

Potential work from home tax deductions during the pandemic

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Since the advent of Covid-19 and remote working, employees have borne the brunt of operational costs associated with places of employment, which are normally paid for by employers. There are certain tax deductions they can claim if they do not get relief by way of reimbursements from their employers.



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The legal principles

Generally, the deductibility of expenses relating to a home office must be determined with reference to section 11 of the Income Tax Act, 58 of 1962 (ITA), read with sections 23(b) and 23(m).

Section 11 (and more particularly paragraphs (a), (d) and (e) thereof) delineates which types of expenses may be claimed (and the requirements to be met in respect thereof), while section 23(m) specifically prohibits certain deductions. As such, when an employee considers claiming home office expenses as a tax deduction, they will have to satisfy themselves that the expenditure in question qualifies in terms of section 11 and is further not specifically prohibited in terms of section 23(m).

Section 23(m) provides that employees (other than commission-based earners) may only deduct amounts pertaining to

very specific expenses, which include pro-rated deductions based on rent, interest on mortgage bonds, repairs to the premises, rates and taxes, cleaning, wear and tear, and all other expenses relating to the house. In Interpretation Note 28 (IN 28), issued by the South African Revenue Service (Sars), the types of expenditure that may be claimed by employees have been set out as follows:

- Rent of the premises;
- Interest on a bond;
- The cost of repairs to the premises; and
- Other expenses in connection with the premises – including wear and tear in terms of section 11(e) of the Income Tax Act.

Once the relevant deductions have been ascertained, the employee will have to consider the provisions of section 23(b), which deals with the prohibition of deductions of private and domestic expenditure except in specified circumstances. In order for an employee to be allowed to claim domestic or private expenses relating to their home offices, the following requirements must be met:

1. The employee must have a dedicated work space that is specifically equipped for the purpose of employment and is used regularly and exclusively by the employee for work purposes.
 - Whether these criteria have been met is a question of fact rather than a question of law and it will be necessary for an employee to be able to prove that the designated work space exists. To this end, it is worth noting that a kitchen counter or office space, that is only occasionally used by the employee for work purposes, will not satisfy this requirement.
 - While it is necessary to have a separate space in the employee's home that is allocated for purposes of performing their employment functions, an employee need not necessarily set aside an entire room for use as a home office. In so far as a portion of a room has been equipped and set aside for the exclusive use by the employee for work purposes, it is likely that this requirement will be met.
 - Whether a home office is used regularly and exclusively for work purposes will have to be determined on a case by case basis. However, it should be borne in mind that a home office that is merely maintained and only occasionally used by the employee will not suffice. In addition, Sars has adopted the view that the use of a home office for any purpose other than the fulfilment of the employee's employment functions will result in this requirement being unfulfilled.
2. Either the employee's income must consist mainly of commission or other variable payments which are based on the employee's work performance, or the employee must perform their duties mainly from the dedicated work space in their home.
 - To the extent that an employee's income consists of more than 50% commission (or other variable payments) this requirement will be readily met. However, if the employee is a salaried employee, this requirement will only be met if more than 50% of the employee's duties are performed for their employer from their home office.
 - On this basis, an employee must have worked from home for more than 50% of the relevant tax year in order to qualify for a deduction of their home office expenses. Where employees work from home for only a couple of days per week, it will be necessary for them to keep records of the number of days that they worked from home and the number of days that were spent at the office. If the number of days working from home does not exceed the number of days that the employee works from the office then the deduction will not be allowed.
3. The employee must be allowed to perform their services from home. It is not necessary for an employer to expressly instruct an employee to work from home in order to meet this requirement as it is a factual inquiry as to whether the employee did in fact discharge their duty to the employer mainly in their home office.
4. The employee has to have actual expenses that have been incurred, which expenses related to their employment.

To the extent that an employee meets each of the requirements set out in section 23(b), those home office expenses dealt

with in section 23(m) and IN 28 may be claimed as a deduction on a pro-rata basis in the employees ITR12 when submitting their tax return for the relevant year of assessment. The amounts that qualify for the deduction must be calculated as a percentage of the square metres of the home office over the total square metres of the employees entire house. It is important to note, however, that some expenses are not subject to the pro-rata formula (e.g. wear and tear on office equipment (the calculation for wear and tear is specifically stipulated in Section 11(e) of the ITA)).

Employees who own their homes and intend on claiming the tax deduction in respect of their home offices should be aware of the negative capital gains consequences associated with such claim. In particular, it should be borne in mind that the primary residence exclusion of R2m that they may be entitled to when they sell their home will not apply to any capital gain that arises in respect of the home office portion of their home. As such, the primary residence exclusion will have to be apportioned, which apportionment must take into account the length of time that the home office was used as a portion of the entire period of ownership, as well as the size of the home office compared to the size of the entire property. This should be taken into consideration when claiming the home office deduction, as it may create a higher capital gain in the employee's hands later on sale of the property.

Review

In the budget speech that was delivered on 24 February 2021, National Treasury announced that the large-scale migration to remote working over the course of the pandemic has prompted it to review the current travel and home office allowances regime, with the view of investigating the efficacy, equity in application and simplicity of use thereof. It was stated that consultations in this respect will commence during 2021/2022. A review of the use and application of the relevant provisions in the context of home offices may be highly beneficial to many employees as the requirements for claiming the deductions are arduous and the burden of proof on the employee to demonstrate that they are entitled to the deductions is extensive.

In addition to the review to be undertaken by National Treasury, Sars has updated and amended IN 28, a draft of which was published for public comment on 17 May 2021. Amongst others, this updated IN 28 addresses the previously ambiguous issue of the deductibility of expenses pertaining to fibre optic cables and other telecommunication devices. On the basis that (in Sars' view) the initial costs of installing fibre networks are not expenses that are incurred in connection with a premises, and because the initial costs and monthly subscriptions are prohibited from being deducted in terms of section 23(m), the view adopted by Sars is that the fibre and telecommunication expenses incurred by employees will not be deductible expenses.

The closing date for public comment on the draft IN 28 is 14 June 2021 and all comments may be sent to policycomments@sars.gov.za.

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