You will have received a complimentary Budget Report from the TaxEd Team on Wednesday morning. This month's newsletter does not cover the budget announcements. However, we might revisit some matters in coming newsletters.

This month, our lead article draws attention to additional processes organisations (including Government & NFP sector entities) will need to implement in order to avoid new foreign resident withholding tax rules. The name of the new rules is a bit misleading because they will likely apply (in different ways) to your organisation's property purchases and sales, unless appropriate steps are taken – the article explores the new rules and looks at those steps. Although the legislation is in place and set to apply from 1 July 2016, the tax is a moving target at present. At least one legal professional body announced late last week that it intends to seek postponement of the tax and further consultation, due to problems legal practitioners have identified. We will keep you posted on developments.

Recognising readers' interest in fuel tax, TaxEd will offer training in this area in the near future. While arrangements are being finalised, we plan to respond to your interest with articles. There is one this month.

TaxEd's superannuation training was well received. In recognition of interest in this area, there is an article on a topic which was popular.

Regards

Andrew Orange

TaxEd Team

Eligibility – Withholding Tax – Get a certificate and make it go away?

Not-for-profit entities (NFPs) that are selling certain property will be affected by a new withholding tax, even though they are exempt from income tax.

While a tax exempt NFP will be able to obtain a refund of the withholding tax from the ATO, it is better to avoid both the need to do so and the associated adverse effect on cash flow. By simple and timely action Australian residents (for tax purposes) that dispose of property can avoid being subjected to the withholding tax.

This article is directed to NFPs that are Australian residents for tax purposes - the expected position of the vast majority, if not all, readers. Australian tax residency is a technical concept and it is not feasible to canvass the matter in this article.

What is taxed and why

Foreign residents (for tax purposes) are liable to pay capital gains tax (the applicable CGT) on disposal of certain property. The ATO has encountered difficulties in recovering the applicable CGT.

For contracts entered into on or after 1 July 2016, a new withholding tax regime will operate.

In order to provide security for payment of tax owed by foreign residents, purchasers of property which is potentially subject to the applicable CGT are required to withhold 10% of, basically, the total price and remit this to the ATO. Note that the amount to be withheld is 10% of the total price and not merely 10% of the amount payable at settlement. There are several exemptions and those considered likely to be relevant to most NFPs are noted below.

Fundamentally, the withholding obligation will apply to sales of the following types of property:

(i) real property situated in Australia (including a lease of land situated in Australia);
(ii) a mining, quarrying or prospecting right (to the extent that the right is not real property), if the minerals, petroleum or quarry materials are situated in Australia;
(iii) indirect Australian real property interests, namely certain interests (e.g. certain shareholdings) in 'an entity whose underlying value is principally derived from Australian real property; and
(iv) an option or right to acquire property or an interest described in items (i) to (iii).

Item (i) is not limited to sales of freehold or leasehold land (e.g. residential or commercial premises, vacant blocks, strata title units, etc.), but includes grants of easements, covenants, mortgages etc. It should also be noted that premiums paid for leases of Australian real property will similarly trigger a withholding tax liability.

Where withholding tax does not apply

Withholding tax does not apply in several situations. The three exemptions most likely to be relevant to NFPs are described below.

Firstly, withholding is not required in respect of sales of property specified in items (i) and (ii) where the market value of that property is less than $2m. The $2m threshold will also apply to company title interests but not to other indirect Australian real property interests mentioned in item (iii). The ATO has indicated that where the purchase price is negotiated on arm's length basis, the price will be a proxy for market value.

Secondly, sales of property described in items (i) and (ii) will also be exempt from withholding where the vendor has provided the purchaser with a certificate (clearance certificate) from the ATO 'confirming that withholding tax is not to be withheld from the transaction'. This exemption will also apply to company title interests but not to other indirect Australian real property interests mentioned in item (iii). The ATO notes that the clearance certificate:

- will be valid for 12 months, and
- has to be current at the time the transaction is entered into.

The vendor would need to provide the purchaser with the clearance certificate prior to settlement of the transaction.

Application for the clearance certificate is made on-line and would, in normal circumstances, be issued on-line.

The ATO website contains further information. However, the link to the application form has not been made active at the time of writing. The website states that it will be operative prior to 30 June 2016.

While the certificate must relate to a period that includes the date on which the transaction was entered into (which appears to be a reference to contract, as distinct from settlement), the ATO has not indicated whether an application can be made to encompass a retrospective date.

