AN ANALYSIS OF THE TAX TREATMENT OF HOME OFFICE EXPENDITURE SOUGHT BY SALARIED EMPLOYEES

by

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I give all the praises to Jesus Christ of Nazareth who has never left me nor forsaken me.

Dedication

This dissertation was written at a very difficult time, during the COVID-19 pandemic, which contributed significantly towards addressing the tax treatment of the home office concept in South Africa. I dedicate this study to each and every one who has been affected by this tragedy.

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ABSTRACT

The South African Revenue Service (SARS) disallowed 60% of home office claims during the 2021 tax year. This is a consequence of the fact that the home office of these taxpayers did not meet the requirements of section 23*(b)* of the Income Tax Act *No.*58 of 1963 (*IT Act*).

In this dissertation, various issues have been identified as to the problems taxpayers encountered and continue to encounter when making home office claims on their Personal Income Tax returns. The main issues identified with SARS disallowing the home office claims is resultant of these taxpayers not meeting the "regularly" and "exclusively" requirement. These specific requirements place these taxpayers in a position where they do not have a big enough dwelling-house or domestic premises or they just cannot afford to acquire one, in which they can dedicate a room/area in their living space for regular and exclusive use as a home office. They, therefore, will not meet the home office requirements for tax purposes and will not be able to enjoy a home office tax benefit.

In support of the reasons why these taxpayers fail to qualify for a home office tax deduction, several case studies and examples have been provided to illustrate the problems of meeting the home office requirements under the current version of section 23*(b)*. Based on the overall findings and analysis, the current tax treatment of home expenditure fails to practise the principles of a good and fair tax system for all its taxpayers. These tax principles are the foundation of tax reform in South Africa. It is therefore submitted that the provisions of section 23*(b)* be revaluated to make it fairer for taxpayers to claim home office expenditure regardless of their economic positions.

In addition, the ongoing electrical outages in South Africa, the ever-changing working environment and technological advancements, have necessitated the need to work from home. This kind of work arrangement is increasing, and more taxpayers will be making home office claims in the future on their Personal Income Tax returns. An efficient way of dealing with the administrative burden of these taxpayers home office claims being disallowed by SARS as a result of not meeting the section 23*(b)* requirements, is for SARS to consider granting an allowance or a reimbursement allowance for business expenditure incurred in the course of employment. This method of dealing with a home office expenditure claim is a probable solution for South Africa and in turn will ease the administrative burden of SARS having to deal with numerous objections and appeals.

ABBREVIATIONS

SARS	South African Revenue Service
IT Act	Income Tax Act *No.*58 of 1962
TAA	Tax Administration Act *No.*28 of 2011
COVID-19	Corona Virus
PAYE	Pay As You Earn / Employees Tax
OECD	Organisation for Economic Co-operation and Development
CGT	Capital Gains Tax

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CHAPTER 1: INTRODUCTION

1.1 Background and objectives

The way in which we work continues to evolve and more so with the transformation of technology, making it possible to work from anywhere in the world. In more recent times, there has been an increase in remote working which re-evaluates the role of the office environment in the future.[1] For many employees, their homes, motor vehicles and even the local cafeteria has become their place of work, since all that is required to work is a decent space and place to sit. This dissertation focuses on the tax consequences for *Salaried Employees* who seek to claim home office expenditure.

The working from home concept surprisingly, is not a new concept and has been practised by a large part of the professional workforce for many years. This concept was introduced by employers as mechanisms for their employees to save on fuel, travel time commuting to work, better work productivity as well as work and lifestyle flexibility.[2]

Employees, who have adopted this "working from home" culture may be allowed to claim a deduction in respect of expenditure incurred for the upkeep and cost of running a home office. This deduction is subject to meeting very stringent requirements before the SARS[3] will consider the claim (see chapter 3). These requirements are dealt with under section 23 of the *IT Act*[4] read together with section 11 and other relevant sections of the *IT Act* governing certain types of expenditure and allowances whereunder these individuals seek to make claims in this regard. It must be highlighted that section 23 is a limitation provision (namely it prohibits certain deductions from being allowed in the determination of taxable income).[5] When seeking deductions under relevant sections in the *IT Act*, section 23 must be applied unless otherwise stated.

The issue with applying section 23 for *Salaried Employees* wishing to claim home office expenditure is the difficulty in meeting the qualifying criteria under section 23*(b)* which for

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[1] Christabella, P. Bushiri. 2014. *The impact of working environment on employees' performance: The case of institute of finance management in Dar Es Salaam region.* Masters. Thesis. University of Tanzania. Available: http://repository.out.ac.tz/608/ [2021, January 9].

[2] Olson, M.H. 1987. *An investigation of the impacts of remote work environments and supporting technology.* (STERN Working Paper Series; no. IS-87-80). New York, United States of America: Department of information Systems, NYU Stern School of Business.

[3] South Africa's tax collecting authority.

[4] Unless otherwise stated, all section references are made in terms of the Income Tax Act *No.*58 of 1963.

[5] Taxable income is the amount left after all the relevant exemptions and deductions have been allowed.

these individuals becomes nigh impossible or unrealistic to meet when having to assess circumstances and economic positions.

It is evident that stemming from the history of South Africa, many taxpayers are not capable of meeting all of the section 23*(b)* requirements which has become even more apparent with the awakening of the deadly global COVID-19[6] pandemic. The sad reality of the pandemic was embedded in its severity, resulting in several unfortunate and tragic events[7] whereby the entire population has been negatively impacted and forced into adapting to a "new normal".[8] This "new normal" has resulted in the restructuring of personal and social lifestyles and more so the restructuring in the "way of doing business".

It is well known that the aftermath of the pandemic has succeeded in engineering worldwide panic and economic distress placing an assortment of challenges on individuals. In a bid to protect the fight against the COVID-19 pandemic, the President of South Africa[9] in his address to the South African people announced on 23 March 2020 that the country would go into a hard-national lockdown[10], imposing very strict restrictions and curfews[11] in accordance with prescribed lockdown levels.[12] One of the restrictions was a request for employers to allow employees to work from home, this request was mainly targeted at corporate employers[13] and those employers who fall outside of the ambit of providing essential services.[14]

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[6] World Health Organisation. 2023. *Coronavirus disease (COVID-19)*. 28 March. Available: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19 [2023, January 9].

[7] Worldometer. Available: https://www.worldometers.info/coronavirus/ [2021, November 19].

[8] "A previously unfamiliar or atypical situation that has become standard, usual or expected". Oxford English Dictionary. Available: https://www.oed.com/search/dictionary/?scope=Entries&q=new%20normal [2021, November 19].

[9] Mr. Cyril Ramaphosa, the 21st elected president of the Republic of South Africa.

[10]Ramaphosa, C. 2020. *Presidency briefing by the president of the Republic of South Africa Mr. C. Ramaphosa.* Tshwane, 24 March 2020. Available: https://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-escalation-measures-combat-covid-19-epidemic%2C-union [2020, March 24].

[11] Midnight, twelve o'clock to four o'clock in the morning.

[12] *South African Government Official information and Services*. Available: https://www.gov.za/covid-19/about/about-alert-system [2021, September 8].

[13] Corporate entities that are able to continue their operations remotely should do so.

[14] *"Essential services" means services, by whomsoever rendered, and whether rendered to the Government or to any person, the interruption of which would endanger the life, health or personal safety of the whole or part of the population*". Available: https://www.ilo.org/static/english/dialogue/ifpdial/llg/ch5/ex4.htm [2020, April 15].

Following the President's request, employees who were summoned to this working arrangement identified cardinal issues whilst working from home, however similar issues have also been experienced by employees who had been working from home prior to the COVID-19 pandemic, these issues have been identified as follows:

- Adding to the normal costs of running a household, there was an increase in data usage, electricity and water, printing and stationery, telephone costs and unsubsidised meals, etc.
- Non-reimbursement by the employer to compensate for these additional costs.
- Sharing of home office space with other occupiers of a household.
- The use of a non-designated office space such as a dining room and kitchen areas.

In addition to the after-effects of the COVID-19 pandemic, South Africa is currently facing an electricity crisis, where there is a shortage in the supply of electricity. This is the result of there being insufficient electrical power reserves to sustain the ongoing high demand for electricity and inefficient maintenance. In trying to preserve the very scarce power resources, state-owned[15] electricity giant "Eskom"[16] who controls the supply of electricity in South Africa has rolled out regular electrical power cuts in order to safeguard the power system grid from experiencing complete electrical outages which will leave South Africa without electricity. When these power cuts occur, it is commonly referred to as "load-shedding" (see chapter 4).

While some of the issues have arisen because of the COVID-19 pandemic and the current electricity crisis it must be noted has encountered similar problems with the rapid increase in doing business "digitally".

With the above in mind, it is hard to overlook that the need to work from home has become a requirement and at often times a non-negotiable and or a hybrid working[17] requirement for many *Salaried Employees*. With this being said, the current version of section 23*(b)* appears to malfunction in that it fails to recognise that for the majority of these individuals, seeking to claim home office expenses is unreachable and as such, they will not be able to enjoy a tax benefit for expenditure incurred against their home office. They, therefore, are prejudiced by

[15] Owned by the South African government.

[16] "Eskom" is the main supplier of electricity in South Africa.

[17] Example: Salaried Employees may be allowed to work from home three days a work week and the other two days must be spent working at the office.

the misrepresentation of the principles of practising a good and fair tax system which as described in *An Inquiry into the Nature and Causes of the Wealth of Nations* by *Adam Smith*[18] should contain the following four canons:

i. Equality – Taxes should be paid according to each person's capabilities pursuant to income being earned.

ii. Certainty – Taxpayers should be duly made aware of the amount of taxes being levied, the type of taxes being levied and when these taxes are to be settled to the receiver of revenue.

iii. Convenience – The receiver of revenue must ensure that the collection of taxes is a straightforward and uncomplicated process.

iv. Efficiency – The collection of taxes should not exhaust the resources used by the receiver of revenue to collect the taxes and should not exceed the amount of taxes being collected.

These four canons have set a sound foundation on what a good tax system should be built on and has been applied throughout the recommendations of the Katz Commission[19] who was appointed to re-evaluate the tax system under the old segregationist South Africa. In its first report, the Katz Commission developed a tax structure in conformity with the South African Constitution[20], whereby all individuals, regardless of their race, gender preferences, sex, pregnancy, marital status, ethnicity, social origin, age, disability, religion and language will be treated equally[21] when subjected to tax.[22] As a result of this reform, a single tax structure[23] was admitted into the South African tax system.[24]

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[18] Soares, S.M. Ed. 2007. *An Inquiry into the Nature and Causes of the Wealth of Nations*. Lausanne, Switzerland: MetaLibri.

[19] The Katz Commission was set up by "Michael Katz" who was a private corporate lawyer appointed by SARS to provide sound tax reforms in South Africa following the end of apartheid.

[20] *Constitution of the Republic of South Africa*, 1996 *as amended.* Available: https://www.justice.gov.za/legislation/constitution/pdf.html [2023, December 2].

[21] In terms of section 9(1) of the *Constitution of the Republic of South Africa, 1996* which states that: "everyone is equal before the law and has the right to equal protection and benefit of the law".

[22] For example, before the 1994 tax reform: Any income received by accrued to or in favour of a married woman is to be the income of the husband. The husband is the taxpayer of the wife's income and any exemption available to a taxpayer will only be claimable by the husband and not by the wife.

[23] Taxpayers will be taxed based on earnings and applying the applicable tax rates and not based on gender, race, sexual preferences etc.

[24] *Gender and Taxation in South Africa.* Available: http://sds.ukzn.ac.za/files/GenderTaxSA_policy_brief_final.pdf. [2021, January 4].

In 1999, the Katz Commission had ended its tenure of recommendations on tax reform and was succeeded by the establishment of the Davis Tax Committee[25] which was inaugurated in July 2013. The Davis Tax Committee progressed on from the work carried out by the Katz Commission. In its first Macro Analysis Report[26], the Davis Tax Committee emphasised that government is highly dependent on its taxpayers to generate revenue for the state.[27] To successfully achieve the collection of revenue from its taxpayers, it is imperative that taxpayers have a flattering opinion of the South African tax system, which is heavily reliant on governments ability to provide taxpayers with clear and fair treatment of its administration, objectives and transparency of state collected funds.

The collection of taxes is executed and controlled by SARS; SARS ensures that all taxes are collected through applying its strategic objectives:[28]

- *"Provide clarity and certainty for taxpayers and traders of their obligations.*
- *Make it easy for taxpayers and traders to comply with their obligations.*
- *Detect taxpayers and traders who do not comply, making non-compliance hard and costly.*
- *Develop a high performing, diverse, agile, engaged and evolved workforce.*
- *Increase and expand the use of data within a comprehensive knowledge management framework.*
- *Modernise our systems to provide digital and streamlined online services.*
- *Demonstrate effective stewardship of our resources to ensure efficiency and effectiveness in the delivery of quality outcomes and performance excellence.*
- *Work with and through stakeholders to improve the tax ecosystem.*
- *Build public trust and confidence in the tax administration system".*

Emanating from Adam Smith's canons, the recommendations on tax reform by the Katz Commission and the Davis Tax Committee and the objectives of SARS, it is clear that this does not reflect in the current version of section 23*(b)* as many home office claims will be disallowed by SARS as a result of the difficult qualifying criteria of section 23*(b)*, which has already become a reality as stated in the *BussinessDay* article:

> *"SARS disallows R1.8bn of R2.9bn in home office expenses claims".*[29]

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[25] The Davis Tax Committee's role is to: *"assess our tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability*".

[26] Monkam, N., Woolard, I. & Ajam, T. 2014. *First Interim Report on Macro Analysis – Full Report for The Minster of Finance.*(DTC: Macro Analysis First Report: December 2014). South Africa.

[27] The South African government.

[28] South African Revenue Service. Available: https://www.sars.gov.za/about/annual-reports-strategic-plans/ [2023, December 31].

[29] Ensor, L. 2022. *Sars disallows R1.8bn of R2.9bn in home office expenses claims*. BusinessDay. 06 March. Available:

This dissertation further discusses the problems and contributing factors *Salaried Employees* are met with when claiming home offices expenses, with the objective of highlighting the provisions of section 23*(b)* and determining whether the administration thereof is fair in its application and/or if it requires modification.

1.2 Research objective

This research aims to formulate clear rules surrounding the tax treatment of home office expenditure for *Salaried Employees* by addressing the following:

- Why is SARS disallowing so many home office claims.
- What is the setup of the environment where the home office room/area is situated .
- Who is allowed to claim a home office deduction.
- What deductions are allowable.

Where there remains uncertainty to addressing the above issues, recommendations will be provided to establish clarity regarding the claiming of a home office deduction. To accomplish these objectives, the following procedures are undertaken:

- Obtain an understanding of the tax effect imposed on *Salaried Employees* who have a designated home office room/area and those *Salaried Employees* who do not have a designated home office room/area.
- Analysing the effects of the above, through a comparative case study and establishing the findings thereof.
- Determine the objective of the very limited deductions allowed to *Salaried Employees* seeking to make a home office claim.
- Examine SARS's interpretation, requirements and qualification criteria for a successful home office deduction.
- Align SARS's interpretation, requirements and qualification criteria against the *Constitution of the Republic of South Africa, 1996* and the recommendations on tax reform.

https://www.businesslive.co.za/bd/national/2022-03-06-sars-disallows-r18bn-of-r29bn-in-home-office-expense-claims/ [2023, November 21].

