



Edited version of your private ruling

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Ruling

Subject: PAYG Withholding

Questions

1. Will an amount be required to be withheld under section 12-35 of Schedule 1 to the *Taxation Administration Act 1953* (ITAA 1953), in respect of payments made to a support worker?

Answer: No

2. Would the answer to question one differ if a support worker was involved for a period in excess of 6 months?

Answer: No

3. If the answer to question one is no, will an amount be required to be withheld under section 12-190 in Schedule 1 to the ITAA 1953 in respect of payments made to a support worker, where the worker also provides a 'statement by supplier' form stating the supply is wholly of a private or domestic nature?

Answer: No

4. Would the answer to question three differ if the support worker worked more than 30 hours per week?

Answer: No

This ruling applies for the following period

Year ended 30 June 2013

Year ended 30 June 2014

Year ended 30 June 2015

Year ended 30 June 2016

Year ended 30 June 2017

The scheme commenced on

1 July 2012

Relevant facts

You live with your family and receive disability support funding.

Together with your family, you enlist the help of individuals to support you while your family is away on an as-needed basis.

You pay an hourly rate.

The number of hours where care is required varies depending upon your situation.

The support is typically provided by transient workers (such as backpackers) and the length of time that a particular individual will be involved can vary, but is typically up to six months.

The support provided to you by the support workers will also vary depending upon the time of day that care is required, but can include:

- transport to and from the nearest school bus stop
- providing meals
- assistance with personal hygiene matters
- entertainment such as playing games
- general supervision to ensure your safety
- undertaking general household duties including washing clothes, folding and ironing, vacuuming sweeping and mopping, cooking, washing dishes, cleaning and making beds.

Your family makes the payments to the support workers on your behalf in their capacity as your legal guardians.

The support worker provides you with a 'Statement by Supplier' declaration such that tax is not withheld on the payments made to them.

A variety of means are used by my family to source support workers including, but not limited to:

- family and social networks
- internet sites
- local newspapers.

The support workers are not professional care workers. On occasions, multiple support workers are utilised.

There is no sick or annual leave entitlement accruing for the support workers.

You do not provide insurance for the support workers.

There is no formal agreement. Tasks are agreed verbally and are provided on an ad-hoc basis, when required.

The typical length of the stay is generally no longer than 6 months.

The support workers are provided with some general guidelines on what is required in relation to caring for you. The support workers are flexible in determining how these tasks are performed provided your safety and wellbeing is maintained.

Edited version of private ruling

Page 2 of 5

You are not in the business of providing support services.

You do not specify that a company uniform or specific dress code is required.

You maintain no conditions that the support workers are bound to work specifically for you.

Relevant legislative provisions

Taxation Administration Act 1953 section 12-35

Taxation Administration Act 1953 section 12-190

Reasons for decision

Question one and two

The expression employee is not defined in either the ITAA 1936 or the *Income Tax Assessment Act 1997*. Therefore it has its ordinary meaning.

Taxation Ruling TR 2005/16 discusses who is an employee within the ordinary meaning of that expression.

Paragraph 17 states:

The relationship between an employer and employee is a contractual one. It is often referred to as a *contract of service*. Such a relationship is typically contrasted with the principal/independent contractor relationship that is referred to as a *contract for services*. An independent contractor typically contracts to achieve a result whereas an employee contracts to provide their labour (typically to enable the employer to achieve a result).

The ruling provides the following key indicators that should be considered when determining whether an individual is an employee or independent contractor at common law:

1. Terms and circumstances of contract - a clause in a contract that purports to characterise the relationship between the parties as that of principal/independent contractor and not that of employer/employee must be considered with all the other terms of the contract. That is, the parties cannot deem the relationship between themselves to be something that it is not by simply giving it a different label.
2. Control test - the degree of control which a person who engages another person can exercise over that person is a classic test for determining the nature of the relationship: *Hollis v Vabu* (2001) 207 CLR 21; 47 ATR 559. A common law employee is told not only what work is to be done, but how and where it is to be done. However, the mere fact that a contract may specify how the contracted services are to be performed does not necessarily imply an employment relationship.
3. Contract for results - where the substance of a contract is to achieve a specified result, there is a strong (but not conclusive) indication that the contract is one for services. Other indicators of a contract for services include where the person is free to employ their own means (such as third party labour, plant and equipment) to achieve the contractually specified outcome, the consideration is for a fixed sum on completion of the specified services which is the result, as opposed to an amount paid by reference to hours worked.
4. Whether work can be delegated - if a person is contractually required to personally perform the work, this is an indication that the person is an employee. However, 'delegation' exercised by an employee (e.g. a

manager or supervisor) is fundamentally different from the delegation exercised by a contractor where the contractor is responsible for the cost and the emphasis is on achieving a result.

