Government & NFP Support

Spring is approaching.

This heralds football codes finals seasons and Spring balls. With this in mind, it is timely for Deductible Gift Recipients (DGRs) to review what they can do to structure functions (ticket pricing, auctions of sporting memorabilia etc.) in order to maximise returns through enabling attendees to benefit from tax deductions. This newsletter includes an article that will assist DGRs in understanding the requirements governing access to the relevant tax concessions.

The newsletter also includes a note on the latest minutes of the State/Territory – ATO discussion of GST issues. We delve further into one of those issues in a dedicated article on grants.

Superannuation remains a topic 'on the boil' as elements within the Turnbull Government (and the Turnbull Government and the opposition) fence over mooted legislative changes.

Superannuation is full of hot spots – one of which is employment termination and super. TaxEd is presenting a seminar on this topic, along with a general update on the mooted changes, on 6 September. For more information see: Superannuation September 2016 - hot spots for Government and NFP finance and payroll staff.

Regards

Andrew Orange

TaxEd Team

GST – State and Territory GST Issues – Matters on the ATO's Mind

The Minutes (published in August 2016) from a meeting held on 27 April 2016 of the GST - States and Territories Industry Partnership deal with State and Territory concerns in relation to the following aspects of GST:

(a) GST-free supply of unimproved land - application of s 38-445 *GST Act*;

(b) Margin scheme - application of Item 4 of the table in s 75-10(3) *GST Act*;

(c) Local Government Class action - seeking to argue that a 'notional GST cannot be imposed on the state, and therefore local Government, as it is forbidden by section 114 of the Constitution';

(d) Government Grants and payments - reporting of these to the ATO;

(e) Application of GST for council dump fees where Council does not provide a kerbside collection - application of Div. 81 *GST Act*;

(f) Application of GST to forfeiture of a security deposit in the context of sales of land to which the margin scheme applies;

(g) Whether certain government appropriations are subject to GST - application of s 9-17(3) *GST Act*;

(h) Tax Invoices - where a supplier has assigned (under a debt factoring arrangement) the debt for a supply;

(i) Effect of Grants on GST registration turnover threshold;

(j) Impact of High Court decision in Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49;

(k) Significance/role of ATO Law Companion Guidelines; and

(l) Issue of a tax invoice where supplier is a member of a GST group.

Below is a summary of the key issues discussed for each of the items referred to above. For a more detailed discussion, please refer to the full content of the minutes.

Issues (a) & (b): The nature of improvements - s 38-445 and Item 4 of s 75-10(3)

Section 38-445 and Item 4 of the table in s 75-10(3) each refer to improvements on land (or lack thereof). In the former case, a supply of 'Commonwealth, State and Territory land on which there are no improvements will be GST-free' in certain circumstances. The latter provision deals with the calculation of the margin under margin scheme where there is a supply of pre-GST land and there were improvements on the land as at 1 July 2000.

The common issue is what constitutes 'improvement'. The ATO has deferred considering whether GSTR 2006/6 Goods and services tax: improvements on the land for the purposes of Subdivision 38-N and Division 75 should be updated following a neutral evaluation provided by senior Counsel (see: previous meeting minutes of 5 November 2015), pending receipt of a further neutral evaluation.

As appears from the previous minutes, the ATO viewed Counsel as concluding that:

- 'an alteration to land in its natural state which has the effect of increasing its value or increasing its usefulness will result in there being an improvement to the land';
- 'the appropriate comparison is to the land in its natural state and not to whether the human intervention contributes to the land's highest and best use'; and
- 'an "improvement" to land is a physical alteration or addition which results in an enhancement in value of the land from the value in its natural state, as well as an alteration or addition which for an occupier will improve the usefulness of land when compared with its natural state.'

The previous minutes contained discussion of the relevance of physical improvements whose benefit had been exhausted; the need to consider usefulness from the perspective of any entity (and not for a particular party); and situations where improvements had been made to a part of a large parcel of land that was subsequently subdivided and a subdivisional parcel without improvement was supplied.

The further neutral evaluation relates to dams, fences and roads. It is not expected to be finalised before September 2016.

Issue (c) - local government class action

The Minutes note that the ATO is aware of a potential class action questioning the constitutional validity of the imposition of GST on the state, and therefore local Government.

For your information, s 114 of the Constitution provides that the Commonwealth shall not impose 'any tax on property of any kind belonging to a State'.

As an interesting aside, we note the minutes for the previous meeting referred to more than 70 local government bodies potentially joining in the mooted class action whereas the latest minutes suggest that this has increased to more than 90 local government bodies.

Issue (d) - Government Reporting of payments and grants

The ATO noted that, under legislation enacted on 30 November 2015:

- Commonwealth, State/Territory and local government levels have obligations to report in relation to payments made to businesses providing services to them for the period commencing 1 July 2017; and
- Commonwealth and State/Territory levels are required to report 'total grants paid to entities with an ABN'.

The first report relates to FY 2017/18 and is due on 28 August 2018.

By way of comment, we add that the relevant legislation principally comprises Subdivision 396-B of Schedule 1 of the *Taxation Administration Act 1953*. The legislation was discussed in a previous newsletter.

Some entities are excluded from the need to report or are relieved from reporting certain payments. These are identified in the following legislative instruments:

(i) [Classes of Government Related Entities Exempt from Providing Third Party Reports Determination 2016]

(ii) [Classes of Transactions for which Government Related Entities are Exempt from Providing Third Party Reports Determination 2016]

The ATO stressed that the entity making the payment is required to be identified as the payer in the report. The ATO will be following-up non-receipt of reports and the paying (reporting) entity's name will also appear pre-filled in information that the ATO provides to the recipient of the payment.