1.3 Research question

Does the current version of section 23*(b)* regarding the tax treatment of home office expenditure represent a good, fair, and equal application for all taxpayers seeking to claim home office expenditure?.

If it is found that this is not the case, recommendations will be made as to a more equitable, fair, and efficient way of dealing with the situation where more and more taxpayers are working from their homes.

1.4 Research method

In this dissertation, a doctrinal investigative method will be applied under which the research objective will address and conclude on the research question. This will be conducted through examining the provisions of the relevant sections in the *IT Act* applicable to the deduction of home office expenses together with SARS's interpretation of the qualifying criteria required for this deduction.

The primary sources that are consulted in applying the doctrinal investigative methods are:

- Case law.
- Statutes: *IT Act*, Tax Administration Act *No.*28 of 2011 (*TAA)* and the *Constitution of the Republic of South Africa, 1996*.

The secondary sources that are consulted in applying the doctrinal investigative methods are:

- Publications, articles and literature.
- Verifiable case studies: Based on scenarios used to demonstrate the application of section 23*(b)*.
- Analysis of the tax treatment of home office claims between South Africa, India, Germany and the United Kingdom by means of a comparative study.

1.5 Limitations

The scope of this study will be limited to analysing the tax treatment of home office expenditure claimed by *Salaried Employees*. For purposes of this dissertation and unless otherwise stated, *Salaried Employees* are individuals employed by a South African employer.

1.6 Chapter structure

The structure of this dissertation will consist of 11 Chapters as follows:

Chapter 1	This chapter will deal with the home office concept, the introduction of section 23, the impact of COVID-19 on the home office concept and a brief overview of tax reform in South Africa.
Chapter 2	This chapter will deal with the brief overview of the South African tax system, tax consequences for individuals and the tax statistics.
Chapter 3	This chapter will deal with the governing provisions and challenges faced by *Salaried Employees* who seek to claim deductions in respect of their home office.
Chapter 4	This chapter will deal with the effects of the energy crisis on home offices.
Chapter 5	This chapter will deal with the tax allowances and tax credits available to claim in respect of maintaining a home office.
Chapter 6	This chapter will deal with the home office calculation and an overview of the findings discussed of the relevant sections pertaining to the deductions available to *Salaried Employees* for maintaining a home office.
Chapter 7	This chapter will deal with employees tax and the tax treatment of *Salaried Employees* versus non-Salaried Employees for purposes of claiming home office expenditure.
Chapter 8	This chapter will deal with the Capital Gains Tax consequences when disposing of a primary residence where a part of the residence is used as a home office.
Chapter 9	This chapter will deal with a comparative analysis of the tax treatment of home office deductions in India, Germany and the United Kingdom. These countries have a similar treatment regarding home office deductions apart from some pertinent differences identified in this analysis.
Chapter 10	This chapter will deal with SARS's legal processes to remedy the disallowance of home office expenditure as well as the implications of being non-compliant for tax purposes.
Chapter 11	This chapter will provide recommendations and give an overall conclusion to the discussions throughout this dissertation.

CHAPTER 2: BRIEF OVERVIEW OF THE SOUTH AFRICAN TAX SYSTEM

2.1 Tax in South Africa

South Africa has a residency basis system of taxation where residents are taxed on their worldwide income whilst non-residents are taxed only on South African sourced income.

There are various types of taxes imposed in South Africa. The below list is by no means exhaustive but includes common tax subjects:[30]

- Corporate Income Tax.
- Customs and Excise Duties.
- Estate Duty.
- Personal Income Tax.
- Pay As You Earn (PAYE).
- Transfer Duty.
- Value Added Tax (VAT).

The way in which taxes are calculated in South Africa is based on a set tax framework. There are various considerations made by tax policy makers in order to achieve the optimisation of best tax practices when setting up tax frameworks. For each tax type there is a specific tax framework. The tax frameworks provide an order and sequence of the tax events with the objective of determining the tax result due.

The tax type that will be dealt with in this paper is that of "Personal Income Tax" which includes Capital Gains Tax and advance collection of tax in the form of employees tax (PAYE).

2.2 Brief introduction to Personal Income Tax

Human beings are generally referred to as "individuals" within the tax environment. Individuals are taxed on a sliding scale.[31] This actively demonstrates that when the taxable income increases, the tax rate[32] increases.

[30] South African Revenue Service. Available: https://www.sars.gov.za/wp-content/uploads/Ops/Guides/Legal-Pub-Guide-Gen01-Taxation-in-South-Africa.pdf [2023, October 21].
[31] This generally means that individuals are taxed at a progressive tax rate, the higher the income, the higher the tax rate applicable.
[32] The percentage at which the individual is taxed.

Individuals mainly receive their sources of income in the form of:[33]

- Salaries, wages and other employment income sources.
- Profits or losses from a business or trade.
- Income or profits arising from an individual being a beneficiary of a trust.
- Director's fees.
- Investment income, such as interest and dividends.
- Rental profit or losses.
- Income from royalties.
- Annuities.
- Pension income.
- Certain capital gains.

The calculation of normal tax for individuals is calculated using the tax framework applicable to individuals as depicted in the table below.

Table 1: Tax framework applicable to personal income tax for the 2023 tax year[34]

Calculation of normal tax for individuals
Gross income.....
Less: exempt income.....
Less: Deductions and allowances.....
Less: Assessed loss.....
Add: Other amounts included in taxable income.....
Add: taxable capital gain.....
Less: Retirement fund contributions (pension and provident fund) .....
Less: Deductions made in terms of a SARS approved section 18A public benefit organisation.....
Taxable income.....
Normal tax (calculated using the progressive tax tables applicable to individuals) .....
Less: rebates and tax credits.....
Normal tax payable.....
Less: Employees tax.....
Amount payable/(refundable on assessment).....

[33] South African Revenue Service. Available: https://www.sars.gov.za/types-of-tax/personal-income-tax/ [2023, October 21].
[34] Stiglingh, M., Koekemoer, A.D., van Heerden, L., Wilcocks, J.S. & van der Zwan, P. 2023. *SILKE: South African Income Tax. Rev. 25th ed*. South Africa: LexisNexis. § 2.5.3.

The tax framework must be applied when preparing the Personal Income Tax return. SARS announces annually when the period for filing Personal Income Tax returns will commence and when it will cease for the relevant tax year. Individuals, where required must submit to SARS during the specified period their sources of income and relevant expenditure either on the "SARS eFiling"[35] platform or at their nearest SARS office. When the Personal Income Tax return has been filed, SARS will issue an "assessment"[36] which will display what the individual has disclosed on the Personal Income Tax return. The "assessment" is designed in such a way that it is a replica of the tax framework applicable to individuals (see table 1).

The point at which individuals become liable for income tax[37] is if their income for the relevant tax year exceeds the tax threshold[38] in accordance with their age.

The taxes that are collected from individuals by SARS consist of:

- Employees tax.[39]
- Provisional tax.[40]
- Assessed tax.[41]

According to the 2023 SARS tax statistics tabled below, individuals remain the highest contributor of the collection of tax revenue, ranking in 1st place.

Table 2: Tax collection rankings based on tax type for the 2023 tax year[42]

Tax Silo	Ranking	
Individuals	1st	35.7%
Corporate Income Tax	2nd	20.6%
Value-Added Tax	3rd	25.0%
Fuel Levy, Customs Duty and Other	4th	18.7%

[35] The official online platform for taxpayers to submit tax returns.
[36] An "*IT34*" is an assessment issued to individuals to determine the amount of a tax liability due to SARS or due to the individual when the Personal Income Tax return has been filed.
[37] Mandatory tax imposed by the state.
[38] In respect of the 2023 tax year:
- R91,250 younger than 65
- R141,250 65 and younger than 75
- R157,900 75 and older

[39] A tax deducted from the employees remuneration by the employer as an advance payment of income tax, usually monthly.
[40] An advance payment towards the income tax liability, payable in August and February of the tax year.
[41] Determination of taxable income or not.
[42] National Treasury & the South African Revenue Service. 2023. *Tax Statistics*, 2023. Pretoria: National Treasury. Page 1.

The nett tax revenue collected during the 2023 tax year amounts to R1.69 trillion[43] of this an amount R602.2 billion[44] consists of tax revenue collected from individuals.

2.3 Conclusion: Chapter 2

In respect of the 2023 tax statistics, individuals are the major contributors towards tax revenue collections for the state and have contributed 35.7% towards the entire state revenue collections. Based on this contribution, individuals play a significant role in generating state revenue.

Following this significant contribution by individuals, they are greatly challenged by the provisions in the *IT Act* when seeking tax relief against their salaried income despite them being the biggest contributor towards tax revenue collections.

In the subsequent chapters, discussed are some of the challenges experienced by individuals who seek claims against their salaried income.

[43] National Treasury & the South African Revenue Service. 2023. *Joint media statement National Treasury and the South African Revenue Service on the release of the 16th annual edition of tax statistics.* 29 December 2023. Available: https://www.sars.gov.za/about/sars-tax-and-customs-system/tax-statistics/ [2023, December 31].
[44] National Treasury & the South African Revenue Service. 2023. *Tax Statistics 2023 Highlights*. Available: https://www.sars.gov.za/about/sars-tax-and-customs-system/tax-statistics/ [2023, December 31].

CHAPTER 3: GOVERNING PROVISIONS AND CHALLENGES OF CLAIMING HOME OFFICE EXPENDITURE

3.1 Brief introduction to gross income for Salaried Employees

As discussed in chapter 2, a tax framework is used in determining the tax due and follows a specific sequence, the start of the sequence deals with "gross income" (see table 1).

"Gross income" is widely defined in section 1 of the *IT Act* and states that:

> *"... 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 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 a year or period of assessment but excluding receipt and accruals of a capital nature..."*

Specifically included in the definition of "gross income" is paragraph *"(c)"* which deals with employment and states that:

> *"Any amount including any voluntary award, received or accrued in respect of services rendered or to be rendered or any amount ...in respect of any employment or the holding of any office..."*

It is unquestionable that a *Salaried Employee's* income constitutes "gross income" as defined in paragraph "*(c)"* of this definition. Founded on this determination, a *Salaried Employee* may therefore be entitled to receive certain deductions and may claim certain expenditure against their salaried income, all of which is subject to the relevant provisions in terms of the *IT Act*. *Salaried Employees* seeking to claim a home office deduction against their salaried income will be subjected to the provisions discussed in 3.2 below.

3.2 Legal provisions governing home office expenditure

The lawful framework under which home office deductions are claimed is mainly governed by the provisions of section 11, section 23*(b)* and section 23*(m)*. It is critical to highlight that the point of departure of claiming deductions for this purpose is to examine the requirements as set out under section 11 (permits a deduction) read together with section 23 (prohibits a deduction). Before the relevant sections can be applied in respect of claiming home office expenses, it must first be determined *who is allowed a home office deduction* and secondly *what deductions are allowed*.

There are two types of individuals who may qualify for home office expenditure, they are:

- *Salaried Employees* (main source of income is in the form of a salary).
- Non-Salaried Employees (main source of income is in the form other than a salary):

i. Commission earners (main source of income is in the form of commission provided the commission earned is made up of more than 50% of the total remuneration).
ii. Independent contractors.[45]
iii. Personal Service Providers.[46]
iv. Labour Brokers.[47]

As previously identified, "salaried income" constitutes "gross income", and it is therefore necessary to determine who is a Salaried Employee. The *IT Act* does not define a Salaried Employee as a term, but part 1 of the definitions in the Fourth Schedule[48] to the *IT Act* defines "remuneration" and "employee" respectively as:

> *"Remuneration means any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance, or stipend, whether in cash or otherwise and whether or not in respect of services rendered…"*
>
> *"An employee means any person (other than a company) who receives any remuneration or to whom any remuneration accrues…"*

Based on the statutory definitions of "remuneration" and "employee", a *Salaried Employee* falls within the ambit of these definitions, and as such, these individuals may be allowed to claim home office expenditure subject to applying the relevant sections and meeting the requirements (see 3.4).

3.3 Brief introduction to section 11 for purposes of claiming home office expenditure

Section 11 deals with general deductions, whereby any person, carrying on any trade is allowed to deduct from their income the expenses incurred in connection with their trade.

Salaried Employees may claim certain home office expenses in terms of section 11*(a).* SARS has identified the type of home office expenses likely to be incurred for maintaining a home office (see 3.4 for list), but this does not necessarily mean that these expenses are allowable.

[45] See for more information: SARS *Interpretation Note: No.17* (Issue 5). Dated, 5 March 2019.
[46] See for more information: SARS *Interpretation Note: No.35* (Issue 5). Dated, 14 March 2023.
[47] Ibid.
[48] The *Fourth Schedule* deals with amounts to be deducted or withheld by employers and provisional payments in respect of *normal tax*.

Before section 11*(a)* expenses are claimed, the courts have determined specific requirements that need to be met before this deduction will be allowed, the requirements are:

- Expenditure and losses,
- actually incurred,
- during the year of assessment,[49]
- in the production of income, of which these expenditure and losses are,
- not of a capital nature.

Notwithstanding the above requirements of section 11*(a)*, there are specific rules to claiming home office expenditure. If the rules under section 23*(b)* are not met, then no section 11*(a)* deductions are permissible.

3.4 Brief introduction to section 23 and the relevant subsections pertaining to home office expenditure

Generally, *Salaried Employees* are not allowed to claim deductions against their employment income but with the introduction of section 23*(m)*, these individuals can claim deductions listed in this section. Prior to section 23*(m)*, these deductions were not always available.

Over time, several amendments were made to section 23, with the introduction of section 23*(m)* on 1 March 2002 and the addition to section 23*(b)*. These amendments were enacted as a result of the decision in the court case of *Kommissaris van Binnelandse Inkomste v Van der Walt (*1986) 48 SATC 104.[50] In this case the taxpayer, a salaried university lecturer had claimed deductions against his earnings in respect of costs incurred whilst performing his duties from his home study. He was under no obligation to work from home but decided he would be more productive and had claimed the following expenses on his Personal Income Tax return:

- Home study expenses
- Journals and Stationery
- Photocopies

[49] In South Africa a year of assessment is the period 1 March to 28/29 February which is also referred to as the "*tax year*".

[50] Williams, R.C. 2015. *Income Tax in South Africa Cases and Materials*. 4th ed. South Africa: LexisNexis. Page 498.

The court in this judgement held that the taxpayer had met the requirements of section 11*(a)* and did not fall foul of section 23*(g)*.[51] The court further held that the taxpayer was rightfully entitled to claim the above expenses since he had fulfilled the definition of trade[52] and carried out his duties in performance of his trade. There was no contention against the taxpayer's declaration by any of the revenue officials and the taxpayers declaration was accepted by the court. Following the court's decision, amendments were introduced to section 23 to inflict stricter restrictions by the inclusion of section 23*(m)* and periodic changes have been made to section 23*(b)* to precisely include the qualifying criteria.

The current version of section 23*(m)* states that:

- No deductions will be allowed against employment income apart from the list of deductions permissible (discussed below).
- Commission Earners and Independent Contractors are exempt from the section 23*(m)* restrictions.
- Labour Brokers and Personal Service Providers are restricted to claiming expenses in terms of section 23*(k)*.[53]

The list of deductions permissible under section 23*(m)* for *Salaried Employees* consists of:

(i) Any contributions to a pension fund, provident fund or retirement annuity fund as may be deducted from the income of that person in terms of section 11*(F)*.[54]

[51] "Section 23*(g)* of the *IT Act* states that "*a deduction is denied for moneys claimed as a deduction from income derived from trade to the extent that the moneys are not laid out or expended for the purposes of trade"*.