The clearance certificate process has been instigated because a purchaser would not normally have knowledge of whether a vendor is a foreign resident under the tax law.

The third exemption relates to transactions conducted through an approved stock exchange or crossing system.

The foregoing is not an exhaustive list of exemptions. For instance, it is possible that some NFPs will hold interests in companies (e.g. companies that are used to conduct commercial enterprises) and anticipate selling the whole or part of those interests - c.f. item (iii) above. Less commonly, NFP's may grant (sell) options/rights over property mentioned in items (i) to (iii) above. Any such sales may entail a need to consider withholding tax and exemptions not mentioned above. However, it is anticipated that this area will not, as a practical matter, be problematic for most NFPs and we suggest you raise the matter with your professional advisers ahead of sale negotiations to identify any appropriate action.

Some Practical Considerations

If your organisation is contemplating that, after 30 June 2016, the organisation will enter into a contract to sell real property or other property mentioned in item (ii) above, deal with (e.g. grant easement over) that property or grant a lease at a premium, it is suggested that:

- you raise the application of withholding tax with your professional legal advisers prior to the commencement of the marketing process;
- in particular, you consider whether the sale will be under the $2m threshold or whether a clearance certificate is required;
- in particular, where a clearance certificate is appropriate, you ensure that it obtained in a timely way so that it is current for a period that includes the time the transaction is entered into; and
- where a clearance certificate is appropriate and you anticipate entering into a contract shortly after 30 June 2016, you monitor the release of on-line application form and identify, as soon as possible, the information it requests.

An initial heavy demand for access to the application form is to be anticipated and allowance for this and teething difficulties may need to be factored in to the sale process.

If your organisation holds at least 10% of the interests in a company and is contemplating selling the whole or part of its interest after 30 June 2016, you may like to consider whether it will need to invoke an exemption from withholding or to take steps to establish for the prospective purchaser that its interest is not an indirect Australian real property interest.

Finally, if your organisation is purchasing real property etc. or purchasing an interest in a company other than via on an approved stock exchange, you should ensure the purchase documentation reflects your withholding obligations and that the vendor is aware of any action that is needed in order to avoid withholding. This will entail early timely communication with your legal advisers.

Eligibility – Taxpayer Alert 2016/5 – Purported tax-exempt non-profit 'foundations' used to evade or avoid taxation obligations

The ATO is investigating the use of non-profit 'foundations' as vehicles to avoid or evade tax. The ATO's area of interest, its line of enquiry and actions are set out in *TA 2016/5 - Purported tax-exempt non-profit 'foundations' used to evade or avoid taxation obligations*.

Readers should review the Tax Alert in detail. The following is a high level introduction to assist understanding.

ATO's Areas of Interest

The ATO's areas of interest are:

(i) Taxpayers who 'purport to stream their untaxed employment, contractor or business income through an unincorporated 'foundation' that they treat as not being subject to income tax'; and

(ii) The non-payment of other taxes such as superannuation and GST. In addition to avoidance/evasion of income tax, the purported 'foundations' and their controlling personnel are not complying with other tax obligations.

ATO's line of enquiry

The Tax Alert identifies the elements of a typical arrangement.

In overview, these are:

- A promoter provides advice/assistance to individuals (participants) to create a private 'foundation', which it is claimed is exempt from all taxes.
- The participants are led to believe income creating activities conducted within the foundation are not subject to the tax system.
- A small proportion of the income may be streamed to charitable purposes in support the claim to tax free status of the foundation.

The ATO notes that the purported foundation has all or most the following features:

- There is a document purporting to create a 'non-profit private foundation'. The document provides for the participants to be responsible for carrying on the foundation's activities. Often the document makes provision for others to perform day to day activities of the foundation.
- Bank accounts are opened in the name of the foundation.
- The foundation does not have either a tax file number or an ABN.
- The foundation does not comply with the tax legislation requirements for tax exemption or gift deductibility. In particular, the foundation will not be registered as a charity with the Australian Charities and Not-for-Profits Commission.
- The foundation may inform the ATO that it makes payments of exempt income to which tax withholding obligations do not apply.
- Often participants do not lodge personal tax returns or omit receipts that are streamed to them through the foundation.

The Alert notes that participants operate the foundation in various ways:

- The participants purport to carry on business through, or in the name of, the foundation.
- The participants arrange for income from a business conducted outside the foundation to be channelled into the foundation's bank accounts.

