TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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21 | Payroll Tax Grouping Provisions

Before the introduction of payroll grouping provisions, it was easy to avoid paying payroll tax. Just split the business into several parts and do so-called Splitting. And then claim the state’s threshold for each business. Voila – no payroll tax. The payroll tax grouping provisions are to prevent this. If a collection of entities meet certain criteria, they are treated as one business with one threshold. 2007 saw the harmonisation of grouping provisions across Australia. So these provisions apply in all Australian states and territories.

Incorrect grouping is the most expensive mistake to make.

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Payroll Tax Grouping Provisions

The payroll tax grouping provisions are not an option but a policy instrument to prevent tax avoidance. This is different to income tax or GST where there is a choice.

Grouping provisions result in all of the members of a group paying payroll tax as if the group had only a single employer. The provisions exist to prevent an entity, be it a person or corporate entity, from carrying on a number of businesses with each business claiming the threshold deduction.

The provisions establish joint and several liability between group members.

A group can claim the threshold deduction in one of two ways:

- A member, the Designated Group Employer (DGE), gets the threshold deduction and the other members get no threshold deduction, or
- A member, the group single lodger, includes the wages of the whole group in its return.

As the members of a group can only claim one threshold deduction, all members that pay wages must register for payroll tax if the group as a whole pays total Australian wages that exceed the threshold.

Five provisions define a group. In summary, groups are two or more:

1. corporations that are related corporations under the Corporations Act 2001
2. employers who carry on businesses where one or more employees of any of those businesses perform duties under an agreement in connection with the businesses carried on by any of the other employers
3. businesses that are commonly controlled by the same person or persons
4. corporations that directly, indirectly or in aggregate are controlled by the same person or set of associated persons though a combination of personal and corporate share ownership
5. groups that have common members and as a result are subsumed into a larger group of three or more members.

Groups of corporations

Two or more corporations are a group if ‘related bodies corporate’ within the meaning of the Corporations Act 2001 (CA). Related corporations have a holding company-subsidiary relationship as determined under the CA. Australian subsidiaries of overseas holding companies are still related to each other under the CA. This does not apply to trustee or nominee corporations.

Common employee groups

Two or more businesses are part of a group if any of them have employees who perform duties for, or in connection with, the other businesses under an agreement for the provision of services between the businesses. All of the parties to such an agreement are the members of the group. There need not be a single agreement but could be a series of agreements between different businesses with common parties to those agreements.

A group formed under this provision will contain at least one business whose employees perform duties to satisfy an obligation to provide services for, or in connection with, another business. The provision does not apply to all contracts for services between businesses. There must be evidence showing the performance of duties.

A common example is a legal arm and its service trust. The corporate trustee of the service trust will employ administrative staff to perform legal work such as typing quotes and record keeping. Such work is duties performed in connection with the business of the legal arm.

Common control groups

A business forms a group with another business if the person or persons who control the first business are the same person or persons who control a second business.

If a person or set of persons has a controlling interest in each of two businesses, the persons who carry on those businesses constitute a group.

The control provisions define a controlling interest. More than one control provision can apply to some businesses.

Sole person

A business carried on by a sole owner, as trustee or otherwise, is controlled by that person.

Exclusive owners

A business carried on by two or more owners, or as trustees, is controlled by all of those persons together. This requires all of the owners, not just a majority.

Corporations that carry on businesses

- **Director voting power**
  The director(s) who can exercise more than 50 per cent of the voting power either individually or jointly at directors’ meetings are persons who control the business carried on by the corporation.
  Any person who can require director(s) with more than 50 per cent voting power to act in accordance with their wishes are persons that control the business carried on by the corporation.
- **Composition of the board**
  The persons who comprise more than 50 per cent of the board of management of a corporation are persons who control a business carried on by that corporation. This includes the directors.

- **Shareholders**
  Shareholders who directly or indirectly exercise, control the exercise of, or substantially in uence the exercise of more than 50 per cent of the voting power attached to the voting shares of the corporation are persons that control the business carried on by the corporation.

Partnerships that carry on businesses

The partners in a partnership are the persons that control the business carried on by the partnership. One or more of the partners are persons who control the business carried on under the partnership if they:

- own (benecially or not) more than 50 per cent of the capital of the partnership
- have an entitlement (beneficially or not) to more than 50 per cent of the profits of the partnership.

The partnership deed is the basis to establish the interest of the partners.

Trusts with a business carried on under the trust

The beneficiaries of a trust are the persons that control the business in the trust when their entitlement is more than 50 percent of the value of the trust. The trust deed defines how to determine their entitlement to value.

Discretionary trusts

Beneficiaries of such trusts are all taken to have an interest in the value of the trust that exceeds 50 per cent. This means any single or combination of beneficiaries control the business carried on under the trust.

Composition of common control groups

Corporations that carry on businesses are the most common employers forming a group. But trustees and partnerships are now commonly members of groups as well.

When the same person or persons control two or more businesses the types of businesses grouped can be any combination of owners, corporations, trustees and partnerships.

Common control also applies to trusts, corporations and partnerships controlled through trusts

In many business structures it is common to have a trust control the main trading business as a major beneficiary, shareholder or partner. In these structures it is then common to have a discretionary trust in receipt of the income from the trading businesses.

When the trustee of a trust has a controlling interest in the business of another trust, or a corporation or a partnership, any person with a controlling interest in the trust has a controlling interest in any of the businesses controlled by that trustee.

Smaller groups subsumed into one group

If any member of a group is also a member of another group, both groups are one group for payroll tax purposes.

Subsuming also applies when two or more members of a group have a controlling interest in another business.

Tracing of interests in corporations

Tracing of interests in corporations applies when a person has a combination of corporate and shareholder control in two or more corporations. In such cases, a person will own shares in the first corporation and both the same person and the first corporation will own shares in the second corporation.

The provision uses direct interests in corporations, indirect interests in corporations and aggregate interests in corporations. When an entity has either:

- a direct interest of more than 50 per cent, or
- an indirect interest of more than 50 per cent, or
- an aggregate interest of more than 50 per cent in a corporation where the entity and the corporation form a group.

If the same entity has such a level of control in a second corporation then the two corporations are part of a group.

Exclusion determinations

When two businesses are part of a group, they remain so unless the Chief Commissioner makes an exclusion determination to 'de-group' them. The Chief Commissioner cannot de-group related corporations.

The Chief Commissioner may exclude a member from a group. This is an option when the business runs independently and without any connection to another business in that group. The decision will depend on the nature and degree of ownership and control of the businesses, the nature of the businesses and any other matters the Chief Commissioner considers relevant.

Some points to consider include:

- a business does not have to employ to be member of a group
- you must clearly identify the business/es which you seek to de-group
- the level of interaction and interrelation of the activities of the businesses may impact the decision for de-grouping
- the ability of a principal of one business to influence the management of another may impact the decision for de-grouping.

This is a rough overview of Australia's grouping provisions.

For more detailed information, please refer to the website for your state or territory: *NSW* – *Victoria* – *Queensland* – *Tasmania* – *South Australia* – *ACT* – *Northern Territory*

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Payroll Tax Contractor Provisions

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