

January 2008

PAY-ROLL TAX                    GUIDELINES ON SUBCONTRACTING ARRANGEMENTS  
AND EMPLOYMENT AGENTS

## INTRODUCTION

1. Legal precedents have established that the process of determining whether an employment relationship exists is one of gathering detailed information about the relationship, identifying the indicia that either support or do not support the existence of an employment relationship, evaluating those indicia in the context of the relationship, and then on balance, making a decision as to whether or not an employment relationship exists.
2. While the process is well settled, it is recognised that in some cases the application of the legal principles to a particular set of facts is most difficult. Accordingly, in these cases there is no easy answer for employers, their representatives, or taxation authorities, to the question •who is an employee?Ž and in those cases it may be necessary to seek legal advice.
3. The Commissioner of State Revenue would be acting contrary to legal principles if a process other than that established by case law were to be adopted in determining whether an employment relationship existed or not. As those legal principles require that all the circumstances of the parties• relationship must be taken into account when determining whether or not an employment relationship exists, each case must be considered on its own facts. For this reason, the Commissioner of State Revenue can do no more than provide guidelines to assist employers and their representatives.
4. The purpose of this ruling is to provide some background information about employment relationships and to provide guidelines as to how the Commissioner of State Revenue will consider certain subcontracting arrangements for pay-roll tax purposes. These arrangements include:
  - 4.1 a contract between a principal and the individual who performs the services;
  - 4.2 a contract between a principal and a company, partnership or trust that is related to the individual who performs the services; and
  - 4.3 •employment agentsŽ as defined in the Glossary of the Pay-roll Tax Assessment Act 2002 (•PTAAŽ).

6. In accordance with the definition of •wages•, payments liable to pay-roll tax include payments made to an employee under an employer/employee relationship.  
Any wages paid by someone acting for the employer, or acting in concert or under an arrangement or undertaking, whether formal or informal and whether express or implied, are taken to be an employer.
7. Where an employer/employee relationship does not exist between a principal and a worker, no pay-roll tax is payable.
8. The relationship between an employer and an employee is a contractual one and is referred to as a •contract of serviceŽ. The Act does not include a definition of the terms •employeeŽ or •contract of serviceŽ and therefore case law is relied on to provide working interpretations of those terms.
9. In contrast to an employer/employee relationship is the principal/independent contractor relationship, which is referred to as a •contract for servicesŽ.
10. In general terms, an employee contracts to provide his/her labour in the service of the employer, while an independent contractor works in his/her own independent business and, in the course of his/her business, contracts to achieve a result for the principal.
11. In most cases, distinguishing between an employee and an independent contractor is relatively simple. However, over time a change in work practices has, in some cases, tended to blur the traditional distinctions between the two.
12. Over many years the courts have established tests to assist in determining when an employer/employee relationship exists and these will be outlined later in this document.

#### Worker Contracting Through a Company, Partnership or Trust

13. Section 21(1) of the PTAA provides that:
  - If a person is a party to a tax-reducing arrangement, the Commissioner may ...
  - (a) disregard the arrangement;
  - (b) determine that any party to the arrangement, is an employer for the purposes of this Act; and
  - (c) determine that any payment made under the arrangement is wages for the purposes of this Act.Ž

In the Glossary of the PTAA a •tax-reducing arrangement• means •any arrangement, transaction or agreement, whether in writing or otherwise ...

  - (a) under which a natural person [the worker] carries out, for or on behalf of a second person, services for which any payment is made to a third person related or connected to the worker; and
  - (b) which has the effect of reducing or avoiding the liability of any person to the assessment, imposition, or payment of pay-roll tax (whether or not that is the only effect of the agreement);Ž
14. The effect of this provision is that, notwithstanding that a person•s services are provided through an arrangement with an entity such as a company, partnership or trust, the Commissioner can disregard that arrangement and determine the pay-roll tax liability of payments based on the relationship between the principal and the natural person who performs the services.





relationship that exists between the parties.

30. Similarly, a clause in a contract that describes the contract as one to produce a result, is not conclusive and the contract will not be regarded as a contract between an independent contractor and principal unless supported by the facts.

#### Contracts to Achieve a Given Result

31. A contract to produce a given result is one in which the focus is on what ultimate result the contract requires, rather than what must be provided when performing the contracted task.
32. If the facts behind a contract support that its purpose is to achieve a given result, then it is an indicator that the relationship is one between principal and independent contractor.
33. This is particularly the case where the contract is for a fixed price, where payment is made subject to meeting various milestones specified in the contract, or at its completion.
34. If the contract is not to achieve a given result but is really for the labour of the worker, this is an indication that the relationship is one of employer/employee. An example of this type of arrangement would be where a worker provides labour only pursuant to a contract and is paid at an hourly rate, or set rate of pay, per pay period.

