

Revenue Rulings

Contractors - Commissioner's discretion

Revenue Ruling PT.075 Replaced by Ruling PT.091

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Preamble

Section 3C of the *Pay-roll Tax Act 1971* (the Act) provides for certain contractors (whether incorporated or not) to be deemed employees (under what are known as 'relevant contracts') and for payments to those contractors to be treated as wages for the purposes of the Act.

Most contracts for the provision of services are relevant contracts and payments made in relation to such contracts are wages for the purposes of Section 3C of the Act and are subject to pay-roll tax. However, there are several possible exemptions that would exclude contracts from being relevant contracts and thereby exclude payments under such contracts from the definition of wages.

Section 3C(1)(e)(v) of the Act allows the Commissioner a discretion to exempt contracts under which services are rendered by a contractor who ordinarily renders such services to the public generally. 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. It is necessary to consider what steps the contractor has actually taken 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 numerous 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 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;
- the concurrency of work on separate contracts;
- the nature of the contractor's business and the type of services provided;
- whether the contractor bears the cost and responsibility for faulty materials/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.

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The above is not intended to be an exhaustive list of the issues that the Commissioner will consider in making his determination and no one issue in isolation will necessarily be conclusive.

The Commissioner will consider all the information available to him and in conducting his review, is not limited to merely considering the financial year under review.

Although the Commissioner will consider a range of factors where necessary, it has become desirable for a more objective test to be developed in order to alleviate the uncertainty surrounding the granting of this exemption. The recent Administrative Appeals Tribunal case of *Behmer & Wright v Commissioner of Pay-roll Tax* confirms the need for the development of a more objective set of conditions. It was held in this case that the exemption should be allowed where the contractor has a genuine independent business and in the ordinary course of that business, but for the contract in question, the contractor deals with persons other than the principal in question.

The purpose of this Ruling is to outline three objective tests which may be used in determining whether the exemption applies.

Ruling

This Ruling replaces Revenue Ruling PT.056.

In circumstances where either one or more of the following tests is of application to a contractor in a particular financial year, the exemption under Section 3C(1)(e)(v) of the Act will apply and there will be no requirement to obtain a decision from the Commissioner.

Test 1

A contractor will be accepted as ordinarily rendering services to the public generally where, in a given financial year, the average number of days on which services of the type in question were rendered to a particular principal was 10 or less per month. Consequently, where a contractor provides his or her services of the type in question to a particular principal for 10 days or less on average a month, the exemption under Section 3C(1)(e)(v) will apply.

In determining the average days worked per month, attention will be given to the period in which services are provided to the one principal. Where a contractor has provided services of the type in question for more than 18 consecutive months to predominantly one principal, the test will not apply.

Example

A computer programmer provided services to a computer software company pursuant to a twelve month contract during the 1992-93 financial year as follows:

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

As the contractor worked an average of 8.3 days per month for the software company and did not provide services to the software company for a continuous period of 18 months, the software company would be exempted from pay-roll tax in respect of the payments made to the programming contractor under this Ruling.

Test 2

A contractor will be accepted as ordinarily rendering services to the public generally where the payments (in respect of labour and materials or equipment) made to the contractor by the principal for services of the type in question, in a given financial year, constitute no more than 40 per cent of the gross trading income of the contractor for services of the type in question.

For the purposes of this Ruling, gross trading income is considered to be the gross income earned by the contractor in the conduct of the contractor's business for services of the type in question, and therefore excludes any investment income or wages that would appear on a group certificate.

Test 3

A contractor will be accepted as ordinarily rendering services to the public generally in respect of a particular financial year if the following test is satisfied:

- **in the financial year under review and the two financial years immediately preceding that year, the contractor provided services of the type in question to more than two principals (not being principals related under Section 9A of the Act): and**
- **in the financial year under review the contractor received less than 100 per cent of his/her gross trading income from the principal in question, and in each of the two prior financial years the contractor received less than 80 per cent of its gross trading income from the principal in question.**

If the financial year under review is the first or second year of operation of the contractor's business then this test cannot be satisfied. However, the taxpayer can approach this Office for a private ruling.

Where none of the above tests applies, but the principal considers the exemption under Section 3C(1)(e)(v) of the Act should nevertheless apply, an application in writing should be made to the Commissioner. The application will be considered in light of all the circumstances, with particular regard to the factors listed in the preamble to 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.

**Denzil Griffiths
Commissioner of State Revenue
1 March 1995**