contractors are obligated to perform specific work within a stipulated timeframe.

²⁷ *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Eiendoms) Bpk* 1966 (4) SA 434 (A).

²⁸ *Liberty Life Association of Africa Ltd v Niselow* ([1996] 17 ILJ 673 (LAC)).

²⁹ *SABC v McKenzie* ([1999] 1 BLLR 1 (LAC)).



- Employees are subject to the control and supervision of the employer, including receiving orders and instructions on how tasks should be carried out. On the other hand, independent contractors operate on a more equal footing with the employer, retaining control over their work without supervision.
- Employee contracts may terminate upon the death of the employee or expiration of the contracted period, while contract work concludes upon the completion of specified work or the achievement of a specific result.

3.3.3 Conclusion of employee or independent contractor status

If Influencers are deemed employees, they may be subject to PAYE. The statutory tests introduced by BGR40 and IN17 help determine their employment status. In the event of being classified as an employee, Influencers will receive 'remuneration,' and their employer, the entity using the Influencer's services, will be liable to deduct PAYE from the remuneration paid. In cases where an Influencer receives remuneration from multiple employers, the PAYE calculation for the earnings from each employer must be conducted separately.

On the other hand, if the employment status of the Influencer is inconclusive the common law dominant impression test is applied. According to information on Influencer relationships and the previously described factors, it is more likely that Influencers will be categorised as independent contractors than as common law employees. This is because:

- Nature of services: Influencers typically engage in content creation or promotion for specific results, making it akin to a contract for services rather than personal services as required in employment contracts.
- Control and Supervision: Influencers often maintain a level of creative control and autonomy over their work, which is more aligned with an independent contractor relationship. They are not typically subject to detailed instructions and continuous supervision by clients.
- Availability and Discretion: Influencers generally have discretion over their work hours, schedules, and creative methods, demonstrating an independent contractor-like independence.
- Termination and Duration: Influencers' contracts often terminate upon the completion of specified content or result delivery rather than upon the Influencer's death or at the client's discretion, as is common in employment contracts.

The case law and legal guidelines mentioned also support this determination, emphasising that no single factor is decisive. Still, these factors collectively suggest that Influencers are more appropriately classified as independent contractors in most cases. Therefore, their income is business income and not remuneration.

If Influencers are classified as independent contractors, they will not be subject to PAYE. However, they will be liable to register for provisional tax³⁰. Provisional tax is a way to pay the income tax obligation ahead of time; it is not different from income tax. The taxable income of an Influencer will be their gross income minus any allowable deductions.³¹ In the realm of Influencer taxation, the ability to claim deductions against business income depends on various factors, including the Influencer's niche, chosen platform, and content type. Influencers often incur specific expenses tailored to their activities. For instance, gamers may invest in high-performance computers, gaming chairs, multiple screens, and related accessories. Potential general deductions include costs related to maintaining a website, internet subscription fees, home office expenses, phone and internet costs, wear and tear on equipment, travel expenses, professional and accounting fees, agency costs, and content creation expenses like filming and editing etc. It is important to note that, personal use items, like clothing, are generally not deductible.

Additionally, Influencers should register for Value-Added Tax ('VAT') if their earnings are in excess of R1 million. The VAT Act imposes VAT³² at the standard rate of 15% (currently).³³ VAT will not be applicable to an employee receiving remuneration and paying PAYE.

3.4 PROMOTIONAL GIFTS

In examining the types of income streams an Influencer can earn as discussed in chapter 2.3, it appears that the predominant form of compensation Influencers may receive is cash. However, Influencers may also receive non-monetary forms of compensation, such as event invitations, products and services, hereinafter referred to as 'promotional gifts'.

When Influencers receive promotional gifts in exchange for creating content, it is an example of compensation received in a form other than cash. However, there are cases in which promotional

³⁰ A provisional taxpayer is defined in paragraph 1 of the Fourth Schedule of the Income Tax Act as any – “*natural person who derives income, other than remuneration or an allowance or advance as mentioned in section 8(1) or who derives remuneration from an employer who is not registered for employees' tax (for example, an embassy is not obligated to register as an employer for employees' tax purposes).*”

³¹ Definition of 'taxable income' in section 1(1) of the Income Tax Act.

³² The Value-Added Tax Act 89 of 1991.

³³ Section 7(1)(a) of the VAT Act.



gifts are sent to the Influencer gratuitously, with no expectations for creating content or any actions required from the Influencer. It is therefore important to consider what the tax consequences are if an Influencer receives promotional gifts.

3.4.1 Promotional goods acquired for consideration

Promotional gifts received in exchange for a service are subject to the same rules applicable to barter transactions. A barter transaction is when goods are supplied for a consideration that is not monetary.³⁴ As per the gross income definition, any amount received 'in cash or otherwise' is taxable. Consequently, the value of the promotional gifts received from bartering is taxable.

