Government of **Western Australia**
Department of **Finance**
Office of State Revenue

COMMISSIONER'S PRACTICE
PT 2.0

PAY-ROLL TAX – GROUPING EXCLUSIONS

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
PT 2.0	23 December 2003	23 December 2003	30 June 2012

This Commissioner's practice outlines the major factors to be taken into account when considering an exclusion from grouping for an employer. As the factors vary for each type of exclusion, they are dealt with separately in this practice.

Background

Where an employer is grouped under section 31, section 32 or section 35 of the *Pay-roll Tax Assessment Act 2002* ("the Act"), the ability exists for the Commissioner to exclude that employer from the application of the grouping provisions, either of his own volition or upon application by a taxpayer.

Section 38 of the Act provides the mechanisms to allow the Commissioner to exclude a person from a group under sections 31(4), 32(3) and 35(2) of the Act.

<u>Grouping where employees used in another business</u>

Section 31(1) and (2) of the Act groups an employer and another person where the employer's employees are engaged in another business.

Where businesses are grouped pursuant to section 31(1) or (2) of the Act, the Commissioner may consider the provisions of section 31(4).

Section 31(4) authorises the Commissioner to consider exclusion where he is satisfied that it would not be just and reasonable, having regard to the nature and degree of the duties performed and any other relevant matters, to group the employer and the other person.

Grouping commonly controlled businesses involving discretionary trusts

Section 32 operates to group two employers where the same person has, or the same persons together have, a controlling interest in two businesses.

Section 33(4) provides that persons have a controlling interest in a business carried on under a trust, if those persons, whether or not as trustees of another trust, are beneficiaries in respect of more than 50% of the value of the interests in that trust.

Section 33(9) deems that where persons are beneficiaries under a trust in respect of more than 50% of the interests in that trust and the trustees have a controlling interest in a business, those beneficiaries have a controlling interest in that business.

Section 34 provides that where a person, as a result of the exercise of a power or discretion by the trustee of a discretionary trust or by any other person, may benefit under that trust, they shall be deemed for the purposes of section 33 to be a beneficiary in respect of more than 50% of the value of the interests in that trust. Therefore, all potential beneficiaries of a discretionary trust will have a controlling interest in any business carried on under that trust.

The Commissioner may consider excluding a person from a group where that person has been included in the group as a consequence of a person (or persons) having a controlling interest, pursuant to section 33(4) or 33(9) of the Act, in a business because they are a beneficiary (or beneficiaries) under a discretionary trust.

After considering:

- the nature and degree of ownership and control of the businesses;
- the nature of the businesses; and
- any other matter that the Commissioner considers relevant,

the Commissioner may exclude that person from the group if he is satisfied that -

- the business carried on by that person operates substantially independently to the business carried by any other member of the group; and
- it is just and reasonable to exclude that person from the group.

Grouping head and branch businesses

Section 35(1) provides that two businesses constitute a group where:

- one of the businesses is the head or parent business;
- the second business is a branch, agency or subsidiary of the head or parent business; and

- the head or parent business exercises managerial control, whether administrative, financial or procedural, over the branch, agency or subsidiary.

Section 35(2) authorises the Commissioner to consider exclusion where he is satisfied that it would not be just and reasonable to group the businesses.

Commissioner's Practice

1. In determining whether an employer may be excluded from a group under the applicable sections, the Commissioner will consider all cases on their own merits.

Section 31(4) exclusion where employees used in another business

2. The nature and degree of the duties performed will be an important factor in determining whether exclusion should be allowed under section 31(4). To determine the nature and degree of duties performed, the business activities of each employer will be evaluated and the nature of the work completed by the employees in the other business examined. Factors considered concerning the business activities of each employer and the nature of the work completed by the employees include:

    2.1 the proportion of work completed by the employees for each employer;

    2.2 the integration of the duties completed by the employees to the operations of the other employer; and

    2.3 whether a commercially realistic payment has been made for the duties completed by the employees.

3. Other relevant matters (for example managerial control, ownership, commercial and financial arrangements, and sharing of common resources) will also be important factors to be considered when making an exclusion determination.

