



Legal Counsel

Employment Tax Incentive

**Guide to the
Employment Tax Incentive
(Issue 3)**



South African Revenue Service

Guide to the Employment Tax Incentive

Preface

The employment tax incentive was introduced by the Employment Tax Incentive Act 26 of 2013 which was promulgated on 18 December 2013. This Act has since been amended on a number of occasions. This guide provides general guidance on the incentive.

While this guide reflects SARS's interpretation of the law, taxpayers who take a different view may use the normal avenues for resolving such differences.

This guide is not an "official publication" as defined in section 1 of the Tax Administration Act 28 of 2011 and accordingly does not create a practice generally prevailing under section 5 of that Act. It should, therefore, not be used as a legal reference. It is also not a binding general ruling under section 89 of Chapter 7 of the Tax Administration Act. Should an advance tax ruling be required, visit the SARS website for details of the application procedure.

All guides, interpretation notes, rulings, forms, returns and tables referred to are available on the **SARS website**. Unless indicated otherwise, the latest issues of these documents should be consulted.

Should you require additional information concerning any aspect on the interpretation and administration of the employment tax incentive legislation you may –

- visit the SARS website at **www.sars.gov.za**;
- visit your nearest SARS branch;
- contact your own tax advisor or tax practitioner; or
- contact the SARS National Contact Centre –
 - if calling locally, on 0800 00 7277; or
 - if calling from abroad, on +27 11 602 2093 (only between 8am and 4pm South African time).

Comments or suggestions on this guide may be sent to **policycomments@sars.gov.za**.

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Contents

Preface	i
Glossary	1
1. Background	1
2. Scope and definitions [section 1(1)]	2
2.1 Associated person.....	2
2.2 Employee.....	3
2.3 Employees' tax.....	4
2.4 Monthly remuneration.....	4
2.4.1 The position before 1 March 2015	6
2.4.2 The position on or after 1 March 2015	7
2.4.3 The position on or after 1 March 2017	8
2.5 Qualifying employee.....	8
2.6 Wage	8
3. Qualifying criteria for the employment tax incentive	9
3.1 Eligible employers (section 3).....	9
3.2 Qualifying employees (section 6).....	11
3.3 Qualifying period	14
4. Disqualification	15
4.1 Compliance with wage regulating measures and minimum wage requirement (section 4).....	15
4.1.1 Employer subject to wage regulating measures [section 4(1)(a)].....	16
4.1.2 Employer not subject to wage regulating measures [section 4(1)(b)]	18
(a) The position before 1 March 2015	18
(b) The position on or after 1 March 2015	19
(c) The position on or after 1 January 2016	20
(d) The position on or after 1 March 2017	21
4.2 Displacement [section 5(2)]	22
4.3 Non-compliance with tax obligations (section 8).....	22
5. Determining the amount of the employment tax incentive (section 7)	23
5.1 Determination of the employment tax incentive [section 7(1), (2) and (3)].....	23
5.1.1 The position before 1 March 2017	23
5.1.2 The position on or after 1 March 2017	25
5.2 Associated persons [section 7(4)]	26
5.3 Employee employed for part of a month [section 7(5)].....	27
5.3.1 The position before 1 March 2015	27
5.3.2 The position on or after 1 March 2015	28
5.3.3 The position on or after 1 March 2017	29
5.4 Employment tax incentive and the learnership allowance.....	30
6. Process for claiming the employment tax incentive	31
6.1 Submitting the monthly employees' tax return (EMP201) and payment of liability.....	31
6.2 Penalty.....	32
6.2.1 Non-compliance	32
6.2.2 Displacement of employees.....	32

6.3	Late payment penalty and interest	33
7.	Roll-over amounts (section 9)	33
8.	Reimbursement (section 10).....	35
9.	Cessation of the employment tax incentive	36
10.	Implications for other taxes.....	36
10.1	Value-added tax.....	36
10.2	Income tax	37
Annexure A – Diagram illustrating the rule for determining who are related within the third degree of consanguinity in the case of natural persons		38
Annexure B – The meaning of “remuneration” in paragraph (1) of the Fourth Schedule to the Income Tax Act.....		39

Glossary

In this guide unless the context indicates otherwise –

- **“Basic Conditions of Employment Act”** means the Basic Conditions of Employment Act 75 of 1997;
- **“ETI”** means employment tax incentive;
- **“ETI Act”** means the Employment Tax Incentive Act 26 of 2013;
- **“Income Tax Act”** means the Income Tax Act 58 of 1962;
- **“Labour Relations Act”** means the Labour Relations Act 66 of 1995;
- **“Minister”** means Minister of Finance;
- **“Schedule”** means a Schedule to the Income Tax Act;
- **“section”** means a section of the ETI Act;
- **“SEZ”** means a “special economic zone” as defined under section 1(1);
- **“TA Act”** means the Tax Administration Act 28 of 2011;
- **“VAT”** means value-added tax;
- **“VAT Act”** means the Value-Added Tax Act 89 of 1991; and
- any other word or expression bears the meaning ascribed to it in the ETI Act.

1. Background

The ETI is a temporary tax incentive that may be claimed by eligible employers and is aimed at encouraging such employers to employ young employees between the ages of 18 and 29, and employees of any age in special economic zones and in any industry identified by the Minister by notice in the *Government Gazette*. Payment of the incentive is effected by eligible employers being able to reduce the employees’ tax due by them by the amount of the ETI that they may claim – provided of course that they meet the requirements of the ETI Act. The ETI is administered by SARS through the employees’ tax system that is deducted and withheld and accounted for to SARS (usually monthly) via the Pay-As-You-Earn (PAYE) system.

As mentioned, the ETI is a temporary programme initially covering a period of three years. The Taxation Laws Amendment Act 15 of 2016 extended the ETI for a further two years and two months.¹ The Taxation Laws Amendment Act 23 of 2018 extends the ETI for a further ten years.² During this period an eligible employer may claim the ETI for a maximum of 24 months per qualifying employee. The ETI will be subject to continuous review of its effectiveness and impact in order to determine the extent to which its core objective of reducing youth unemployment is achieved. The ETI commenced on 1 January 2014 and will end on 28 February 2029. It applies to qualifying employees employed on or after 1 October 2013 by eligible employers.

¹ Section 97(1) of the Taxation Laws Amendment Act 15 of 2016.

² Section 102 of the Taxation Laws Amendment Act 23 of 2018.

2. Scope and definitions [section 1(1)]

The most important definitions are discussed below.

2.1 Associated person

“associated person”, in relation to an employer—

- (a) where the employer is a company, means any other company which is associated with that employer by reason of the fact that both companies are managed or controlled directly or indirectly by substantially the same persons;
- (b) where the employer is not a company, means any company which is managed or controlled directly or indirectly by the employer or by any partnership of which the employer is a member; or
- (c) where the employer is a natural person, means any relative of that employer;

The definition of “associated person” is relevant in the calculation of the 24-month period for which the ETI is available (see 5.2). The definition was included to prevent the redeployment of employees by employers with associated persons solely in order to obtain a benefit under the ETI.

The words “managed” and “controlled” in paragraphs (a) and (b) of the definition of “associated person” are not defined in the ETI Act. The use of the co-ordinating conjunction “or” between “managed” and “controlled” means that either term can apply. The expression is thus wider than “managed and controlled”.

The word “management” has been defined as –³

“the organization and coordination of the activities of a business in order to achieve defined objectives”.

The words “management” and, in context, “manage” are very broad and it is not possible to list activities which do (and in contrast, do not) constitute management. Instead when assessing whether or not a particular person is managing a company it is necessary to consider all the facts of the particular case taking into account the activities for which the person is responsible, the person’s level of seniority and the scope of the person’s responsibilities.

In ITC 1741⁴ the court held that “controlled” in the absence of a statutory definition or any other contrary indicators meant *de facto* control,⁵ that is, control and not shareholder control. *De facto* control is generally, but not necessarily, held and exercised by the board of directors. However, the facts and circumstances of each case are critical in determining who is controlling a company because the presence and influence of controlling individuals can have a significant impact.

The word “substantially” in paragraph (a) of the definition of “associated person” is not defined in the ETI Act. The Oxford Dictionary⁶ defines the term “substantially” as –

“to a great or significant extent”.

³ www.businessdictionary.com/definition/management.html [Accessed 6 May 2019].

⁴ (2002) 65 SATC 106 (EC).

⁵ In fact, whether by right or not.

⁶ www.oxforddictionaries.com/definition/english/substantially [Accessed 6 May 2019].

Under paragraph (c) of the definition of “associated person” an employer that is a natural person will constitute an “associated person” in relation to any “relative” of the employer. The term “relative” includes in relation to any person –⁷

- that person’s spouse;
- anybody related to that person within the third degree of consanguinity;⁸
- anybody related to that person’s spouse within the third degree of consanguinity; and
- the spouse of anybody related within the third degree of consanguinity to that person or that person’s spouse.

2.2 Employee

Since “employee” is specifically defined in the ETI Act, it follows that the definition of “employee” in paragraph 1 of the Fourth Schedule will not apply for purposes of the ETI.

The definition of “employee” was amended with retrospective effect by the Taxation Laws Amendment Act 23 of 2018⁹ and is deemed to come into operation on 26 July 2018. Contrary to the definition of “employee” before the amendment, it will no longer be a requirement that the natural person works “directly” for another person. For a discussion on the definition of “employee” prior to this amendment, please refer to Issue 2 of this Guide.

“**employee**” means a natural person—

- (a) who works for another person; and
- (b) who receives, or is entitled to receive remuneration, from that other person, but does not include an independent contractor;

The ETI applies only to natural persons that work for another person and who receive or are entitled to receive *remuneration*. The term “remuneration” is not separately defined in the ETI Act. Having regard to section 1(2) and read together with the definition of the term “monthly remuneration” (see 2.4) it suggests that the term should bear the meaning ascribed to it in paragraph 1 of the Fourth Schedule.¹⁰

Before the effective date of the deletion of the word “directly”, the requirement was that there must not be any intermediary or agency arrangement between the natural person and the other person. However, upon the effective date of the amendment, this would, for example, mean that a person who is provided by a so-called labour broker to render services to another person would meet the first requirement of the definition of “employee” but would still need to receive remuneration from that other person in order to be regarded as an “employee” of the other person for purposes of the ETI. A person that renders services via a “personal service provider” as defined for employees’ tax purposes¹¹ would similarly meet the first requirement of the definition of “employee” but would still need to receive

⁷ A “relative” is defined in section 1(3) of the ETI Act.

⁸ See **Annexure A** for a diagram illustrating the rule for determining persons who are related within the third degree of consanguinity. See also Interpretation Note 67 “Connected Persons”.

⁹ See section 101 of the Taxation Laws Amendment Act 23 of 2018.

¹⁰ See section 1(2) which states that for the purposes of the definition of “monthly remuneration” in subsection (1), “remuneration” has the meaning ascribed to it in paragraph (1) of the Fourth Schedule.

¹¹ Paragraph 1 of the Fourth Schedule.

remuneration from that other person in order to be regarded as an “employee” of the person to whom the relevant services are provided for ETI purposes.

An independent contractor is specifically excluded from the definition of “employee” for purposes of the ETI. The ETI Act does not contain a definition of “independent contractor” but some useful guidance can be obtained from Interpretation Note 17 “Employees’ Tax: Independent Contractor”.¹²

The definition of “employee” in the ETI Act has been aligned with the definition of “employee”¹³ in the Labour Relations Act¹⁴ because the aim of the ETI is to assist in creating employment opportunities regulated by labour legislation.