In determination of the value of the promotional gifts exchanged for content creation in a barter transaction, Binns-Ward J noted in *South Atlantic Jazz Festival (Pty) Ltd v C: SARS*³⁵ that –

*“...In an ordinary arm’s length barter transaction the value that the parties to it have attributed to the goods and services that are exchanged seems to me, in the absence of any contrary indication, to be a reliable indicator of their market value.”*³⁶

Therefore, it can be accepted that in a barter transaction with an Influencer and another party, the value of the promotional gifts given to an Influencer will, in the 'absence of any contrary indication', be the value of the content created by the Influencer, as agreed between the parties and would be of equal value.³⁷ Therefore, the market value of the promotional gifts should be included in the Influencer's gross income and be subject to taxation even though no cash consideration has been given.

A practical solution to this situation is including the market value of promotional gifts and content creation services as well as the details of the transaction and contractual terms in the contractual agreement between the parties. The specific details of the transaction are important as they may impact the value and timing of the transaction.

³⁴ In the case of *South Atlantic Jazz Festival (Pty) Ltd v CSARS* [2015] ZAWCHC 8, the taxpayer organized yearly jazz festivals in Cape Town and entered into sponsorship agreements with entities such as SAA, City of Cape Town, SABC, and Telkom. These sponsors contributed funds, goods, and services. In reciprocation, the taxpayer furnished goods and services to the sponsors, primarily in the form of branding and marketing. Consequently, these arrangements were deemed barter transactions.

³⁵ 2015 (6) SA 78 (WCC), 77 SATC 254 at 260 and 261.

³⁶ 2015 (6) SA 78 (WCC), 77 SATC 254 at 260 and 261.

³⁷ SARS Interpretation Note 58 (Issue 3), *The Brummeria Case And The Right To Use Loan Capital Interest Free*, Page 3.



3.4.2 Promotional gifts acquired for no consideration

Receiving promotional gifts without expectations presents complex tax challenges for Influencers. If Influencers retain these gifts for personal use, no taxable event occurs. However, since Influencers often showcase such items on social media, businesses provide these gifts in exchange for content creation services, potentially subjecting them to taxation.

Influencers must be aware that due to the broad definition of ‘trade’³⁸ in the Income Tax Act. Frequently providing advertising or marketing services can be classified as a ‘trade’, even if the Influencer is unaware of offering such services. Consider a scenario where an individual, driven by a passion for hair, makeup, and beauty products, holds a regular job but dedicates her free time to posting videos and content on social media about beauty products etc. In doing so she has gained a substantial following on her social media platforms. As a result, beauty companies send her promotional packages featuring new product launches. The Influencer consistently creates videos showcasing and reviewing these products on her social media platforms. In this context, she is deemed to be engaging in a trade by providing advertising and marketing services. Consequently, the value of the promotional gifts received becomes subject to taxation.

Regarding the value of these promotional gifts received, case law determines the value that should be included in gross income when non-cash amounts are involved. The term ‘amount’ does not only mean money but the value of every form of property with a monetary value.³⁹ Furthermore, an amount will fall into gross income if it has an ascertainable monetary value that can objectively be determined.⁴⁰ Therefore, the monetary value of promotional gifts must be included in the Influencer's gross income if a service was provided to the party sending the promotional gifts.

It is crucial for Influencers to distinguish between genuine gifts for personal use, contractual agreements, and transactions triggering tax responsibilities. Even seemingly small benefits in kind or ‘pittances’ must be declared to SARS. The term ‘pittances’ may imply a modest amount. However, tax obligations persist for the taxpayer. The foundation of the South African tax system is the concept that a taxpayer's total income is calculated by adding all of their sources of income together and using a progressive tax rate table to calculate their ultimate tax liability upon

³⁸ The term “trade” is defined in section 1 the Income Tax Act and includes “every profession, trade, business, employment, calling, occupation or of venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act or any design as defined in the Designs Act or any trade mark as defined in the Trade Marks Act or any copyright as defined in the Copyright Act or any other property which is of a similar nature”.

³⁹ *Lategan v CIR* (2 SATC 16)(1926 CPD 2013).

⁴⁰ *CSARS v Brummeria Renaissance (Pty) Ltd* (2007 SCA).



assessment. Therefore, it imposes a lower tax rate on low-income earners and a higher tax rate on those with higher income. For instance, a stay-at-home mom might assume she falls below the tax threshold, but she could end up in a higher tax bracket when all her income sources are considered. Influencers must maintain meticulous record-keeping practices to ensure compliance with SARS regulations.

