



REVENUE CIRCULAR PTA021.1

Exemption for Contractors Ordinarily Perform Services to the Public
Payroll Tax Act 2011

Issue Date: 29 March 2021

Status: Current – Effective 26 March 2021

Previous Circular: PTA021

Preamble

This circular explains how section 32(2)(b)(ii) of the *Payroll Tax Act 2011* (**the Act**) applies to exclude a contract from the definition of ‘relevant contract’ for the purposes of the contractor provisions in Division 7 of Part 3 of the Act.

This circular replaces the earlier PTA021 to address the decision in *Nationwide Towing & Transport Pty Ltd & Ors v Commissioner of State Revenue* [2018] VSC 262. In that case, the Supreme Court of Victoria found that, contrary to PTA021, the Commissioner of State Revenue does not need to be satisfied that a contractor conducts a genuine independent business in order for the exclusion under section 32(2)(b)(iv) of the *Payroll Tax Act 2007* (VIC) to apply.

This circular adopts Victoria’s position to remove that requirement in the ACT and clarifies the application of the exclusion under section 32(2)(b)(ii) of the Act.

1. A contract between a principal and a contractor may be a ‘relevant contract’ under the contractor provisions in Division 3.7 of Part 3 of the Act.
2. If the contract is a relevant contract, the principal who engages the contractor is deemed to be an employer (section 33), the contractor is deemed to be an employee (section 34) and payments made under the contract for the performance of work are deemed to be wages (section 35). Deemed wages are wages (section 13(1)(d)) and are taxable in the ACT if they meet the nexus provisions under section 11 of the Act. Taxable wages are subject to payroll tax (section 6).
3. While most contracts for the provision of services come within the meaning of ‘relevant contract’ under section 32(1) of the Act, a contract is not a relevant contract if any of the exclusions under section 32(2) of the Act applies.
4. If a contract is not excluded under section 32(2)(b)(i) of the Act, the exclusion in section 32(2)(b)(ii) of the Act may apply. Section 32(2)(b)(ii) of the Act provides that a contract is not a ‘relevant contract’ in relation to a financial year if the Commissioner of ACT Revenue (**the Commissioner**) is satisfied that the person who performed the services under the contract ordinarily performs services of that kind to the public generally in that financial year.

Circular

Factors which may be relevant to the exclusion

5. In determining whether a contractor who performed services under a contract ordinarily performs services of that kind to the public generally in a financial year, the Commissioner will consider a range of factors in the context of the contractor's particular circumstances. The Commissioner considers that the following factors may be relevant and would generally support a finding that the exclusion applies:
 - The contractor provides the same type of services to a range of principals in the financial year (however, providing the same type of services to members of the same payroll tax group is not a strong factor supporting a finding that the contract is not a relevant contract).
 - The contractor derives income from principals other than the principal claiming the exclusion in the financial year. The case for exclusion is stronger when the proportion of the contractor's income obtained from other principals is greater.
 - The contractor enters into contracts which do not tie the contractor to the principal and do not restrict the contractor from providing the same type of services to other principals in the financial year.
 - The contractor is proactive in sourcing work from a range of principals in the financial year for example, by advertising to the public. However, merely advertising to the public without actually providing services to the public is not a strong factor supporting a finding that the contract is not a relevant contract.
 - The contractor performs work on separate contracts with separate principals concurrently in the financial year.
6. None of the above factors is conclusive on its own. In addition to the above list of factors, the Commissioner will also consider any other factors that are relevant to the particular circumstances. In some circumstances, the Commissioner may determine that the exclusion applies to a contract for a given financial year but not for another financial year; in such cases, the exclusion will only apply to the amounts paid or payable under the contract in the financial year in which the Commissioner has determined that the exclusion applies.

Example 1:

Amy is an electrician. Amy does not advertise and instead tends to learn about jobs through word of mouth. Amy typically provides services to the same principal for relatively long periods. Amy does not work for other principals concurrently. During a financial year, Amy provides services to Principal A only. Based on these facts, the Commissioner is not satisfied that Amy ordinarily provides electrical services to the public generally in that financial year, and as a result the payments made by Principal A to Amy for the performance of work are wages subject to payroll tax.

Example 2:

Oliver is a carpenter. Oliver tenders for small advertised jobs. During the first half of a financial year, Oliver concurrently provides carpentry services to three principals, and during the second half of the financial year Oliver provides carpentry services to one principal only. Based on these facts, the Commissioner is satisfied that Oliver ordinarily provides carpentry services to the public generally in the financial year, and as a result the payments made by each principal to Oliver for the performance of work in that financial year are not wages subject to payroll tax.

The 10 days or less per month method

7. The Commissioner will accept that a contract is excluded under section 32(2)(b)(ii) of the Act in the following circumstances, in which case the principal can exclude the payments made to the contractor from its taxable wages. The circumstances are where:
 - (a) the contractor provides services of the same type to the principal claiming the exclusion and to one or more other principals (not being members of a group) during the financial year, and
 - (b) the contractor provides services of that type to the principal claiming the exclusion for an average of 10 days or less per month (excluding the months in which no services were provided to that principal).
8. Revenue Circular PTA014 explains what constitutes a day's work for a contractor.
9. Principals must keep, or cause to be kept, all records that are necessary to demonstrate that these circumstances existed for a period of not less than 5 years (section 64 of the *Taxation Administration Act 1999*).

Example 3:

Michael is a computer programmer. During the financial year, he provided the same type of services to Principal B and Principal C. Under his contract for service with Principal B, he provided his services as follows during the financial year:

| Month | Number of days worked for Principal B |
|--------------|---------------------------------------|
| July | 5 |
| August | 3 |
| September | 7 |
| October | 5 |
| November | 16 |
| December | 9 |
| January | 13 |
| February | 4 |
| March | 8 |
| April | 5 |
| May | 14 |
| June | 11 |
| Total | 100 |

In that financial year, Michael worked for a total of 100 days for Principal B, which is an average of 8.3 days per month (100 days divided by 12 months). As a result, the Commissioner will be satisfied that Michael ordinarily performed services of that kind to the public generally in that financial year. Principal B can exclude the payments it makes to Michael from its taxable wages.

Example 4: Shelly is also a computer programmer. During the financial year, she provided the same type of services to Principal D and Principal E. Under her contract for service with Principal D, she provided her services as follows during the financial year:

| Month | Number of days worked for Principal D |
|--------------|---------------------------------------|
| July | 11 |
| August | 16 |
| September | - |
| October | - |
| November | - |
| December | 22 |
| January | 21 |
| February | 20 |
| March | - |
| April | - |
| May | 18 |
| June | - |
| Total | 108 |

In that financial year, Shelly worked for a total of 108 days for Principal D. This worked out to be 18 days per month (108 days divided by 6 months). The circumstances do not meet the criteria for Principal D to exclude the payments to Shelly from its taxable wages.

Signed

Lisa Holmes
Acting Commissioner for ACT Revenue
26 March 2021