The Mischel & Co. Group
Accountants & Advisors

2017 Payroll Tax Awareness

Definitions to be aware of in your business

Office of State Revenue-NSW & Other States

Compliance activity

Through extensive data matching with other agencies, we identified a payroll tax shortfall in 8 out of 10 audits conducted last year.

We identified $158 million in underpaid payroll tax, which resulted in businesses having to pay an extra $34 million in interest and penalty tax.

We found that employers made the most errors when calculating their payroll tax liability in the following areas.

Contractors

Contractors vs employees

Confusing employees with contractors. It is essential that before applying the contractors exemptions to workers, businesses properly determine whether the workers are in fact common law employees. Read more about contractors vs employees.

Contractor exemption – 180 days vs 90 days rule

Claiming the 180 days exemption as an extension of the 90-days rule and/or for extra labour used for peak periods. Read more about the 180 day exemption.

Contractor exemption – Ordinarily rendering services to the public

Claiming this exemption when the contractor is either not providing those services in the course of conducting a genuine independent business, or when the contractor is providing the majority of their service to that particular business. Read more about rendering service to the public.

Contractor exemption – Contractors engaging labour

Claiming the exemption when the additional labour engaged do not perform core services of the contract or that they are not engaged directly by the contractor. Read more about contractors engaging labour.

Failing to recognise grouping of employers

Many employers are confused by the payroll tax grouping provisions and fail to recognise that a grouping applies in their circumstances. Read more about grouping.

Other employers may recognise the grouping, but fail to understand how it impacts their payroll tax returns and liability. Read more about incorrectly claiming threshold entitlements.

Failing to include third party payments

Employers often fail to recognise that all amounts paid for the services of their employees need to be included in taxable wages, no matter who pays those wages or to whom they are paid. Read more about third party payments.

Others

Superannuation

Contributions to superannuation made on behalf of an employee, director of a company or deemed employee not being included as liable for payroll tax. Read more about superannuation.

Fringe benefits

Not including the correct value of taxable fringe benefits under the Commonwealth Fringe Benefits Tax Assessment Act 1986. Read more about fringe benefits.

Apprentices and trainees

All wages paid to apprentices and trainees are liable for payroll tax purposes (except for non-profit group apprenticeship and traineeship schemes). However employers are sometimes unaware that NSW has introduced specific provisions allowing taxpayers to claim a payroll tax rebate on wages paid to approved apprentices and trainees as recognised by the NSW Department of Industry. Read more about apprentice and trainees.

Interstate wages, threshold entitlement and nexus provisions

Employers often overlook that Australian wages comprise NSW wages plus all interstate wages. NSW wages are the wages subject to tax under the Act. Interstate wages are those wages subject to tax in the other Australian States and Territories (jurisdictions) under their equivalent payroll tax legislation.

Payroll tax is payable on an employer's NSW wages when its total Australian wages exceed the tax-free threshold (deduction amount). Read more about the threshold entitlement.

All wages paid to an employee for one month's service are taxable in one jurisdiction. The nexus provisions determine in which jurisdiction the wage is taxable. Read more about nexus provisions.

Allowances

Employers are sometimes unaware that allowances are generally included as taxable wages. The only allowances that are not wholly taxable are motor vehicle, accommodation, and living away from home allowances. Read more about allowances.

Revenue Ruling No. PTA 038

Determining whether a worker is an employee
(Payroll Tax Act 2007)

Ruling history

Ruling no.	Issued date	Dates of effect		Status
		From	To	
PTA 038	29 July 2011	1 July 2009	-	**Current**

Preamble/Background

Payroll tax is payable on wages paid or payable to an employee. The term 'employee' is not defined in the Payroll Tax Act 2007 (the Act) and therefore takes its ordinary or common law meaning. The courts have established a number of principles that assist in determining whether a worker is a common law employee.
In most cases, it will be clear whether an employee/employer relationship or a principal/independent contractor relationship exists. However, there may be cases where the true character of the relationship is unclear or ambiguous.

