IT 2677 - Income tax: requirements to make tax instalment deductions from payments of salary or wages to locum doctors

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Taxation Ruling
Income tax: requirements to make tax instalment d payments of salary or wages to locum doctors

other Rulings on this topic

IT 2129 IT 2511 IT 2576

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contents para

What this Ruling is about

1. This Ruling explains when a locum doctor is in receipt of 'salary or wages' and when tax instalment deductions must be made from such salary and wages under subsection 221C(1A) of the *Income Tax Assessment Act 1936* .

Ruling

Australian Medical Association standard locum agreements

2. If the principal doctor (principal) and the locum doctor (locum) use one of the Australian Medical Association (AMA) standard locum doctor agreements in existence at the date of issue of this Ruling, tax instalment deductions (TIDs) must be made from the locum's pay. Under the terms of these agreements payments received by a locum are 'salary or wages' within the meaning of subsection 221A(1) and therefore TIDs must be made.

Other locum agreements

3. If an agreement, other than a standard AMA agreement with terms substantially the same as those set out in paragraphs 13 and 14 of this Ruling, is used then the need to make TIDs will depend on the facts of each case and in particular on the precise terms of the agreement, whether oral or written. Taxation Ruling IT 2129 sets out the principles and tests to be used in deciding whether the locum is in receipt of salary or wages.

Non-resident locums

4. In determining employment status, non-resident locums will be treated in the same way as resident locums. However, the terms of the double tax agreement between the country of residence of the non-resident locum and Australia may provide that the non-resident locum is taxable only in his or her country of residence. The relevant conditions of the double tax agreements are set out at paragraph 16 of this Ruling.

Deputising locums

5. Deputising locums are not in receipt of salary or wages and no TIDs need to be made from payments to them.

Date of effect

6. This Ruling sets out the current practice of the Australian Taxation Office. It applies (subject to any limitations imposed by statute) for years of income commencing both before and after the date on which it is issued.

Definitions

7. In this Ruling:

'locum' means a doctor who acts as a substitute for a principal in that principal's absence. An example is where the principal is sick or away on holidays. Generally, a locum:

- is paid a fixed amount (the AMA provides a suggested scale of rates) or receives a percentage of the fees she or he bills;
- works hours set by the principal;
- works from the principal's premises and uses the principal's diagnostic equipment, surgical instruments and so on;
- may provide his or her own doctor's bag which contains drugs and minor procedural equipment.

The principal generally has control over where, when and who carries out the duties.

'non-resident locum' means a doctor whose usual place of abode is outside of Australia and who, in the particular income year, lives in Australia for less than 183 days.

'deputising locum' means a doctor who offers his or her services, through an agency, to be on call after hours and at weekends. These locums use their own equipment and bill patients directly and in their own name.

'AMA standard locum agreement' means the standard locum agreements which some state branches of the AMA use, including 'agency' agreements made between a principal, locum and 'agency' or 'locum service'. Those agreements have terms and conditions substantially the same as those set out in paragraphs 13-14 of this Ruling.

Explanations

Subsections 221C(1A) and 221A(1) - salary or wages

8. Subsection 221C(1A) provides that if an employer pays salary or wages to an employee, the employer must make tax instalment deductions from the salary or wages. 'Employee' is defined as a person who receives, or is entitled to receive, salary or wages. Salary or wages is defined in subsection 221A(1), in so far as is relevant, as :

(a) 'salary, wages, commission, bonuses or allowances paid (whether at piece-work rates or otherwise) to an employee as such'; and

(b) includes any payments made under a contract that is wholly or principally for the labour of the person to whom the payments are made(paragraph 221A(1)(a)).

'Master and servant' relationships

9. A locum will be in receipt of 'salary and wages' as defined in paragraph 8 (a) above if a master and servant relationship exists between the principal and the locum as any payment made to the

locum is received in the capacity as an employee. Whether or not a master and servant relationship exists between a principal and a locum will be a question of fact in each particular case. Taxation Ruling IT 2129 at paragraphs 26-30 explains the tests to be used to determine whether a master and servant relationship exists. The Ruling states that 'control' is a primary test of whether a master and servant relationship exists. In deciding whether the control test is met, consideration should be given to:

(a) the presence of the right to nominate the person who is to carry out the work;

(b) the location and the times at which the work is to be carried out;

(c) the manner in which the work will be carried out;

