Payroll Tax 2016

Seminar Notes

NSW GOVERNMENT | Office of State Revenue

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Contents

NSW payroll tax 2016

Payroll tax is paid by NSW employers whose wages exceed the threshold deduction for the financial year. The threshold deduction for 2016 is $750,000 and payroll tax is payable on the balance of the wages at a rate of 5.45 per cent. Similar threshold deductions exist in all States and Territories.

The threshold deduction for a NSW employer is less than $750,000 if that employer pays wages in other States or Territories in Australia or if they pay wages for less than a full financial year.

Employers are required to pay payroll tax monthly and their monthly wages get a monthly threshold deduction calculated using the days in the month. The tax on each month's wages must be returned on or by the seventh day of the following month. The Chief Commissioner may determine that an annual return is the only return required for employers with a small payroll tax liability.

An annual reconciliation is used to make a return on the June wages and any other wages paid within the financial year and must be lodged by 21 July.

NSW threshold and rates

Tax Year	Threshold ($)	Tax Rate (%)
2016	750,000	5.45
2015	750,000	5.45
2014	750,000	5.45
2013	689,000	5.45

These threshold deductions are the maximum deductions available and apply when the employer employs only in NSW and for the full financial year.

Monthly returns

All NSW employers registered for NSW payroll tax are obliged to pay payroll tax on their monthly wages. The due date is the seventh day of the following month except for June wages which are included in the annual reconciliation. If the seventh is a non-working day the due date becomes the next working day.

We provide an on-line monthly calculator to assist clients in determining the tax that is required to be paid. Employers may use any calculation system but must ensure that whatever they use is accurate and up-to-date.

Note: We consider the lodgement of a return to be the payment of your monthly liability. Saving a calculation in the online monthly calculator does not constitute a return. If there is no liability calculated, you will need to lodge a 'Nil return'. Use the online calculator to determine your liability.

Payment options

- Online payment linked to the monthly calculator. Register your bank details with us and then authorise each payment by selecting the online payment button.
- BPAY payment can be made using your online or telephone banking system.
- EFT payment can be made through internet banking.
- Cheques through the post.
- Australia Post by cash, cheque or EFTPOS.
- Visa and MasterCard can be used for payments of up to **$50,000. A processing fee of 0.4 per cent applies.**

Monthly thresholds

The monthly thresholds vary with the number of days in the month. For 2015 the annual threshold deduction of $750,000 becomes:

- $63,525 for months with 31 days
- $61,475 for months with 30 days
- $59,426 for February (29 days).

Once the taxable wages for NSW have been determined employers deduct the threshold from that value, multiply the remainder by 5.45 per cent and pay the amount calculated.

Example

In May 2015 an employer has NSW wages of	$437,450
Threshold deduction for May is	$ 63,525
	$373,925 x 5.45% = $20,378.91

Interstate wages

The threshold deduction in NSW is reduced if the employer pays wages anywhere else in Australia. The formula is:

$$\frac{\text{NSW wages}}{\text{Total Australian wages}} \times \text{threshold deduction} = \text{applicable threshold deduction}$$

Example

NSW wages	**$800,000**		
Total Australian wages	**$1,200,000**	**x $750,000 =**	**$500,000**

This formula is used in all jurisdictions. It ensures that employers have a similar payroll tax outcome whether they pay a value of wages in one State or the same value of wages in multiple States.

If an employer's total Australian wages are below the threshold in one or more States but above the threshold in other States the employer will only have a liability to pay tax in those States in which their wages exceed the threshold.

Annual reconciliation

All registered employers must complete an annual reconciliation. The annual reconciliation includes the June wages and any corrections for the 2016 financial year.

Employers are able to show the breakdown of wages with the addition of three new wage fields: bonuses and commissions, directors' fees and employee shares and options.

This year, new features include a mandatory email field, the introduction of a mobile phone field, and sending of a confirmation email once a successful lodgement is done.

Common annual adjustments include the adjustment for fringe benefits from the Fringe Benefits Tax (FBT) annual return in March bonuses based on financial year results and superannuation contributions up to 30 June.

Adjustments for prior financial years cannot be done using the current annual reconciliation. A written request, with sufficient evidence available to substantiate the claim must be sent to the Chief Commissioner.

Employers may lodge additional annual reconciliations to correct any deficiency in their first return. Annual reconciliations lodged after 21 July may be subject to interest and/or penalties.

Annual reconciliations and fringe benefits

Employers must include the value of any discrepancy between the March 2015 FBT return and the March 2016 FBT return in the 2016 annual reconciliation. There is no requirement to return the FBT values for April, May or June 2016 unless the employer ceases to employ during that time. Employers are reminded that when grossing up fringe benefits, only the Type 2 grossing up factor is used. For 2016 the Type 2 grossing up factor is 1.9608.

If you overstate your fringe benefit liability using the estimated method, you can deduct the surplus amount from the June payment. If the amount is greater than the June amount, deduct the excess from another wage component. You cannot enter negative values into the online Annual Reconciliation.

Financial year wages

Employers must include all wages paid or payable from 1 July 2015 to 30 June 2016 in their annual reconciliation. Wages paid after 1 July 2016 that relate to services performed prior to 1 July need not be returned in the annual reconciliation but can be if the employer wishes to align their wages declared for payroll tax with their accrued wage liability for the financial year. Employers must use a consistent approach for each financial year.

Part-year employers

A part-year employer is an employer who does not pay taxable wages in Australia for all of a financial year. The threshold entitlement for a part-year employer is based on the number of days in which the employer pays or is obliged to pay wages to employees.

Example

Jetson Sprockets has been trading in NSW for some years but ceases to employ on 31 January 2016. It employs for 215 days in 2015–16.

2015–16 threshold deduction

$$\frac{215 \text{ days}}{366 \text{ days}} \times \$\,750{,}000 = \$\,440{,}574$$

Taxable wages

Employers are required to pay payroll tax based on wages that are taxable in NSW. A wage paid to any employee is taxable in one State or another on a per employee and per month basis. A wage paid to an employee cannot be taxable in two or more jurisdictions.

Work wholly in NSW

If in any month an employee works wholly in NSW, then the wages for that months' work are taxable in NSW.

Work not wholly in NSW

If in any month an employee does not work wholly in NSW there are three alternatives:

1. worked in NSW and in one or more other States or Territories in Australia
2. worked in NSW and worked outside of Australia
3. worked in two or more States or Territories other than NSW.

If any of the above three alternatives apply, then where a wage is taxable for a month, a tiered test is applied. As soon as one of these tests is applicable, the sequence ends and the wage is taxable as indicated in that test.

The tiered test are:

1. The jurisdiction in which the employee's principal place of residence is located.
2. The jurisdiction in which the principal place of business of the employer is located if the employee has no principal place of residence in Australia.
3. The jurisdiction in which the employee is paid if the employee does not reside in Australia and the employer does not have a principal place of business in Australia.
4. The jurisdiction in which the work is mainly performed if (1), (2) and (3) all do not apply.

'Mainly performed' considers if an employee performs more than 50 per cent of their working time for that month in a single jurisdiction.

Example of residence based taxable wages

Optimus Prime Transport Pty Ltd runs a logistics business delivering goods across all of Australia and as a result all 15 truck drivers perform work in all States and Territories every month. The truck depot is in NSW.

- The office staff work only in NSW so their wages are taxable in NSW.
- Nine of the truck drivers reside in NSW so their wages are taxable in NSW.
- Six of the truck drivers reside in Victoria so their wages are taxable in Victoria.

Working overseas and paid in Australia

An employer who pays wages to a person working in another country has an exemption on those wages if the period overseas is six consecutive months or more. The six month period is not broken by returning to Australia for non-work related breaks or to attend meetings or updates relating to the overseas work.

If the overseas work period is less than six months the wages are taxable in the State or Territory in which the employee is paid their wage.

Wages paid for services performed in prior months

When an employee performs services in a month but the wage for that service is not paid or payable in that month there is no taxable wage until it is paid. Once paid the wage becomes taxable based solely on the service performed in the month of payment.

