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[2] NSW Payroll Tax Act – yet another basis for taxing payments to contractors?

by Nicole Sammel, Nicole Sammel Tax Lawyers

Payments to a contractor can be subject to payroll tax under multiple bases. Of these bases, 3 are now well-known. This article discusses a potential 4th basis.

Legislative references in this article are to provisions of the *Payroll Tax Act 2007* (NSW).

The 3 "known" bases

It is clear that payroll tax can apply to payments made by a business entity (the "taxpayer") to a contractor under any of the following 3 bases.

1. ***Employee:*** The contractor, though labelled a "contractor", is in fact an employee of the taxpayer under the general law meaning of the term employee.
2. ***Employment agent under s 37:*** The taxpayer is an "employment agent" under the definition of that term in s 37 of the Act. A taxpayer will satisfy the definition of "employment agent" in s 37 if, under a contract, they procure another person to provide labour in and for the conduct of the business of the taxpayer's client (see, for example, the December 2023 decision of the NSW Court of Appeal in *Chief Commissioner of State Revenue v Integrated Trolley Management Pty Ltd* [2023] NSWCA 302).
3. ***No contractor exemption:*** The contract between the taxpayer and the contractor does not qualify for any of the "contractor exemptions" listed in s 32(2) of the Act.

In other words, it is clear that if a business taxpayer makes a payment to a contractor, the payment will be liable to payroll tax (subject to the taxpayer meeting the payroll tax threshold and not being exempt from payroll tax, eg, under Pt 4 of the Act) unless the taxpayer can show that:

- the contractor is not an employee;
- the taxpayer is not an "employment agent" as defined in s 37; and
- one of the "contractor exemptions" in s 32(2) applies to the contract between the taxpayer and the contractor.

The 4th basis

But it seems to me that there is a 4th basis under which payroll tax could be imposed on payments to a contractor. It is s 42 of the Act. Under s 42 any party to an employment agency contract, including a party that is ***not*** the employment agent (eg, the party to whom workers are supplied by the employment agent) can be deemed to be an employer and have payments they make under the contract treated as wages for payroll tax purposes.

Section 42 states:

"[I]f the effect of an employment agency contract is to reduce or avoid the liability of any party to the contract to...payroll tax, the Chief Commissioner may...determine that any party to the contract is taken to be an employer for the purposes of this Act; and determine that any payment made in respect of the contract is taken to be wages for the purposes of this Act."

When might Revenue NSW seek to apply s 42?

One possible situation is where the employment agent (as defined in s 37) under an employment agency contract is not itself liable for payroll tax, eg, because it is below the payroll tax threshold.

Compare the scenarios where a business entity that requires workers for use in its business obtains workers from:

(a) multiple small contractors (which in turn engage sub-contractors to provide labour to the business entity), each of which is under the payroll tax threshold; vs

(b) a single, large, contractor (which in turn engages sub-contractors to provide labour to the business entity), which is over the payroll tax threshold.

Although the small contractors and the large contractor will both satisfy the definition of "employment agent" in s 37, only the large contractor will be liable to payroll tax on the payments it makes to sub-contractors. Therefore, under scenario (b), payroll tax will be payable to Revenue NSW, but under scenario (a), it might not be. Query whether Revenue NSW could successfully seek to apply s 42 to a contract between the business entity and a small contractor (and thereby require the business entity to treat payments to the small contractor as taxable wages notwithstanding that:

- the small contractor is not an employee of the business entity;
- the business entity is not an employment agent; and
- the contract between the business entity and the small contractor qualifies for a contractor exemption).

As far as I am aware, there is no case law or other guidance on s 42. However, the application of s 42 may not be entirely theoretical – in the course of my own client work, I was asked by Revenue NSW to provide submissions on the application of this section.

TAX PRACTICE UPDATE

[3] TASA changes: 2024 timetable updated

A number of important changes were made to the *Tax Agent Services Act 2009* by the *Treasury Laws Amendment (2023 Measures No 1) Act 2023*: see 2023 WTB 7 [75]. The Tax Practitioners Board has updated a ***release*** that lists the changes which have either recently commenced or will commence in 2024.

1 JANUARY 2024

The following changes have already commenced.

Use of disqualified entities

Items 15 and 16 of the Code of Professional Conduct prevent tax practitioners from employing or using a "disqualified entity" without TPB approval, or entering into certain arrangements with such entities.

The TPB issued 2 draft guidance documents on disqualified entities in November 2023: see 2023 WTB 52 [936]. The consultation period for these close on 16 February 2024, so presumably the final versions will not be too slow in coming after that.

For tax practitioners that need to seek the TPB's approval, a simple approval form has been created which can be accessed by logging into ***My Profile*** from 1 January 2024.

Minister's power to expand the Code

The Minister has the ability to expand the Code to include additional obligations that tax practitioners must comply with, to address emerging or existing behaviours and practices.

TASA objects clause

The objects clause in the TASA has been updated to modernise the object of the TASA to recognise its role in "supporting public trust and confidence in the integrity of the tax profession and the tax system".

1 JULY 2024

The following changes will commence on 1 July 2024.

Registration periods to become annual

The registration period for tax practitioners will change from at least every 3 years to at least every year.

Self-reporting of breaches

A tax practitioner will be required to notify the TPB in writing if the tax practitioner has reasonable grounds to believe that they have breached the Code and that the breach is a significant breach.

