Pay-Roll Tax (Amendment) Bill (No 2)

EXPLANATORY MEMORANDUM

Clauses 1, 2 and 3. These clauses contain the usual provisions relating to title, date of commencement and preservation of the basis for levying pay-roll tax in relation to periods prior to this Bill having effect.

Clause 4. Sub-clause (1) of this clause substitutes, in the definition of "wages", the expression "provision of accommodation" for the word "premises". The relevant part of the definition will now read as follows:

> "the provision by the employer of meals or sustenance or the use of quarters or the provision of accommodation as consideration or part consideration for the employee's services".

The purpose of the amendment is to clearly distinguish "quarters" as being applicable to barracks-style accommodation and "provision of accommodation" as including provision of a house, flat or long-term motel/hotel accommodation. Sub-clause (2) raises the weekly value of the provision of "meals or sustenance" and use of "quarters" from $1.50 to $20 and 50 cents to $15 respectively and inserts a separate weekly value of $50 for "accommodation".

These amendments, in addition to updating the value of meals and quarters, will resolve the anomaly whereby the provision of a house to an employee presently has a taxable value of 50 cents per week whereas if the employer pays the amount of the rent to the employee or to the lessor on the employee's behalf the full amount is taxable as a benefit.

Clause 5. This clause amends the definitions of "employer" and "wages" in section 3 (1) of the Principal Act as a consequence of other provisions in this Bill which impose pay-roll tax on payments to contractors.

Paragraph (*a*) of the clause 5 extends the definition of "employer" to include a person who is deemed to be an employer by virtue of the two new sections, 3C and 3D, which provide for the taxation of certain payments to contractors as described within those sections.

Paragraph (*b*) of clause 5 amends the existing definition of "wages". Sub-paragraph (i) amends the general definition to include payments to or in relation to a person who is deemed to be an employee under the new sections 3C and 3D. Sub-paragraph (ii) inserts a new pargraph, (*ba*), under the general definition to provide that "wages" includes amounts deemed to be wages under the amending legislation.

Clause 6. This clause inserts a new sub-section, (10), in section 3B of the Principal Act to give legislative effect to the Government's decision to exempt from the liability to tax as a benefit the provision by a licensed motor car trader to an employee of a vehicle which forms part of the stock-in-trade of that licensed motor car trader.

Clause 7. This clause inserts two new sections, 3C and 3D, into the Principal Act to provide for the taxation of payments to contractors where certain criteria are satisfied.

Over the last five or six years there has been an accelerated erosion of the pay-roll tax base through the increased propensity of employers to engage new staff as contractors rather than as employees, and to convert existing employees to contractor status. Where a contracting relationship has been substituted for what was traditionally an employer/employee relationship, payment for the supply of services is typically made to a contractor, partnership, family trust or trustee. In many instances the employer/employee nexus is broken by sophisticated arrangements whereby the "worker's" services are supplied to the

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employer under a contract between the employer and the corporate trustee of the "worker's" family trust. It is now common in nearly all industries for contractors to be performing identical tasks to those being performed by employees, to be under the same amount of control and direction as employees and to have comparable length of service. In many cases contractors are variously supervising or being supervised by employees.

The impetus for these arrangements to be entered into has come from both the "employee" or "worker" and the employer. The "workers" through such vehicles as partnerships, companies or trusts, are able to split their income after first deducting many normal living expenses, such as travelling or depreciation of a vehicle, not permitted to be deducted by an employee. Employers save on pay-roll tax and other employee overheads and are able to provide a higher "real" remuneration to their "workers" at less cost to themselves.

SECTION 3C—RELEVANT CONTRACTS

The first of the new sections, (section 3C), deals with the major class of cases intended to be remedied by this legislation. The introductory words of sub-section (1) and paragraph (*a*), (*b*) and (*c*) define a "relevant contract" (for pay-roll tax purposes) as one under which a person in the course of a business carried on by him supplies services to another person, or is supplied with persons to perform work, or gives out goods to natural persons for work to be performed by those persons and for the re-supply of those goods to the first-mentioned persons. Paragraph (*c*) is directed at the proliferating system of giving work to "out-workers" in their homes.

