

Payroll Tax & Grouping | Cases from CG Law Vault: How advisors can spot the risk!

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1. Introduction | What is Payroll Tax

1.1 Background

- (a) Payroll tax is a state imposed tax which is controlled and regulated by eight separate pieces of legislation. Historically, one of the most obvious complications which arose with payroll tax was the interplay between each of the state's legislative requirements (such as different exemptions), particularly in circumstances where business was conducted in more than one state.
- (b) However, over the years, each state has adopted similar legislative provisions to create some sense of uniformity, whilst allowing each state to set their own rates and thresholds.
- (c) Payroll tax was originally introduced by the Menzies Government. On 4 April 1941, the *Payroll Tax Act 1941* was granted its royal assent and became a Commonwealth law in Australia from 2 May 1941. Originally, payroll tax was introduced to finance the Federal Government's obligations to pay an endowment to the carer who was responsible for caring for more than one child under the age of 16 years.
- (d) Around this time, other significant changes occurred to Australia's tax system, including a decision by the states to hand over their exclusive control of the collection of income tax in return for Federal Government grants.
- (e) Since the Federal Government passed control of payroll tax to the states in 1971, every state has used (and continues to use) this tax to meet a significant part of its revenue requirements.
- (f) Given the amplified reliance by state Governments on the revenue raised by payroll tax, it is becoming increasingly important for Advisors to be familiar with payroll tax obligations to ensure that potential areas of non-compliance are identified and addressed early.

1.2 Obligation

- (a) Payroll tax in Queensland is a self-assessed tax which is payable on wages paid to Queensland employees once a particular monetary threshold has met. An employer must register for payroll within seven (7) days at the end of a month whereby they:
 - (i) pay more than \$25,000.00 a week in Australian taxable wages; or
 - (ii) become a member of a group that collectively pays more than \$25,000.00 a week in Australian taxable wages.
- (b) Whilst an employer must register if they meet the above values, an employer must pay more than \$1.3 million in annual Australian taxable wages before they attract a payroll tax liability.
- (c) The payroll tax rate for Queensland is currently:
 - (i) 4.75% for employers or groups of employers who pay \$6.5 million or less in Australian taxable wages; and
 - (ii) 4.95% for employers or groups of employers who pay more than \$6.5 million in Australian taxable wages.
- (d) Regional employers may be entitled to a 1% discount on the above rate until 30 June 2023.
- (e) For the purposes of payroll tax, particular entities may be grouped such that their combined taxable wages will need to be assessed in determining what, if any, payroll tax liability arises.
- (f) Due to potential grouping, employers fall into one of three categories:

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- (i) **designated group employer (DGE)** - an employer who has been grouped with other corporate entities that has been nominated by the other group members to claim any applicable deductions on behalf of the group;
 - (ii) **group member** - a group member is an entity that has been grouped for the purposes of payroll tax but cannot claim a deduction as the DGE will receive the deduction; or
 - (iii) **non-grouped member** - an employer who has not been grouped with another entity for the purposes of payroll tax.

1.3 Definition of Wages

- (a) As outlined above, the liability to pay payroll tax only arises once specific monetary values are paid out in wages - but what is included in the definition of 'wages'?
- (b) In each state, the definition of wages is outlined in the relevant *Payroll Tax Act* or the *Pay-roll Tax Assessment Act*. In Queensland, the defemination can be found in the Schedule to the *Payroll Tax Act 1971* (Qld) (the **Act**) and provides as follows:

wages—

- 1 means any wages, remuneration, salary, commission, bonuses or allowances paid or payable (whether at piecework rates or otherwise and whether paid or payable in cash or in kind) to an employee as an employee, and, without limiting the generality of the foregoing, includes—
 - a. any amount paid or payable by way of remuneration to a person holding office under the Crown in right of the state of Queensland or in the service of the Crown in right of the state of Queensland; and
 - b. any amount paid or payable under any prescribed classes of contracts to the extent to which that payment is attributable to labour; and
 - c. any amount paid or payable by a company by way of remuneration to a director of that company; and
 - d. any amount paid or payable by way of commission to an insurance or time payment canvasser or collector; and
 - e. the provision by the employer of meals or sustenance or the use of premises or quarters as consideration or part consideration for the employee's services; and
 - f. fringe benefits; and
 - g. a superannuation contribution, other than a superannuation contribution—
 - (i) paid or payable by a company for a director of the company before 1 July 2008; or
 - (ii) for services performed or rendered by an employee before 1 January 2000; and
 - h. a termination payment; and
 - i. an amount taken to be wages under another provision of this Act; and
- Note— See, for example, sections 13E (amounts paid or payable under a relevant contract), 13J (amounts paid or payable under an employment agency contract) and 51 (amounts paid or payable by or to third parties).*

j. a share or option granted by an employer to an employee in relation to services performed or rendered by the employee, if the share or option is—

(iii) an ESS interest under the Income Tax Assessment Act 1997 (Cwlth), section 83A-10; and

(iv) granted to the employee under an employee share scheme within the meaning of that section; and

Note— See part 2, division 1C for provisions that apply for interpreting this paragraph.

k. a share or option granted by a company to a director of the company by way of remuneration for the appointment or services of the director.

Note— See part 2, division 1C for provisions that apply for interpreting this paragraph.

2 However, wages does not include a benefit that is an exempt benefit under the Fringe Benefits Assessment Act.

[our emphasis added]

(c) It is also important to note that JobKeeper payments are exempt from payroll tax.