3.4.3 Sale of promotional gifts

The subsequent sale of the promotional gifts that were previously sent by brands to Influencers are subject to taxation, involving two separate taxation events. The first event pertains to the receipt of the promotional gifts, as discussed above, while the second concerns the subsequent sale of these gifts. Suppose the gifts are acquired by the Influencer for no consideration or for a consideration which is not measurable in terms of a monetary value. In that case, the Influencer acquiring it is deemed to have obtained it at a cost equal to the current market value on the acquisition date.⁴¹ Thus, the initial value of the promotional gifts received will be deducted from the selling price to determine the taxable amount of the gifts sold.

3.5 ROYALTY INCOME

The term “royalty”, as defined in section 49A of the Income Tax Act, means –

“any amount that is received or accrues in respect of—

- (a) the use or right of use of or permission to use any intellectual property as defined in section 23I; or*
- (b) the imparting of or the undertaking to impart any scientific, technical, industrial or commercial knowledge or information, or the rendering of or the undertaking to render any assistance or service in connection with the application or utilisation of such knowledge or information.”*

Royalty income is generally subject to income tax, with a 15% withholding tax specifically applicable to royalties paid to non-residents when sourced from South Africa. In the context of Influencers, this withholding tax on royalties is relevant to foreign-resident Influencers. South African tax resident Influencers are not affected by this withholding tax.

⁴¹ Section 22(4) of the Income Tax Act.

Influencers often engage in collaborations, brand partnerships, and content creation that involve the use of their intellectual property. Intellectual property for Influencers includes their original content, brand identity, and creative works, granting them legal rights to control and protect their unique creations. Collaborations with Influencers may result in royalty income, and therefore Influencers need to be aware of the tax implications associated with such. Furthermore, brands in South Africa also need to be aware that when using foreign Influencers' intellectual property, royalty payment may be subject to 15% withholding tax. There are situations where a reduced tax rate might be applicable. For instance, the foreign Influencer could be eligible for a reduced tax rate under a Double Taxation Agreement ('DTA') between South Africa and their country of residence. Alternatively, the foreign person might be exempt under the DTA, particularly when South Africa lacks the authority to tax royalties in certain circumstances.

3.6 *INCOME DERIVED FROM ENTERTAINMENT*

From a South African perspective, income generated by an Influencer from entertainment is subject to taxation. Furthermore, if a resident of South Africa is obligated to make a payment to a foreign entertainer for their services in respect of their performance in South Africa, a 15% withholding tax, termed 'tax on foreign entertainers and sportspersons', must be withheld from the payment.⁴² The resident responsible for the deduction must remit this tax to SARS on behalf of the foreign entertainer or sportsperson. This withholding tax is a final tax, meaning it covers all payments received or accrued by the foreign entertainer or sportsperson. Therefore, only that particular income is liable to income tax in South Africa if the foreign individual receives any additional income from a South African source. Foreign sportspersons and entertainers are exempt from withholding tax on relevant sums; these amounts are not included in determining their total tax liability due to the 15% withholding tax.

It is crucial for foreign Influencers who are classified as entertainers and sportspersons to be aware of South Africa's withholding tax on entertainment income, along with the corresponding obligations. Additionally, South African brands engaging with foreign Influencers should also be mindful of these tax implications. The criteria for classifying an Influencer as an entertainer are discussed in further detail under section 4.7 of this research report.

⁴² Section 47B of the Income Tax Act.



3.7 Conclusion of the chapter

In summary, this chapter has laid the foundation for determining how South Africa should tax Influencers. It began by providing insights into the evolving Influencer landscape, emphasising the need for clarity from SARS in taxing Influencers. The discussion then delved into South African tax principles, focusing on gross income and the employment status of Influencers. The crucial question of whether Influencers should be considered employees or independent contractors was explored through statutory tests and common law indicators. The complexity of Influencer roles and the challenges in applying these tests were acknowledged, urging a case-by-case assessment. As such, Influencers can be classified as either self-employed individuals or employees, with their income falling into business or employment categories. However, most of the time, Influencers are classified as independent contractors or self-employed individuals due to the nature of their services. Furthermore, it is submitted that when Influencers receive promotional gifts or PR packages for compensation or for no compensation, it generally constitutes a taxable event, emphasising the importance of declaring non-cash benefits to SARS.

The chapter concluded by scrutinising the tax implications of gifts and barter transactions including royalty income and income derived from entertainment. The next chapter will delve deeper into the source rules for income earned by Influencers in an international context.