The definition of a "relevant contract" is very wide in order to ensure that all the required transactions are caught and also to combat tax avoidance. Paragraphs (*d*) and (*e*) provide exclusions to a "relevant contract" in order to exempt transactions that are not intended to be caught by the legislation.

Exemptions to Relevant Contracts

Paragraph (*d*) of sub-section (1) provides that where, in the course of his business, a person is supplied with another person's labour which is incidental to the supply of goods or equipment by the person supplying the labour such a contract will be exempt. For example, if A enters into a contract with B for B to supply the use of a crane in A's business and B also insists on supplying the crane driver, the contract would be regarded primarily as one for the supply of the crane and any payment attributable to the crane driver's labour would not be caught. Equally, if A in the course of his business sent certain machinery to B for testing on B's equipment, the labour involved by B's staff in operating B's equipment would be regarded as incidental and not caught.

Paragraph (*e*) exempts contracts under which a person in the course of a business carried on by him has supplied to him services which meet the criteria specified in any of sub-paragraphs numbered (i) to (v).

Sub-paragraph (i) is intended to exempt normal business transactions which are clearly not part of the mainstream of a person's business. It provides an exemption where the services provided are of a type not ordinarily required in the course of a person's business and which are provided by persons who are *bona fide* rendering services to the public generally. An example would be where a retailer engaged a firm of shop fitters to refit the interior of his premises.

Sub-paragraph (ii) exempts contracts which are for services of a kind ordinarily required in the course of a person's business but are required by him for less than 180 days in the relevant financial year. An example would be a contracting plumber engaged by a medium-sized building firm.

Sub-paragraph (iii) exempts contracts which are for services that are provided by a person for less than 90 days in a financial year notwithstanding that they may be of a kind which are ordinarily required by the person to whom they are supplied for more than 180 days a year. This is designed to exempt short term engagements having regard to the fact that the general thrust of the legislative amendments is to tax payments under contracts which are long term and which are replacing the traditional contract of employment.

Sub-paragraph (iv) exempts contracts where the payment of the consideration under the contract is made at a rate that is greater than $500 000 per annum. It is most likely that the party receiving the $500 000 will be required to engage staff to fulfil his contractual obligations and, in most cases, the payments to those staff will be subject to pay-roll tax either under the existing provisions or under these new provisions.

Sub-paragraph (v) exempts contracts for services of a kind where exemption cannot be obtained under sub-paragraphs (ii), (iii) or (iv) but where the Commissioner of Pay-roll Tax is satisfied that the services are rendered by a person who is *bona fide* rendering services to the public generally and therefore outside the intended scope of the legislation.

Deemed Employer, Employee and Wages

Paragraph (*a*) of sub-section (2) of section 3C deems which of the parties to a "relevant contract" shall be the employer for pay-roll tax purposes. Paragraph (*b*) deems which of the parties to a "relevant contract" shall be an employee for pay-roll tax purposes. In general, the persons deemed to be the employer and the employee are the persons who would be the actual employer and actual employee respectively if the employer/employee relationship existed. Paragraph (*c*) deems that amounts paid or payable by an employer (this includes a deemed employer) under a "relevant contract" are wages during that financial year.

Sub-section (3) provides that in circumstances where two parties to a contract are deemed to be employers under sub-section (1) (*a*) and (1) (*b*) respectively, the party who receives the services shall be deemed to be the employer and the party who supplies the services shall be exempt.

Anti-avoidance

Sub-section (4) is an anti-avoidance provision to defeat schemes designed to qualify for the various exemptions under section 3C (paragraphs (*d*) and (*e*)) by means of artificial arrangements. It provides that where contracts are arranged so as to qualify for exemption from classification as a "relevant contract" and the Commissioner is not satisfied that the businesses of the parties to the contracts are carried on independently of each other, and are not being carried on with an intention of avoiding or evading payment of tax the contracts will be "relevant contracts" for pay-roll tax purposes.