A wage that is not payable is a wage where some value or entitlement may be accruing but the employer is not obliged to pay the employee for the work in that month. Common examples are paid out leave and annual bonuses.

Example

A NSW branch of a Queensland based business has an employee retire three months after moving to NSW after 15 years' service in Queensland. In the month the employee retired the employee worked wholly in NSW so all of the paid out leave is taxable in NSW as a termination payment.

A detailed explanation is found in: **Payroll Tax Nexus Provisions PTA039.**

Wages

Employers are required to pay payroll tax on all of their taxable wages. The term 'wages' is widely defined in the *NSW Payroll Tax Act 2007* (the Act) under nine divisions and includes all forms of direct and indirect reward for work.

It is not restricted to wages and salaries and includes other forms of reward such as fringe benefits and share schemes.

The general concept of wages – Division 1

Wages paid or payable to employees make up almost all wages liable for payroll tax. Payments are a wage if they are:

- wages
- remuneration
- salary
- commissions
- bonuses
- allowances

and are paid or payable at piece work rates or otherwise and whether paid or payable in cash or in kind to an employee.

Paid	credited or given to the employee within any month
Payable	the employee is entitled to the money within any month
Piece work rate	payment per item on an ongoing basis
In kind	any item of worth other than money
Employees	any person working under a contract of service

Most workers are employees engaged under a contract of service. The person is, or can be, subject to ongoing control and direction and the work performed will be ordinarily required by and be for the benefit of the employer's business. Employees can be full time, part time, casual or employed for a fixed term.

A contract of service is evidenced by the totality of the relationship between the business and the worker. A large body of case law exists to deal with employers who attempt to have work performed by contractors while retaining the control and benefits found in an employment relationship.

Revenue Ruling: **Determining whether a worker is an employee PTA038**.

Directors

Wages include any amount paid or payable by a company by way of remuneration to or in relation to a director of that company.

Corporations should be aware that any payment that relates to any service performed by a director is a wage. This includes directors fees and any other form of remuneration including superannuation contributions, consultancy fees, on call allowances, marketing fees and any other form of value.

Third party provisions ensure that wages paid to other persons such as trustees and corporations are also a wage for the corporation in receipt of the service of the director.

Salary sacrifice arrangements

Wages subject to an effective salary sacrifice should be returned on their new value under the agreement.

Wages sacrificed into:

- fringe benefits, such as motor vehicles, have an FBT value that is used to determine the payroll tax value
- superannuation contributions have the same value as the wage sacrificed.

Workers compensation payments

Employees in receipt of workers compensation payments from their employer or from an insurance company are covered by Revenue Ruling: **Workers Compensation Payments PTA015**. Only 'make up pay' being paid above the award or agreement level is a wage.

Profit distributions and loan amounts

Owners of a business that take a share of profits are not in receipt of wages. The situation is clarified in Revenue Ruling: **Profit Distributions and Loan Accounts PTA016**.

Fringe benefits – Division 2

The definition of wages includes a fringe benefit under the *Fringe Benefits Tax Assessment Act 1986* (FBTAA). Exempt fringe benefits are not liable for payroll tax. Fringe benefits that have a 'nil' value have no returnable value for payroll tax.

Employers must use the taxable value of fringe benefits and not the 'reportable' value. The reportable value is incorrect and will under-declare the value.

Calculating fringe benefit value

Under the FBTAA, fringe benefits are categorised as:

- Type 1 fringe benefits which are grossed-up by a specified factor
- Type 2 fringe benefits which are grossed-up by a specified factor. Only the Type 2 factor is used to gross-up all taxable fringe benefits for payroll tax including Type 1.

The table below lists the specified Type 2 grossed-up factor to be applied to each relevant financial year rather than FBT year.

Period	Type 2 grossed-up rate
01/07/2015–30/06/2017	1.9608
07/07/2014–30/06/2015	1.8868
01/07/2013–30/06/2014	1.8692

Declaring fringe benefit value – Estimate Method

The value of an employer's total taxable fringe benefits is returned on a monthly basis as 1/12 of the most recent FBT return. The taxable amount of fringe benefits in the March 2015 FBT return is divided by 12 and returned in the 11 monthly returns for July 2015 to May 2016. The March 2016 FBT return is then used for the annual reconciliation and for the following financial year.

If an employer pays wages in multiple States or Territories and cannot isolate the fringe benefits value for each jurisdiction they can pro-rata their fringe benefits in the same ratio as their wages.

If an employer ceases to employ they must reconcile their fringe benefits up to the final day they paid wages.

Revenue Ruling: **Fringe benefits PTA003**.

Reportable fringe benefits

Reportable fringe benefits are fringe benefits whose value must be displayed on group certificates. Using this amount often leads to under-declaration of fringe benefits liability for payroll tax as it does not include the full value of benefits received by the worker.

Superannuation contributions – Division 3

All employer superannuation contributions to any form of superannuation fund in respect of any employee, director, relevant contract worker or agency contract worker are a wage.

Setting aside any money or anything that is worth money as, or as part of, a superannuation fund, superannuation guarantee charge or any other form of superannuation, provident or retirement fund or scheme is taken to be making a superannuation contribution for the purpose of the Act.

Top-up payments to defined benefit schemes in respect of post 1 July 1996 service, are a wage even if the scheme is now closed to new entrants.

Employers' failure to pay the required Superannuation Contributions

If an employer fails to pay the full amount of superannuation contributions as required by law, the employer is liable to pay any additional payroll tax on the value of underpaid superannuation including nominal interest and administration fee components less any penalty charges.

Revenue Ruling: **Penalty charges under Superannuation Guarantee Charge PTA030.**

Shares or options – Division 4

Wages include the value of shares and options acquired by or granted to employees and directors less the value of any payment the employee or director makes in order to have that share or option. Share and option schemes usually have criteria that must be met before the employee gets the share or option.

As these criteria may never be met, employers have a choice to declare the value of the share or option on the day of granting or on the day the share or option vests in the employee. If the employer chooses not to declare on granting they must declare on vesting.

If an employer declares on granting and the shares or options are later rescinded the value of the wage declared is to be deducted from the liable wages in the year of rescission.

The value of the share or option is the market value or the value as determined under the *Income Tax Assessment Act 1997* (ITAA).

Changes due to amendments in the 'Income Tax Assessment Act' from 1 July 2011

The changes to the Income Tax Assessment Act mean only shares or options that are an Employee Share Scheme (ESS) interest are a wage. If the share or option scheme is not an ESS interest, it will be treated as a fringe benefit for payroll tax purposes.

Employment Termination Payments – Division 5

Wages include termination payments and there are two types:

1. Employment Termination Payments (ETP) as defined in Section 82-130 of the ITAA, when paid by an employer as a result of an employee's termination. The amount subject to payroll tax is the whole of the ETP paid by the employer (whether paid to the employee or to a roll-over fund), less any component which is exempt income when received by the employee
2. All paid out annual leave and long service leave.

ETPs paid by employers may include payments for:

- unused sick leave or rostered days off
- ex gratia payments or 'golden handshakes'
- payment in lieu of notice or service contract payouts.

Redundancy or early retirement payments are only a wage to the extent that they exceed the exempt limits.

Revenue Ruling: **Termination Payments PTA004**.

Allowances – Division 6

All allowances other than motor vehicle and accommodation allowances are a wage under Division 1. Division 6 defines as a wage amounts paid as motor vehicle allowances or accommodation allowances that exceed limits set with reference to Commonwealth taxation limits. Only the value of the excess payments is a wage under Division 6.

Motor vehicle allowances

Motor vehicle allowances paid at a rate per kilometre are not liable even on amounts paid that exceed 77 cents per kilometre. Amounts classified as expended car benefits that exceed 77 cents per kilometre are not a wage if they are a 'reasonable' amount under the FBTA. This is allowed for under Revenue Ruling: **Exempt allowances; Motor Vehicle and Accommodation PTA005-v2**.