4. Chapter 4: The application of double tax treaties to Influencers

As Influencers traverse national borders through their online presence, the challenge of defining and taxing their income becomes increasingly complex. It is common for Influencers to work with multinational companies, engage with a worldwide audience, and engage in cross-border activities. Below are a few examples of the cross-border activities of Influencers:

1. International Brand Partnerships: To market their goods or services to a worldwide audience, Influencers are increasingly in demand by international businesses. These partnerships might be brand ambassadorships, affiliate marketing initiatives that go outside the Influencer's home country, or sponsored content campaigns. As a result, Influencers could have to deal with international contracts.
2. Global Audience: Brands and companies from other countries naturally pay attention to Influencers that have a sizable worldwide following. Companies may work with Influencers to reach their worldwide audience in an effort to broaden their reach and target

certain foreign markets. In these situations, Influencers must be aware of the various jurisdictions' tax laws and reporting obligations.

3. Influencer travel: Influencers may receive invitations to go abroad to participate in occasions, product launches, or advertising campaigns. In exchange for their involvement in these activities, brands may pay for their travel costs and offer remuneration. These activities could give rise to tax issues with compensation for services provided overseas and how to deal with travel-related costs.
4. Influencer merchandising: Influencers with sizable international fan bases who sell goods online and export them internationally are known as "merchants." These foreign business transactions might result in complicated tax problems, such as VAT concerns and international tax treaty compliance.
5. Cross-Border Collaborations: Influencers may work with other Influencers, artists, or companies from other nations, leading to cross-border engagements and activities. These partnerships could result in revenue-sharing agreements, necessitating a thorough examination of the tax implications in each concerned jurisdiction.
6. Digital platforms and social media: Influencers may connect with a worldwide audience online regardless of where they are physically located. Influencers now find it simpler to interact with a global following because of social media platforms, blogs, and video-sharing websites.

The above situations could lead to complex tax issues, requiring Influencers to navigate international contracts, understand diverse tax laws, and comply with reporting obligations in several countries.

The Influencers' income categories, explored comprehensively in the preceding chapters encompass commission income, fees for services rendered, sale of goods, promotional gifts, royalty income, and income derived from their roles as entertainers. This chapter specifically delves into how double tax treaties (DTAs) come into play in allocating taxing rights to the different jurisdictions in which they earn these types of income streams. The prevailing MTC widely adopted by various jurisdictions is the OECD MTC. Consequently, in this chapter, the OECD MTC and its commentaries are relied on as a guide for interpretation and is applied in the context of Influencers.

When an Influencer engages in cross-border activities, the primary risk they face is having their income subject to multiple taxes, either from different tax authorities or from diverse sources in an international context. 'Judicial double taxation' is the most popular term used to describe



this circumstance. Having examined the various income categories of Influencers, the next step involves categorising them into the appropriate Articles of the OECD Model.

4.1 *RESIDENCE AND SOURCE*

Whether there is a link, or nexus, between the income and a particular country is one of the key considerations for determining whether income is subject to taxation in that country. According to the domestic laws of various countries, the necessary connection aspect is that the income must be derived from activities that are either connected to the country in question or connected to the individual who received the income. 'Residence jurisdiction' and 'source jurisdiction' are the terms used to describe these linking aspects. While the source basis of taxation depends on a sufficient link between the source of the income and the country in question, the residency basis of taxation is dependent on a sufficient connection between the taxpayer and the country in question.

When a residence basis of taxation is adopted, an element of source basis of taxation is also adopted. Non-residents are, subject to the provisions of the tax treaty, taxed on income generated within their domestic economy of the country. Likewise, countries embracing a source basis of taxation have extended their tax nets by deeming specific income received outside their borders as originating from a domestic source.

The consequence of some countries applying tax on a residence basis while others opt for a source basis leads to a scenario where the same income might face taxation in two countries, commonly referred to as 'international double taxation'. This situation can also arise when two countries impose tax on the same basis, such as both recognising an individual as a resident or considering the income to be sourced within their respective jurisdictions. To mitigate the impact of double taxation, relief measures are typically provided either under domestic laws or through tax treaties.

One method of eliminating double taxation under a tax treaty involves the allocation of taxing rights between the State of residence and the State of source. Therefore, determining whether a taxpayer is a resident in a specific State or identifying the country where the income originates becomes crucial in establishing which State holds the authority to impose taxes.

4.2 *COMMISSION INCOME*

Commission-based arrangements are common in industries like sales and affiliate marketing, which Influencers are very much a part of. Typically, the compensation is based on the success

of the arrangement. For example, if no sales or transactions occur, there may be no commission earned.

