IT 2137 - Income tax : tax instalment deductions - fishermen

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TAXATION RULING NO. IT 2137

INCOME TAX : TAX INSTALMENT DEDUCTIONS - FISHERMEN

F.O.I. EMBARGO: May be released

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1194318	SALARY OR WAGES	221A(1)
	TAX INSTALMENT DEDUCTIONS - FISHERMEN	221C 51(1)

OTHER RULINGS ON TOPIC : IT.2129 Tax Instalment Deductions From Payments of Salary or Wages.

PREAMBLE Taxation Ruling No. IT 2129 provides guidelines to assist in the identification of payments that are subject to PAY-AS-YOU-EARN (PAYE) tax instalment deductions under Division 2 of Part VI of the Income Tax Assessment Act.

2. Paragraph 31 of the Ruling gives examples of persons who, on application of the tests provided in the Ruling, are considered to be employees from whose incomes tax instalment deductions should be made. The examples include share fishermen of whom it is said :

> "where, amongst other things, work is performed under the direction and control of the owner and/or operator of a fishing vessel, it is considered that crew members (including the skipper) paid on a share, or share of the catch basis are neither carrying on business in common nor in receipt of income jointly."

3. It should be noted that the statement applies only to those who perform their activities under the "direction and control of the owner and/or operator". The purpose of this Ruling is to identify circumstances where fishermen are considered to come within this category and whose resultant remuneration is subject to tax instalment deductions. The Ruling should be read in conjunction with Taxation Ruling No. IT2129 which sets out the general principles to be applied in determining whether the relationship of employer and employee exists.

4. It should be emphasised that sub-section 221C(1A) of the Act requires persons who make payments of "salary or wages" to deduct tax instalments at the prescribed rates. Under sub-section 221A(1) "salary or wages" means, amongst other things, "salary, wages, commission, bonuses or allowances paid (whether at piece-work rates or otherwise) to an employee as

such, and, without limiting the generality of the foregoing, includes...any payments made - (a) under a contract that is wholly or principally for the labour of the person to whom the payments are made,...".

5. The requirement under sub-section 221C(1A) to deduct instalments from payments of "salary or wages" is mandatory. Failure to deduct, or underdeduction of tax instalments is a breach of the law. Persons in breach of the law are liable to pay by way of penalty an amount equal to the undeducted instalments plus interest at the rate of 20 per cent per annum. The interest is calculated from the time when, had the instalment been deducted, the person would have been required to pay the amount to the Commissioner or otherwise affix tax stamps of equal value as required under Division 2 of Part VI of the Act.

6. The income tax law also provides that a person who fails to deduct tax instalments from payments of "salary or wages" may be liable to prosecution and, if convicted, to a court imposed fine of up to $1000. The court may, in addition, order a convicted person to pay the Commissioner an amount not exceeding the amount of the instalment deductions.

7. Section 221D provides for the variation of tax instalment deductions in any case or class of cases where special circumstances are found to exist. In the case of employee taxpayers engaged in fishing operations special circumstances may exist where the employee is paid on a share of the catch basis or is paid at irregular intervals. The procedure for calculating tax instalment deductions in these cases is illustrated in the Attachment to this Ruling.

RULING

8. For the purposes of the income tax law primary production includes fishing operations. Sub-section 6(1) of the Act defines "fishing operations" to mean :

(a) operations relating directly to the taking or catching of fish, turtles, dugong, crustacea or oysters or other shellfish; or

(b) pearling operations,

and includes oyster farming, but does not include whaling and also does not include operations conducted otherwise than for the purposes of a business.

9. Although fishing operations may constitute a business of primary production it does not follow that all persons engaged in fishing operations may be said to be carrying on a business. There will undoubtedly be some persons who are carrying on a business of fishing operations. They will be the persons who have the responsibility, the control, the liability for all the expenses of the venture and who ultimately receive the net profits or bear any losses.