An employer will only be able to claim the ETI for a “qualifying employee” as defined.¹⁵ An employee will only be regarded as a “qualifying employee” if the employee meets all the criteria prescribed in section 6 (see **3.2**).

2.3 Employees’ tax

“**employees’ tax**” means the amount deducted or withheld and that must be paid over to the Commissioner for the South African Revenue Service by virtue of paragraph 2(1) of the Fourth Schedule to the Income Tax Act;

Paragraph 2(1) of the Fourth Schedule requires every employer to deduct or withhold employees’ tax from the amount of “remuneration” paid or payable to an employee.

The employer must pay the employees’ tax over to SARS within seven days after the end of the month during which the amount was deducted or withheld or such longer period as the Commissioner may approve.¹⁶

2.4 Monthly remuneration

“Remuneration” for purposes of the definition of “monthly remuneration” in section 1(1) of the ETI Act has the meaning ascribed to it in paragraph 1 of the Fourth Schedule.¹⁷

The word “remuneration” is defined in the Fourth Schedule as 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, paid in cash or otherwise and is not dependent on whether the amount is paid or payable for services rendered. The definition is subject to a number of inclusions and exclusions.¹⁸

¹² The Note discusses the statutory and the common law tests used to assess whether a person is an independent contractor.

¹³ Section 213 of the Labour Relations Act.

¹⁴ *Explanatory Memorandum on the Draft Employment Tax Incentive Bill (2013)*, Clause-By-Clause Explanation.

¹⁵ Section 1(1).

¹⁶ For more details see the *Guide for Employers in respect of Employees’ Tax, 2019*.

¹⁷ Section 1(2) of the ETI Act.

¹⁸ See **Annexure B** for a more detailed explanation of the inclusions and exclusions contained in the definition of the term “remuneration” as defined in the Fourth Schedule.

Importantly, it is only an amount of remuneration that is “*paid or is payable*” to an employee in the particular month that will constitute “remuneration”, and therefore “monthly remuneration”, in that month. Since the definition of “remuneration” in the Fourth Schedule refers to amounts of income which is “*paid or is payable*”, and an employer is only required to account for employees’ tax when the employer “*pays or becomes liable to pay any amount by way of remuneration*” (i.e. the remuneration is “payable”),¹⁹ it is evident that an eligible employer is only entitled to claim the ETI in the month in which the relevant remuneration (“monthly remuneration”) is “paid or payable” to the qualifying employee. The employer would usually also be required to account for employees’ tax in relation to the relevant remuneration in that same month.

The then Appellate Division was called upon to consider the meaning of “payable” in *Singh v Commissioner for the South African Revenue Service*²⁰ in the context of the VAT debt recovery provisions of the VAT Act. Olivier JA noted²¹ the following:

“The word ‘payable’ can have at least two different meanings, viz ‘. . . (a) that which is due or must be paid, or (b) that which may be paid or may have to be paid . . . The sense of (a) is a present liability – due and payable – . . . (b) . . . a future or contingent liability’...*Depending on the context of the statute involved, the word payable may refer to ‘. . . what is eventually due, or what there is a liability to pay’; ‘. . . payable at a future time’, or ‘in respect of which there is liability to pay’*”.

(Emphasis added)

In the context of the VAT recovery provisions, the learned Judge held that “‘(p)ayable’ *in order to distinguish it from ‘due’* must be given the meaning of a ‘. . . future or contingent liability’.” (Emphasis added.) However, in the context of the definition of “remuneration” in the Fourth Schedule and the definition of “monthly remuneration” in section 1(1) of the ETI Act, where the reference is to “paid” – in contradistinction to “due” – the view is held that “payable” means that the employer has an unconditional liability to pay the relevant remuneration, although actual payment thereof may take place sometime in the future. In essence, an amount of remuneration that is “payable” to an employee will also be regarded as having accrued to the employee since the employee in these circumstances will have an unconditional entitlement to the remuneration. This approach will ensure alignment of the ETI and employees’ tax provisions.

As regards “variable remuneration” as contemplated in section 7B of the Income Tax Act, such income is deemed to *accrue* to an employee, and is therefore only included as part of an employee’s remuneration, when it has actually been *paid* to the employee. The term “variable remuneration” is defined in section 7B(1) of the Income Tax Act as overtime pay, bonus, commission, an allowance or advance paid for transport expenses²² or leave pay.²³ It follows that “remuneration” for purposes of calculating the “monthly remuneration” of a qualifying employee who is in receipt of variable remuneration will only include variable remuneration that has been *paid* to the employee in the relevant month and not variable remuneration that is merely *payable* to the employee.

¹⁹ Paragraph 2(1) of the Fourth Schedule.

²⁰ 65 SATC 203.

²¹ At page 216.

²² Section 8(1)(b)(ii) of the Income Tax Act.

²³ Section 7B(1)(c) of the Income Tax Act.

As regards reimbursive travel allowances paid to an employee, certain allowances and advances are required to be included in an employee's taxable income to the extent that the allowance or advance is not expended on travelling on business – subject to specified exclusions.²⁴ These amounts are in turn included in the definition of “remuneration” under paragraph 1 of the Fourth Schedule.²⁵

In addition, 80% of the amount of any allowance or advance paid or payable to an employee to cover travelling expenses, other than an allowance or advance contemplated in section 8(1)(b)(iii), constitutes “remuneration” as defined and will therefore also form part of an employee's “monthly remuneration” for ETI purposes. An employer that pays an allowance or advance under section 8(1)(b)(iii), that exceeds the applicable rate per kilometre fixed by the Minister by notice in the *Gazette*, the full amount of the excess above the fixed rate also constitutes remuneration and therefore also “monthly remuneration” for ETI purposes.²⁶

The Taxation Laws Amendment Act 43 of 2014 extensively amended the definition of “monthly remuneration” with effect from 1 March 2015. The definition of “monthly remuneration” was further amended in the Taxation Laws Amendment Act 15 of 2016 and is effective from 1 March 2017. For the sake of completeness, a discussion of the previous versions and current version of “monthly remuneration” is set out separately below.

2.4.1 The position before 1 March 2015

“monthly remuneration”—

- (a) where an employer employs a qualifying employee for a month, means the amount paid or payable in respect of that month; or
- (b) where an employer employs a qualifying employee for part of a month, means that amount that would have been payable in respect of that month had that employer employed that employee for the entire month;

The remuneration for a month includes all amounts paid or payable to an employee in relation to the relevant month, irrespective of whether paid or payable on a monthly, weekly, daily or hourly basis.

In the event that an eligible employer employs a qualifying employee for part of a month, the remuneration paid or payable to a qualifying employee for part of the month is first grossed up to determine the employee's “monthly remuneration”.²⁷

²⁴ Section 8(1)(a)(i) of the Income Tax Act.

²⁵ Paragraph (bA) of the definition of “remuneration”.

²⁶ Section 8(1)(b) and (c) of the Taxation Administration Laws Amendment Act 13 of 2017 amends the definition of “remuneration” under paragraph 1 of the Fourth Schedule. This amendment comes into operation on 1 March 2018.

²⁷ Paragraph (b) of the definition of “monthly remuneration” in section 1(1) of the ETI Act.

The question whether an employee has been employed for a month or part of a month is a factual question. In the context of the ordinary meaning of the word “employ”,²⁸ if an employee is contractually obliged to render services for a month, the employee is regarded as being employed for a full month and no gross up is necessary. An employee will be employed for a full month in these circumstances even if the employee renders services for part of a month owing to, for example, leave taken by the employee.

While the remuneration paid to a qualifying employee that is employed for part of a month is grossed up to determine the employee’s “monthly remuneration”, the ETI will ultimately only be determined by reference to the actual remuneration paid to the qualifying employee that is attributable to the number of days that the qualifying employee was actually employed. This outcome is achieved by dividing the number of days the qualifying employee was partly employed by the number of days in a full month of employment and multiplying that ratio by the value of the incentive (see 5.3.1 and Example 20).

2.4.2 The position on or after 1 March 2015

“monthly remuneration”—²⁹

- (a) where an employer employs a qualifying employee for more than 160 hours in a month, means the amount paid or payable to the qualifying employee by the employer in respect of a month; or
- (b) where an employer employs a qualifying employee for less than 160 hours in a month, means an amount calculated in terms of section 7(5);

For the period 1 March 2015 to 28 February 2017, if an employee is employed for more than 160 hours in a month, the remuneration for that month will include amounts paid or payable to an employee irrespective of whether paid or payable on a monthly, weekly, daily or hourly basis. If an employee is *employed* for more than 160 hours in a month but *works* less than 160 hours as a result of, for example, leave (whether paid or unpaid), that employee would still have been employed for more than 160 hours in that month. In that case, the amount paid or payable to the employee for that month would constitute “monthly remuneration” for purposes of the ETI.

Should an eligible employer employ a qualifying employee for less than 160 hours in a month, the employee’s equivalent “monthly remuneration” has to be calculated under section 7(5). Remuneration paid or payable to a qualifying employee for part of the month is first grossed up under section 7(5) to determine the equivalent full month’s “monthly remuneration”.

As mentioned above in relation to the period before 1 March 2015, that amount is then apportioned such that the ETI is only available in relation to the remuneration attributable to the actual number of hours that the qualifying employee was employed for in that month. This outcome is achieved by dividing the number of hours that the qualifying employee was employed for in the relevant month by 160 hours and multiplying that ratio by the value of the incentive (see 5.3.2 and Example 21).

²⁸ “Employ” is defined in the Oxford English Dictionary as to “give work to (someone) and pay them for it”. <https://en.oxforddictionaries.com/definition/employ> [Accessed 6 May 2019].

²⁹ Section 112(1) of the Taxation Laws Amendment Act 43 of 2014. This amendment came into operation on 1 March 2015.

2.4.3 The position on or after 1 March 2017

“monthly remuneration”—³⁰

- (a) where an employer employs and pays remuneration to a qualifying employee for at least 160 hours in a month, means the amount paid or payable to the qualifying employee by the employer in respect of a month; or
- (b) where an employer employs a qualifying employee and pays remuneration to that employee for less than 160 hours in a month, means an amount calculated in terms of section 7(5);

From 1 March 2017, if an employer employs and pays remuneration to a qualifying employee for at least 160 hours in a month, the remuneration for that month will include amounts paid or payable to the employee irrespective of whether paid or payable on a monthly, weekly, daily or hourly basis.

Should an eligible employer employ and pay remuneration to a qualifying employee for less than 160 hours in a month, the employee’s equivalent “monthly remuneration” has to be calculated under section 7(5). Remuneration paid or payable to a qualifying employee for part of the month is first grossed up under section 7(5) to determine the equivalent full month’s “monthly remuneration”.

That amount is then apportioned such that the ETI is only available in relation to the remuneration attributable to the actual number of hours that the qualifying employee was employed and paid remuneration for in that month. This outcome is achieved by dividing the number of hours that the qualifying employee was employed and paid remuneration for in the relevant month by 160 hours and multiplying that ratio by the value of the incentive (see 5.3.3 and Example 22).

2.5 Qualifying employee

The ETI can only be claimed by an “eligible employer” (see 3.1) that employs a “qualifying employee”. Section 6 prescribes requirements that must be met before an employee is considered to be a “qualifying employee” as defined (see 3.2 for a detailed discussion).

2.6 Wage

The term “wage” means “wage” as defined in section 1 of the Basic Conditions of Employment Act, which is –

the amount of money paid or payable to an employee in respect of ordinary hours of work or, if they are shorter, the hours an employee ordinarily works in a day or week;

The definition of the term “wage” in the ETI Act is of application in determining whether an employer has complied with wage regulating measures in order to be eligible for the ETI (see 4.1).

³⁰ Section 93(1) of the Taxation Laws Amendment Act 15 of 2016. This amendment came into operation on 1 March 2017.

