

Payroll Tax Act 2007 - Employment Agency Contracts - Declaration by exempt clients

Ruling no.	Issued date	Dates of effect		Status
		From	To	
PTA026 v2	08 July 2011	01 July 2011	-	Current. Replaces Revenue Ruling PTA026

Preamble/Background

The *Payroll Tax Act 2007* (the Act), which commenced on 1 July 2007, rewrites the *Pay-roll Tax Act 1971* and harmonises the payroll tax legislation in a number of Australian jurisdictions.

The employment agency provisions in Division 8 of Part 3 of the Act apply to an employment agency contract, which is defined as a contract under which a person (the employment agent) procures the services of another person (the service provider) for a client of the employment agent. The provisions are designed to apply to labour hire arrangements where the employment agent contracts with the client for the provision of labour where there is no agreement between the service provider and the client.

Under the employment agency provisions, the employment agent is taken to be the employer (section 38 of the Act) and the person who performs work for or in relation to which services are supplied to the client under an employment agency contract (on-hired worker) is taken to be the employee (section 39 of the Act). Amounts paid or payable under the employment agency contract are taken to be wages (section 40(1) of the Act). Consequently, the employment agent is liable to pay payroll tax on the amounts taken to be wages.

However, certain types of payments are exempt from payroll tax under section 40(2) of the Act. The exemption applies where:

- (a) the wages would have been exempt from payroll tax under Part 4 except for Division 4 or 5 of that part, section 50 or clause 5 of schedule 2 (**the Relevant Provisions**) had the service provider been paid directly by the client as an employee, and
- (b) the client has made a declaration to that effect to the employment agent, in respect of the service provider (**the Relevant Declaration**).

Organisations that are exempt from payroll tax under the Relevant Provisions include:

- Non-profit bodies having as their sole or dominant purpose a charitable, benevolent, philanthropic or patriotic purpose
- Public benevolent institutions
- Religious institutions
- Certain private non-profit schools providing education at or below the secondary level
- Health care service providers, and
- Councils (except for wages paid in relation to certain activities. See section 60 of the Act).

This Revenue Ruling explains the operation of the exemption under section 40(2) of the Act and its requirements.

Ruling

Relevant Declaration

To claim the exemption under section 40(2) of the Act, the employment agent has to obtain a Relevant Declaration from its client. The Relevant Declaration must be in writing and must state that the wages paid or payable to or in relation to the service provider for the provision of services in connection with the employment agency contract would be exempt under the Relevant Provisions had the service provider been paid by the client as an employee.

OSR Payroll Tax Form OPT006 (*Employment Agency Contracts - Declaration by Exempt Client*) which is available on www.osr.nsw.gov.au may be used to make the Relevant Declaration. This form is not a prescribed form and employment agents are free to develop their own version of the declaration.

Example 1

TempStaff Agency on-hired a worker to the Southern Benevolent Foundation, a public benevolent institution. The worker performed work for the Southern Benevolent Foundation in respect of its benevolent services.

Had the worker been paid directly by the Southern Benevolent Foundation as an employee, the wages would be exempt under the Relevant Provisions. Therefore, TempStaff Agency is entitled to the exemption under section 40(2) of the Act provided it obtains a Relevant Declaration from the Southern Benevolent Foundation for the worker.

Example 2

Recruitment Solutions Agency on-hired a worker to the Northern Region Shire Council. The worker performed work for the Northern Region Shire Council in connection with the supply of electricity (which is a non-exempt activity under section 60 of the Act).

Had the worker been paid directly by the Northern Region Shire Council as an employee, the wages would **not** be exempt under the Relevant Provisions. Therefore, Recruitment Solutions Agency is **not** entitled to the exemption under section 40(2) of the Act in respect of the wages it pays the worker.

Incomplete or Incorrect Declaration

Employment agents are liable for any payroll tax liability if a Relevant Declaration is found to be incomplete or does not meet the requirements outlined above. For this reason, employment agents should ensure that their exempt clients have completed the Relevant Declaration in full.