#### Control and Direction

35. It is accepted that an important test of whether an employer/employee relationship exists is that of control. The power or right to control or to direct (eg. through a supervisor) how, where, when and who is to perform the work in question, is a strong indication of an employer/employee relationship. For example, if the worker is required to work in conjunction with one or more others (eg. in a pair or as part of a team), or if his/her work is co-ordinated with the work undertaken by others, it is likely that it would be necessary for the employer to exercise, or have the right to exercise, some degree of control and direction over the worker. Similarly, if the worker works on a project that is subject to quality control measures, it is likely that the worker will also be subject to some degree of control and direction.
36. The absence of control may indicate that the relationship is not one of employer/employee, but this is not necessarily conclusive. In the High Court judgement in *Stevens v Brodribb Sawmilling Co Pty Ltd (1986)*, it was noted that control is not the sole determinant of the nature of the relationship. It is merely one of a number of indicia to be considered in making that determination and therefore it is the totality of the relationship between the parties which must be considered.
37. This multi-factor approach is illustrated in more recent judgements such as *Vabu Pty Ltd v Federal Commissioner of Taxation (1996)*. In the *Vabu* case it was held that while Vabu exercised a measure of control over its couriers, they were not employees because they supplied their own vehicles, were at risk of loss if they did not make enough deliveries and were paid to produce a result.
38. Clearly, in this case other factors have outweighed the importance of control.
39. Nevertheless, it is considered that in many instances the control test is still an important guide as to whether a person is contracting independently or working as an employee.

## Independent Business

40. If a worker is engaged by a person in the ordinary course of operating their own independent business, then this is indicative of an independent contractor and principal relationship, particularly if the person works for a number of clients.
41. For example, if the worker was engaged as a result of advertising his or her services

49. This approach, based on legal principles which require the totality of the relationship to be taken into account, requires that each case be considered on its own particular facts.
50. However, in order to provide employers and their advisors with some guidance in respect of the Commissioner's position on employer/employee relationships in general, a short list of factors has been developed from judicial precedents.
51. Where all those factors exist in a relationship between a worker and the person for whom the services are provided, it is likely that the Commissioner will accept that the relationship is one of independent contractor/principal.
52. The factors are as follows:  
The worker:
  - 52.1 undertakes to produce a "given result" for a fixed fee rather than to simply do work i.e. the worker is paid for the result of the labour and not for the labour itself;
  - 52.2 provides the materials and/or equipment necessary to undertake the task. The equipment should be more than "incidental" to the person's services i.e. should be more than tools of trade;
  - 52.3 has an unfettered discretion to delegate the work;
  - 52.4 bears the risk of making a loss in running a business through incurring significant expenses related to the income earned; and
  - 52.5 provides services to the general public.
53. Where all the factors identified in paragraph 52 above are not present in an arrangement, it will be necessary for the Commissioner to examine the totality of the relationship, as explained in paragraphs 48 and 49 of this ruling, before making a determination as to the nature of the relationship.
54. Where all the factors identified in paragraph 52 are not present in an arrangement and that arrangement is simply "to do work" for an hourly, or other time based rate of pay, it is likely that the Commissioner will determine that the arrangement is one of employer/employee.
55. Should there be any doubt as to whether an arrangement would attract pay-roll tax, a written approach should be made to the Commissioner specifying the details and attaching the relevant documentation.
56. At Schedule 1 is a list of questions which when answered, will give an indication as to whether an employer/employee relationship is likely to exist. Note that these questions are provided only to give an indication as to whether an employment relationship exists.

## SCHEDULE 1

The following is a list of questions which, when answered, will give an indication as to whether an employer/employee relationship exists.

If the answer to most of the questions is •yes•, it is a strong indication that the person providing the services is an employee and payments made to that person will be subject to pay-roll tax:

- ◆ Is the person providing the services paid on a time basis (e.g. hourly rate) rather than on a per job basis?
- ◆ Is the contract wholly or principally for labour?
- ◆ Does the person requiring the services have the authority to control or direct the manner in which the work is to be performed?
- ◆ Is the person providing the services prevented from delegating or subcontracting his/her work to another person without approval?
- ◆ Is the person providing the services engaged for a lengthy period or on a continuing basis?
- ◆ Are the services provided by the worker ordinarily required by the person requiring the services in the normal course of their business?
- ◆ Is the person providing the services performing work similar to work carried out by an employee in the organisation?
- ◆ Are the work hours defined?

