

IT Contractors, ATO and Personal Services Income - APESMA

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From: **Damien Ryan-Green** <rostercoaster@gmail.com>

Date: Fri, Nov 4, 2011 at 2:55 PM

Subject: "Research" ...re: IT Contractors, ATO and Personal Services Income - APESMA

To: Steve Bergen <steve.bergen@gmail.com>

Cc: Tony Ryan <hawk.computing@gmail.com>, Minh Tran <mtran@ehpartners.com.au>, Guy Thomas <gthomas@loopsoftware.com.au>, Claude Staub <claudio.staub@shiftingnirvana.com>, Lisa Fischer <lfischer1@optusnet.com.au>, Christine Tiernan <christine.tiernan@bigpond.com.au>, Sylvia Ryan <sylviaunferdorben@gmail.com>

Thanks Steve

Yes, if any of us happens to pass the 80% rule it's a bonus (and Jandapac itself now does, though it didn't use to), but even if any of us doesn't (and Tony's and my companies don't, in their supplies to Jandapac), we pass the "Results Test Rule" regardless.

In other words, we bear no similarity to "Mr. Martin" in a recent ruling below.

Also, I like your comment "takes a little mental shift to change from "working by the hour" to "selling a product". In a nutshell, you've managed to summarise large volumes of words as written by me into our websites, and into those supplier cuts emails etc!

Damien

PS Claude - this is all completely in line with the current work you are doing to enhance our "supplier cuts" model, let me know if you need any info :)

Jandapac Research re PSI

The comment in the ruling below that reads "Because the departments only work through pre-selected 'panels' of labour hire companies, it's impossible for the IT contractors to 'offer their work at large'" underlines the fact that we are not IT contractors in this context. Because we actually do supply products to government, and not via panels, and we also offer these products 'at large'. The key here is that our dominant offering is 'products', and not 'hours'.

The ruling states that 'Because the departments only work through pre-selected 'panels' of labour hire companies ... This means that if an IT contractor works for a government department, it is almost impossible to pass the PSI laws.' This further underlines the fact that we are not IT contractors, because if we were, we could not be supplying to government. And yet, we are.

Also, unlike Mr. Martin (the subject of the ruling below), we (and hence our supply chain, which includes Tony and me) are "paid on a results basis, and are required to rectify work, etc.", which turns out to be a good thing - it proves we are all genuinely "in business" in an entrepreneurial sense

IT Contractor Loses PSI Case

BRMJCQ Pty Limited and Commissioner of Taxation [2010] AATA 311 (29 April 2010)

The Australian Taxation Office has won another case on the Personal Services Income tax laws. The basic facts are:

The IT contractor (Mr Martin) had his own Pty Ltd company and he was the only director and shareholder. He did IT work for the Department of Veterans Affairs and the Australian Taxation Office through two different labour hire companies, Icon Recruitment and Paxus, managing large IT development projects.

The AAT found that the contracts between Mr Martin and Paxus and Icon did not pass the results test because there was no clear demonstration in either the contracts, or the behaviours, that Mr Martin was paid on a results basis or required to rectify work, etc.

Having failed the results test, the AAT considered if Mr Martin passed the 80/20 rule or the unrelated client test. The ATO found that, in two of the years, Mr Martin's income came entirely from one source. In the other year, Mr Martin's income came from two sources, but because he had not adequately offered his services to the public 'at large' he could not pass the unrelated clients test.

Contracting Difficulties

The case shows the difficulty of IT contractors working for government departments through labour hire companies. Because the departments only work through pre-selected 'panels' of labour hire companies, it's impossible for the IT contractors to 'offer their work at large'. That is, they are excluded from directly offering or performing their work for, or to, government. This means that if an IT contractor works for a government department, it is almost impossible to pass the PSI laws.