This ruling also covers employers who pay lump sums and fixed amounts as a motor vehicle allowance and requires their employees to keep records of business kilometres. The distance can be multiplied by 77 cents and subtracted from the lump sum paid. If distance records are not kept the allowances are a wage. There are two methods of substantiating business kilometres; the continuous recording of business kilometres or use of the averaging method. The averaging method requires the employee to maintain a log of all their business kilometres for a 12-week period and then applying the average on a monthly basis.

Real estate agents

This industry has a specific ruling with an assumed weekly travel of 250 kilometres for agents who do not record business kilometres. At 77 cents per kilometre the exempt amount is $192.50 a week.

Revenue Ruling: **Motor vehicle allowance paid to real estate sale persons PTA025.**

Accommodation Allowances

Accommodation allowances are only liable on amounts that exceed a daily limit of $255.45 during 2015–16. Amounts paid above this limit are a wage.

Truck driver's allowance

The overnight allowance paid to truck drivers is an accommodation allowance. The exemption limit is $255.45. Revenue ruling: **Overnight accommodation allowance paid to truck drivers PTA024.**

Reimbursements

Reimbursements of business expenses incurred by employees on behalf of their employers are not liable wages. There must be document substantiation. Revenue ruling: **Allowances and Reimbursements PTA011.**

Living Away from Home Allowances

A Living Away from Home Allowance (LAFHA) is a fringe benefit and must be declared as such.

Changes in the taxation treatment of a LAFHA occurred in October 2012 at the Commonwealth level. The reform does not change the way an LAFHA is treated for payroll tax as it is still a fringe benefit.

Contractor provisions – Division 7

Employers may use contractors to perform services for their businesses. They can be contractors, sub-contractors, agents, consultants or any other title and can be natural persons or incorporated. All payments made to these persons are a wage if paid under a **'relevant contract'**.

A **'relevant contract'** is a contract under which a person, in the course of a business carried on by that person, supplies to another person services for or in relation to the performance of work. Such a contract is subject to three deeming provisions:

1. the payment for the services, excluding any GST component, is taken to be a wage, and
2. the person paying that wage is taken to be an employer, and
3. the natural person who actually performs the work is taken to be an employee.

Under the Act not all contracts for services are relevant. Nine provisions define types of contracts that are not relevant and these are known as the contractor exemptions. If any one of them applies the contract is not relevant and there is no wage subject to payroll tax.

The nine relevant contract exemptions

1. **Services ancillary to the provision of goods or use of goods**

   A contract is not a relevant contract if the labour provided under the contract is ancillary to the supply of goods as its basic purpose or the labour provided under the contract is ancillary to the use of goods supplied by the contractor.

   Revenue ruling: **Contractors – Services Ancillary to the Supply of Goods PTA033.**

2. **Services not ordinarily required by your business and supplied by a person who supplies such services to the general public**

   The purpose of such a contract must be to secure services that a business does not ordinarily require and the person that provides those services must supply the same type of services to the general public in that financial year.

   Revenue ruling: **Contractors – Services not ordinarily required and supplied by a person who supplies such services to the general public PTA022.**

3. **Services ordinarily required by your business for less than 180 days in a financial year**

   This provision again requires a business to determine what services it does not ordinarily require and if the total number of those days is 179 days a year or less the contract is excluded.

   This exclusion does not extend the 90-day exemption below.

   Revenue Ruling: **Contractors – 180-day Exemption PTA020.**

4. **Services provided for 90 days or less in a financial year**

   For a contract to be excluded under this provision the workers must work for the hiring business for a period in total that does not exceed 90 days in the financial year. After 90 days, the entire contract becomes relevant from day 1 unless one of the other provisions apply.

   Revenue Ruling: **Contractors – 90 Day Exemption PTA035 v2.**

   Revenue Ruling: **What Constitutes a Day's Work PTA014.**

5. **Services are supplied by the contractor to the public generally**

   This provision can be applied for when the first four exemption provisions do not apply.

   The Chief Commissioner can exclude the contract when satisfied that the contractor provides services of that type to the general public during the financial year.

   The contractor **must have actually provided services to the public** – simply being available to provide them is not enough. For a contract to be excluded, the Chief Commissioner requires evidence that these services have been provided within the relevant financial year.

   Revenue Ruling: **Contractors servicing the public generally PTA021**.

6. **Services performed by two or more people**

   A contract is not a relevant contract if the contractor engages others to provide the services they are contracted for or two or more people are needed to fulfil the purpose of the contract.

   The criteria are slightly different for corporations, partnerships and sole traders.

   a) For corporations there must be two or more persons employed by, or who provide services for, a corporation in the course of a business carried on by the contractor.

   b) For partnerships there must be a person employed by, or who provides services for, a partnership in the course of a business carried on by the partnership.

   c) For natural persons there must be at least one more person employed by, or who provide services for, the contractor in the course of a business carried on by the contractor.

   The Chief Commissioner can deny the benefit of this exemption if the Chief Commissioner determines that the contract or arrangement under which the additional person provides services was entered into with the intention of avoiding payroll tax.

   Revenue Ruling: **Contractors Engaging Others PTA023**.

7. **Services provided by an owner-driver**

   If the contract is solely for the conveyance of goods in a vehicle provided by the contractor the contract is not a relevant contract. The contractor must own or lease the vehicle as a vehicle and must not be an employee.

   Revenue Ruling: **Payroll Tax Exemption for Payments to Owner-drivers PTA006**.

8. **Services are for the procurement of persons wishing to be insured**

   If an independent agent provides services involving the procurement of persons wishing to be insured by the principal business, the contract will not be a relevant contract.

9. **Services are as a door-to-door salesperson**

   If the contract is for the door-to-door sale of goods solely for domestic purposes, the contract will not be a relevant contract.

   Revenue Ruling: **Contractor Provisions: Door-to-door Sale of Goods PTA007**.

Removal of contractor exemptions from 1 January 2016

From 1 January 2016, exemptions for services of procurement of persons wishing to be insured and contracts for the door-to-door sale of goods have been abolished. It is anticipated that hiring businesses who engage genuine independent contractors, will be able to secure an exemption from one of the other general exemptions.

Door-to-door and insurance selling agents

Not all door-to-door or commission based insurance selling agents will be treated as independent contractors for payroll tax. If it is determined that the door-to-door or insurance selling agent operates like a common law employee then all the payments will be seen as liable wages.

OSR uses a qualitative, 'whole of relationship' decision-making approach that looks carefully at the roles and responsibilities of the parties involved. Each case is looked at individually taking into consideration all of the unique circumstances. Once a determination has been made that a door-to-door or insurance selling agent is an employee no contracting exemptions are available.

There are three exemptions which may potentially apply to businesses that enter into contracts with door-to door and insurance selling agents. These include contracts that:

- are no more than 90 days in a financial year,
- the agent ordinarily performs the same kind of services for other clients during the financial year in question,
- the work is carried out by a least two workers engaged by the agent.

Employer substantiation

In the absence of evidence that a contract for services is not relevant the contractor provisions will apply. The payment will be a wage, the person paying that wage is taken to be an employer and the person who performs the work is taken to be an employee.

The onus of proving that any of the seven exclusions apply rests with the employer. Employers must ensure that the work completed by the contractor for the exemption or exclusion, is what was required in the actual contract. Any other work performed outside the contract will not receive an exemption or exclusion. Documentation that substantiates that a contract is not relevant must be kept for each contract for services. The revenue rulings give some guidance in this area.

Deductions

If your contract is a relevant contract the cost of materials is not a wage. If the contract does not itemise the cost of materials, deductions from the total cost of the contract are set out in:

- Revenue Ruling: **Contractor Deductions PTA018.**
- Revenue Ruling: **Contractors: Labour and Non-Labour Components PTA019.**

No deductions are available for other business expenses such as vehicles, fuel and the cost of maintaining business premises.