- The participants arrange for pre-tax salary and wages to be paid directly (or through an intermediary) into the foundation's bank accounts.
- The participants arrange for remuneration from the provision of personal services to be paid directly (or through an intermediary) into the foundation's bank accounts.

The amounts received by the foundation and the amounts paid to participants and volunteers are not reported to the ATO.

The participants primarily apply the foundation's receipts for the personal use or investment.

The ATO's concerns are:

- The foundations are contrived and are designed to evade or avoid tax.
- The participants and volunteers are not properly reporting their assessable income for tax purposes.

The Alert lists eleven aspects of tax law which the ATO is currently considering in connection with the foundations, participants, volunteers and promoters of the arrangements.

ATO's Action

Current ATO action:

- Reviewing the arrangements identified; and
- Engaging with a number of entities believed to be already involved.

Foreshadowed further action:

- Compliance action may be taken in respect of other taxpayers who the ATO identifies as having entered into the relevant type of arrangements.

The Alert concludes by:

(a) setting out action which the ATO encourages people who have entered into the relevant type of arrangements to take;

(b) setting out action which the ATO encourages people who contemplate entering into the relevant type of arrangement to take;

(c) referring to certain penalty provisions that may apply to persons involved in/connected with the arrangements; and

(d) inviting persons with certain information to contact the ATO.

Eligibility – ACNC Roundup – April 2016

The ACNC has a future

For some time there has been a question mark hanging over the ACNC - would the Federal Government retain it or disband it?

The Turnbull Government has opted for retention.

Reading between the lines of the joint (Small Business Minister's and Assistant Treasurer's) Ministerial announcement, it might be expected that the ACNC will be mindful of overburdening charities with red tape. The Ministers' press release noted: 'It is intended that the ACNC will have a *renewed* focus on working with charities to help them to become more effective, and helping them to improve their governance.' (italics added) Their announcement concluded with assurance that the Federal Government intends 'to work with the ACNC, states and territories and the sector to identify areas where we can reduce the burden of red tape for charities and not-for-profit organisations.'

The theme of minimising administrative load is also evident in the welcome of the announcement by Prime Ministers Community Business Partnership that it looks 'forward to working with the ACNC in 2016 to eliminate burdensome red tape and streamline sector regulatory approaches, including harmonising fundraising regulation and cutting red tape for volunteers.' The ACNC has endorsed this goal.

On a personal note, it is to be hoped that the aspiration will be made good. The writer keeps an eye on the charities 'administrative defaulter' list. He was recently dismayed to observe a local charity group had made this year's list. On contacting a (senior) volunteer with an offer of help, it was evident the group had been endeavouring to comply but found the administrative process daunting. (The writer's offer was not needed, as assistance was also forthcoming from another quarter.) It would have been a pity if the local community had lost a valuable resource because it was all too hard. The ACNC needs to be conscious that local charities are often staffed by elderly retiree volunteers, many of whom have not grown up in a digital world.

What has been your experience? Let us know your 'red tape gripes' through emailing the TaxEd editorial team at admin@taxed.com.au (subject line: Editorial team).

Entering the forthcoming (and other) electoral forays

The ACNC has published a new guide indicating the ACNC's view of permissible activities that a charity can undertake in context of an election or advocacy on a particular issue. (The ability of a charity to participate in advocacy was the subject of a TaxEd newsletter article last year.)

The heart of the guide is the touchstone that a charity may pursue its charitable purposes (which may be advanced by advocating the adoption of a particular policy) but should not engage in party/candidate politicking. As with any activity to be undertaken, a charity should ensure its advocacy activities also comply with all constraints in its constitution which, while primarily comprised in its objects/purposes, may include other restrictions.

If your organisation (or office bearers) anticipates having any connection with the electoral or an advocacy process, it (or they) should consider the guide. The frequently asked questions component offer some more targeted guidance - including highlighting some issues that may not be at the forefront of mind, such as charity office bearers having a political involvement, the charity's resources being used in party political activities, etc.

Fuel Tax Credits – Potential Developments on Apportionment

Over recent years, the high cost of fuel in Australia has been a hot topic and one which has had a significant impact on the costs and profitability of many enterprises that use fuel in their day-to-day operations. The Abbott Government's decision in 2014 to re-introduce bi-annual fuel indexation for the first time since the Howard Government froze the rate of fuel excise in 2001 means that the cost of fuel is only set to rise into the future. However, in this environment of high fuel costs, the Federal Government enables enterprises to recover some or all of the excise paid on fuel acquisitions for eligible use through the Fuel Tax Credit (FTC) system.