[52] Trade is defined in section 1 it *"includes every profession, trade, business, employment, calling, occupation or 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, 1978 (Act No. 57 of 1978), or any design as defined in the Designs Act, 1993 (Act No. 195 of 1993), or any trade mark as defined in the Trade Marks Act, 1993 (Act No. 194 of 1993), or any copyright as defined in the Copyright Act, 1978 (Act No. 98 of 1978), or any other property which is of a similar nature)".*

[53] See for a list of permissible expenses: SARS *Interpretation Note: No.35* (Issue 5). Dated, 14 March 2023.

[54] Section 11*(F)* deals with the deductions in respect of contributions made to any pension fund, provident fund or retirement annuity fund. The contributions that may be claimed as a deduction in the current year of assessment is limited to the lesser of:

- (i) R350,000;
- (ii) 27,5% of the higher of – remuneration; or taxable income; or taxable income of that person before including any taxable capital gain.

(ii) Any allowance or expense which may be deducted from the income of that person in terms of section 11*(c)*[55], *(e)*[56], *(i)*[57], *(j)*[58],

(iiA) Any deduction which is allowable under section 11*(nA)*[59] or *(nB)*[60];

(iv) Any deduction which is allowable under section 11*(a)* or *(d)*[61] in respect of any rent of, cost of repairs of or expenses in connection with any dwelling-house or domestic premises, to the extent that the deduction is not prohibited under paragraph *(b)*.

The objective of section 23*(m)* is to prohibit employees and office holders from claiming business-like expenditure[62] against employment income (as discussed above), therefore *Salaried Employees* have been restricted to only being able to claim the above mentioned deductions.

Salaried Employees claiming home office expenditure must be cautioned as to the proviso of section 23*(m)(iv)*[63] which states that if the requirements under section 23*(b)* are not met, then they are prohibited from claiming home office expenses.

Although the introduction of section 23*(m)* was welcomed, for many *Salaried Employees*, qualifying for the home office criterion under section 23*(b)* is challenging.

Prior to the current version of section 23*(b)*, this sub-section read as follows:

> *"No deductions shall in any case be made in respect of...domestic or private expenses, including the rent of or cost of repairs of or expenses in connection with any premises not occupied for the purposes of trade or of any dwelling-house or domestic premises except in respect of such part as may be occupied for the purpose of trade".*[64]

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[55] Section 11*(c)* deals with the deductions allowed in respect of certain types of *legal expenses*.

[56] Section 11*(e)* deals with allowances in respect of *wear and tear* of machinery, plant, implements, utensils and articles.

[57] Section 11*(i)* deals with deductions allowed in respect of *bad debts*.

[58] Section 11*(j)* deals with allowances in respect of amounts that represent *doubtful debts*.

[59] Section 11*(n)(A)* deals with the *repayment of employee benefits*.

[60] Section 11*(n)(B)* deals with the *repayment of employee benefits*.

[61] Section 11*(d)* deals with the deductions in respect of *repairs* to a property where that property is used for purposes of trade.

[62] Expenses incurred in the ordinary course of running a business.

[63] Section 23*(m)(iv)* states that *"Any deduction which is allowable under section 11(a), or (d) in respect of any rent of, cost of repairs of or expenses in connection with any dwelling-house or domestic premises, to the extent that the deduction is not prohibited under paragraph (b)".*

[64] Huxhum, K., Haupt, P. 1985. *Notes on South African Income Tax.* Rev. 4th ed. South Africa. H & H Publications. Page 58.

In addition to the prior version of section 23*(b)* quoted above, the below amendment has been added to this section to include:

> *"Provided that such part shall not be deemed to have been occupied for the purposes of trade, unless such part, is specially equipped for purposes of the taxpayers trade*[65] *and regularly and exclusively used for such purposes..."*[66]

When comparing the prior and present amended versions of section 23*(b)*, the old version only had one requirement:

- The expenses incurred in respect of the home office may only be allowed based on the portion of the dwelling-house or domestic premises used for trade.

The new version is very specific and in addition to the old version includes SARS's interpretation[67] of the qualifying criteria rooted in this sub-section as follows:

- The home office space must be *used for purposes of trade* (*Salaried Employees* must be able to fulfil their work obligations as part of their employment for which their remuneration is earned).
- The home office space must be *specially equipped for purposes of trade* (*Salaried Employees* must have the necessary office equipment to be able to work such as a computer, desk and chair etc.).
- The home office space must be *regularly* and *exclusively used for purposes of trade* (the area in which the office space is set up must only be used for work purposes and for no other purpose).
- The home office space must be a *designated area*, set up independently from the other rooms or areas in the residence occupying living space (the kitchen countertop, the living and dining room, the bedroom with a bed/television etc. are all spaces *not* considered to be designated areas).[68]

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[65] Trade is defined in section 1 it *"includes every profession, trade, business, employment, calling, occupation or 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, 1978 (Act No. 57 of 1978), or any design as defined in the Designs Act, 1993 (Act No. 195 of 1993), or any trade mark as defined in the Trade Marks Act, 1993 (Act No. 194 of 1993), or any copyright as defined in the Copyright Act, 1978 (Act No. 98 of 1978), or any other property which is of a similar nature)".*

[66] LexisNexis. 2023. *Professional Tax Handbook*. Vol 1. 32nd ed. South Africa.

[67] SARS Interpretation Note: No.28 (Issue 3). Available: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf. [2023, May 25].

[68] SARS. 2021. *Home Office Tax Requirements webinar*: SARS TV [Video file]. Available: https://m.youtube.com/watch?v=JOCnHA7FFzU. [2021, July 8].

Salaried Employees who have met all of the above requirements may claim a home office deduction for the relevant home office expenses incurred.

SARS has provided two sets of lists of expenses as a guide to the type of expenses potentially incurred.

The first set of expenses listed below, SARS considers to be intimately connected to the premises and likely to be incurred in reference to section 23*(b).*

- Rental expenses incurred for the use of premises.
- The cost of repairs to the premises and other expenses incurred relevant to the premises.
- Rates and taxes.
- Cleaning.
- Electricity.

The second set of expenses below may qualify for a deduction under section 11*(a)* and section 11*(e)* subject to meeting the qualifying criteria of those sections (see chapter 5*).*

- Office equipment.
- Wear and tear of office equipment.
- Phones.
- Internet.
- Stationery.

With the addition of the qualifying criteria ingrained in section 23*(b)*, the majority of *Salaried Employees* are unable to meet these requirements and succumb to the challenges discussed in 3.5 as a result of the existing rigid legislation.

3.5 Challenges experienced by Salaried Employees seeking to claim home office expenditure

Given that SARS is concerned about some taxpayers using mechanisms to exploit the provisions in the *IT Act* as a means to advance a tax benefit which is unfortunately a practise by some taxpayers. These well thought out malpractices are detrimental to the fiscus, and SARS ends up the victim of this type of abuse.

As a consequence of this abuse, SARS, as part of its strategic objectives (see chapter 1), is on a quest to detect taxpayers who are misusing the provisions by making it “hard and costly” for taxpayers found to be non-compliant. On these grounds it is understandable that

SARS continues to tighten legalisation as a result of such malpractices and SARS will not display sympathy where non-compliance is identified.

However, SARS is using the same approach where non-compliance has been detected and is applying its "hard" objective towards those taxpayers who are compliant but are simply just struggling to meet the home office requirements under section 23*(b)*. This approach emerged on the unveiling of a bewildering amount of home office claims being disallowed by SARS as a venture to make it very difficult for taxpayers to claim a home office deduction as seen in the 2021 tax year.

During the 2021 tax year there has been an increase in the claiming of home office expenditure due to the national lockdown imposing a significant increase in the number of employees working from home. Although these individuals have made home office claims on their Personal Income Tax returns, SARS has disallowed a staggering number of home office claims made by individuals on their Personal Income Tax returns.[69] The repercussions of SARS's pursuance to dismiss these individuals home office claims causes uncertainty for taxpayers who grapple with SARS's treatment and interpretation of the home office requirements needed to qualify for the deduction as well as the type of allowable expenditure.

SARS is of the opinion that many *Salaried Employees* will not qualify for the deduction on the basis that no additional expenses would have been incurred when working from home, since the employer would provide the employee with the necessary equipment to perform his or her employment related duties, and that it is essentially just a change of the working environment (working from home as opposed to working from the office).

To some extent SARS's view must be questioned as many employees are incurring additional expenses, such as the use of the employees personal WiFi and Fiber data. These expenses form a big part of the employees work function, but SARS considers this type of expense not intimately connected to the premises and prohibits such a deduction.[70]

Not only is the allowable expenditure limited, but meeting the requirements in order to qualify for the deduction is even more difficult. The best way to demonstrate the adversities

[69]Moneyweb.2022. Sars disallows over 60% of home office claims last year. Available: https://www.moneyweb.co.za/mymoney/moneyweb-tax/sars-disallowed-over-60-of-home-office-claims-last-year/#:~:text=It%20disallowed%20more%20than%2060,or%20got%20their%20calculations%20wrong.[2023, July 15].

[70] SARS Interpretation Note: No.28 (Issue 3). Available: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf. [2023, May 25].

experienced by *Salaried Employees* is through the application of section 23*(b)* to the case study presented below.

3.5.1 Case study 1: A comparison between two Salaried Employees whereby one employee has a designated home office room/area, and the other employee does not have a designated home office room/area.

Employee A has a designated home office room/area in his dwelling-house or domestic premises and Employee B does not have a designated home office room/area in his dwelling-house or domestic premises.

Tables 3, 4 and 5 deals with the case study scenarios, application of section 23*(b)* and the analysis and findings of the case study.

Table 3: Case study 1 – scenarios

Scenario 1 – Salaried Employees *with* a designated home office room/area	**Scenario 2 – Salaried Employees *without* a designated home office room/area**
Employee A works at a large corporate firm and as part of his employment arrangement has the option of working from home since the firm has started to migrate over to a more digital way of working. He only has to be present in office for in person client meetings. He lives in a three-bedroom house with a kitchen, dining room and two bathrooms. He has converted one of the bedrooms into a designated home office room/area and has acquired at his own expense an office desk, chair, and printer. His employer pays for all his business-related expenses such as internet, data cost and telephone expenses.	*Employee B* works at a small corporate firm and as part of his employment arrangement has the option of working from home since the firm has decided that working remotely is a cost saver for the firm. His employer has provided him with the necessary office equipment (laptop, office chair and printer) to remotely perform his duties. He lives in a one-bedroom flat with a kitchen, dining room and one bathroom. He has set up a working station in his living room and occasionally moves his workstation to other living areas in the home since the flat is too small to accommodate a designated home office room/area. He pays for all his business-related expenses such as internet, data cost and telephone expenses. These expenses are not reimbursed by his employer.

Table 4: Application of the section 23(b) requirements

Criteria	Criteria 1	Criteria 2	Criteria 3	Criteria 4
Qualification criteria	There must be a ***designated*** home office area.	The home office area must be ***equipped*** for purposes of trade.	The home office area must be ***regularly*** used for purposes of trade.	The home office area must be ***exclusively*** used for purposes of trade.
Scenario 1	✔	✔	✔	✔
Scenario 2	✘	✔	✘	✘
✔ = Has ***met*** the qualification criteria ✘ = Has ***not met*** the qualification criteria				

Table 5: Analysis and Findings - case study 1

Scenario 1	Scenario 2
Employee A has met all the qualification criteria of section 23*(b)* and will be allowed to claim home office expenditure for the expenses intimately connected to the premises.	*Employee B* has failed to meet qualification criteria 1, 3 and 4 of section 23*(b)* and therefore will not be allowed the deduction for claiming home office expenditure.
Findings	
The differences established in the two scenarios is that *Employee B* uses his living room and other living areas as a home office and does not use the area regularly (qualification 3) and exclusively (qualification 4) for work purposes. Although *Employee B* is still able to fulfill his work-related duties (he has a computer, a chair to sit on and a space to work) exactly the same as *Employee A,* he is being disadvantaged in not qualifying for the home office deduction since his dwelling-house or domestic premises only accommodates one bedroom which he sleeps in and no additional room/area which can be used exclusively for work purposes.	

3.6 Conclusion: Chapter 3

Based on the analysis and findings of case study 1, section 23*(b)* disappoints in that it does not recognise the practices of a good, fair, and equal treatment of its application to all individuals seeking a home office deduction. This section displays discriminating elements as identified between *Employee A* and *Employee B* on the grounds that it favours *Employee A* since he is in the position to have a designated home office in his dwelling-house or domestic premises used exclusively for work purposes, and as such he qualifies for a home office deduction whilst *Employee B* is being disadvantaged from claiming home office expenditure because he does not have a designated home office used exclusively for work purposes like *Employee A*.

SARS recognises that the current tax treatment of the home office requirements is warped when applying the requirements to the two *Salaried Employees* (see case study 1) and has taken a firm position in its current tax treatment of the requirements needing fulfilment in order to successfully be granted the deduction of home office expenditure which in its "Interpretation Note: No.28 (Issue 3) states that":

> *"Some people may consider the provisions to be overly strict, inequitable and unaccommodating of the modern work environment, however, absent legislative amendment they are the provisions which must be applied".*[71]

It is clear from case study 1 that the two *Salaried Employees* are treated differently to each other when subjected to tax as a result of the "haves" and "have nots" and SARS acknowledges that regardless of the current tax treatment of section 23*(b)* being overly strict, it remains law irrespective of it being discriminatory by favouring one taxpayer over the next. That being the case, this results in the unfavoured taxpayers experiencing difficulty with successfully applying the requirements of this section to their circumstances and position.

It is pitiful that the canons representing the good, fair, and equal tax treatment to all taxpayers as determined in chapter 1 cannot be applied to section 23*(b)* as established earlier in the discussions along with SARS even admitting it is inequitable, but no steps have been taken thus far to rectify this discrimination.

[71] SARS Interpretation Note: No.28 (Issue 3). *Deductions of home office expenses incurred by persons in employment or persons holding an office*. Available: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf. [2023, May 25]. Page 3.

Admittedly, SARS may be overly concerned about abuse by taxpayers whose behaviours are malicious with the intention to defraud SARS, but this should not trump equity for taxpayers who are tax compliant. These taxpayers should not be subject to the same convictions as those taxpayers who commit malpractices.

Chapter 4 will present a brief overview of the energy crisis and how this has impacted the work from home concept.

CHAPTER 4: THE EFFECTS OF SOUTH AFRICA'S ENERGY CRISIS ON HOME OFFICES

4.1 Introduction to load-shedding

The short supply of electricity in South Africa has been an ongoing problem dating back to 2007 when the first electrical outages occurred. As identified in 1.1 the planned electrical outages are referred to as "load-shedding". Load-shedding is a "thing", it has become part of the South African vocabulary, has gravely impacted the daily lives of South Africans, their businesses, education, traffic (traffic lights are not operational as a result of load-shedding), crime, work etc. and just the general inconvenience of being without electricity and it seems that load-shedding is here to stay, indefinitely.