The ATO noted that the format of the annual report enabled another party to lodge it on behalf of the payer. In this circumstance, the report would need to show the lodging party as the 'sender' and the entity that made the payment would need to be identified in the 'payer' data of the report.

Where the requirement to identify the paying entity gives rise to administrative issues, the entity seeking to report in lieu of the actual payer should make a written request to the ATO with an outline of the circumstances.

Further information on reporting obligations is available on the ATO website at: ato.gov.au/tparGov

Issue (e): Council Dump Fees - Application of Division 81 of GST Act

The issue considered is whether GST applied to a Council waste disposal fee charged to a ratepayer who was not provided with a kerbside garbage collection service and who was required (by Council by-law) to take their rubbish to a waste disposal facility.

The ATO responded as follows:

> 'Residents who receive kerbside collections provided by their Council will not be charged GST where the cost of the service forms part of their rates. Council rates are not subject to GST under section 81-5. Residents who do not receive kerbside collections and are required to take their refuse to a transfer station will pay GST on any fees as the GST Regulations [Paragraph 81-10.01(1)(d)] provide that the payment of these fees is consideration for a taxable supply in these circumstances.
>
> It should be noted, however, that residents who receive a kerbside collection will also pay GST if they take additional refuse to the transfer station.'

Issue (f): GST and Forfeiture of Security Deposit

The ATO has expressed a view on the GST treatment of a forfeited security deposit held in respect of a sale of land to which the margin scheme applies.

In the ATO's view:

- A forfeited security deposit is consideration for the earlier supply of a right to receive land - s. 99-5 of the *GST Act* and paragraph 97I of GSTR 2000/28 Goods and services tax: attributing GST payable or an input tax credit arising from a sale of land under a standard land contract.

- 'The margin scheme cannot be applied to calculate the GST payable on the right to receive a supply of land.'
- The 'margin scheme cannot be applied to a right to receive something as a supply of a right does not involve a supply of land'.
- The margin scheme can be applied to supplies of real property made by (a) selling a freehold interest in land, (b) selling a stratum unit, or (c) granting/selling a long-term lease.

We observe that it would be prudent to consider whether a contract for the supply of land that is drafted on the basis that the margin scheme applies deals with the application of GST to forfeited deposits. Matters for consideration include:

- whether the amount of the deposit recognises that the amount of GST that will be payable on forfeiture and the consequential residual amount that will be available as compensation; and
- whether appropriate provision is made for a tax invoice.

Issue (g): Government Appropriations

Section 9-17(3) of the *GST Act* provides that a payment is not consideration (for GST purposes) where all of the following requirements are met:

(a) 'the payment is made by a government related entity [Entity A] to another government related entity [Entity B] for making a supply;

(b) the payment is ... covered by an appropriation under an Australian law; and

(c) the payment is calculated on the basis that the sum of:

  (i) the payment (including the amounts of any other such payments) relating to the supply; and;

  (ii) anything (including any payment for any act or forbearance) that ... [Entity B] ... receives from another entity in connection with, or in response to, or for the inducement of the supply, or for any other related supply;

does not exceed the supplier's anticipated or actual costs of making those supplies'.

* [names added]

It appears that the broad issue was the application of GST where a program was funded partly by an appropriation under an Australian law and partly out of Entity B's own resources, where those resources (partly) arose from commercial revenue of Entity B.

The questions posed were whether Entity B should:

'determine the percentage of appropriated and commercial revenue and apply the exemption proportionately, or

'drill down' into each transaction to determine whether it is specifically covered by an appropriation.'

The ATO's response was:

- 'Subsection 9-17(3) of the GST Act requires, inter alia, that the payment be covered by an appropriation. The provision does not allow for application proportionately to arrive at a percentage of a payment that is non-taxable. Therefore, unless the funds can be identified as only being sourced from appropriated funds, the payment will not be "covered by an appropriation under an Australian law" for the purposes of subsection 9-17(3).
- In some jurisdictions, Financial Management Acts can provide for own sourced revenue to be appropriated to the agency. An example of this is section 23 of the Financial Management Act 2006 (WA) that provides for the Treasurer to make determinations of prescribed receipts that can be retained by an agency that receives them and that it will be taken to have been appropriated for the year for the service or function to which the determination relates.'

We anticipate this is an area of the GST law where further clarification of interpretation will be required. Accordingly, we propose to deal with the application of s. 9-17(3) of the *GST Act* in a later dedicated article.

Item (h): Invoices - where debt is factored

The issue under this item was whether a tax invoice issued by a debt factor can be relied upon by the recipient in claiming input tax credits for GST purposes where the supplier's name and ABN was substituted with the name and ABN of the factor. In the particular circumstances of the query raised with the ATO, the supplier had not informed the recipient of the supply that the supplier had sold the debt to the debt factor, and the debt factor informed the recipient by a sticker affixed to an invoice issued by the supplier in such manner as to prevent the supplier's name and ABN being accessed.

The ATO considered that the recipient could rely on a tax invoice where the supplier's name and ABN are substituted with the name and ABN of the purchaser of the debt provided the debtor has been expressly notified of the assignment of the debt.

Item (i): Grants and GST Turnover

Grants can trigger a need to register for GST and this has compliance and commercial ramifications for the grant recipient and the grant payer respectively. This issue is dealt with in a separate article in this newsletter.

