



Explanatory Statement

Taxation Administration (Withholding Variation for Personal Services Income) Legislative Instrument 2023

General outline of instrument

1. This instrument is made under section 15-15 of Schedule 1 to the *Taxation Administration Act 1953* (the Act).
2. This instrument varies to nil the amount a personal services entity (PSE) is required to pay to the Commissioner, when it receives alienated personal services payments, in certain circumstances. It continues the existing arrangements under the legislative instrument *Variation of withholding for personal services income* (15/03/2013), which is due to sunset (and will be repealed by the instrument).
3. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Date of effect

5. This instrument commences on 1 April 2023.

Effect of this instrument

6. This instrument varies to nil the amount that a PSE is required to pay to the Commissioner under section 13-5 of Schedule 1 to the Act in cases where:
 - (1) the PSE receives an alienated personal services payment that relates to one or more individuals' personal services income;
 - (2) the PSE pays salary or wages to the individual or individuals within 14 days after the end of the 'PAYG payment period' in which it receives the alienated personal services payment: and
 - (3) the salary or wages paid by the PSE is equal to or greater than either
 - (a) 70 per cent; or
 - (b) a 'net personal services income percentage';of the gross personal services income (exclusive of GST) received by the personal services entity during the PAYG payment period.
7. If a PSE elects to use the net personal services income percentage, it will calculate the percentage using amounts from the previous income year in accordance with the method statement in section 4 of the instrument.

Compliance cost assessment

8. Compliance cost impact: Minor – There will be no additional regulatory impacts as the instrument is minor and machinery in nature OBPR 23-04246.

Background

9. Section 13-5 of Schedule 1 to the Act requires a PSE to pay an amount of tax to the Commissioner if it receives an alienated personal services payment that relates to an individual's personal services income, and it receives the payment during a PAYG payment period for which it is a personal services payment remitter.

10. The amount of tax that a PSE is required to periodically pay the Commissioner during the income year under Division 13 in Schedule 1 to the Act is an 'amount required to be withheld' by an entity from a withholding payment (as defined in subsection 995-1(1) of *Income Tax Assessment Act 1997* (ITAA 1997)). As such, the Commissioner is empowered to vary these amounts (including to nil) under section 15-15 of Schedule 1 to the Act.

11. The amount of tax that a PSE is required to pay is calculated using the method statement in subsection 13-5(2) of Schedule 1 to the Act.

12. Step 2(a) of the method statement in subsection 13-5(2) of Schedule 1 to the Act requires the PSE to identify amounts that are included in an individual's assessable income under section 86-15 of the ITAA 1997 and relate to alienated personal services payments the PSE received during the PAYG payment period.

13. The amounts that are included in the individual's assessable income under section 86-15 of the ITAA 1997 are reduced by certain deductions calculated under section 86-20 of the ITAA 1997. These deductions can only be accurately worked out after the end of the income year, and this gives rise to a timing mismatch.

14. The legislative instrument addresses this timing mismatch by varying to nil the amount of tax required to be paid under section 13-5 of Schedule 1 to the Act in the circumstances outlined in section 6 of the instrument.

15. Varying the amount to be withheld to nil in these circumstances provides a more practical alternative instead of working out an amount to be withheld based on estimating the net amounts that will be included in the individual's assessable income under section 86-15 of the ITAA 1997. This is because once a PSE pays salary or wages equal to or above one of the two percentages in subsection 6(c) of the instrument, the amount not paid as salary or wages is treated as an approximate proxy for deductions that a PSE is entitled to but cannot accurately calculate until after the end of the income year.

16. The instrument also reduces compliance costs for PSEs, because they do not have to comply with section 13-5 of Schedule 1 to the Act in the circumstances specified in the instrument.

Consultation

17. Subsection 17(1) of the *Legislation Act 2003* requires the Commissioner to be satisfied that appropriate and reasonably practicable consultation has been undertaken before they make a legislative instrument.

18. Broad public consultation was undertaken on this instrument for a period of 2 weeks from 7 February to 21 February 2023.

19. The draft instrument and draft explanatory statement were published to the ATO Legal database. Publication was advertised via the 'What's new' page on that website, and via the 'Open Consultation' page on ato.gov.au. Major tax and superannuation publishers and associations monitor these pages and include the details in the daily and weekly alerts and newsletters that they provide to their subscribers and members.

20. No comments were received as part of this consultation process.

Legislative references

Acts Interpretation Act 1901

Human Rights (Parliamentary Scrutiny) Act 2011

Income Tax Assessment Act 1997

Legislation Act 2003

Taxation Administration Act 1953

Statement of compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

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This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

This legislative instrument is beneficial to personal service entities (PSEs) that receive alienated personal services payments. It varies the amount (to nil) that a PSE would otherwise be required to pay to the Commissioner in certain circumstances. It applies when a PSE receives alienated personal services payments that relate to income that is mainly a reward for an individual's personal efforts or skills, the PSE pays out salary or wages to the individual within a particular timeframe, and the amount the PSE pays out comprises a particular proportion of the gross personal services income it receives.

This instrument addresses a timing mismatch problem that would otherwise arise for payments made by PSEs to the Commissioner under section 13-5 of Schedule 1 to the *Taxation Administration Act 1953*. It provides an alternative practical method for estimating the net amounts that will be included in an individual's assessable income under section 86-15 of *Income Tax Assessment Act 1997*. Without this instrument, relevant PSEs would have to pay an amount of tax to the Commissioner every PAYG payment period, rather than retain this money until a related tax liability arises in the future after the income year when tax returns are assessed.

PSEs to which the instrument applies will also benefit from having lower compliance costs because they will not need to pay amounts of tax to the Commissioner on a periodic basis during the income year. It will continue the existing arrangements under the legislative instrument *Variation of withholding for personal services income (15/03/2013)*, which is due to sunset (and will be repealed by the instrument).

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms. It continues existing arrangements, to ensure that PSEs to which the instrument applies are not required to pay an amount of tax to the Commissioner until they have lodged their income tax returns at the end of the income year.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.