GST and non-labour costs

Contractor payments taken to be wages can not contain any GST component.

Revenue Ruling: **GST Considerations for the Calculation of Payroll Tax Liability PTA008.**

Employment Agents – Division 8

Employers use agencies to provide them with persons to perform labour services. An agency can enter into different forms of contract but in essence there are only two types:

1. The employer (client) directly hires the worker as an employee or a contractor using the agency to find the worker. The client usually pays the worker directly and the agency receives a fee or an on-going percentage. These contracts are not employment agency contracts. **Revenue Ruling PTA029 recruitment/placement agencies** clarifies this type of direct hire contract.
2. The client does not offer a direct hire relationship to the worker but the agency offers the work to the worker on behalf of their client as an on-hire arrangement.

   Under an employment agency on-hire contract arrangement, a service provider can never be the employee of the end user client. Businesses that procure or facilitate the services of a service provider for an end user client are taken to be an employment agent.

Employment agency contracts

An employment agency contract is defined in the Act and has three effects under the Act:

1. all amounts paid by the agency to, or in connection with, the work of the worker are taken to be a wage. This picks up payments to corporations connected to the worker
2. the natural person performing the work is taken to be an employee
3. the agency is taken to be the employer to the exclusion of the client or any other person.

Employment agencies have only one concession. If the client makes a declaration that the wages would be exempt from payroll tax if paid by the client the agency does not have to pay payroll tax on all contracts covered by that declaration.

The declaration is available online and requires confirmation from us that the client is exempt. Employers can apply to be classified as exempt even if they have insufficient wages to register for payroll tax.

Agencies must obtain declarations from exempt employers in order to exempt the wages of service providers provided to exempt clients.

Chain of hire

If two or more agencies are involved in an agency agreement they need to make a declaration to ensure that only one of them pays the payroll tax.

Which agency should pay and fill out the declaration is covered in Revenue Ruling: **Employment Agency Contracts Chain of on-hire PTA027**. The liable agency is usually the agency first contacted by the client.

Direct hire using agencies

Employers that use an agency to facilitate the direct hire of a worker may use the agency to pay the worker creating an arrangement that looks like

it meets the definition of an employment agency contract. As the core contract is one of direct hire it is not an agency contract, as explained in Revenue Ruling **PTA029 Recruitment Agencies/Placement agencies/ Job Placement Agencies**.

Government as agency clients

Commonwealth and State Governments departments or organisations affiliated with them cannot make declarations that they are exempt from payroll tax. Local government can make declarations but only on work that is not listed as a prescribed activity.

Revenue Ruling: **Employment Agency Contracts-workers on-hired to Government PTA028**.

Other – Division 9

GST excluded from wages

The GST component of any payment is never a wage.

Revenue ruling: **GST Considerations for the calculation of payroll tax liability PTA008**.

Wages paid by or to third parties

Employees

If any money would have been a wage if it had been paid by an employer to an employee it is still a wage for that employer if:

- paid by a person other than the employer for whom the work was performed. For example, where an employer uses the services of an outsourced payroll company
- paid to a person other than the employee who performed that work. For example, where an employee may request that their wages be paid to their spouse or their own private company
- paid by a person other than the employer to some person other than the employee who performed that work. For example, where an employer uses the services of an outsourced payroll company to process wage payments of its employees and the employ nominates for the wages to be paid to a third party such as a super fund.

Directors

If any money would have been a wage if it had been paid by a corporation to, or in relation to, or for the appointment of a director it is still a wage for that corporation if:

- paid by a person other than the corporation for whom the services were performed
- paid to a person other than the director who performed those services for the corporation
- paid by a person other than the corporation to some person other than the director who performed the services for the corporation.

Employers are rarely subject to third party provisions for employees but corporate employers must be aware that under this provision all payments to any corporation or other person connected to a director are a wage for the corporation unless the corporation can prove the payments are unrelated to the services of their director.

Common payments subject to these provisions are management fees, consulting fees, on call payments and other payments directed to a corporation associated with the director. If there is evidence that the payments are for specific tasks performed under a contract for services the Chief Commissioner will apply the provisions of contractor payments (Division 7) to the contract.

Agreement to reduce or avoid payroll tax

If a person performs services for which any payment is made to some other person related or connected to the person performing the service and the effect of the agreement is to reduce or avoid the liability of payroll tax the Chief Commissioner may:

- disregard the agreement
- determine that any party to the agreement is the employer
- determine that any payment made in respect of the agreement is a wage.

The Chief Commissioner must give reason in writing for such a decision setting out the facts relied upon.

Exemptions

For payroll tax there are basically two types of exemptions:

1. an employer has an exemption on all, or most, of its wages based on the nature of the employer organisation and the work performed by its employees
2. the employees' wages are exempt under a specific exemption such as paid maternity leave.

Employers with all or mostly exempt wages

Wages paid to employees engaged to perform work connected with the objectives of:

- public benevolent institutions
- religious institutions
- non-profit organisations with sole or dominant charitable, benevolent, philanthropic or patriotic purposes

are exempt from payroll tax.

Such organisations usually have all or almost all of their wages exempt and are sometimes referred to as exempt organisations.

Other organisations with wholly or mostly exempt wages include:

- non-profit, non-government schools or colleges (other than technical schools or colleges), for wages paid to persons providing education at or below secondary level
- public hospitals, for wages paid to persons engaged exclusively in the work of the hospital
- non-profit private hospitals, for wages paid to persons engaged exclusively in the work of the hospital.

Local Government

Cities, Shires and Municipalities have an exemption on their wages or on the wages of wholly owned subsidiaries.

The exemption does not apply to wages paid or payable for or in connection with:

- the supply of electricity or gas
- water supply
- sewerage

- the conduct of
  - abattoirs
  - public markets
  - parking stations
  - cemeteries or crematoria
  - hostels
  - a transport service
  - the supplying of building materials
  - a coal mine and the distribution of coal.

Employers with exempt wages can sign declarations for employment agencies that the wages are exempt as long as the wages would have been exempt if that work had been performed by the employees of the organisation.

Revenue ruling: **Employment Agency Contracts Declaration by exempt clients PTA026-v2**.

The other exemptions

Maternity, paternity and adoption leave

Employers that provide paid maternity leave, paternity leave and adoption leave have an exemption for such wages up to and including 14 weeks' pay for the employees' normal duties. If the employee was working full time then they have 70 days at full pay or 140 days at half pay. If the employee was working 3 days a week they have 42 days at full pay and 84 days at half pay.

Revenue Ruling: **Exemption from maternity leave and adoption leave pay PTA012.**

Note: PTA012 is a harmonised revenue ruling that explains the exemption of maternity and adoption leave to the exclusion of paternity leave. For NSW purposes, paternity leave is also exempt to the same effect as maternity and adoption leave exemptions.

Revenue Ruling: **Paid parental leave PTA037**.

Volunteer fire-fighters and emergency service volunteers

Employers who continue to pay wages to staff taking part in bushfire fighting activities as a voluntary member of a rural fire brigade or in emergency operations as volunteer members of an emergency services organisation have an exemption on those wages.

The exemption does not apply to wages paid as recreation, long service or sick leave for the time of their absence.

Defence personnel

Employers who provide paid military leave to employees who are members of the Defence forces, including the Reserves, have an exemption on such payments.

Rebate for apprentice and trainee wages

From 1 July 2008 a rebate of payroll tax applies to all wages paid to apprentices and new entrant trainees. The rebate does not apply to wages paid to a trainee who has been continuously employed by the employer for more than three months full-time or 12 months casual or part-time immediately before commencing work as a trainee.

For more information, please read the factsheet - **Payroll Tax (NSW) - Apprentice and Trainee Wages**.

Payroll Tax Rebate Scheme – Jobs Action Plan

The Jobs Action Plan rebate gives eligible employers a payroll tax rebate of up to $5,000 for each new employee in NSW hired on or after 1 July 2011. The rebate is paid in two parts after the first and second anniversary of the day employment commenced.

