



Legal and Policy  
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25 January 2011

Ms Ronel Sheehan

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(Cape of Good Hope)

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Dear Ms Sheehan

**EMPLOYEES' TAX: PAYMENTS IN LIEU OF LEAVE: SICK LEAVE**

I refer to your query dated 21 September as well as to our meeting held on 20 October 2011.

**1. Facts**

A collective agreement was concluded in the Building Industry Bargaining Council (Cape of Good Hope) [**BIBC**] between certain employers and unions within that industry [**the Agreement**], and is binding on the parties in terms of section 31 of the Labour Relations Act, 1996 [**the Labour Act**]. The Minister of Labour, on 17 December 2010, published Notice No. R1207 in Government Gazette No. 33874, which provides that, in terms of section 32(2) of the Labour Act, the Agreement is binding on all employers and employees in that industry.

In terms of paragraph 15(1) of the Agreement, the Sick Pay Fund [**the Fund**] for the Building Industry is continued and administered by BIBC. Paragraph 15(2) of the Agreement provides for the Fund to be administered in accordance with '*the rules which it may make from time to time for this purpose*' [**the Rules**].

In terms of the Rules and the Agreement, employers must contribute a monthly levy to the Fund. If an employee becomes sick and is unable to attend work, the Fund becomes obliged to pay the employee a sick pay benefit. Each category of employee is entitled, for the first 10 days of sick leave, to 75% of the minimum wage payable to that category of employee, and for the 11<sup>th</sup> to 130<sup>th</sup> day, to 33% of that minimum wage.

SARS has been requested to provide an opinion on who is responsible to deduct or withhold employees' tax from the sick pay benefit. If it is decided that the BIBC is responsible, SARS has been requested to lower the rate at which employees' tax needs to be deducted from the sick pay benefit.

**2. The law**

The Fourth Schedule to the Income Tax Act, 1962 [**the Fourth Schedule**] defines 'remuneration' in paragraph 1 to include –

*"any amount of income which is paid or is payable to any person by way of any salary, leave pay..."*

An 'employer' is defined in that same paragraph to mean any person –

*"(...including any person acting in a fiduciary capacity or in his capacity as...an executor or an administrator of a benefit fund...or any other fund) who pay...any amount by way of remuneration..."*

Paragraph (a) of the definition of 'employee' includes any person who receives any remuneration.

Paragraph 9 of the Fourth Schedule provides the Commissioner with authority to set deduction rates and tables to be applied in determining the amount of employees' tax to be deducted or withheld. Paragraph 10 provides as follows:

- "(1) If the Commissioner is satisfied that the circumstances warrant a variation of the basis provided in paragraph 9 for the determination of amounts of employees' tax to be deducted or withheld from remuneration of employees in the case of any employer he may agree with such employer as to the basis of determination of the said amounts to be applied by that employer, and the amounts to be deducted or withheld by that employer in terms of paragraph 2 shall, subject to the provisions of paragraphs 11 and 12, be determined accordingly.*
- "(2) Any agreement made in terms of sub-paragraph (1) shall remain in force indefinitely, but the Commissioner or the employer concerned may give notice of termination thereof and upon the expiration of a period of three months from the date of such notice such agreement shall terminate."*

### **3. Discussion**

Sick leave pay constitutes 'leave pay' under the general part of the definition of remuneration in paragraph 1 of the Fourth Schedule. Payments by the Fund in respect of sick pay benefits are therefore 'remuneration'. The recipient is an 'employee' as defined, and the payer is an 'employer'. An administrator of any fund is specifically included as an employer, and this would include a fund such as the Fund.

This means that the Fund, and BIBC as its administrator, is obliged to deduct or withhold employees' tax from the sick pay benefits payable to employees in the industry.

In the representations made by the BIBC, the level of taxable income of the different categories of employees within the industry has been analysed. These categories are those set out in paragraph 9 of the Agreement. A sample of 2 129 employees out of the total employee compliment of 25 156 was presented for analysis, constituting a sample selection of 8.46% of the total population.

Importantly, the sick pay benefits payable under the Agreement and Rules, should an employee become ill and be unable to work, will have the effect of reducing the average taxable income figures provided for consideration.

Based on the above, and taking into account the average taxable income of the various categories of employees, it is agreed that the 25% deduction rate applicable in terms of paragraph 9 of the Fourth Schedule is inappropriate and that the circumstances warrant a variation in the basis for deducting employees' tax.

Accordingly, in terms of paragraph 10(1) of the Fourth Schedule, BIBC is directed to deduct employees' tax from sick pay benefits at the rates set out in the table below. Please note that the categories are intended to be aligned with those set out in paragraph 9 of the Agreement.

<u>Category of employees</u>	<u>Applicable tax rate</u>
(i) Labourer	0% (zero)
(ii) Cleaners	0% (zero)
(iii) General worker	0% (zero)
(iv) Tradesman, learner class 4, scaffolder	0% (zero)
((v) Tradesman, learner class 3	18% (eighteen)
vi) Tradesman, learner class 2, block layer	18% (eighteen)
(vii) Drivers/Plant operators – with code C1 license	0% (zero)
(viii) Drivers of other vehicles with code A, A1 or B licenses	18% (eighteen)
(ix) Artisan	18% (eighteen)

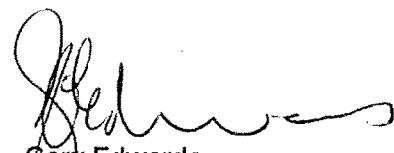
#### 4. Conclusion

At the end of the tax year, BIBC must issue an IRP5 or IT3 (a) certificate disclosing the remuneration paid, and if employees' tax was deducted, the amount of such employees' tax, in terms of the normal rules. This will ensure that any over or under-deduction of employees' tax can be corrected on assessment for normal tax.

Yours faithfully

  
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Operational Specialist

for: THE COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE

  
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