The FTC system has undergone a number of changes since the early 2000's. It was previously known as the Diesel Fuel Rebate, the Diesel and Alternative Fuels Grant Scheme and the Energy Grants (Credits) Scheme before the FTC was introduced in its current form in July 2006. Since that time, there have been several further changes with regards to eligibility of fuel used in certain activities and numerous changes to the applicable rates of FTC entitlement. In addition to the legislative changes to the FTC system, there have also been changes to the law brought about by legal challenges to ATO opinion. Most notably, the 2012 decision of the Administrative Appeals Tribunal in the Linfox Case has led to increased entitlement for fuel used in the auxiliary equipment of road transport vehicles. As a result of this case, we are expecting the ATO to shortly publish its updated views on acceptable apportionment methodologies for calculating relevant FTCs.

Against this moving landscape, it is commonplace for entities not to be fully aware of the extent of their entitlements. The good news is that, more often than not, experience has shown that entities that are eligible are more often under-claiming rather than over-claiming their FTC refund entitlements.

Making a claim and applying an appropriate apportionment methodology could substantially reduce costs. With rising fuel prices and the ever-changing FTC law, and with FTCs available from between 13.39 to 39.5 cents per litre, it is more important than ever to make sure that business that are eligible to do so maximise their FTC entitlement.

Payroll – NSW extends Payroll Tax exemption for local councils

Legislation has been introduced into NSW Parliament that will have the effect of extending the existing payroll tax exemption (PRT exemption) that exists for wages paid by a subsidiary of a local Council.

Under the proposed change, where an entity is wholly owned by more than one local Council the entity will be entitled to PRT exemption as if it were a subsidiary of a local Council.

Under the current NSW law, the exemption is only available where the entity is a wholly owned subsidiary of a single local Council.

The proposed laws will take effect at the date of Royal Assent. We will confirm the final date of effect in due course.

Despite attempts to harmonise PRT legislation, this is an area of which Councils in each State and Territory need to be mindful of differences in treatment. Other issues to consider include:

- what wages are excluded from the scope of exemption despite being paid by a local Council (or subsidiary there-of); and
- whether any labour supplied through employment agents to a local Council or subsidiary there-of also enjoy PRT exemption (and accordingly the fee payable by Council should reflect the PRT exemption available to the employment agent).

TaxEd Members with any specific State or Territory related PRT questions in this area should use the Q&A service.

We will prepare a more detailed article summarising the rules in each State and Territory in an upcoming TaxEd newsletter.

Payroll – Reportable Super – what is reportable (Part 1)

TaxEd recently ran a superannuation webinar, with a popular topic being the reporting of superannuation payments in the employee's payment summary at year end. This article, which is published in two parts, outlines the position.

This first part deals with the basic position. Part 2 of the article (to be published in next month's newsletter) looks at further issues such as reporting of contributions made outside the year of salary sacrifice and who is an employee for reporting purposes.

The Basic Position

An amount which an employer has contributed to superannuation for an employee in respect of an income year is reportable where the employee had the ability to influence the contribution in one of two ways - s. 16-182 in Sched. 1 *Taxation Administration Act 1953* (TAA). It is sufficient that the employee is able to influence the size of the contribution amount. Alternatively, it is sufficient that the employee is able to influence the way the amount is contributed, so that the employee's assessable income is reduced.

Clearly, an employee is unable to influence the size or the way in which superannuation guarantee contributions are made. These are not reportable employer superannuation contributions (RESCs).

Influence over size of contribution

The prime example an employee influencing size of the contribution is an employee salary sacrificing an amount into superannuation. The employee may request the employer to pay a specified amount or a specified proportion of wages/salary to the employee's super fund in lieu of payment of that amount to the employee.

The influence may be actual or to be reasonably expected. The Explanatory Memorandum (EM) relating to RESCs gives the following example of the latter:

> 'Example 3.14
>
> Wei is an employee of TKU Pty Ltd (TKU). During negotiations of Wei's common law employment contract, TKU offered Wei increased contributions to superannuation as part of a range of employment-related benefits. These contributions, which equate to $10,000 of Wei's total remuneration, were provided as part of a remuneration package that Wei was allowed to consider and discuss with TKU. TKU made it clear to Wei that he could negotiate the contents of the additional incentives and that other benefits may be provided. These dealings are evidence to suggest Wei might reasonably have been expected to have had capacity to influence the amount of contributions being made on his behalf. The $10,000 contribution is in addition to contributions being made by TKU under superannuation guarantee law. TKU would be expected to record the $10,000 superannuation contribution as RESC.'