Employers should register each new position within 30 days after the employment of a person in that position commences. However the Commissioner will give consideration depending on the circumstances up to 90 days for late applications. Applications for registration are available at www.osr.nsw.gov.au

The employment of the new person must increase the business's number of full-time equivalent employees (FTE) for a period of at least one year for the employer to receive the first part of the rebate which is up to $2,000. As long as the FTE is maintained or exceeded, the employer will be able to claim the second part of the rebate which is up to $3,000 on the second anniversary.

More information can be found at **www.osr.nsw.gov.au/taxes/payroll/jap**

Grouping provisions

Grouping provisions result in all of the members of a group, as defined under the Act, paying payroll tax as if the group had only a single employer. The provisions exist to prevent a person, or set of persons, from carrying on a number of businesses with each business claiming the threshold deduction.

The provisions operate independently of each other and they also establish joint and several liability between group members.

As a group the threshold deduction can be claimed in one of two ways:

- one member, the Designated Group Employer (DGE), gets the threshold deduction and the other members get no threshold deduction
- one member, the group single lodger, includes the wages of the whole group in its return.

As the members of a group are entitled to only one threshold deduction all members that pay wages must register for payroll tax if the group as a whole pays total Australian wages that exceed $14,344 a week during 2015–16.

A group is defined under five provisions. In summary, groups are two or more:

1. corporations that are related corporations under the Corporations Act
2. employers who carry on businesses where one or more employees of any of those businesses perform duties under an agreement in connection with the businesses carried on by any of the other employers
3. businesses that are commonly controlled by the same person or persons
4. corporations that directly, indirectly or in aggregate are controlled by the same person or set of associated persons though a combination of personal and corporate share ownership
5. groups that have common members and as a result are subsumed into a larger group of three or more members.

Groups of corporations

Two or more corporations are a group if they are 'related bodies corporate' within the meaning of the *Corporations Act 2001*. Related corporations have a holding company-subsidiary relationship as determined under the *Corporations Act 2001*. Australian subsidiaries of overseas holding

companies are still related to each other under the *Corporations Act 2001*. This does not apply to trustee or nominee corporations.

Common employee groups

Two or more businesses are grouped if any of them have employees who perform duties for, or in connection with, the other businesses under an agreement for the provision of services between the businesses. All of the parties to such an agreement are the members of the group. There need not be a single agreement but could be a series of agreements between different businesses with common parties to those agreements.

A group formed under this provision will contain at least one business whose employees perform duties to satisfy an obligation to provide services for, or in connection with, another business. The provision does not apply to all contracts for services between businesses. There must be evidence that duties are being performed.

A common example is a legal firm and its affiliated service trust. The corporate trustee of the service trust will employ administrative staff to perform legal work such as typing writs and record keeping and this work is duties performed in connection with the business of the legal firm.

Common control groups

A business is grouped with another business if the person or persons who control the first business are the same person or persons who control a second business.

'If a person or set of persons has a controlling interest in each of two businesses, the persons who carry on those businesses constitute a group.'

What defines a controlling interest is determined under a number of control provisions and it is common to find that more than one can apply to some businesses.

A business can be carried on by	Control by
A sole person even as trustee	The owner
Two or more persons exclusively	All owners
A corporation	Directors >50% Board >50% Shareholders >50%
A partnership	Equity/income >50%
A trustee	Beneficiaries >50%

Sole person even as trustee

A business carried on by a sole owner, as trustee or otherwise, is controlled by that person.

Exclusive owners

A business carried on by two or more owners, or as trustees, is controlled by all of those persons together. This requires all of the owners, not just a majority.

Corporations that carry on businesses

- **Director voting power**

  The director(s) who can exercise more than 50 per cent of the voting power either individually or jointly at directors' meetings are persons who control the business carried on by the corporation.

Any person who can require director(s) with more than 50 per cent voting power to act in accordance with their wishes are persons that control the business carried on by the corporation.

- **Composition of the board**

  The persons who comprise more than 50 per cent of the board of management of a corporation are persons who control a business carried on by that corporation. This includes the directors.

- **Shareholders**

  Shareholders who directly or indirectly, exercise, control the exercise of, or substantially influence the exercise of more than 50 per cent of the voting power attached to the voting shares of the corporation are persons that control the business carried on by the corporation.

Partnerships that carry on businesses

The partners in a partnership are the persons that control the business carried on by the partnership. One or more of the partners are persons who control the business carried on under the partnership if they:

- own (beneficially or not) more than 50 per cent of the capital of the partnership
- are entitled (beneficially or not) to more than 50 per cent of the profits of the partnership.

The partnership deed is used to establish the interest of the partners.

Trusts with a business carried on under the trust

The beneficiaries of a trust are the persons that control the business carried on under a trust when they are entitled to more than 50 per cent of the value of the trust. Their entitlement to value is determined under the trust deed.

Discretionary trusts

Beneficiaries of such trusts are all taken to have an interest in the value of the trust that exceeds 50 per cent. This means any single or combination of beneficiaries control the business carried on under the trust.

Composition of common control groups

Corporations that carry on businesses are the most common employers grouped but trustees and partnerships are now commonly members of groups.

When the same person or persons control two or more businesses the types of businesses grouped can be any combination of owners, corporations, trustees and partnerships.

Common control also applies to trusts, corporations and partnerships controlled through trusts

In many business structures it is common to find the main trading business is controlled through a trust as a major beneficiary, shareholder or partner. In these structures it is then common to find a discretionary trust is in receipt of the income from the trading businesses.

When the trustee of a trust has a controlling interest in the business of another trust, or a corporation or a partnership any person with a controlling interest in the trust has a controlling interest in any of the businesses controlled by that trustee.

Smaller groups subsumed into one group

If any member of a group is also a member of another group, both groups are subsumed into one group for payroll tax purposes.

Subsuming also applies when two or more members of a group have a controlling interest in another business.

Tracing of interests in corporations

Tracing of interests in corporations is used when a person has a combination of corporate and shareholder control in two or more corporations. The person will own shares in the first corporation and the same person and the first corporation will own shares in the second corporation.

The provision uses direct interests in corporations, indirect interests in corporations and aggregate interests in corporations. When an entity has either:

- a direct interest of more than 50 per cent
- an indirect interest of more than 50 per cent
- an aggregate interest of more than 50 per cent **in a corporation the entity and the corporation form a group.**

If the same entity has such a level of control in a second corporation then the two corporations are grouped.

Exclusion determinations

When two businesses are grouped they remain grouped unless the Chief Commissioner makes an exclusion determination to 'de-group' them. The Chief Commissioner cannot de-group related corporations.

The Chief Commissioner may, by order in writing, exclude a member from a group if *'satisfied, having regard to the nature and degree of ownership and control of the businesses, the nature of the businesses and any other matters the Chief Commissioner considers relevant, that the business carried on by the applicant is carried on independently of, and is not connected with the carrying on of, a business carried on by any other member of that group'.*

Some relevant points to consider include:

- a business does not have to employ to be member of a group
- you must clearly identify the business/es you are seeking an exclusion order for
- the level of interaction and interrelation of the activities of the businesses may impact the determination for de-grouping
- the ability a principal of one business to influence the management of another may also impact the determination for de-grouping.

To assist our customers there is an application form available at www.osr.nsw.gov.au

Revenue Ruling: **Commissioner's Discretion to exclude from a group PTA031**.

Group returns and payment systems

Each member of a group must lodge an annual reconciliation and pay the required amount of tax. Only one member of the group gets the benefit of the threshold deduction.

If the group has a DGE that has been approved as a single lodger the DGE makes a single return and a single payment to include the entire group's wages and pay its payroll tax liability. The approval does not affect the requirement of the other members to be registered for payroll tax but the single return and payment by the DGE satisfies the obligation of the other members to declare wages and pay the tax.

Nomination of a Designated Group Employer

All groups of businesses must nominate a single NSW member, as the DGE to claim the annual threshold deduction on behalf of the group in NSW. All of the other NSW members of the group do not claim any deduction from their wages.