There are different stages to the load-shedding system, the higher the stage the more frequent the electrical outages take place and vice versa when the stage is lower. Electrical outages occur a number of times a day, this means that every part of the country will be without electricity for quite some time based on the load-shedding schedule and stages implemented. At times without prior notice, load-shedding is enforced, mainly as a result of faulty generators or when user consumption has reached its ceiling. Users solely dependent on the electricity provided by the government are the ones who suffer the burden of load-shedding and are therefore encouraged to be more conservative in their usage by switching off appliances, lights, geysers, pool pumps and alike which are not in use and should consider investing in self-generation of electricity items in an attempt to save and preserve the electrical supply.

There are a few essential services that are exempt from experiencing electricity outages and for obvious reasons they are:

- State hospitals.
- Harbours.
- Railways.
- Water treatment plants.
- Other essential infrastructures.

4.2 Load-shedding remedies

The severity of load-shedding has resulted in devastating effects for the South African economy. Countless businesses are suffering, electricity has also become unaffordable with the constant increase in electricity tariffs, crime has escalated to its highest during load-

shedding periods and the country's citizens are all at the receiving end of these distressing effects.

Load-shedding undoubtedly disrupts the day of the employee, and more and more employees are requesting to work from home or seek hybrid working arrangements for safety and work productivity reasons, just to mention a few.

4.3 Conclusion: Chapter 4

One of the many outcomes of load-shedding has resulted in numerous individuals and businesses finding alternative ways and means to remain connected to their work and doing business by having a continuous uninterrupted supply of electricity without having their daily operations being affected or coming to a pause. In order to have a continued supply of electricity, these taxpayers have resorted to purchasing uninterrupted power supply systems, portable power stations, inverters, installed rooftop solar panels and other electrical supply devices, currently these items would not qualify as home office expenses.

The question arises whether there is any relief in the form of a tax benefit when *Salaried Employees* have acquired self-generating electrical systems that is used to be able to continue their work operations from home.

In chapter 5 is a discussion of the possible tax relief measures pertaining to the self-generating of electricity for purposes of maintaining a home office.

CHAPTER 5: INTRODUCTION TO THE ROOFTOP SOLAR ENERGY TAX CREDIT AND THE TAX TREATMENT OF S11(E) FOR ALLOWANCES SOUGHT FOR THE ACQUSITION OF SOLAR PANELS IN RESPECT OF HOME OFFICES

5.1 Introduction to the rooftop solar energy tax credit

As a consequence of the unending load-shedding problems (see chapter 4), there has been an increase in the demand for the self-generation of electricity. Those who are not dependent or partially dependent on the electricity supplied by the government (electricity grid) may be subsidised by receiving a tax benefit for making use of self-generated electricity. The tax benefit is a source of motivation for the encouragement to reduce the usage of the scarce government electricity resource.

This tax benefit is the rooftop solar panel tax incentive[72] which was announced by the Minister of Finance[73] in his budget speech address on 22 February 2023, and is made available to individuals who have acquired and installed rooftop solar panels.

Homemakers who invest in rooftop solar panels achieve the creation of electrical energy through natural sunlight. This electrical energy is produced by the absorption of the sun's rays through the rooftop solar panels which sends electrical charges to batteries and inverters. The electricity produced cannot be stored unless batteries and inverters are used in conjunction with the rooftop solar panels. Sunlight is therefore a key factor which is plentiful in South Africa. Batteries used to store electricity have to be charged from the normal electricity flow (electricity grid) unless inverters are used in the system. It is unfortunate that no tax allowance was made available for individuals for inverters which would enable less use of normal electricity.[74]This however is debatable (see 5.5).

Individuals will be allowed to make the rooftop solar panel claims on their Personal Income Tax return (subject to meeting the relevant requirements). The claim will be in the form of a rebate which will be deducted from taxable income. The rooftop solar panel tax incentive will only be available for the 2024 tax year, being the period covering 1 March 2023 to 28 February 2024. The rationale behind the state making the rooftop solar panel tax incentive available for one year only is to encourage an enormous amount of individuals to invest in rooftop solar panels as quickly as possible in order to preserve the limited supply of

[72] National Treasury. 2023. *Budget Speech*, 2023. Pretoria: National Treasury. Page 10-11.

[73] Mr. Enoch Godongwana, current *Minster of Finance* of the Republic of South Africa.

[74] National Treasury. 2023. *Frequently Asked Questions Enhanced renewable energy incentive for businesses*, 2023. Pretoria: National Treasury. Page 2.

government's electricity. This is contributing to the fact that Eskom lacks funding[75] to acquire electricity resources and the less individuals are making use of the state supplied electricity, the longer the state will be able to provide more essential industries from experiencing load-shedding.

Prior to the introduction of the rooftop solar panel tax incentive program, *Salaried Employees* were prohibited by section 23*(m)* to claim allowances for the self-generation of electricity for the portion of their dwelling-house or domestic premises used for work purposes, such allowances are governed under section 12*(B)* and is only available to non-salaried taxpayers such as corporate entities and sole traders. However, *Salaried Employees* can seek to claim a wear and tear allowance in respect of assets relating to the portion of the dwelling-house or domestic premises used for the home office under section 11*(e)*. The application of applying a section 11*(e)* allowance does not come without its challenges for those employees seeking allowances in this regard. The difficulty of claiming a section 11*(e)* allowance is proving that the proviso under this section is not applicable (see 5.5).

It is however unclear if the rooftop solar panel tax incentive overrides a section 11*(e)* allowance on the grounds that in any event SARS will disallow such an allowance since SARS's view is that the rooftop solar panels are affixed or mounted to the structure (discussed further in 5.4) or if taxpayers can choose between the two. This uncertainty can create the possibility of double tax relief where taxpayers are granted a rooftop solar panel tax incentive on their Personal Income Tax returns and claim a section 11*(e)* allowance (if the requirements are met).

5.2 Requirements for the rooftop solar energy tax credit

The rooftop solar panel tax incentive has been legislated into the *IT Act* under section 6*C*[76] as the "solar energy tax credit" and states that:

> *"In determining the normal tax payable by any natural person…be deducted an amount to be known as the solar energy tax credit…A solar energy tax credit will be allowed… only if— the solar panels are installed and mounted on or affixed to a residence mainly used for domestic purposes by the natural person…".*

[75] *Eskom warns of lack of funds to fuel South Africa's back-up power plants* .2022. *Financial Times*. 21 Nov. Available: https://www.ft.com/content/02e15491-03eb-4102-aafe-83e7e9d4fdec [2023, December 31].
[76] *Draft Taxation Laws Amendment Bill (Initial Batch)* [Draft]. 2023. National Assembly.

As with every deduction there are certain requirements that must be met before SARS will allow such deductions, for purposes of those individuals who want to take advantage of the rooftop solar panel tax incentive, they must meet the following requirements:

- New and unused solar PV panels acquired by the individual and brought into use for the first time by the individual on or after 1 March 2023 and before 1 March 2024.
- The minimum generation capacity of each panel must not be less than 275W.
- The panels must form part of a system that is connected to the distribution board of a residence that is mainly used by an individual for domestic purposes.
- An electrical certificate of compliance must be issued to the individual in terms of Electrical Installation Regulations, 2009.[77]

5.3 The benefit value of the rooftop solar energy tax credit

Individuals who have met the above requirements may be able to claim the lower of:

- 25% of the cost of new and unused solar photovoltaic panels or;
- R15,000 (the maximum allowable).

With the average cost to acquire and install rooftop solar panels ranging anywhere from R150,000 upwards[78] to be independent from the government electricity grid, individuals will need to expend a substantial amount of money to be completely non-reliant on the grid. As the aim of the incentive is to reduce the usage of the electricity grid, it is questionable if government can achieve its objectives on the following basis:

- The rooftop solar panel tax incentive is not commensurate in relation to the outlay costs.
- The rooftop solar panel incentive program is for one year only and ends at the end of February 2024.
- With the high cost of living, the majority of individuals cannot afford rooftop solar panels, as such they are heavily dependent on the electricity grid, and it is doubtful that the incentive will assist with the electricity crisis.

[77] National Treasury. 2023. *Frequently Asked Questions Solar Panel Tax Incentive for Individuals*, 2023. Pretoria: National Treasury. Page 1.

[78] *How much it costs to get rooftop solar in South Africa and ditch load-shedding*. 2023. *BusinessTech*. 24 Jan. Available: https://businesstech.co.za/news/energy/658535/how-much-it-costs-to-get-rooftop-solar-in-south-africa-and-ditch-load-shedding/ [2023, August 14].

At this stage there is uncertainty if the rooftop solar panel rebate will continue beyond its anticipated sunset date and is yet to be addressed at the *2024 Budget Speech* which is likely to take place during February 2024.

5.4 Closing summary of the rooftop solar energy tax credit

It seems unfair of the government to pressure individuals to acquire rooftop solar panels in motivation of a tax benefit as a means to assist the state with the high demand of electricity when the rooftop solar panel tax incentive is available for only one year.

In view of the continued short supply of electricity, individuals are now only starting to find alternative ways to be unaffected by load-shedding and as discussed earlier, it is expensive to acquire rooftop solar panels. It is inevitable with the ongoing load-shedding problems that more and more individuals will sooner or later acquire rooftop solar panels but sadly they will need more time to manage their financial affairs to place them in a position to acquire these. It will be discriminatory of the state for these individuals to miss out on the solar energy credit because time does not permit them. It is therefore submitted that the rooftop solar tax panel tax incentive continues beyond its sunset date to be fair towards individuals who currently cannot afford rooftop solar panels.

5.5 Introduction to section 11*(e)* for purposes of seeking a wear and tear allowance in respect of the acquisition of solar panels installed at a dwelling-house or domestic premises

As discussed in 5.1, prior to the introduction of the rooftop solar panel tax incentive, individuals have sought to claim a wear and tear allowance in terms of section 11*(e)* for the assets used in a home office of a dwelling-house or domestic premises. The allowance is available only if the:

- Qualifying assets are,
- owned by the taxpayer or have been acquired under an installment credit agreement which is,
- used in the taxpayer's trade that has been
- diminished through wear and tear or depreciation during the year of assessment.

A wear and tear allowance will be prohibited if the qualifying asset is:

- Mounted or affixed to any concrete, foundation or supporting structure, as to operate as a work of a,

- permanent nature.

The issue with applying s11*(e)* to a rooftop solar panel asset lies in the above provisos, which in SARS's view states that:

> *"No allowance will be permitted under s11(e) if the solar systems are affixed to a premise so as to become a work of a permanent nature ...Many solar systems will be a work of a permanent nature, since they are wired into the electrical system of the premises and become integrated into the permanent structure".*[79]

SARS's view can be contested if argued correctly in terms of section 11*(e)* which can override the prohibition in terms of section 11*(e)(*ii) read with *(iiA)* of this section[80] and ultimately result in a successful 11*(e)* allowance.

As an example, tabled below, taxpayers who are aggrieved by SARS's view may contend in motivation of a section 11*(e)* allowance on the following basis.

5.5.1 Case study 2: Contending the prohibitions under section 11(e)

Table 6: Prohibition and Contention of section 11(e)

Prohibition	Contention
Section 11*(e)(ii)* read with *(iiA)* of this section will *prohibit* an allowance under section 11*(e)* if:	Section 11*(e)* may *permit* an allowance on the following basis:
Solar panels are mounted or affixed.	• When solar panels are installed, they are *mounted* onto a frame. • The frame is *specifically designed* to fit the solar panels. • The solar panels are *integrated* into the frame such that it cannot operate without the frame, or it will fall off the rooftop without the support of the frame.

[79] SARS Interpretation Note: No.28 (Issue 3). *Deductions of home office expenses incurred by persons in employment or persons holding an office*. Available: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf. [2023, May 25]. Page 17.

[80] Section 11*(e)(ii)* states that "in no case shall any allowance be made for the depreciation of buildings or other structures or works of a permanent nature; *(A)* where any ,machinery, implement, utensil or article qualifying for an allowance...is mounted on or affixed to any concrete or other foundation or supporting structure…".

Solar panels operate as a work of a permanent nature.	The solar panels system is easily removable without or very little damage to the roof top as all that is needed to uninstall the entire solar panel system is a drill to remove the screws affixed to the frame and roof top, some Polyfilla to plaster the little holes from the screws and perhaps the replacement of one or two rooftop tiles.
Batteries and inverters are prohibited from obtaining a section 11*(e)* allowance.	It may further be contended that batteries and inverters are portable assets whose lifespan is impermanent and requires frequent replacing. With the ongoing load-shedding problems these assets lifespan may become even shorter with regular use and on this basis cannot operate as a work of a permanent nature.

Taxpayers should not be discouraged in challenging SARS on its interpretations especially where valid grounds for their contentions can be motivated (see chapter 10 for the SARS legal process to remedy grievances). SARS provides guidelines for write off periods for assets which can be found in its Interpretation Note: *No*.47 Issue 5.[81]

SARS proposes a write off period of 20% per annum over 5 years for solar systems acquired in respect of a wear and tear allowance. The write off is apportioned based on when the asset was first brought into use for trade purposes. The allowance would also have to be apportioned on the basis of the size of the home office in relation to the size of the total house.

Below is a comparison of the rooftop solar panel tax incentive versus the section 11*(e)* allowance in respect of *Salaried Employees* who wish to seek allowances for a portion of the home office.

5.6 Case Study 3: Section 11*(e)* versus the rooftop solar energy tax credit

A *Salaried Employee* acquired new and unused solar panels in the amount of R100,000 on 1 April 2023 and has met all the requirements in terms of the solar panel tax incentive

[81] SARS Interpretation Note: No.47 (Issue 5). *Wear and tear or depreciation allowance*. Available: https://www.sars.gov.za/legal-counsel/interpretation-rulings/interpretation-notes/in-41-60/. [2023, May 25]. Page 22-28.

as well as the section 11*(e)* allowance. The home office room/area is 20% of the total property.

The below table deals with the tax treatment of the rooftop solar panels, section 11*(e),* and the findings of case study 3.

Table 7: Tax treatment of the solar panel tax incentive versus the section 11(e) allowance

Solar panel tax incentive	**Section 11*(e)* allowance**
Calculation: The individual is allowed to claim the lower of: • R25,000 (R100,000*25%) • R15,000 Since the incentive using the prescribed rate of 25% exceeds the maximum allowable deduction of R15,000, the individual is therefore allowed a rebate of R15,000.	Calculation: R3,667: ((R100,000*20%) = R20,000 *11/12 = R18,333*20%) • The write-off period for a solar panel asset is 20% per annum. • The allowance is apportioned for 11 months (1 April 2023 to 28 February 2024) since it was brought into use for the first time on 1 April 2023. • R4,000 is claimed in each of the next 4 years. (R19,667 in total)
Findings	
Based on the calculations, the solar panel tax incentive is more beneficial in the short term for the *Salaried Employee* to claim since there is no apportionment of the home office room/area over the total home area. The R15,000 is an immediate cash flow benefit while the section 11(*e*) deduction is larger, it is spread over 5 years. However, it must also be noted that a deduction from taxable income is not always as beneficial as a rebate from tax payable.	

5.7 Closing summary on section 11*(e)*

It seems that SARS has preconceived that a section 11*(e)* allowance claimed by *Salaried Employees* for the portion of the dwelling-house or domestic premises used for home office purposes would result in a disallowance, owing to the fact that SARS considers that the way in which the rooftop solar panel system is installed would result in the rooftop solar panels

being affixed or mounted to the structure, the house, as to become a work of a permanent nature. This is quite a contentious issue, and SARS needs to be challenged on its view as described in table 6.