Item (j): Commissioner of Taxation v MBI Properties Pty Ltd

Broadly, this issue considers the impact of the decision in the MBI case to the GST treatment of compulsory property acquisitions. The ATO continues to review this issue and plans to consult externally before updating its view. We will also discuss this case and the ATO's view in a later newsletter.

Item (k): Companion Guidelines

We discussed the nature and significance of ATO Law Companion Guidelines in a previous newsletter and you may like to refer the earlier article in conjunction with perusal of the latest ATO Minutes - see 'Something all persons applying tax laws should know about – Law Companion Guidelines' from our March newsletter.

Item (l): Issue of Tax Invoices - where supplier is a member of a group

An entity that makes a taxable supply may be a member of a GST group for which a single activity statement is lodged by another member of the GST group (the representative member). The representative member is also liable to account for GST on all taxable supplies made by the GST group members. The issue was whether the representative member can issue a tax invoice for the relevant taxable supply, or does the tax invoice need to be issued by the relevant GST group member that made the taxable supply.

The ATO noted:

- Where a member of a GST group makes a taxable supply, the identity of that member must be clearly ascertainable from the tax invoice.
- The particular member who makes the taxable supply must issue the tax invoice in relation to that supply. It may however authorise the representative member to issue tax invoices on its behalf.
- The tax invoice is required to include the supplying member's details (name and ABN) and not the details of the representative member of the GST group.

GST – Impact of Grants on the need for GST Registration

Where a grant is consideration for a supply made by the recipient of the grant (grantee), that consideration may cause the grantee to exceed the GST registration turnover threshold. As a result, a grantee that was not previously registered or required to be registered for GST, will need to register and account for GST in relation to the grant.

Whether a grant triggers a need for the grantee to register for GST is a matter that would also be of interest to the entity making the grant (grantor). The grantor will need to consider claiming an input tax credit (ITC) and also to consider whether the grant should be grossed up for GST. The entitlement to an ITC will depend on whether the supply made by the grantee constitutes a creditable acquisition (for GST purposes) by the grantor and whether the grantor holds a tax invoice for the acquisition.

Most grant application systems provide for the grantee to inform the grantor whether the grantee is registered for GST. This allows the grantor to claim ITCs where the grant is consideration for a supply and also allows the grantor to ensure the grant is grossed-up for GST. However, it would be prudent for prospective grantors whose grants are consideration for taxable supplies to design their application (and payment) processes to take account of the possibility that, although at the time of application the applicant is not registered for GST, at the time the grant is made the grantee may have become required to be registered.

The ATO highlighted this issue in the recently published (August 2016) April 2016 minutes of the GST-States and Territories Industry Partnership meeting.

The issues considered by the ATO in the minutes primarily related to the operation of the (GST registration) turnover threshold (i.e. Div. 188 of *GST Act*), rather than the associated question of the circumstances in which a grant is consideration for a supply. We will look at the circumstances in which a grant constitutes consideration for a supply in a later article.

More specifically, the issues identified in the minutes were:

1. 'Does an entity need to register for GST when they receive a one-off grant that will cause the entity to exceed the registration turnover threshold only in the month the grant is made?
2. Does GST apply to a grant that exceeds the registration turnover threshold but the recipient of the grant is not registered for GST?'

The ATO considered the issues in the context of a practical example.

When reading the minutes you should distinguish between the enquirer's analysis set out in the background and the ATO response, as the ATO response differed from the enquirer's conclusion.

The Practical Example

The facts considered:

(a) A non-profit entity carries on an enterprise.

(b) The entity is not registered for GST because the entity's GST turnover is less than $70,000. (A non-profit entity is only required to register for GST where its GST turnover is at or above $150,000.)

(c) In a particular month, the non-profit entity receives grant of $200,000. The grant is consideration for a supply and causes the entity's GST turnover to exceed $150,000.

ATO's response:

(1) The entity is required to register for GST in the month the grant is received.

(2) 'The entity may not be required to be registered for GST in the month that follows the month in which the grant is received.

(3) Even though the entity is not required to be registered, the entity must stay registered for at least 12 months before they can cancel their registration unless the entity ceases carrying on an enterprise.

(4) If the entity is not carrying on an enterprise, the registration will be cancelled from the time the entity ceases carrying on the enterprise.'

(5) In the course of the discussion, the ATO noted that:

   a. '... the scenario highlights the importance of communication between the grant payer and the grant recipient of potential GST consequences for unregistered entities receiving taxable government grants.

   b. It should be noted, however, that if the grant is not taxable then there would be no GST consequences for the grant recipient and the government entity would not be entitled to an input tax credit.'

(6) In the course of the discussion, reference was made to some circumstances in which a grant would be consideration for a taxable supply. (This matter will be dealt with in a later article.)

Some observations on the application of the GST turnover test

By way of background, we have included below a brief review of the circumstances in which registration for GST is required (noting that references are to the *GST Act* and the *GST Regulations* respectively):

- Registration for GST is required where the entity carries on an enterprise (for GST purposes) and the entity's GST turnover meets the registration turnover threshold - s. 23-5.
- For non-profit bodies, the registration turnover threshold is $150,000 (see: s. 23-15 (2) and Reg. 23-15.02.) For other entities, it is $75,000 (see s. 23-15(1) and Reg. 23-15.01.)
- The test of whether the GST turnover threshold is met (s. 188-10(1)) has two separate limbs:

   (a) The entity's current GST turnover is at or above the relevant GST turnover threshold, <u>and</u> the Commissioner is not satisfied that the entity's projected turnover is below that threshold amount; or

   (b) The entity's projected GST turnover is at or above the relevant GST turnover threshold.