Nomination of a Single Lodger

All members of a group must register for payroll tax. A group of businesses may choose to make joint returns where one group member lodges returns and pays the payroll tax on behalf of all NSW group members. If no individual group member can absorb the group's NSW threshold entitlement, the group must nominate a Group Single Lodger to be responsible for lodging and paying payroll tax on behalf of all members of the group.

Businesses need to return a nomination form to advise the method of lodgement they will be utilising.

Joint and several liability of group members

Any payroll tax payable by a group member can be recovered from any other group member.

Agents and trustees

Any person under a legal or other obligation to act on behalf of an employer or any person who is a trustee is required to lodge returns and pay payroll tax as if they were the employer or owner. The returns and payment are in a fiduciary capacity and are separate and distinct from any returns the person may make in their own capacity or in a fiduciary capacity for other persons.

The Taxation Administration Act 1996

Assessments

Original assessments can be made for any number of years but in practical terms the period is the current year and the prior four financial years.

Reassessments

An assessment can be amended for up to five years after it has been assessed. This will be the current year and four prior years.

All overpayments are refunded but any extra tax will be subject to interest and penalties.

Interest

Interest comprises two rates, a premium rate (8 per cent) and a prescribed market rate, which is reviewed quarterly. For the quarter starting 1 April 2016 the full rate is **10.28 per cent.**

Penalty tax

Penalty tax is intended to encourage compliance with the taxation laws. Where a tax shortfall is discovered a rate of 25 per cent is applied, but this can be considerably altered by the behaviour of the client.

- The full disclosure of sufficient information to determine a tax liability before the Chief Commissioner notifies the client an investigation has commenced reduces the penalty tax to 0 per cent
- The full disclosure of sufficient information to determine a tax liability after the Chief Commissioner notifies the client an investigation has commenced reduces the penalty tax to 20 per cent
- An attempt to intentionally disregard the obligation to fully disclose the extent of a tax liability can increase the penalty tax to 75 per cent.

Revenue Ruling: **Payroll tax–Interest and Penalty tax PTA036 v2**

Record keeping requirements

Employers must keep the records necessary to determine their payroll tax liability for five years from the date of a transaction or the date the record was first prepared or obtained.

Investigative powers

We conduct an active investigation program targeting all employers that have taxable wages in NSW. Some interstate businesses are also investigated. The investigation will normally cover the current financial year and the previous four financial years.

Objections

A person who is dissatisfied with a decision, determination or assessment made by the Chief Commissioner affecting their tax liability may, within a period of 60 days after the issue of the notice of the decision, determination or assessment, lodge an objection in writing with the Chief Commissioner. The statement must be explicit, stating the full grounds of the objection and be accompanied by relevant supporting evidence. Application forms can be found at www.osr.nsw.gov.au

Appeals

A person who is dissatisfied with the decision on an objection may, within 60 days after the date of issue of the notice of determination, appeal to the NSW Civil & Administrative Tribunal or to the NSW Supreme Court against that decision.

Lodgement of an objection or appeal does not affect the obligation to pay any tax in the timeframe specified in the assessment.

A range of forms have been issued to assist employers with various payroll tax administrative obligations. They can be found at www.osr.nsw.gov.au

Recent court cases

Regis Mutual Management Pty Ltd v Chief Commissioner of State Revenue [2015] NSWCATD 213

Decision of Senior Member Isenberg on 19 October 2015

Issues

- Grouping Provisions
- Common Employee Grouping
- Chief Commissioner's discretion to exclude from a group

Background

The key question was whether or not the duties being performed by Capricorn Society Ltd (CSL) employees were for or in connection with the Regis Mutual Management (Regis) business. The first issue for the Tribunal to consider was whether or not Regis was a member of the payroll tax group which included CSL in respect of the relevant period from 1June 2008 to 31 December 2011. The second issue was whether or not the Chief Commissioner's discretion not to give a de-grouping was warranted.

Regis stated that CSL employees were performing duties for or in connection with CSL's business and then providing services to Regis. The Tribunal did not accept Regis' submission that the duties being performed by CSL's employees were not also for or in connection with Regis' business.

Decision

Having regard to the terms of the Service Agreement, the Tribunal accepted Regis' submission that CSL employees were performing duties for or in connection with CSL's business and that services were being provided to Regis.

However, it did not accept Regis' submission that the duties being performed by CSL's employees were not also for or in connection with the Regis business. The carrying out of duties in connection with one business did not preclude those duties also being carried out in connection with another business. Accordingly, the Tribunal concluded that it was not satisfied on the balance of probabilities that Regis and CSL were not grouped for the purpose of Section 71(3) of the Act.

Read the case decision on Regis Mutual Management Pty Ltd.

Headwear Pty Ltd v Chief Commissioner of State Revenue [2015] NSWCATAD 166

Decision of Senior Member Isenberg on 10 August 2015

Issues

- Grouping Provisions
- Common Control Grouping
- Chief Commissioner's discretion to exclude from a group (de-group)

Background

The Taxpayer, Headwear Pty Ltd, sought review of the Chief Commissioner's decision not to de-group the Taxpayer and three other employers (the Headwear Group) under Section 79 of the *Payroll Tax Act 2007* (the Act) in respect of the 2008 to 2011 tax years (the Relevant Period). The issue for determination was whether the Tribunal, standing in the shoes of the Chief Commissioner, should exercise that discretion to de-group.

Headwear provides customised headwear for corporate, sporting, licensed and retail customers. By letters dated 28 March 2011 and 12 December 2011, the advisers for the Taxpayer, Nexia Perth Pty Ltd (the Advisers) conceded that the Headwear Group constituted a group for payroll tax purposes. However, they requested that the Chief Commissioner exercise his discretion to exclude the Taxpayer from the group. The decision was based on the nature, degree and ownership of control, the nature of the business, plus relevant, business and commercial matters.

Decision

The Tribunal found that the Chief Commissioner's determination not to de-group was correct. It found that the use of the same external advisers, postal address and registered business office and these factors alone inconsequential. However, the more relevant matters in making its determination included:

- the role played by the same person in the business activities of both Headwear and the WA business, the supply of all stock to all group members from a single factory with exclusive communications through the WA business; the financial connections between Headwear Pty Ltd and other members of the Headware Group
- the businesses' failure to consider alternate sources of stock, funding, administrative and accounting services; group marketing and the joint Headwear Group website
- the communication process for potential clients of the Headwear Group; and the use of the same 'Headwear' branding by all group members.

Read the case decision about Headwear Pty Ltd.

Namoi Tyreright Pty Ltd v Chief Commissioner of State Revenue [2016] NSWCATAD 88

Decision of Senior Member Isenberg on 13 May 2016

Issues

- Grouping Provisions
- Common Control Grouping
- Chief Commissioner's discretion to exclude from a group (de-group)

Background

This was an exclusion from grouping case where Namoi Tyreright (the Taxpayer) was a tyre retailer partly owned by Tyres 4 U (T4U). T4U was the main provider of tyres to the Taxpayer under a non-exclusive dealership agreement, which was part of the business strategy of T4U to sell its tyres nationwide through several Tyreright retailers. The Chief Commissioner issued payroll tax assessments to the Taxpayer for the years 2012 to 2014 where the Taxpayer and T4U were treated as a payroll tax group. The Taxpayer challenged the assessments on the basis that the Chief Commissioner should have exercised his discretion under Section 79 of the *Payroll Tax Act 2007* (NSW) to de-group the companies as they were not connected and carried on independently of one another.

Decision

The Tribunal referred to the *Boston Sales and Marketing Pty Limited v Chief Commissioner of State Revenue* [2014] NSWCATAD case where Justice Block said that:

'The only statutory question which requires an answer is as to whether a business carried on by the person, is carried on independently of, and is not connected with the carrying on of, a business carried on by any other member of that group, the Chief Commissioner (or, Tribunal in this instance) is to have regard to:

1. the nature and degree of ownership and control;
2. the nature of the businesses; and
3. any other matter considered relevant.'