10. Others may operate under the direction and control of

the owner and/or operator of a fishing vessel. Their contracts may well be contracts which are principally for the labour of the person and their duties and status may be, in fact, characteristic of a relationship of master and servant. The fact that they may be remunerated by a share of the catch does not, of itself, affect the relationship of master and servant.

11. It is in the area of those who describe themselves as "share fishermen" that some difficulty may arise in determining the precise nature of the relationship between the parties. A share fisherman, properly so called, carries on with another or others a business of fishing operations. A true share fishing arrangement is a joint venture business and is usually evidenced by a written contract which specifies the rights and obligations of the parties. It is usual for a contract to provide that the parties shall share the gross proceeds of the sale of fish and that they each bear a proportion of the operating expenses of the vessel whether or not the gross proceeds exceed operating expenses. Where an agreement of this nature is entered into and the parties observe the terms of the agreement, they are each in the business of fishing operations. It will be necessary to determine in each case whether the arrangements constitute a true share-fishing situation or whether, in fact, they constitute an employer/employee relationship.

12. Persons directly associated with fishing operations consist of boat owners, skippers and crew-members. The following guidelines are given to assist in determining whether or not their remuneration is liable to tax instalment deductions.

Boat Owners

13. A boat owner/owner-operator may conduct fishing operations either on his own account or jointly with others. A boat owner would, in these circumstances, be considered to be carrying on a business of fishing operations and would not be an "employee" for the purposes of the PAYE provisions of the income tax law. Alternatively, boat owners may lease or hire their vessels to other fishermen. Whether the rental or hire is paid in cash or, as sometimes happens, by a share of the catch, it is not subject to the PAYE provisions.

Boat skippers

14. Boat skippers (other than owner-skippers) generally fall into two distinguishable categories. The first comprises those who, by their relationship with their principal, satisfy the criteria in Taxation Ruling No IT2129, i.e. they are employees in receipt of "salary or wages". Tax instalment deductions are required to be made by the principal from payments to a boat skipper in these circumstances. If boat skippers are paid on a share of the catch basis principals would also be required to make tax instalment deductions in respect of such payments - the deductions would be based on the value of the catch determined according to market prices fetched at the time. The Attachment to this Ruling provides examples of methods of calculating tax instalment deductions for persons who

receive their earnings as a share of the catch or at irregular intervals.

15. The second category of boat skippers are those who, in their own right, conduct fishing operations either alone or jointly with others. The latter will generally occur where a true share fishing agreement exists between the parties. The proceeds from the business are paid on a share of net profits basis according to the agreement concluded by the participants. The income of boat skippers who fall into the second category is not considered to be "salary or wages" under the PAYE provisions.

Crew-members

16. As is the case with boat skippers, crew-members of a vessel engaged in fishing operations may fall into one of two categories. The first category includes deck-hands, cooks, mechanics, engineers, spotters, divers etc who work for, and under the direction of, the owner/skipper of the vessel. Remuneration received by persons in this category may take the form of a set weekly wage, a guaranteed wage plus a share of the catch, a share of the catch only or some other form of periodic remuneration. Persons in this category are considered to be employees under the income tax law and payments to such persons are "salary or wages" for the purposes of sub-section 221A(1) of the Act. Examples of the calculation of tax instalment deductions from payments to persons in this category are provided in the Attachment to this Ruling.

17. The second category of crew-members are those who are parties to a true share fishing agreement referred to earlier. They are participants in a business joint venture formed for the purposes of conducting fishing operations and are paid on a share of net profits basis. Their shares of the net profit are not subject to the PAYE provisions.

18. Persons who carry on a business of fishing operations are primary producers for income tax purposes and allowed the benefit of tax averaging under Division 16 of Part III of the Act.