Prevention of Double Taxation

Sub-section (5) has been inserted to prevent instances of double taxation. Where tax is paid in relation to payment for work because the payment is deemed to be wages under the new section, no other person shall be liable to pay-roll tax in respect of any other payments for that work.

Interpretations

Sub-section (6) defines and elaborates expressions which are used in earlier sub-sections. Paragraph (*a*) defines a reference to a contract; paragraph (*b*) defines the word "supply"; paragraph (*c*) defines the term "re-supply of goods acquired from a person"; and paragraph (*d*) defines a reference to "services" to include "results from work performed". All of these provisions are inserted to prevent unduly narrow interpretation of the respective expressions in the main taxing provisions.

Paragraph (*e*) defines "financial year" to include the six months period ending 30th June 1984. This is necessary because the main taxing provisions relate to a "financial year" but the new section 3(*c*) commences on 1 January 1984 and the six months period ending 30 June 1984 is not otherwise embraced by the term financial year. If this paragraph was not inserted, the operation of section 3C would effectively be delayed until 1 July 1984.

Paragraph (*f*) makes provision for the various exemption tests in sub-section (1) (*e*), which refer to activity and criteria in terms of a "financial year", to be based on the full financial year 1 July 1983 to 30 June 1984 when calculating a tax liability in the period 1 January 1984 to 30 June 1984.

SECTION 3D—FRANCHISE SCHEMES

Definition of "Franchise Schemes"

The new section 3D, deals with particular modes of obtaining services by contracting which are not intended to be covered by 3C. These particular arrangements have been specified under the definition of "franchise scheme".

Sub-section (1) of section 3D provides the definition. It is directed at catching payments made by direct selling organizations which arrange for persons to sell goods and services, insurance companies which arrange insurance through agents, and businesses engaging the services of owner/drivers. To satisfy the definition of a "franchise scheme" there must be—

(*a*) a continuing business relationship, other than an employer/employee relationship, between two or more persons;

(*b*) a participant and a relevant participant where the relevant participant is authorized to provide the services mentioned above; and

(*c*) a situation where—

(i) the participant has a right to exert an influence over the party performing the actual services (i.e. the relevant participant); or

(ii) the participant assists the relevant participant to perform the required services; or

(iii) the activities performed by the relevant participant are such that they are commonly identified with another participant in the scheme.

A "franchise scheme" will not exist if the services provided by the relevant participant are provided exclusively from business premises occupied by the relevant participant. This will exclude operations such as fast food outlets and certain categories of motor vehicles repairers.

Definition of Promoter and Nominated Promoter

Sub-section (1) of section 3D also defines a promoter to mean a participant in the scheme—

(*a*) who exerts or has the right to exert an influence over the relevant participant in relation to his activities under the scheme; or

(*b*) who assists or supports the relevant participant in carrying on his activities under the scheme.

Because it is possible under a "franchise scheme" for more than one person to be a promoter, the promoter who is deemed to be the employer needs to be distinguished. Accordingly, a definition of a "nominated promoter" is provided in order that a person so nominated will be the employer for pay-roll tax purposes.

Definition of sell, arrange or perform

In sub-section (1) and sub-section (2) the interpretation and the meaning of the words "sell", "arrange" and "perform" for the purpose of a "franchise scheme" under the Pay-Roll Tax Act are expanded to prevent them being narrowly interpreted.

Nomination and Registration of Promoters

Sub-section (3) provides that where there is only one promoter in a "franchise scheme" he shall apply to the Commissioner for registration for pay-roll tax as the "nominated promoter".

Paragraph (*b*) of sub-section (3) provides a maximum penalty of $5000 for failure to register.

Sub-section (4) provides that where there is more than one promoter in a scheme, the promoter shall nominate one of their number as the nominated promoter for pay-roll tax registration purposes and give notice of that nomination in writing to the Commissioner. Paragraph (*b*) of sub-section (4) provides a maximum penalty of $5000 where promoters fail to give notice as required.

