

**SOUTH AUSTRALIA**



**STATE TAXATION OFFICE**

**Pay-roll Tax**

**Circular No. 34**

(RE-ISSUED)

(formerly PRT Circular No. 7)

**PAY-ROLL TAX (MISCELLANEOUS) AMENDMENT  
ACT, 1991 - NO. 55 OF 1991**

**SERVICE CONTRACTS**

This circular has been re-issued as a guide to the Service contract provisions of the Pay-roll Tax Act. It replaces Circular No. 7 issued on 12 December, 1991. It is not intended to be a complete statement of law and must not be construed to waive or modify any legal obligation provided in the Act.

Printed copies of the Act and its regulations are available from the State Information Centre, Grenfell Centre Plaza, 25 Grenfell Street, Adelaide, or from State Print, Netley.

For further details on any matters relating to the Act mentioned in this circular contact the pay-roll tax section of the State Taxation Office (08) 226 3795.

June, 1992

COMMISSIONER OF STAMPS

## 1. INTRODUCTION

Certain anti-avoidance amendments to the Pay-roll Tax Act were effected by the Pay-roll Tax (Miscellaneous) Amendment Act, 1991. These measures are aimed at schemes designed to avoid liability for pay-roll tax by severing the employer-employee relationship.

The service contract provisions, however, do not affect the genuine independent contractor who provides services to the public generally. Exemptions are provided in the legislation to exclude such contractors or subcontractors from its operations.

The amendments deal with:

- certain contract situations (called "Service Contracts" under Section 4 of the Act);
- the provision of contract workers by employment agents;
- the payment of wages by or to third parties.

A general anti-avoidance provision has also been enacted.

The definition of "wages" in the principal Act is extended by the amending legislation to include a service contract where the object of the contract is primarily to obtain the labour or services of a contractor. The Act provides that tax will be levied on payments made for labour or services provided under a service contract.

Payments made under a service contract will be subject to pay-roll tax whether or not the person supplying the labour services does so:

- as a natural person or
- through a company or trustee (whether incorporated or unincorporated)
- through a partnership.

In general terms, where a service contract is subject to the legislation, payments made under the contract for labour will be deemed to be "wages". The person to whom the services are rendered will be deemed to be an "employer" and will, subject to the normal pay-roll tax exemption level, be liable to pay pay-roll tax in respect of the deemed "wages".

Specific exemptions are provided for:

- "owner/drivers"
- "insurance agents"
- "door-to-door selling agents".

This circular contains detailed explanations of the service contract provisions and provides guidelines on some of the problem areas including what proportion of payments to contactors will be attributable to labour where materials and labour components are not separately specified.

Pay-roll Tax Circular No 6 provides a general overview of the amendments effected by the Pay-roll Tax (Miscellaneous) Amendment Act, 1991 together with a detailed explanation of the concessions provided, namely:

- a reduction in the rate of pay-roll tax from 6.25% to 6.1% in respect of wages paid on or after 1 December, 1991; and,
- increases in the general exemption level to \$444,000 per annum from 1 January, 1992 and \$456,000 from 1 July, 1992.

## **2. EFFECTIVE DATE**

The amending legislation was assented to on 28 November, 1991.

The provisions relating to service contracts apply from 1 April, 1992 to amounts paid or payable on or after that date.

The Act applies in respect of all service contracts regardless of when the relevant agreement, arrangement of undertaking was effected or given or when the relevant transaction occurred but, pay-roll tax is only payable in respect of any (deemed) wages paid or payable on or after 1 April, 1992.

The Employment Agents, Third Party Payments and the general anti-avoidance provisions also apply to amounts paid or payable on or after 1 April, 1992.

## **3. EMPLOYMENT AGENTS**

It should be noted that a contract relating to the engagement of an employment agency "contract worker" is excluded from the operation of the service contract provisions for the purposes of determining any pay-roll tax liability that may arise. A contract that is so excluded may be either a contract of service (i.e. a contract of employment) or a contract for service.

However, where a contract for service arises (i.e. no employer/employee relationship exists) the agent is liable for pay-roll tax under the Employment Agents provisions contained at Section 4a of the Act.

Where a contract of employment is entered into, liability for pay-roll tax is to be determined in accordance with the provisions applying to employers generally.

Reference should be made to Pay-roll Tax Circular No. 8 for a detailed explanation of Section 4a and related provisions of the Act.