Appropriate Article in the OECD MTC to allocate taxing rights:

The 'fees from independent services' category within the OECD MTC captures commission income earned by individuals engaging in independent activities. Commission income, derived from services that contribute to the generation of sales or transactions, aligns with the concept of 'fees from independent services'. The crucial commonality lies in the autonomy of the service provider, operating independently of an employer-employee relationship, and earning compensation based on their activities. Therefore, Article 14, dealing with "income from personal services", would be the appropriate Article to allocate taxing rights for commission income. However, Article 14 was deleted from the OECD MTC on 29 April 2000, on the grounds that there were no intended differences between the meanings of a fixed base, as used in Article 14, and permanent establishment, as used in Article 7 dealing with business profits. Furthermore, it wasn't always evident which activities were covered by Article 14 as opposed to Article 7. The removal of Article 14 has the consequence of income derived from independent personal services now being treated as business profits under Article 7.⁴³ This shift has been strategically addressed through the insertion of a refined definition of 'business' in Article 3 of the OECD MTC, where the scope now extends to encompass the performance of professional services and other independent activities. This adjustment ensures that income arising from the performance of independent services by an individual aligns appropriately with the framework of business profits under the revised OECD MTC. Consequently, Article 7 is the appropriate Article to allocate taxing rights for commission income.

Allocation of taxing rights for commission income:

The foundational principle of Article 7 can be found in Paragraph 1, where exclusive taxing rights over the business profits of a taxpayer are conferred upon the Contracting State of the taxpayer's residence. This fundamental rule is then followed by an exception that grants the taxing rights to the other Contracting State in case the taxpayer's business is conducted through a permanent establishment situated in that Contracting State. It can generally be concluded that an Influencer lacks a permanent establishment in any source State due to their high degree of mobility.

⁴³ OECD MTC Commentary (2017) on Article 14.

However, a detailed assessment of whether an Influencer's activities establish a permanent establishment in another jurisdiction is beyond the intended scope of this document.

Application to Influencers:

Where an Influencer is a party to a commission-based arrangement and earns commission income, this income will, therefore, be taxable in the country of the Influencer's tax residence. For example, an Influencer partners with an international beauty brand, earning a commission for each sale made through their unique affiliate link shared on social media. The commission income will be subject to taxation in the Influencer's Country of residence. However, the complexity arises when the Influencer creates a permanent establishment in another State, such as a studio or office. In this instance, the income derived from the commission-based collaboration that is directly attributable to this permanent establishment may be subject to taxation in the State where the permanent establishment is situated. However, it is outside the purview of this dissertation to ascertain if an Influencer's actions result in the development of a permanent establishment in a different jurisdiction.

4.3 *FEES FOR SERVICES RENDERED*

The key difference between commission income and fees for services rendered is how the compensation is determined. Commission income is contingent upon successful transactions or sales and is calculated as a percentage of the value of those transactions or sales. On the other hand, fees from services rendered are fixed amounts agreed upon for the provision of specific services, irrespective of the outcome or success of those services.

Appropriate Article in the OECD MTC to allocate taxing rights:

Regarding the allocation of taxing rights under the OECD MTC, the relevant Article for 'fees for services rendered' is Article 7, which addresses business profits. This is substantiated by Article 3 of the OECD MTC, which defines 'business' to include the performance of professional services. Consequently, the income derived from services rendered is appropriately covered under Article 7.

Allocation of taxing rights for fees for services rendered:

As evaluated in section 4.3 of this document dealing with commission income, taxing rights over the business profits of a taxpayer are allocated to the Contracting State of the taxpayer's residence.



Application to Influencers:

Suppose an Influencer collaborates with an international technology company, to promote their latest gadgets, devices, or software. The Influencer, renowned for their expertise, employs a promotional strategy, creating content to showcase the product features. In this arrangement, where the Influencer received compensation for their promotional services, any profits derived from this collaboration would be subject to taxation in the Influencer's country of residence.

4.4 *SALE OF GOODS*

Influencers that have a large fan base frequently produce and sell their own goods, such as apparel, accessories, or digital goods. Fans may directly support their favourite Influencers through merchandise, which presents a special chance to interact with their audience in a more personal way. Influencers' sale of goods can become a substantial source of revenue, particularly for those who have established brands.

Appropriate Article in the OECD MTC to allocate taxing rights:

Proceeds from the sale of goods fall within gross income and will therefore be included in the taxable income of the Influencer. The Influencer is deemed to be conducting a business in selling merchandise. Consequently, the income derived from the sale of goods is appropriately covered under Article 7, which deals with business profits.

Allocation of taxing rights for the sale of goods:

Taxing rights over the business profits of a taxpayer are allocated to the Contracting State of the taxpayer's residence.

Application to Influencers:

When an Influencer starts selling goods, the profits from these sales become subject to taxation in the country of the Influencer's tax residence. For example, an Influencer recognised for her lifestyle content decides to expand her reach by launching a line of sustainable and eco-friendly skincare products. Despite selling these goods to an international audience, the profits generated will be subject to taxation in the Influencer's country of tax residence.