An employee is statutorily deemed to be unable to influence the size of certain superannuation contributions where the employer is required by an industrial instrument (Australian law, award, order, determination or industrial agreement under such law) or the rules of the fund to make the contribution. The employee must not be able or be reasonably expected to influence the content of the instrument/rules in so far as it/they provide for the requirement to contribute or the size of the contribution to be made - s. 16-182(5) Sched.1 TAA.

The Explanatory Memorandum appertaining to s. 16-182(5) gives the following illustration:

> 'Example 4.2

> Rodger's employer is required to make an employer contribution for Rodger's benefit under the deed of the superannuation fund into which Rodger's employer contributes. This deed is subordinate legislation under a provision of state legislation. The amount of the contribution is prescribed in the deed and is based on the amount of personal superannuation contribution made by Rodger. For example, Rodger can elect to contribute 0 per cent, 5 per cent or 8 per cent of his salary as a personal after-tax contribution. The deed requires that if Rodger elects to contribute 0 per cent, 5 per cent or 8 per cent, his employer must contribute 9 per cent, 11.5 per cent or 13 per cent respectively. Rodger elects to contribute 8 per cent of his salary as a personal after-tax contribution. His employer contributes 13 per cent to Rodger's superannuation as required.
>
> None of the amount the employer contributes is a reportable employer superannuation contribution as the additional employer contributions are required by an Australian law. Neither Rodger nor his employer has capacity to influence the requirement for the additional contribution to be made or its size as the contribution and its amount are determined by the deed. None of Rodger's personal after-tax superannuation contributions are reportable employer superannuation contributions as they are made from his assessable income.'

It is important to note that Rodger's election in regard to the quantum of his contribution related to the amount that he was to pay out of his after-tax income. Section 16-182(2) Sched 1. TAA provides that an amount is not a RESC to the extent that is included in the employee's after-tax income. If Rodger had made his 8 per cent contribution out of his pre-tax income, this would have been an RESC.

Influence over way in employer contributions are made

Some superfund rules, especially those of defined benefit funds, require members to make contributions from their after-tax income. These contributions may be set at a specified percentage of employment income, although in some cases, the members may determine the amount of the contribution. While contributions from after-tax income are not RESC, employee exercise of an election in the rules to contribute out of pre-tax income would give rise to RESC. The following EM example illustrates this:

> 'Example 3.19
>
> Rhonda's employer makes superannuation contributions on Rhonda's behalf to a defined benefit fund. The employer contributions are applied to a pool to fund the liability of the entire fund. In addition, the rules of the fund require Rhonda to make a member contribution equal to 7 per cent of ordinary time earnings. Ordinarily, this member contribution would be made from Rhonda's assessable income. However, the rules of the defined benefit fund were recently amended so that individuals may elect to contribute their member contribution from pre-tax salary or wages. Rhonda exercises this option and the 'grossed-up' amount of her member contribution is deducted from her pre-tax salary or wages so that Rhonda makes the same net contribution to her employer's defined benefit fund as she would have made if the member contribution were made from assessable income. The total 'grossed-up' amount of the contribution is RESC because it represents the amount that Rhonda has elected to have made from pre-tax salary with the effect that her assessable income is reduced.'

Absence of influence

Industrial agreements may also require employers to contribute to employee superannuation in excess of the required superannuation guarantee amount. Where the agreement is made at arm's length and there was not any reasonable capacity of the employee to influence the terms of the agreement, the contribution would not be RESC. The following example given in the EM indicates that an employee's vote in favour of an agreement negotiated by an industrial union does not constitute influence:

> 'Example 3.17
>
> Costa is an employee of PQZ Pty Ltd (PQZ). Costa's employment conditions are governed by an industrial agreement that was negotiated between Costa's employer and the union representative. Costa was not

involved in the negotiations and had no involvement in the preparation of the agreement, aside from voting on it. The terms of the agreement require PQZ to contribute 15 per cent of Costa's ordinary time earnings to superannuation. However, PQZ's payroll system pays 15 per cent of Costa's total remuneration (including overtime). PQZ's payroll system does not allow for superannuation contributions to be made on an employee's ordinary time earnings alone. Because Costa has not influenced further contributions to be made on his behalf or influenced contributions to be made in such a way that his assessable income is reduced, Costa has no RESC for the income year.'