## **4. SERVICE CONTRACTS**

The information set out below in relation to "service contracts" is of necessity brief. The precise nature and scope of the service contracts amendments and related changes to the Act must be taken from the reading of the provision as set out in full in the amending Act in conjunction with the Pay-roll Tax Act, 1971.

#### **4.1. What s a Service Contract?**

The new Section 4 of the Act establishes at first instance a broad definition of what constitutes a service contract but then lists a number of exclusions.

Service contracts (unless one of the exclusions referred to in this circular applies) are those where a person:

- supplies services to another person for or in relation to the performance of work, or
- receives services from another person for or in relation to performance of work, or
- gives out goods to persons who perform work and re-supply the goods. (This includes the practice of giving out good to "outworkers" or "home workers".)

#### **4.2. Typical contracting arrangements now embraced by the Act include the following:**

- a) an organisation uses a particular subcontractor exclusively as an integral part of the operations of that organisation; usually that subcontractor does not work for any other organisation.
- b) an employee ceases to be an employee and becomes a subcontractor working exclusively for the person who was his or her former employer.
- c) an employee forms a family company or a family trust. The company or trustee contracts with the employer to provide the services of the "employee" to the "employer".

Generally, contract services subject to pay-roll tax are those of a type normally required in the business receiving them and which have been provided by the contractor on more than 90 days.

However, given that there are a number of exclusions to be considered, a person who engages labour needs to examine the exclusions outlined below to determine whether or not any contracts arising from such engagements are service contracts for the purposes of the Act.

#### **4.3. Excluded Contracts (i.e. Contracts which are excluded from being "Service Contracts")**

It has been previously stated in this circular that the Act initially establishes a broad definition of what constitutes a service contract and then provides a number of exclusion situations that reduced the scope of the service contract provisions.

**ONLY ONE OF THE EXCLUSION PROVISIONS HAS TO BE SATISFIED IN ORDER TO FIND THAT A PARTICULAR CONTRACT IS NOT A SERVICE CONTRACT.**

Set out below are contracts which are excluded and which do not therefore attract pay-roll tax:

##### **4.3.1. Services Ancillary to the supply of goods.**

Contracts for the supply of goods by way of sale, exchange, lease, hire or hire purchase which involve the provision of labour by the supplier of the goods are excluded where the labour is ancillary (i.e. secondary) to the supply of the goods (Section 4(2)(a)(i)).

This exclusion recognises that a contractor, in supplying goods, may also provide some labour but the supply of goods is the fundamental object of the contract.

A contract, between a vendor of air-conditioning systems and a purchaser to supply and install an air-conditioning system is an example of the kind of contract excluded by this provision.

However, a further contract between a vendor and an installer for the performance of the actual installation work would not fall within this exclusion provision.

#### **4.3.2. Services ancillary to the use of goods.**

Contracts for the use of goods which involve the provision of labour by the owner of the goods are excluded where the labour is ancillary to the use of the goods (i.e. the use of the goods is the fundamental object of the contract) (Section 4(2)(a)(ii)).

A hire contract for the use of a crane which includes the supply of the crane operator is an example of the kind of contract excluded by this provision, the labour of the crane operator being merely ancillary to the use of the crane.

#### **4.3.3. Classes of contracts specifically excluded**

The following classes of contracts are specifically excluded from the operation of the service contracts provisions as provided at Section 4 of the Act:

- a) "OWNER/DRIVER" contracts where the services are only ancillary to the carriage of goods by means of a vehicle provided by the goods carrier (Section 4(2)(g)(i)).
- b) "INSURANCE SALES AGENTS" contracts where the services are supplied to a person (e.g. an insurance company) for the purposes of selling insurance policies of that person (Section 4(2)(g)(ii)).
- c) "DOOR-TO-DOOR SALES AGENTS" contracts where the services are supplied to a person whose goods are offered for sale by the door-to-door sales agent (Section 4(2)(g)(iii)).

Should the Commissioner determined that the contract of arrangement under which any or the abovementioned services are supplied was entered into with an intention either directly or indirectly of avoiding or evading the payment of tax by any person, then exclusion does not apply.

#### **4.3.4. Contracts where the Contractor employs or uses two or more persons to perform the actual work under the contract**

A contract is secluded where the contractor (sole proprietor, partnership, corporation etc.) in the course of a business carried on by that party employs or uses two or more persons ("the workers") to perform the actual work required under the contract.

