



## Précis Paper

### Insight into JP Property Services

An interesting discussion on how the Office of State Revenue applies the employment agency rules in light of some recent decisions relating to payroll tax.

#### **Discussion Includes**

- Overview of payroll tax
- Labour hire arrangements.
- How the Office of State Revenue applied the employment agency rules
- *UNSW Global Pty Ltd v Chief Commissioner of State Revenue*
- The facts of *JP Property v Chief Commissioner of State Revenue*
- The main takeaway

# Précis Paper

## Insight into JP Property Services

1. In this edition of BenchTV, Nicholas Gangemi (barrister) and Peter Laverick (solicitor) discuss the application of employment agency rules and what type of working arrangements are subject to payroll tax in light of the recent emergence of a specific test set by the courts.

### Overview of Payroll Tax

2. Payroll Tax is a tax on employers for payments and provisions of wages, salary, and other benefits to employees. It is generally a tax on the employment relationship itself but it is paid by the employer and not the employee. It is state based tax so it varies from state to state. However, there has been harmonisation where many of the rules are the same or similar across all or most of the states and territories.
3. There are a number of tricks and special rules in relation to payroll tax. Three in particular are:
  - (1) Grouping Provisions - where employers can be grouped. Payroll tax is actually payable on above the tax-free threshold and by grouping you can effectively erode the tax-free threshold claimed by each business.
  - (2) The relevant contractor provisions - These apply to a broad range of service contracts which are not traditional employment relationships.
  - (3) The employment agency provisions - These were the subject of this case.
4. The relevant contractor provisions are contained in Division 7, of Part 3 of *Payroll Tax Act 2007*. They apply to any contracts where services are provided. It is a broad definition and can cover quite a number of situations including when people do not realise that they are providing services.
5. Because this is supposed to be a tax on employment relationships, they contain a large number of exclusions from the relevant contract provisions, to try and bring it in line with a general employment relationship.
6. Some of the exclusions are time based. For example, if services are provided for less than 90 days. There is also an exclusion where the service providers are in the business of providing services to the public at large. Exclusions also exist in situations where the service provider is in their own business or the employee is not really considered to be part of the employer or part of the workforce.
7. The employment agency provisions are in Division 8 of Part 3 of *Payroll Tax Act 2007*, and they apply in tripartite situations. This is where a person, called an employment agent, procures the services of another for a client of the employment agent. In this instance, the first person is deemed to be an employer hiring the service provider and the service provider is deemed to be their employee - even though the services are provided to a

client and not to the agent themselves. The deemed employer who procures the service is called an "employment agent" under the provisions. This is not the same as a recruiter.

8. Employment agency provisions have no exceptions and they trump the relevant contract provisions.

#### Labour Hire Arrangements

9. The employment agency provisions are really aimed at Labour Hire Arrangements. Labour Hire Arrangements are where one person hires a worker to work in a client's business, usually, but not always, on a temporary basis. In some cases, where the person hires the worker into the business it's technically not an employee of the client because the worker is not the person that contracts with the employer. It's not actually the employee of the hirer because they don't work in the hirer's business. The relevant contractor provisions do not cover these arrangements because it's a tripartite scenario where you have someone "standing in the middle".

#### How the Office of State Revenue applied the employment agency rules

10. The OSR start by auditing someone under the relevant contract provisions. This person will have a list of people that they contract and then the OSR review them to see if they fall under the relevant contract provisions. They also review the exceptions to see if they fall under the exceptions.
11. In *JP Properties*, about halfway through the audit, the OSR noticed that a lot of the exceptions were applying and that the relevant contract provisions did not apply. The OSR reads in this tripartite arrangement - where they are providing services to their own client and while they are providing services to you, they are also directly or indirectly providing services to your clients - and therefore the employment agency rules could apply in those situations.
12. If the Rules are broadly read, they would capture a number of scenarios where the employment agency provisions could apply which were not originally anticipated. For example, a solicitor engaging a barrister on behalf of their client.
13. *CXC Consulting Pty Ltd & Ors v Commissioner of State Revenue* [2013] VSC 492 and *Freelance Global Ltd v Chief Commissioner of State Revenue* [2014] NSWSC 127 were cases related to traditional labour hire companies which argued that the provisions applied because of certain technicalities concerning their arrangements and the timing at which the arrangements were entered into. It was clear that the provisions were intended to apply to these arrangements, whatever the technicalities.