Example 3.17 also demonstrates that the limitations of an employer's payroll system which result in an additional amount being contributed is a further instance of absence of employee influence. The additional amount would not be an RESC.

Contrast, the foregoing example with the following instance, given in the EM, of an industrial agreement where the employer was not dealing at arm's length in negotiating the industrial agreement:

'Example 3.18

Tula is an employee of MGK Pty Ltd (MGK). Tula's employment conditions are governed by an industrial agreement that was negotiated between Tula and the other employees of MGK (Tula's husband, Tony and their adult children, Michael and Rena). There was no external involvement in the negotiations of the agreement and it was not made at arms' length. The agreement requires MGK to contribute an amount equating to 15 per cent of employee total remuneration (including overtime) to superannuation. In Tula's case, her total remuneration is $66,000 per year but ordinary time earnings is only $60,000 per year. Tula's annual contribution from MGK is $5,940. However, under superannuation guarantee law, MGK is only compelled to pay $5,400 on behalf of Tula, being 9 per cent multiplied by $60,000. Because the contributions made on behalf of Tula and her fellow employees are required under the terms of an agreement that was not negotiated at arms' length, and which Tula had capacity to influence, then MGK must report the difference between the amount compelled by law and the amount paid under the industrial agreement as RESC. That amount is the difference between $5,940 and $5,400 (being $540).'

Combination of contributions that are influenced and not influenced

The following example, which is published on the ATO website, illustrates the common scenario of the combined payment of superannuation guarantee (a situation of absence of employee influence) and salary sacrifice (exercise of influence):

'Example 2:

On 1 July 2014, Sally and Zoe started work with ABC Pty Ltd. They receive the same remuneration package of $40,000 a year. Zoe decides to enter into an effective salary sacrifice arrangement to contribute pre-tax income of $10,000, which is to be paid to her super fund.

Where contributions are paid to a complying super fund, your earnings base may be reduced unless the salary sacrifice arrangement states otherwise. Your earnings base is the amount on which super contributions made by your employer are calculated.

The collective agreement that ABC has with its employees require that ABC Pty Ltd pay 9.5% of total salary before the salary is reduced by any salary sacrifice amounts, and is paid in addition to salary sacrifice contributions. In working out Sally and Zoe's reportable employer superannuation contributions amount, ABC does the following calculation:

Zoe

ABC records total employer super contributions paid on behalf of Zoe	$13,800
Salary sacrifice contributions	$10,000

ABC calculates 9.5% compulsory super contributions on $40,000	$3,800
ABC subtracts employer compulsory contributions from the total contributions made on behalf of Zoe to calculate reportable employer superannuation contributions amount	$10,000

Sally

ABC calculates Sally's 9.5% compulsory super contributions based on her salary of $40,000. ABC contributes $3,800 to Sally's super fund, and she has no reportable employer superannuation contributions.'

Article continues with Part 2 next month

Next month, Part 2 of this article considers further matters affecting the amounts included in RESCs such as allocating RESC to particular year and the extension of RESCs to certain persons who are not common law employees.

GST – GST and Compulsory Land Acquisitions

Generally, for the majority of transactions, the GST rules relating to the sale of real property should be pretty straightforward. For some transactions, however, the GST implications can be quite complex.

Situations where land is compulsorily acquired, vested, or resumed by a government authority fall into the latter category.

In this article, we have assumed that the land in question would ordinarily be subject to GST if sold (e.g. commercial premises), and also that none of the GST exemptions would have applied (e.g. the sale would not have been a GST-free supply of a going concern).

ATO View

The ATO has issued GST ruling GSTR 2006/9 on supplies. Supply is a cornerstone concept in the GST law and the ruling provides detailed analysis on what constitutes a supply, including setting out ten propositions to assist in analysing a transaction to identify the supply or supplies made in that transaction. It is under Proposition 5 - to 'make a supply' an entity must do something - that the ruling sets out specific comments and the ATO opinion on the GST implications of compulsory acquisitions.

Paragraph 80 of GSTR 2006/9 provides:

> ' Various government authorities are empowered by legislation to acquire an interest in real property. Two common mechanisms employed by legislation are:
>
> - the vesting of the interest in the relevant government authority and extinguishing any previous interests in the real property; and
> - the particular statute may allow the government authority to acquire the real property by agreement.'

The ruling then goes on to state (at paragraph 82):

> ' In cases where land vests in the authority as a result of the authority seeking to acquire the land, and initiating the compulsory acquisition process pursuant to its statutory right, then the owner does not make a supply because it takes no action to cause its legal interest to be transferred or surrendered to the authority.'