The Tribunal established that although the Taxpayer may have had day-to-day managerial control of its business without T4U's interference, the Taxpayer conducted its business in compliance with the comprehensive standards and requirements contained in the dealership agreement with T4U and therefore no exclusion was available.

Read the case decision on Namoi Tyreright Pty Ltd.

Eastside Veterinary Emergency & Specialists Pty Ltd v Chief Commissioner of State Revenue [2016] NSWCATAD 104

Decision of Senior Member Verick on 26 May 2016

Issues

- Grouping Provisions
- Common Control Grouping
- Chief Commissioner's discretion to exclude from a group (de-group)

Background

This was a case where the applicant challenged the Chief Commissioner's decision not to grant a de-grouping of three businesses, Eastside Veterinary Emergency and Specialists Pty Ltd (Eastside), Rose Bay Veterinary Hospital Pty Ltd (Rose Bay), and ANHM Investments ATF Eastside Property Unit Trust (ANHM).

The taxpayer conceded that there was a grouping under Section 72 of the *Payroll Tax Act 2007* from 19 December 2011 to 31 August 2014, but was asking the Chief Commissioner to use his discretion to de-group Eastside under Section 79. From 13 July 2011 to 13 April 2012, the shareholders had 67 per cent joint control of the shares of Eastside. The same shareholders were also the sole unit holders of the Eastside Property Unit Trust.

The argument put forward by the applicant was that Eastside and ANHM ran different businesses. Eastside was a specialist emergency veterinary hospital providing different veterinary services to ANHM, which offered the services associated with an ordinary veterinary practice. The Applicant stated that:

- each shareholder had complete responsibility for managing their separate businesses
- only 6 per cent of Eastside's income is from referrals by ANHM
- bookkeeping and accounting functions were separate
- there was no sharing of premises and staff
- and there were no loan agreements or any other shared financial arrangements.

The Applicant also stated that the only shared arrangement was an x-ray machine with costs being borne at an arm's length basis.

The Chief Commissioner's argument was that:

- from the date of registration until 14 January 2014 Eastside and ANHM shared and occupied the same premises
- one shareholder was a guarantor for the leases of Eastside and ANHM since 2011, and that both directors were on the payroll records of both businesses
- Eastside and ANHM are joint lessees of the x-ray and blood equipment and split the purchasing cost
- both Eastside and ANHM's websites provided links to each other's websites which also advertised the services of each director/doctor
- in May 2014 the Rose Bay address is recorded as the postal and business address of Eastside for income tax and BAS records in 2014 Eastside and Rose Bay used the same tax agents for income tax, and Eastside charged fees to Rose Bay
- Eastside and Rose Bay had common suppliers of medication
- both directors were signatories for Eastside and Rose Bay
- an ASIC notice to cease being a director of Eastside, was only given two days after Eastside lodged its application for a grouping exclusion.

The applicant cited the decision of C J Martin in the *1994 Crusher Holdings NTSC* case emphasising the focus should have been on the *'nature of the business and not the control'*.

Justice Verick:

- Discussed the old wording of the equivalent of Section 79 which required application of the *'substantial independence and connection'* test stated that from the 1 July 2007 there was now no need to determine the *'quantum of independence or connection'*.
- Highlighted the earlier Supreme Court decision in the *1997 Commissioner of Stamps v Hunter Garrett Pty Ltd* case where the importance on the *capacity to control* as well as the relationship between the nature of the businesses was influential. Therefore *one aspect of the test could not be ignored at the expense of the other.*
- Cited subsequent cases like the *2012 Port Augusta Medical Centre* Supreme Court case, and the 2014 Supreme Court *Conrad Holdings*

case which reinforced the new focus on the control of the business, having regard to the *nature and degree of ownership*.

- Mentioned Justice Anderson's reasoning in the 2014 NCAT *Seovic Civil Engineering Appeal* case, where he stated that the new Section 79 now focuses on the *interconnections between grouped businesses, the nature of the businesses and other relevant matters.*

Decision

In his summary, Justice Verick stated that the Chief Commissioner was correct in his decision and the applicant had not established the commercial independence of Eastside's business and its lack of connection with ANHM.

Read the case decision on Eastside Veterinary Emergency & Specialists.

Styling Australia Pty Ltd v Commissioner of State Revenue (Review and Regulation) (Correction) [2015] VCAT 1792

Decision of Senior Member Davis on 10 November 2015

Issues

- Common law employees or independent contractors
- Employment agency provisions

Background

Styling Australia (Styling) sought a review of the Victorian Commissioner's determination disallowing the applicant's objection against the Commissioner's Notice of Assessment relating to a period from 1July 2010 to 30 June 2013 inclusive. The issue to be determined was whether the promotional hosts hired by Styling, were employees, on-hired employees or independent contractors.

Styling supplied promotional hosts to clients throughout Australia. Its clients were often marketing companies that sought quotes from Styling for services to provide skilled people to host and manage events, campaigns and carnivals. Depending on the budgets and criteria of the client, Styling found suitable hosts which fitted the brief for the job. Many of the staff that were sent to host the events were aspiring models, actors and individuals, who saw this type of work as an entry level into the entertainment industry.

Styling argued the workers were independent agents, and not their employees or on-hired employees. Styling argued that the promotional hosts were independent contractors because:

- they had ABNs
- the client decides when and where the workers should attend
- Styling doesn't run an agency, but merely represents the workers
- once the worker arrives at the event, they are under the control of the client, not Styling
- the client decides when and where the workers should attend
- Styling doesn't preclude the workers from sub-contracting
- they were responsible for their own risk and insurance
- they were required to bring their own public address system, assorted costumes including clothing, accessories, evening gowns, swimwear, general wardrobe, props and electronic devices (iPads, mobile phones)
- Styling couldn't suspend or dismiss them.

In addition, Styling maintained that as there was an investigation in relation to the period from 1 July 2005 to 30 June 2010, whereby the Commissioner didn't assess Styling for payroll tax in that period, therefore it shouldn't be liable to pay such tax now until the investigation had been finalised.

The Commissioner argued that the promotional hosts were:

- under the control of the agency at all times prior to entering the function
- only under the control of the client because of the contract between the workers and the applicant
- forced to notify Styling when they were not available to accept an assignment offered
- not allowed to accept an offer of employment, without the consent of Styling
- asked to immediately notify Styling of any difficulties arising in relation to the assignment
- paid by Styling and didn't take any commercial risk in relation to the venture and required to keep a record of the work they performed and would get paid for a minimum for 3 hours.

Decision

As there was no evidence to support the promotional hosts running independent businesses, the Tribunal found them to be on-hired temporary or casual employees of Styling. However, it was also mentioned by Senior Member Davis that the workers could have also been seen as service providers and deemed employees under Section 37 of the *Payroll Tax Act 2007* as an employment agency arrangement.

In addition, the Tribunal found that the investigations that the Commissioner made during a previous audit period were a different period to the present, and it wasn't clear that the same material was presented before the Commissioner. In any event, a previous decision of the Commissioner cannot operate as an estoppel against the proper construction and application of the Act, and cannot prevent the Commissioner from performing his statutory duty to administer taxation laws. See Kurtovic v the Minister of Immigration [1990] FCA 22; (1990) 21 FCR 193 at [196], [200], [207-208], [210-211], [214-215].

Read the case decision on Styling Australia Pty Ltd.

Compliance program

We collect revenue to help fund the future for the people of NSW. A key element of this is our compliance program which ensures the integrity of the tax and benefit systems we administer.

Our compliance approach aims to:

- encourage and assist clients to comply
- detect and deter non-compliance
- provide a level playing field and minimise business disruption.

Detect and deter non-compliance

Our compliance program takes a targeted, risk-based approach to focus activities on areas of highest potential for non-compliance and minimise disruption for business.