It is sufficient that either limb (a) or (b) is met.

- The concept of current GST turnover at a time during a particular month (the test month) is the sum of:

  (i) the values of all supplies (with some exceptions) which the entity made or is likely to make during the test month; and

  (ii) the values of all supplies (with some exceptions) made during the 11 months preceding the test month.

  The concept is set out in s. 188-15.

  Note:

  It is sufficient that the test is met at any time in the test month. Given the events later in the month and changing expectations (at the test time) for the balance of the month, it is conceivable that a higher current GST turnover may emerge as the test month progresses.

- The projected GST turnover is also tested at any time in the test month. It is the sum of:

  (i) the values of all supplies (with some exceptions) that the entity made or is likely to make in the test month, and

  (ii) the values of all suppliers (with some exceptions) that the entity is likely to make in the 11 months following the test month.

  The concept is set out in s. 188-20.

  Note:

  For both current GST turnover and projected GST turnover, the main exceptions comprise:

  (a) input taxed supplies;

  (b) supplies not made for consideration (and are not taxable supplies see s. 72-5); or

  (c) supplies that are not made in connection with an enterprise which is carried on by the entity - see s. 188-15(1).

  Other exceptions relate to supplies that are not relevantly connected with the indirect tax zone (s. 188-15(3)); supplies described in s. 188-22 (appertaining to insurance settlements); supplies described in s. 188-23 ('reverse charged' supplies under Div. 83); and (per s. 188-24) supplies made by an entity as agent (i.e. supplies dealt with in Sub-Div. 153-B).

  The present context in which current GST turnover is being considered makes it unnecessary to advert to the special rules for current members of GST groups.

  For projected GST turnover there are two significant further exceptions:

  (a) actual/likely supplies of capital assets; and

(b) actual/expected supplies arising out of ceasing to carry on (or substantially and permanently reducing the size/scale of) an enterprise which the entity carries on.

These further exceptions are found in s. 188-25.

- A key point to note about the test in s. 188-10(1) is that the current GST turnover and the projected GST turnover are applied in relation to one month that is common to each type of turnover. As a result when a grant (which is consideration for a supply) is made in a particular month, that grant will increase the grantee's current GST turnover and also increase the grantee's projected GST turnover. The effect of the increase in each type of turnover needs to be considered in determining whether the entity is required to be registered for GST.

  This point becomes important because the tests of current GST turnover and projected GST turnover respectively look to the time at which the supplies are made, rather than the time at which the grant is paid. If the supply which the grantee makes in consideration of receiving the grant does not occur in the test month, it will not be included in the current GST turnover but one might normally expect the supply to be made within the following 11 months and so would form part of the projected GST turnover.

- The background discussion of the practical example set out in the minutes suggested that determination of the need to register for GST also involved application of the GST turnover test in s. 188-10(2). This test determines whether a GST turnover does not exceed a particular turnover threshold, whereas the test in s. 188-10(1) tests whether a GST turnover meets a particular turnover threshold.

  Registration for GST is required (s. 23-5) where the entity carries on an enterprise and its GST turnover meets the registration turnover threshold. The test in s. 188-10(2) is not relevant to determining the need to register. However, comparison of the tests in s. 188-10(1) and s. 188-10(2) shows they are consistent.

  The test in s. 188-10(2) is relevant to other uses of GST turnover, such as determining whether an entity can use a cash accounting for GST. Under s. 29-40(1)(ab), one of the requirements for using the cash basis is that the entity's GST turnover does not exceed the cash accounting threshold.

By way of further illustration of meeting the GST turnover test, it is worthwhile considering the ATO's observation that the in the month following that in which the $200,000 grant was paid (the post-grant month), the non-profit entity in the foregoing example may not be required to be registered for GST. Applying the first limb of the test in s. 188-10(1) with reference to the post-grant month as the test month, the $200,000 grant would be included in the current GST turnover. However, it would not be included in projected GST turnover. As a result, whether the non-profit entity was required to be registered at a particular time in the post-grant month would depend on the value of supplies made during the post-grant month and the value of supplies likely to be made in the following 11 months.

We reiterate that even if the non-profit entity is not required to be registered in the post-grant month, the antecedent requirement for registration would have to be complied with and, under s. 29-55, that registration would have to be maintained for a period of 12 months unless the non-profit entity ceased to carry on an enterprise for GST purposes.

Conclusion

When a grant is made to an entity that is not registered for GST, it is necessary to consider whether the grant constitutes (for GST purposes) consideration for a supply. If the grant is consideration for a supply, the grant (being the value of the supply) may cause the grantee to exceed the GST registration turnover threshold and have to register for GST.

Both the grantee and grantor need to consider their respective obligations and right to account for and claim ITCs in respect of the grant. As the entitlement to an ITC will reduce the real cost of the grant to the grantor, it may wish to consider grossing up the grant by the amount of GST recouped as an ITC.

The key point is that the grantor's processes for making grants should take account of the possibility that the grant will be made to an entity that is now required to be registered for GST where the contrary position applied at the time the grantee applied for the grant.

