



# Employment tax COVID-19 chronicles: Home office expenses for employees – can you or can't you?

In these difficult times, it appears that many employers are receiving questions from their employees regarding whether, and how, they can assist their employees in being able to claim a personal tax deduction in respect of working from home. In this article, we will be discussing the possible deduction an employee could claim for home office expenditure and to what extent, if any, an employer can assist employees in making such a claim.

Amongst the COVID-19 tax changes that have been announced so far, as well as in the recent draft tax proposals released for comment on 31 July 2020, nothing has been announced in terms of any special relief provisions for employees now needing to work from home. Therefore, one should look to existing legislation and guidelines to determine any relief available. Although there have been some requests for specific changes to this legislation in light of the COVID-19 developments, National Treasury has resisted any pressure in this regard, presumably on the basis that current provisions suffice.



## General requirements to be met

Without getting too technical, one needs to understand some basic mechanisms of the Income Tax Act.<sup>1</sup> The first is that taxpayers are not permitted to deduct private or domestic expenditure in their tax return, except for a few specific cases (e.g. retirement fund contributions, medical expenditure under certain circumstances, etc). A general deduction needs to meet the requirements of section 11(a) and 23(g) to be an allowable deduction. These requirements are that an expense or loss must be:

- actually incurred,
- in the current year of assessment,
- in and for the purposes of carrying on of any trade (including employment),
- incurred 'in the production of income', and
- cannot be capital in nature.

## Requirements specific to an employee

Further to the above requirements, section 23(m) limits the possible deductions that are available for an employee in particular,

once again to certain specific expenses (e.g. retirement fund contributions, certain legal fees, depreciation, etc). In other words, even if all the above requirements are met, one would still need to ensure section 23(m) does not limit that expenditure. Fortunately, home office expenditure is permitted under section 23(m).

Where an employee is incurring (non-capital) expenditure during COVID-19 in respect of an office at home in order to tender services to an employer, one would be satisfied that, on the face of it, the above requirements are met. However, it is worth mentioning that one must always ask the question 'are my expenses incurred directly related to my employment, or in the production of my income?'

Improvements to one's home, such as building on an additional room to use as an office, will not be deductible, since that expense is typically capital in nature. Allowable non-capital home office expenses typically include stationery, telephone bills, rent, rates and taxes, interest on bond repayments, cleaning expenses, wear and tear on assets, internet expenses and repairs. It is also important to note that any items that the employer provides to the employee, such as laptop computers, 3G card or office furniture,

<sup>1</sup> No. 58 of 1962



would in any event not be deductible in the employee's hands since it is not an amount actually incurred by the employee. We will discuss the tax consequences of employer-provided equipment and furniture in a future article.

Once one is satisfied that the above requirements are met (i.e. in principle the expenses are deductible in terms of section 11(a) and not specifically prohibited in terms of section 23(m)), an employee or office holder in receipt of remuneration must ensure that the requirements of section 23(b) are also met. In order for the home office expense to qualify under this section (being typically a pro rata percentage of mortgage interest, rates and utilities, rent and/or levies, based on the floor area of the office compared to the total floor area of the house), once again the normal rules governing employees being able to claim a tax deduction for

such expenses would apply. In terms of section 23(b), an employee would only be entitled to claim such an expense if:

- the area used as a home office is **specifically equipped** for purposes of the taxpayer's trade only **and**
- **regularly and exclusively** used for such purposes (i.e. it cannot be a dining room table or a desk in a spare bedroom, but must be an area specifically set up as an office and **used only for that purpose**) **and**
- either the employee's income must consist mainly of commission or other variable payments which are based on the employee's work performance or the employee's duties must be **mainly\*** performed in the home office.

\*The word 'mainly' has been interpreted to mean more than 50%.

From the above specific requirements of section 23(b) it is clear that not all employees who have been working from home during the lockdown period will qualify for a home office deduction. Only those who meet all of the required provisions will qualify and the onus will be on them to prove these facts, should SARS query the claim.

### Requirements to work mainly from home

The question has arisen as to whether the fact that the employee's duties must be performed in the home office in light of COVID-19 requirements is sufficient to meet that part of the requirement, or whether the employer must specifically direct the employee to work from home. There is some guidance from the Courts on this matter.

In *Kommissaris van Binnelandse Inkomste v Van Der Walt* 48 SATC 104 (a case that was decided before the current versions of section 23(b) and (m) were in force), it was held that a university lecturer could claim his home study expenses, where he worked after hours as a lecturer and doctoral candidate. He established the necessary connection between expenditure claimed and his earnings, since he showed that he had, in good faith, incurred the expenditure for the more efficient discharge of the duties of his employment. This leads one to conclude that there is no requirement for the employer to expressly instruct the employee to work from home in order to meet this requirement. It is a factual enquiry as to whether the employee did in fact mainly perform their duties of

employment in their home office of not. If the employee is able to prove that they did mainly perform their duties from their home office, then this requirement should be met. Nevertheless, it would still be preferable if the employee was able to prove that working from home was a requirement by the employer.

### Capital gains tax consequences

An often overlooked but important point to note is the future capital gains tax consequences of the above for the employee. Where an employee works at home and claims a tax deduction in respect of home office expenses, that home office now becomes a place of trade and no longer forms part of the employee's primary residence. Normally, when a primary residence is sold, there is an exclusion from the capital gains tax calculation for such primary residence, known as the primary residence exclusion. A person who has claimed a tax deduction in respect of home office expenditure will now have to apportion the primary residence exclusion to only the portion of the house that is used for residential purposes, i.e. they will have to exclude the square metres of the home office. For example, if the area of the home office is 10% of the total area of the house, then only 90% of the primary residence exclusion can be claimed on disposal of the property.



## The takeaway

As is evident from the above, the rules for claiming home office expenses are very strict and not of general application, since very specific requirements need to be met to enable an employee to claim such an expense as a tax deduction. From a practical perspective, the employee would need to complete the ITR12 tax return to claim such expenditure and can expect some practical challenges in being able to claim the expense in their tax return on e-filing. Since the onus of proof is on the taxpayer, the South African Revenue Service will very likely ask a taxpayer making a home office claim to prove that all the above requirements are met and will typically disallow the expenditure if they are of the view that all of the necessary requirements are not met or the employee is unable to prove the expenditure claimed.

Since there appears to be much misinformation in the public domain regarding this matter, employers are therefore advised to inform their employees of the requirements to qualify to claim home office expenses as a tax deduction in their tax returns and also point out the potential implications for them if they do. Employees should be counselled to proceed with caution as regards claiming a tax deduction for home office expenses and preferably advised to obtain tax advice from a reputable tax adviser before embarking on the process. If the demand warrants it, they could consider holding information sessions for their employees (via an appropriate online forum) where the requirements are explained, risks are pointed out, employees afforded an opportunity to ask questions, and misinformation clarified by a suitably qualified tax expert.



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