MERIDIAN LAWYERS

May 2023

Commercial Insights

Payroll tax concerns for medical and allied health practices

Recent payroll tax decisions and policy developments in NSW, QLD and VIC have put medical and allied health practices across the country at risk of incurring large payroll tax liabilities.

This Insight provides you with critical information on how your business could be affected.

Different business structures

Practices using service entities to provide administrative and practice management services (such as billing, reception and other shared services) for practitioners and health professionals should be aware that some business structures may trigger payroll tax obligations.

Most commonly, private healthcare centres (including GP and other specialist medical practices and dental clinics), are operated by service entities which:

a. engage practitioners as independent contractors, or
b. provide services and facilities to practitioners.

These business structures have led State Revenue authorities to impose payroll tax obligations on the service entity, as if the practitioners are employees.

Over the coming months, following recent cases in VIC and NSW, it is expected that State Revenue offices across the country will increase their compliance and audit activities in the private healthcare sector.

Case 1: The Optical Superstore

The first major test of Revenue authorities' push to impose payroll tax on this type of structure was in the Victorian Supreme Court in *Commissioner of State Revenue (Vic) v The Optical Superstore Pty Ltd*.[1]

In that case, The Optical Superstore owned and operated an optical clinic. The Court determined that Optical Superstore:

a. owned and managed the store
b. collected the fees and income from sales and eye tests provided by the optometrists, and
c. paid a portion of the fees from customers to the optometrists.

[1] [2019] VSCA 197.

It was held that the payments made by The Optical Superstore to the optometrists represented payment for work performed under the contractor provisions of the *Payroll Tax Act 2007* (Vic).

This involved a 'relevant contract' for work performed by the optometrists to The Optical Superstore, the service entity, who owned the facilities.[2] This meant that the payments to the optometrists were deemed to be wages and subject to payroll tax.

Case 2: Thomas & Naaz

The more recent NSW decision in *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* (**Thomas & Naaz**) has expanded the application of payroll tax for payments made by service entities to health practitioners.[3]

In this case, Thomas & Naaz operated three medical centres from which doctors treated patients. Thomas & Naaz held contracts with each of the doctors which allowed them to use the centre's facilities as private practitioners.

Under the agreements, Thomas & Naaz provided rooms and shared administrative and support services to the doctors, in return for 30% of the Medicare benefits payable to the doctors for each patient treated at the centre. Relevantly, the agreements provided that Thomas & Naaz were to collect the fees payable to the doctors. Separate to these contracts, all but three of the doctors in the centres had arrangements to direct Medicare to pay their benefits for the patients treated by them into a bank account held by Thomas & Naaz. The employees of Thomas & Naaz were responsible for reconciling the incoming Medicare benefits and would then pay 70% of those amounts to the doctors, retaining the 30% entitled to them under the contractor agreements.

The NSW Revenue Office levied payroll tax on the payments made by Thomas & Naaz to the doctors on the basis that the agreements were 'relevant contracts' and that the payments were 'for or in relation to the performance of work relating to a relevant contract'.[4]

This case was first heard in the NSW Civil and Administrative Tribunal (**NCAT**), where the Tribunal upheld the payroll tax assessment on the basis that the agreements between the doctors and Thomas & Naaz were 'relevant contracts' that secured the services of the doctors in the service entity's facilities and those services were work-related.

NCAT found that the medical services provided by the doctors were a necessary part of Thomas & Naaz's medical centre business, without which the medical centres could not operate. The Tribunal held that the payments to the doctors were for or in relation to the performance of work and therefore attracted payroll tax under the contractor provisions.

Despite attempts by Thomas & Naaz, the initial Tribunal decision was upheld on appeal and leave refused for further appeal to the NSW Supreme Court of Appeal.

---

[2] *Payroll Tax Act 2007* (Vic) ss 31-36; *Commissioner of State Revenue (Vic) v The Optical Superstore Pty Ltd* [2019] VSCA 197, [63]-[65].

[3] [2021] NSWCATAD 259.

[4] *Payroll Tax Act 2007* (NSW) ss 31-36; *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259, [38]-[41].

Implications of these recent decisions

Operators of medical and allied health practices should consider the agreements underpinning their business structure, relationships with health practitioners, and how their arrangements may be caught by the payroll tax net. Medical and allied health practices operated by a service entity are likely to face increased scrutiny from revenue authorities with an increased risk that payments made to practitioners will be subject to payroll tax.

Payroll tax legislation is largely homogenous across Australian jurisdictions. The victories of revenue offices in Victoria and NSW are likely to encourage Revenue authorities elsewhere in the country to pursue and investigate medical practices and centres for payroll tax liability where a service entity is used.

The Optical Superstore and Thomas & Naaz decisions confirm the views and approaches of Revenue authorities that a service entity supplying services to a contractor, for or in relation to the performance of work by the contractor, might well be subject to the ‘relevant contracts’ provision and thus subject to payroll tax liability.

The overall risk of payroll tax liability for payments between practitioners in a medical or allied health practice and the service management entity will depend on the terms of agreement between the parties, as well as the unique daily operations of the centres.

It is clear that the most common billing arrangements in the private health sector, where consultation or treatment fees (including Medicare benefits or rebates) are collected by the clinic’s service entity into its operating account and remitted back to practitioners after deducting service fee, are at significant risk of being subject to payroll tax.

Things to consider

Agreements underpinning arrangements between service entities and practitioners will need to be carefully reviewed and possibly updated to reduce the risk of exposure to payroll tax liabilities.

There are many factors that are relevant to determining whether a particular arrangement between a service entity and a practitioner, and payments made under that arrangement, might be subject to payroll tax.

Set out below is a summary of some key considerations:

1. **Control of work hours** - practitioners should consider whether they have discretion about when they work, including the days and hours they do so.
2. **Invoicing** - invoices to customers and patients issued in the name of the practitioner could reduce the risk of payroll tax liability.
3. **Fee collection** - practitioners should consider which entity is collecting patient fees and the direction of services and facilities fees to the service entity.

4. **Restraints** - prohibitions could be restricted to soliciting staff, patients/customers and other practitioners on termination of the services agreement; allowing practitioners to work at other practices may also reduce the risk of payroll tax being imposed.

What's next?

Despite an amnesty being announced by the Queensland State Revenue Office that will not require eligible and successful applicant GP clinics to pay payroll tax on payments made to contracted practitioners up to June 2025, Revenue authorities are likely to continue to pursue payroll tax on payments made by service entities to health practitioners, unless there is a public policy or legislative change.

It is important to review your service entity arrangements and consider the payroll tax implications arising from the current approach of Revenue authorities.

Meridian Lawyers has extensive experience in the medical and allied health industries, particularly in establishing compliant, tailored and comprehensive services, contractor or consultancy agreements, as well as advising on appropriate corporate structuring of practices and clinics.

This article was written by Solicitor Meg Ryan and Principal Mark Fitzgerald. If you have any questions, or would like advice on your current service structure and potential changes, please contact Principals Georgina Odell and Mark Fitzgerald.

Georgina Odell
Principal
+61 2 9018 9975
godell@meridianlawyers.com.au

Mark Fitzgerald
Principal
+61 3 9810 6767
mfitzgerald@meridianlawyers.com.au

Disclaimer: This information is current as of May 2023. This article does not constitute legal advice and does not give rise to any solicitor/client relationship between Meridian Lawyers and the reader. Professional legal advice should be sought before acting or relying upon the content of this article.