FBT – Home to work travel when on stand-by

Where a car or station wagon is taken home by employees who are on stand-by or on-call duty, the FBT outcome to the employer will vary depending on:

(i) whether the statutory formula or operating cost method is chosen; and

(ii) whether or not the employee is required to have bulky equipment in the vehicle that is to be used should a call-out be made that they must attend.

Travel when on stand-by or on-call is not sufficient enough to make home to work travel deductible unless the duties are taken to have commenced from the time of leaving home. Most of the travel for employees on-call is between work and home. It is only when there is a call-out that other travel is involved being travel between home and a work site other than the employee's usual work site.

However, one of the main exceptions to the private nature of home to work travel is where the employee is required to transport bulky equipment other than as a matter of convenience (for example, in order to reduce call out response times, equipment necessary for the employee to undertake repair work is carried on the car at all times).

In this case the car is necessary for the transportation of equipment to various work sites. However, the actual travel to an alternate work site will depend on whether or not a call-out is received. Although it may be more convenient for the equipment to be taken home each night, it is necessary to take the equipment home to meet the employer's operational standards relating to response times.

Where the statutory formula method is used to calculate a car fringe benefit, no consideration is given to business use. The transportation of bulky equipment between home and work may be regarded as business use but this would not affect a calculation of FBT based on the statutory method. It would be necessary to elect to calculate the car fringe benefit under the operating cost basis in order to take into account the transportation of bulky equipment

Conclusion

The travel is attributable to the transportation of bulky equipment rather than to private travel between home and work. Therefore, travel between home and work whilst on stand-by or on-call in the circumstances described above is regarded as business use.

The use of the operating cost method will allow such business use to be taken into account in working out an appropriate business use percentage for the car. Necessary log book records will also be required.

Eligibility – Structuring fundraising events and auctions held by DGRs so attendees can claim deductions

As is widely known, a monetary gift of $2 or more to a DGR is generally income tax deductible to the donor. For the technically minded, this is provided for under item 1 of the table in s30-15 of the *Income Tax Assessment Act 1997 (ITAA 1997)*. This is a major way in which DGRs raise funds for their operations.

When DGRs host fundraising events in which attendees pay an amount far in excess of market value for the right to attend, confusion exits as to whether any deduction can be claimed.

One of the requirements to be a gift and therefore potentially deductible under Item 1 of the Table in s. 30-15 is that no material benefit is received by the giver. Furthermore, in the ATO's view, the notional gift component can't be split from the amount paid for the material benefit received. This is explained in paragraphs 149 and 150 of TR 2005/13 Tax deductible gifts – what is a gift as follows:

> '149. Where DGRs conduct fundraising events such as celebrity dinners, gala events, $1,000-a-plate dinners, and so on, the price of a ticket cannot be notionally split between the value of the material benefit received, that is, the meal, and the amount which represents a gift. Where attendees are to pay a given sum of money in order to attend a function, no part of that sum can be considered a gift. This is so even where the cost of attendance is well in excess of the value of the meal received.
>
> *Example 42*
>
> *150. F attends a '$600 a plate dinner'. Regardless of whether the payment exceeds the cost of the meal, F has received a material benefit in exchange for the purchase price of the ticket to the dinner. No part of the $600 is a gift.*'

Accordingly, when a material benefit (being the meal/drinks) is provided in return for the payment to attend, the payment will not be a gift and a deduction will not be available under Item 1 of the Table in s. 30-15.

However, Item 7 of the Table in s. 30-15 allows part of the contribution to attend an 'eligible fundraising event' to be income tax deductible to the contributor even when a material benefit is provided.

The key requirements are that:

- the contribution must be made by an individual;
- the amount paid must be more than $150; and
- the GST inclusive market value of the right to attend the fund-raising event must not exceed the lesser of 20% of the amount of the contribution and $150. (In other words, the market value of the right to attend cannot be more than $150 and the contribution must be at least 5 times the GST inclusive market value of the right to attend.)

It is this last point that can be difficult to understand, so it is best explained by way of the following examples.

If the DGR hosting the fundraising event wanted to potentially be able to provide an income tax deduction to the donor for an event where the GST inclusive market value of the event was, say $40:

- The individual would need to pay at least $200 to attend the fundraising event as this would satisfy the requirement that the contribution be at least 5 times the GST inclusive market value of any benefits received;
- By paying a minimum of $200 to meet the requirement above, the individual would also meet the minimum contribution requirement of at least $150.

If the GST inclusive market value of the event was, say $100:

- The individual would need to pay at least $500 to attend the fundraising event as this would satisfy the requirement that the contribution be at least 5 times the GST inclusive market value of any benefits received;
- By paying a minimum of $500 to meet the requirement above, the individual would meet the minimum contribution requirement of at least $150.

When these contribution requirements are met, the individual is generally able to claim a deduction for the amount of the contribution less the GST inclusive market value of the right to attend the fundraising event (i.e. the notional gift component).

In the first example above, the individual would be able to claim a deduction of $160 (i.e. $200 payment less $40 benefit), whilst in the second example they would be able to claim a deduction of $400 (i.e. $500 payment less $100 benefit). The individual is prevented from deducting more than 2 contributions in relation to the same fundraising event.

Individuals may also be able to claim a deduction for goods or services acquired at an auction held at the fundraising event, under Item 8 of the Table in s. 30-15. The conditions needing to be met for a deduction are similar to the rules outlined above for the right to attend a fundraising event. These include the requirements that the monetary contribution is at least $150, it must be made by an individual and the GST inclusive market value of the goods services received must not exceed the lesser of 20% of the amount of the contribution and $150.