The amount of money paid or payable must be “in respect of *ordinary hours of work*”.³¹ It follows that payments that are not paid by reference to the “ordinary hours” worked by the employee do not constitute a “wage” as defined in section 1(1) of the ETI Act, read with the definition of that word in the Basic Conditions of Employment Act. The Basic Conditions of Employment Act defines “ordinary hours of work” as “the hours of work permitted in terms of section 9 or in terms of any agreement in terms of sections 11 or 12”.³² Section 9 of the Basic Conditions of Employment Act regulates the maximum ordinary hours that an employee is required or permitted to work while sections 11 and 12 of the Basic Conditions of Employment Act regulate the allowable variations of “ordinary hours of work” that an employee may be required to work (that is, compressed working week or averaging of hours of work).

The concept of “ordinary hours of work” may however differ from industry to industry and whether an amount constitutes a “wage” must thus be determined on a case by case basis. In most circumstances amounts paid in the form of a bonus, overtime or car and subsistence allowances will not constitute amounts paid “in respect of ordinary hours of work” and as such would not form part of the employee’s “wage” for purposes of the ETI.

The purpose of the Basic Conditions of Employment Act is to give effect to and regulate the right to fair labour practices conferred by section 23 of the Constitution.³³ The Basic Conditions of Employment Act applies, with limited exclusions not relevant for present purposes, to all employees and employers.

A wage paid to an employee for services rendered will constitute remuneration irrespective of the nature of the work performed. In addition, the basis upon which an employee may be compensated for “ordinary hours” worked is not limited to amounts payable to employees that are computed on an hourly rate basis. As to whether an amount paid to an employee will constitute an amount paid “in respect of ordinary hours of work”, will be determined in accordance with the employee’s employment contract.

The fact that a qualifying employee is paid a “wage”, in contradistinction to a “salary”, does not disqualify the eligible employer from claiming the ETI as wages are specifically included in the definition of “remuneration” (see 2.4).

3. Qualifying criteria for the employment tax incentive

3.1 Eligible employers (section 3)

An employer is only eligible to receive the ETI if the employer meets the requirements prescribed in section 3.

Paragraph 15 of the Fourth Schedule requires every person who is an “employer” as defined for employees’ tax purposes³⁴ to apply to the Commissioner for registration in accordance with Chapter 3 of the TA Act.

³¹ See definition of “wage” in the Basic Conditions of Employment Act.

³² Section 1 of the Basic Conditions of Employment Act.

³³ Constitution of the Republic of South Africa, 1996.

³⁴ Paragraph 1 of the Fourth Schedule.

The term “employer” is defined in paragraph 1 of the Fourth Schedule and includes amongst others, any person who pays or is liable to pay any person an amount by way of “remuneration” as defined in paragraph 1 of the Fourth Schedule (see **Annexure B**), and excludes any person not acting as a principal.

Section 22 of the TA Act provides that every person who is obliged to register under a tax Act, or every person who voluntarily registers under such an Act, must apply for registration within 21 business days (excluding a voluntary registration) or a further period as SARS may determine.

While the term “employer” is not defined in the ETI Act, the fact that an employer will only be eligible to receive the ETI if the employer is registered for purposes of withholding and paying over to SARS employees’ tax under paragraph 15 of the Fourth Schedule [section 3(a)], suggests that in order to qualify the relevant employer must be an “employer” as defined for employees’ tax purposes. However, certain employers are specifically excluded and will not be eligible to receive any ETI notwithstanding that they are registered employers for employees’ tax purposes [section 3(b) and (c)]. The exclusions are dealt with below.

Section 3(b) provides that the following employers (even if registered for employees’ tax purposes) will not be eligible to claim the ETI:

- The government of the Republic in the national, provincial or local sphere.
- A public entity that is listed in Schedule 2 or 3 of the Public Finance Management Act 1 of 1999, other than those public entities that the Minister may designate by notice in the *Government Gazette* on such conditions as the Minister may prescribe by regulation.
- A “municipal entity” defined in section 1 of the Local Government Municipal Systems Act 32 of 2000.³⁵

In addition to the above exclusions, under section 3(c) the ETI will also not be available to employers that have been disqualified by the Minister –

- by reason of the displacement of employees (see **4.2**); or
- by virtue of not meeting such conditions as the Minister, after consultation with the Minister of Labour, may prescribe by regulation, including conditions based on –
 - requirements for the training of employees; and
 - the classification of trade in the most recent Standard Industrial Classification Code issued by Statistics South Africa.

Currently no conditions have been prescribed by the Minister.

³⁵ The Local Government Municipal Systems Act 32 of 2000 defines a “municipal entity” as meaning (a) private company referred to in section 86(B)(1)(a) of that Act, (b) a service utility; or (c) a multi-jurisdictional service utility.

3.2 Qualifying employees (section 6)

An employee is a “qualifying employee” if the employee meets the requirements discussed below.

Firstly, the employee must be aged from 18 to 29 at the end of the month in which the ETI is claimed. An employee will therefore be a “qualifying employee” in the month that the employee turns 18 years old and will cease to be a “qualifying employee” in the month in which the employee turns 30 years old.

Example 1 – Age requirement

Facts:

Employee X was employed by an eligible employer, Employer Y, on 1 October 2017. Employee X turned 30 years old in May 2018.

Result:

Employer Y can claim the ETI for Employee X only from the month commencing 1 October 2017 until 30 April 2018 as Employee X turned 30 years old in May 2018 subject to Employee X meeting all the other requirements of a qualifying employee provided for under section 6 during the relevant period.

No age limit applies, however, if the relevant employee is employed by an employer operating through a fixed place of business located within a “special economic zone” (see below), **or** the employee is employed in an industry designated by the Minister.

A “special economic zone” is defined in section 1(1) as follows:

“special economic zone” means a special economic zone designated by the Minister of Trade and Industry pursuant to an Act of Parliament;

The following six SEZs were designated by the Minister by notice in the *Government Gazette*³⁶ for purposes of section 6(a)(ii) effective from 1 August 2018:

- Coega Special Economic Zone
- Dube Transport Special Economic Zone
- East London Special Economic Zone
- Maluti-a-Phofung Special Economic Zone
- Richards Bay Special Economic Zone
- Saldanha Bay Special Economic Zone

SEZs promote targeted economic activities, supported through special arrangements and support systems, including incentives, business support services, streamlined approval processes and infrastructure.³⁷

³⁶ Government Notice 700 in *Government Gazette* 41759 of 6 July 2018.

³⁷ See *Brochure on the Special Economic Zone Tax Incentive*.

The ETI and other tax incentives applicable to SEZs were developed to attract investors to the SEZs.³⁸ The tax incentives are provided by Government to ensure SEZs' growth, revenue generation, creation of jobs, attraction of foreign direct investment and international competitiveness, which also include income tax, VAT and customs related incentives. Thus these incentives offered are intended for taxpayers carrying on business with a physical location within the designated SEZs.

For section 6(a)(ii) to apply, an employee must –

- be employed by an eligible employer operating through a fixed place of business located within a designated SEZ; and
- render services to that employer mainly within that SEZ.³⁹

The ETI Act does not define a “fixed place of business” and as such the ordinary dictionary meaning should be considered.

The *Oxford Dictionary* defines the term “fixed”⁴⁰ as follows:

“Definitely and permanently placed or assigned, stationary or unchanging in relative position, definite, permanent, lasting”

The *Business Dictionary* defines the phrase “place of business”⁴¹ as:

“An office or location where main business transactions are executed and its records are stored. It is necessary to have a place of business filed to the secretary of state for establishing a business.”

A “fixed place of business” should thus be interpreted as a place where, amongst others, –

- that business is conducted through one or more offices, shops, factories, warehouses or other structures;
- that fixed place of business is suitably staffed with on-site managerial and operational employees of that company who conduct the primary operations of that business;
- that fixed place of business is suitably equipped for conducting the primary operations of that business; and
- that fixed place of business has suitable facilities for conducting the primary operations of that business.

The employer itself must have a physical presence within the designated SEZ meeting at least the above criteria.

Section 6(a)(ii) further requires that the employee renders services to that employer *mainly* within that SEZ. The word “mainly” has been considered in a number of court cases⁴² and should be interpreted to mean more than 50%.

³⁸ See *Policy on the development of Special Economic Zones in South Africa (2012)*, paragraphs 6.5.1 and 7.6.

³⁹ Section 6(a)(ii).

⁴⁰ Lesley Brown *The New Shorter Oxford English Dictionary* 4 ed (1993) Oxford University Press in vol 1.

⁴¹ www.businessdictionary.com/definition/place-of-business.html [Accessed 6 May 2019].

⁴² *Glen Anil Development Corporation Ltd v SIR* 1975 (4) SA 715(A), 37 SATC 319 and *SBI v Lourens Erasmus (Edms) Bpk* 1966 (4) SA 434(A), 28 SATC 233.

In the context of section 6(a)(ii), in order for the eligible employer to be entitled to claim the ETI, the employee must render more than 50% of his or her services physically within that SEZ to that employer operating through a fixed place of business located within that designated SEZ.

Businesses often have branches in numerous locations across the country. A branch operating through a fixed place of business within a designated SEZ will be entitled to claim ETI for qualifying employees (irrespective of their age) that render services to that employer mainly within that SEZ provided that all of the requirements under the ETI Act are met.

The Minister has not yet designated any industry for purposes of section 6(a)(iii).

Secondly, the employee must –

- be in possession⁴³ of either:
 - an identity card or a green identity book,⁴⁴
 - an asylum seeker permit,⁴⁵ or
 - a refugee identity document,^{46 47}
- not be a connected person⁴⁸ in relation to the employer;
- not be a domestic worker as defined in section 1 of the Basic Conditions of Employment Act;⁴⁹
- be employed by the employer or an associated person (see 2.1) on or after 1 October 2013;
- not be an employee for whom an employer is ineligible to receive the ETI by virtue of section 4 (see 4.1 below); and
- receive monthly remuneration of less than R6 000.⁵⁰

Domestic workers are excluded as qualifying employees owing to the private nature of the cost of their wages. The definition of “domestic worker” does not include a farm worker. A farmer who is eligible and employs a qualifying employee will therefore be able to claim the ETI.

⁴³ Defined in the Oxford Dictionary (British and World English) online as “the state of having, owning, or controlling something”. www.oxforddictionaries.com/definition/possession [Accessed 6 May 2019].

⁴⁴ Section 14 of the Identification Act 68 of 1997.

⁴⁵ Section 22(1) of the Refugees Act 130 of 1998.

⁴⁶ Section 30 of the Refugees Act 130 of 1998.

⁴⁷ Section 115(1)(a) of the Taxation Laws Amendment Act 43 of 2014. This amendment is retrospective and came into operation on 1 January 2014.

⁴⁸ See the diagram in **Annexure A**. For a detailed discussion on the meaning of a “connected person”, see Interpretation Note 67 “Connected Persons”.

⁴⁹ “[D]omestic worker” means an employee who performs domestic work in the home of his or her employer and includes—

(a) a gardener;

(b) a person employed by a household as driver of a motor vehicle; and

(c) a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker;”

⁵⁰ Section 115(1)(b) of the Taxation Laws Amendment Act 43 of 2014. This amendment is retrospective and comes into operation on 1 January 2014.

3.3 Qualifying period

The ETI will operate for a period of fifteen years and two months commencing on 1 January 2014 and ending on 28 February 2029.⁵¹ An eligible employer can, however, only claim the ETI for a maximum of 24 months *per qualifying employee*.⁵² The 24 months need not be consecutive.