Sub-section (5) provides that a nomination made in accordance with sub-section (4) shall stand as a valid nomination notwithstanding that at the time not all of the promoters joined in making that nomination.

Sub-section (6) provides that the Commissioner may appoint one of the participants in the scheme as the nominated promoter where the promoters have failed to give the appropriate notice of nomination.

Sub-section (7) provides for a change of nominated promoter either at the instigation of a promoter or promoters or by the Commissioner revoking the appointment of a nominated promoter and appointing another participant in the scheme as the nominated promoter.

Sub-section (8) provides that the Commissioner must give written notice of any appointment or revocation of appointment made by him.

Deemed employer, employee and wages

Sub-section (9) contains deeming provisions to facilitate collection of pay-roll tax. Paragraph (*a*) deems the nominated promoter to be the employer; paragraph (*b*) deems each participant in a "franchise scheme" other than the nominated promoter to be an employee; paragraph (*c*) deems any amount paid by the nominated promoter to a participant in the scheme or received or receivable by a participant in a scheme to be wages paid or payable by the nominated promoter.

Adjustment to amount of deemed wages

Sub-section (10) provides for a reduction of the amount deemed to be wages under the "franchise scheme" where a motor vehicle is required to be used for the purposes of a scheme (e.g. where the scheme involves the provision of a vehicle by an owner/driver). The amount deemed to be wages under sub-section (9) (*c*) may be reduced by 20 per cent or a higher proportion as determined by the Commissioner. This is to enable an allowance to be made for the fact that part of the payment in such cases represents the cost of running and replacing the vehicle.

Prevention of Double Taxation

Sub-section (11) has been inserted to avoid any double taxation under the legislation. Where tax has been paid in relation to a payment for activities carried out under the "franchise scheme" because the payment is deemed to be wages under the new section, no other person shall be liable to pay-roll tax in respect of any other payments made in respect of those identical activities.

INCREASES IN EXEMPTION AND CHANGE IN TAX RATE

Clause 8. This amends section 7 of the Principal Act to provide that, as from 1 July 1984, a differential rate of tax of six per cent per annum will apply where wages in any month exceed $83 334. This amendment is required as a consequence of the decision to replace the surcharge of one per cent with ongoing differential rate of pay-roll tax of six per cent on pay-rolls which exceed $1 million per annum.

Clause 9. This clause gives effect to the decisions to increase the maximum exemption from pay-roll tax from $140 000 to $200 000 from 1 January 1984 and to incorporate the one per cent surcharge as a differential rate of tax of six per cent on wages of $1 million and over as from 1 July 1984.

Sub-clause (1) amends sections 9A (3A) (*ga*) of the Principal Act so as to apply the new levels of annual deductions prescribed in the Schedules of the Principal Act in relation to members of groups. This is achieved by substituting new sub-sections (2A) and (2B) of section 11A which are to operate only in respect of employers who are members of groups. In addition, by substituting a new sub-section (2C) of section 11A, again to operate only in respect of employers who are members of groups, it also defines the "reduction amount" for the purpose of calculating the annual adjustment of pay-roll tax in respect of members of a group as from 1 July 1984. The calculation of the "reduction amount" and the reason for it are explained in detail under sub-clause (4) below.

Sub-clause (2) amends section 9B of the Principal Act. After 31 December 1983 the maximum monthly deduction which may be claimed will increase to $16 666. As with the present legislation, this amount will reduce by $2 for every $3 by which the taxable wages exceed $16 666 a month until it reaches the minimum deduction. Additionally, the definition of "prescribed amount" has been amended to apply in respect of return periods after 31 December 1983.

Sub-clause (3) amends sub-section (2A) and (2B) of section 11A of the Principal Act so as to apply the new levels of annual deductions presctibed in the Schedules of the Principal Act in relation to employers who are not members of a group. In addition, by inserting a new sub-section (2C) of section 11A to operate in respect of employers who are not members of a group, it also defines the "reduction amount" for the purpose of calculating the annual adjustment of pay-roll tax as from 1 July 1984. The calculation of the "reduction amount" and the reason for it are explained in detail under sub-clause (4) below.

