Employment Tax Update

2 June 2014

Superannuation Guarantee - Employee v Contractor

In XVQY and Commissioner of Taxation [2014] AATA 319, the Administrative Appeals Tribunal (AAT) overturned the decision by the Commissioner that the applicant’s workers were employees for superannuation guarantee purposes.

In handing down its decision in favour of the applicant and ruling that the workers were not common law employees, the AAT noted that:

- The persons engaged were free to exercise their discretion in working for themselves. The employer did not give instructions or directions on the manner in which the allocated work was to be done;
- The workers were responsible for providing a significant amount of materials and expenses. In addition, workers were not required to make use of materials available from the applicant. Rather, the workers could choose to do so because of the favourable cost and convenience;
- The workers bore the commercial risk and responsibility for any poor workmanship or injury arising from the performance of work. This was evidenced by the fact that all workers took out their own insurance policy.

In determining whether the workers were considered to be employees under the extended definition of an employee in s12(3) of Superannuation Guarantee (Administration) Act 1992, the AAT considered whether the workers were working for themselves or whether they were providing labour in the service of another. In accordance with the decision in Vabu Pty Ltd v Federal Commissioner of Taxation (1996) 33 ATR 537, the AAT found that, as each worker provided their own capital, and faced a loss of capital if the venture did not work out, it was clear that they were not providing their services under a contract that was wholly or principally for their labour and were not considered to be employees under the extended definition.

Fringe Benefits Tax – Airport car parking facilities are considered to be commercial parking stations

In Qantas Airways Limited and Commissioner of Taxation [2014] AATA 316, the AAT found that airports with either long term or short term car parking facilities that were available for use upon payment of fees, without further restrictions on the eligibility of the user, were ‘commercial parking stations’ for the purposes of the Fringe Benefits Tax Assessment Act 1986. Accordingly, employee car parking provided at the airport by Qantas was found to result in a car parking fringe benefit.

The sole exception to the position was the car park at Canberra Airport, which was found not to be a commercial parking station on the basis that use of the car park was restricted to airline travellers and meeters and greeters of airline travellers. This effectively meant that the car park was not available in the ordinary course of business to members of the public for all-day parking and could not be considered to be a commercial parking station.
Following the reasoning outlined in Virgin Blue Airlines Pty Ltd v Commissioner of Taxation [2010] FCAFC 137, Qantas had contended that the short and long term car parks at the Airports were not commercial parking stations, primarily because those car parks were not provided principally, or primarily, for use by commuters driving their cars to and from work. This argument was rejected by the AAT on the grounds that the law did not differentiate car parking facilities by reference to primary or predominant customers. Provided the car parking facility was available in the ordinary course of business to members of the public for all-day parking, there was no requirement to give any consideration to the customers of the facility. Interestingly, this would appear to be inconsistent with the ATO’s Public Ruling TR 96/26.

**Payroll tax grouping cases**

There has been a series of payroll tax grouping cases handed down in the last month, which provide further guidance as to the revenue authorities’ views on the factors which lead to companies being grouped for payroll tax purposes. A key theme in the two cases where the revenue authorities were successful was a common level of control or inter-connection between the grouped companies.

**HJA Holdings Pty Ltd**

In HJA Holdings Pty Ltd & Ors v Commissioner for ACT Revenue (Administrative Review) [2014] ACAT 24, the Australian Capital Territory Civil and Administrative Tribunal found that the majority of companies owned by the Konstantinou family (referred to in the case as the K Group) should be grouped for payroll tax purposes. The matters were remitted to the Commissioner for assessment of payroll tax, penalty tax and interest in accordance with the Tribunal’s orders.

The Tribunal placed a significant weight on the ownership and control of the K group, including reviewing the shareholding, the control of the boards and the managerial roles amongst the family. Other factors the Tribunal considered were as follows:

- that all cheque signatories and EFT authorisers of the businesses were the directors;
- loans were made informally to members of the group;
- bookkeeping services were provided to all of the members of the group; and
- some of the companies within K group acted as landlord to other companies and the evidence did not establish rent was on commercial terms.

**Starr Partners Pty Ltd**

In Starr Partners Pty Ltd v Chief Commissioner of State Revenue [2014] NSWCATAD 51, the New South Wales Civil and Administrative Tribunal affirmed the decision of the Chief Commissioner and found that a number of entities were to be grouped for payroll tax purposes. The Tribunal stated that the taxpayers did not provide sufficient evidence that the businesses carried on by members of the entities were carried on independently of each other.

The Applicant submitted that there were no shared resources, no common employees and no shared customers or suppliers between any of the businesses carried on by the Starr group during the relevant period. The Tribunal found there was insufficient evidence confirming that the management teams make all decisions regarding the day to day business operations and that each business is independently managed.

**Seovic Civil Engineering Pty Ltd**

In Seovic Civil Engineering Pty Ltd & ors v CCSR [2014] NSWCATAD 52, the New South Wales Civil and Administrative Tribunal agreed with the approach suggested by the Chief Commissioner to exercise his discretion under s79 of the Payroll Tax Act 2007 to de-group a member from a group of companies for payroll tax purposes, given that the company supplying the contract workers had ceased operating.

Excell Management Pty Limited was conducting an independent business in the relevant period, being the supply of contract workers to Seovic Civil Engineering Pty Limited and Seovic Engineering Pty Limited. Although Excell Management Pty Limited was owned by a member of the Seovic family, there was no evidence of any control by either Seovic Civil Engineering Pty Limited or Seovic Engineering Pty Limited in the management of Excell Management Pty Limited. There was no evidence or any suggestion of any contrivance by Excell Management Pty Limited or any other applicant to split or de-aggregate a conglomerate to reduce payroll tax otherwise...
payable. Excell’s business arrangements were commercial. The Tribunal stated the de-grouping would "avoid...what can be best described as a harsh and unreasonable outcome on the technical application of the grouping provisions" and remitted the matter to the Chief Commissioner to exercise his discretion under s79 as directed.

Let's talk

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

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