Where the contractor is a sole proprietor or a genuine partnership the workers may include either one or more of the partners or, in the case of a sole proprietor business, the sole proprietor (Section 4(2)(f)).

Under this exclusion, the workers must perform the actual work which is the object of the contract. Persons who provide services (such as administrative or clerical services) to the contractor which are merely incidental to performance of the actual work (e.g. electrical fitting) cannot be regarded as persons performing the actual work under the contract.

The exclusion does not apply if the Commissioner determines that the contract or arrangement under which the services are supplied was entered into with an intention either directly or indirectly of avoiding or evading the payment of tax by any person.

#### **4.3.5. Services provided for less than 90 days**

A contract for the provisions of the services where, in relation to the contract, services are provided on no more than 90 days, or services are provided over a number of periods which in aggregate do not exceed 90 days in a financial year, are excluded unless;

- a) the contractor (whether an individual, partnership or corporation) provides under another contract or other arrangement similar services to the same person or,
- b) the person who performs the actual work under the contract also performs similar work for the person who engaged the contractor (Section 4(2)(b)).

In determining whether or not work, under a contract or arrangement, is performed on more than 90 days, the primary criterion does not require that the elapsed period be wholly within a financial or calendar year. If work is performed on more than 90 days, at any time, the exclusion does not apply.

Where the secondary criterion applies (i.e. broken periods under the same contract or arrangement are to be aggregated), the total number of days worked is determined by reference to the financial year in which the work is performed.

Similarly, for contracts entered into prior to commencement of the service contract provisions on 1 April, 1992, it is not relevant that any part of the "90 days" may have occurred prior to that date. However, pay-roll tax liability only arises in respect of amounts paid or payable on or after 1 April, 1992.

In this exclusion the number of "days" is a reference to the number of days on which work is performed. The number of hours worked is not relevant because the subject "days" are not determined by an accumulation of hours worked.

This provision excludes payments under contracts where the services or work are only required on a short term or casual basis. It does however recognise that a subcontractor may perform similar services for the same principal under a different contract of arrangement. In these circumstances the total days worked by the subcontractor, regardless of the arrangements, must be included in counting total days worked.

Examples of situations addressed by the provision include:-

- a) A person contracts as a "carpenter" in the first instance and as a "shopfitter" in the second, but is providing the same (or similar) services, then both terms of service must be added together to determine eligibility for the 90 days exclusion criteria.
- b) "A Pty Ltd" provides services and "B Pty Ltd" provides similar services and the person actually performing the work is the same person, then those periods must be aggregated.

It is recognised that difficulties may be encountered in predicting the actual number of working days which may elapse in the carrying out of contract work.

Accordingly, the Commissioner will, as a "rule of thumb" accept that a "120 Calendar Days" measure may be used instead of the primary 90 Working Days criterion when such difficulties are encountered. The 120 Calendar Days are to be determined by reference to the expected commencement and finishing dates of the contract work to be performed.

Difficulty may also be encountered in determining whether or not the "90 working days" criterion is applicable in some other situations. This may lead to uncertainty as to whether progress payments made pursuant to a contract are, at the time they are made, liable to tax.

Examples of situations where liability to tax may not be determinable at the time payments are made, are:-

the anticipated term of a contract is uncertain but it is likely that work will be performed on approximately 80 to 100 days (i.e. the number of days worked may be either less or more than 90 days) or,

a person may be engaged to provide a particular service involving the performance of work on 80 days but it is possible that similar work may be performed by the same person later in the same financial year which when added to the first 80 days may exceed the 90 days criteria.

To resolve these difficulties, the commissioner will accept that affected payments need not be included until such time as it is clear that the exclusion will not apply. However, all payments made under such contracts, prior to determination of liability, must be included when it is clear that no exclusion applies.

Should payment be included in taxable wages and it is subsequently found that an exclusion is applicable, a written request for refund should be lodged with the Commissioner.

