SGR 93/1 - Superannuation guarantee: Who is an employee?

Superannuation Guarantee Ruling
Superannuation guarantee: Who is an employee?

other Rulings on this topic

IT 2129, IT 2077, IT 2121

contents para

Superannuation Guarantee Rulings do not have the force of law. Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Rulings and Determinations.

What this Ruling is about

1. The *Superannuation Guarantee (Administration) Act 1992* (the SGAA) imposes a charge on employers who do not make sufficient superannuation contributions for each of their employees.

2. This Ruling explains who is an 'employee' under section 12 of the SGAA.

Ruling

(a) Relationship with PAYE

3. Generally, the extended definition of 'employee' in the SGAA is intended to reflect that in the Pay As You Earn (PAYE) provisions in Part IV Division 2 of the *Income Tax Assessment Act 1936* (ITAA). Though there are some differences which are explained in this Ruling, assistance in the meaning of the term can be obtained from Income Tax Rulings.

(b) Prescribed Payments System

4. People who receive prescribed payments (within Division 3A of Part VI of the ITAA) but who enter into a contract wholly or principally for their labour, are employees within the SGAA, even though they are not treated as employees for PAYE purposes.

(c) Employees at common law

5. If a person is an employee at common law, that person is an employee under the SGAA.

6. The main test of a common law employment relationship is the *right* to control how, when, where and who is to perform labour. The degree of control necessary varies according to the type of job.

7. A subsidiary test that can be used when the control test is inconclusive is the integration test - whether a person providing services does so as an individual carrying on his or her own business (contract for services) or individually as an integral part of another's business organisation (a contract of service).

(d) Is the common law expanded?

8. The definition of 'employee' is changed from the common law meaning by subsections 12(2)-(11). These subsections include as employees certain contractors, directors, artistes and sportspersons and exclude certain domestic or private workers.

(e) Contractors

9. A person who has entered into a contract principally for his or her labour is an employee of the other party to the contract (sub-section 12(3)).

10. If the principal has a contract, not with the individual who will do the work, but with a company or trustee, then subsection 12(3) will not make the worker the employee of the principal. Of course, the worker could be the employee of the intermediary company or trustee.

11. If a partnership has contracted to provide services, then the person who actually does the work is not the employee of the other party to the contract. This is so even if the worker is a partner and even if the contract requires that partner to do the work. However, if partners enter into contracts in their personal capacity, they can be employees within subsection 12(3).

12. A contract is principally for labour when more than half of the value of the contract is for labour.

13. 'Labour' includes mental and artistic effort as well as physical toil (*Deputy Commissioner of Taxation v. Bolwell* (1967) 1 ATR 862 at 873).

14. A contract is a contract for a person's labour if the work must be done by that particular person. If the contract leaves the person completely free to have the labour performed by another person(s), then the contract is not a contract for the labour of a particular person (*Neale (Deputy Commissioner of Taxation) v. Atlas Products (Vic.) Pty Ltd* (1955) 10 ATD 460; *World Book (Australia) Pty Ltd v. Commissioner of Taxation* 92 ATC 4327; (1992) 23 ATR 412).

(f) Directors

15. 'Directors of bodies corporate' on a salary package are usually employees within the ordinary meaning. Even if not, **any** director will be an employee under the SGAA if he or she receives, or is entitled to receive, a payment for the performance of duties as a director (sub-section 12(2)).

(g) Artistes and sportspersons

16. The legislation includes as employees those individuals who are paid:

- to perform or present a display or an artistic, sporting, or promotional spectacle (paragraph 12(8)(a)); or
- to provide services in connection with such an activity (paragraph 12(8)(b)); or
- to perform services in, or in connection with, the making of a film, tape, disc, or television or radio broadcast (paragraph 12(8)(c)).

(h) Domestic or private work

17. Anyone paid to do domestic or private work for no more than 30 hours a week is not an employee (subsection 12(11)).

18. Private work is work which relates only to the employer as a private person. Domestic work is work which relates only to the employer's house, home or family.

Explanations

Relationship with PAYE

19. The intention, in the SGAA, is largely to reflect the extended PAYE definition of 'employee' in subsection 221A(1) of the ITAA. However, there are some differences, including:

- persons excluded from the PAYE definition of employee because they receive prescribed payments (paragraph (q) of the definition of 'salary or wages' in subsection 221A(1) of the ITAA), can still be SGAA employees because the SGAA has no similar exclusion.
- contracts for domestic or private labour are entirely excluded for PAYE purposes (paragraph 221A(1)(a) of the ITAA) but

are only excluded under subsection 12(11) of the SGAA when the employment is for no more than 30 hours a week.