Based on these comments, government authorities that issue a notice to resume would appear at first instance to be able to rely on the comments in the public ruling to treat the transfer of land as not being a supply, and therefore not subject to GST. However, care should be taken to understand the precise nature of the transaction or arrangement.

Potentially Taxable

In this regard, we note that there is a Tribunal decision, SXGX and Commissioner of Taxation [2011] AATA 110 (18 February 2011), which looks at transaction that took place in Queensland which appears to be a compulsory acquisition triggered by the legislative process, but which comes to a different conclusion to that stated in the ATO ruling.

Relevant comments from the Tribunal decision include:

- 'I would have thought that, at least in Queensland, the compulsory process is initiated upon service of the notice of intention to resume. There may well be situations where, after the service of the notice of intention, the parties agree on a sale rather than the continuation of the statutory process.'

- 'At the time the statutory process of resumption was in prospect but it had not come to fruition. In my view the sale by the applicant to the State constituted a supply and it was a supply for consideration.'

Therefore, notwithstanding that the process may have been initiated via the statutory process, contrary to the view in paragraph 82 referred to above, the Tribunal considered the actual transaction was a supply for consideration. Provided the other conditions are met, such a supply would be a taxable supply and subject to GST.

We note that the above Tribunal decision relates to Queensland laws, and care should be taken as each State/Territory laws with regard to the mechanism for statutory compulsory acquisition may differ.

Conclusion

While the general proposition that a compulsory land acquisition which follows the relevant State/Territory laws would not be a supply, and therefore not be subject to GST as a taxable supply, care must be taken to ensure the whole transaction followed this process.

GST – Bad or Overdue Debts

One of the general housekeeping matters as part of financial year end tax planning is reviewing debtors to determine whether there are any bad debts. Provided the debt is actually bad and is written off before 30 June, a taxpayer in business will be able to claim the bad debt as a deduction.

A further consequence of writing off the bad debt is that it generally gives rise to GST adjustments.

Example

Consider a simple example where an entity (the supplier) has made a taxable supply to a customer for $1,100 inclusive of GST. Assume the supplier issued a tax invoice dated 31 March 2015 with payment terms of 30 days. Unfortunately, the customer did not make payment within the payment terms and while the supplier attempted to collect the debt in the following months, as at 30 June 2015 the supplier continued to consider that the full debt was collectible. Accordingly, the debt was neither bad nor written off as at 30 June 2015. Despite continuing to seek collection of the debt the customer has failed to pay and the supplier is now considering whether to write the debt off as bad.

In the example, and assuming the supplier accounts for GST on a non-cash (accruals) basis, the supplier would have included the sale in its March 2015 BAS and the $100 of GST would have been paid to the ATO. As the supplier has not yet collected any of the debt, the supplier is out of pocket for the $100.

Division 21 of the GST law contains specific rules regarding bad debts. This division applies not only to debts that are written off as bad, but also to debts that are outstanding or overdue for at least 12 months.

Bad Debts

With regard to bad debts the supplier would be entitled to a GST decreasing adjustment (that is, claiming an amount of GST back from the ATO) where the supplier made a taxable supply, the whole or part of the consideration for that supply has not been received, and the supplier has written off as bad the whole or part of the debt. The decreasing adjustment is calculated as 1/11th of the amount of the bad debt written off.

In terms of the example, provided the debt is bad and the whole debt has been written off, the supplier would have a GST decreasing adjustment of $100 (being 1/11th of the $1,100). This adjustment would be attributed to the tax period during which the debt is written off.

12 Months Overdue Debts

Even where a debt is not bad or has not been written off, similar GST adjustments arise where debts have become more than 12 months overdue. Even though a supplier may not have actually written off the debt as bad, and assuming no part of the debt has been collected, the supplier would be entitled to a GST decreasing adjustment where the debt is more than 12 months outstanding.

In the example, as the customer has 30 days payment terms the debt would be due for payment on 30 April 2015. Therefore, the debt only becomes overdue for 12 months or more as from 30 April 2016. Where this is the case, the supplier is entitled to a GST decreasing adjustment of $100 and can include this in the April 2016 tax period. If monthly this would be the April 2016 BAS, or if quarterly this would be the June 2016 BAS.