Purpose

The purpose of this ruling is to provide information about employment relationships to assist employers, principals and their professional representatives determine whether their workers are common law employees.

This ruling is not intended to provide definitive advice as to whether a particular relationship is an employer/employee relationship or a principal/independent contractor relationship as the facts of each case vary. Where the nature of the relationship is unclear, tax professionals and practitioners may seek further information from the Chief Commissioner of State Revenue about the payroll tax implications of specific arrangements.

It should be noted that if a worker is not a common law employee, it does not necessarily mean that payments made to them are not subject to payroll tax. The definition of wages in the Act also includes amounts paid or payable to contractors under the contractor provisions. Therefore, the contractor provisions should also be considered. Specifically, where the contractor provisions apply, the principal is deemed to be the employer, the worker is deemed to be the employee and the payments made to the worker are deemed to be wages unless one of the exemptions applies.

Details about the contractor provisions in each jurisdiction are available through each State or Territory's website.

Examples

The examples used in this ruling have been included to illustrate a particular factor relevant to the determination of whether a worker is an employee or an independent contractor and are based on a limited set of facts. In practice, the totality of the relationship must be considered before determining whether a worker is an employee or an independent contractor. It is also recognised that, in practice, a much broader set of facts than those detailed in the examples will generally be present.

Ruling

Legal principles

The courts start from a position of determining whether a common law employment relationship exists, as opposed to a principal/independent contractor relationship. In a common law employment relationship there is a 'contract of service'. A 'contract of service' is based on a 'mutuality of obligation'; that is, the employer makes an offer of work with accompanying remuneration and the employee accepts the terms of the offer by performing the work.
This contract can be either implied or expressed orally or in written form.

Factors that have been considered by the courts in determining whether a worker is an employee include:

1. control and direction;
2. contract and practical relationship;
3. contracts to achieve a 'given result';
4. independent business;
5. power to delegate;
6. risk;
7. provision of tools and equipment; and
8. other indicators.

In considering these factors, it should be noted that numerous court decisions have held that the totality of the relationship between the parties must be taken into account before deciding whether a worker is an employee or an independent contractor; that is, a determination cannot be made on the basis of a limited, or selective, number of factors (see for example: Stevens v Brodribb Sawmilling Co Pty Ltd [1986] 160 CLR 16, Abdalla v Viewdaze [2003] AIRC 504, Commissioner of State Revenue (WA) v Mortgage Force Australia Pty Ltd [2009] WASCA 24, Commissioner of State Taxation (SA) v Roy Morgan Research Centre Pty Ltd [2004] SASC 288, Sweeney v Boylan Nominees Pty Ltd [2006] HCA19) and B & L Linings Pty Ltd & anor v Chief Commissioner of State Revenue (No 2) [2006] NSWADTAP 32).

Control and Direction

An important factor in determining the nature of the relationship between a business operator and a worker is the degree of control that the business operator can exercise over the worker.

The right of a business operator to control or to direct how, where, when and who is to perform the work in question is a strong indicator that a worker is an employee (see for example: D & D Tolhurst Pty Ltd v Commissioner of State Revenue (Vic) 97 ATC 2179; Hollis v Vabu Pty Ltd (T/A Crisis Couriers) (2001) 207 CLR 21; JA & BM Bowden & Sons Pty Ltd v Chief Commissioner of State Revenue (2000) ATC 4596; Narich Pty Ltd v Commissioner of Pay-roll Tax (NSW) 84 ATC 4035 and Commissioner of Pay-roll Tax (Vic) v Mary Kay Cosmetics Pty Ltd 82 ATC 4444)).

The importance of control lies not only in its existence, but also in the right of the business operator to exercise it. In some businesses, the business operator does not actually exercise much control or direction over a worker. In this context, the issue to be considered is whether the business operator has the **right** or **authority** to exercise control or direction over the worker, not whether such control is actually exercised.