4.5 *PROMOTIONAL GIFTS*

As discussed in chapter 3.4 of this document, promotional gifts received from brands are similar to barter transactions primarily because Influencers often reciprocate by posting content about the gifts they received. Consequently, these promotional gifts may be subject to taxation. If a



prearranged contractual agreement exists stipulating that the Influencer must create content showcasing the gifts, taxation indeed becomes applicable, aligning with consideration received for services rendered. Whether countries opt to tax Influencers on promotional gifts received without any contractual obligation to post content is a grey area.

Appropriate Article in the OECD MTC to allocate taxing rights:

As this aligns with compensation received for services rendered, despite being a non-monetary form of compensation, it falls within the scope of Article 7, addressing business profits of income derived from services rendered.

Allocation of taxing rights for promotional gifts:

Taxing rights over the business profits of a taxpayer are allocated to the Contracting State of the taxpayer's residence.

Application to Influencers:

When, for example, the Influencer receives promotional gifts in the mail after entering into a formal promotional services agreement with the international technology company, and the Influencer engages in an unboxing video or review on their social media platforms, the promotional items received will be subject to taxation in the Influencer's country of residence. The market value of the items received needs to be determined on the day they were acquired, and the value thereof will be subject to taxation. In the absence of a contractual obligation between the Influencer and the international technology company to create content or provide specific services, things can become more complicated. However, in the author's view, the promotional gifts are still subject to taxation because the primary motive behind the gifts is to gain access to the Influencer's services, which hold value for the international technology company.

4.6 ROYALTY INCOME

Influencers can earn royalty income through various avenues by leveraging their intellectual property, creative works, and personal brands.

Appropriate Article in the OECD MTC to allocate taxing rights:

The relevant Article in the OECD MTC governing the allocation of taxing rights for royalty income is found in Article 12. This Article explicitly defines 'royalties' in Paragraph 2 as:

“payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.”

As per the definition provided, royalty income is appropriately covered under Article 12 of the OECD MTC rather than Article 7, which pertains to business profits. This distinction is reinforced by Paragraph 4 of Article 7, stipulating that when profits involve income items separately addressed in other Articles of the OECD MTC, those specific Articles take precedence in the determination of taxing rights.

Allocation of taxing rights for royalty income:

As per Paragraph 1 of Article 12, royalties arising in one of the Contracting State and beneficially owned by a resident of the other Contracting State are only taxable in the latter State. In other words, exclusive taxing rights are awarded to the State in which the beneficial owner of the royalties is resident. The source State (i.e., the State in which the royalties arose) generally does not have the right to tax royalties under the treaty based on the OECD MTC.

As the allocation rule for royalties refers to the ‘beneficial owner’, it is important to understand the term. The OECD MTC does not provide a definition for the term.⁴⁴ Nonetheless, Vogel has distinctly clarified that individuals acting as agents, collecting income on behalf of another party, and intermediaries collecting income in their own name but for the benefit of another party (e.g., trustees, nominees, administrators, fiduciary owners) do not qualify as beneficial owners of said income.⁴⁵ Moreover, according to the OECD MTC Commentary, a ‘beneficial owner’ is considered the individual that has the ‘right to use and enjoy’ that income.⁴⁶

Application to Influencers:

The first consideration is establishing the relevance of Article 12. If royalties are generated in one country and paid to an Influencer residing in another country, then Article 12 becomes applicable to govern the taxation of that income. Conversely, if the royalties are earned within the same country where the Influencer is a resident, the provisions of Article 12 do not apply.

⁴⁴ Eric Kemmeren/Annika Streicher, in Reimer & Rust (ed.), Klaus Vogel on Double Taxation Conventions, 5th ed. (2021), Article 10 to 12 at m.no. 24.

⁴⁵ Eric Kemmeren/Annika Streicher, in Reimer & Rust (ed.), Klaus Vogel on Double Taxation Conventions, 5th ed. (2021), Article 10 to 12 at m.no. 50.

⁴⁶ OECD MTC Commentary (2017) paragraph 12.4 on Article 10.



For instance, if an Influencer based in Country A receives royalties from endorsements made in Country B, Article 12 of the tax treaty between the two countries would come into play. On the other hand, if the Influencer generates royalties within their home country (Country A), the specific provisions of Article 12 do not apply.

Consider an example where an Influencer resides in Country X. This Influencer, renowned for their creative content, licenses the use of their copyrighted photographs to a fashion company based in Country Y. The fashion company pays the Influencer for the right to use these images in its marketing campaigns. In this scenario, the payments received by the Influencer from the fashion company represent royalty income. The Influencer is compensated for granting the right to use their copyrighted material, aligning with the definition of royalty income, which includes payments for the use of copyrights of artistic work, in this case, the Influencer's photographs. According to the OECD MTC, this royalty income is taxable only in the Influencer's residence country, Country X, regardless of the source being the fashion company in Country Y.