1. Services ordinarily required for less than 180 days
2. Contracts where the services provided are of a kind of a type ordinarily required in the course of a person's ongoing business for less than 180 days in a financial year are excluded (Section 4(2)(c)).
3. The "days" in this exclusion refers to days on which any work of the kind or type is performed or required. The total number of "days" is counted by reference to the elapsed calendar days for which work is performed or required.
4. For contracts entered into prior to commencement of the service contract provisions on 1 April, 1992, it is not relevant that any part of the "180 days" may have occurred prior to that date. However, pay-roll tax liability only arises in respect of amounts paid or payable on or after 1 April, 1992.
5. Where two or more contractors are engaged at the same time, only the elapsed days on which the work is required are counted (i.e. on any day where both are contracted to work that day is counted only once) but, where two contractors are engaged at different times during the year the two elapsed periods are added together. Thus, if two contractors are engaged to 100 days at the same time the count would be 100 days, but, if they are engaged in different periods the count would be 200 days.
6. The exclusion recognises that businesses require various ad hoc services allied to the mainstream of the work of the business, but so infrequently that permanent workers are not engaged.
7. For example, a seasonal worker for a primary producer may be hired for more than 90 days but as the primary producer does not normally hire seasonal workers for more than 180 days in a financial year, the contract is excluded.
8. Services ancillary to the conduct of a business where the supplier also provides such services to the public generally
9. A contract where the services provided are of a type not ordinarily required in the course of a person's ongoing business and those services are provided by a person who normally renders services of that type to the public generally is excluded (section 4(2)(d)).
10. This exclusion recognises that many transactions are contracts for services which are not part of the mainstream of a person's business (i.e. they are not normally required by the business in an ongoing sense). It applies where work of this type is performed by persons who are bona fide rendering services to other business and the public generally.
11. For example, where a small retailer engages a shopfitter, who conducts his or her own business, to refit the interior of the retailer's premises, this would not be regarded as a regular requirement of the retail business and both exclusion tests of this provision would be satisfied because the shopfitter provides his services to shopkeepers generally and not exclusively or extensively to the one shopkeeper.



12. conversely, where a large chain store, which due to the scale of its operations requires ongoing shopfitting in various stores, engages a shopfitter permanently on contact or by way of a series of contacts, this service would be regarded as a normal requirement of the business and the exclusion tests would not be satisfied.
13. Other types of contacts excluded under this provision include:
  14. provision of professional services by accountants, solicitors, doctors, engineers, architects to members of the general public. This provision does not exclude professional persons engaged solely by a single corporation or other entirety, and
  15. trades person providing labour only services to the public generally where such services are not ordinarily required on a regular basis.
  16. Services rendered to the public generally
  17. Contracts may be excluded where the Commissioner is satisfied that the services are supplied by a person who ordinarily renders services of that kind to the public generally (Section 4(2)(e).
  18. This exclusion allows for referral to the Commissioner for a determination in situations where none of the other exclusion provisions apply but it can be demonstrated to the Commissioner's satisfaction that the service provider usually renders services of the subject kind to the public generally (i.e. the service provider normally conducts a genuinely independent business and his or her services are not integral to the conduct of the business of another person).
  19. An application for exclusion under this section will be favourable considered where it can be shown to the satisfaction of the Commissioner that the contractor regularly conducts an independent trade or business and has been consistently rendering such services to a significant range of unrelated clients.
  20. In most cases it is unlikely that applications will be favourable considered where the contractor has:-
    21. been consistently working for one principal (or for persons who are members of the same group) or,
    22. or more of the contractor's income is derived from the one principal (or from persons who are members of the same group).
  23. To assist in the identification of contractor payments which may be excluded under this provision and to reduce the need for referral to the Commissioner, the following guidelines have been adopted:
    24. Where a contractor works intermittently (i.e. not continuously) for a principal or for members of the same group in the course of a financial year and the contractor is paid less than 40% in total of the equivalent award in that financial year by that principal or that group, payment to that contractor will be regarded as non-taxable, in short, it will be accepted that the contractor supplies services of that kind to the public generally.

25. Where a building trade contractor in respect of the services designated below, is able to genuinely satisfy all of the criteria specified below, for the purposes of the exclusion provisions of the Act, it will be accepted that the contractor supplies services of that kind to the public generally.
26. Specified Criteria
27. The Contractor:-
28. conducts an independent trade or business;
29. takes an entrepreneurial risk in the way that services are provided;
30. is not providing essentially labour-only services;
31. does not simply charge for services at an hourly rate and merely add the cost of materials purchased to the total hourly charge;
32. quotes competitively for jobs on an all inclusive basis for the cost of all labour and material specified in quotes;
33. bears the cost and responsibility for any fault workmanship or materials specified in the quote;
34. proves his own vehicle and equipment;
35. does not purchase the materials necessary to fulfil the contract from the person who engaged the contractor; and
36. usually renders services of the subject kind to a range of unrelated clients.
37. Specified kind of contractor service
38. Contracting Electrician
39. The type of materials referred to in the above specified criteria are electrical cabling, switches, power boxes etc. and not prime cost decor fittings such as light fittings.
40. Contracting Plumber
41. The type of materials referred to in the above specified criteria are tubing, pipes, bends, tapes, spouting, downpipe etc, and not major prime cost decor fittings such as basins, taps etc.
42. Cabinet Makers
43. In this class of contract the materials referred to in the above specified criteria are all the raw materials necessary to manufacturer the basins on the contractor's premises using his own equipment.
44. Exclusion by Regulation

