

The Hon Jeremy Buckingham, MLC  
Chair and Member of the Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Chair and Member of the Legislative Council,

**Inquiry into the application of the contractor and employment agency provisions in the *Payroll Tax Act 2007 (NSW)***

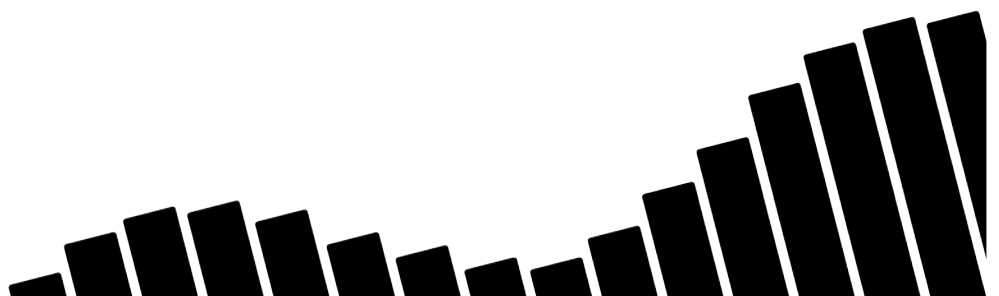
The Tax Institute (the **Institute**) took the following question on notice:

1. 'In what circumstances have your members sought rulings in relation to potential liability for payroll tax?'

Members of the Institute have provided feedback on the following circumstances where a private ruling was sought from Revenue NSW in relation to a potential payroll tax liability. They include:

- the timing of payroll tax payments in relation to commissions;
- the determination of 'employer' for payroll tax purposes; and
- share plan related matters where the operation of the relevant legislation was unclear.

Feedback that the Institute has obtained from our members indicates that the process for dealing with private ruling applications is generally cumbersome and time-consuming for the applicant, and that there are often long waiting times before they obtain a response from Revenue NSW. Our members who provided feedback are of the view that Revenue NSW is under-resourced to efficiently deal with private ruling requests, and that this contributes to significant delays.



Some members of the Institute have indicated that they try to avoid seeking private rulings due to the challenges with the application process, except in exceptional circumstances. An example of such an exceptional circumstance that has been provided by a member was during the COVID-19 pandemic where a number of private rulings were sought from various State Revenue Offices (**SROs**) including Revenue NSW for an exemption from payroll tax for individuals who were temporarily displaced in Australia. That is, where an individual was unable to return to their overseas employment location due to the travel restrictions that were imposed during the pandemic. The exemption from payroll tax that was requested, by way of private rulings, was in relation to wages and incentive earnings in respect of employees temporarily working in the relevant Australian jurisdiction.

We have received feedback that, these exemptions were generally granted and the relevant SRO generally acknowledged that if not for the pandemic travel restrictions, the employees would be ordinarily working in another country. We understand that the private rulings were caveated with an end date, and were provided on the presumption that the employee would return overseas as soon as possible. We also understand that, with the exception of the Victorian SRO, which generally provided a formal response within 4 weeks, the turnaround for these private rulings, including with Revenue NSW, ranged between 8–12 weeks and typically required multiple follow-ups.

Members have provided feedback that, where the views of Revenue NSW are well known or expressed, it is generally not necessary to seek a private ruling. This demonstrates the efficiency that stems from clear and concise law and guidance, both for practitioners and their clients, and for Revenue NSW. Where there is less need for taxpayers to seek private rulings, the workload for Revenue NSW in processing and responding to those applications may be reduced and their resources better allocated elsewhere.

We have also received feedback that Revenue NSW often expresses a reluctance to provide a private ruling where the arrangement or transaction in question has not yet occurred or been carried out. Taxpayers and their advisers often seek a private ruling on a proposed arrangement or transaction prior to its execution to obtain certainty and assurance of the relevant payroll tax liability or that there will be no such liability. Our members have expressed frustration with the current process, as it requires practitioners and their clients to seek to obtain a private ruling, if at all, after the fact, and therefore assume the associated risk of potentially triggering a compliance issue or audit with Revenue NSW.

We have set out below a sanitised case study provided by a member based on their experience seeking a private ruling from Revenue NSW. The private ruling was sought on behalf of a real estate client.

The facts involved an agency that engages with 'agent businesses' who hold an Australian Business Number (**ABN**) and employ sales staff.

## **Issue 1 – are commission payments made under a relevant contract?**

The sales process was as follows:

1. A commission split is agreed upon in the Service Agreement between the Agent Business and Agency.

2. The vendor enters into a joint conjunction Agreement with both the Agent Business and Agency for the sale of the property.
3. The property is sold by the Agent Business.
4. The vendor pays the commission to a trust.
5. The agreed percentage of commission is remitted to the Agent Business's nominated bank account.
6. The remaining percentage of commission is remitted to the Agency.

The applicant argued that the arrangement did not fall within the definition of a relevant contract because the commission payments were not for services provided by the Agent Business to the Agency but rather, payments to which the Agent Business was legally entitled from their clients.

The applicant further argued that the Agency provides administrative and support services to Agent Businesses, such as access to a desk, branding, and other associated services. The primary reason the Agent Businesses engage with the Agency is for these support services, not for the provision of real estate services to Agency. Therefore, the payments made under this arrangement should not be considered as payments under a relevant contract for payroll tax purposes.

