TD 93/D190 - Income tax: do the Pay-As-You-Earn (PAYE) tax instalment deduction provisions of the Income Tax Assessment Act 1936 (ITAA) apply to persons entering into licence agreements for the use of hairdressing facilities?

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Australian Taxation Office

Taxation Determination TD 93/D190

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Draft Taxation Determination

Income tax: do the Pay-As-You-Earn (PAYE) tax instalment deduction provisions of the *Income Tax Assessment Act 1936* (ITAA) apply to persons entering into licence agreements for the use of hairdressing facilities?

1. Generally yes. The PAYE provisions apply to persons who receive salary or wages, as that term is defined in the ITAA. The term 'salary or wages', as defined in subsection 221A(1) and (2), includes salary, wages, commissions, bonuses or allowances paid (whether at piece-work rates or otherwise) to an 'eligible person as such'.

2. Under the extended definiton of 'salary and wages' contained in subsection 221A(1), the PAYE provisions of the ITAA cover other payments including payments made under a contract that is wholly or principally for the labour of the person to whom the payments are made. 'Principally', in this context, means more than 50%. (TD 92/191, IT 2129)

3. Contractual agreements that purport to be other than for employment may not be indicative of the true nature of activities carried on e.g. activities demonstrably carried on under a master and servant relationship. Generally speaking, if the evidence points to a master and servant relationship, or to the payments being wholly or principally for labour, the contract (including any terms which purport to otherwise define the status of the parties to the contract) will not avoid the requirement for instalments to be deducted. Taxation Ruling IT 2129 discusses the factors to be taken into account in determining whether the relationship of master and servant exists and in what circumstances the payments are wholly or principally for labour.

4. In some cases, a hairdresser enters into a licence agreement with a salon owner under which the hairdresser uses all salon facilites (in return for the payment of a fee to the salon owner). Customers pay the salon owner for the work done by the hairdresser, and the salon owner pays the hairdresser a set percentage of the fees received from customers. In those cases, even though a hairdresser has entered into the licence agreement, the question is whether the true nature of the activities carried on point to the existence of a master and servant relationship. If the master and servant relationship exists, the PAYE provisions apply to the amounts paid by the salon owner to the hairdresser even though they have entered into a licence agreement.

5. Either of the following factors will point strongly (and usually conclusively) to the hairdresser having employee status:

1) if the salon owner can control how, where, when and who is to carry out the hairdressing work (e.g. if the hairdresser has no right to refuse to perform an allocated task, the hairdresser is unable to engage another person to perform the work, the hairdresser is to perform the work during specified hours and any absence or leave is at the discretion of the salon owner).

2) if the hairdresser performing the work is part and parcel of the salon owner's business rather than being an individual carrying on business on his or her own account(e.g. if the relationship is continuing, the hairdresser is not free to accept work from the public at large on her or his own account, or to work at another salon).

Example:

Peter (Licensee/Renter) and John (Salon owner) enter into a licence agreement/letting of hairdressing chair agreement, whereby Peter uses all salon facilities, and in return John receives a fixed fee or percentage of Peter's turnover. Customers pay fees for hairdressing work done by Peter directly to John. At the end of the day John pays Peter 33% of the takings and keeps 67%. The question is whether TIDs should be made from the amount paid by John to Peter (ie from 33% of takings).

Under the agreement between them
- *John has the right to direct how the work is to be performed.*
- *Peter is to work agreed hours and any absence or leave is at John's discretion.*
- *Peter is unable to engage another person to perform the work. He is also unable to refuse to perform tasks as directed by John.*
- *Peter is unable to work at another salon or take work from the public on his own account.*

It also appears that all other hairdressers employed at the salon are paid 33% of their individual turnover. Peter has been employed by John for a number of years and apart from entering into the licence agreement their contractual relationship has remained the same.

In the circumstances described above, we consider that a master and servant relationship exists between John and Peter for income tax purposes, or alternatively that the payments made by John to Peter are wholly or principally for Peter's labour. The PAYE provisions require John to deduct tax instalments from the amounts he pays to Peter.

Commissioner of Taxation
12/8/93

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