It is also submitted that in addition to try and remedy the electricity crisis with the introduction of the rooftop solar panel tax incentive program, that the incentive is a short-term solution to address the complexities *Salaried Employees* are encountering for claiming allowances for the acquisition of rooftop solar panels under section 11*(e)*. While this incentive is a benevolent gesture, it is quite fleeting.

The issue in question with the rooftop solar panel tax incentive and the section 11*(e)* allowance is when the sunset date of 28 February 2024 ends, will *Salaried Employees* be reverted back to claiming an allowance in respect of the rooftop solar panels under section 11*(e)* if they are successful (based on their contentions in table 6) for the portion used for purposes of their trade, is a question yet to be answered.

5.8 Conclusion: Chapter 5

Although there are clear rules with regards to obtaining a rooftop solar panel tax rebate in terms of the new section 6*C*, the same cannot be said about the section 11*(e)* wear and tear allowance. If one were to apply the rules of section 6*C* and section 11*(e)* to an individual acquiring rooftop solar panels, it would be perceived that there are contradictions between these two sections. In one instance SARS *disallows* a section 11*(e)* where the rooftop solar panel is affixed or mounted to the structure and in another instance *allows* the solar energy tax credit under section 6*C* where the solar panels is affixed or mounted to the structure.

It is submitted that SARS would need to establish clear rules regarding the tax treatment of the application of the section 6*C* rooftop solar panel tax benefit and the application of the section 11*(e)* wear and tear allowance. This uncertainty poses enquiry, that as a result of the electricity cuts, individuals will help the state combat load-shedding if they purchase rooftop solar panels immediately and if the state is satisfied that enough individuals have acquired the rooftop solar panels and the state's electricity demand has dropped, then the solar energy tax credit ceases and will no longer be available to individuals who acquire rooftop solar panels after 28 February 2024.

It is regrettable that the application of section 6*C* lacks integrity in that SARS has made it fairly easy to obtain the solar energy tax credit (see 5.2 for the requirements) as a need to assist the state with the current power cuts and may even prepopulate this information on

the Personal Income Tax return, whilst in the absence of the rooftop solar panel tax incentive, obtaining a tax benefit becomes harder or even impossible under section 11*(e)*.

CHAPTER 6: HOME OFFICE DEDUCTION FORMULA AND OVERVIEW OF THE RELEVANT SECTIONS PERTAINING TO THE DEDUCTIONS AVAILABLE TO SALARIED EMPLOYEES FOR MAINTAINING A HOME OFFICE

6.1 Home office deduction formula

SARS has provided a specific formula which will be acceptable when disclosing the home office expenses on the Personal Income Tax return. The formula is displayed in the table below.

Table 8: Home office expense formula

"A / B x total costs, where:

- *A = the area in m² of the area specifically equipped and used regularly and exclusively for trade*
- *B = the total area in m² of the residence (including any outbuildings and the area used for trade in the residence)*
- *Total costs = the costs incurred in the acquisition and upkeep of the property (excluding expenses of a capital nature)".* [82]

Salaried Employees must assess whether sacrificing a home office deduction is beneficial or not in relation to suffering other adverse tax consequences (see chapter 8). This is as a result of the apportionment method used to determine the home office deduction, discussed in the below case study.

6.2 Case study 4: Home office deduction calculation

Table 9: Home office deduction calculation

Employee A has met all the section 23*(b)* requirements and qualifies for a home office deduction. He uses 96 square meters of the property for his home office, the floor size of the property is 496 square meters (in terms of the percentage size, it is 20% = 96/496)

He incurred the following expenses in connection with his home office:

ZAR

- Rates and Taxes.....1,000
- Cleaning.....400

[82] SARS: 2022. How do I declare home office expenses?. Available: https://www.sars.gov.za/faq/how-do-i-declare-home-office-expenses/#:~:text=A%20%2F%20B%20x%20total%20costs,for%20trade%20in%20the%20residence) [2023, December 31].

Calculation	Findings
Home office deduction: 280 = (1,000 + 400) * 20%	Based on the calculation, the home office deduction is very minimal as only the portion that is used for the home office will be deductible. Claiming the R15 000 rebate for rooftop solar panels would be of assistance, however, the overall net cash outflow (cost of panels) needs to be considered.

6.3 Legal Provisions in respect of home office deductions

Table 10: Legal provisions governing the claiming of home office expenses

Section 23*(m)*: **Deductions prohibited against employment income**	Section 23*(m)* prohibits deductions against any employment apart from allowing the deductions discussed in chapter 3. Home office expenditure can only be allowable under section 23*(m)(iv)* if all of the requirements under section 23*(b)* have been met.
Section 23*(b)*: **Home office requirements**	Subject to meeting all of the requirements under section 23*(b)*. SARS provides in list 1 (discussed in chapter 3) the type of expenditure that is intimately connected to the dwelling-house or domestic premises which may be allowed as deduction for maintaining a home office. If the requirements are not met under this section, then those expenses are not allowed as a deduction in terms of section 23*(m)(iv)*.
Section 11*(a)*: **General deductions**	Subject to meeting all the requirements under section 11*(a)*, SARS provides in list 2 (discussed in chapter 3) the type of expenditure that typically occurs for maintaining a home office and may be allowed as a deduction. The deduction is only available if the section 23*(b)* requirements have been met.
Section 12*(B)*: **Deductions in respect of certain machinery, plant, implements, utensils, and articles used in**	The self-generating of electricity allowances is mainly governed under section 12*(B)* and is not available to *Salaried Employees* as a result of section 23*(m)*. *Salaried Employees* will need to seek an allowance under section

farming or production of renewable energy	11*(e)* or the rooftop solar panel tax incentive on the basis that the relevant requirements have been met.
Section 11*(e)*: **Wear and Tear allowance**	The claiming of deductions under s11*(e)* is very contentious and each case must be assessed on its own merits in order to qualify for this deduction. *Salaried Employees* who want to benefit from a wear and tear allowance in respect of their rooftop solar panels together with batteries and inverters must be able to motivate with reasons why they qualify for this benefit (see table 6 for contentions). At this stage (being the 2024 tax year) it is feasible for *Salaried Employees* to instead seek the rooftop solar panel tax incentive since no contentions are needed and the incentive is more beneficial in the short term than a section 11*(e)* allowance discussed in table 7.
Section 6*C*: **Solar Energy Tax Credit**	With the introduction of the rooftop solar panel tax incentive, the view is that SARS would in any case disallow *Salaried Employees* with claims in respect of rooftop solar panels under section 11*(e)*. Individuals will be allowed an incentive (see table 7 for the calculation of the incentive) for the cost incurred for purchasing rooftop solar panels, subjected to having the administrative requirements in place for a successful deduction.

6.4 Conclusion: Chapter 6

If the intention is to dispose of the property it may not be beneficial to claim a home office deduction since the portion used as a home office will be taxable for capital gains tax purposes (see chapter 8). Taxpayers must therefore consider carefully when making a home office deduction on their Personal Income Tax return, especially where the claim is minimal.

CHAPTER 7: TAX TREATMENT OF SALARIED EMPLOYEES VERSUS NON-SALARIED EMPLOYEES

7.1 Brief introduction to employees tax and remuneration

Employees tax or PAYE (Pay As You Earn) is a monthly tax levied which is deducted by the employer from the employees remuneration and paid over to SARS. It is the responsibility of the employer to ensure that the business is tax compliant and that the relevant taxes are duly paid, the employer therefore takes the role of being the "representative taxpayer" who is defined in section 1 of the *IT Act* as a natural person who resides in South Africa.

There are three components that must be present when employees tax is charged, these components are:

i. Employer.
ii. Employee.
iii. Remuneration.

For employees tax purposes, the above components cannot exist without each other and if any of the components are absent, then no employees tax is chargeable.

Once an employer and employee relationship has been established, the component of remuneration must be identified. There are certain inclusions and exclusions to the definition of remuneration, and they are important to note since it will have an impact on whether or not employees' tax should be withheld.

The table below, defines what is included and excluded from the definition of remuneration.[83]

Table 11: Inclusion and exclusions to the definition of remuneration

Included in the definition of remuneration	Excluded from the definition of remuneration
• Salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance, or stipend.	• Independent Contractors income • Pension income • Reimbursement of expenditure actually incurred by an employee in the course of his employment. • Any annuity under divorce or decree

[83] LexisNexis. 2023. *Professional Tax Handbook*. Vol. 1. 32nd ed. South Africa. Paragraph *1* of the *Fourth Schedule* to the *IT Act*.

• Any amount in terms of paragraph (a),(c),(cA), (cB), (d), (e), (eA) or (f) of the definition of gross income[84] • Any allowance or advance (certain provision apply) • Any gain under approved broad-based employee share plans and vesting of equity instruments	

From the above table, it can be seen that those employees whose income falls within the definition of remuneration will be subject to employees tax.

The remainder of this chapter will focus on the tax treatment of *Salaried Employees* and non-Salaried Employees claiming home office expenditure as well as the withholding of employees tax.

A *Salaried Employee* for demonstration purposes of this discussion is an individual receiving a salary from employment and a non-Salaried Employee is an individual who receives income other than a salary and is referred to as an Independent Contractor for comparisons sake.

7.2 Salaried Employees versus non-salaried employees for tax purposes

Salaried Employees who have been identified for employees tax will receive their remuneration from their employer after the employees tax has been deducted. Employees tax is calculated based on the deduction tables for employees[85], taking into account the section 6 rebates[86] where applicable.[87]

As stated, it is the responsibility of the employer to ensure that the employees tax deducted is correct and timeously paid to SARS. Employees tax is essentially an advance tax payment which is deducted in determining the individuals annual normal tax liability (see table 1 for the sequence where employees tax fits in) upon submitting the Personal Income Tax return to SARS.

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[84] See full definition of gross income in section 1 of the *IT Act*.

[85] SARS. Tax Deduction Tables. Available: https://www.sars.gov.za/tax-rates/employers/tax-deduction-tables/ [2023, December 31].

[86] LexisNexis. 2023. *Professional Tax Handbook*. Vol. 1. 32nd ed. South Africa. Section 6 *normal tax rebates* to the *IT Act*.

[87] For purposes of section 6*C, the* rebate would not have been taken into account (too late now) by employers so PAYE would be overpaid, and many could be receiving refunds from SARS which always leads to verification or audit. More work for SARS.

Independent Contractors are excluded from the definition of remuneration and will not be subjected to employees' tax.

The table below highlights two pertinent differences identified between a *Salaried Employee* and an Independent Contractor.

Table 12: Comparison of salaried individuals and non-salaried individuals for tax purposes

Salaried individuals	Independent Contractors
• Subjected to statutory deductions (Pay-As-You-Earn, Unemployment Insurance Fund contributions, Workmans Compensation contributions, Skills development Levy). • *Salaried Employees* are restricted by the limitations of section 23*(m)* and *(b)* in respect of seeking deductions.	• Not subjected to statutory deductions. • Not restricted by the limitation provisions of section 23*(m)* and may claim business-like expenditure against their income.
Findings	
The above table illustrates that the withholding of employees' tax is a statutory deduction for *Salaried Employees* whose income is included in the definition of remuneration, the same does not apply to Independent Contractors and Independent Contractors are not restricted by section 23*(m)* for the claiming of home office expenditure.	

7.3 The withholding of employees tax

The withholding of employees tax is at often times difficult to detect since some employers fail in treating their employees correctly for employees tax purposes which has ignited the topic of the potential payment of employees tax for South African employees working remotely for Foreign Employers.

As presently legislated, Foreign Employers who don't have a representative taxpayer (being a local representative employer residing in South Africa) have no obligation to withhold employees tax. National Treasury has circulated in its *Draft Tax Administration Laws Amendment Bill*, 2023[88], highlighting the concept of registering Foreign Employers for

[88] *Draft Tax Administration Laws Amendment Bill* [Draft].2023. National Assembly.

employees tax where they have employed individuals residing in South Africa and who work remotely from a location in South Africa.

To reiterate from the discussion in 7.1, three components must exist for employees tax to be withheld. The current requirements governing employees tax compels a South African employer (representative taxpayer) who pays remuneration to its employees as discussed, to pay these individuals nett of employees tax where applicable. The employees tax must be withheld by the South African employer and paid over to SARS on or before the 7th day of the following month. This becomes a challenge where National Treasury proposes to have Foreign Employers be held liable to SARS for the payment of employees tax.

The problem SARS is facing, is that given the increase in remote working (which for the foreseeable future is likely to increase even more with the continued technological advancements), there is a risk that employees who are working remotely in South Africa and earning remuneration from their Foreign Employer are failing to report their remuneration to SARS by non-submission and/or omission of this income on their Personal Income Tax returns.

The risks identified above may ultimately result in a loss to the fiscus and SARS may not have the capacity to detect each individual who receives remuneration from a Foreign Employer in a situation where the Foreign Employer is not registered as an employer in South Africa.

The proposed solution by National Treasury is to have these Foreign Employers register for employees tax in an attempt to identify these individuals for tax purposes.

This proposal to have Foreign Employers register for employees tax can result in an extreme administrative burden for Foreign Employers consisting of:

- The preparation and submission of monthly employees tax returns (EMP201's).
- The preparation and submission of annual reconciliations of employees taxes (EMP501's).
- The preparation and issuance of annual employees tax certificates (IRP5's).
- Maintaining the personal information of the employees.
- Keeping track of their employees.

In view of the above administrative requirements, policing employees from a foreign location is quite difficult. It is commendable that and in the *most recent response to the "2023 Draft*

Tax Bills", National Treasury has concluded the same, that the administrative burden is too heavy. However, National Treasury has slimmed down its proposal to state that where a Permanent Establishment has been identified in South Africa, these Foreign Employers will have to register for employees tax.[89]

The concept of a Permanent Establishment is a complex one, and identifying the establishment of one is even more complicated. The *IT Act* provides for the definition of a Permanent Establishment which is based on the same definition according to the relevant updates of the definition of the Organisation for Economic Co-operation and Development (*OECD*)[90] and states that in terms of *Article 5* of the *OECD* convention, it is essentially a "fixed place of business" through which the activity of the employer is carried on in full or in part. The definition carries on, including but not limited to the below two main pillars in determining a Permanent Establishment:

- Place of management.
- Habitually exercises an authority to conclude contracts in the name of the Foreign Employer.

To demonstrate the difficulty of applying the Permanent Establishment rules where National Treasury proposes to enforce that Foreign Employers be registered for employees tax is explained in 7.4 below.

7.4 Case study 5: Determining a Permanent Establishment where a Foreign Employer employs individuals in South Africa

A Foreign Employer employs 10 individuals from South Africa who all work remotely from a location in South Africa. These individuals are not employees at any decision making level regarding the operations of the Foreign Employer's business.

The below table applies the rules of a Permanent Establishment to the above case study.

[89] SARS Response Documents.2023. *Presentation to the Standing Committee on Finance (ScoF)*. Available: https://www.sars.gov.za/legal-lprep-respdocs-2023-01a-scof-response-slides-2023102701-25-october-2023/. [2023, December 31]. Page 55-58.

[90] Organisation for Economic and Co-operation and Development. 2017. *Articles of the model convention with respect to taxes on income and on capital, OECD, November 2017.* Available: https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiKs7-7loKEAxWLppUCHV3QATcQFnoECBcQAQ&url=https%3A%2F%2Fwww.oecd.org%2Fctp%2Ftreaties%2Farticles-model-tax-convention-2017.pdf&usg=AOvVaw3hZHUv3cRJroE3dTjVOOwQ&opi=89978449 [2023, December 31].