4.7 *INCOME DERIVED FROM ENTERTAINMENT*

It should first be considered if Influencers can be classified as 'entertainers' in order to determine if they could receive income from entertainment.

Appropriate Article in the OECD MTC to allocate taxing rights:

Article 17 of the OECD MTC deals with entertainers and sportspersons. The OECD MTC commentary does not provide a precise definition for 'entertainers', but it directs attention to the examples in Paragraph 1 of Article 17. These examples include individuals such as theatre, motion picture, radio, or television artists, and musicians. It's important to note that the Commentary emphasises that these examples are not exhaustive, allowing for a broader interpretation of the term 'entertainers'.⁴⁷ The commentary further states that the term 'entertainers' explicitly covers individuals like stage performers and film actors (including former athletes) in television commercials. The scope of the Article may also encompass income from activities with political, social, religious, or charitable elements, provided there is an entertainment aspect. Conversely, it does not apply to a visiting conference speaker (e.g., a former politician receiving a fee for a speaking engagement), a model performing in their modelling capacity (e.g., presenting clothes during a fashion show), or administrative and

⁴⁷ OECD MTC Commentary (2017) paragraph 3 on Article 17.

support staff (e.g., cameramen, producers, film directors, choreographers, technical personnel, road crew for a pop group, etc.).

It is important to note that the Commentary on Article 17 requires the performance of an entertainer or sports person to be public⁴⁸ and to have an entertaining character⁴⁹. When the activities of Influencers take place in front of a real public, for example in participation in shows and live events, it may trigger the applicability of Article 17. Influencers may also ‘perform’ digitally and as a result it could be argued that this type of activity is not public. However, in the author’s view a performance is also ‘public’ if the relevant public is not physically present, but the performance is made available to the public virtually, for example a ‘live’ video on a social media platform.

The inclusive language of the OECD MTC embraces a broad interpretation. While Influencers may not fit traditional roles, their content creation on online platforms often aligns with the broader concept of entertainment. Through their online presence and content creation, Influencers can be seen as engaging in activities akin to stage or screen performance, participating in events.

According to Kostikidis⁵⁰, Influencers are similar to models, as both earn income primarily by using their image. Additionally, he states that Influencers and models do not necessarily possess a specific education, as opposed to singers and actors. They naturally present themselves to the public, which adores them mainly because of their beauty, style and flair. That makes them two very similar professions, which endorses a parallel treatment of Influencers for the purpose of Article 17 of the OECD MTC. The OECD MTC Commentary construes the participation of models in fashion shows and in commercials to be an activity that does not possess the character of entertainment since the main purpose of the activity of models is to advertise the clothes they wear.⁵¹ However, there is no general consensus among scholars on whether the activities of models should be classified under this Article. Nevertheless, especially regarding fashion shows, the outcome of fashion shows is the enjoyment of the people watching them. Generally, they contain music and other events that serve to amuse the public.

⁴⁸ OECD MTC Commentary (2017) paragraph 9 on Article 17.

⁴⁹ OECD MTC Commentary (2017) paragraph 3 on Article 17

⁵⁰ S. Kostikidis, *Influencer Income and Tax Treaties*, 74 Bull. Intl. Taxn. 6 (2020), Journal Articles & Opinion Pieces IBFD (accessed 3 February 2024).

⁵¹ Para. 3 Fourth sentence OECD Model: Commentary on Article 17 (2017).

There was a case⁵² before the Austrian Supreme Court where a very popular model who was also a party girl was invited by a drinks manufacturer to present a new drink in a public relations event in a ski resort which was attended by 20,000 fans. During the event she danced on stage and signed autographs. She was invited not in her capacity as a model but for her image which guaranteed optimal advertising. The court had to decide whether she appeared in her capacity as an entertainer or not. She argued that even though the performance served an advertising purpose, an entertainment character was missing and that she only moved her hips slightly to the music. The Court held that the artistic level of a performance is immaterial for the purpose of Article 17 and that even if the drinks manufacturer paid for advertising of its product and not for the entertainment of the public does not preclude the fact that the public did not come because of product advertising but to see their favourite party girl live.

As a result, Influencers may generate income from public entertainment-related activities, and such income would fall within the purview of Article 17 of the OECD MTC. However, not all activities of an Influencer would qualify under Article 17. For instance, mere reporting or commenting is not sufficient to constitute entertainment; visiting conference speaker, a model performing in her capacity as a model rather than as an entertainer, administrative support, or support staff. Consequently, where an Influencer provides content that is informative or educational rather than entertainment, such activity would not be within the scope of Article 17. For instance, where an Influencer posts videos of a conference where they made a speech about climate change, it would not be considered an entertaining event and would not fall under Article 17.⁵³

As stipulated by Article 7(4) of the OECD MTC, where profits involving income items are separately addressed in other Articles of the OECD MTC, those Articles take precedence. Accordingly, if Article 17 of the OECD MTC does not apply with regard to Influencer income, Article 7(1) dealing with business profits applies.

