

# Decision impact statement

## MWWD and Commissioner of Taxation (Taxation)

<b>Court citation:</b>	[2020] AATA 4169
<b>Venue:</b>	Administrative Appeals Tribunal – Small Business Taxation Division
<b>Venue reference no:</b>	2020/0839 – 2020/0843
<b>AAT member name:</b>	Deputy President Bernard J McCabe
<b>Judgment date:</b>	16 October 2020
<b>Appeals on foot:</b>	No
<b>Decision outcome:</b>	Unfavourable to the Commissioner

## Impacted advice



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

## Précis

This Decision impact statement outlines the ATO's response to this case, which considered whether a person engaged by the taxpayer was an 'employee' under section 12 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA).

## Brief summary of facts

The taxpayer provides repair and maintenance services. They provide some of these services to their clients through service technicians. This case concerned a person who was engaged by the taxpayer as a service technician and was treated as an independent contractor for the quarterly periods ending 30 September 2013 to 30 September 2017 (the period).

The person was initially engaged as a casual worker, then was subsequently offered written terms of engagement that specified, among other things, that he was an 'independent contractor'. He was engaged under that agreement, and similar agreements, over the period.

The taxpayer did not make any superannuation contributions for the person during the period on the basis that he was not an employee.

The Commissioner assessed the taxpayer as being liable to pay superannuation guarantee charge on the basis that the person was an employee under subsections 12(1) and 12(3) of the SGAA during the period.

## Issues decided by the Tribunal

The Tribunal found that the person was not an employee under subsections 12(1) or 12(3) of the SGAA.

### **Subsection 12(1) of the SGAA – employee at common law**

The Tribunal observed at [13] that determining whether a person is an employee at common law involves a ‘multi-factorial’ approach. The Tribunal’s specific findings in relation to the factors that it considered are outlined below.

#### ***Terms of the contract***

The Tribunal concluded at [32] that the text of the agreement pointed in both directions.

It found at [32] that the terms described the person as an ‘independent contractor’ and gave the person a ‘right to delegate’, indicating he was an independent contractor. It also found that some terms gave the taxpayer ‘some formal control over where, when and how the person provided the services’, indicating he was an employee.

#### ***Exercising control***

The Tribunal concluded that the control test did not point decisively in either direction.

It observed at [33] that the agreement gave the taxpayer more control over the person than would be expected in an independent contracting arrangement, but found, on the evidence at [41], that the person was not actively ‘supervised or directed’.

#### ***Integration into the organisation of the business***

The Tribunal observed at [43] that the work of the service technicians was central to the taxpayer’s business. The person was the ‘face’ of the taxpayer and was expected to promote its business to customers, which may be suggestive of an employment arrangement.

It found on the evidence at [43] that the person did not supervise any of the taxpayer’s employees and was not actively supervised himself as part of the taxpayer’s hierarchy. Generally, the person operated alone at the premises of the taxpayer’s customers.

The Tribunal found at [44] that the person ‘enjoyed a great deal of autonomy in the relationship’ but concluded that this was not ‘necessarily inconsistent with an employment relationship’.

#### ***Exclusivity***

The Tribunal concluded at [46] that ‘this indicator was ultimately inconclusive’.

It found at [45] that the person was ‘permitted to undertake private work’ notwithstanding a restraint of trade clause in the agreement and practical impediments to working for third parties.

The Tribunal also found on the evidence at [46] that the person performed all work personally, did not subcontract, and worked substantially for the taxpayer.

#### ***Tools and equipment***

The Tribunal concluded at [52] that this factor pointed to an independent contractor relationship, but not decisively so.

The Tribunal found on the evidence at [50] that the person was required to provide many of his own tools and a vehicle, but the taxpayer maintained a workshop and provided some equipment to the person.

### ***Remuneration and tax arrangements***

The Tribunal found on the evidence at [54] that the person was, for the most part, being paid to complete discrete tasks in accordance with the agreement, which pointed to an independent contractor relationship.

The Tribunal also observed at [53–54] that the taxpayer did not withhold amounts in respect of income tax nor make any superannuation contributions. The person included goods and services tax in his invoices and claimed deductions for expenses. The Tribunal accepted that this merely reflected the parties arranging their affairs in accordance with the agreement.

### ***Insurance arrangements and risk***

The Tribunal found on the evidence at [56] that the person assumed the risk.

It found at [55] that the agreement required the person to bear liability for any loss or damage arising out of his work. There were a handful of instances where he had to re-do work at his own expense.

### ***Conclusion – employee at common law***

The Tribunal found on the evidence at [57] that while the parties intended to negotiate an independent contracting relationship, the relationship they created included features of both an employment and independent contracting arrangement.

The Tribunal ultimately decided at [57–58] that the person was not a common-law employee. It was satisfied that the person and the taxpayer were ‘dealing with each other as principals’ and while individual indicia pointed to different conclusions, the overall impression was that they were not in an employment relationship.

### ***Subsection 12(3) of the SGAA – statutorily-expanded definition***

The Tribunal accepted at [60] that the person performed the contracted work personally and that the agreement did not place much emphasis on the provision of tools and equipment.

However, despite both the evidence suggesting there were practical obstacles to delegating the work, and the person not delegating work in practice, the Tribunal found on the evidence at [61] that he had the right to delegate. Further, there was no reason to suppose the taxpayer would have (or could have) unreasonably prevented delegation.

### ***Conclusion – statutorily-expanded definition***

The Tribunal concluded at [64] that the person was not an employee under subsection 12(3) of the SGAA because he had a right to delegate.

## **ATO view of decision**

The ATO observes that determining whether a person is an employee, or an independent contractor, depends on the facts and circumstances of each case.

The Tribunal’s conclusion differed from that of the ATO’s because of the finding of facts made by the Tribunal and the emphasis that it gave to some facts over others. This finding of facts was open to the Tribunal based on the evidence presented.

The ATO accepts the Tribunal’s decision (that the person was not an employee under subsection 12(1) and that subsection 12(3) did not apply) was open to it based on its finding of facts.

The ATO does not consider that this decision has wider ramifications beyond the taxpayer’s particular circumstances.

## 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.

<b>Date issued:</b>	25 February 2021
<b>Due date:</b>	26 March 2021
<b>Contact officer:</b>	Contact officer details have been removed as the comments period has expired.

## Legislative references

*Income Tax Assessment Act 1936*

*Superannuation Guarantee (Administration) Act 1992*

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12(1)

12(3)

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