



Office of State Revenue
NSW TREASURY

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Revenue Ruling No. PT 4

Anti-tax Avoidance Provisions Relevant Contracts and Employment Agents

Ruling history

Ruling no.	Issued date	Dates of effect		Status
		From	To	
PT 4	28 April 1986	01 April 1986	30 June 2007	Obsolete

Preamble

On 3 December 1985, certain anti-avoidance amendments to the Pay-roll Tax Act 1971 (NSW) were assented to. These measures were aimed at schemes designed to avoid liability for pay-roll tax by severing the employer-employee relationship (such arrangements included the use of so-called contractors to replace wages staff). The amendments dealt also with the use of employment agents.

Since the date of assent, it has become increasingly apparent that some sectors of industry would have been decidedly disadvantaged had the date of effect (3 December 1985) been enforced. As a result, the Minister for Finance has announced across the board changes to the date of effect and has excluded some sectors completely to be consistent with similar legislation in Victoria.

This ruling is designed to give a more detailed explanation of the new laws and to provide guidelines on some of the problem areas identified by employers and employment agents.

Ruling

DATE OF EFFECT

The Minister announced on 27 February 1986 that the date of effect had been extended to 1 April 1986. A further concession has now been granted for contracts entered into on or before 28 February 1986, extending the date of effect, in these circumstances, to 1 July 1986.

In short, payments for services performed on contracts entered into on or before 28 February 1986, will be liable for pay-roll tax from **1 July 1986** and payments for services relating to contracts entered into after 28 February 1986, will be liable from **1 April 1986**. All payments for services performed after 1 July 1986 will be automatically liable.

The changes in the dates of effect relate only to the contractor and employment agent provisions. The anti-avoidance legislation (Section 3B) still has a date of effect of 3 December 1985.

Also, for the purpose of working days in determining whether a contract is relevant, the count will commence on 3 December 1985 - paragraph 3(a)(iii) refers:

NOTE: *It is the date that services are performed that is relevant, not the date of the payment for those services.*

2 EMPLOYMENT AGENTS¹

The provisions of the Amendment Act, created some uncertainty as to the party liable in a situation where both a relevant contract existed and the services had been arranged through an employment agent. The Act will now be changed slightly to render employment agents, rather than the person receiving the services, primarily liable in these situations.

Pay-roll tax is calculated only on the remuneration paid by the agent to the worker and is payable regardless of the duration of employment. In other words, providing the worker carries out duties similar to that of an employee, the agent will be liable for pay-roll tax on **all** remuneration payments, subject, of course, to the normal pay-roll tax threshold.

The question has been regularly raised as to the position where the services are performed in another State. Providing the services are rendered **wholly** within that other State, the employment agent will not be liable in NSW. The agent could of course, be liable under the laws operating in that other State.

3 CONTRACTORS

It should be said, at this point, that the legislative changes relating to contractors were designed to make liable only those payments to persons who are, essentially, employees. It was not intended to tax payments made to independent contractors or subcontractors who genuinely offer their services to the public at large. These people are suitably provided for in the exemption provisions of the legislation. Another common misconception was that pay-roll tax would be payable on the **gross** amount of contracts.

It was never envisaged that pay-roll tax would be calculated on anything but the labour content of any contract and some guidelines are given in paragraph 7 for calculating this content.

(a) What is a relevant contract?

The contracts which are prima facie caught as 'relevant' contracts (subject to the exclusions referred to below), are those where, a person in course of carrying on a business:

- (i) supplies services to another person for or in relation to the performance of work, or
- (ii) receives services from another person for or in relation to the performance of work, or
- (iii) gives out goods to natural persons who perform work and re-supply the goods. (This includes the practice of giving out goods to 'outworkers' or 'homeworkers'.)

Accordingly, a person who engages labour needs to examine the exclusions or exemptions outlined below to determine whether or not any contracts are relevant contracts.

NOTE: Refer to Section 3A (1)(a)(b) and (c) of the Act.

In general terms, where a contract is subject to the legislation, (i.e. a relevant contract) payments under the contract will be deemed to be 'wages'. The person who pays for the labour will be deemed to be an 'employer' and will, subject to the normal pay-roll tax exemption level, be liable to pay pay-roll tax in respect of those deemed 'wages'. (N.B. As at 1 April 1986, the exemption level is \$170,000 per annum. Employers whose wages and payments to sub-contractors in respect of relevant contracts are \$170,000 per annum or

¹ Paragraph 2 applies only up to 31 December 1998. from 1 January 1999, See Section 3C of the Pay-roll Tax Act 1971

less will be exempt from pay-roll tax. This exemption level will be increased to \$200,000 from 1 July 1986.)