Sub-clause (4) amends section 11B of the Principal Act to provide, as from 1 July 1984, for the annual adjustment of tax using the differential rate of six per cent where annual wages exceed $1 million. Employers can gain the benefit of a concession (called a "reduction amount") if the total annual pay-roll of an employer (or group of employers, as the case may be) is $1 million or more but does not exceed $1·1 million. This concession is provided to avoid a situation where an employer (or a group) with an annual pay-roll totalling $999 999 would pay pay-roll tax at a rate of five per cent, but an employer (or a group) with an annual pay-roll of $1 million would be required to pay at the higher differential rate of six per cent, thus incurring an additional pay-roll tax liability of $10 000 because of an increase of $1 in the pay-roll. Accordingly, a taper zone has been provided between pay-rolls of $1 million and $1·1 million whereby a reduction of $9622 from the pay-roll tax payable is allowed on a pay-roll of $1 million and this reduction reduces proportionately to zero at a pay-roll of $1·1 million. Examples of the operation of the concession are as follows—

1.	Group pay-roll of		$999 999
	Less minimum deduction		37 800
			$962 199
	Pay-roll Tax at 5% =	$48 109·95	
2.	Group pay-roll of		$1 000 000
	Less minimum deduction		37 800
			$962 200

	Pay-roll Tax at 6% =	$57 732·00	
	Less reduction amount	9 622·00	
		$48 110·00	
3.	Group pay-roll of		$1 050 000
	Less minimum deduction		37 800
			$1 012 200
	Pay-roll Tax at 6% =	$60 732·00	
	Less reduction amount	4 622·00	
		$56 110·00	
4.	Group pay-roll of		$1 100 000
	Less minimum deduction		37 800
			$1 062 200
	Pay-roll Tax at 6% =	$63 732·00	
	Less reduction amount	—	
		$63 732·00	

Sub-clause (5) amends section 11C of the Principal Act to give effect, as from 1 July, 1984, to the annual adjustment of tax paid by employers who have employed for less than a full year but who are liable for the six per cent rate because wages were paid at a rate equivalent to $1 million per annum or more.

Sub-clause (6) amends section 12 of the Principal Act to require an employer to register for pay-roll tax purposes where his weekly pay-roll exceeds $3840 instead of the present $2690.

Sub-clauses (7) to (10) inclusive amend Schedules One and Two of the Principal Act (which contain the formulae for calculating the actual deduction applicable for the annual adjustment of each employer's pay-roll tax liability) by substituting the new levels of maximum and minimum deductions in those Schedules and by substituting the current years for the years appearing in the Schedules.

Clause 10. This clause amends section 16 (1) of the Principal Act. This amendment is required to facilitate the conduct of investigations into pay-roll tax avoidance and evasion. Section 16 empowers the Commissioner of Pay-roll Tax to obtain information and evidence for the purpose of enquiring into or ascertaining a person's liability for the payment of pay-roll tax. The High Court has ruled in connection with a similar provision in the income tax legislation that the appropriate Commissioner must specify the name of the person in respect of whom he requires the information or evidence. In some cases the Commissioner may not be aware of the name of the person and he is required to expend valuable inspection resources in conducting on-site investigations to obtain the necessary details instead of resolving the matter by way of correspondence. The amendment to section 16 will widen the provision and enable more information to be obtained by way of correspondence.

Clause 11. This clause inserts two new Schedules, Schedule 7 and Schedule 8, into the Principal Act. These schedules contain formulae which facilitate the calculation of a "reduction amount" for non-group and group employers respectively where the relevant pay-roll is between $1 million and $1·1 million. The formulae will provide an amount which is to be deducted from the annual amount of tax to phase-in the six per cent differential rate of tax for pay-rolls over $1 million. The application of the "reduction amount" is explained in greater detail under clause 9.

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