It follows that an eligible employer will be able to claim the ETI for 24 months per qualifying employee during the period 1 January 2014 up to and including 28 February 2029. The ETI will not be available on or after 1 March 2029. Thus, for example, if a qualifying employee is employed on 1 March 2028, the eligible employer will only be allowed to claim the ETI for 12 months for that qualifying employee (if the employee is a qualifying employee in each month) as the ETI will no longer be available from 1 March 2029.

The 24-month period is determined with reference to the period that a qualifying employee is employed and not the periods during which the ETI are actually claimed for that employee. If, for example, an employer does not claim the ETI for a qualifying employee in a month, that month still counts towards the 24 qualifying months that an employer may claim the ETI in respect of that qualifying employee (see 5).

The ETI is only claimable on monthly remuneration paid on or after 1 January 2014 for qualifying employees who commenced employment with an eligible employer on or after 1 October 2013.

Example 2 – Commencement date of eligible employment

Facts:

Employee X was employed by an eligible employer, Employer Y, on 1 October 2013. Employee X met all the requirements of a qualifying employee as provided for under section 6.

Result:

Employer Y could only claim the ETI as from the month commencing 1 January 2014. The period between 1 October 2013 and 31 December 2013 was not taken into account because the commencement date of the ETI Act is 1 January 2014. Had Employee X's employment commenced on any date before 1 October 2013, Employee X would not be regarded as a qualifying employee and Employer Y would not be able to claim the ETI for Employee X.

Example 3 – Commencement date of eligible employment

Facts:

Employee A was employed by Employer B on 1 September 2013 and continued in employment with Employer B during 2014.

⁵¹ See section 12 and section 102 of the Taxation Laws Amendment Act 23 of 2018.

⁵² Section 7.

Result:

Employer B could not claim the ETI for Employee A because Employee A's employment commenced before 1 October 2013.

Example 4 – Calculation of qualifying periods

Facts:

Employee C was employed by an eligible employer, Employer D, on 1 January 2018. Employee C met all the requirements of a qualifying employee as provided for under section 6 from 1 January 2018 to 31 December 2018. Employer D was entitled to claim the ETI for Employee C during this period but only claimed the ETI for Employee C for 5 months during this 12-month period.

Result:

Even though Employer D only claimed the ETI for 5 months during the period 1 January 2018 to 31 December 2018, the 7 months that Employer D was entitled to claim the ETI for Employee C but did not claim the ETI must still be included in the calculation of the 24 qualifying months. In December 2018, Employee C would be in the 12th qualifying month.

4. Disqualification

An eligible employer will be disqualified from claiming the ETI in the circumstances discussed below.

4.1 Compliance with wage regulating measures and minimum wage requirement (section 4)

An employer who is otherwise an eligible employer because it meets the requirements of section 3 is nevertheless not eligible to receive the ETI if the wage paid to a qualifying employee is less than the following prescribed minimum amounts – the actual prescribed minimum is dependent on whether the wage is paid under a wage regulating measure or not.

Section 4(3) defines a “wage regulating measure” as –

- (a) a collective agreement as contemplated in section 23 of the Labour Relations Act;
- (b) a sectoral determination as contemplated in section 51 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997); or
- (c) a binding bargaining council agreement as contemplated in section 31 of the Labour Relations Act, including where such agreement is extended by reason of a determination of the Minister of Labour in terms of section 32 of that Act.

Section 4 prescribes the minimum wage payable to a qualifying employee before an employer will be eligible for the ETI. For a detailed discussion on the term “wage” see **2.6**.

The preamble to section 4(1) refers to the wage **paid** to an employee for a month and section 4(1)(a) refers to this wage not being less than the wage payable by virtue of a wage regulating measure. In the context of section 4(1)(a), the use of the word “paid” requires that an employee must receive in that month, a wage that is not less than the regulated minimum wage applicable to that employer.

“Wage” for purposes of section 4(1)(a) should not include amounts payable in a month following the month under consideration, for example if the employee will be paid a “back pay” owing to a wage regulating measure applying retrospectively. The same principle applies to the minimum wage under section 4(1)(b). Furthermore, the employer cannot claim the ETI on the wage paid including the “back pay” in the month that the increased wage is implemented since the amount of “back pay”, even though it is paid in that month, is not *in respect of* that month. See Example 9.

4.1.1 Employer subject to wage regulating measures [section 4(1)(a)]

An employer that is subject to a wage regulating measure is not allowed to claim the ETI for an employee if the wage paid to that employee for that month is less than the wage prescribed by the relevant wage regulating measures. Although section 4(1) refers to the wage paid in respect of a month, the wage regulatory measure does not only apply to payment on a monthly basis, but also to payment on an hourly or weekly basis. It is, however, important that the hourly, weekly or monthly wage paid to the employee is not less than that prescribed under the wage regulating measure.

In order to determine whether an hourly, daily, weekly or monthly rate is to be used it is necessary to refer to the employment contract and the wage measure used in the contract. If more than one measure is used any of the measures in the contract is acceptable.

An employee who takes unpaid leave and as a result is **paid** less than the monthly minimum wage prescribed by a wage regulating measure in a particular month will not meet the requirements of section 4(1)(a) and the employer will not be allowed to claim the ETI for that employee for that month. In such instances, the employee is employed for the full month and the employer may therefore not apply the “gross-up” calculation as discussed in **5.3**.

Employers occasionally have more than one wage regulating measure applicable to them. These wage regulating measures may overlap and can differ in the prescribed minimum wage. For this reason, an employer must consider the Acts that govern those wage regulating measures to determine which wage regulating measure takes precedence and which minimum wage should be applied for purposes of section 4(1)(a).

Example 5 – A wage which does not comply with wage regulating measures

Facts:

Employee A was employed by Employer B. A collective agreement entered into between Employer B and the trade unions representing the employees stipulated that each new employee joining the company had to be remunerated at a minimum monthly wage of R3 000. Employer B paid Employee A an amount of R2 900 in March 2018.

Result:

The wage amount payable to the employee was subject to the wage regulating measure which provided that employees had to be remunerated at a minimum monthly wage of R3 000. Since Employer B paid Employee A less than the prescribed minimum wage, Employer B was not be eligible to claim the ETI for Employee A for March 2018.

Example 6 – A wage which complies with wage regulating measures

Facts:

Employee C was employed by Employer D. A sectoral determination provided that employees employed in that sector had to be remunerated at a minimum wage of R1 800 a month. Employer D paid a wage of R1 900 to Employee C for the month of March 2018.

Result:

Since Employer D remunerated Employee C at the rate of R1 900 a month, which was more than the prescribed minimum monthly rate of R1 800, Employer D complied with the minimum prescribed wage requirements as required by the sectoral determination for that specific sector. Employer D could accordingly claim the ETI despite the monthly wage being less than R2 000 (see 4.1.2) since the employer was subject to and complied with a wage regulating measure.

Example 7 – A wage which does not comply with a wage regulating measure owing to the employee taking unpaid leave

Facts:

Employee X was employed by Employer Y. A sectoral determination provided that employees employed in that sector had to be remunerated at a minimum wage of R1 800 a month. While Employer Y usually paid a wage of R1 900 to Employee X, since Employee X took 4 days unpaid leave during March 2018, Employer Y paid Employee X only R1 500 for that month.

Result:

Although Employer Y usually remunerated Employee X at the rate of R1 900 a month, which was more than the prescribed minimum monthly rate of R1 800, Employer Y did not comply with the minimum prescribed wage requirements for March 2018 since Employee X was paid only R1 500 for that month. As a result, Employer Y could not claim the ETI for the wage paid to Employee X despite the usual monthly wage paid to Employee X being more than the minimum wage prescribed by the relevant sectorial wage regulating measure.

Example 8 – A wage which complies with a wage regulating measure

Facts:

Employee G was employed by Employer H. According to the employment contract entered into between Employee G and Employer H, the prescribed minimum hourly wage for their sector would be paid. A sectoral determination provided that employees employed in that sector had to be remunerated a minimum hourly wage of R15 and a minimum monthly wage of R2 400 (R15 × 160 standard hours). Employee G however only worked 140 hours in April 2018 and therefore received wages of only R2 100 for that month.

Result:

Employer H would be entitled to claim the ETI for the wage paid to Employee G despite the minimum monthly wage of R2 400 not being met since the wage paid to Employee G complied with the minimum prescribed hourly wage requirements as required by the sectoral determination for that specific sector.

Example 9 – A wage which does not comply with a wage regulating measure owing to the employee only receiving the prescribed wage increases in a subsequent month

Facts:

Employee V was employed by Employer W. According to the employment contract entered into between Employee V and Employer W, the prescribed minimum hourly wage under the particular sectoral determination would be paid. The sectoral determination provided that employees had to be remunerated a minimum hourly wage of R15 from 1 February 2017 and a minimum hourly wage of R18 from 1 February 2018. Employee V worked 160 hours in February 2018 and March 2018. Employer W however, only implemented the wage increase per the sectoral determination for employees with effect from 1 April 2018 and as a result Employee V received a wage back pay of R960 (R3 × 160 hours × 2 months) for February 2018 and March 2018 in the April 2018 pay cycle.

Result:

Employer W would not be entitled to claim the ETI for the wage paid to Employee V for the February 2018 and March 2018 periods since Employee V was not paid the minimum hourly wage of R18 as prescribed by the sectoral determination for these two months. Employer W will also not be allowed to claim the ETI on the back pay portion of R960 paid in April 2018 since this amount was not in respect of April 2018 but in respect of February and March 2018.

4.1.2 Employer not subject to wage regulating measures [section 4(1)(b)]

An employer that is not subject to a wage regulating measure has to meet the minimum wage requirements prescribed in the ETI Act. The minimum wage requirements under section 4(1)(b) were amended several times⁵³ respectively effective from 1 March 2015, 1 January 2016 and 1 March 2017 to align them with the changes made to the definition of “monthly remuneration”. The previous versions and current version are set out below.

An employee that takes unpaid leave and as a result is paid less than the prescribed monthly minimum wage as required by section 4(1)(b) in a particular month, will not meet the minimum wage requirement and the employer will not be allowed to claim the ETI for that employee for that month.

(a) The position before 1 March 2015

An employer that is not subject to a wage regulating measure will be allowed to claim the ETI for an employee only if the wage paid to that employee for that month is not less than R2 000 [section 4(1)(b)(i)].

Example 10 – Wage not subject to wage regulating measures: Employee employed for a full month but wage below R2 000

Facts:

Employee E was employed by Employer F. There was no wage regulating measure that applied to the employer. Employer F paid Employee E a wage of R1 900 for the month of April 2014.

⁵³ Section 113(1) of the Taxation Laws Amendment Act 43 of 2014, section 141(1) of the Taxation Laws Amendment Act 25 of 2015 and section 94(1) of the Taxation Laws Amendment Act 15 of 2016.

Result:

Employer F was not permitted to claim the ETI for Employee E because the wage paid to Employee E was less than R2 000.

In the event that an employee is employed for less than a month, the prescribed minimum wage of R2 000 a month is apportioned by applying the ratio of days actually worked by the employee to the number of days the employee would have worked had the employee been employed for the full month [section 4(1)(b)(ii)]. This apportionment determination may be expressed by way of the following formula:

$$\frac{\text{Actual number of days the employee worked}}{\text{Total number of working days in a month}} \times \text{R2 000}$$

Example 11 – Wage not subject to wage regulating measures: Employee employed for a part of a month

Facts:

Employee A was employed by Employer X in May 2014. There is no wage regulating measure that applied to the employer. There were 21 working days in May 2014, of which Employee A worked 10 days. Employer X paid Employee A a wage of R1 100 for the month of May 2014.