In considering whether the business operator has the right or authority to exercise control over how the worker performs the work, it is important to recognise that in certain circumstances there may be very limited scope or need to exercise control. Additionally, as discussed in Tolhurst, the element of "control" must be assessed in light of the nature of the actual work that is being performed by the worker.

For instance, where a worker is a highly skilled tradesperson, there may be little need for the business operator to supervise or direct the manner in which the worker goes about providing services, even though he or she could do so. Where the business operator does not have the qualifications or experience of the worker, the business operator will have little scope or need to exercise control over how the worker routinely goes about his or her tasks.

However, where the business operator does not exercise direct control, there may be scope to exercise control in relation to incidental or collateral matters and this will be sufficient to satisfy the element of control. Such control of **incidental or collateral matters** may indicate that the business operator exercises their right to control not by instructing the worker on how to perform work, but by directing the worker as to which jobs to perform at a given time or by checking on the standard of the work carried out.

Example 1

A project management firm engages a worker as a site supervisor. The site supervisor is responsible for overseeing all things that happen on-site. In this example, the site supervisor could be either a professional or a highly skilled or experienced tradesperson. The general manager of the firm may not have the technical skills and experience to be able to tell the site supervisor how to actually go about performing the work.

However, the project management firm may be able to control or direct the site supervisor in relation to the general nature of the work to be undertaken, as well as incidental or collateral matters such as the hours of their attendance at the work site, the records they must maintain and the format of any progress reports.

Example 2

The owner of a fishing boat engages a worker to captain the boat. The owner remains on shore, the captain has the day to day control over the boat and the crew while at sea and there is very little scope for the boat owner to control how the captain carries out their work while the boat is at sea.

However, there is scope for the boat owner to give the captain directions on general matters such as what areas are to be fished and what fish are being sought, as well as incidental or collateral matters such as safety procedures on the boat and how the catch is to be processed and stored while at sea.

The absence of control may indicate that an employer/employee relationship does not exist; however, this is not necessarily conclusive. In several court cases including Brodribb, Tolhurst, Vabu Pty Ltd v Federal Commissioner of Taxation 96 ATC 4898 and Hollis, it was noted that control is not the sole determinant of the nature of the relationship. The totality of the relationship must be considered.

Finally, control exerted by a principal over, for example, a distributor, for the sole purpose of protecting business interests such as intellectual property, is not considered to constitute control in the way that the word ‘control’ is used in this ruling in determining whether a worker is an employee.

Contract versus Practical Relationship

The terms of a contract provide evidence of the nature of the relationship between the parties (see for example: Commissioner of State Taxation (SA) v Roy Morgan Research Centre Pty Ltd [2004] SASC 288; Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue (2005) ATC 4735 and Forstaff v The Chief Commissioner of State Revenue [2004] NSWSC 573).

However, it is necessary to consider all of the facts and circumstances of the relationship between the parties to the contract, including their conduct towards each other both at the time they entered into the contract and after the contract has been executed.

Contractual arrangements may contain a clause that purports to characterise the relationship as that of principal/independent contractor and not employer/employee. Such a term can be given little weight if it contradicts the effect of the agreement (Narich) or the

practical relationship between the parties (Tolhurst). That is, parties labelling their relationship as 'independent contractor and principal' or 'to produce a result', whether by a clause in a written contract or otherwise, will have no effect where that relationship, in practice, is really one of employment.

After the execution of the contract, the conduct of the parties will also be considered to determine the full extent of the contractual relationship.

The fact that the conduct of the parties may not accord with the terms of the contract does not mean that the Chief Commissioner considers that the contract is a sham; rather, the Chief Commissioner will take into account the terms of any contract in addition to the conduct of the parties.

Contracts to Achieve a "given result"

A contract to produce a "given result" is one in which the focus is on the ultimate result (usually required under a contract), rather than what must be provided during the performance of the contracted task. If the facts support a finding that the purpose of a contract is to achieve a "given result", this is an indicator that there is a principal/independent contractor relationship.

This is particularly the case where the contract is for a fixed price, or where payment is made subject to meeting various milestones specified in the contract or at its completion.