4. The Commissioner will generally not exclude an employer from a group where any of the following situations occur:

    4.1 one business was created or exists solely to provide support services for another business, for example, a service trust;

    4.2 the business could not operate in its own right. An example is a separate private entity providing substantially all of its services to a single client; or

    4.3 a single business splits its operations into separate but related activities (eg. manufacturing and selling) with the intention of avoiding pay-roll tax.

Section 32(3) exclusion involving discretionary trusts

5. The factors listed in paragraphs 6, 7 and 8 are relevant to the Commissioner's consideration of the nature and degree of ownership and control of the businesses, the nature of the businesses and other relevant matters.

The nature and degree of ownership and control of the businesses

6. The factors to be considered by the Commissioner include the following:

   6.1 distribution of funds to beneficiaries;

   6.2 entitlement to the capital of the trust;

   6.3 relationship of beneficiaries to the trustee;

   6.4 extent of control that may be exercised by the appointer or guardian;

   6.5 level of involvement by the beneficiaries in the activities of the trust, including responsibility for the management and executive decisions of the businesses; and

   6.6 extent of the beneficiary's relationship to the trust (remoteness of the beneficiary), including:

      6.6.1 where the beneficiary is a recognised public benevolent or charitable institution;

      6.6.2 where the beneficiary is included solely because other beneficiaries have an interest in them (for example, the beneficiary is a publicly listed company and is a beneficiary only because another named beneficiary holds shares in that company); and

      6.6.3 where several beneficiaries of a trust have a controlling interest in another business.

Nature of the businesses

7. The nature of the relationship between the businesses will be established by the following factors:

   7.1 the type of industry and the operations of each business within those industries;

   7.2 any activities of each business and the extent to which they are integral to the operations of the other business; and

   7.3 whether the businesses are complementary.

Other relevant matters

8. Other relevant matters will be determined on a case-by-case basis, but will include the following and will provide additional support for making the determination:

   8.1 the type and amount of trade between the businesses;

   8.2 the service and purchasing arrangements relating to the businesses;

   8.3 the commerciality of the agreements and contractual obligations between the businesses;

   8.4 whether there are any common representative arrangements between the businesses; and

   8.5 whether there are any common credit arrangements for the businesses.

9. After taking into account the matters in paragraphs 6, 7 and 8, the Commissioner will determine whether the businesses are operating substantially independently and whether it is just and reasonable to exclude them or one of them from grouping.

   In circumstances where the beneficiary is a recognised public benevolent or charitable institution or publicly listed company, the Commissioner will generally consider that it would be just and reasonable to exclude any business carried on by that beneficiary from the group.

   In circumstances where the beneficiary (or all the beneficiaries together) of a trust business have a controlling interest in another business (even where the businesses are different) or exercise common management or executive control in another business, the Commissioner will generally consider that it would not be just and reasonable to exclude the business from the group.

10. Although there may be circumstances where two businesses are carried on substantially independently, it will not necessarily follow that it will be just and reasonable to exclude the persons who carry on those businesses from constituting a group.

Section 35(2) exclusion of head and branch businesses

11. Where the provisions of section 35(1) apply, the nature and degree of managerial control exercised by the head or parent business will be established by the following:

Administrative

11.1 This relates to responsibility for executive control or the bookkeeping, payroll and other general clerical functions that form an essential part of the branch's operations.

Financial

11.2 This relates to responsibility for the financial aspects relating to the branch's operations including banking procedures, profit sharing and goodwill.

Procedural

11.3 This relates to the day-to-day running of the branch's operations including reporting functions and instruction manuals, and also includes whether the branch has a reporting responsibility to the parent relating to its operations.

12. In point 11, it is the nature and degree of managerial control by the parent over the branch that constitutes the primary basis for exclusion under section 35(2).

13. The determination of whether or not a business is a branch or agency of another business will vary with each set of circumstances.

14. In determining what is just and reasonable in relation to a section 35(2) exclusion, the Commissioner will have regard to the extent of managerial control exercised by the parent over the branch business.

Date of Effect

This Commissioner's practice takes effect from 23 December 2003.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

23 December 2003