We use data analytics and risk assessment processes to identify clients that may be non-compliant in their tax obligations or benefits and grants eligibility. These processes use specialist analytical software to review client data sourced from over 50 external agencies, including the Australian Taxation Office (ATO), SafeWork the Australian Securities and Investments Commission (ASIC) and Rental Bond Board.

Our audit and investigation projects focus on:

- identifying and contacting individuals or businesses not currently registered within the tax system, but who are likely to have a liability
- identifying clients who may have understated their liabilities through a program of desk and field audits
- identifying clients who do not satisfy the eligibility requirements for benefits and grants
- ensuring clients with an obligation to lodge returns do so in a timely manner.

For more information on Investigations, read the **Investigations factsheet** and **compliance program**.

What's new for the 2016–17 financial year

Jobs Action Plan rebate – Legislative amendment effective from 31 July 2016

New jobs commencing on or after 31 July 2016, will only be eligible for the rebate if the employers full-time equivalent (FTE) employee number, prior to the new job, is 50 or below.

The total rebate amount per new job has increased to $6,000. New jobs commencing on or after 31 July 2016 will receive a rebate of $2,000 payable on the first anniversary and $4,000 on the second anniversary.

To be eligible for the scheme you must be registered as an employer and paying payroll tax in NSW and from 23 November 2015, late registrations for the Jobs Action Plan will only be accepted, without justification, if made within 90 days of the commencement of the new position.

To calculate your number of FTE employees use the following formula:

FTE = F + A/B

Where:

FTE = Full-time Equivalent

F = number of NSW full-time employees on the relevant date

A = total number of hours worked in the preceding pay period by all NSW part-time employees employed on the relevant date

B = average number of hours worked in the preceding pay period by all NSW full-time employees employed on the relevant date.

To calculate the number of FTE employees:

- on the date of commencement of a person in a new job, exclude the person employed in the new job
- on the first and second anniversaries of commencing the new job, include the person employed in the new job.

FBT gross-up rate Type 2

From 1 July 2016 to 30 June 2017, businesses are still to use 1.9608 as the Type 2 grossed-up rate multiplier for the aggregate value of all fringe benefits. This rate is to be applied by all taxpayers who either use the actual or estimate method of returning fringe benefits for payroll tax purposes.

Motor vehicle allowance exempt component

66c/km during the period 2016–17.

Local Government Business Entities

From 1 May 2016, a wholly-owned subsidiary of a local council is exempt from the liability to pay payroll tax on wages that are paid or payable to a person for an activity conducted for the council.

This amendment extends the exemption to a body corporate wholly owned by 2 or more local councils if the wages are paid or payable to a person for an activity conducted for those councils.

Common payroll tax mistakes

We have identified a number of errors clients generally make when remitting their payroll tax returns. To ensure your business correctly complies with the payroll tax provisions, below is a list of common mistakes.

- Wages – for the purposes of determining the payroll tax liability, gross wages should be used rather than net wages.
- Allowances – claiming an exempt component for motor vehicle and accommodation allowances requires substantiation with log books or records.
- Fringe benefits:
  - using reportable values from employee pay summaries results in an incorrect calculation of fringe benefits for payroll tax purposes
  - including salary sacrifice amounts towards fringe benefits results in an overstatement of payroll tax liability
  - using the Type 1 grossing up factor when calculating the taxable amount results in an overstatement of liability. Only use Type 2 grossing up factor for both benefit types
  - forgetting to proportion the fringe benefits taxable amount according to the State's wages proportionate to total Australian wages results in an overstatement of taxable fringe benefits.
- Superannuation – only including up to the Super Guarantee Charge leads to an understatement of liability. All amounts paid into Superannuation including salary sacrifice amounts are liable.
- Third-party payments to Directors – if a director provides services to a corporation, all payments relating to those services are wages for the corporation even if the payments are made to another company, a superannuation fund or other entity.
- Contractors – failure to include liable contractor payments (less GST and approved deductions) results in an understatement of payroll tax unless an exemption applies. If an employer is claiming an exemption for one of their contractors, the employer needs to have the evidence to be able to substantiate the exemption they wish to claim. This involves the employer being aware of the contractor's business – e.g. do the contractors engage others to fulfil the contract, do they have other customers that they provide services to?
- Threshold entitlement – excluding interstate wages when calculating payroll tax results in incorrect threshold allocation and underpayment of tax. Including interstate wages allows for the threshold to be proportioned according to total Australian wages.
- Apprentices and Trainees – to claim the available rebate the apprentices and trainees must be registered with the Department of Education and Communities. Additionally, all forms of wages (wages, allowances, super, fringe benefits) paid to apprentices and trainees are rebateable wages. Trainees must be new entrant trainees, not working more than three months full time or three months part time or casual to be eligible for the rebate.
- Grouping – multiple thresholds claimed by group members. This often eventuates due to businesses not being aware of the grouping provisions.

Payroll Tax

Quick Reference Checklist

NSW GOVERNMENT | Office of State Revenue

Note:

This checklist is a **general guide,** designed to assist employers when calculating their payroll tax liabilities. It includes liable wages where errors are commonly made. It does not include **all** liable wages.*****

Read more about payroll tax at www.osr.nsw.gov.au or call **1300 139 815**.

Have you included these in your NSW taxable wages?

	Yes	No
■ **Salaries and wages**	☐	☐
‣ Bonuses and commissions	☐	☐
‣ Piecework payments (remuneration per item, rather than by time)	☐	☐
‣ Contributions to shares and options schemes	☐	☐
‣ Make-up pay (additional payments in excess of workers' compensation)	☐	☐
‣ Directors' remuneration	☐	☐
■ **Fringe benefits** The aggregate fringe benefits taxable amount from your FBT return, grossed-up using the Type 2 factor for both Type 1 and Type 2 benefits	☐	☐
■ **Employer superannuation contributions** All superannuation guarantee, salary sacrifice, or other payments	☐	☐
■ **Employment termination payments (ETP)** Any ETP amount that would be income taxable if paid to an employee	☐	☐
■ **Payment to contractors under relevant contracts** The labour content of all contracts is liable unless the contracts are specifically exempted by the payroll tax provisions	☐	☐
■ **Allowances** Allowances are liable, except the exempt portion of motor vehicle and overnight accommodation allowances	☐	☐

Other considerations – have you:

	Yes	No
■ included your gross interstate wages when calculating your threshold entitlement?	☐	☐
■ included all other group members' gross NSW and gross interstate wages when calculating your threshold entitlement if you are the group's DGE?	☐	☐
■ deducted all workers compensation payments, and other exempt payments such as payments in respect of maternity or adoption leave?	☐	☐
■ reported all wages paid to apprentices and new entrant trainees, and then offset these amounts to claim your rebate?	☐	☐

***Note**: This is a general guide only. Other liable wages such as third party payments, payments to expatriate or impatriate employees, or the liability for workers under employment agency contracts are not included in the above checklist.

Read more about liable wages at www.osr.nsw.gov.au or call 1300 139 815.

MORE INFORMATION

www.osr.nsw.gov.au

OSR directory

Client education
Phone: (02) 9689 6138
Email: client.education@osr.nsw.gov.au

Duties
(Conveyances, mortgages, contracts etc)
Phone: 1300 139 814*
Email: duties@osr.nsw.gov.au

Duties returns and gaming
(Parking space levy, general insurance, insurance protection tax, gaming and racing)
Phone: 1300 139 817*
Email: returns@osr.nsw.gov.au

Payroll tax
Phone: 1300 139 815*
Email: payrolltax@osr.nsw.gov.au

Land tax
Phone: 1300 139 816*
Email: landtax@osr.nsw.gov.au

Payments by post:
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Sydney NSW 1159

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Sydney NSW 2001

DX 456 Sydney

Phone enquiries
8.30 am – 5.00 pm,
Monday to Friday

Counter services
8.30 am – 4.30 pm,
Monday to Friday

*Interstate clients please call (02) 9689 6200.
Help in community languages is available.

Office of State Revenue:
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