Where a worker provides a 'labour only' service pursuant to a contract and is paid at an hourly or daily rate, or set rate of pay (including piecework rates and commission), this indicates that the contract is not for a given result.

If the contract is not to achieve a given result, but is rather for the labour of the worker, the arrangement will tend to have the characteristics of an employer/employee relationship (Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52 (26 May 2010)).

Example 3

A construction company enters into a contract with various construction workers to perform tasks required for the construction of a building. The company pays the workers an hourly rate. The construction workers are not entering into a contract to produce a given result but rather are entering into a contract to provide services for an hourly fee.

Example 4

A construction company enters into a contract with a landscaper to carry out the landscaping required for the building for a fixed fee of $10 000. The landscaper has entered into a contract to produce a given result for a fixed fee.

Example 5

The owner of a mango farm engages a number of workers to prune trees. The workers are paid on the basis of the number of trees pruned. The workers are not entering into a contract to produce a given result but rather are entering into a contract to provide services at piecework rates.

Independent Business (also referred to as the 'Integration Test')

If a worker is engaged by a business operator in the ordinary course of operating the worker's own independent business, this indicates that the worker is not engaged as an employee.

The issue to be considered is whether the worker is conducting their own business as distinct from participating in the business of the business operator. In deciding whether or not the worker is in fact conducting their own business the Chief Commissioner will consider a range of factors including:

How the worker sources or obtains clients or customers. If the worker was engaged by a business operator as a result of advertising their services to the public as a normal part of carrying on a business, or as a result of winning a tender, this will usually indicate that the worker is operating a business;

- Whether the worker bears the risk. It is more likely that a worker is operating his or her own business, rather than operating as an employee, where the worker bears the risk and makes a profit or loss as a result of the work undertaken. Similarly, where a worker has an opportunity to create his or her own goodwill, it is more likely that the worker is operating a business;
- Whether the worker incurs expenditure in earning the income or provides their own materials and equipment. The greater the expenditure incurred in earning income and the greater the materials and equipment supplied by the worker, the more likely it is that the worker is operating a business rather than operating as an employee;
- Whether basic transactional business systems are in place such as invoicing, insurance (professional indemnity and public liability), appropriate financial record keeping practices and membership of professional or trade associations;
- Whether regulatory business compliance requirements are in place such as registration of business name, ABN and GST;
- Whether the services provided involve the provision of labour of sufficient skill to suggest that a profession or trade is being pursued through a business;
- The number of clients or customers the worker has had over the life of the business and in relation to the specific years in question;
- Whether the worker is required to perform the services personally;
- Whether the worker is prevented from sub-contracting, engaging others or delegating the work to others. If the worker has engaged or arranged for others to undertake work in conjunction with themselves this is likely to indicate that the worker is operating a business rather than providing services as an employee;
- Whether the worker was previously employed by the business operator; and
- How long the worker has been in business.

Notwithstanding the above, it is still possible for workers who normally operate independent businesses to work as casual employees from time to time. In particular, it is not unusual in the building and construction industry for tradespeople operating genuine independent businesses for most of the time, to be occasionally engaged as casual employees for larger jobs carried out by an employer.

For example, an independent electrician engaged by an electrical maintenance company to work as part of a team, being paid at an hourly rate and working under supervision may be treated as a casual employee resulting in payments received being subject to payroll tax.

However, before making a final decision, all factors relating to the relationship would need to be considered.

Power to Delegate

The power to delegate is a factor that firmly indicates that the worker is an independent contractor rather than an employee (Australian Air Express Pty Ltd v Langford [2005] 147 IR 240).

The power to delegate in this context refers to the capacity of the worker to engage others to undertake the services for which the worker was engaged. In these circumstances, the worker is the party responsible for paying the other persons.

A common law employee delegating tasks to other employees is fundamentally different to the power to delegate exercised by a contractor. When an employee asks a colleague to undertake certain tasks, the employee is not responsible for paying that colleague.