Allocation of taxing rights for income derived from entertainment:

In terms of Article 17(1) of the OECD MTC, income derived by a resident of a Contracting State as an entertainer, or sportsperson, from their personal activities exercised in the other Contracting State may be taxed in that other State. In terms of Article 17(2) where such income

⁵² AT: *Verwaltungsgerichtshof (Supreme Administrative Court) (VwGH)*, 30 June 2015, no. 2013/15/0266.

⁵³ Sa'id Ahmed, Fatimah, 11 July 2023, *The Tax Treatment of Online Influencers Under Article 17 OECD MC*. Available: <https://ssrn.com/abstract=4506870> or <http://dx.doi.org/10.2139/ssrn.4506870> (accessed 2 February 2024).



accrues not to the entertainer or sportsperson themselves but to another person, it may nevertheless be taxed in the State of activity, more commonly referred to as the 'State of Performance'.

Therefore, the State of Performance gets taxing rights to the income derived from entertainment.

Application to Influencers:

Consider the scenario where an Influencer specialising in beauty content is commissioned to a foreign country by an international cosmetics brand to lead a promotional campaign for their latest makeup line. Tasked with showcasing the products in an engaging manner, the Influencer develops a unique character persona for the campaign. The promotional strategy includes hosting a live virtual event targeted at the audience in the specified country, allowing for real-time interaction and product demonstrations. The Influencer's compensation is tied to various aspects of the campaign, encompassing the creation of promotional content, the live virtual event, and potential commission based on product sales. The income received by the Influencer for the live event may be captured under Article 17 and be subject to taxation in the foreign country as the State of Performance.

4.8 *Conclusion of the chapter*

In conclusion, Influencers may be captured under Article 17 OECD MTC when posting live material on social media platforms and when it is entertaining for their followers. Article 17 should be given a broad interpretation and as such cover persons who perform activities and earn income like traditional entertainers such as musicians, singers, dancers, and the like, regardless of the medium in which the performance is delivered. However, there are activities of Influencers that do not fall under Article 17 but are to be treated under the special Articles where they fall such as Articles 7 and 12 with respect to business profits and royalty payments respectively. The study concludes that Influencers may be categorised as entertainers according to Article 17 of the OECD MTC. Drawing parallels with fashion models due to similar characteristics, the absence of specific guidance in the Commentary on Article 17 allows for a comparable treatment. The activities of Influencers, particularly when they entertain their followers through social media posts, bring them within the purview of Article 17.



5. Chapter 5: Conclusion

Upon analysing the activities of Influencers from both a South African and international point of view, the primary finding is that Influencers are subject to existing legislation rather than specific provisions tailored to them.

In a South African context, critical aspects such as an Influencer's classification as an employee versus an independent contractor are pivotal as they determine how the Influencer needs to be taxed. However, it was found that most of the time, Influencers will be regarded as independent contractors due to the nature of their activities. Furthermore, a key finding is that promotional gifts, whether received for consideration or for no consideration, are subject to taxation as they are generally acquired in exchange for marketing or advertising services.

From an international point of view, except for the debate on using Article 17 of the OECD MTC, existing rules are deemed adequate for encompassing Influencer activities. The choice between applying Article 7 (business profits) or Article 17 (income derived from entertainment) depends on the nature of the Influencer's activities. The activities of Influencers, particularly when they entertain their followers through live social media posts, bring them within the scope of Article 17. Different income streams of Influencers, including commission income, fees for services rendered, sale of goods and merchandising are subject to Article 7 of the OECD MTC. The use of, or the right to use, images and/or names rights falls under Article 12 (royalty Income) of the OECD MTC. Only in those rare cases where a close connection with a performance can be identified will the income accruing from that place fall within Article 17 of the OECD MTC.

The second conclusion emphasises that Influencers face similar challenges to other taxpayers in cross-border transactions. Yet, their diverse income streams require careful identification for proper application of double tax treaties and avoidance of double taxation or non-taxation. The unique lifestyle of Influencers can lead to scenarios of double taxation, countered by the trend of seeking nomad visas for lower tax jurisdictions, considering that most of their income is taxable in the resident country.

The ongoing discussions on Influencers' taxation are vital, especially considering emerging dynamics in the digital economy and their significant tax collection potential, necessitating clear guidance by Tax Authorities.



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