(b) Exempt contracts

After defining a relevant contract, the Act goes on to list a number of contracts which are exempt. IT SHOULD BE NOTED THAT ONLY ONE OF THESE PROVISIONS HAS TO BE SATISFIED TO RENDER THE CONTRACT EXEMPT.

(i) Contracts where the supply of a person's labour is ancillary to the supply of goods or the use of goods which are owned by the person.

This exemption recognises that a contractor, in supplying goods or the use of goods, may provide a considerable amount of labour but the supply of goods is the fundamental object of the contract. Examples of these situations would be where:-

- A) a person contracts to supply and install an air conditioning system, or
- B) a person contracts for the supply of a backhoe but as part of the contract the driver is provided as well.

In both of these cases, the associated labour is ancillary to the contract itself.

NOTE: Refer to Section 3A (1)(d) of the Act.

(ii) Contracts for services not normally required by the employer and rendered by a person who ordinarily provides such services to the public generally.

This exemption recognises that many transactions are contracts for services which are not part of the mainstream of a person's business (i.e. they are not normally required by the business in an ongoing sense). It applies where work of this type is performed by persons who are bona fide rendering services to other businesses and the public generally.

For example, where a small retailer engages a shopfitter to refit the interior of his or her premises, this would not be regarded as a regular requirement and the exemption test would be satisfied because the shopfitter provides services to shopkeepers generally and not just to the one shopkeeper.

Conversely, where a large chain store engages a shopfitter permanently on contract or by way of a series of contracts, because the scale of its operations require ongoing shopfitting in various stores, payment for the shopfitter's services would be liable to payroll tax.

NOTE: Refer to Section 3A (1) (e) (i) of the Act.

(iii) Contracts where services are performed by one contractor on no more than, in the aggregate, 90 days in the financial year.

This provision seeks to exempt payments to persons who are generally employed for a short term by the same employer in one financial year. It does however, recognise that a subcontractor may perform similar services for the same employer under a different contract or arrangement. In these circumstances the total days worked by the subcontractor, regardless of the arrangements, must be included in counting total days worked.

For example

- A) If a person contracts as a concreter in the first instance and as a cement mixer operator in the second, but is providing the same services, then both terms of service must be included; or
- B) If 'A Pty. Ltd.' provides services and 'B Pty. Ltd.' provides similar services and the persons actually performing the work are the same, then these periods must be aggregated.

Where a person has performed services for 80 days only, the contract is not relevant at that point. If, however, a further 11 days is performed by the same person later in the year, the contract becomes relevant and pay-roll tax is payable on payments relating to the full 91 days, i.e. liability goes back to day 1. Naturally, in these circumstances employers would only be expected to pay the pay-roll tax at the point when the 90 days is exceeded and not amend previous monthly returns.

The word 'days' refers to the number of days on which work is performed - the number of hours worked each day is not relevant. Thus if only two hours is worked on one day then this must still be counted as a "day".

NOTE: Refer to Section 3A (1)(e)(iii) of the Act.

For the year ended 30 June 1986 only, the count of days will commence on 3 December 1985, i.e. if a person under contract works for the same employer for more than 90 days between 3 December 1985 and 30 June 1986, all payments for services after 1 April 1986 will attract pay-roll tax. For other years, the count will recommence each July 1.

(iv) Contracts for services normally required by an employer for less than 180 days in the year.

It is considered that this provision will not be utilised to a great extent but it does provide further concessions where a person performs services for more than 90 days.

It recognises that businesses require various ad hoc services allied to the mainstream of work, but so infrequently that permanent employees are not engaged.

For example, a contract fruit picker may work in excess of 90 days but as the employer does not normally engage pickers for more than 180 days in the financial year, the contract would not be relevant.

It should be stressed, at this point, that the exemptions in paragraphs 3(b)(iii) and 3(b)(iv) of this circular apply to subcontractors and not casual employees who have always been subject to pay-roll tax.

NOTE: Refer to Section 3A(1)(e)(ii) of the Act.

(v) Contracts where payment is made at a rate exceeding \$500,000 per annum.

This provision recognises that a person receiving consideration of this magnitude would either not be a regular employee or would be providing services to the public generally.