Table 13: Application of the Permanent Establishment rules

Permanent Establishment Main Pillars	Outcome of applying the Permanent Establishment main pillars in respect of the employee's home office
Fixed place of business	Any one of the 10 employees home office cannot be the Foreign Employers fixed place of business on the following basis: • Employees working remotely can work from anywhere and is not always in one fixed place. • The employees working from a location in South Africa cannot create a Permanent Establishment for the Foreign Employer merely by fact of these employees being in South Africa. • The dwelling-houses or domestic premises of these employees is not used for the Foreign Employers business activities but used for purposes of the employees work related duties.
Place of management	Any one of the ten employee's home office cannot be the place from where the Foreign Employer is managed and from where it conducts its daily operations. The Foreign Employer conducts its place of business from a location in a foreign place, as such the place of management is not in South Africa.
Habitually exercises authority	Unless the authority has been given to an employee in South Africa who usually is an individual holding a senior position in the business and making decisions for the benefit of the business, then a potential Permanent Establishment could be identified. However, staff level employees such as individuals generally working remotely from a location in South Africa for a Foreign Employer, do not have the authority to exercise business decisions for the Foreign Employer and so cannot create a Permanent Establishment for their Foreign Employer. This would have to be decided on a case by case basis.
Findings	

Based on the application of the Permanent Establishment rules it will be difficult for SARS to prove that employees working remotely from a location in South Africa for Foreign Employers establishes a Permanent Establishment for the Foreign Employer. Another point SARS will find difficulty proving is that the definition of a representative taxpayer clearly states that the natural person is a South African resident, and this is not possible where the employer is a Foreign Employer. It is doubtful that SARS will be successful on its proposal to have Foreign Employers register for employees tax when the Permanent Establishment rules cannot be successfully applied.

SARS will need to clarify the rules regarding the position for employees tax to be withheld and paid where the employer is a Foreign Employer in order to create certainty and fairness within the working environment.

7.5 Conclusion: Chapter 7

Considering all facts discussed in this chapter it is established that even though a *Salaried Employee*, Independent Contractor and an employee working remotely in South Africa for a Foreign Employer are all individuals for tax purposes, they are all treated differently when subjected to tax. These tax differences are further explained below.[91]

Independent Contractors enjoy a much more generous tax benefit for expenditure incurred against their income since they are not restricted by the limitation of expenses under section 23, and they are not subjected to employees tax. *Salaried Employees* working for South African employers on the other hand are limited by section 23 to claiming only certain expenses listed under this section and are obligated by law to have employees tax withheld from their remuneration whilst employees working remotely from a location in South Africa for a Foreign Employer need not have their Foreign Employer withhold any employees tax. It can be seen from this conclusion that *Salaried Employees* are once again discriminated against when compared to their peers for tax purposes.

Whilst there remain restrictions for *Salaried Employees* in terms of the *IT Act*, the possibility of *Salaried Employees* terminating their employment, taking up freelance work and identifying themselves as Independent Contractors or as remote workers being employed by Foreign Employers is on the increase. This is as a means to claim more deductions against their income and/or avoid being charged employees tax as opposed to being

[91] While no employees tax is deducted provisional tax could be applicable and the onus is on the individual to register and declare their South African source income for services rendered in South Africa. Admittedly this relies on the integrity of these individuals.

restricted by the section 23 deductions if they maintained their identity as being a *Salaried Employee*.[92]

To pause or prevent this trend, there may be some sort of relief measures for *Salaried Employees* for certain expenses incurred for working from home should they be unsuccessful with claiming home office expenditure on their Personal Income Tax returns. This relief could be in the form of a reimbursement granted by the employer to the employee for incurring expenditure such as Wi-Fi, printing and stationery expenses in the course of employment.

The reimbursement is excluded from the definition of remuneration (see table 11) and thus will not be included in the employee's income. This relief is made in terms of section 8(1)(a)*(ii)* which states that when an employer instructs an employee to incur business expenses for work purposes and the employer reimburses the employee, then the reimbursement is not included in the employee's taxable income. The employer must however take caution that the reimbursement is not an allowance made in terms of section 8(1)(a)*(i)* of the *IT Act*[93] (allowances are all taxable in terms of section 8 apart from certain allowances such as a travel and subsistence allowances). It does, however, rely on the circumstance and willingness of the employer to negotiate a salaried package arrangement.

[92] Ibid
[93] LexisNexis. 2023. *Professional Tax Handbook*. Vol. 1. 32nd ed. South Africa. Section 8 *Certain amounts to be included in income or taxable income* to the *IT Act*.

CHAPTER 8: INTRODUCTION TO CAPITAL GAINS TAX AND THE CONSEQUENCES WHEN DISPOSING OF A PRIMARY RESIDENCE WHERE A PART OF THE RESIDENCE IS USED AS A HOME OFFICE

8.1 Introduction to Capital Gains Tax

Capital Gains Tax (CGT) was first legislated into the South African tax system on 1 October 2001. The tax implications giving rise to a capital gains tax event are dealt with in the *Eighth Schedule* to the *IT Act*. The objective of CGT is to tax the capital gain[94] or determine the assessed capital loss[95] on the disposal or deemed disposal[96] of an asset or assets. The taxable capital gain[97] or the assessed capital loss is determined by calculating the difference between the proceeds[98] (selling price of the asset) and the base cost[99] (cost price of the asset). The taxable portion of the capital gain is the amount after deducting the annual exclusion[100] and taxing the balance at the inclusion rate[101]. Once the taxable capital gain has been determined, it will be included in the taxable income of the natural person[102] and forms part of the normal tax[103] for the year of assessment.[104]

When a capital asset is disposed of, the relevant provisions of the *Eighth Schedule* will be applicable in the determination of the amount leviable for CGT. This amount is not a separate tax and is included in taxable income (see table 1 where CGT fits in the framework). It must however be noted that not all capital assets attract a CGT event.

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[94] In terms of paragraph *3* of the *Eighth Schedule* to the *IT Act* a person's " capital gain for a year of assessment in respect of the disposal of an asset ... is equal to the amount by which the proceeds received or accrued in respect of that disposal exceed the base cost of that asset ..."

[95] In terms of paragraph *4* of the *Eighth Schedule* to the *IT Act* a person's " capital loss for a year of assessment in respect of the disposal of an asset ... is equal to the amount by which the base cost of that asset exceeds the proceeds received or accrued in respect of that disposal ..."

[96] "Disposal" is defined in paragraph *1* of the *Eighth Schedule* to the *IT Act* as "an event, act, forbearance or operation of law envisaged in paragraph *11* ..."

[97] Paragraph *10* of the *Eighth Schedule* to the *IT Act* defines a "taxable capital gain" as "in the case of a natural person ... 40 per cent ... of that person's net capital gain for that year of assessment".

[98] In terms of paragraph *35* of the *Eighth Schedule* to the *IT Act* "proceeds" is defined as "the amount received by or accrued to ... that person in respect of that disposal ..."

[99] Paragraph *20* of the *Eighth Schedule* to the *IT Act* defines the "base cost" of an asset acquired by a taxpayer as "the sum of ... the expenditure actually incurred in respect of the cost of acquisition ... of that asset ..."

[100] Paragraph *5* of the *Eighth Schedule* to the *IT Act* states that the "annual exclusion of a natural person ... in respect of a year of assessment is R40 000".

[101] The inclusion rate for natural persons is 40%.

[102] A human being.

[103] Income tax.

[104] Any year or period when any tax or duty is chargeable.

Paragraph 53 of the *Eighth Schedule* states that the capital gain or loss calculated on the disposal of any assets used for personal use must be disregarded for CGT purposes with the exception of certain assets (discussed in the table below).

Table 14: Personal asset exempt and not exempt from CGT

Personal use assets exempt from CGT	Personal use assets that are not exempt from CGT
• Artwork • Jewelry • Motor vehicles • Household furniture	• Coins derived from gold and platinum • Immovable property (such as primary residence) • Aircraft of empty mass exceeding 450kg • Boat exceeding 10 meters in length • Financial instruments (shares, crypto currencies etc.) • Any fiduciary and usufruct interest • Certain insurance policies • Rights or interest to the above-mentioned assets.

To put it briefly, where capital assets are used for purposes other than for personal use, such as where capital assets are used for trade then the relevant *Eighth Schedule* rules will apply to determine the CGT. To follow is a discussion of the disposal of a primary residence for purposes of CGT.

It is interesting to note that a primary residence (dwelling-house or domestic premises) attracts CGT. One would consider a primary residence to be fully exempt from CGT since it is a personal use asset (you live in it and do all your personal things in your residence). Sadly, this is not case which in terms of paragraph 53 states that the disposal of immovable property is a CGT event as discussed in the table above.

However, there is some relief from CGT found in paragraph 45*(1)* of the *Eighth Schedule* to the *IT Act* which states that the first R2million will be exempt from the capital gain determined where there has been a disposal of a primary residence. This exempt portion from capital gains is known as the “primary residence exclusion”.[105] There are certain instances where

[105] Paragraph *44* of the *Eighth Schedule* to the *IT Act* defines "Primary residence" - (a) in which a natural person...(b)(i) ...resided in as his or her main residence...(b)(ii) used mainly for domestic purposes.

the primary residence exclusion will not be allowed in full and requires apportionment. This apportionment originates from where a portion of the primary residence is used for purposes other than for private use, such as for trade, which for purposes of this discussion is the portion of the primary residence used as a home office.

Paragraph 49 to the *Eighth Schedule* deals with the non-residential use of the primary residence, and states that when the primary residence is disposed of, the portion of the primary residence that was used for purposes of trade, will not qualify for the primary residence exclusion. This means that an apportionment between the residential use and non-residential use must be determined. The best way to demonstrate the exempt portion of the primary residence exclusion for purposes of a home office is by means of the case study below.

8.2 Case study 6: Disposal of primary residence where part of the property was used as a home office

The table below demonstrates the CGT consequences when disposing of a primary residence where a portion of the residence was used for purposes of trade and deductions were allowed for this portion.

Table 15: Calculation of CGT where part of the primary residence was used for purposes of a home office

Mrs. Y acquired a primary residence in 2013 for R1million. The size of the property is 496 square meters, and the bedroom size is 96 square meters. She converted one of the bedrooms into a home office during the 2021 tax year when she was instructed by her employer to work from home as a result of the COVID pandemic. She worked from home for 3 years and subsequently disposed of the residence after 10 years for R 2,5million during the 2023 tax year. It must also be assumed that she was granted the specified deductions for the home office.

Calculation of Capital Gains Tax	**ZAR**

Proceeds…….....2,500,000
Less: Base cost…….....(1,000,000)
Equal: Capital gain…….....1,500,000

Apportionment

- *Less:* Portion occupied as a home office……...(87,096)
  (1,500,000 x 3/10) = 450,000
  (450,000 x 96/496) = 87,096

- *Equal:* Portion occupied as primary residence
  (1,500,000 – 87,096) ……..1,412,904

Less: Primary residence exclusion (limited to portion occupied as primary residence)…….(1,412,904)
Equal: Capital gain…….....nil
Add: portion occupied as a home office……..87,096
Equal: Total Capital Gain…….....87,096
Less: Annual Exclusion……(40,000)
Equal: Aggregate Capital Gain…….....47,096
Capital Gain taxed @ 40% inclusion rate (47,096 x 40%) …….18,838

18,838 will be included in Mrs. Y taxable income for the 2023 tax year and taxed accordingly, based on the relevant tax tables

8.3 Conclusion: Chapter 8

Based on the above CGT calculation, taxpayers who have used a portion of their primary residence for home office purposes will face the adverse consequences of CGT for this portion. Taxpayers must therefore take note that where they have declared home office expenses on their Personal Income Tax returns, SARS maintains a records of the disclosure and when the primary residence has been disposed of the necessary home office portion will be excluded from the primary residence exclusions.

The SARS Commissioner, Mr Edward Kieswetter states that:

> *"The need for many employees to work remotely has been necessitated by the Covid-19 pandemic in an unprecedented manner. We understand that many employers, and employees alike, are grappling with establishing a new normal. We would simply ask taxpayers to consider carefully the longer term implication of defining an area in their primary residence as a home office for tax purposes. It may be more prudent to wait and establish a more sustainable rhythm before making the decision".*[106]

Taxpayers are therefore cautioned to think about making home office claims on their Personal Income Tax returns as a result of the adverse capital gains tax consequences and should weigh up if claiming home office deductions is beneficial in relation to suffering the CGT at a later date. It is submitted that if the home office claim is disallowed then the apportionment of the gain falls away.

[106] SARS: 2021. *Claiming home office expenses*. Available: https://www.sars.gov.za/media-release/claiming-home-office-expenses/ [2023, September 8].

CHAPTER 9: COMPARATIVE ANALYSIS

9.1 Introduction

As stated in the research methodology, a comparative analysis has been formulated to demonstrate the tax treatment of home office expenses between South Africa, India, Germany and the United Kingdom. The rationale behind the selection of these countries is that home office relief in the form of allowing a tax deduction for the upkeep and cost of running a home office against employment income is present in all four countries albeit with some pertinent differences identified in the below table.

Table 16: Comparative analysis of the tax treatemnt of home offices expenses between South Africa, India, Gemany and the United Kingdom

Country Comparison	**South Africa** 	**India** 	**Germany** 	**United Kingdom** 
Individuals who qualify for a home office deduction	All individuals working from home (see 3.2).	Self-employed individuals.[107]	Taxpayers working from home.[108]	-Individuals whose jobs require them to live far away from the office. -Employer does not have an office. -Required under Government restrictions.[109]

[107] The Times of India. *Standard deductions: What is it, how can you claim it and what is work from home allowance?.* Available: https://timesofindia.indiatimes.com/business/india-business/standard-deduction-what-is-it-how-can-you-claim-it-and-what-is-work-from-home-allowance/articleshow/88869775.cms [2023, November 19].

[108] Wundertax. 2023. *This is how the home office lump sum works*. Available: https://germantaxes.de/tax-tips/home-office-lump-sum/#:~:text=Employees%20enter%20the%20Home%20Office,Lump%20Sum%20to%20be%20uncomplicated [2023, October 5].

[109] GOV.UK. *Claim tax relief for your job expenses.* Available: https://www.tax.service.gov.uk/claim-tax-relief-expenses/disclaimer [2023, January 9].

Requirements of the home office room/area	Designated room/area, which is specially equipped and used regularly and exclusively for work purposes (see 3.4).	Exclusive or regular use.[110]	Separate room/area, private use of the home office room/area must not exceed 10% and must be equipped like an office.[111]	The room/area must be regularly and exclusively used for work purposes and the room/area is the principal place of business.[112]
Calculation Method of the portion of the house used as a home office	Apportionment of the home office room/area over the home area.	Apportionment only available to self-employed individuals.[113]	Apportionment of the home office room/area over the home area.[114]	No specific calculation method.[115]
Relief	Relief granted subject to meeting all the relevant requirements (see 3.4).	A standard deduction of INR[116] 50,000.00 is available against expenses incurred in respect of employment	There are two types of relief options available: 1-Home office lump sum (limited deduction):	An allowance of GBP[121]6.00 a week. Relief in excess of the allowance may be granted if evidence can be proven of the home office

[110] The Times of India. *Standard deductions: What is it, how can you claim it and what is work from home allowance?.* Available: https://timesofindia.indiatimes.com/business/india-business/standard-deduction-what-is-it-how-can-you-claim-it-and-what-is-work-from-home-allowance/articleshow/88869775.cms [2023, November 19].