In a principal/independent contractor relationship, the power to delegate will generally be implicit, as the focus is generally on achieving a result rather than obtaining the services of any particular person.

Where a business operator claims that the workers engaged have the power to delegate their work, they will need to produce evidence that the delegation power is actually exercisable in practical terms. The right to delegate must always be initiated and carried out by the independent contractor and not be controlled by the business operator.

If the worker performs all of the work and in practice does not engage others to assist with the performance of the work, or where the business operator provides a replacement worker when the worker is unable to provide their services, it is unlikely that the worker has the power to delegate.

Delegation clauses in contracts must be considered in the context of the arrangement between the parties to ensure that they accurately reflect what occurs in practice. Where there is a delegation clause in which a replacement worker must be approved by the business operator and this approval is not provided in practice, this may mean that the 'right' to delegate is illusory.

Example 6

A worker is engaged on a contract by a steel fabrication firm and is paid an hourly rate. It is claimed that under the terms of the contract the worker has the power to delegate. On the occasions when the worker has been unable to attend work (for example, due to illness), the steel fabrication firm has allocated the worker's tasks to someone else, paid that other person (rather than the worker) and has not permitted the worker to provide a replacement.

In this example, the worker does not have any real or practical power to delegate.

Risk

A worker who bears the commercial risk and responsibility for any poor workmanship or injury sustained in the performance of the work indicates that the worker is an independent contractor. An independent contractor typically carries their own insurance and indemnity policies.

Provision of Tools & Equipment

Providing assets, tools and equipment and incurring expenses and other overheads indicates that the worker is an independent contractor.

However, providing the necessary tools and equipment is not necessarily inconsistent with an employment relationship because an employee is likely to be reimbursed or receive an allowance for providing their own tools and equipment.

Other Factors

The Courts have considered a number of other factors in determining whether an employer/employee relationship exists. Those suggesting an employee/employer relationship exists include:

- the right to suspend or dismiss the worker;
- the obligation to work;
- working set and regular hours;
- the payment of a regular or fixed remuneration;
- the deduction of income tax;
- providing superannuation benefits, annual leave, sick leave and long service leave; and
- requiring the worker to wear a company uniform.

Lease or Bailment Arrangements

The courts have considered that an employer/employee relationship will generally not exist where there is a lease or bailment arrangement. These arrangements involve payments for the right to use or exploit property rather than for the provision of services.

An example of a bailment arrangement is the relationship that exists between the owner of a taxi and the taxi driver. Under this type of arrangement the taxi driver makes a payment to the owner in return for the right to use the taxi (Federal Commissioner of Taxation v De Luxe Red and Yellow Cabs Co-operative (Trading) Society Ltd & Ors 98 ATC 4466; (1998) 82 FCR 507).

Payments to inter-posed entities

A common law employment relationship cannot exist between a principal and an inter-posed entity such as a company. However, payments made in these circumstances may still be subject to payroll tax under the contractor or avoidance arrangement provisions.

With respect to partnerships, raising invoices in a partnership name or making payments to joint bank accounts does not on their own prove the existence of a legally constituted business partnership. If the other partner is not providing services in relation to the payment and no formal partnership agreement has been prepared, it is unlikely it would be accepted that there is an agreement with an interposed entity.

Comparison of Employee and Independent Contractor Indicators

The following table outlines employee and contractor indicators in terms of the various factors utilised by the courts in determining whether a worker is an employee or an independent contractor.

Factor	Employee Indicator	Independent Contractor Indicator
Control	The worker is subject to the direction of the business operator, or the direction of an employee of the business operator, as to where, when and how the work is to be performed.	The worker is free to decide the manner in which they will complete the task and achieve the agreed result.
Payment	The worker is paid on a time basis or at 'piece rates'.	The business operator pays the worker on the basis of a quote to achieve a set result (generally without regard for the time taken). Payment is made to an interposed entity.
Provision of labour/ materials	The worker wholly or predominantly provides labour. The business operator supplies all or most of the materials and equipment necessary for the worker to perform their services. Where the worker provides their own tools or materials	The worker supplies all or most of the materials, equipment and tools needed to complete the contracted work (not just tools of the trade or a motor vehicle used to drive to and from a work site).