If these conditions are met, the amount of the deduction is the amount of the contribution less the GST inclusive market value of what is received in return.

Payroll – WA says don't delay - for prudence apply for (charitable) PRT exemptions straight away

The Western Australian Court of Appeal recently handed down its decision in *Association of Mining and Exploration Companies Inc v Commissioner of State Revenue* (AMEC Case). The parties accepted the taxpayer was a charity. The issue was the date from which the taxpayer was exempt from payroll tax (PRT) under the *Pay-roll Tax Assessment Act 2002* (WA).

The Court noted:

> '15 Section 41 of the Act, which is the critical provision in this case, provided at the relevant time:
>
> (1) A charitable body or organisation may apply to the Commissioner for exemption from liability to pay-roll tax.
>
> (2) The Commissioner may, by giving notice to the charitable body or organisation, exempt it from liability to pay-roll tax.
>
> (3) The exemption is subject to any conditions specified in the notice.
>
> (4) The exemption comes into operation on the day specified in the notice, which may be the day on which the notice is given, or an earlier or later day.
>
> (5) The exemption continues in force until it is revoked.
>
> (6) The Commissioner may amend or revoke the exemption and any condition to which it is subject, by giving further notice to the charitable body or organisation.
>
> 16 Therefore, the exemption of wages paid by AMEC from pay-roll tax depended on the existence of an operative exemption at the time when the wages were paid.
>
> 17 The Commissioner had a statutory discretion to specify the day on which an exemption comes into operation, which may be earlier or later than the day on which notice of the exemption is given. AMEC alleges that the Tribunal misapprehended the nature of that discretion.'

The taxpayer was a charitable body for at least 5 years prior to seeking the exemption and contended the Commissioner should have back-dated exemption for this period. Under WA legislation, the Commissioner was authorised to issue amended assessments for up to 5 prior years. The Commissioner argued the exempting power was not capable of retrospective effect solely due to the antecedent charity status of the applicant.

The Court held:

- The Commissioner was neither obliged to back-date, not prohibited from back-dating, operation of the exemption to the first day on which the taxpayer 'acquired its charitable status.
- The matters which governed the Commissioner's decision as to the date on which the exemption should commence were not specified but should 'be inferred from the subject matter, scope and purpose of the Act'.

- While the discretionary power could only be exercised in respect of a period in which the taxpayer was a charity, other considerations affecting the decision to back-date the exemption included: (a) 'the reasons for the delay in applying for the exemption'; (b) 'the impact which the decision will have on the charitable ... organisation' and (c) 'the impact that the decision will have on ... the orderly and proper administration of the Act'. (We interpolate that the last mentioned consideration appears to include the fiscal disruption caused by retrospective conferral of exempt status.)
- The matter should be remitted to the Tribunal from whose decision the appeal had been brought. In view of the Court's clarification of the law, the Court concluded that the parties should be permitted to adduce evidence before the Tribunal at the remitted hearing.

It is not feasible to traverse the Court's reasoning in detail. However, four interesting points are especially noteworthy.

The Court noted that Commissioner's discretionary power to retrospectively determine charitable status was a matter separate from the Commissioner's retrospective power (limited to 5 years) to reassess PRT. The latter power did not compel a conclusion that the Commissioner should exercise the discretionary power retrospectively for 5 years.

The Court noted that some of the Western Australian PRT exemptions were automatic, with the character of the organisation determining entitlement to the exemption. The distinct conferral of the Commissioner's discretion to determine the date of commencement of the charitable exemption signified that charitable status was not the sole factor that might be taken into account in back-dating the exemption.

Associated with the preceding point, the Court looked at the history of the charitable exemption. It noted an historical legislative concern with fiscal disruption for the State where application for the exemption was delayed. It noted the counterpoint historical legislative acknowledgement of some circumstances in which retrospective collection of PRT would be a harsh outcome for the charity.

The Commissioner's ability to impose conditions in granting the exemption indicated that the charitable status was not a definitive determinant of the applicable head of exemption.

The Current Law

The decision prompts comment on the current law. This is done briefly for all States and Territories, below.

In summary, it is thought that the case is only relevant to application of Western Australian PRT.

(a) Current relevant WA Legislation

Section 41 was relevantly amended with effect from 10 March 2015.

The current *Pay-roll Tax Assessment Act 2002* (WA) retains the need for the Commissioner to determine that the charitable exemption shall apply. However, for charitable organisations that have at any time been registered, the exemption cannot be back-dated to earlier than 'the commencement of the assessment year during which the application for the exemption was made' - s. 41(5)(a). For other charitable organisations, the exemption cannot be back-dated to earlier than 'the commencement of the assessment year that is 5 years before the assessment year in which the ... organisation was first found by the Commissioner to be liable to pay-roll tax' - s. 41(5)(b).

For the sake of completeness, it is also noted that the WA legislation has special provisions that limit entitlement to exemption for charitable organisations that promote trade industry and commerce etc.

(b) NSW Legislation

Subsections 48(1) and (2) of the *Payroll Tax Act 2007 (NSW)* provide that wages are exempt, where the wages meet two conditions - vis. the wages are paid:

(i) to 'a non-profit organisation having as its sole or dominant purpose a charitable ... purpose' (but the organisation must not be one of certain educational bodies); and

(ii) to a person for certain kind of work and who is exclusively engaged in that kind of work.

It will be noted that, unlike the WA legislation, the provision operates automatically - the NSW OSR does not need to make any determination. It is considered that the AMEC Case is not relevant.