#### *UNSW Global Pty Ltd v Chief Commissioner of State Revenue*

14. In *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852, the plaintiff provided the services of experts to provide expert services in connection with litigation or in relation to some aspect of a client's business. These experts were retained by the plaintiff as independent contractors.
15. It was found that the employment agency provisions did not apply even though it would appear that UNSW Global procured the services of these experts for their clients. White J at looked at the purpose of the law and what the law was aiming to do. At [66] - [67] White J identified that the experts never became part of the workforce of the businesses of the ultimate client. They never worked within the businesses of the solicitors; they worked independently; they were in their own offices; they write their own opinions; they did it in their own time. At [62] White J defined an employment agency contract as:

...being a contract under which a person (the employment agent) "... procures the services of another ... for a client of the employment agent" can be read as meaning a contract under which a person procures the services of another person in and for the conduct of the business of the employment agent's client...
16. White J has added words into the legislation. It wasn't just procuring services for a client - it is procuring services to work in and for the business of the agent's client. At [62]:

...That was the intended scope of the provisions. It does not do too much violence to the text (Taylor v The Owners – Strata Plan 11564 at [40]) to confine the operation of the phrase "for a client" in that way, rather than as meaning for the client's benefit.
17. At [63] White J said

...Whether the worker is to be characterised as an employee or a contractor, the employment agency contract provisions were intended to apply to cases where the employment agent provided individuals who would comprise, or who would be added to, the workforce of the client for the conduct of the client's business... The mischief apprehended by the legislature following the first instance decision in Drake Personnel was that the supply of temporary personnel by a labour hire company resulted in the avoidance of payroll tax because it muddled the waters as to whether the individuals concerned might be classified as independent contractors, although they would be serving the same function for the client as its employees.
18. At [64] White J compared an independent contractor relationship with one that looks like an independent contractor relationship but is really a labour hire one.
19. It was held that the services were provided for a client's benefit but not provided by a service provider working in a client's business and, accordingly, were not intended to fall within the scope of the employment agency contract provisions as the work done by the experts retained by the plaintiff was not done in the conduct of a client's business. The payroll tax assessment notice was set aside.

The facts of *JP Property Services Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWSC 1391

20. JP Property were a cleaning company contracted to clean offices, taverns, supermarkets etc. JP Property usually hired their own employees and paid payroll tax on their wages.

Occasionally, the company could not service some of the contracts, so it subcontracted out to other cleaners, and it was those sub-contactors on which OSR tried to say the employment agency rules applied.

21. JP Property were not procuring the services of the sub-contractors for the clients directly. They were procuring it for themselves because they had an obligation to provide the services themselves. The OSR argued that they were indirectly procuring those services for their clients.
22. If it looks like an independent contractor but in actual fact the worker comes on and does the services that an employee would ordinarily do, then that will fall within these provisions. However, if they did services that an independent service provider would ordinarily do then it should not fall within the provisions.
23. These subcontractor cleaners did not work within the business of these ultimate clients. One of the main reasons was that the cleaning was gone outside of the business hours. They were providing services that were ancillary or incidental to their businesses.

#### 37 Definitions

(1) For the purposes of this Act, an employment agency contract is a contract, whether formal or informal and whether express or implied, under which a person (an employment agent) **procures the services of another person** (a service provider) for a client of the employment agent...[emphasis added]

24. It was ultimately held that the contracts were not employment agency contracts and the plaintiff was not obliged to pay payroll tax on payments made to subcontractors. Accordingly, the assessments were revoked.

#### The main takeaway

- Employment agency provisions are not intended to cover traditional sub-contracting arrangements.
- When applying the provisions, the "line in the sand is" - are you procuring the services of somebody or are you retaining a sub-contractor to provide the services that would be provided by an employee? To provide services within and as part of the client's business or part of their workforce?
- If the services are ancillary or incidental to the way that the business is run, then they should fall outside of these provisions. If the services are part of the workforce, you'll be treated like a traditional labour hire firm and you're well within the provisions.
- A specific test now exists.

#### **BIOGRAPHY**

Nicholas Gangemi

Barrister – Second Floor Selborne Chambers, Sydney

Nick was admitted to the NSW bar in 2012. Nick has been working in tax (in law and accounting firms) for over 20 years, and his areas of expertise cover corporate tax, international tax, trust law and mergers and acquisitions. He has written and presented on key issues facing taxation law.

#### Peter Laverick

Solicitor – Laverick Legal, Sydney

Peter has been a professional tax adviser for over 25 years. Following his university studies, he moved into the taxation industry where for several years he worked for the Australian Taxation Office and then for 3 international accounting firms as a taxation adviser. After establishing Laverick Legal in 2011, Peter now works for a diverse range of clients, including accounting practices and law

### **BIBLIOGRAPHY**

#### Focus Case

*JP Property Services Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWSC 1391

#### Benchmark Link

[https://benchmarkinc.com.au/benchmark/construction/benchmark\\_13-10-2017\\_construction.pdf](https://benchmarkinc.com.au/benchmark/construction/benchmark_13-10-2017_construction.pdf)

#### Judgment Link

<https://www.caselaw.nsw.gov.au/decision/59ddbdba9e4b074a7c6e19632>

#### Cases

*CXC Consulting Pty Ltd & Ors v Commissioner of State Revenue* [2013] VSC 492

*Freelance Global Ltd v Chief Commissioner of State Revenue* [2014] NSWSC 127

*UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852

#### Legislation

*Payroll Tax Act 2007*