Alert

Tax

Payroll Tax and Medical Practices

By Daniel Idema

On 30 June 2023, RevenueSA published Revenue Ruling PTASA003 (Relevant Contracts – Medical Centres) (**Ruling**).

The stated purpose of the Ruling is to "*explain the application of the relevant contract provisions in the Payroll Tax Act 2009 to an entity that conducts a medical centre business…*".

For medical centres that engage general practitioners and specialists as independent contractors, the Ruling will make for rather bleak reading, though the Commissioner's views as expressed in the Ruling may be of little surprise in the wake of recent decisions in Victoria and New South Wales (namely, The Optical Superstore Case and the Thomas and Naaz Case) which highlight the serious and significant payroll tax implications to medical centre businesses receiving monies on behalf of practitioners/specialists they engage as independent contractors.

Medical and other health practices that engage practitioners and specialists as independent contractors may well need to obtain advice on their arrangements and their exposure to payroll tax, and, for designated medical practices, the criteria and process of applying for the payroll tax amnesty as outlined in RevenueSA's Information Circular Number 106 (**Circular**).

A condition of eligibility for the amnesty is that "designated medical practices" submit an expression of interest to RevenueSA by 30 September 2023.

The opportunity is therefore taken here to comment further on the criteria for eligibility and the process to engage with the Commissioner as part of the administration of the amnesty, as well as other aspects of the amnesty.

The amnesty for general medical practices has been welcomed by many, but the amnesty and its scope and the Circular – in setting out how the amnesty will be administered – raise a number of important questions.

The first of these is why the amnesty is only available to general medical practices. As outlined in the Ruling, the Commissioner's approach to Relevant Contracts for medical centre businesses is not confined to general medical practices.

As is stated in the Ruling, medical centre businesses will include "*dental clinics, physiotherapy practices, radiology centres and similar healthcare providers who engage medical, dental and other health practitioners or their entities*".

Whilst for these broader medical and allied health businesses adopting similar models and payment arrangements to those of general medical practices, the payroll tax consequences will likely be the same. The amnesty will afford them no protection at all.

From the perspective of general medical practices who are considering submitting an expression of interest about the amnesty to RevenueSA, the eligibility requirements for the amnesty and the process to engage with the Commissioner raise some further questions.

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The Circular provides that the amnesty will apply to medical practices that:

1. are a designated medical practice;

2. submit an expression of interest to RevenueSA by 30 September 2023;

3. make a voluntary disclosure and, if not already registered for payroll tax, register for payroll tax in South Australia by 30 June 2024; and

4. comply with its ongoing payroll tax obligations after making the voluntary disclosure, this includes from 1 July 2024.

With respect to the first requirement – being a "designated medical practice" – the language of the Circular suggests that is to be determined by reference to the state of affairs as they then exist. Yet the Circular provides that, as part of the voluntary disclosure requirements, medical practices may be requested to provide information for the previous five financial years (not just the current financial year). The relevance of such historical information to the administration of the amnesty is not clear, particularly when one purpose of the amnesty is to relieve eligible medical practices from payment of what might be significant historical payroll tax liabilities. It will be remembered that section 10 of the *Taxation Administration Act 1996* permits the Commissioner to reassess the tax liability of a taxpayer within five years of the initial assessment.

Designated medical practices will be keen to ensure their disclosure constitutes a voluntary disclosure so as to meet that aspect of the eligibility requirements. The Circular does not contain a prescriptive list of the information that must be disclosed by a practice to constitute a voluntary disclosure. Rather, it is said, "*[t]o constitute a voluntary disclosure, designated medical practices will need to voluntarily provide the Commissioner of State Taxation with all of the information that the Commissioner of State Taxation considers is necessary to properly determine the practice's payroll tax obligations*".

As will be seen from the Circular, whether voluntary disclosure has been made is a subjective test to be determined by the Commissioner. If the Commissioner were to rule a medical practice as ineligible for the amnesty on the basis of inadequate disclosure, the Commissioner's decision is non-reviewable. This may be of concern to medical practices who have, in good faith, made a voluntary disclosure of commercially sensitive business information to the Commissioner.

The Circular does not contain guidelines setting out the express purposes for which the Commissioner might use the information the subject of a voluntary disclosure as part of the amnesty.

Whether the Commissioner's use of such information is to be limited to a consideration of the practice's eligibility for the amnesty or whether that information might have broader application by the Commissioner, for example, to assess a practice's historical liability for payroll tax (where the practice is ruled ineligible for the amnesty), or to scrutinise the legitimacy of any restructure appropriately undertaken by a practice to achieve valid legal or commercial considerations and objectives, will be of interest to medical practices.

Given the context in which the amnesty has been approved, and the Circular published, being to "*incentivise and support medical practices to bring themselves forward and into compliance with their payroll tax obligations*", safeguarding of the use of such information by the Commissioner so as not to unfairly penalise practices who have in good faith made voluntary disclosure of commercially sensitive business information will be of importance to practices.

A more obtuse question concerning the amnesty relates to the power of the Commissioner, or the Treasurer, to, in such a way, generally waive the recovery of lawfully applicable tax. Historically, gratuitous relief has been through ex gratia processes. Pragmatism will likely, however, leave this question unanswered.

One is left to ponder how the Commissioner will treat, both in the context of the administration of the amnesty and post-1 July 2024, patient fees (including Medicare rebates) directly collected by contracted medical practitioners. It was suggested by Leeming JA in the taxpayer's appeal to the Supreme Court of New South Wales Court of Appeal in *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40 that this was a "ready mechanism" available to medical practices to avoid such amounts otherwise being treated as taxable wages. The Ruling, while

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acknowledging the operation of the third-party payment provisions contained in section 46 of the *Payroll Tax Act 2009*, does not outline the Commissioner's approach to the direct collection of fees by medical practitioners in the assessment of a practice's liability for payroll tax, including based on a possible application of section 46. Notice of that approach will be of extreme interest to medical practices and, indeed, the broader community.

Medical and other health practices should act swiftly to engage legal representation to review their arrangements and advise on their possible exposure to payroll tax, and how any such issues identified might be appropriately addressed and managed.

Given the broader application of the relevant contract provisions in the *Payroll Tax Act 2009*, now is an opportune time for businesses in other industries operating under contractor models to have their arrangements reviewed to determine any possible exposure for payroll tax.

DW Fox Tucker Lawyers are experts in taxation matters and would be pleased to assist businesses in their review of any payroll tax obligations.

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