### IMPORTANT

Note that these questions are provided only to give an indication as to whether an employment relationship exists. Should an employer be uncertain as to whether an employment relationship exists, professional advice should be sought or the Office of State Revenue contacted.

Telephone: (08) 9262 1300

Facsimile: (08) 9226 0841

Email: payroll@ f



## ADDENDUM TO REVENUE RULING PT6

### Guidelines on subcontracting arrangements

Date: January 2008

#### Introduction

1. Following consultation with industry bodies, professional advisers and employers, it has become apparent that some business operators may not be correctly applying the guidelines in Revenue Ruling PT6 when considering whether the workers they have engaged are independent contractors or employees and, in turn, when deciding whether payments made to, or in relation to, such workers are liable for pay-roll tax.
2. This addendum provides additional guidance on the characteristics of (a) employer/employee relationships and (b) principal/independent contractor relationships and should be read in conjunction with Revenue Ruling PT6.

The status of all workers engaged as "contractors" should be considered

3. Many different types of workers are engaged by business operators as "contractors" including tradespersons (such as welders, boilermakers, fitters), trades assistants, draftsmen, architects, riggers, site supervisors, various types of installers and executive/managerial staff.
4. Whenever one or more workers are engaged as "contractors" the business operator should be aware that there is a possible liability for pay-roll tax on the payments made to the workers particularly where:
  - the worker is not engaged to produce a given result for a fixed fee and accordingly is paid an hourly/daily rate or a piece work rate;
  - the worker performs services required by the business operator either at the business operator's place of business or at a site specified by the business operator;
  - payment is wholly or principally for the labour of the worker; or
  - the worker is not conducting a business that is independent from the business operator's business.

Note: For the purpose of determining pay-roll tax liability, the fact that the worker is paid or engaged through their interposed entity or business such as a company, partnership or trust is irrelevant (see paragraphs 13-16 of Revenue Ruling PT6).

5. Where after examining all aspects of the relationship between the business operator and the worker the combined elements at paragraph 5 are considered to be satisfied, that is, the worker is engaged directly or indirectly









20. When considering whether a business operator has the right or authority to exercise control or direction over a worker it is important to consider this issue in the context of the entire period that the worker has worked for the business operator and not simply concentrate on the recent history. For example, the worker may perform the tasks in accordance with the instructions he was given when he first commenced working for the business operator. Similarly, the worker may carry out the tasks in accordance with manuals or other written instructions provided by the business operator.

#### Power to delegate

21. Revenue Ruling PT6 explains that the power to delegate work may be

## Example

A firm sells air conditioning units. The firm has a number of salaried employees who are sales people and also has several commission based sales people. The commission based sales people do work that is almost identical to the work of the employed sales people. As the business of the firm is the selling of air conditioners, the commission based sales staff are considered integral to the business.

## Independent business

26. If a business operator engages a worker who conducts their own independent business, then this is indicative of a principal/independent contractor relationship rather than an employer/employee relationship (see paragraphs 40-43 of Revenue Ruling PT6). The issue to be considered here is whether the worker is conducting a business on their own account as distinct from participating in the business of the business operator.
27. In *Hollis v. Vabu Pty Ltd trading as Crisis Couriers* (2001) the High Court examined the relationship between a courier company and its bicycle couriers. In concluding that the bicycle couriers were employees and not independent contractors, the Court examined whether the bicycle couriers were running their own independent businesses:

*"Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. ...*

*... A bicycle courier is unable to make an independent career as a free-lancer or to generate any "goodwill" as a bicycle courier. The notion that the couriers somehow were running their own enterprise is intuitively unsound, and denied by the facts disclosed in the record".*

28. Some of the features usually regarded as indicating that the worker is operating their own independent business are:
- they have their own business premises;;

- they own and maintain significant capital equipment and assets (not just hand tools);
- they bear the commercial risk of making a profit or loss on a job;
- they advertise to the general public;
- they bear the liability and responsibility for any poor workmanship or injury.

Examples



## Summary

30. In determining if payments made to a worker should be included for pay-roll tax purposes, the entire working relationship between the business operator and the worker should be considered in detail and no worker should be included or omitted on the basis of only a few factors or on the basis of a superficial examination of the relationship.

### IMPORTANT

This addendum is provided to assist in determining if payments to workers are liable for pay-roll tax. Should a business operator be uncertain as to their liability for pay-roll tax, professional advice should be sought or the Office of State Revenue contacted for further information.

Telephone: (08) 9262 1300  
Email: payroll@finance.wa.gov.au

Facsimile: (08) 9226 0841  
Website: www.finance.wa.gov.au