

## *Employment Taxes Update*

*1 April 2014*

### ***New ATO compliance project - Superannuation Guarantee audits for the Management Advice and Consulting industry***

Starting from July 2014, the ATO will begin a superannuation guarantee (SG) compliance project focusing specifically on the Management Advice and Consulting industry. This project continues a recent trend we have seen of the ATO undertaking targeted reviews, as part of their broader employer obligation compliance program, including the ATO contractor program that commenced in November last year.

The ATO indicates that the upcoming audits will focus specifically on a number of matters, such as making sure "Choice of Super" is being offered, and Tax File Numbers have been provided. However, of most significance, is the fact that the ATO will be auditing to ensure that SG "has been paid in respect of eligible contractors, even where the contractor has quoted an ABN". This appears to be a direct reference to the ATO's SG ruling, which states that an individual with an Australian Business Number that undertakes a contractual engagement which is a contract for services will be considered an employee for SG purposes. This is because the scope of SG is extended beyond common law

employees to include contractors who are engaged as individuals under a contract that is wholly or principally for their labour. In our experience, contractors in the Management Consulting industry tend to be engaged under contracts wholly or principally for their labour, so this is likely to be a significant audit focus. In addition, recent court cases have concluded that long term incorporated contractors who work solely, or mainly, for one principal can still be liable to SG, even if they are operating through an interposed entity, such as a company. As such, it is possible that incorporated contractors could also be caught up in the scope of this project. It is important to consider that the ATO can impose penalties of up to 200% for an unpaid superannuation liability.

### ***Payroll Tax – Fresh Start Support Rebate (NSW)***

The NSW Government announced during the month that it will provide a payroll tax rebate to businesses that employ workers who have recently lost their jobs through large-scale restructures.

The Fresh Start Support payroll tax rebate will be an extension of the existing rebate already available under the NSW Government's Jobs Action Plan ('JAP') and will begin from 1 January 2014. The JAP provides

a payroll tax rebate to businesses that employ new workers from 1 July 2011 in eligible employment. The rebate is paid in two parts, 12 months and 24 months after the employee is hired.

Under the Fresh Start Support scheme, an employer who hires an employee who was previously retrenched from a "designated employer" will benefit from the Fresh Start Scheme supplement (of \$1,000) at the 12 month anniversary of the new employment. Initial guidelines for the scheme indicate that the NSW Office of State Revenue (OSR) will qualify an employer as a "designated employer" where they have made 100 or more employees redundant (in the case of metropolitan employers) or 50 employees redundant (in the case of non-metropolitan employers) and this will cause significant disruption to an industry or region. These criteria may be flexible where a large-scale retrenchment has had an inordinate impact on a particular region, occupational field or industry. The NSW OSR is expected to provide further guidance on which employers are considered designated employers later in the year.

## ***Payroll Tax – Employment Agency Contracts (NSW)***

Following the *Victorian Supreme Court's decision in CXC Consulting Pty Ltd & Ors v Commissioner of State Revenue* [2013] VSC 492 (*CXC Consulting*) in October 2013, *Freelance Global Ltd v Chief Commissioner of State Revenue* [2014] NSWSC 127 (*Freelance Global*) was brought before the New South Wales Supreme Court. Once again, the issue of employment agency contracts was considered and, in particular, the definition of the word 'procures' was examined in detail.

In *Freelance Global*, independent contractors used legal structures that had been established by *Freelance* to provide services to an end user client. While the details of the agreement were generally agreed by the contractor and client directly prior to any

involvement by *Freelance*, ultimately it was *Freelance* that signed the contract with the end user client on the understanding that the services would be provided by a nominated contractor. In contrast with the *CXC Consulting* case, the nominated contractor was generally not a direct party to the contract with the client, even though the contractor could be named as a preferred operator by *Freelance*.

The effect of the arrangement was that the contractor became a beneficiary of a discretionary trust operated by *Freelance*. The client made payment directly to the discretionary trust for the services provided by the contractor on behalf of *Freelance* and the contractor ultimately received a distribution from the trust equal to the agreed payment for the services, less a management fee deducted by *Freelance*.

The Court found that *Freelance* had 'procured' the services of the contract worker for the end user client as it had clearly expended care and effort in effecting the arrangement. *Freelance* was the party that had the obligation to provide the specific services to the end user client under the contract and it also secured the services of the contractor by admitting them as beneficiaries of the *Freelance* trust and facilitating the payments to the contractors through the trust.

Further, it was found that it was not essential that *Freelance's* efforts be the sole cause of the provision of services by the contractors to its client, which confirmed the decision in *CXC Consulting* that any agreements reached between the client and the contractor prior to the involvement of *Freelance* was not a deciding factor.

### ***Let's talk***

For a deeper discussion of how these issues might affect your business, please contact:

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