Result:

To determine the prescribed minimum wage for Employee A for May 2014, the prescribed minimum wage of R2 000 per month must be apportioned since Employee A only worked part of a month.

$$\text{Formula: } 10 / 21 \times \text{R2 000} = \text{R952,38}$$

Employer X was permitted to claim the ETI for Employee A because the wage paid to Employee A was more than the prescribed minimum wage of R952,38.

(b) The position on or after 1 March 2015

An employer that is not subject to a wage regulating measure will only be allowed to claim the ETI for an employee who is employed for more than 160 hours in a month if the wage paid to that employee for that month is at least R2 000 [section 4(1)(b)(i) as amended].

Example 12 – Wage not subject to wage regulating measures: Employee employed for a full month but wage below R2 000

Facts:

Employee E was employed by Employer F for more than 160 hours in the month of April 2015. There was no wage regulating measure that applied to the employer. Employer F paid Employee E a wage of R1 700 for the month of April 2015.

Result:

Employer F was not permitted to claim the ETI for Employee E in April 2015 because the wage paid for this month to Employee E was below R2 000, regardless of the fact that Employee E was employed for more than 160 hours in a month.

In the event that an employee is employed for less than 160 hours in a month, the prescribed minimum wage of R2 000 a month is apportioned by the ratio of hours employed for to 160 hours [section 4(1)(b)(ii) as amended]. This apportionment determination may be expressed by way of the following formula:

$$\frac{\text{Actual number of hours the employee was employed}}{160 \text{ hours in a month}} \times R2\ 000$$

Example 13 – Wage not subject to wage regulating measures: Employee employed for less than 160 hours in a month

Facts:

Employee B was employed by Employer Y in June 2015. There was no wage regulating measure that applied to the employer. Employee B was employed for 130 hours in June 2015 and was paid a wage of R1 800 for this month.

Result:

To determine the prescribed minimum wage for Employee B for June 2015, the prescribed minimum wage of R2 000 per month must be apportioned since Employee B worked less than 160 hours in a month.

$$\text{Formula: } 130 / 160 \times R2\ 000 = R1\ 625$$

Employer Y was permitted to claim the ETI for Employee B because the wage paid to Employee B was more than the prescribed minimum wage of R1 625.

(c) The position on or after 1 January 2016

The Taxation Laws Amendment Act 25 of 2015 amended section 4(1)(b)(i) by substituting the words “*more than* 160 hours” with “*at least* 160 hours” and is effective from 1 January 2016.⁵⁴

Prior to the amendment, the wording of section 4(1)(b)(i) resulted in the exclusion of 160 hours. The amended wording of “*at least* 160 hours” rectifies this exclusion.

An employer that is not subject to a wage regulating measure will only be allowed to claim the ETI for an employee who is employed for at least 160 hours in a month if the wage paid to that employee for that month is at least R2 000 [section 4(1)(b)(i) as amended].

If an employee is employed for less than 160 hours in a month, the same situation applies as described in **(b)** above. The prescribed minimum wage of R2 000 a month is apportioned by the ratio of hours employed for to 160 hours.

⁵⁴ Section 141(1) of the Taxation Laws Amendment Act 25 of 2015.

(d) The position on or after 1 March 2017

The minimum wage requirements under section 4(1)(b) were amended with effect from 1 March 2017.⁵⁵

An employer that is not subject to a wage regulating measure will only be allowed to claim the ETI for an employee who is employed and paid remuneration for at least 160 hours in a month if the wage paid to that employee for that month is at least R2 000 [section 4(1)(b)(i) as amended].

In the event that an employee is employed and paid remuneration for less than 160 hours in a month, the prescribed minimum wage of R2 000 a month is apportioned by the ratio of hours that the employee is actually employed and paid remuneration⁵⁶ for to 160 hours [section 4(1)(b)(ii) as amended]. This apportionment determination may be expressed by way of the following formula:

$$\frac{\text{Actual number of hours the employee was employed and paid remuneration}}{160 \text{ hours in a month}} \times \text{R2 000}$$

The hours that should be taken into account in the 160 hours, are the ordinary working hours. Overtime hours or hours other than ordinary hours of work should not be included in the 160 hours. For a detailed discussion, see the Binding General Ruling 44 “Meaning of 160 hours for purposes of section 4(1)(b)”.

From 1 March 2018 the Taxation Laws Amendment Act 17 of 2017 defines “hours” for purpose of section 4 to mean “ordinary hours” as defined in section 1 of the Basic Conditions of Employment Act.⁵⁷ For a discussion on “ordinary hours of work” see 2.6.

Example 14 – Wage not subject to wage regulating measures: Employee employed for less than 160 hours in a month

Facts:

Employee A was employed by Employer X in March 2018. There was no wage regulating measure that applied to the employer. Employee A was employed and remunerated for 150 hours in March 2018 and was paid a wage of R1 900 for this month. Employee A also worked 20 hours of overtime and was paid R400 for these hours.

Result:

For purposes of the 160 hours calculation, the 20 hours of overtime should be excluded. Similarly, the R400 paid for the overtime hours should be excluded from the amount of remuneration. Since Employee A was employed and remunerated for less than 160 hours in the month (ordinary hours of work = 150 hours), the minimum monthly wage of R2 000 prescribed by section 4(1)(b)(i) must be apportioned under section 4(1)(b)(ii) so as to arrive at the applicable minimum monthly wage. The applicable minimum monthly wage had to be calculated as follows:

$$150 / 160 \times \text{R2 000} = \text{R1 875}.$$

⁵⁵ Section 94(1) of the Taxation Laws Amendment Act 15 of 2016.

⁵⁶ Section 91(1)(a) of the Taxation Laws Amendment Act 17 of 2017 inserted the words “and paid remuneration” in section 4(1)(b)(ii) with effect from 1 March 2018.

⁵⁷ Section 91(1)(b) of the Taxation Laws Amendment Act 17 of 2017 inserted section 4(4) to clarify the meaning of “hours”.

Since the actual wage paid to Employee A (R1 900) for March 2018 was greater than the determined minimum monthly wage of R1 875, the eligible employer was not prohibited from claiming ETI in relation to Employee A under section 4.

4.2 Displacement [section 5(2)]

An employer that is deemed to have displaced the employee –

- is liable to pay a penalty of R30 000 to SARS for that displaced employee; and
- may be disqualified by the Minister from receiving the incentive by notice in the *Government Gazette* (see 6.2.2).

While “displacement” is not defined in the ETI Act, an employer is deemed to have displaced an employee in the circumstances prescribed in section 5(2).

Section 5(2) stipulates that an employee is deemed to have been displaced if –

- the resolution of a dispute,⁵⁸ whether by agreement, order of court or otherwise, reveals that the dismissal of that employee constitutes an automatically unfair dismissal under section 187(1)(f)⁵⁹ of the Labour Relations Act; *and*
- the employer replaces that dismissed employee with an employee for which the employer is eligible with the intention of unjustly benefiting from the ETI.

4.3 Non-compliance with tax obligations (section 8)

In order to be eligible for claiming the ETI, it is crucial that the employer complies with all its tax obligations. This applies to all tax types that the employer has registered, or is required to register for under the applicable tax Act.

An employer will not be eligible to claim the ETI in a month if the employer has –

- any outstanding tax returns;⁶⁰ or
- an outstanding tax debt.

A “tax debt” is defined in section 1 of the TA Act to mean an amount referred to in section 169(1) of the TA Act which stipulates that a tax debt is an amount of tax due by a person under a tax Act. This would, for example, include income tax, employees’ tax, VAT, skills development levy (SDL), unemployment insurance fund contributions (UIF) and so forth. “Tax” is also defined in section 1 of the TA Act to include a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act. A taxpayer will therefore owe a tax debt even if it is only an amount of interest or penalty outstanding.

⁵⁸ A dispute will be regarded as having been resolved if the final decision has been reached and the matter is not subject to appeal.

⁵⁹ “(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”

⁶⁰ A “return” is defined in section 1 of the TA Act.

A tax debt for purposes of the ETI does not, however, include –

- an amount due under an instalment payment agreement or which has been compromised under the TA Act;
- any amount that has been suspended by a senior SARS official pending an objection or appeal; or
- an amount below R100.⁶¹

5. Determining the amount of the employment tax incentive (section 7)

The eligible employer is required to perform a monthly calculation to determine the amount of the ETI that it may claim *per qualifying employee*. The calculation takes into account the monthly remuneration paid to the qualifying employee, the period for which the qualifying employee is employed and the amount or percentage that may be claimed. The employer must add any amounts rolled over from previous months to the amount of the ETI for the current month, but subject to the limitation under section 9(4) (see 7).

5.1 Determination of the employment tax incentive [section 7(1), (2) and (3)]

5.1.1 The position before 1 March 2017

The table below illustrates how the ETI will be calculated in relation to the remuneration received by a qualifying employee during the period 1 January 2014 to 28 February 2017.

Monthly remuneration	ETI per month during the first 12 months ⁶² in which the employee qualified	ETI per month during the next 12 months ⁶³ in which the employee qualified
R0 – R2 000	50% of monthly remuneration	25% of monthly remuneration
R2 001 – R4 000	R1 000	R500
R4 001 – R6 000	Formula: R1 000 – [0,5 × (monthly remuneration – R4 000)]	Formula: R500 – [0,25 × (monthly remuneration – R4 000)]

Example 15 – Determination of ETI for the first 12 months of employment

Facts:

In May 2014 an eligible employer employed a qualifying employee, Employee K. A sectoral determination provided that employees employed in that sector had to be remunerated at a minimum wage of R1 600 a month. Employee K earned a monthly wage of R1 800. Employee K was in the fourth qualifying ETI month with the eligible employer.

⁶¹ Under section 16(4) of the TA Act, SARS need not recover a tax debt if it is less than R100.

⁶² The 12 months need not be consecutive (see 3.3).

⁶³ The 12 months need not be consecutive (see 3.3).

Result:

Since the eligible employer remunerated Employee K at the rate of R1 800 a month, which was more than the prescribed minimum monthly wage of R1 600, the eligible employer complied with the minimum prescribed wage requirements as required by the sectoral determination for that specific sector. The eligible employer was therefore permitted to claim the ETI despite the monthly wage being less than the monthly minimum of R2 000 prescribed by section 4(1)(b). Employee K was employed for a full month thus no remuneration gross-up is required as per section 7(5). Since Employee K earned below R2 000 a month during the first 12-month period, the incentive amount available to the eligible employer was 50% of R1 800 = R900 per month.

Example 16 – Determination of ETI for the second 12 months of employment

Facts:

On 1 May 2014 an eligible employer employed a qualifying employee, Employee B, at a monthly remuneration of R3 000. From 1 May 2015 Employee B's monthly remuneration increased to R5 200. No wage regulating measure applied in these circumstances.

Employee B remained in employment with the eligible employer for two years.

Result:

During the first 12 qualifying months the ETI available to the eligible employer was R1 000 a month (ETI applicable to an employee earning more than R2 000 and less than R4 001).

During the second 12 qualifying months Employee B earned between R4 000 and R6 000 a month. The incentive amount available to the eligible employer was calculated according to the following formula: $R500 - [0,25 \times (R5\ 200 - R4\ 000)] = R200$ a month.

The eligible employer was able to claim an ETI of R12 000 ($R1\ 000 \times 12$) for the period 1 May 2014 to 30 April 2015 and R2 400 ($R200 \times 12$) for the period 1 May 2015 to 30 April 2016 for Employee B.

Example 17 – Determination of ETI for the first 12 months of employment of a seasonal farm worker

Facts:

On 1 February 2014 an eligible employer employed qualifying Employee D at a monthly wage of R2 300. A sectoral determination provided that employees employed in that sector had to be remunerated at a minimum wage of R2 300 a month. From 1 April 2015 Employee D's monthly wage increased to R2 600 in line with the minimum wage prescribed for that sector.

