

Edited version of your private ruling

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Ruling

Subject: PAYG Withholding

Question 1

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

Answer

No

Question 2

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 TAA in respect of payments made to assistants, where they provide a 'statement by supplier' form stating the supply is wholly of a private or domestic nature?

Answer

No

This ruling applies for the following periods

Year ended 30 June 2013

Year ending 30 June 2014

Year ending 30 June 2015

Year ending 30 June 2016

Year ending 30 June 2017

The scheme commenced on

1 July 2013

Relevant facts

You receive Government support.

You use the services of assistants.

Specific role

The role of this person is to assist you with specific tasks as agreed between you, your family and the other assistant.

The role also requires the services of a skilled person as they undertake tasks that are crucial to your future. The role is defined by discussions with you and your family in consultation with the other assistant.

This person helps you for a small number of hours per week.

This person is paid on an hourly basis on a casual rate.

This person has provided a "Statement by Supplier" form and as such tax is not withheld from payments made.

There is no formal agreement but there is a job description.

Other assistants

This role is to maintain your safety and wellbeing and to minimise stress on your family.

You use this person to work with you, your family and the other person.

This person's tasks are determined by you and your family according to your desires and needs with some flexibility.

This person does not have the flexibility or control to decide what tasks they will do without agreement in advance.

This assistant is used and is paid an hourly rate on a casual basis.

This person has provided a "Statement by a Supplier" form and as such tax is not withheld from payments made.

There is no formal agreement but there is a job description.

General

Your family is not in the business of providing services and therefore both assistants are not working as part of a family business.

The nature of the tasks undertaken is akin to personal and domestic purposes.

There is no ability to delegate services provided by the assistants.

There is no significant commercial risk involved.

The nature of the activities does not require significant tools to be provided.

There is no sick or annual leave accruing from either role.

You do not provide insurance cover for the assistants.

Relevant legislative provisions

Taxation Administration Act 1953 Section 12-35 to Schedule 1

Taxation Administration Act 1953 Section 12-190 to Schedule 1

Reasons for decision

Question 1

Section 12-35 of the *Taxation Administration Act 1953* (TAA) states an entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity)

The expression employee is not defined in either the *Income Tax Assessment Act 1936* (ITAA 1936) or the *Income Tax Assessment Act 1997* (ITAA 1997). Therefore we use 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

- a requirement that a worker wear a company uniform.

In application to your case there is no formal agreement between you and the assistants, as tasks are agreed to verbally.

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

You pay the assistants on an hourly basis not in a results achieved basis.

The work cannot be delegated to anyone else.

You do not provide insurance for the assistants, which points towards them being independent contractors rather than employees.

The nature of the activities does not require significant equipment or tools to be used.

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

Having regard to all the factors listed above, it is considered that the assistants are not employees (according to its ordinary meaning) and that they better fit the description of independent contractors who are providing a service.

Please note that the length of the arrangement between you and the assistants will not alter the status of the relationship, the individuals will remain contractors provided the relationship is materially the same as that described above.

As such, you are not required to withhold amounts from payments made to your assistants under section 12-35 of Sch 1 of the TAA.

Question 2

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.

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:

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.

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 assistants to assist you with your daily activities. You hire the assistants 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 assistants will not alter the requirement to withhold.

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