5. Risk - where the worker bears little or no risk of the costs arising out of injury or defect in carrying out their work, they are more likely to be an employee. On the other hand, an independent contractor bears the commercial risk and responsibility for any poor workmanship or injury sustained in the performance of work. An independent contractor also often carries their own insurance and indemnity policies.

6. Provision of tools/payment of own expenses - the provision of assets, equipment and tools by an individual and the incurring of expenses and other overheads is an indicator that the individual is an independent contractor. Further, the Tax Office considers that an employee, unlike an independent contractor, is often reimbursed (or receives an allowance) for expenses incurred in the course of employment, including for the use of their own assets such as a car.

7. Other - other indicia suggesting an employer-employee relationship include:

- the right to suspend or dismiss the person engaged;
- the right to the exclusive services of the person engaged;
- provision of benefits such as annual, sick and long service leave;
- provision of other benefits prescribed under an award for employees; or
- a requirement that a worker wear a company uniform.

Application to your circumstances:

There is no formal agreement between yourself and the support workers, tasks are agreed to verbally.

With respect to the control test, you do not control the support workers and your verbal agreement covers only general guidelines on what is required. The care workers have flexibility in determining how tasks are performed provided your safety and wellbeing is maintained.

You do not provide insurance for the support workers which indicates that they are independent contractors rather than employees.

Regarding the provision of equipment, the nature of the activities do not require significant tools to be involved.

Consistent with the indicators for independent contractors, you maintain no conditions that the support workers are bound to work specifically for you. Furthermore there are no sick or annual leave entitlements accruing from the carer role which are usually mandatory in an employment contract.

You do not specify that a company uniform or specific dress code is required.

In application to your case, having regard to all the factors listed above, it is considered that your individual support workers are not employees (according to its ordinary meaning) and that they better fit the description of independent contractors who are providing only a service.

Please note that the length of the arrangement between yourself and the support workers will not alter the status of the relationship, the individual will remain a contractor provided the relationship is materially the same as that described above.

As such, you are not required to register for PAYGW, nor are you required to deduct amounts for PAYGW from payments made to the support workers.

Question three and Question four

Taxation Ruling TR 2002/9 provides guidance as to whether an entity making a payment in respect of a supply is required to withhold an amount under section 12-190 of Part 2-5 (the PAYG provisions) of Schedule 1 to the TAA 1953.

TR 2002/9 states that if a payment is not made in the course or furtherance of an enterprise carried on in Australia by the payer, there is no requirement to withhold.

This subsection was inserted into section 12-190 by the *A New Tax System (Tax Administration) Act (No 2) 2000* on 30 June 2000. Previously the provision had provided that there was no requirement to withhold if the payment was made by an individual and the payment was for the payer wholly of a private or domestic nature.

It was considered that this exclusion was too narrow. The new exception is wider in that it also applies to payers that are not individuals. Also, the provision now clearly excludes payments made to an employee or a labour hire worker relating to their work in that capacity.

TR 2002/9 provides the following example:

85. Naree has just purchased a home in a residential suburb to be used for her private residential accommodation. Naree has her own consulting business and has an ABN as she is carrying on an enterprise in relation to her consulting work. Naree works from her business premises in the city.

86. The home needs painting so Naree engages a painter to paint the exterior and interior of the house. The painter does not provide Naree with his ABN at or before the time of payment. Naree is not required to withhold as the payment is not made in the course or furtherance of an enterprise carried on by Naree. Naree has hired the painter in her personal capacity in relation to a private and domestic matter - not as part of her business or enterprise activities.

In your case, you engage the services of various support workers to assist you with your daily activities. You hire the support workers in your personal capacity in relation to a private and domestic matter and not as part of a business or enterprise you carry on. As such you are not required to withhold an amount under section 12-190 of Schedule 1 to the TAA 1953. Please note that the number of hours worked by the support workers will not alter the requirement to withhold.

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