Factor	Employee Indicator	Independent Contractor Indicator
	they are usually reimbursed or paid an allowance.	
Entitlements	The worker receives superannuation, sick leave, recreation leave or long service leave or is paid extra in lieu of such entitlements.	The worker makes provision for their own superannuation and is not entitled to sick leave, recreation leave or long service leave.
Tax	Income tax is deducted from the payments made to the worker.	Income tax is not generally withheld from the payments made to the worker. However, a worker can request a business operator to withhold tax from payments made to them (see Section 12-55 of Schedule 1 to the Taxation Administration Act 1953 (Cwlth)). In these cases, the voluntary withholding of tax is not necessarily indicative of an employer/employee relationship.
Hours of work	The worker works set hours (either by agreement with the business operator or under an award).	The worker works the hours necessary to complete the task to the standard, and within the timeframes, specified by the business operator.
Continuity	The worker has been working for the business operator for a continuous extended period of time.	The worker does not provide services to the business operator on a regular or continuous basis.
Representation to the public	The worker is recognised as part of the business operator's business.	The worker is not seen as part of the business operator's business; that is, the worker is recognised as operating their own business.
Responsibility for quality	The business operator, not the worker, is legally responsible for the quality of the work performed by the worker.	The worker is legally liable for the quality of the work performed.
Delegation	The worker is required to perform the work personally (they are not able to delegate	The worker employs others to assist them in doing the work, or is able to delegate or subcontract the work to other persons of

Factor	Employee Indicator	Independent Contractor Indicator
	or subcontract the work).	their choice.
Insurance and licences	Maintained by the business operator.	The worker maintains relevant and necessary licences and insurance policies.
ABN	The worker does not have an ABN.	The worker has an ABN.
Risk	All risk is borne by the business operator.	The worker bears the commercial risk of deriving a profit or suffering a loss for the work performed and incurs significant expenses in deriving income. Payments are reduced to cover the cost of rectifying defects
Dismissal/ resignation	The business operator can suspend or dismiss the worker, or the worker can cease to work for the business operator, regardless of whether the worker has completed any particular task or not.	The worker is free to choose whether to accept or refuse work from the business operator.

Conclusions

Each case must be considered on its own facts using the principles identified by the courts and tribunals as a guide. The decision on whether a worker is an employee cannot be made on the basis of only a few features of the relationship. In each case it is necessary to consider the totality of the relationship between the business operator and the worker and this involves considering a wide range of factors.

Some of these factors may suggest that the worker is an employee, whilst other factors may suggest that the worker is an independent contractor (Commissioner of State Revenue v Mortgage Force Australia Pty Ltd [2009] WASCA 24).

Additionally, as noted in the Purpose section on page 1 of this ruling, if it is determined that an employer/employee relationship does not exist, consideration must still be given to whether the contractor provisions apply.

If the position is not clear, professional advice should be sought as there are complex legal issues to be considered. Alternatively, the relevant State or Territory Revenue Office may be contacted for further information.

Please note that rulings do not have the force of law. Each decision made by the Office of State Revenue is made on the merits of each individual case, having regard to any relevant ruling.

Failing to recognise grouping of employers

Many employers are confused by the payroll tax grouping provisions and fail to recognise that a grouping applies in their circumstances. Groupings are imposed by Part 5 of the Act and exist between:

1. two companies which are related corporations of each other within the meaning of s50 of the Commonwealth Corporations Act 2001 (grouped under s70 of the Act)
2. an employer and a person or persons utilising common employees in a business or businesses it or they carry on (grouped under s71 of the Act)
3. two persons who carry on businesses which are commonly controlled (grouped under s72 of the Act)
4. an entity and any corporation in which it holds a controlling interest through tracing of interests in shareholdings (grouped under s73 of the Act)
5. all members of two groups having a common member (grouped under s74 of the Act).