Division 21 also contains a corresponding GST increasing adjustment provision that applies to the customer. That is, if the customer is on an accruals basis, has made a creditable acquisition, the whole or part of the consideration is overdue and the customer has not provided the overdue consideration, and the debt is either written off as bad or becomes more than 12 months overdue, then a GST increasing adjustment arises to the customer. The increasing adjustment is calculated as 1/11th of the amount of the overdue debt and would be attributed to the tax period during which this adjustment is triggered.

Should the supplier subsequently recover any or all of a written off bad debt or a debt that is 12 months overdue, then this would give rise to a GST increasing adjustment to the supplier equal to 1/11th of the amount recovered. Similarly, a GST decreasing adjustment (equal to 1/11th of the amount paid) would arise to the customer to the extent that such a debt is actually paid.

Summary

It is good housekeeping to review all debts prior to year-end to determine if any are bad. Where bad debts are written off, don't forget to also determine whether this gives rise to a GST decreasing adjustment. At the same time, even though a debt may not bad, if it is more than 12 months overdue this may also give rise to a GST decreasing adjustment claim.

FBT – Changes to Adjusted Taxable Income

Employees in receipt of fringe benefits who also receive family assistance and certain other government payments may be affected by a proposed change to the 'adjusted taxable income' formula.

On 13th of April 2016 the ATO published the following advice:

> *'The Government announced a change to the treatment of fringe benefits which impacts the way adjusted taxable income (ATI) is calculated for family assistance payments, and for parental income tests which apply to youth income support payments. The ATI is also used in income tax tests such as low income superannuation contribution, net medical expenses tax offset, dependant tax offsets, and seniors and pensioners tax offset.*
>
> *Under the proposed change, the grossed-up value of fringe benefits will be used for the purposes of calculating ATI. The grossed-up value of fringe benefits is already reported as reportable fringe benefits amount by the employer on their employee's pay as you go payment summary.*
>
> *Currently, the reportable fringe benefits amount is adjusted down for the purposes of calculating ATI for those benefits.*
>
> *The proposed change will not apply to fringe benefits sourced from certain not-for-profit institutions that are exempt from fringe benefits tax, including registered health promotion charities and registered public benevolent institutions. These employees will continue to be assessed under the current arrangements where the reportable fringe benefits amount will be adjusted down.*
>
> *The measure is intended to take effect from 1 January 2017. It is not law yet.'*

The adjustment of reportable fringe benefits referred to in the above announcement as applied to the above payments is as follows:

Adjusted Fringe Benefits = Reportable fringe benefits x (1 minus FBT rate)

Calculating the adjusted fringe benefits amount has the effect of subtracting the gross-up factor from the employee's reportable fringe benefits total. Only the cash or market value of the employee's fringe benefits is assessed.

FBT Q&A – 50/50 method for meal entertainment – what's included?

Question:

If we elect the 50/50 method for entertainment do we have to capture everything like coffees, meals when travelling, morning teas etc. and then apply the 50/50 method?

If the CEO pays for dinner for 11 people including himself, and the other 10 people are CEOs from other Councils, do we work out our CEO's proportion of the bill, say $50 and apply the 50/50 method to the $50 or do we include the whole bill of $400 and apply the 50/50 method to the $400?

Answer:

The 50/50 method requires the employer to total up the entire meal entertainment spend for the FBT year - this includes meal entertainment provided to non-employees in addition to employees & their associates.

The taxable value for FBT purposes is then 50% of this total.

Coffees, meals when travelling and light morning teas are unlikely to be considered the provision of meal entertainment and will therefore not form part of the 50/50 meal entertainment total.

Given the above, in the CEO example, the entire bill goes into the 50/50 meal entertainment pot - i.e. the $400.

FBT Q&A – Fringe benefits provided to deceased employee's family

Question:

Is FBT payable by an employer where the employer pays for the funeral expenses of a deceased employee?

Answer:

The definition of employee for FBT proposes includes a current, future or former employee and therefore, as such, a deceased employee would appear to fall within the concept of a former employee for FBT purposes. The payment of the funeral costs payable by the deceased employee's family would therefore appear to be an expense payment fringe benefit as the family members are associates.

However, the longstanding view of the Commissioner is that FBT does not apply to benefits provided in respect of a deceased employee. Taxation Ruling TR 1999/10a addendum states that: 'The fringe benefits tax system does not apply to benefits provided to relatives of deceased employees.'

In further support of the above, ATO Interpretative Decision 2006/159 discusses the outcome of an employer paying funeral expenses for a deceased employee in detail.

Given the above, benefits provided to the deceased employee in the form of the payment of funeral costs will not be subject to FBT.