(c) Victorian Legislation

Section 48 of the *Payroll Tax Act 2007 (Vic)* is substantially in the same form as s. 48 of the NSW payroll tax legislation - the Victorian OSR does not need to make any determination.

(d) Queensland Legislation

Under s. 14(2)(c) of the *Payroll Tax Act 1971 (Qld)* (PRT Act Qld) wages paid by a charitable institution for certain specified purposes are exempt. However, in order to be a charitable institution for PRT purposes, the relevant organisation must (as a general rule) be registered under Part 11A of the *Tax Administration Act 2001 (Qld)* (TAA Qld) - see: s. 14(9) of the PRT Act Qld.

The TAA Qld provides for registration of various specific categories of charitable institutions, non-profit institutions whose principal object is fulfilling a charitable object/promoting public good (being a principal object that is not leisure, recreation etc.), and certain other bodies. Under s. 149G of the TAA Qld, the registration may be back-dated prior to the application for registration.

Part 11A of the TAA Qld was inserted as a common determination of eligibility for tax concessions under several Queensland Acts (Duties Act, Land Tax Act and PRT Act Qld). Its purpose of providing a single point for determination of an organisation's concessional tax status across multiple Acts (as outlined in the Explanatory Note in relation to the amendment that inserted Part 11A) differs markedly from the purpose of the WA provision as evident from the latter's history set out in the AMEC Case.

Notwithstanding that the PRT provisions of Qld and WA both require a determination in respect of charitable institution by the relevant Commissioner, one should be cautious of viewing the AMEC Case as relevant to the Queensland legislation. The Queensland determination relates to determination of the nature of the entity whereas the WA determination relates to conferral of exempt status on the entity.

Like s. 48 of the NSW and Victorian legislation, we suggest that the Queensland legislation of itself confers exempt status and not the Commissioner.

(e) South Australian Legislation

Section 48 of the *Payroll Tax Act 2007 (SA)* is substantially in the same form as s. 48 of the NSW payroll tax legislation - the South Australian OSR does not need to make any determination.

(f) Tasmanian Legislation

Section 48 of the *Payroll Tax Act 2008 (Tas.)* is substantially in the same form as s. 48 of the NSW payroll tax legislation - the Tasmanian OSR does not need to make any determination.

(g) Northern Territory Legislation

Subsection 48C(1) of the *Payroll Tax Act (NT)* (PRT Act NT) provides that wages are exempt from PRT where the Commissioner is satisfied the wages meet two conditions - vis. the wages are paid/payable:

(i) by a non-profit entity that carries on charitable activities, and

(ii) to a person who is predominantly engaged in performance of certain services and is not engaged in performance of certain other services.

It will be noted that the Commissioner's determination is limited to deciding whether a test specified in the PRT Act NT has been met. Unlike the WA legislation, the Commissioner is not conferring exempt status on the taxpayer. The AMEC case is considered to be not relevant.

(h) ACT Legislation

Pursuant to s. 48 of the *Payroll Tax Act 2011 (ACT)*, wages are exempt where either of two conditions is met:

(i) the wages are paid/payable by a charitable organisation (for purposes of that Act) other than one carried on for educational purposes, or

(ii) the wages are paid/payable by certain educational charitable organisations.

The concept of charitable institution does not involve any exercise of administrative discretion.

In the circumstances, the ACT provision operates automatically - the ACT OSR does not need to make any determination. It is considered that the AMEC Case is not relevant.

Conclusion

In conclusion, it appears the relevance of the AMEC Case is confined to Western Australian PRT. It seems especially prudent for charitable organisations contemplating access to the Western Australian concession for PRT not to delay in seeking that access.

GST Q&A – Supplier not GST Registered

Question:

We have discovered that a supplier that was never registered for GST has been issued invoices stating they are inclusive of GST (which we have then claimed on the BAS). We have been reading through your recent article 'GST – Correcting GST Errors', but we are unsure whether this applies to this situation. Can you please provide some guidance on how to deal with this including: relevant legislation/taxation rulings to work out our obligation to reverse the GST claimed, how far back we need to go, how we actually do this, etc?

Answer:

An interesting question and one that probably occurs more often than expected, and may in fact not be detected.

The main GST provision that applies is s. 11-5 regarding creditable acquisitions. Broadly, an entity makes a creditable acquisition where the following conditions are met:

(a) the entity makes the acquisition solely or partly for a creditable purpose;

(b) the supply of the thing to the entity is a taxable supply;

(c) the entity provides or is liable to provide consideration for the supply; and

(d) the entity is registered or required to be registered.

An entity acquires a thing for a creditable purpose to the extent that it acquires the thing in carrying on an enterprise, but not to the extent that the acquisition relates to making input taxed supplies or is private or domestic in nature.

Where the supplier is not GST-registered, the first matter to check is whether they are required to be registered. If they are required to be registered, then the supply to you will still be a taxable supply, and you will have an ITC entitlement. However, if they are not registered and are also not required to be registered, then condition (b) above will not be met - no taxable supply will have been made to you, and you will not be entitled to claim the ITCs.

Generally, the open period for GST is 4 years. Technically, you would need to go back and amend all BASs where ITCs have been overclaimed. However, if this situation arose as a genuine error, then provided the error time period and error value amounts falls within the relevant limits in the ATO's Correcting GST Errors guideline, you could arguably rely on this administrative mechanism and make the correction in your next BAS. If not, you will need to amend each prior BAS that contains such errors.