Employee D was employed for the following seasons:

- 1 February 2014 to 30 June 2014 (5 months)
- 1 August 2014 to 31 December 2014 (5 months)
- 1 February 2015 to 30 April 2015 (3 months)

Result:

During the first 12 qualifying months [1 February 2014 to 30 June 2014 (5 months), 1 August 2014 to 31 December 2014 (5 months) and 1 February 2015 to 31 March 2015 (2 months)] the ETI available to the eligible employer was R1 000 a month (ETI applicable to an employee earning more than R2 000 and less than R4 001 during the first 12 months).

During the second 12 qualifying months [April 2015 (1 month)] Employee D earned between R2 000 and R4 001 a month. The ETI available to the eligible employer was R500 for the month of April (ETI applicable to an employee earning more than R2 000 and less than R4 001 during the second 12 months).

5.1.2 The position on or after 1 March 2017

The table below illustrates how the ETI will be calculated in relation to the remuneration received by a qualifying employee from 1 March 2017.⁶⁴

Monthly remuneration	ETI per month during the first 12 months ⁶⁵ in which the employee qualified	ETI per month during the next 12 months ⁶⁶ in which the employee qualified
R0 – R1 999	50% of monthly remuneration	25% of monthly remuneration
R2 000 – R3 999	R1 000	R500
R4 000 – R5 999	Formula: R1 000 – [0,5 × (monthly remuneration – R4 000)]	Formula: R500 – [0,25 × (monthly remuneration – R4 000)]

Example 18 – Determination of ETI if an employee is employed for less than 160 hours and works overtime

Facts:

Employee B was employed by Employer Y in April 2018. There was no wage regulating measure that applied to the employer. Employee B was employed for 140 hours in April 2018 and was paid a wage of R1 800 for this month. Employee B also worked 30 hours of overtime and was paid R400 for these extra hours.

⁶⁴ Sections 95(1)(b), (c), (d), (e), (f), (g), (h) and (i) of the Taxation Laws Amendment Act 15 of 2016. Sections 5(1)(a), (b), (c), (d), (e), (f), (g), and (h) of the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2019 propose amendments to section 7 with an effective date of 1 March 2019. These proposed rates will, however, only come into effect upon the promulgation of the Rates and Monetary Amounts and Amendment of Revenue Laws Act.

⁶⁵ The 12 months need not be consecutive (see 3.3).

⁶⁶ The 12 months need not be consecutive (see 3.3).

Result:

Since Employee B was employed and paid remuneration for less than 160 hours in the month (ordinary hours of work = 140 hours), the minimum monthly wage of R2 000 prescribed by section 4(1)(b)(i) had to be apportioned under section 4(1)(b)(ii) so as to arrive at the applicable minimum monthly wage. The applicable minimum monthly wage had to be calculated as follows:

$$R2\ 000 \times 140 / 160 = R1\ 750.$$

As the actual wage paid to Employee B (R1 800) was greater than the determined minimum monthly wage of R1 750, the eligible employer was not prohibited from claiming the ETI in relation to Employee B under section 4.

Employee B's monthly remuneration for April 2018 is R2 200 (R1 800 + 400) and was paid remuneration for at least 160 hours (140 + 30 hours) and thus no gross up is required in terms of section 7(5) (see 5.3).

Because Employee B earned R2 000 or more but less than R4 000 during the first 12-month period, the incentive amount was R1 000.

The eligible employer was therefore entitled to claim an ETI of R1 000 for Employee B for April 2018.

5.2 Associated persons [section 7(4)]

In claiming the ETI an eligible employer must take into account periods during which a qualifying employee was employed by an "associated person" as defined in section 1(1) (see 2.1). The period during which a qualifying employee was employed by an associated person will be considered in calculating the 24 qualifying months.

Example 19 – Calculation involving an associated person

Facts:

Company X and Company Y formed part of the same group of companies and were managed by the same holding company.

On 1 April 2017 a qualifying employee, Employee C, was employed by an eligible employer, Company X. On 1 July 2017 Employee C left the employment of Company X and signed an employment contract with Company Y. Employee C was in the 12th month with the group. Employee C's monthly remuneration was R4 600. Employee C was a qualifying employee in each month of employment at both Company X and Company Y.

Result:

Company Y was an associated person in relation to Company X since they were managed by the same holding company.

The ETI is available for 24 months per qualifying employee. The ETI for the second 12 months is lower than the ETI for the first 12 months. In determining an employee's qualifying months for the purposes of the ETI, the qualifying months with associated persons must be taken into account.

In this instance Employee C was employed by Company X for three months (1 April 2017 to 30 June 2017) and by Company Y for nine months (1 July 2017 to 31 March 2018) and was a qualifying employee for all these months. Company X was allowed to claim the higher ETI during the first three months of Employee C's qualifying months. Company Y could claim the higher ETI only for the remaining nine months of the first 12-month period. From 1 April 2018 Company Y had to claim the ETI at the lower rate applicable to the second 12-month period.

Employee C earned between R4 000 and R6 000 during the second 12-month period. The incentive amount available for that period commencing on 1 April 2018 was therefore calculated according to the following formula: $R500 - [0,25 \times (R4\ 600 - R4\ 000)] = R350$.

Based on the information provided, Company Y was entitled to claim an amount of R350 per month as part of the ETI commencing on 1 April 2018.

5.3 Employee employed for part of a month [section 7(5)]

In order to determine the ETI amount for an employee who is only employed for part of a month, the "monthly remuneration" paid or payable to the qualifying employee for the month is determined by grossing up the actual remuneration earned by the employee for part of the month (i.e. calculated as if the employee had worked for the full month) and the corresponding ETI calculated on the grossed up amount, as if it were for a full month (see 2.4).

Once this grossed-up amount of remuneration has been determined, the basic calculation or formula can be applied depending on the level of monthly remuneration that has been received and how many months the qualifying employee has been employed with the eligible employer. The tables in 5.1.1 and 5.1.2 illustrate the applicable calculation or formula which must be applied depending on the qualifying employee's monthly remuneration and how many months the qualifying employee has been employed.

5.3.1 The position before 1 March 2015

In determining the ETI for the period 1 January 2014 to 28 February 2015 for an employee who is only employed for part of a month, the calculation is required to take into account the actual number of days that the employee was *employed*. No gross up must be done for an employee who is *employed* for a full month, but owing to the provisions of the employment contract is only required to *work* for part of a month.

Once the grossed up monthly remuneration has been applied to the calculation or formula to determine the ETI applicable to the employee for the relevant month, the ETI is then apportioned by taking into account the *actual number of days worked* by the employee divided by the *total number of working days* in the particular month. The result of this calculation will determine the ETI available to the eligible employer for that month for that qualifying employee.

The formula to apportion the number of days in this scenario is as follows:

$$\frac{\text{Actual number of days the employee worked}}{\text{Total number of working days in a month}} \times \text{ETI determined by applying the table}$$

Example 20 – Employee employed for part of a month (pre 1 March 2015)

Facts:

An eligible employer appointed a qualifying employee, Employee E, on 24 February 2014. There were 20 working days in February 2014, of which Employee E worked 5 days.

Employee E's employment contract provided for monthly remuneration of R4 200. Employee E received remuneration of R1 050 for February 2014. The remuneration payable to Employee E was not subject to a wage regulating measure as contemplated in section 4.

Result:

Employee E's monthly remuneration for February 2014 was arrived at by grossing up the actual remuneration by the number of working days in the month ($R1\ 050 \times 20 / 5 = R4\ 200$).

While the actual wage paid to Employee E was less than the prescribed minimum monthly wage of R2 000 [section 4(1)(b)(i)], the wage paid to Employee E for the month had to be grossed up under section 4(1)(b)(ii) since Employee E was employed for less than a month. Since the grossed up monthly wage payable to Employee E was greater than the prescribed minimum of R2 000, the eligible employer was not prohibited from claiming the ETI in relation to Employee E under section 4.

Because Employee E earned between R4 000 and R6 000 during the first 12-month period, the incentive amount had to be calculated as follows:

$$\text{Formula: } R1\ 000 - [0,5 \times (R4\ 200 - R4\ 000)] = R900$$

Apportionment according to the number of days actually worked: $5 / 20 \times R900 = R225$

The eligible employer was therefore entitled to an incentive for Employee E of R225 for February 2014.

5.3.2 The position on or after 1 March 2015

During the period 1 March 2015 to 28 February 2017,⁶⁷ the basis on which to calculate the ETI amount for an employee who is only employed for part of a month has been revised and is linked to a baseline of 160 hours employed per month. In determining the ETI amount for the period 1 March 2015 to 28 February 2017 for an employee who is employed for less than 160 hours in a month, the calculation is required to take into account the actual number of hours that the employee was employed.

The resultant ETI amount from the calculation or formula which is based on the grossed-up monthly remuneration is then apportioned by taking into account the actual number of hours employed by the employee divided by 160 hours in the month. The result of this calculation will determine the ETI amount available to the eligible employer for that month for that qualifying employee.

The formula to apportion the number of hours in this scenario is as follows:

$$\frac{\text{Actual number of days the employee was employed}}{160 \text{ hours in a month}} \times \text{ETI determined by applying the table}$$

⁶⁷ Section 116(1) of the Taxation Laws Amendment Act 43 of 2014.

Example 21 – Employee employed for less than 160 hours in a month (post 1 March 2015)

Facts:

An eligible employer appointed a qualifying employee, Employee G, on 15 April 2015. Employee G was employed for 80 hours in April 2015. The wage payable to Employee G was not subject to a wage regulating measure as contemplated in section 4.

Employee G's employment contract provided for him to be remunerated at R30 per hour. Employee G was remunerated a total of R2 400 for the hours worked by him for part of April 2015.

Result:

As Employee G was employed for less than 160 hours in the month, the minimum monthly wage of R2 000 prescribed by section 4(1)(b)(i) had to be apportioned under section 4(1)(b)(ii) so as to arrive at the applicable minimum monthly wage. The applicable minimum monthly wage had to be calculated as follows:

$$R2\ 000 \times 80 / 160 = R1\ 000.$$

Since the actual wage paid to Employee G (R2 400) was greater than the determined minimum monthly wage of R1 000, the eligible employer was not prohibited from claiming the ETI in relation to Employee G under section 4.

Employee G's monthly remuneration for April 2015 was arrived at by grossing up the actual remuneration to 160 hours in the month ($R2\ 400 \times 160 / 80 = R4\ 800$).

Because Employee G earned between R4 000 and R6 000 during the first 12-month period, the incentive amount had to be calculated as follows:

$$\text{Formula: } R1\ 000 - [0,5 \times (R4\ 800 - R4\ 000)] = R600$$

Apportionment according to the number of hours employed: $80 / 160 \times R600 = R300$

The eligible employer was therefore entitled to claim the ETI of R300 for Employee G for April 2015.

5.3.3 The position on or after 1 March 2017

With effect from 1 March 2017, in determining the ETI amount for an employee who is employed for less than 160 hours in a month, the calculation is required to take into account the number of hours that the employee was employed and paid remuneration for in respect of those hours.

The resultant ETI amount from the calculation or formula which is based on the grossed-up monthly remuneration is then apportioned by taking into account the number of hours the employee is employed and paid remuneration for in respect of those hours divided by 160 hours in the month. The result of this calculation will determine the ETI amount available to the eligible employer for that month for that qualifying employee.

