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Significant win for Uber in payroll tax dispute: Relevant contractor provisions do have limitations

In a significant win for taxpayers Uber has successfully established that payments made to drivers are not wages subject to payroll tax under the relevant contractor provisions.

Uber has successfully challenged payroll tax assessments totalling $81.5m on contracts with drivers. The critical difference from other recent cases concerning medical practitioners and loan brokers is that Uber was able to establish that payments made by Uber were not payments made for the performance of work under relevant contracts.

Before delving into the reasoning it is necessary to say a little about how Uber functions behind the scenes.

Essentially, Uber has developed two software applications – the "driver app" (used by drivers) and the "rider app" (used by riders). The apps are platforms which enable drivers and riders to connect, which in turn enables drivers to be available to provide transport to riders. The apps share only limited information about the rider and the driver with the other party up until the time that the ride is accepted. Uber also contracts with drivers and riders separately. Contracts with each provide that Uber does not itself provide transportation services and that Uber acts as collection agent between the rider and driver. Each contract describes Uber's business as being the provision of access to the apps and providing access to lead generation services for a fee. Invoices when issued include the drivers ABN and name, not Ubers.

The Commissioner argued that the services supplied by drivers to Uber were:

- Transporting riders;
- Giving feedback about riders; and
- Referring people to Uber for the purpose of them becoming drivers,

and that each of those services were for or in relation to the performance of work under a relevant contract.

The Court agreed, holding that:

- each of those actions were services;
- that the act of driving (or transporting riders) was "undoubtably work";
- that although rating and referring are not themselves work given the minimal exertion involved they were sufficiently connected to the act of driving to render them services "in relation to" work; and
- The services were under a contract as the contracts between drivers and Uber were properly to be seen as the source of the obligations drivers had to transport riders, give feedback and make referrals.

With respect to the last point it is critical to note that it was accepted that the contracts were not directly the basis of the obligation to transport riders. But the contracts were nonetheless the source of that right because the contracts between drivers and Uber gave drivers, if and when they drive, the right to use the driver app. That they have that right even if they choose not to drive. Further, that the right to use the driver app, and all entitlements and benefits stemming from its use, have their source in the contracts with drivers.

Where the Commissioner's assessments fell over was in the requirement that there be a connection between payments made by Uber and the work done by drivers under the relevant contracts so as to make the payments "for or in relation to the work".

That is, it is not Uber who pays the driver. The rider does that. Uber is a mere “payment collection agent”.

By the time Uber accounts to the driver as collection agent the driver has already been paid and the rider has already discharged their obligation to pay. To quote directly from paragraphs 180 and 181 of the judgment:

> There is no element of reciprocity or calibration between the driver and Uber or the rider and Uber with respect to the money paid by the rider. Those elements exist only between the driver and the rider. The payment here is made pursuant to an obligation to account, and no more.
>
> What the rider pays the driver is for or in relation to the work done by the driver. What Uber pays the driver is in relation to the payment Uber has received, not in relation to the work itself.

Therefore, the payments made by Uber are not to be taken as wages.

The judgment comments also on a number of the exceptions to the relevant contractor provisions. Most of those comments are unremarkable. But one worth considering is the interaction between the ancillary exclusion and the additional services provision – and in particular that whether services are bundled together as a holistic offering or put forward as separate options can significantly influence how that exclusion applies.

Conclusion

Taxpayers disheartened by the recent trend in relevant contractor cases should take heart from this case.

The relevant contractor provisions do have limitations. But their application is complex and advice should be sought on a case-by-case basis. Ideally before legal arrangements are entered into; although afterwards is better than not at all.

Service provider, labour hire, and lead generation based contractual arrangements should be reviewed in light of this case – in particular in relation to:

- the comments around payments for work performed and whether payment mechanisms properly reflect the legal relationships established; and
- the interaction between the ancillary exclusion and additional services provision.