NOTE: Refer to Section 3A(1)(e)(iv) of the Act.

- (vi) **Contracts which do not qualify under the above headings but where the Chief Commissioner is satisfied that the services are rendered by a person who provides services to the public generally.**

This exemption allows for anomalous cases, not intended to be caught by the legislation, to be referred to the Chief Commissioner of Pay-roll Tax for determination regarding exemption.

- (vii) **Contracts which do not qualify under the above headings but where the Chief Commissioner is satisfied that the services are rendered by a person who provides services to the public generally.**

This exemption allows for anomalous cases, not intended to be caught by the legislation, to be referred to the Chief Commissioner of Pay-roll Tax for determination regarding exemption, e.g. a carpenter is engaged by a number of builders throughout the year but exceeds 90 days service with one of these. In the circumstances, the employer may still seek exemption under this provision.

NOTE: Refer to Section 3A(1)(e)(v) of the Act.

- (viii) **Contracts where the person, who contracts to provide services, engages labour to perform these services.**

The following contracts would not be considered 'relevant':

- A) a party who contracts to provide the services is a **corporation** or partnership including corporations which engage two or more persons to perform the actual work under the contract;
- B) a party who contracts to provide the services is a **partnership** of natural persons and the work 'is performed by one or more partners and one or more persons engaged by the partnership to perform the actual work required under the contract;

NOTE: Where the work is performed by at least two partners who are natural persons, it will be accepted that the contract is not a relevant contract (see further note under C);

and

- C) the party who contracts to provide the services is a **natural person** and that person, together with at least one other person engaged by him, performs the actual work required under the contract.

NOTE: In all cases, the person engaged must perform the work that is the object of the contract. It would not be sufficient for say, a spouse, who performs purely clerical work, to satisfy the exemption provisions, as he or she would not be engaged in the work to which the contract relates.

This exemption will not apply where the Chief Commissioner determines that any part of the arrangement was entered into with the intention of avoiding payment of tax.

NOTE: Refer to Section 3A(1)(f) of the Act.

4 ANTI-AVOIDANCE PROVISION

Where the Chief Commissioner is satisfied that two entities are not operating independently of each other for the purposes of the exemptions under paragraphs 3(b)(iii) and 3(b)(iv) above (90 day and 180 day provisions), then any arrangement may, by notice in writing, be disregarded and a contract deemed 'relevant'.

5 LIMITATION OF APPLICATION OF THE "RELEVANT" CONTRACT CONCEPT

The New South Wales Government, consistent with the Victorian Government which introduced similar legislation in January 1984, has given an undertaking that the taxing of payments for contract labour as described in this circular will not extend to contracts with:

- (a) owner/drivers,
- (b) insurance agents, or
- (c) direct selling agents

unless the contracts are part of a contrived arrangement to avoid pay-roll tax. The services of these groups could attract pay-roll tax, however, if remuneration is paid by an employment agent.

6 DOUBLE TAXATION

The Amendment Act contains a provision to prevent instances of double taxation. Where pay-roll tax is paid in relation to deemed wages, no other person shall be liable for pay-roll tax in respect of that payment unless it is part of an arrangement to avoid or evade tax.

NOTE: Refer to Section 3A (5) of the Act.

7 ALLOWANCES FOR EQUIPMENT AND MATERIAL COSTS

As indicated earlier, the new legislation relates to the labour portion only of any contracts for the performance of work. Where a contract does not distinguish between labour and other costs, the Commissioner will accept, without verification the following percentages:

TRADE	LABOUR CONTENT
Bricklayer	70%
Carpenter	70%
Painter	70% (if the painter provides the paint)
Plasterer (not plaster board fixers)	80%

Contracting plaster board fixers, electricians, concreters and plumbers who provide their own vehicles, equipment and materials at their own cost (providing the materials are not purchased from the person engaging the contractor) would be considered exempt under Section 3A(1)(d) - paragraph 3(b)(i) refers (page 2).

The above rates have been arrived at in consultation with the Master Builders' Association of NSW and the NSW Division of the Housing Industry Association.

Should an employer maintain that a lesser percentage applies to labour in a particular contract, details should be submitted for consideration at the time the pay-roll tax return is lodged.

Similarly, if an employer maintains that an allowance should be made for a trade not listed above, then details should be enclosed with the appropriate return.

A D Clyne,
Chief Commissioner of Pay-roll Tax
28 April 1986