The formula to apportion the number of hours in this scenario is as follows:

$$\frac{\text{Number of hours the employee was employed and was paid remuneration for}}{160 \text{ hours in a month}} \times \text{ETI determined by applying the table}$$

Example 22 – Employee employed for less than 160 hours in a month (post 1 March 2017)

Facts:

On 15 May 2018 an eligible employer appointed a qualifying employee, Employee H. Employee H was employed for 70 hours in May 2018. The employer was not subject to a wage regulating measure as contemplated in section 4.

Employee H's employment contract provided for remuneration of R25 per hour. Employee H was remunerated a total of R1 750 for the hours worked in May 2018.

Result:

Since Employee H was employed and paid remuneration for less than 160 hours in the month, the minimum monthly wage of R2 000 prescribed by section 4(1)(b)(i) must be apportioned under section 4(1)(b)(ii) so as to arrive at the applicable minimum monthly wage. The applicable minimum monthly wage was calculated as follows:

$$R2\ 000 \times 70 / 160 = R875$$

Since the actual wage paid to Employee H (R1 750) was greater than the determined minimum monthly wage of R875, the eligible employer was not prohibited from claiming ETI in relation to Employee H under section 4.

Employee H's monthly remuneration for May 2018 was arrived at by grossing up the actual remuneration to 160 hours in the month ($R1\ 750 \times 160 / 70 = R4\ 000$).

Because Employee H earned R4 000 but less than R6 000 during the first 12-month period, the incentive amount had to be calculated as follows:

$$\text{Formula: } R1\ 000 - [0,5 \times (R4\ 000 - R4\ 000)] = R1\ 000$$

Apportionment according to the number of hours employed and paid remuneration for:

$$70 / 160 \times R1\ 000 = R437,50$$

The eligible employer was therefore entitled to claim the ETI of R437,50 for Employee H for May 2018.

5.4 Employment tax incentive and the learnership allowance

In addition to the ETI, an employer may be eligible for a deduction of a learnership allowance during a year of assessment if the requirements of section 12H of the Income Tax Act are met.⁶⁸

⁶⁸ See Interpretation Note 20 "Additional Deduction for Learnership Agreements".

6. Process for claiming the employment tax incentive

6.1 Submitting the monthly employees' tax return (EMP201) and payment of liability

The Fourth Schedule requires every employer to submit a monthly return to SARS declaring, amongst other things, the amount of employees' tax that was deducted or withheld from employees' remuneration during that month. The return must be accompanied by payment of the employees' tax deducted or withheld. The return and payment must reach SARS by no later than seven days after the end of the month in which the employees' tax was deducted or withheld, or, if the seventh day falls on a Saturday, Sunday or public holiday, the last business day before that Saturday, Sunday or public holiday.

In essence, the ETI is paid to the eligible employer through the employees' tax system by allowing the eligible employer to reduce the employees' tax that the eligible employer must pay over to SARS every month. The ETI is in essence deductible from the total employees' tax payable by the eligible employer for the relevant month – regardless of whether the employees' tax was deducted or withheld from qualifying employees or non-qualifying employees. In other words, the eligible employer's total employees' tax liability for the month is simply reduced by the total ETI that the employer qualifies for during that month.

Example 23 – Claiming the ETI

Facts:

ABC (Pty) Ltd, an eligible employer, employed both qualifying and non-qualifying employees under the ETI Act. The total employees' tax deducted or withheld from all employees during March 2018 equalled R32 800. ABC (Pty) Ltd was entitled to an ETI of R3 500 for qualifying employees for March 2018.

Result:

The total amount of employees' tax to be paid by ABC (Pty) Ltd to SARS by Friday, 6 April 2018 (since the seventh day after the end of the month in which the employees' tax was withheld fell on a Saturday, employees' tax was payable by the last business day before the Saturday, i.e. Friday), was R29 300 (R32 800 – R3 500).

The ETI does not affect the remuneration received by the employee, or the employees' tax deducted or withheld from that employee. The employees' tax certificate (IRP5) that the qualifying employee is entitled to receive must disclose the total remuneration, as well as the total employees' tax deducted or withheld, disregarding the ETI.

Example 24 – Disclosure on the IRP5

Facts:

DEF (Pty) Ltd, an eligible employer, employed a qualifying employee, Employee Y, on 1 January 2014. Employee Y's remuneration was R5 850 a month for each of January and February 2014. Employees' tax of R47 a month was deducted from Employee Y's salary. The total employees' tax deducted or withheld by DEF (Pty) Ltd from all of its employees was R4 000 for each of those two months. The ETI for which the employer qualified was R75 a month calculated as follows:

$$R1\ 000 - [0,5 \times (R5\ 850 - R4\ 000)]. \text{ (See 5)}$$

Result:

The employer was allowed to reduce the R4 000 payable to SARS for each of January and February 2014 by the R75 ETI. Thus only R3 925 was payable to SARS for employees' tax for each of those months.

Employee Y's IRP5 certificate for the 2014 year of assessment had to disclose R11 700 (R5 850 × 2) under code 3601 as "Income (PAYE)"; and R94 (R47 × 2) under code 4102 "PAYE (Pay-As-You-Earn)". Employee Y's employees' tax credit remained what was actually deducted or withheld from the employee, irrespective of the ETI that was deducted from the total employees' tax payment owing to SARS by DEF (Pty) Ltd for all its employees.

The employer may be entitled to roll over the ETI if the ETI amount exceeds the employees' tax payable in any particular month. For details on this, see 7.

6.2 Penalty

A penalty under the ETI Act can be levied in two instances, namely, non-compliance and displacement of employees.

6.2.1 Non-compliance

Under section 4(2) an employer that pays a qualifying employee less than the monthly wage prescribed in section 4(1) is ineligible for the ETI. Should the employer nevertheless claim ETI in these circumstances, the employer must pay a penalty to SARS of 100% of the ETI received for that employee.

Although the ETI Act does not address the repayment of the ETI amount incorrectly claimed in consequence of the qualifying employee earning less than the minimum wage prescribed under section 4(1), such incorrectly claimed ETI will be recoverable by SARS under Chapter 11 of the TA Act.

As regards the possible imposition of an "understatement penalty" under Chapter 16 of the TA Act in these circumstances, no such understatement penalty will be imposed as the incorrect statement (an "understatement" as defined) in the return in which the ETI is claimed does not affect the employees' tax that is chargeable (the liability). Stated differently, as the employees' tax "*properly chargeable*" for the relevant tax period and the amount of employees' tax that would have been "*chargeable*" for the tax period had the "understatement" (incorrectly claimed ETI) been accepted are the same, no "shortfall" as contemplated in section 222(3)(a) of the TA Act arises.

The ETI incorrectly claimed will be disallowed and a penalty will be levied by issuing an additional assessment under section 92 of the TA Act.

6.2.2 Displacement of employees

An employer that is found to have unfairly dismissed an employee in order to obtain a benefit under the ETI must pay a penalty of R30 000 for each employee so displaced.⁶⁹ In addition, such an employer may be disqualified by the Minister by notice in the *Government Gazette* from receiving any future incentive.⁷⁰

⁶⁹ Section 5(1)(a).

⁷⁰ Section 5(1)(b).

In determining the disqualification, the Minister may take into account –

- the number of employees that have been displaced by an employer; and
- the effect that the disqualification may directly or indirectly have on the employees of the employer.

SARS will issue an additional assessment to levy the penalty and thereafter follow the collection process under the TA Act. SARS is not afforded any discretion to raise a displacement penalty lower than the R30 000 imposed under section 5(1)(a).

6.3 Late payment penalty and interest

An employer who has incorrectly claimed the ETI would not have been entitled to reduce the monthly employees' tax payment due by the employer. That employer will have accordingly underpaid employees' tax, and must pay a "percentage-based penalty" levied under Chapter 15 of the TA Act. Paragraph 6 of the Fourth Schedule prescribes that the penalty payable is equal to 10% of the unpaid employees' tax.

Section 89*bis*(2) of the Income Tax Act provides for the payment of interest at the prescribed rate if employees' tax payable is not paid in full within the prescribed period of seven days. It follows that interest will be payable when the ETI has been wrongly claimed since the amount of employees' tax paid will be less than that which was properly payable.

6.4 Objection and appeal

Under section 104 of the TA Act, "a taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment".

The non-compliance penalty (see **6.2.1**) and the displacement penalty (see **6.2.2**) are levied by raising an additional assessment under section 92 of the TA Act. If an employer is aggrieved by such an assessment, an objection may be lodged under section 104 of the TA Act. If SARS disallows the objection, the employer may follow the appeal route under section 107 of the TA Act, read with the rules made by the Minister.⁷¹

7. Roll-over amounts (section 9)

The ETI Act provides for three instances when the ETI may be rolled over and claimed in a succeeding or future period, but may be subject to certain limitations.

- Firstly, if the ETI amount exceeds the employees' tax due for a particular month, the excess must be added to the ETI available in the succeeding month and is accordingly available for deduction in the succeeding month – subject to the reimbursement of such excess under section 10(3) (see **8**).
- Secondly, section 9(2) provides that if the employer does not reduce the employees' tax due by the employer in the relevant month by the ETI, despite the ETI being available to that employer, the ETI not claimed must similarly be added to the ETI available for deduction in the first month that the employer reduces employees' tax by any available ETI. With effect from 1 March 2017, section 9(4) was inserted and provides that the amount contemplated in section 9(2) must be deemed to be nil for each qualifying employee employed by the employer on the first day of the month

⁷¹ Government Notice 550 in *Government Gazette* 37819 of 11 July 2014.

following the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(a) of the Fourth Schedule (these reconciliation returns are normally submitted for the six month periods ending August and February) (see Example 27).

- Thirdly, if the employer was not allowed to reduce the employees' tax payable by the employer because of the employer's tax returns being outstanding or the employer having a tax debt due to SARS, the relevant ETI must be carried forward and may be claimed in the first month that the employer becomes compliant.

It follows that the monthly ETI may consist of the ETI pertaining to that month as well as any excess ETI that the employer has carried forward from previous months as discussed above but subject to the limitation under section 9(4).

Example 25 – Excess roll-over of ETI [section 9(1)]

Facts:

In April 2018 Company Z had 30 employees in service, of which 22 were qualifying employees. Company Z was eligible to claim an ETI of R1 000 per qualifying employee based on their remuneration earned in April 2018 and their qualifying periods. The total ETI claimable for Company Z for April 2018 was accordingly R22 000 (22 qualifying employees x R1 000). A total amount of R20 000 employees' tax was due by Company Z to SARS for April 2018.

Result:

Company Z had to carry over the excess ETI of R2 000 (R22 000 ETI limited to employees tax of R20 000) in April 2018 to May 2018.

Example 26 – Excess roll-over of ETI [section 9(2)]

Facts:

In December 2017 Company X had 40 employees in service, of which the employer claimed ETI for 15 qualifying employees against the employees' tax for that month. In February 2018 Company X established that it was entitled to claim for an additional 10 qualifying employees for December 2017 but failed to do so. Company X was eligible to claim an ETI of R1 000 per the 10 qualifying employee based on their remuneration earned in December 2017 and their qualifying periods.

Result:

The excess ETI claimable by Company X for December 2017 is accordingly R10 000 (10 qualifying employees x R1 000). Company X must claim the excess ETI of R10 000 in February 2018.

Example 27 – Excess roll-over of ETI subject to limitation under section 9(4)

Facts:

In March 2018 Company Y established that it could have claimed the ETI for 5 qualifying employees in January 2018 but did not claim same. The ETI that Company Y was entitled to claim for these 5 qualifying employees was R1 000 each based on their remuneration earned in January 2018 and their qualifying periods.