We understand that Revenue NSW effectively declined to provide a ruling. We note that the ruling request was prepared in 2022, at a time at which there was a lot of uncertainty regarding the relevant contract provisions, particularly in light of the decision in *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40. At the time, given the uncertainty, rulings and other Revenue NSW guidance were not considered to be sufficiently helpful and the member indicated that the Revenue NSW case officer assigned to consider the ruling request did not appear to be willing to commit to a position. The member acknowledged that the questions raised in the ruling request were highly technical and contentious.

## **Issue 2 – can the engagement of 2 or more persons exemption be used?**

The applicant indicated that most agent businesses engage employees to provide real estate services. They argued that this constitutes genuine engagement of 2 or more persons under the contract.

We understand that Revenue NSW responded that if sufficient documentation and records are kept to evidence that employees are engaged to provide genuine real estate services, then Revenue NSW would be willing to accept this.

The scenario above illustrates some of the many complexities of the relevant contract provisions and exemptions contained in the *Payroll Tax Act 2007* (the **Act**). Despite proactive engagement with Revenue NSW, a clear answer was unable to be given, and as such, certainty was unable to be afforded to the business. Revenue NSW was unable to provide an outcome on the treatment of the arrangement for payroll tax purposes, which further demonstrates the need for amendments to the Act.

I trust this information assists the Inquiry. Please contact me on 02 8223 0058 if you have any further questions.

Yours faithfully,

**Julie Abdalla**  
Head of Tax & Legal  
The Tax Institute

The Hon Jeremy Buckingham, MLC  
Chair and Member of the Legislative Council  
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SYDNEY NSW 2000

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**Inquiry into the application of the contractor and employment agency provisions in the Payroll Tax Act 2007 (NSW)**

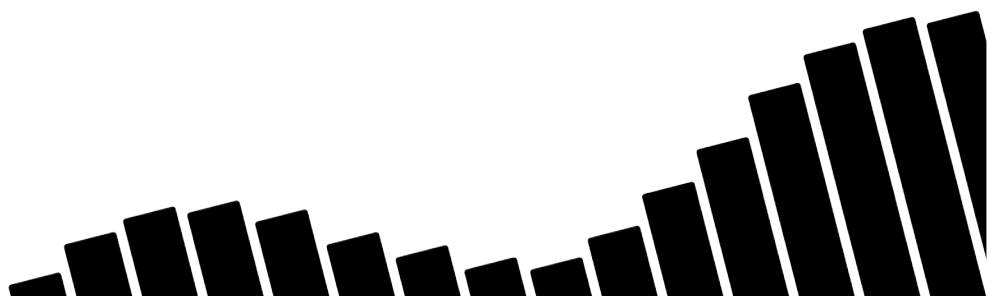
The Tax Institute (the **Institute**) took the following question on notice:

2. 'After the decision in *Optical Superstore*, did you provide advice to any of your clients or any of your members in relation to potential ramifications of that decision?'

As outlined during the public hearing on 21 March 2025, the Institute does not provide advice to its members or the public. The Institute is an educational organisation, and seeks to educate its members and the broader community through its advocacy and by providing educational materials that can assist members and the public to understand tax law, policy, and administrative matters. The Institute regularly publishes articles and papers on significant tax case decisions and their implications. Such cases are also frequently topics presented on at our various events and conferences across Australia and online.

The Institute produces a weekly digest of the top issues, case law and tax news including important updates from government agencies including revenue authorities, called TaxVine. At the beginning of each weekly TaxVine is a preamble, which is authored by members of the Institute, or members of the Tax Policy and Advocacy (**TPA**) team within the Institute. On four occasions, members of the Institute have produced a preamble including content related to *Commissioner of State Revenue v The Optical Superstore Pty Ltd* [2019] VSCA 197 (**Optical Superstore**). These preambles are listed below.

- TaxVine preamble dated 29 October 2021 – Current employment tax challenges;
- TaxVine preamble dated 10 December 2021 – Payroll tax and medical practices: position becoming clearer but seemingly not good news;
- TaxVine preamble dated 26 August 2022 – Payroll Tax and the health professions; and



- TaxVine preamble dated 16 February 2024 – Recent payroll tax changes and medical practices.

For your reference, we have included these preambles in **Annexure A**.

The Institute publishes a journal titled *Taxation in Australia*, containing articles written by members of the Institute and members of the TPA team, for practitioners. The publication features articles with a practical approach to the latest tax issues and professional development. On two occasions, *Optical Superstore* was referenced in *Taxation in Australia*. These articles are listed below.

- *Taxation in Australia* Vol 54(5) – Payroll tax game changer? Optical Superstore decision; and
- *Taxation in Australia* Vol 57(5) – Superannuation.

For your reference, we have included these articles in **Annexure B**.

The Institute also publishes a journal titled *The Tax Specialist*, which contains more detailed and technical articles on specialist tax topics for professionals. On three occasions, *Optical Superstore* was referenced in these articles. The articles are listed below.

- *The Tax Specialist* Vol 22(1) – Alienation of income and “taxable wages”;
- *The Tax Specialist* Vol 25(3) – Employee versus contractor: why is it still important?; and
- *The Tax Specialist* Vol 26(1) – Payroll tax for medical and health practices.

For your reference, we have included these articles in **Annexure C**.

In addition, there are over 35 audio, video and presentation materials concerning *Optical Superstore*, available on the Institute’s Tax Knowledge Exchange platform which is a library for tax-related content that members can access on a subscription basis. We would be pleased to provide further information on these materials and provide access if it would assist the Inquiry.

I trust this information assists the Inquiry. Please contact me on 02 8223 0058 if you have any further questions.

Yours faithfully,

**Julie Abdalla**  
Head of Tax & Legal  
The Tax Institute