[111] Wundertax. 2023. *How to deduct your work room at home from taxes*. Available: https://germantaxes.de/tax-tips/work-room-homeoffice/ [2023, October 5].

[112] IONOS. 2023. *How to tax deduct working from home*. Available: https://www.ionos.co.uk/startupguide/productivity/working-from-home-tax-deductions/[2023, October 5].

[113] BankBazaar. *How to Claim Tax Deduction for Home Office*. Available: https://www.bankbazaar.com/tax/how-to-calculate-tax-deduction-for-home-office.html#:~:text=Claiming%20a%20Deduction%20%2D%20Requirements%3A&text=Exclusive%20or%20Regular%20Use%3AThe,for%20home%20office%20tax%20exemption. [2023, October 5].

[114] Wundertax. 2023. *How to deduct your work room at home from taxes*. Available: https://germantaxes.de/tax-tips/work-room-homeoffice/ [2023, October 5].

[115] DNS accountants. 2020. *Home Office Tax Deductions*. Available: https://www.dnsassociates.co.uk/blog/home-office-tax-deductions#:~:text=There%20is%20no%20specified%20formula,have%20utilised%20for%20business%20use. [2023, July, 7].

[116] Currency in India: Indian Rupee (INR).

[121] Currency in the United Kingdom: Great British Pound (GBP).

		and is deducted from the individuals taxable salaried income.[117]	EUR[118] 6.00 per home office day, limited to EUR 600.00 per calendar year and the limit of days to be claimed is 210 days for the assessment period.[119] 2-Blanket allowance (unlimited business expenses deduction): EUR 1,230.00 may be claimed as a business deduction. This amount can be exceeded where it can be proven that the expenses have been incurred for employment purposes.[120]	expenses incurred.[122]

[117] PwC Worldwide Tax Summaries. 2023. *India Individual – Deductions Employment Expenses*. Available: https://taxsummaries.pwc.com/india/individual/deductions [2023, September 8].

[118] Currency in Germany: Euro (EUR).

[119] PwC Worldwide Tax Summaries. 2023. *Germany Individual – Deductions Employment Expenses*. Available: https://taxsummaries.pwc.com/germany/individual/deductions [2023, September 8].

[120] PwC Worldwide Tax Summaries. 2023. *Germany Individual – Deductions Employment Expenses*. Available: https://taxsummaries.pwc.com/germany/individual/deductions [2023, September 8].

[122] GOV.UK. *Claim tax relief for your job expenses.* Available: https://www.gov.uk/tax-relief-for-employees/working-at-home [2023, January 9].

Home office expenditure allowed	Two lists of type of expenses allowed subject to meeting the relevant requirements (see 3.4).	This is not an exhaustive list but includes: Rent, rates, taxes, repairs, insurances and depreciation etc.[123]	This is not an exhaustive list but includes: Rent, water and electricity, repairs and maintenance and cleaning etc.[124]	This is not an exhaustive list but includes: Business telephone calls, gas and electricity for the workspace and other expenses connected to performing your work.[125]

The table below is a summary which displays the similarities and dissimilarities identified from the above comparative analysis.

Table 17: Summary of the findings of the Comparative Analysis

South Africa versus:	Similarities	Dissimilarities
India	Home office room/area must be set up for work purposes.	Home office deduction is only available to self-employed individuals. Relief granted in the form of a standard deduction from employment income available to all taxpayers irrespective of working from home or not.
Germany	Taxpayers who work from home. Apportionment of additional home office expenses incurred	The home office room/area can be split between private use and personal use.

[123] Income Tax Department. Deductions. Available: https://incometaxindia.gov.in/charts%20%20tables/deductions.htm [2023, December 1].

[124] Wundertax. 2023. *How to Deduct Your Work Room at Home from Taxes*. Available: https://germantaxes.de/tax-tips/work-room-homeoffice/ [2023, October 5].

[125] GOV.UK. *Claim tax relief for your job expenses.* Available: https://www.gov.uk/tax-relief-for-employees/working-at-home [2023, August 9].

	(home office room/area over home office area). Similar home office expenses claimed (rates, water and electricity, repairs and maintenance).	There is no specific calculation method for the deduction of home office expenditure. Relief granted for a home office setup in the form of a set allowance for each day working from home.
United Kingdom	The home office room/area must be regularly and exclusively used for work purposes. Similar home office expenses claimed (rates, water and electricity, repairs and maintenance).	Individuals who are required by employment or by the government to work from home. No specific calculation method needed. Relief granted for a home office setup in the form of a set allowance for each day working from home.

9.2 Conclusion: Chapter 9

Given the summary of the comparative analysis (table 17), the similarities identified are that the home office room/area must be set up for work purposes and must be used for this very purpose. It is also established that similar type of home office expenses is claimable between all four countries. There are, however, slight differences identified that has given rise to the validity for the amendment of the current version of section 23*(b)* for South Africa. The main difference that is evident is that India, Germany and the United Kingdom provide relief either in the form of a tax benefit for working from home or a non-tax allowance for working from home without the imposition of the harsh home office requirements as opposed to the section 23*(b)* requirements currently enforceable by South Africa. Based on this study providing a non-taxable allowance or capped relief could assist South Africa in avoiding the unending issues surrounding the home office tax treatment.

CHAPTER 10: SARS LEGAL PROCESSES

10.1 Brief introduction to the Tax Administration Act *No.*28 of 2011

The TAA is a very important piece of tax legislation, and many taxpayers fall foul to the provisions contained in the TAA as they are not schooled in the area of tax legislation and so are not mindful of their rights and obligations.

The TAA governs the management of tax legislation and all the administrative requirements of the tax Acts in South Africa (apart from the Customs and Excise Act). The TAA sets out the rights and duties of SARS and its officials and the adherence to the TAA by taxpayers.

This chapter will focus on the submission of the Personal Income Tax return, the disclosure of home office claims on the Personal Income Tax return, SARS investigating processes, the imposition of understatement penalties and the remedy for grievances.

10.2 Submission of the Personal Income Tax return

Section 25 of the TAA instructs taxpayers to complete their tax returns as "full and true" amongst other factors. The Commissioner for SARS announces every year through public notice when Personal Income Tax filing season will commence and when it will cease in respect of the relevant tax year. This notice will provide taxpayers with important information regarding tax filing requirements. During tax filing season (usually in July to November for non-provisional[126] taxpayers and until January of the following year for provisional taxpayers)[127], taxpayers are afforded the opportunity to declare and submit their Personal Income Tax returns in accordance with the provisions of section 25 of the TAA.

When completing a tax return, taxpayers acknowledge upon submitting the tax return that the information disclosed is accurate and correct under this section. Taxpayers are therefore required to ensure that all the information provided on the tax return has been properly declared. Where it is found that the information is incorrect, taxpayers may fall victim to the consequences of the understatement penalties which is governed by section 221 of the TAA.

10.3 Disclosure of the home office claims made on the Personal Income Tax return

Where SARS has provided a dedicated area or "box" on the return to disclose specific information, taxpayers must ensure that they disclose that information in the relevant space provided. With regards to the disclosure of the home office expenditure on the Personal

[126] A person receiving remuneration.

[127] A provisional taxpayer is any person who receives income other than remuneration.

Income Tax return, SARS has allocated a designated place for this disclosure, which must be disclosed under:

> *"Source code 4028 (Home Office Expenses) in the "Other Deduction" container on your Income Tax Return".*[128]

Taxpayers who have made home office claims on their Personal Income Tax return based on the above disclosure requirements have been warned by SARS that:

> *"Whilst all claims for home office expenses may be subject to further verification or audit by SARS, it is important to note that there is a high likelihood that a taxpayer who claims home office expenses for the first time will be selected for verification or audit".*[129]

As such these taxpayers will presumably be selected for an investigation in this regard. This investigation is made in terms section 40 of the TAA which empowers SARS to instigate an inspection, verification or audit on the basis of any consideration as well as on a random or risk assessment basis.

10.4 SARS's investigative procedures

Where a taxpayer is selected for any of these investigative reasons, SARS may request the taxpayer to provide relevant material and any other supporting documentation pertaining to the inspection, verification or audit. The request for relevant material is made in terms of section 46 of the TAA. For this reason, taxpayers must take care to ensure they have the relevant information on hand when they submit their Personal Income Tax returns to SARS.

The information SARS may request in respect of the home office claims made on the Personal Income Tax return may include the following, but is not limited to:

- The square meterage of the property.
- The size of the floor plan of the property.
- The portion of the property used as a home office.
- Pictures of the home office area where SARS will need to satisfy itself that it is well equipped for purposes of a home office.
- How the calculation was determined regarding the home office claim and on what basis was the method used.

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[128] SARS: 2021. *Home Office Expenses*. Available: https://www.sars.gov.za/types-of-tax/personal-income-tax/filingseason/home-office-expenses/#:~:text=Where%20will%20I%20claim%20home,on%20your%20Income%20Tax%20Return. [2023, September 8].

[129] Ibid.

- Detailed calculation displaying how each claim was determined.
- Relevant supporting documents (invoices, statements, agreements etc.) together with all confirmation of payments made in respect of these expenses.
- A letter from the employer on the employer's letterhead stating that the employee has been allowed to work from home. The letter must display the dates the employee worked from home as well as the dates the employee worked from the office and must include the calculation stipulating that the employee for the year of assessment spent more time working from home.

Where it is found that during the inspection, verification, or audit taxpayers have to the prejudice of SARS or the fiscus caused an understatement in their declarations to SARS, the applicable understatement penalties will apply.

10.5 Wrath of the understatement penalties

The objective of the imposition of the understatement penalties (section 222 of the *TAA*) is for taxpayers to ensure that their tax affairs are up to date, tax returns are filed duly, they are tax compliant and have not evaded tax, just to mention a few. Where taxpayers have for any reason acted contrary to these mentioned behaviours and it is discovered that their behaviours have prejudiced SARS or the fiscus, SARS may induce understatement penalties where they find that the taxpayers behaviour has resulted in:[130]

a) Failure to submit a return as required under a Tax Act or by the Commissioner.[131]
b) An omission from a return.[132]
c) An incorrect statement in a return.[133]
d) If no return is required, the failure to pay the correct amount of tax.[134]
e) An impermissible avoidance arrangement.[135]

[130] SARS Guide to Understatement Penalties (Issue 2). Available: https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiwrJWk-96DAxWGUkEAHdWUBOEQFnoECBkQAQ&url=https%3A%2F%2Fwww.sars.gov.za%2Fwp-content%2Fuploads%2FOps%2FGuides%2FLAPD-TAdm-G11-Understatement-Penalty-Guide.pdf&usg=AOvVaw3q1REY11QgcPVWDxD4GJML&opi=89978449. [2023, December 27].
[131] Mr. Edward Kieswetter
[132] As an example, a taxpayer failed to declare the income he received from the rental of his property.
[133] As an example, a taxpayer underdeclared the income he received from the rental of his property. The under declaration was identified from an analysis of the taxpayers bank statements where SARS established that the income per the bank statements differs significantly from what the taxpayer had declared on his tax return.
[134] As an example, you have a tax liability of R100 and have paid SARS only R50.
[135] In terms of s80A of the *TAA*, defines the term "impermissible tax avoidance arrangement to be an arrangement that's sole or main purpose was to obtain a tax benefit and either the transaction was carried

Taxpayers must treat the imposition of understatement penalties seriously, or they will grieve the brutality of facing the provisions of the understatement penalty percentage table which in terms of section 223 of the TAA can be levied up to 200%. This is costly and the possibility of facing criminal charges[136] may also arise where SARS has levied a 150% or 200% understatement penalty, there is prima facie[137] evidence that the taxpayer committed a criminal offence.

Should the taxpayer be found guilty of a criminal offence he is liable, upon conviction, to a fine or to imprisonment of up to two years (section 234 of the TAA). In terms of section 102(2)[138] of the TAA the burden of proving the facts on which SARS based the understatement penalty is upon SARS. The burden of proof relevant here is the civil burden of proof (balance of probability)[139] and not the criminal burden of proof (beyond reasonable doubt).[140] It is understood that understatement penalties is imposed as a result of an audit conducted by a SARS civil auditor and not by a SARS criminal investigator. Therefore, even though a 150% or 200% understatement penalty was imposed it is still for SARS to prove beyond reasonable doubt that a criminal offence had been committed as envisaged in section 234 of the TAA.

Depicted in the table below is the percentage that will be attributable to the taxpayers behaviour as identified by SARS. [141]

out in a manner which would not normally be employed in the course of business, or such arrangements lacks commercial substance.

[136] Section 234 of the *TAA* deals with tax crimes.

[137] Appears to be true when first considered.

[138] Burden to discharge the onus of proving (usually by means of supporting evidence in the form of documents).

[139] More likely to occur than not.

[140] No other reasonable explanation.

[141] SARS Guide to Understatement Penalties (Issue 2). Available: https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiwrJWk-96DAxWGUkEAHdWUBOEQFnoECBkQAQ&url=https%3A%2F%2Fwww.sars.gov.za%2Fwp-content%2Fuploads%2FOps%2FGuides%2FLAPD-TAdm-G11-Understatement-Penalty-Guide.pdf&usg=AOvVaw3q1REY11QgcPVWDxD4GJML&opi=89978449. [2023, December 27].

Table 18: Section 223 of the TAA – Understatement Penalty Percentage Table

Understatement Penalty Percentage Table					
1	**2**	**3**	**4**	**5**	**6**
Item	Behaviour	Standard Case	If obstructive, or if it is a repeat case	Voluntary disclosure after notification of audit or criminal investigation	Voluntary disclosure before notification of audit or criminal investigation
(i)	Substantial understatement	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%
(iii)	No reasonable grounds for "tax position" taken	50%	75%	25%	0%
(iv)	Impermissible avoidance arrangement	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

Below is a demonstration of the understanding of the application of the understatement penalty percentage table:

- Column 1 of the table displays the item giving rise to the understatement.
- Column 2 of the table represents the behaviour of the taxpayer attributable to the understatement.
- Colum 3 to 6 of the table shows the percentage that will be applied to the understatement identified to each understatement in a tax period based on the behaviour of the taxpayer established in column 2.

The table below demonstrates the application of the understatement penalties to a home office scenario.

10.5.1 Case study 7: The effects of the understatement penalty percentage

Table 19: Applying the understatement penalty percentage table to a home office scenario

Mr. X claimed home office expenditure in amount of R10,000 on his Personal Income Tax return. It was subsequently discovered by SARS that he was a full-time employee working full-time from his employers office.	
Outcome	**Finding**
SARS has identified that Mr. X behaved in a manner that resulted in a prejudice to SARS as it was Mr. X's intention to purposefully claim a home office deduction in order to reduce his normal tax liability. On this basis, SARS is satisfied that the appropriate understatement penalty to be imposed is that of "intentional tax evasion" levied at 200%.	Mr. X will be liable to pay SARS R20,000 (R10,000 x 200%) in understatement penalties and face criminal charges for defrauding SARS.[142]

Based on the findings, taxpayers are cautioned against tax malpractices and will be subjected to understatement penalties and the possibility of imprisonment for such practices.

