

Revenue | Rulings

Exemption for contractors ordinarily rendering services to the public

Revenue Ruling PT. 091

Replaces PT.075

Preamble

Section 3C of the *Pay-roll Tax Act 1971* (the Act) defines a 'relevant contract' and deems the principal and contractor under such a contract as employer and employee. It also deems payments made under the contract as wages for pay-roll tax purposes. Most contracts for the provision of services are relevant contracts but a number of exemptions exclude some contract payments from the imposition of tax.

The exemption found in section 3C(1)(e)(v) provides the Commissioner of State Revenue (the Commissioner) with discretion to exempt contracts to which other exemptions do not apply. Originally, this provision exempted services supplied under a relevant contract where:

'...the Commissioner is satisfied that those services are rendered by a person who ordinarily renders services of that kind to the public generally'.

The State Revenue Office (SRO) viewed this exemption as applying only in anomalous situations where section 3C included a contract outside the intended scope of the provisions but for which no other exemption was available. The SRO's view, that this exemption had limited application, was not supported by the decision of the Administrative Appeals Tribunal in *Behmer & Wright v Commissioner of Pay-roll Tax (1994) 94 ATC 2067*. The Presiding Member of the Tribunal found that in determining whether 'services were rendered to the public generally' it was necessary to consider a longer period than the financial year for which the liability of a principal (deemed employer) was to be established.

Following the Tribunal's decision, the SRO considered that the exemption was no longer applied as a 'fail safe' mechanism but was often applied inappropriately to override the requirements for the exemption provided in section 3C(1)(e)(iii) (for services provided on 90 days or less in a financial year).

In particular, the SRO was concerned that the exemption was being routinely applied to exempt payments to contractors who provide labour only and who are essentially captive to one principal.

Section 3C(1)(e)(v) was amended to ensure that the exemption could not be applied widely to a range of contracts intended to be taxable.

From 1 February 1999, the exemption applies to services where:

'...the Commissioner is satisfied that those services are rendered by a person who ordinarily renders services of that kind to the public generally **in that financial year**'.

This ruling replaces PT.075, which dealt with the exemption in its original form. It lists the factors considered by the Commissioner of State Revenue when exercising the discretion to find that a contract is not a relevant contract under section 3C(1)(e)(v). It also provides a single test which employers can use to claim the exemption for a contractor on a self-assessing basis.

Ruling

This ruling applies from 1 July 1999 although the amendments to section 3C(1)(e)(v) took effect on 1 February 1999. PT.075 was retained until 30 June 1999 to ensure that no taxpayer was disadvantaged by a change part way through a financial year in the tests to claim the exemption by self-assessment.

Section 3C(1)(e)(v) of the Act allows the Commissioner discretion to exempt a contract when satisfied that the services supplied under the contract are services which are rendered by a contractor who ordinarily renders such services to the public generally in that financial year. In applying this exemption, the Commissioner needs to be satisfied that the contractor provides the services in the course of conducting a genuine independent business, which stands in the market place and ordinarily renders like services to the public generally.

The mere fact that a contractor works on a succession of jobs for different principals does not mean that this requirement is satisfied. It is necessary to consider those steps actually taken by the contractor to create an independent business and to obtain work from clients other than the principal in question.

The Commissioner, in making his determination, will conduct a broad review of the contractor's business and, in so doing, will consider many issues, including the following:

- the use of a business name by the contractor;
- the extent and nature of advertising undertaken by the contractor;
- the range of clients serviced by the contractor;
- the extent and nature of plant and equipment provided by the contractor in execution of the services;
- the engagement of staff or sub-contractors by the contractor;
- the use of business premises by the contractor;
- the method of operation of the business (such as tendering for jobs);
- the potential for entrepreneurial risk;
- the nature of contracts entered into (such as formal long term or informal rolled over contracts);
- the history of the formation of the contractor's business;
- how the contractor won the contract;
- whether work is performed on separate contracts concurrently;
- the nature of the contractor's business and the type of services provided;
- whether the contractor bears the cost and responsibility for faulty materials or workmanship;
- whether the contractor quotes competitively for jobs on an all inclusive basis (all labour and materials); and
- whether the contractor merely charges for services on an hourly rate and adds on the cost of materials.

The above is not intended to be an exhaustive list of the issues that the Commissioner considers in deciding whether the exemption applies. No one issue in isolation will necessarily be conclusive and the Commissioner will consider all the information available which is relevant to the review.

Test for application of exemption by self assessment

If the following test is satisfied for a contractor who has supplied services under a contract to a principal in a particular financial year, the exemption under Section 3C(1)(e)(v) of the Act applies and there is no requirement to obtain a decision from the Commissioner.

A contractor will be accepted as ordinarily rendering services to the public generally where, in the financial year in which services were provided under the contract in question, the contractor provided services of that type to the same principal for an average of ten days or less per month (excluding months in which no services were provided). Consequently, where a contractor provided services of the same type to a particular principal for ten days or less on average a month for a financial year, the exemption under Section 3C(1)(e)(v) applies to each contract for those services provided by the contractor to the principal for the particular financial year.

Example

A computer programmer provided services to a computer software company under a 12 month contract during the financial year as follows:

Month	Number of days on which services are performed for software company	
	Scenario 1	Scenario 2
July	5	11
August	3	16
September	7	-
October	5	-
November	16	-
December	9	22
January	13	21
February	4	20
March	8	-
April	5	-
May	14	18
June	11	-
Total	100	108

In scenario 1, the contractor worked an average of 8.3 days per month for the software company and payments made by the software company to the programming contractor would be exempt from pay-roll tax under this ruling. In scenario 2, the contractor worked an average of 18 days per month for those months in which some work was performed. Consequently, the exemption would not apply under this test.

Where payments to a contractor are not exempt under this test, a principal may still seek the exemption under Section 3C(1)(e)(v) of the Act by making a written application to the Commissioner. The application will be considered having regard to all the circumstances of the contract and particularly, the factors listed in this ruling.

Please note that rulings do not have the force of law. Each decision made by the State Revenue Office is made on the merits of each individual case having regard to any relevant ruling. All rulings must be read subject to Revenue Ruling GEN.01.

Commissioner of State Revenue

October 1999