COMMISSIONER OF TAXATION
27 November 1985

APPENDIX

METHODS OF CALCULATION OF TAX INSTALMENT DEDUCTIONS (TIDs)

FOR FISHING BOAT EMPLOYEES PAID AT IRREGULAR INTERVALS

Background

Section 221D of the Act empowers the Commissioner to vary the prescribed rates of TIDs where this is necessary for the purpose of meeting the special circumstances of any case or class of cases. In principle, the Commissioner accepts that the circumstances of fishing boat employees can be such that some variation from the prescribed instalments is warranted. It is

therefore accepted that where the earnings of fishing boat employees are paid at irregular intervals of more than one week and consist of -

(i) a share of the catch;

(ii) a set amount of pay for a fishing trip; or

(iii) an amount of pay for a fishing trip plus a share of the catch,

the tax instalments to be deducted are to be determined according to the formula given below.

TID Calculation Method

(1) Calculate average weekly earnings as follows -

(a) where the person is in continuous employment with the employer*, divide the amount paid by the number of weeks** since the person was last paid;

(b) where the person is not in continuous employment with the employer, divide the amount paid by - the number of weeks** the vessel was at sea, plus time spent by the person preparing the vessel for the fishing trip and tidying up after the trip;

(2) ascertain from the TID Schedule the amount of deduction applicable to the average weekly earnings calculated in (1);

(3) multiply the TID obtained in (2) by the number of weeks in (1) to obtain the instalment to be deducted.

* A person may be regarded as being in continuous employment with an employer if the person has been paid by the employer within the past two months and that person is a regular member of the crew used by the employer.

** Where the number of days for which a person is being paid is not exactly divisible by 7, regard any remainder which is 4 days or more as being a week and ignore any remainder which is less than 4 days.

Example 1

A crew-member, in continuous employment with his employer, is paid $720 as his share of the catch. It is 18 days since the crew-member was last paid by the employer. The TID is calculated according to the method above as follows -

(1) Divide $720 by the number of weeks (2 weeks plus 4 days becomes 3 weeks) in the period since the person was last paid by the employer, i.e.,

$720/3 = $240

(2) TID applicable to $240 per week = $42.40

(3) $42.40 x 3 = $127.20

The TID applicable to the $720 share of the catch is $127.20.

Example 2

A crew-member is paid $200 by his employer for a fishing trip plus $580 as his share of the catch. The person is not in continuous employment with the employer and spent 1 day working on the boat prior to the trip and 1 day tidying up after the trip, which lasted 15 days. The TID is calculated as follows -

(1) Divide total earnings from the trip, $780, by the number of weeks of employment (2 weeks plus 3 days becomes 2 weeks), i.e. $780/2 = $390.

(2) TID applicable to $390 per week = $93.05.

(3) $93.05 x 2 = $186.10.

The TID applicable to the employee's earnings from the fishing trip is $186.10.

Example 3

A crew-member, in continuous employment, receives a basic pay of $100 per week from his employer and is also paid a share of the catch at irregular intervals. It is 16 days (i.e., 2 weeks and 2 days) since he was last paid a share of the catch and during that time he has received 2 weeks basic pay. The crew member is to be paid $170 as his share of the catch. The tax instalment to be deducted from the $170 is calculated as follows -

Wages received	$	Instalments deducted to date	$
Basic pay - 1st week	100	1st week	4.15
Basic pay - 2nd week	100	2nd week	4.15
Total basic pay in period	200	Total instalments	
Share of the catch	170	in period	8.30
Total pay in period	370		

(1) Average weekly earnings = $370/2 = $185
(2 weeks plus 2 days becomes 2 weeks)

(2) TID applicable to $185 per week = $27.65

(3) Total TID = $27.65 x 2 = $55.30. As TIDs have already been deducted to the extent of $8.30, the $55.30 is reduced by this amount, resulting in a net amount of TID of $47.00 to be deducted from

the $170 share of the catch payment.

If at any time the total of the tax instalments deducted from the basic pay exceeds the amount calculated in (3) above, there is no instalment to be deducted in respect of the share of the catch payment. In such circumstances, however, there is to be no refund of tax instalments deducted from the basic pay.