10.6 SARS's dispute resolution remedies

In view of the staggering amount of home office claims disallowed by SARS, taxpayers who are aggrieved by SARS's decisions to disallow their claims have the right in terms of sections 33*(1)* and 33*(2)* of the *Constitution of the Republic of South Africa, 1996* which states respectively, that:

> *"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair"*
>
> *"People have the right to be given reasons for administrative actions that affects their rights".*

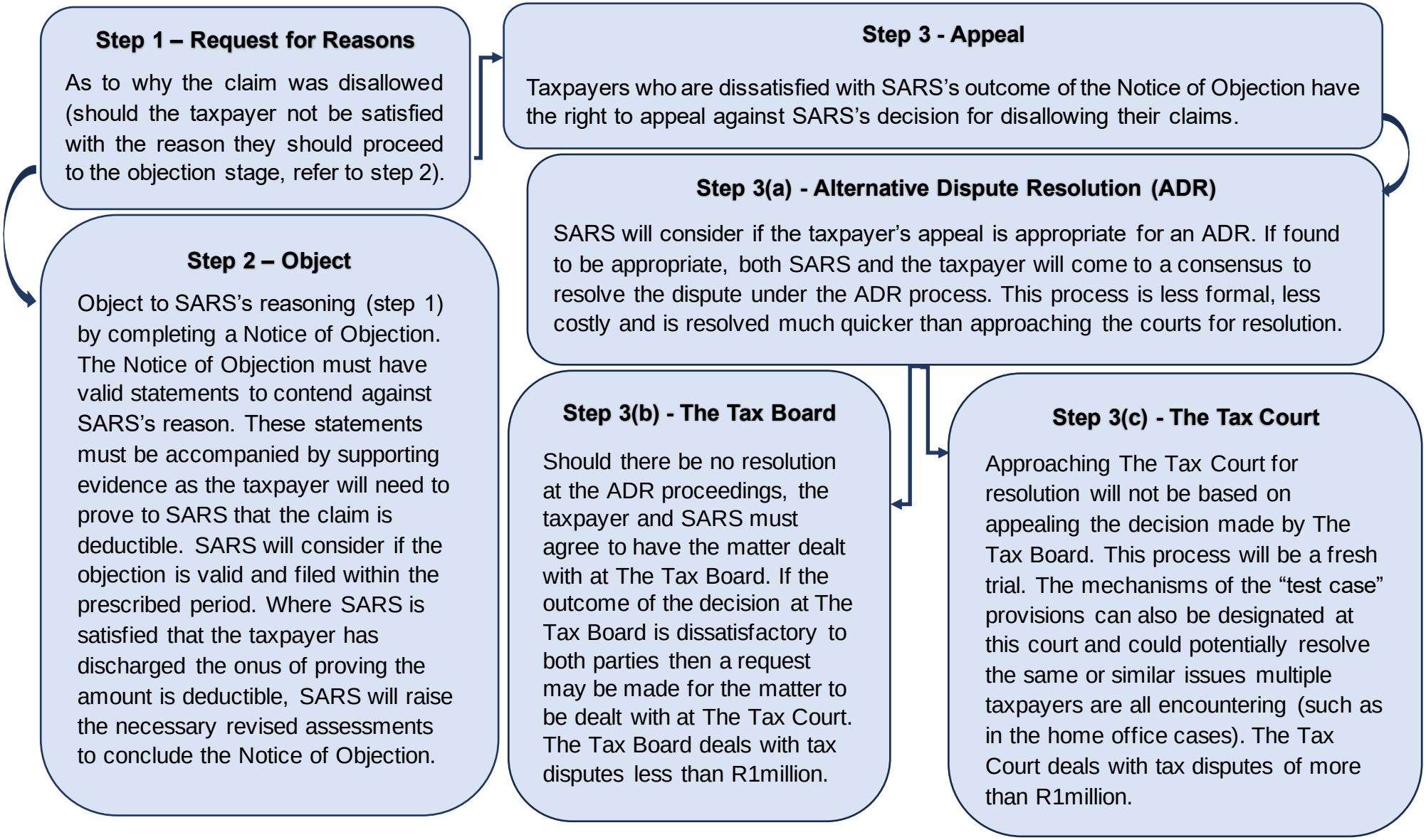
Taxpayers have therefore been empowered to query SARS's outcome of the disallowance based on their constitutional rights and the *TAA* gives effect to the rights enshrined in the constitution. Therefore, aggrieved taxpayers have the opportunity to remedy their grievances through the dispute resolution process which is governed in terms of sections

[142] Refer to Chapter 17 of the *TAA* (criminal offences) for further information.

104 to 107 of the *TAA* (see flow chart 1 below). Taxpayers who have exhausted all their options through SARS's dispute resolution process can proceed to the higher courts[143] for resolution.

[143] Such as the Supreme Court and Constitutional Court.

Flow chart 1: SARS's dispute resolution process



Taxpayers who wish to follow the dispute resolution process for their grievances in respect of their home office claims being disallowed by SARS must consider very carefully taking remedial action since the likelihood of the costs incurred to remedy the grievance will be greater than the home office claim, this is as a result of the method used to calculate the home office expenses.

Taxpayers can however make recommendations to National Treasury. National Treasury makes available its drafts tax amendments to the public. The public have the opportunity to make submissions regarding the issues of the proposed tax amendments. This method attracts no costs and can be used to address the significant amount of home office claims disallowed by SARS as a result of not meeting the section 23*(b)* requirements. It must be noted that making recommendations to National Treasury, is not a tool used to resolve tax disputes, it is merely available for taxpayers to provide their suggestions to potentially bring about an amendment to legislation.

Given the frequency of SARS disallowing home office claims and taxpayers who are aggrieved and object or appeal SARS's decision, may result in SARS receiving a significant number of disputes in this regard. SARS may want to designate a Test Case to get finality on the correct interpretation of the "exclusively for purposes of trade" requirement which in terms of section 106*(6)* of the *TAA* read together with Rule 12 states that a senior SARS official may designate an objection or appeal as a Test Case if the official considers the objections or appeals to be similar on a question of law or fact or both. The result of the Test Case would bring conclusiveness on all or a substantial number of issues involved. This will afford SARS the opportunity to deal with these repetitive disputes uniformly instead of a piecemeal approach which will take up a considerable amount of time, state resources (i.e. allocation of SARS auditors) and to avoid unnecessary litigation, financial and other related costs. Pending the outcome of the Test Case, all other objections and appeals relating to the objections and appeals in respect of the same type of disputes are stayed until such time the Test Case has been finalised. This is an expedient way for SARS to deal with the correct interpretation and application of the home office claims in light of the stupefying amount of home office disallowances.

It must be noted that where SARS is substantially successful in a Test Case, the appellants in the Test case will be responsible for the legal costs and where the appellants are successful in the Test Case, SARS will be responsible for the legal costs.

Demonstrated in the table below is the application of the Test Case provisions.

10.7 Case study 8: The Test Case application

Table 20: Application of the Test Case provisions

SARS disallowed 60% of taxpayers home office claims. Which consist of 600 taxpayers objecting and appealing SARS's decision to disallow their home office claims.	
Outcome	**Finding**
These disputes are appropriate for a Test case on the following grounds: • All these disputes are the same or are similar (the home office is not exclusively used for work purposes). • The dispute is staggering in nature (600 cases of the same or similar nature). • It will be a waste of state resources to deal with each and every dispute on its own when they are all the same or similar. All such disputes will have the same outcome once the Test Case has been finalised so there will be no contradictions such as where each case was handled on a piece meal basis.	Based on the above demonstration, the Test Case provisions may resolve the interpretation and application of section 23*(b)* where more taxpayers continue to contend SARS for disallowing their home office claims.

10.8 Conclusion: Chapter 10

In reference to case study 3 discussed in section 6.2 of this paper, the basis on which the home office expenses are calculated is by use of an "apportionment method", which is made up of the home office room/area size (being the part of the residence used for purposes of trade) over the size of the property. The example in 6.2 clearly shows that the percentage determined from applying the apportionment method is paltry when making home office claims. If one were to use discernment, the outcome conceived would be the same, that the apportionment is of little worth and minuscule compared to the entire floor size of the property.

As stated by SARS, every taxpayer is likely to be subjected to an inspection, verification or audit at any point in time and no taxpayer is an exception to the rule and it is therefore imperative that taxpayers understand their rights and obligations when subjected to tax and should educate themselves on tax matters or they will suffer the consequences of the provisions of the *TAA* for their lack of knowledge. Taxpayers are reminded that they are at the mercy of SARS where it is found that they have been non-compliant, and SARS has the legal right to enforce their powers as stated in the *TAA*.

Where taxpayers want to contest SARS, they are encouraged to carefully think about their tax affairs before making the relevant admissions to SARS, as the outcome upon submission may result in adverse tax implications and it may also not be feasible disputing SARS on a decision in relation to the disputed amount versus the costs likely to be incurred when pursuing SARS with formal proceedings.

It is therefore submitted that given the current tax treatment of home office expenses, challenging SARS on the reasoning to disallow home office claims is a waste of time, money and a futile exercise but taxpayers can provide their suggestions to National Treasury in an attempt to get clarification on the current tax treatment of home office claims. It is further submitted that SARS explore the Test Case provisions by taking into account the number of the “common cause” relating to these taxpayers home office claims being disallowed and subsequently disputed. This will give effect for SARS to establish the reasons why these taxpayers are all encountering the same issues with claiming a home office deduction on their Personal Income Tax return.

CHAPTER 11: CONCLUSION AND RECOMMENDATION

11.1 Introduction

It is a reality that with the economic downturn, the COVID-19 pandemic, the continued electrical outages and increase in prices due to inflation, many individuals just cannot afford to have a dwelling-house or domestic premises which offers more than one room/area that can be used as a dedicated home office as required by section 23*(b)*. It must be borne in mind that individuals, more so *Salaried Employees*, contribute the most towards tax revenue collection, suffer the tax limitations and restrictions in terms of the *IT Act* and struggle to meet certain requirements in order to get a little bit of a tax break and they are rarely incentivised for their contribution towards tax revenue collection.

Throughout this discussion, various case studies and examples have been used to demonstrate the hardships and adversities *Salaried Employees* experience when seeking a home office deduction and it is therefore unfortunate that based on the findings of these various case studies and examples that the principles discussed in chapter 1 that represent a good, fair, and equal tax system for all taxpayers cannot successfully be applied to the research question of:

> *"Does the current version of section 23(b) regarding the tax treatment of home office expenditure represent a good, fair, and equal application for all taxpayers seeking to claim home office expenditure?*.

To further validate answering the research question in the negative, the discussion below sets out the application of section 23*(b)* to the Adam Smith tax principles on which the recommendations of the Katz Commission and the ongoing works of the Davis Tax Committee of tax reform in South Africa were built.

11.2 Findings of the application of section 23*(b)* to the tax principles

Equality – The equality principle cannot be applied to section 23*(b)* on the basis that two *Salaried Employees* are treated differently to each other where one who has a designated room/area and will enjoy a tax benefit for home office related expenses and the other will not as a result of him/her not having a designated home office room/area. SARS also acknowledges that the current version is:

> *"overly strict, inequitable and unaccommodating of the modern work environment".*[144]

[144] SARS Interpretation Note: No.28 (Issue 3). Available: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf. [2023, May 25].

Certainty – The certainty principle cannot be applied to section 23*(b)*, SARS has taken a stance that in the absence of legislative amendments the current version will continue ipso facto whether taxpayers accept it or reject it.

Convenience – The convenience principle cannot be applied to section 23*(b)* as it is not an easy and straightforward process to claim a home office deduction but rather a difficult and overly administrative one. Taxpayers who claim home office expenses on their Personal Income Tax returns are likely to be audited by SARS. SARS will require very specific information (see 10.4) in order to validate a home office claim, therefore taxpayers must be able to provide details of the property in which the home office is situated and provide proof of the relevant home office expenditure, just to mention a few.

Efficiency – The efficiency principle cannot be applied to section 23*(b)* as taxpayers will waste time and money in their efforts should they challenge SARS for disallowing their claims (see 10.6). SARS has prematurely decided that those taxpayers claiming home expenses will not succeed and should follow SARS's legal process (see chapter 10) to remedy their grievances which can take up to several months to resolve. There is also a cost to SARS, which, it is submitted is not worth the benefit considering the small quantum of the actual claims submitted by the majority of taxpayers. SARS, on this basis may consider that the time spent pursuing the objection is a waste of state resources and may therefore invalidate the taxpayers objection. In general, such objections are not significant enough and will be of no benefit to the fiscus.

In the summary above, none of the Adam Smith tax principles can successfully be applied to section 23*(b)*. The findings determined in every chapter exhibited the hardships *Salaried Employees* are forced to contend with when endeavoring to pursue claims against their remuneration. SARS has upheld its ground that taxpayers will find it extremely hard to obtain deductions in the course of their employment, which is submitted has towered above SARS's good judgement due to the ongoing abuse of certain taxpayers exploiting the provisions for desirable tax benefits. It is deplorable that SARS has tainted compliant taxpayers with the behaviours of non-compliant taxpayers and SARS should consider withdrawing the casting of judgement unjustly since there is no point to legislate a home office deduction, make it available for taxpayers to claim but at the same time making it extremely hard to claim.

11.3 Closing remarks

In terms of section 9(1) of the *Constitution of the Republic of South Africa, 1996* which states that:

> *"everyone is equal before the law and has the right to equal protection and benefit of the law".*

Section 9(2) carries on to state that:

> *"equality includes the full and equal enjoyment of all rights and freedoms".*

As stated above, section 23*(b)* fails to treat all taxpayers equally when subjected to tax. It is clear that taxpayers who cannot afford a dwelling-house or domestic premises with a room/area exclusively dedicated to a home office will not qualify for the home office deduction.

Furthermore, SARS has offered a short term incentive in the form of a rebate on the acquisition of rooftop solar panels which will only be available to those who can afford such and it is a once off. The wear and tear allowance on such expenditure may also be unavailable due to the permanent nature of a solar system (in SARS's view). This will also not assist individuals who do not have a dedicated room/area to use as a home office as there is no means to calculate a dedicated room/area over the total home area to apportion such expenses resulting in these taxpayers not having the full and equal enjoyment of the right to a home office deduction as contained in the *IT Act*.

11.4 Recommendations

Having regard to all the factors, the research objective has established the uncertainties with the current version of section 23*(b)* (see 1.2) and is unable to address with certainty that the current version of section 23*(b)* functions in such a way that the tax principles can successfully be applied. These uncertainties have been verified through the undertaking of the procedures as determined in 1.2. It is therefore recommended as stated in the research objective that where uncertainty remains (which is the case with the current version of section 23*(b)*, and which has been identified in the entirety of this paper) that clear rules be formulated to address the ongoing issues (disallowance of home office claims by SARS) taxpayers are experiencing. Consequently, this study proposes that section 23*(b)* be amended so as to provide a more equitable application of the provision where all taxpayers can enjoy the same benefit regardless of their economic circumstances.

A probable solution to addressing the unending issues surrounding home office claims is to remove the "exclusively" requirement and or provide relief in the form of a non-taxable allowance as identified in the comparative study (see chapter 9). In order to reduce the workload of SARS it may also be better to introduce a *de minimus* rule which ensures no disallowance for claims below a certain amount. This does not, however, negate the capital gains tax consequences when the primary residence is disposed. The deduction claimed by taxpayers is generally not a large amount and the cost benefit of SARS auditing the claim or it being contested is far greater than the revenue received by the fiscus in disallowing the expense. It would also not be fair to expect employers to reimburse employees as many of them are themselves a victim of the current economic downturn.

The fact that the law is overly strict, as admitted by SARS, and has caused unequal treatment of individuals working from home is clearly discrimination and this needs to be corrected.

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