Employees at common law

20. The courts have developed a method for applying the ordinary, or 'common law', meaning of 'employee'. Their approach is to look at a wide range of factors which indicate whether a person is an employee or not. For example, if the employer provides the place of work, this might indicate an employment relationship, while the absence of holiday pay might suggest the opposite. The courts' decisions tend to be taken on balance, after considering the relevant factors. Many of those factors are discussed in Income Tax Ruling 2129.

21. Historically, the two most important (often decisive) factors have been the control test and the integration test. The control test asks whether the employer has the *right* to control how, when and where the work is done (even if control is not actually exercised).

22. The integration test examines whether the individual's services are an integral part of the employer's business or merely ancillary to it. Some of the factors to be taken into account in deciding whether the integration test is satisfied include:

(a) whether the relationship between the worker and the master is a continuing one; and

(b) whether the worker's activities are effectively restricted to providing services to only one master; and

(c) whether the worker generally profits commercially from sound management in the performance of his tasks.

23. The courts also look at factors other than these tests (e.g. if the workers provide their own place of work and equipment and if they must pay expenses out of their own remuneration).

24. These tests are discussed in many cases, including *Commissioner of Payroll Tax (Vic.) v. Mary Kay Cosmetics Pty Ltd* 82 ATC 4444 at 4451; (1982) 13 ATR 360 at 367 and *Stevens v. Brodribb Sawmilling Company Pty Ltd* (1985-6) 160 CLR 16.

Is the common law expanded?

25. Although 'employee' has its ordinary meaning in the SGAA, subsections 12(2) to 12(10) list a number of further persons who are also treated as employees.

26. The Commissioner considers that these subsections mean that people who fit within their terms are treated as employees even if they

are not common law employees and are clearly distinguishable from common law employees.

Contractors

27. If a person is not a common law employee, it is necessary to consider whether that person is treated as an employee by sub-section 12(3). This provision extends the definition of 'employee' to cover people who have entered into a contract which is wholly or principally for their labour.

28. A contract is principally for labour if the labour content exceeds 50% of the value of the contract (IT 2129 at para. 35).

29. Therefore contracts which, in the main, provide for payments in respect of the supply of goods, materials, or hire of plant or machinery and any other related costs incurred by the recipient of such payments in the course of performing work under the contract are not principally for labour (IT 2129 at para. 40).

30. Generally, the value of various parts is specified in the contract. However, the Commissioner will not automatically accept the parties' costings. Instead, the share of the total value of a contract which is represented by labour should be similar to that which would be determined on a market basis.

31. The wording of subsection 12(3) requires that the contract be for the labour *of the person who works under the contract.* In *Neale (Deputy Commissioner of Taxation) v Atlas Products (Vic.) Pty. Ltd.* (1955) 10 ATD 460, the High Court considered that (p. 461):

> '[I]f the contract leaves the contractor free to do the work himself or to employ other persons to carry it out the contractual remuneration when paid is not a payment made wholly or at all for the labour of the person to whom the payments are made. It is a payment made under a contract whereby the contractor has undertaken to produce a given result ....'

32. In other words, the fact that the contract leaves a person completely free, if they choose, to engage others to perform the work on their behalf means that the payments are not payments under a contract for labour. This is so even if the contractor actually does perform the work personally and had no intention of doing otherwise. Similar views were expressed in *World Book (Australia) Pty Ltd v. Commissioner of Taxation* 92 ATC 4327; (1992) 23 ATR 412.

33. Amendments to subsection 221A(2) of the ITAA have limited the scope of this decision in the PAYE context but there are no similar limiting provisions in the SGAA. Therefore, the High Court's decision applies for superannuation guarantee purposes.

34. Subsection 12(3) applies if a person has entered into a contract requiring that particular person's labour. In the Commissioner's opinion, this only covers cases where the person has contracted in a personal capacity.

35. Consequently, even though every partner can be said to be a party to a contract entered into by a partnership, they are not a party in their personal capacity and so are not within subsection 12(3). However, when a partner does contract in a personal capacity (i.e. outside of the partnership relationship) he or she can be an employee within subsection 12(3). For example, an accountant in partnership might coach the local football team for a small fee for which he or she does not have to account to the partnership. In that case, the accountant could be an employee of the football club within sub-section 12(3).

