Qian and Commissioner of Taxation -

Decision impact statement

Qian and Commissioner of Taxation

Court citation(s):	[2019] AATA 14
Venue:	Administrative Appeals Tribunal
Venue reference no:	2017/3327, 3329
Judge/AAT member name(s):	P W Taylor SC, Senior Member
Judgment date:	9 January 2019
Appeals on foot:	No
Decision outcome:	Unfavourable to the Commissioner

Impacted advice

This decision has no impact on any related advice or guidance.

Précis

At issue in this decision was whether the taxpayer was carrying on an enterprise as a courier driver for the purposes of the taxpayer's entitlement to GST registration, and entitlement to input tax credits in his activity statement for the June 2016 quarter, under the *A New Tax System (Goods and Services Tax) Act 1999*.

Brief summary of facts

The taxpayer undertook, through an intermediary company, work as a courier on an exclusive basis for Mail Call Couriers and, subsequently, Direct Couriers (delivery companies). To undertake this work, the taxpayer purchased a van (subject to finance).

There was limited written evidence of the terms and conditions of the taxpayer's engagement with the respective companies. The delivery companies set the fee for each delivery. Evidence was provided that Mail Call issued daily 'payment summaries' and also issued recipient-created tax invoices for the taxpayer. Public liability insurance was organised on the taxpayer's behalf by either the delivery companies or the intermediary (the evidence was unclear on this point).

The taxpayer wore a uniform bearing the relevant delivery company's logo and affixed the relevant delivery company's logo on his vehicle. The taxpayer was notified of available deliveries through a device supplied by the delivery company.

There were no contracts directly between the taxpayer and the people to whom, and from, he delivered and collected goods.

Although the taxpayer was to be paid on the basis of deliveries done, there was a minimum amount that he was to be paid per day. In practice, the taxpayer did not make enough deliveries to exceed that minimum amount.

Issues decided by the court

Entitlement to GST registration – carrying on an enterprise

The parties conducted the matter on the basis that the taxpayer's work as a courier driver was capable of constituting carrying on an enterprise, unless his role was that of an employee. Consequently, the focus of the Tribunal was on whether the taxpayer was undertaking the work for the delivery companies as an employee or independent contractor.

The Tribunal highlighted (at [16]) the key indicators of the employee/independent contractor distinction outlined in Taxation Ruling TR 2005/16 *Income tax: Pay As You Go – withholding from payments to employees* and Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?*

The Tribunal noted that regard must be had to the totality and substance of the relationship, and that the comparative weight of relevant aspects of the relationship may vary according to the particular circumstances. [at 18]

The Tribunal observed that the evidence in this matter was opaque and ambiguous in certain important aspects, and that a number of inferences had to be made from the evidence presented. [at 21-24, 29 and 37-38)

The Tribunal considered that the following facts pointed more towards the taxpayer being an employee.

- The taxpayer was liveried as a representative of the delivery company.
- The taxpayer did not outwardly appear to be working on his own behalf and worked exclusively for one delivery company at a time.
- The taxpayer was reliant on the delivery company to generate and allocate jobs to him.
- The taxpayer had no control over the rates paid or the total cost for each job.
- The taxpayer did not maintain an accounting system for the jobs.
- The taxpayer did not generate invoices or payment summaries.

The Tribunal considered that the following facts did not meaningfully inform the character of the relationship:

- The taxpayer had some freedom to accept or reject individual jobs, but the basis on which he did so was really a matter of objective practical efficiency which served both his own interests and that of the delivery company.
- The conceivable, but unexpressed, contractual permissibility of delegation, because the objective circumstances tend to contradict its likely, or likely to be tolerated, occurrence.

The Tribunal also had regard to the fact that the taxpayer supplied, operated and maintained his own van, which was a commercial transport vehicle. The Tribunal noted that there was the (theoretical) possibility that the taxpayer's remuneration could be influenced by his own endeavours and efficiency. The Tribunal thought these factors, and the form of the regular accounting in the 'payment summary' documents, favoured the view that the taxpayer was an independent contractor.

Ultimately, the Tribunal found that the taxpayer was conducting an enterprise as an independent contractor.

Entitlement to input tax credits – June 2016 quarter

The Tribunal noted that the amended assessment for the June 2016 activity statement was based wholly on a determination that the taxpayer was not conducting an enterprise. It did not address, and could not meaningfully address, the accuracy of the contents of the contentious activity statement. The Tribunal observed that there were reasons to doubt the accuracy of the contents of the activity statement including:

- the discrepancy between the 'total sales' and the arithmetic total of all the payments made to the taxpayer
- the use of the amounts paid to the taxpayer as the 'total sales' value, rather than the total invoice amount, and
- the unexplained/unexamined basis for the 'GST on purchases' value.

For the above reasons, the Tribunal set aside the amended assessment decision and remitted that aspect back to the Commissioner.

ATO view of decision

The ATO observes that determining whether a worker is an employee or independent contractor is highly factually dependent and requires the consideration of many factors. The decision of the Tribunal was open to it on the facts and evidence before it, which it observed was opaque in certain important respects.

However, the ATO does not accept that the Tribunal decision is authority for the proposition that the fact that a worker supplies his or her own vehicle is a matter that always or generally is to be given decisive or predominant weight in assessing whether a worker is an independent contractor or employee.

The ATO is seeking an appropriate case to clarify the law concerning the significance of the fact that a worker supplies his or her own vehicle in assessing whether a worker is a contractor or an employee.

Implications for impacted advice or guidance

None.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	11 April 2019
Due date:	10 May 2019
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

A New Tax System (Goods and Services Tax) Act 1999

Case references

ACE Insurance Ltd v Trifunovski [2013] FCAFC 3; (2013) 209 FCR 146
Australian Air Express Pty Limited v Langford [2005] NSWCA 96
Hollis v Vabu Pty Ltd [2001] HCA 44; (2001) 207 CLR 21; 2001 ATC 4508; (2001) 47 ATR 559
Humberstone v Northern Timber Mills [1949] HCA 49
On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) [2011] FCA 366; (2011) 214 FCR 82; 2011 ATC 20–258; (2011) 83 ATR 137
Hollis v Vabu Pty Ltd [2001] HCA 44; (2001) 207 CLR 21; 2001 ATC 4508; (2001) 47 ATR 559
Queensland Stations Pty Ltd v Federal Commissioner of Taxation [1945] HCA 13
The Trustee for the SR & K Hall Family Trust and Commissioner of Taxation [2013] AATA 681
Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance [1968] 2 QB 497
Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52; (2010) 184 FCR 448; 2010 ATC 20–184; (2010) 76 ATR 264
Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1; (1986) 160 CLR 16
Australian Air Express Pty Limited v. Langford [2005] NSWCA 96

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