Read more about service entities supplying services to professional practices which may be grouped by use of common employees.

Whenever you register for payroll tax or complete an annual reconciliation return, you should review your current business structure or structures, the ownership and control of any entity associated with an employer, and any employment arrangements. If you think you may be grouped but are unsure, you can contact us for advice.

If you require formal advice about the grouping implications of your existing circumstances you can seek a private ruling by applying to the Chief Commissioner in writing, setting out in detail the factual circumstances.

Incorrectly claiming threshold entitlements for multiple members of a group

Many employers are unaware that members of a group are only allowed a single payroll tax free threshold entitlement between them, or are confused about how this works in practice.

The whole of the NSW threshold entitlement for a payroll tax group must be taken by a single nominated member (the 'designated group employer' for the group – s80 of the Act). All other members of the group do not receive any threshold amount, and must pay payroll tax on the whole of the NSW wages they pay (s8 and Schedules 1 and 2A to the Act).

To qualify as a designated group employer of a group, a nominated member must either:

1. have paid wages during the preceding financial year that exceeded the threshold amount for that year (within the meaning of Schedule 1)
2. be likely to pay wages during the current financial year that will exceed that amount.

If no member of a group is a qualified member, but the group together has paid wages during the preceding financial year that exceeded the threshold amount or will likely pay wages during the current financial year that will exceed that amount, the Chief Commissioner may approve any member of the group to be the designated group employer for the group (s80(3) of the Act).

To nominate a designated group employer for the group, all members of the group must notify the Chief Commissioner in writing (ss80(1) and 80(6) of the Act). This can be done at any time, but the easiest way is to nominate the designated group employer using the facility available within the online annual reconciliation return when completing each group member's annual reconciliation return.

Note: the designated group employer for a group may, with the approval of the Chief Commissioner, lodge joint returns for itself and other specified members of the group (s87(2) of the Act).

Failing to include third party payments

Another common error is employers failing to recognise that all amounts paid in respect of the services of their employees need to be included in their taxable wages, no matter who pays those wages or to whom they are paid. Typical scenarios include:

a. where someone other than the employer pays the remuneration to the employee for his or her services (liable under s46(1)(a) of the Act)
b. where the employer pays the remuneration to someone other than the employee (liable under s46(1)(b) of the Act)
c. where someone other than the employer pays the remuneration to someone other than the employee (liable under s46(1)(c) of the Act).

An even more common error applies to remuneration paid by or to third parties for the services of a director of a company (liable under ss46(2)(a) to 46(2)(c) of the Act). It is important to note that the company is liable in all circumstances where payments are made to someone other than the director or by someone other than the company for the services of a director to that company. This includes circumstances where payments are made to another company which holds shares in your company and places one or more of its employees on your Board as its representative.

Companies also mistakenly exclude amounts paid by or to third parties in relation to former directors of that company and persons who by arrangement are to be appointed as directors of the company (liable under ss46(2) and 46(3) of the Act).

For companies, whenever you complete your annual financial statements or ATO company tax return, you should review the total remuneration paid to or on behalf of any executive or non-executive director and ensure that all these amounts have been included in your payroll tax returns.

Apprentices and Trainees

Some common errors made by employers when claiming the apprentice and trainee rebates include:

- not claiming the rebate despite being eligible
- only claiming the rebate on the apprentice/trainee hourly wage instead of claiming their total remuneration including superannuation, allowances and bonuses
- continuing to claim the rebate despite the workers no longer being considered an apprentice or new entrant trainee by NSW Department of Industry
- claiming wages for the whole year when the employee was only eligible for a part period
- claiming a rebate for an apprentice or trainee not registered with NSW Department of Industry
- double claiming the same wages paid to the same employee under different payroll tax registrations. This could happen where the client is a member of a group and a rebate for an employee's wages is claimed under the client registered with NSW Department of Industry and again under the actual employer of the employee

- claiming apprentice/trainee rebate and also claiming Jobs Action Plan (JAP) rebate for the same employee. Employers can claim only one rebate
- claiming wages paid to an apprentice/ trainee registered with an external training provider or engaged through an employment agency. The employment agency may correctly claim the rebate for that employee while the employer that hires through the employment agency also mistakenly claims the rebate
- claiming wages paid to an ineligible trainee (see cl5(5)(b) of Schedule 2 to the Act). An ineligible trainee is someone that:
    i. was employed for > 3 months full time
    ii. was employed for > 12 months part time or casual

    before entering into their traineeship contract.