Poor Labour Hire Contracts

Further, the contracts Mr Martin had with both Paxus and Icon showed little regard for the PSI rules. It's also clear that few labour hire companies have structured their contracts with a view to considering the business status of contractors. In other words, it's quite common for the contracts to look like de facto employment contracts rather than genuine commercial contracts.

Whilst the "results test" for determining independent contractor status is very specific, the criteria does not consider common law and a number of precedences that can affect the engagement relationship. In some cases, if a contractor actually behaves and is managed like an employee, then they most probably are an employee. This is why a rigorous audit process must be used to validate the status of contractors.

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From: **Steven Bergen** <steve.bergen@gmail.com>

Date: Fri, Nov 4, 2011 at 2:02 PM

Subject: Re: IT Contractors, ATO and Personal Services Income - APESMA

To: rostercoaster@gmail.com

Thanks Damien,

That's a really good explanation to put the "results" and 80% rules into context with what we are doing.

It takes a little mental shift to change from "working by the hour" to "selling a product".

Regards

Steve Bergen

On Fri, Nov 4, 2011 at 1:57 PM, Damien Ryan-Green <rostercoaster@gmail.com> wrote:

CC Suppliers / Allies

A useful attachment coming in from Steve. It's basically about making sure that the ATO knows that we are all genuinely in business, and none of us are trying to dodge normal income tax rates by 'pretending' to be in business. Important: if your accountant has any feedback that may differ from what our accountants have advised us, please let us know, and we will make sure you are covered.

The attached is an item Tony and I had to cover ourselves for years ago via our accountant, so recommend pass this email and the attachment onto your accountant next time you see him or her, just to file note that all our Suppliers (those from Tony's and my individual companies, which likewise are Suppliers to Jandapac, included) are based on a % cut of Jandapac sales to customers, and that these % cuts are tied to the successful delivery by Jandapac of products, i.e. "results", in the context of the "ATO Results Test" (see below).

Thanks!

Hi Steve

Aside: This also related more recently to the rules about whether Jandapac could be on eServices Panel, and the answer to that is that the types of products we sell, and then split up between us all via "Supplier Cuts", are not IT Services within the context of the eServices Panel, but on the plus side, pass the "Results Test" in your attachment.

Yes, Jandapac and all of us have been having to pass the "results test" for many years (though Jandapac itself no longer needs to, and neither do some Suppliers, as they meet the 80% rule), and this underpins our entire model (see all websites, supplier cuts emails etc.), which is dominantly about Jandapac selling products, and then splitting the revenue among suppliers according to "Supplier Cuts".

This doesn't mean that hours never come into our buildups when working out quotes etc, it just means that the dominant factor in our pricing is sales (in almost all cases, start-up price + tailoring price + monthly licencing).

Of course, we didn't build this model only to make the ATO happy - we actually *wanted* to be genuinely 'in business', and entrepreneurial ... the last thing we wanted was to be in pseudo-employment "working by the hour" for Jandapac, and we didn't want Jandapac to be in pseudo-employment with DHS either (otherwise, I would have simply got myself re-hired as a senior manager within DHS, something I can walk back into at any time, but plan never to do).

The end result is that for those of us that need to (i.e. anyone who gets 80% of income from Jandapac, which I suspect is Tony and me only), we pass the "Results Test" (i.e. see all the words in the 'Supplier Cuts' emails we send out to everyone, which include info about an 'entrepreneurial' model, and finish off at the bottom with the %s that each of us as Suppliers are in on with respect to the product / result)

Thanks!

Damein

On Fri, Oct 21, 2011 at 2:07 PM, Steven Bergen <steve.bergen@gmail.com> wrote:

Hi Guys,

I found this report from APESMA which talks about Personal Services Income and some of the things that should go into contracts so that the ATO doesn't consider you to be an employee instead of a contractor.

Regards

Steve Bergen

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Why Gmail? For our communication needs, Gmail is a better service than all other options paid or free. However, if you prefer, I can also be reached via Damien.Ryan@RosterCoster.com.

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