Artistes and sportspersons

36. Subsection 12(8) of the SGAA defines 'employee' to include:

> '(a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical physical or other personal skills is an employee of the person liable to make the payment.'

37. One clear limitation on these words is that the active participation of the artiste or sportsman is required. If not, it could not be said that the person is 'paid to perform or present' the activity. A painter, for instance, does not perform or present a painting exhibition. He or she merely produces the works used in the exhibition. Therefore, even though the products of their work can form part of, for example, a display, people such as painters and photographers are not usually within paragraph 12(8)(a).

38. The activities covered are limited by the *ejusdem generis* rule.

> [*That rule says that, where an Act lists a number of specific matters of a particular kind, then general words used with them are to be limited to things of a like kind. For example, the words 'no tradesman, artificer, workman, labourer, or other person whatsoever ....' do not include a real estate agent. Even though the agent is within 'other person whatsoever', those general words are limited, by the specific words, to persons of like kind to tradesmen, workmen and labourers. Thus, they do not describe estate agents (Gregory v Fearn [1953] 1 WLR 974).*]

39. That the word 'similar' is used also shows clearly that 'activity' is limited to things of a like kind. In the Commissioner's opinion, the activities covered by paragraph 12(8)(a) are those which derive their artistic or sporting content from the performance or display because that is the common thread running through the listed activities.

40. The requirement of paragraph 12(8)(a) that the employees it covers must be active participants will, in some cases, be of no more than academic interest because the persons defined to be employees are extended further in paragraphs 12(8)(b) and 12(8)(c). These provide:

> '(b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment.'
>
> '(c) a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment.'

41. There is no evident limitation on these provisions. In particular, they go beyond a mere extension of the contract wholly or principally for labour test, unlike subsection 221A(2) of the ITAA. However, it is necessary that the putative employee is actually providing services. For example, a person engaged to write a script is performing services but those who sell existing scripts are not - they are transferring property (see Income Tax Ruling 2077).

42. Paragraphs 12(8)(b) and 12(8)(c) of the SGAA do not require the person to actively participate in the display, etc. For example, a technician engaged to control the sound quality for a concert is included. Even though not within paragraph (a) because he or she is not an active participant in any performance, he or she is paid for services in connection with a musical performance.

Domestic or private work

43. The terms 'private' and 'domestic' are not defined so it is necessary to refer to the ordinary meaning of the words.

44. In (1955) 5 CTBR (NS) *Case 50,* the Board of Review defined 'private or domestic' expenditure [under subsection 51(1), ITAA] as:

> '... losses or outgoings of a private nature we take to mean here losses or outgoings relating solely to the person incurring them ... e.g., travelling expenses incurred by a person to and from his place of employment.... Losses or outgoings of a domestic nature we take to mean here losses or outgoings which relate solely to the house, home or family organisation, of the person incurring them, e.g., expenses paid by a person to a domestic to enable the former to carry on his or her own employment....'

45. This ordinary meaning of the words 'domestic' and 'private' (with appropriate modifications) will also extend to the interpretation of these words for superannuation guarantee purposes.

46. For example, people employed by someone to clean their private home, to mind their children, to effect repairs or extensions to their home, or to tend their garden would be engaged in domestic or private work for that employer. If they worked for that person for no more than 30 hours a week, they would not be that person's employee under the SGAA.

Date of effect

47. This Ruling sets out the current practice of the Australian Taxation Office and is not concerned with a change in interpretation. Consequently, it applies from the time that the legislation commenced to operate.

Commissioner of Taxation

3 November 1993

ISSN 1038 - 7463

ATO references
NO 92/9352-3
BO

Previously released in draft form as
SGR 92/D3

Price $0.80

FOI index detail
reference number
I 1013582

subject references
- artistes
- contractors
- directors
- employees
- partnerships

legislative references
- SGAA 12
- ITAA 221A

case references

- Commissioner of Payroll Tax (Vic) v Mary Kay Cosmetics Pty Ltd 82ATC 4444 (1982)13ATR 360
- Commissioner of Taxation v Bolwell (1967)1 ATR 862
- Gregory v Fearn [1953] 1 WLR 974
- Neale (Deputy Commissioner of Taxation) v Atlas Products (Vic) Pty Ltd (1955) 10 ATD 460
- Stevens v Brodribb Sawmilling Company Pty Ltd (1985-6) 160 CLR 16
- World Book (Australia) Pty Ltd v Commissioner of Taxation 92 ATC 4327 (1992) 23 ATR 412