45. Should anomalies arise in the administration of the service contracts provisions under Section 4 of the Act, regulations may be made to exclude any class of contracts from the operation of the section (Section 4(2)(i)).
46. Deemed Employer, Employee and wages under a service contract
47. Unless a contract qualifies for exclusion under any of the provisions set out herein, the following applies in respect of the parties to a service contract:-
48. Deemed employer: A person to whom services are rendered or goods are re-supplied under a contract involving the performance of work is deemed to be an employer.
49. Deemed employee: A person who performs work or re-supplies goods under a service contract is deemed to be an employee.
50. Deemed wages: Payments made for labour under a service contract and the value of any benefits provided for or in relation to the performance of work or the re-supply of goods under a service contract are deemed to be wages (Section 4(3)).
51. Where a payment made under a service contract does not distinguish between labour and other costs, the commissioner may determine the amount that is not attributable to the performance work. Amounts so determined are set out in paragraph 6 of this circular (Section 4(4)).
52. Where pay-roll tax is paid in relation to deemed wages, no other person shall be liable in respect of that payment unless it is part of an arrangement to avoid or evade the payment of tax by any person (Section 4(5)).
53. Allowance for Equipment and material costs under a service contract
54. To avoid the necessity of having to refer individual contracts to the commissioner for determination, under Section 4(4), where a contract does not distinguish between labour and other costs, the Commissioner has made the following determinations of general application where the contractor is providing materials or equipment.
55. Determination by the Commissioner of amounts to be excluded from a service contract payment for materials and equipment:

56. Contractor Class	Percentage Deduction
57. Architects	5%
58. Bricklayers	30%
59. Building Supervisors who provide their own vehicles and	
60. inspect more than six sites per week	25%
61. Carpenters	25%
62. Carpet Layers	25%
63. Computer Programmers	5%
64. Draughtspersons	5%
65. Engineers	5%
66. Fencing Contractors	25%
67. Painters	15%

68.	Painters (where the painter provides the paint)	30%
69.	Plasterers (other than plaster board fixers)	20%
70.	Resilient Floor Layers	37%
71.	Roof Tilers	25%
72.	Tree Fellers	25%

73. Should an employer maintain that a greater percentage applies to non-labour costs in relation to a particular contract, or class of contract, or in cases where no general determination has been made, details should be submitted at the time the appropriate pay-roll tax return is lodged.

74. Agreement to reduce or avoid liability to pay-roll tax

75. Any agreement, arrangement or transaction relating to the performance of services by natural persons may be disregarded where the Commissioner has reason to believe or suspect that the purposes of the agreement etc. is to avoid the liability of any person to pay-roll tax.

76. In respect of any such agreement, arrangement or transaction the Commissioner may, for the purposes of the Act, determine that any party to the agreement etc. is to be taken as an employer and any payment made under it is to be taken as wages. Notice of the Determination and the facts relied upon must be served on the person taken to be the employer (Section 4c).

### 76.1. ENQUIRIES

77. Enquiries on matters of interpretation on the more complicated issues should be made in writing and addressed to the Commissioner of Stamps.

78. Enquiries may be made in person or by post at the following addresses:

79.	LOCATION	POSTAL
80.	State Taxation Office	GPO Box 2418
81.	Enquiry and Payments Centre	ADELAIDE SA 5001
82.	Ground Floor, State Administration Centre	
83.	Victoria Square East	<b>FACSIMILE</b>
84.	ADELAIDE SA 5000	(08) 226 3805

### 85. TELEPHONE ENQUIRIES

86. Service Contracts (08) 226 3795

### 87. OTHER

88.	Employment Agents	(08) 226 3795
89.	Third Party Payments	(08) 226 3795
90.	Return Lodgement and Assessments	(08) 226 3735
91.	Exemptions	(08) 226 3795
92.	Groupings	(08) 226 3793/226 0869
93.	Registrations	(08) 226 3735

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