(d) the extent of the obligation on the locum to obey the orders of the principal as to the manner in which the work is to be performed. The greater this obligation the greater the relative weight to be attached to the control criteria and the more certain it is that the individual is an employee. Control over performance of a doctor's professional duties is only exercised through ethical pronouncements of the medical profession. This does not mean that the control test cannot be applied to doctors. As Dixon CJ , Williams, Webb and Taylor JJ stated in *Zuijs v.Wirth Bros Pty Ltd* (1955) 93 CLR 561 at 571, 'What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it if only in incidental or collateral matters'. (see also *Stevens v. Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 at 24 and 36). The control test has been applied to doctors providing professional services (*Harbinson and Ors v. Buckingham* (1979) 21 AILR 479). It is considered that a principal who employs a locum has lawful authority to command that locum.

In *Stevens v. Brodribb Sawmilling Company Pty Ltd* the High Court stated that although the control test is a significant criterion which is often appropriately applied in the first instance it is not the sole or exclusive test of whether a master and servant relationship exists. Rather, it is merely one of a number of indications that the relationship exists. All aspects of the relationship between the parties must be considered.

10. The 'integration' or organisation test may also be relevant. This test is concerned with whether the individual is performing the relevant services as an individual carrying on business on his or her own account or whether the activities are part and parcel of another's business activity (*Stevens v. Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 at 26).

11. The intention of the parties is also a relevant factor (*Building Workers' Industrial Union of Australia v. Odco Pty Ltd* (1991) 29 FCR 104 at 126). However, an express term in a contract to the effect that the locum is not an employee of the principal does not always give the locum an independent contractor status. The effect of such a term was considered by Lord Denning MR in *Massey v. Crown Life Insurance Co.* [1978] 1 WLR 676 at 679:

> '....if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it... On the other hand, if their relationship is ambiguous and capable of being one or the other [that is, either service or agency], then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them.'

(See also *Narich Pty Ltd v. Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 at 601 per Lord Brandon).

12. Many other factors may be relevant in determining whether or not a master and servant relationship exists. A table containing a large number of those factors is contained in Appendix B of IT 2129. All of those factors, as well as any other relevant factors, should be considered and weighed against each other to determine the nature of the relationship.

Contracts wholly or principally for a person's labour

13. Paragraph (a) of subsection 221A(1) is an extension of the definition of salary or wages and covers payments to individual contractors who are substantially in the position of an employee. The contract must be wholly or principally for the labour of the individual. Under the tests set out in IT 2129, professional work would be classified as labour for the purpose of determining whether a payment

made constitutes salary or wages for the purposes of subsection 221A(1). IT 2129 states that a person falls within paragraph (a) if she or he performs tasks under similar general conditions as an employee. In particular, the Ruling looks to:

(a similarity of working conditions, performance requirements and financial arrangements for employees and contractors; and

(b) the extent to which the individual's activities are integrated into the principal's business.

AMA Standard Agreements

14. At the very least, these agreements provide that the locum must:

(i) attend to the practice during certain hours;

(ii) observe professional ethics;

(iii) exercise all reasonable care and skill in his or her duties;

(iv) pay over to the principal all monies received from the practice; and

(v) the principal pays the locum at a fixed rate over regular intervals.

15. Some AMA agreements go further and provide that:

(i) the locum cannot attend to patients other than those of the principal;

(ii) the locum is entitled to holiday and sick leave;

(iii) the principal provides surgical instruments .; and

(iv) the locum is to be reimbursed for expenses such as motor vehicle expenses.

16. Under the principles outlined in IT 2129 and provided there are no contrary indications, either in the contract or by the behaviour of the parties, these agreements are considered to either create a master and servant relationship between the principal and the locum or to be contracts wholly or principally for the locum's labour.

Non-resident locums and double tax agreements

17. Under some Double Taxation Agreements between Australia and other countries a locum will be taxed only in his or her home country and not in Australia if:

(a) the locum is self-employed (for example a deputising locum) and while in Australia does not have a fixed base regularly available to him or her for the purpose of performing his or her activities;or

(b) the locum is present in Australia for less than 183 days in the year of income and is an employee while in Australia. However, if the remuneration is paid by or on behalf of an employer who is an Australian resident or the remuneration is deductible in determining the profits of a permanent establishment or a fixed base which the non-resident employer has in Australia, the locum is taxable in Australia.