Commercially, if the supplier has held themselves out as making supplies including GST, then you may have recourse to seek to recover the overcharged amounts. This would help in offsetting the GST you may need to repay to the ATO.

GST Q&A – Tax Invoices and Staff Reimbursements

Question:

A local Council has the following scenarios involving tax invoices:

(1) Council receives a tax invoice from the supplier for $55 (including GST of $5) but it contains an employee name and only a broad reference to Council's address (e.g. Mr John Smith, Elizabeth Street).

(2) Same as scenario 1 however the tax invoice is for $11,000 (including GST of $1000).

(3) Council receives a request for a reimbursement from a staff member. Along with their reimbursement claim they provide the tax invoice issued to them by the supplier (i.e. the tax invoice is made out in the name and address of the staff member). Council make the payment to the employee. The tax invoice is for $55 (including GST of $5).

(4) Same as scenario 3 however the tax invoice was for $11,000 (including GST of $1000).

Is Council entitled to claim GST credits in any of the above scenarios?

Answer:

There are essentially two rules at play here: the general rules about valid tax invoices (s. 29-70), and special rules regarding reimbursements (Division 111).

As in all of the scenarios the invoice is made out to the individual, we have assumed that the supplies are being made from the supplier to the individual.

With regard to tax invoices:

- there is no requirement for a tax invoice where the supply is below $82.50 (including GST);
- for invoices above $82.50 but below $1,000, the normal tax invoice requirements apply; and
- for invoices above $1,000 to be a valid tax invoice it must contain 'the recipient's identity or the recipient's ABN'. As an employee would typically not have an ABN, it would need to have the recipient's identity. Provided the recipient's identity is clearly ascertained from the document this additional requirement should be met.

With regard to employee reimbursements, Division 111 contains special rules to ensure that employers are still able to claim GST credits where the relevant requirements are met. Broadly, if an employer reimburses an employee for an expense that the employee has incurred that is directly related to the activities as the employee, and the employee holds a valid tax invoice, the employer is taken to hold a valid tax invoice. A GST credit would therefore generally be available to the employer provided that:

- the supply to the employee is a taxable supply;
- the employee is not otherwise entitled to claim a GST credit for the acquisition (which they generally would not);

- the acquisition is not a creditable acquisition because of Division 69 (non-deductible expenses); or
- the employer would not be entitled to a GST credit because of Division 71.

Applying these broad rules to the above scenarios:

Scenario 1: No tax invoice is required as the invoice is below $82.50.The employer can claim a GST credit (subject to the provisos above)

Scenario 2: Employer can claim a GST credit provided a valid tax invoice is given and held by employee.

Scenario 3: No tax invoice is required as the invoice is below $82.50. The employer can claim a GST credit (subject to the provisos above).

Scenario 4: Employer can claim a GST credit provided a valid tax invoice is given and held by the employee.

It would be prudent for Council (or any other employer) to retain copies of the relevant tax invoices, but we note that this would typically occur as part of the employee reimbursement process. That is, Council (or other employer) would generally require a copy of the invoice/receipt/tax invoice to be provided as evidence of the expense being incurred.

FBT Q&A – Evening dinner to celebrate years of service

Question:

We are a Council and during the FBT year we held a formal 20 years of service dinner for staff and partners to recognise 5 long term employees.

The event encompassed:

- entertainment (live band)
- employee gifts
- food and drinks
- decorations

The cost per attendee was below $300.

Are the above items tax-exempt body entertainment? If so, can we use the minor benefit exemption?

Answer:

The dinner you have described will constitute entertainment. Where tax-exempt body entertainment is provided, such benefits are excluded from consideration for exemption under the minor benefit provisions except in two limited circumstances outlined below:

(1) The provision of entertainment to the employee or associate must be merely incidental to the provision of entertainment to outsiders (i.e. not employees and/or their associates) and must not consist of, or be provided in connection with, a meal other than a meal consisting of light refreshments.

(2) The entertainment provided to the employee or associate must be on "eligible premises of the employer" and for the sole purpose of recognizing the special achievements of the employee in a matter related to his or her employment.

In the second category, the exemption is only available to the particular employee (and their associates) being recognised where the function is held on the employers premises - refer paragraph 167, TR 2007/12.

In regards to the particular costs of the function, gifts provided are generally treated separately for the minor benefit exemption. To the extent the gifts are not entertainment FBT should not apply.

The remaining costs - i.e. band, decorations and food/drink - are entertainment items and, as noted above, it would seem the function is not exempt from FBT under the minor benefit rule apart from the employee (and their associates) being recognised.

FBT Q&A – Short term hire car arrangement

Question:

We have an employee who is provided with private use of one of our car fleet.

The employee was recently in an accident & the vehicle is now at the workshop for repairs, therefore he does not have access to use it.

We have arranged the hire of a vehicle from a hire company for the employee to drive while the vehicle is being repaired.

Just wondering about the FBT implications in this situation.

Answer:

A hire car provided to an employee on a short term basis (i.e. less than 3 months) where it is available for the private use of the employee will not constitute a car fringe benefit.

However, it will be considered a residual benefit in this instance.

Where a hire car is provided on a short term basis and it constitutes a residual benefit, the taxable value will essentially equal what it would cost on an arm's length basis to hire the car for the particular period.

To the extent the car is used for work-related travel the otherwise deductible rule is available. We would recommend the employee keep a log book of their usage for this purpose.