Payments to Contractors

(d) It is important to note that in most instances payments made to contractors will fall within the definition of wages under section 13E of the Act insofar as they are:

(i) amounts in relation to the performance of work for which services are supplied on or after 1 July 2008 under a relevant contract;¹ and

(ii) provided under a relevant contract which arises where a person, in the course of a business carried on by that person, —

- supplies to another person services in relation to the performance of work; or
- has supplied to the designated person the services of persons in relation to the performance of work; or
- gives goods to individuals for work to be performed by those individuals in respect of the goods and for the goods to be re-supplied.²

(e) For the sake of clarity, whilst payments made to contractors are most likely covered by the provisions of the Act, it will only be to the extent that the payments relate to labour and will not include, for example, other expenses such as outlays and materials.

(f) However, section 13B of the Act continues to exclude a number of instances from falling within the definition of a relevant contract. These exemptions include, but are not limited to where:

- (i) the labour component of the contract is ancillary to the supply of materials or equipment;
- (ii) the services are not normally required by the business and the person providing the services provides them to the general public; and

¹ Payroll Tax Act 1971 (Qld), section 13E.

² Ibid, section 13B.

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- (iii) the services are not required for more than 180 days of the financial year (irrespective of how many contractors provide the services).

1.4 Jurisdictional Issues

- (a) The applicable legislative instrument in each state provides circumstances in which wages are liable to attract payroll tax to ensure that tax in respect of any services rendered by a particular employee is payable in only one state for any given month.
- (b) Across the states, the following provision is consistent in operation: wages are taxable in a state if they relate to services performed wholly in that jurisdiction.
- (c) Where services are completed in two or more Australian jurisdictions, or partly in one or more Australian jurisdictions and partly overseas, the assessment process becomes more difficult.
- (d) Generally speaking, wages will attract payroll tax liability in a particular state if:
 - (i) the employee is based in that state;
 - (ii) where the employee is not based in an Australian jurisdiction, but the employer is based in that state;
 - (iii) where both the employer and employee are not based in an Australian jurisdiction, where the wages are paid or become payable; and
 - (iv) where both the employer and employee are not based in an Australian jurisdiction and the wages are not paid or become payable in an Australian jurisdiction, where the services are primarily performed in that state.
- (e) As a result of the above, it is important for advisors to keep in mind:
 - (i) where the employee resides;
 - (ii) where the employer is located (primarily in reference to the Company's registered address for business);
 - (iii) where the services are performed; and
 - (iv) the place where wages are paid,
 when considering payroll tax liabilities.

1.5 Grouping Provisions

- (a) Another consistent provision which applies to payroll tax across all Australian jurisdictions is grouping. In essence, the grouping provisions result in related or associated entities being "grouped" for the purposes of payroll tax such that their aggregated wages is used in order to assess any payroll tax liability.
- (b) Whilst the total of the wages will be grouped, it is important to note that each entity will remain independently liable for the payment of payroll tax on the wages they pay.
- (c) The Act provides for grouping in the following circumstances:
 - (i) where companies are related for the purposes of the *Corporations Act 2001* (Cth) (for example, in a holding and subsidiary relationship);
 - (ii) where employees of one entity perform services solely for, or mainly for the benefit of, another entity;
 - (iii) where there is an agreement between two entities relating to the performance of duties by employees of one entity for the benefit of the other;

- (iv) where the same person/s have a controlling interest in the entities; and
 - (v) where an employer has controlling interest in another employer under tracing provisions.
- (d) The assessment of the above relationships are largely discretionary and the Commissioner, if required, will make an assessment dependent on the factual circumstances of each matter. The Commissioner has the discretion to exclude an employer from grouping if the relevant employer is able to demonstrate that, amongst other things:
- (i) the businesses are substantially independent;
 - (ii) the businesses are substantially unconnected; and
 - (iii) the relationship is not designed to reduce and/or avoid payroll tax liability.³
- (e) Advisors should contact CGLaw for guidance around this issue.

2. Implications of not complying with Payroll Tax Provisions

2.1 Potential Penalties

- (a) If an employer fails to lodge a return for payroll tax or fails to make a payment on time, unpaid tax interest and penalties may apply.
- (b) If an employer is issued with a default assessment notice due to a failure to lodge a periodic, annual or final return by the due date, the penalty tax attached is an additional 75% of the payroll tax amount which is in addition to the existing payroll tax liability. In some circumstances, this penalty tax can be increased by a further 20%.
- (c) The unpaid tax interest will begin to accrue from the date payment was due until the date payment of the payroll tax is received in full.
- (d) If any payroll tax (including any penalty tax and/or unpaid tax interest) is not paid by any one employer in a group, each of the other businesses in the group become liable for the outstanding amount.

2.2 Areas of Risk

- (a) The main risk associated with payroll tax is the self-assessment nature of the liability.
- (b) When dealing with clients, we recommend that advisors keep front of mind the following questions:
 - (i) Is this business closely connected with another entity?
 - (ii) Does the Director of this business have a controlling interest in another entity?
 - (iii) Do the employees of the business reside in a different location to where payment is made or the services are performed?
 - (iv) Are there any contractors involved?
- (c) If the answer to any of the above questions is yes, we would recommend that further advice is sought to reduce the likelihood of incurring the significant penalties outlined above.

³ *Telgrove Pty Ltd t/as P & E Francis Plant Hire v Commissioner of State Revenue [2019] QCAT 199.*



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