Examples

18. As the existence or non-existence of an employment relationship depends so much on the circumstances of the particular case, the answers given in the following examples are not determinative of our views on cases with similar, but different, facts. It is necessary to look at all the circumstances in each individual case.

Oral agreement for short-term substitution

19. Dr X has her own medical practice. She decides to go on an overseas trip for two months. She makes an oral agreement with Dr Y under which Dr Y runs Dr X's practice for the two months that she is away. Dr Y :

- uses Dr X's premises and her diagnostic equipment;
- has to observe professional ethics and exercise all reasonable care and skill in his duties;
- is free to delegate his duties to another doctor;
- is entitled to take a percentage of the net profits of the practice (i.e. a percentage of the amount left after the expenses of the practice have been met) at any time convenient to him;

- is not entitled to direct reimbursement for any expenses he incurs e.g. motor vehicle expenses.

Under the terms of the agreement Dr Y is not an employee of Dr X. Factors pointing to this conclusion are the freedom to delegate duties, entitlement to a share of net profits and the lack of entitlement to direct reimbursement of expenses. In these circumstances, Dr X does not have to make any tax instalment deductions from Dr Y's pay. However, in each case all of the circumstances must be considered. If, in the present example, Dr Y

- was not entitled to delegate his duties; and
- was paid on a weekly basis according to the AMA scale,

he would be an employee of Dr X (provided all other factors remained equal). Dr X would have to make tax instalment deductions from Dr Y's pay.

Written agreement other than the standard AMA agreement

20. Dr A runs a medical practice. Some time ago, he decided that he would work four days a week and employ a locum, Dr B, to work on the fifth day. Dr A and Dr B made a written agreement which was prepared by Dr A's solicitor. Under the agreement Dr B:

- attends to the practice during the hours set by Dr A;
- accounts to Dr A for all monies she bills;
- receives a fixed amount of money from Dr A each fortnight;
- uses Dr A's premises and surgical equipment;
- is entitled to take sick leave and annual leave;
- is entitled to reimbursement for motor vehicle expenses she incurs;
- cannot delegate her duties to another doctor.

Under the agreement Dr B is Dr A's employee. Each of the above-mentioned factors points to this conclusion. Dr A must make tax instalment deductions from Dr B's pay.

Written agreement containing a 'non-employment' term

21. Dr Z enters into a written contract with the ABC medical centre in Canberra. The centre is open 24 hours a day, seven days a week and operates on a bulk billing basis. The terms of the contract state that Dr Z:

- is to work two four hour sessions (9am - 1pm and 2pm - 6pm), five days a week, for a period of three months;
- is paid 40% of the income attributable to her at the session, with a minimum retainer;
- is not entitled to leave entitlements of any kind;
- cannot delegate her duties to another doctor;
- uses ABC's facilities and equipment.

In addition, the contract contains a term to the effect that Dr Z is not an employee of ABC and is liable to attend to her own tax arrangements. In these circumstances, Dr Z is an employee of ABC and ABC must make tax instalment deductions from Dr Z's pay. This is despite the fact the contract contains a term stating that Dr Z is not an employee. With the exception of not being entitled to leave, the terms of the contract indicate that the true relationship of the parties is one of employment.

Non-resident locum using AMA standard locum agreement

22. Dr C usually lives in England but is in Australia on a three month working holiday. Dr D needs someone to help out in her Sydney practice for a month and makes an agreement with Dr C, using a standard agreement provided by the NSW branch of the AMA. Under the standard agreement Dr C is an employee of Dr D and Dr D must make tax instalment deductions from his pay. Under Article 12 of the Double Taxation Agreement between Australia and the United Kingdom, Dr C will be subject to Australian tax because his employer, Dr D, is an Australian resident.

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- ITAA 221A(1); ITAA 221A(1)(a); ITAA 221C(1A)

case references
- Building Workers' Industrial Union of Australia v. Odco Pty Ltd (1991) 29 FCR 104
- Harbinson v. Buckingham (1979) 21 AILR 479
- Massey v. Crown Life Insurance Co. [1978] 1 WLR 676
- Narich Pty Ltd v. Commissioner of Pay-roll Tax [1983] 2 NSWLR 597
- Stevens v. Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 479
- Zuijs v. Wirth Bros Pty Ltd (1955) 93 CLR 561