
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

FEBRUARY 2004

INSOLVENCY UPDATE

Introduction

Since 1971, when the Commonwealth abandoned the levying of payroll tax, each state and territory has maintained its own payroll tax system. In New South Wales, the relevant legislation is the Pay-roll Tax Act 1971 (NSW) ("Payroll Tax Act"). The payroll tax rates, tax-free thresholds and the definition of wages vary considerably from jurisdiction to jurisdiction. The lowest taxing jurisdiction is Queensland with a basic rate of 4.75% and a tax-free threshold of \$850,000. The highest taxing jurisdiction is the Australian Capital Territory with a basic rate of 6.85% and a tax-free threshold of \$1.25M. From 1 July 2003, the New South Wales payroll tax rate is 6% and the tax-free threshold is \$600,000. The tax-free threshold has not changed since 1 July 1996. **Many employers are being caught by bracket creep.** However, during this period the payroll tax has reduced from 6.85% to 6%. A business, which starts up or closes down within a financial year, does not have a full year's tax-free threshold. The threshold is determined on the number of operating days.

It is our experience that many small and medium size businesses now have a payroll tax liability due to

rising employment costs. To illustrate this point, in November 2000 an employer with 13 staff that paid average weekly earnings of \$803.30, would have had annual wages for NSW payroll tax purposes of approximately \$586,000. Accordingly, there would have been no liability for NSW payroll tax. This assumes that superannuation was 8% of wages and no fringe benefits tax was applicable. In August 2003 average weekly earnings had increased to \$931.40. The employer would have had annual wages for NSW payroll tax purposes of \$686,000, assuming superannuation was 9% of wages and no fringe benefits tax was applicable.

With the surge in the economy in recent years and the resultant growth in business, there will be many employers who are now exposed to substantial payroll tax liability.

Wages

Employers whose monthly total Australian wages exceed the NSW monthly threshold of \$50,000 are required to register for NSW payroll tax, within seven days of the month, during

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which the payroll first exceeded \$50,000. When a business pays wages in NSW and interstate, or is part of a group with interstate wages, the NSW threshold is determined as a proportion of the NSW wages divided by the total Australian wages. Hence, the total Australian wages of all group members must be taken into account when determining the payroll tax liability.

The definition of wages pursuant to Section 3AA of the Payroll Tax Act includes ordinary time earnings, overtime, penalty rates, shift loadings, allowances, commissions, bonuses and directors' fees whether those are paid in cash or in kind. The reimbursement of employee's expenses, when incurred in the ordinary course of business, is not defined as wages for the purposes of the Payroll tax Act.

Wages are paid when cash, cheques, money orders, or any other type of payment is sent or given by an employer to any employee, including electronically into an employee's bank account.

Since 1 July 1996 superannuation contributions have been defined as wages by the Payroll Tax Act. All superannuation payments made by an employer are included, including any salary sacrifice arrangements. A salary sacrifice is the conversion of the cash component of a salary package into some other kind of remuneration. Employees' superannuation contributions are not included.

From 1 July 2003 any accrued annual or long service leave paid out on termination is included as wages irrespective of when it accrued. Prior to 1 July 2003, only annual leave or long service leave accrued after 1 January 1990 was liable for payroll tax.

From 1 July 2003 certain payments in respect to redundancy or payment in lieu of notice to employees are included as wages. The income tax exempt component of redundancy or early retirement payments is exempt from payroll tax.

Since 1 January 1999 NSW imposed payroll tax on fringe benefits. From 1 July 2003 the value of fringe benefits is the value recorded on the fringe benefits tax return to the Australian Taxation Office. The fringe benefits tax value is based on the previous year's grossed up annual fringe benefit tax return.

All wages paid to an employee who is an apprentice within the meaning of the Apprenticeship and Traineeship Act 2001 (NSW) are fully exempt from the definition of wages.

From 1 July 2003 the definition of wages includes any distribution to a person as a beneficiary under a trust, in lieu of wages for work done by that person, for the trust. If the beneficiary receives no wages or less than the market rate wages for his/her work, a wages shortfall exists. If a wages shortfall exists and a beneficiary receives a trust distribution then all or part of that distribution will be deemed to be wages. The market rates payable for the work will be determined by reference to the minimum wage rate applicable in respect of that work under a Commonwealth or State industrial award. If there is no applicable industrial award rate, the full time adult ordinary time earnings for NSW is used, as published by the Australian Bureau of Statistics.

Grouping provisions

From 1 July 2003 the grouping provisions applicable to NSW payroll tax have changed. Those provisions are now located in Part 10A of the Taxation Administration Act 1996 (NSW). The definition of a business for grouping provisions has been altered to include the carrying on of a trust. This closes the avoidance situation where multiple businesses could not be grouped together due to the inclusion of a trust in the business structure. Previously trusts were not included in the definition of a business in the Payroll Tax Act.

The Act defines the following as forming a group:

- where there is a group of corporations in a holding company – subsidiary relationship pursuant to Section 50 of the Corporations Act 2001 (Cth).
- where the employees of one business provide a service to another business and either solely or mainly work for that other business.
- where the same person or persons have a controlling interest in each of the two or more businesses.

Contractors

Contractors are a growing feature of Australian employment. For the purposes of NSW payroll tax, contractors may be considered to be employees and hence payments to those contractors may be liable for payroll tax. Principal contractors are liable for the unpaid payroll tax liabilities of their sub-contractors, if

the sub-contractor provides a service to the principal contractor. The principal contractor however is relieved of that liability if the sub-contractor provides a written statement declaring that the requirements the Payroll Tax Act regarding registration and payment have been met or that the sub-contractor is not liable for payroll tax. The principal contractor is required to obtain a written statement from its sub-contractors within 60 days of the end of a financial year.

Compliance

The onus for complying with the provisions of the Payroll Tax Act is with the employer. Where an employer fails to pay a payroll tax liability, interest accrues under the Taxation Administration Act 1996 (NSW). The current interest rate is 12.84%. There is also the possibility of penalties being imposed.

The Office of State Revenue is also conducting an increasing number of periodic random audits of employers to ensure compliance with the provisions of the Payroll Tax Act, as well as carrying out an extensive survey of employers.

If an employer is a member of a group, all members of the group are jointly and severally liable for the payroll tax liabilities of any member of the group.

Personal liability of directors

Since 1 January 2000 the directors and former directors of a corporation may be

personally liable for the payroll tax debts of a company if the Chief Commissioner of Payroll Tax has served a notice of assessment on the corporation and the notice is not complied with within 21 days pursuant to Section 31C of the Payroll Tax Act. For the purposes of Section 31C a failure to pay an assessed amount is rectified if:

- the assessment amount is paid.
- the Chief Commissioner makes a special arrangement with the corporation for the payment of the assessment amount.
- a Voluntary Administrator is appointed under Part 5.3A of the Corporations Act.
- the corporation is being wound up within the meaning of the Corporations Act.

A person does not cease to be liable to pay an assessment amount

merely because the person ceases to be a director of the corporation.

If a special arrangement is entered into and not complied with the Chief Commissioner may issue a further compliance notice.

We are aware of the Chief Commissioner serving on directors a number of notices pursuant to Section 31C, thus initiating personal exposure for directors.

Solutions

Stay on top of the calculation and payment of payroll tax liability. If the solvency of a corporation or a group of companies is threatened, contact Woodgate & Co.

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