Read more about apprentices and trainees.

Nexus Provisions

Employers who employ in more than one jurisdiction may find it difficult to establish in which jurisdiction the wages they pay are liable.

All wages paid to an employee for a month's service are taxable in one jurisdiction. The nexus provisions determine in which jurisdiction the wage is taxable.

Where are wages taxable?

If a worker performs services in only one jurisdiction in a calendar month, payroll tax is payable on those wages in that jurisdiction. If a worker performs services in more than one jurisdiction in a calendar month, a four-tiered test is used to determine where the wages for that month are taxable:

1. the employee's principal place of residence
2. the employer's registered Australian Business Number address/principal place of business
3. the place where the wages are paid to the employee
4. the place where most of the services were performed.

Read more about the nexus provisions through our revenue rulings:

- Revenue Ruling No. PTA 001 – NSW payroll tax liability for wages paid by an employer
- Revenue Ruling No. PTA 002 – Expatriate employees Revenue Ruling No. PTA 039 – Payroll Tax Nexus Provisions
- Revenue Ruling No. PT 058 Liability where Services Performed Offshore

Superannuation

Employers should be aware that all contributions to superannuation made on behalf of an employee or director are liable for payroll tax. Common errors include:

- not including superannuation payments made to employees
- not including additional payments in excess of the super guarantee
- not including additional payments made to directors of the business outside the payroll system
- not including payments made to an employee's superannuation fund under salary sacrifice arrangements as taxable wages
- not including payments made to a 'relevant contractor's' superannuation as taxable wages
- including superannuation payments paid to an owner of an individual sole trader business or to an equity partner of a partnership business as taxable wages (any payments to owners of a sole trader or a partnership business are not taxable wages)
- including contributions made by an employee from their own Pay-As-You-Go (PAYG) post tax pay (these amounts are not taxable as the wage has already been reported as part of the employer's gross salaries and wages).

Allowances

Employers often mistakenly claim motor vehicle allowances paid (payment made as a flat or fixed amount) to staff as exempt wages, when no records were kept to demonstrate business kilometres travelled. Sufficient records must be kept in order to claim an exemption and only the amount not exceeding the exempt component can be claimed.

Another common error found in lodgement is not declaring the excess accommodation allowances paid as a taxable wage. If an accommodation allowance has exceeded the exempt component, the excess component is taxable.

Read more about exempt motor vehicle and accommodation allowances.

Employers also frequently fail to report allowances paid to employees as after PAYG tax allowances. All allowances paid to an employee are liable for payroll tax, regardless of how the ATO taxes the allowance.

Fringe Benefits

Employers should be aware that all fringe benefits with taxable value under the Fringe Benefits Tax Assessments Act 1986, except tax-exempt body entertainment fringe benefits, are taxable for payroll tax.

The value of fringe benefits for payroll tax purposes is the total of the Type 1 and Type 2 aggregated amounts grossed up by the Type 2 rate of 1.9608 (01 July 2015 onwards)

Some common errors made by employers in relation to taxable fringe benefit amount include:

- omitting to declare the taxable value of fringe benefits
- using the reportable fringe benefit amount from PAYG Summaries/ Payroll system
- using the amount of fringe benefits tax (FBT) payable
- using the fringe benefits taxable amount (line item 15 on FBT return) when Type 1 fringe benefits were paid
- deducting meal entertainment fringe benefits
- deducting car and novated lease salary sacrifice amount from the car benefits taxable value.

Read more about fringe benefits through our Revenue Ruling PTA 003.