Result:

Company Y would have been entitled to an excess ETI of R5 000 (5 qualifying employees x R1 000) for January 2018. However, Company Y could not carry over the excess ETI for these 5 qualifying employees for January 2018 since section 9(4) deems this excess ETI to be nil on 1 March 2018 (the first day of the month following the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(a) of the Fourth Schedule). Company Y consequently is not entitled to the excess ETI amount of R5 000.

8. Reimbursement (section 10)

While the ETI Act made provision for the reimbursement of ETI in certain prescribed circumstances, the relevant provision (section 10) only came into operation on the date determined by the Minister by notice in the *Gazette*, namely 19 December 2014⁷² – the date upon which the remaining provisions of the ETI Act came into operation.

Any excess ETI contemplated in section 9 (see 7) that must be carried forward and deducted from employees' tax due by the employer in a subsequent month that has not been deducted at the end of the period for which a return must be submitted under paragraph 14(3)(a) of the Fourth Schedule (these reconciliation returns are normally submitted for the six month periods ending August and February), may be claimed from SARS.

A reimbursement of such excess ETI will however be made by SARS only if an employer is tax compliant. If an employer is not tax compliant (see 4.3) and subsequently becomes compliant, the excess ETI must be reimbursed to the employer in the first month during which the employer becomes tax compliant. However, in order to claim reimbursement of the ETI that was not paid to the employer owing to the employer being non-compliant, the employer must become tax compliant in the reporting period subsequent to the reporting period in which the employer's entitlement to claim reimbursement arose. If the employer fails to become tax compliant before the end of the subsequent reconciliation period then the excess amount will be deemed to be nil at the end of that reconciliation period,⁷³ in other words, the excess ETI will be forfeited.

Example 28 – Reimbursement of excess ETI to tax compliant employer

Facts:

An eligible employer had an excess ETI amount of R20 000 at the end of the six month reconciliation period ending 28 February 2018 and was tax compliant.

Result:

SARS had to reimburse the eligible employer the excess ETI amount of R20 000 for the reconciliation period ending 28 February 2018.

⁷² Government Notice 1039 in *Government Gazette* 38346 of 18 December 2014.

⁷³ Section 118(1) of the Taxation Laws Amendment Act 43 of 2014. This amendment is retrospective and comes into operation on 1 January 2014.

Example 29 – Reimbursement of excess ETI once employer becomes tax compliant

Facts:

An excess ETI amount of R50 000 was available to the eligible employer at the end of the six month reconciliation period ending 28 February 2018. The employer claimed payment of the excess amount at 28 February 2018 by submission of the EMP501 for this period, but the amount was not paid by SARS because the employer was not tax compliant at that date since the employer had outstanding VAT returns. The employer subsequently submitted the outstanding VAT returns and became tax compliant on 30 June 2018.

Result:

SARS should reimburse the eligible employer the excess ETI amount of R50 000 for the reconciliation period ending 28 February 2018 since the employer became tax compliant in the subsequent reconciliation period ending 31 August 2018.

Example 30 – No reimbursement of excess ETI if employer is not tax compliant

Facts:

An excess ETI amount of R30 000 was available to an eligible employer at the end of the six month reconciliation period ending 28 February 2018. The eligible employer claimed payment of the excess amount at 28 February 2018, but the amount was not paid by SARS because the employer was not tax compliant at that date since the employer had an outstanding income tax return for the 2016 year of assessment. At the end of the subsequent reconciliation period, 31 August 2018, the employer was still not tax compliant because the employer's income tax return for the 2016 year of assessment was still outstanding.

Result:

At 31 August 2018 (the subsequent reconciliation period) the employer was still not tax compliant. As a result, the excess ETI amount of R30 000 from the reconciliation period ending 28 February 2018 was deemed to be nil at 31 August 2018 and the employer forfeited the excess amount.

9. Cessation of the employment tax incentive

The incentive will not be available to employers on or after 1 March 2029.

10. Implications for other taxes

10.1 Value-added tax

The ETI is a tax incentive that is paid by the State to eligible employers by allowing eligible employers to reduce their liability for employees' tax under the Income Tax Act. Any excess ETI that the eligible employer is unable to recover from any employees' tax due by the eligible employer is, subject to certain limitations, payable by SARS from the National Revenue Fund (see 8).

The ETI amount retained by the employer from the total employees' tax liability is regarded as an appropriation, grant-in-aid subsidy or contribution transferred by a public authority as contemplated in the definition of "grant".⁷⁴ As such, any ETI claimed by an eligible employer that is a VAT vendor will be treated as consideration received in respect of a deemed supply made to a public authority under section 8(5A). As such, the ETI grant amount will be subject to VAT at the zero rate under section 11(2)(f) of the VAT Act to the extent that it is in respect of the taxable activities conducted by the enterprise.

For further guidance as regards the meaning of "grant" for VAT purposes, see Interpretation Note 39 "VAT Treatment of Public Authorities, Grants and Transfer Payments".

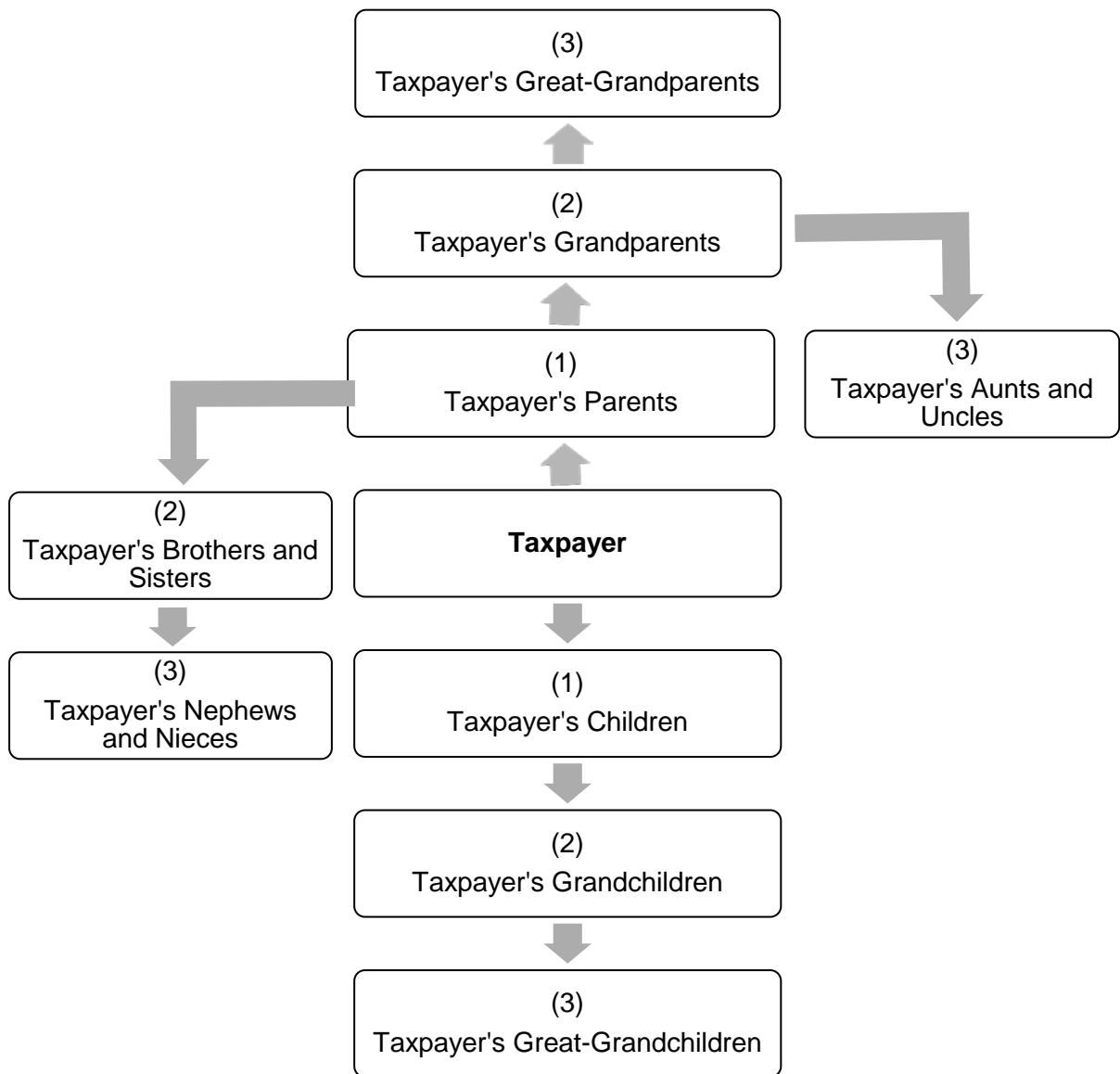
10.2 Income tax

With effect from 1 January 2014, any amount of ETI received by an eligible employer under the ETI Act that reduces the employee's tax payable by that employer is exempt from income tax under section 10(1)(s) of the Income Tax Act.⁷⁵

⁷⁴ Section 1(1) of the VAT Act.

⁷⁵ As inserted by section 13 of the ETI Act with effect from 1 January 2014.

Annexure A – Diagram illustrating the rule for determining who are related within the third degree of consanguinity in the case of natural persons



Annexure B – The meaning of “remuneration” in paragraph (1) of the Fourth Schedule to the Income Tax Act

The term “remuneration” for employees’ tax purposes is defined as 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 for services rendered, including –

- restraint of trade payments;
- an amount, including a voluntary award, received or accrued in commutation of amounts due in terms of a contract of employment or service;
- an amount received or accrued for the relinquishment, termination, loss, repudiation, cancellation or variation of an office or employment or of an appointment;
- an allowance or advance paid to an employee for accommodation, meals or other incidental costs while the employee is by reason of the duties of the employee’s office obliged to spend at least one night away from the employee’s usual place of residence in the Republic is deemed to become payable to the employee in the following month for services rendered. This deeming provision applies when such an allowance or advance was paid to an employee during any month for a night away from the employee’s usual place of residence and that employee has not by the last day of the following month either spent the night away from that employee’s usual place of residence or refunded that allowance or advance to the employer;
- 50% of an allowance paid to a holder of a public office;
- 80% of an allowance or advance for the expense of travelling for business purposes (excluding an allowance paid for actual distance travelled for business purposes);
- 100% of an allowance or advance for the expense of travelling for business purposes as exceeds the amount determined by applying the rate per kilometre by the Minister in the *Government Gazette* to the actual distance travelled;
- fringe benefits received under the Seventh Schedule to the Income Tax Act;
- a gratuity received by or accrued to a person from that person’s employer because such person obtained a university degree or diploma or has been successful in an examination;
- any gain determined under section 8B, which must be included in that person’s income under that section (broad-based equity share plan); and
- any gain determined under section 8C which is required to be included in the income of that person;
- certain dividends received from restricted equity instruments that do not qualify for an income tax exemption and are taxable on assessment of the directors and employees;

but not including —

- amounts paid to common law independent contractors, but excluding amounts paid to common law independent contractors who do not employ three or more qualifying employees and are required to render services mainly at the premises of the client and are subject to the control or supervision of any person as to the manner in which their duties are performed or as to the hours of work.

This exclusion does not apply to —

- any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker;
- any labour broker;
- any personal service provider;
- a person who is not ordinarily resident in South Africa;
- any pension or additional pension under the Social Assistance Act 59 of 1992;
- any disability grant or additional or supplementary allowance under the Social Assistance Act 59 of 1992;
- any grant or contribution under section 89 of the Children's Act 33 of 1960;
- amounts paid to an employee, wholly in reimbursement of expenditure actually incurred by such employee in the course of employment; and
- any annuity in terms of an order of divorce or decree of judicial separation or agreement of separation.