If a client has provided a Relevant Declaration which is later found to be incorrect (because the wages paid to or in relation to the service provider would not have been exempt under the Relevant Provisions had the service provider been paid by the client as an employee), the employment agent will nevertheless be liable to pay payroll tax on the amounts paid to the on-hired workers provided to that client.¹

If an employment agent wishes to confirm that a Relevant Declaration from a client is correct, the agent may contact the OSR. The secrecy provisions within the *Taxation Administration Act 1996* (TAA) prevent the OSR from divulging information about the client to the agent unless the agent first obtains written consent from the client that will enable the OSR to provide information about its payroll tax status.

¹ The previous version of this Ruling stated that the employment agent would be exonerated from any payroll tax liability in this situation if the employment agent had acted in good faith at all times. However, in the process of arriving at a single harmonised position, all jurisdictions agreed that it is not appropriate to exonerate the employment agent in such circumstances. Accordingly, jurisdictions which had issued the previous version of this Ruling have re-issued this Ruling as PTA026 (version 2).

Frequency of Declaration

The Act requires a separate Relevant Declaration for each employment agency contract entered into between the employment agent and their client(s). However, the Chief Commissioner recognises that this requirement may be impractical and onerous.

For this reason, the Chief Commissioner will be satisfied if the employment agent obtains one Relevant Declaration from its exempt client for each financial year if the type of work performed by all persons on-hired by that employment agent to that client is similar.

Where the contract for the provision of the workers goes beyond a financial year, only one declaration is required.

Employment agents should ensure that a Relevant Declaration is obtained before the end of the relevant financial year.

Example 3

ABC Personnel Agency on-hired six workers to the Western Public Hospital for two financial years. All six workers performed accounts payable work for Western Public Hospital for the whole period.

ABC Personnel Agency is entitled to the exemption under section 40(2) of the Act as the wages would have been exempt under the Relevant Provisions had the on-hired workers been paid directly by the Western Public Hospital as employees. To claim this exemption, ABC Personnel Agency must obtain a Relevant Declaration from the Western Public Hospital before the end of the first financial year for the six workers. As the contract to provide the six workers relates to a period of two financial years, ABC Personnel Agency will not be required to obtain a subsequent Relevant Declaration in the second year in respect of the six workers.

Example 4

In the 2011-12 financial year, TempPeople Agency on-hires three nurses to the Eastern Public Hospital. TempPeople Agency is entitled to the exemption under section 40(2) of the Act as the wages would be exempt under the Relevant Provisions had the three nurses been paid directly by the Eastern Public Hospital as employees. TempPeople Agency must obtain a Relevant Declaration from the Eastern Public Hospital for the three nurses by the end of the financial year.

Later that year, TempPeople Agency on-hires two accounts payable workers to the Eastern Public Hospital. TempPeople Agency is entitled to the exemption under section 40(2) of the Act as the wages would be exempt under the Relevant Provisions had the two on-hired workers been paid directly by the Eastern Public Hospital as employees. The Relevant Declaration already obtained by TempPeople Agency from the Eastern Public Hospital for that financial year relates to the provision of the nurses. As the work provided by the two accounts payable workers is not similar to the nursing services, it must obtain a further Relevant Declaration from the Eastern Public Hospital in respect of the two accounts payable workers.

Application for refund made by an employment agent

If an employment agent becomes aware that its client is exempt under the Relevant Provisions of the Act after having paid payroll tax on the wages under an employment agency contract, the employment agent may apply for a refund under section 18 of the TAA.

A refund application must be accompanied by a Relevant Declaration and written confirmation from the client stating that the Relevant Declaration is made for a retrospective period correlating to the refund period. All refund applications are subject to the time limits on reassessments in section 9 of the TAA.

Record keeping by employment agent

All Relevant Declarations must be kept by the employment agent for five years. Employment agents must ensure that all Relevant Declarations can be readily produced upon request by the Chief Commissioner.

Anti-avoidance provisions

If an employment agency contract has the effect of reducing or avoiding payroll tax, section 42 of the Act allows the Chief Commissioner to impose payroll tax on any payment made under the contract on any party to the contract including the client of the employment agent or the service provider.

Please note that rulings do not have the force of law. Each decision made by the Office of State Revenue is made on the merits of each individual case, having regard to any relevant ruling.

Tony Newbury

Chief Commissioner of State Revenue

08 July 2011