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AUSTRALIAN TAX ADVISER

2409 : MAY 2024

The IFX Legal Tax Team

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SECTION 1 – PROFESSIONAL DEVELOPMENTS

Two cases caught our team's attention this month – one to do with the thorny issue of employees versus contractors and the second about taxable supplies made by gaming venues.

EMPLOYEE OR CONTRACTOR?

In *S&H Investments Pty Ltd and FCT*, the AAT agreed with the ATO's decision that a cleaner was an 'employee' under the extended definition of that term in s 12(3) of the *Superannuation Guarantee (Administration) Act 1992*. This follows an extensive list of cases on the topic, including the most recent decisions of the Federal Court in *JMC Pty Limited v COT* and the Full Federal Court in *JMC Pty Limited v COT* last year.

In S&H Investments, TW had been engaged by S&H Investments ('the employer') in March 2014 as a full-time employee to clean the employer's offices. She was paid an hourly rate and was given a desk and a work email address. The employer had initially made super contributions for TW under the super guarantee scheme.

In May 2015, as part of a restructure, the employer suggested that TW should work for only 20 hours per week but would be paid at an increased hourly rate. The increased rate of pay was said to compensate TW for her additional expenditure and, more importantly for not accruing entitlements such as personal leave, annual leave and superannuation. TW accepted these new terms on the assumption that she was no longer an employee, but an independent contractor.

¶9.1 The ATO position

The ATO disagreed and imposed the superannuation guarantee charge (SGC) on the employer for the quarters ending 30 June 2015 to 30 September 2018 inclusive, on the basis that TW was an 'employee' for super guarantee purposes and the employer had failed to pay super contributions for her. The employer objected but this objection was disallowed by the ATO.

¶9.2 The AAT case

The issue before the Tribunal was to determine whether TW was an 'employee' of the employer under the extended definition of that term in s 12(3) of the SGAA during the relevant quarters. The parties both agreed that there was a contract (albeit an oral one) and that TW performed work under that contract. So, the only issue in contention was whether the contract was wholly or principally for TW's labour.