Last month, I editorialised a desire that the tax debate would move forward with some statement of the Government's specific thoughts. As I write, it seems that the Government back-benchers are also wanting the Treasurer to produce specifics.

It appears that much activity is occurring behind the scenes and, hopefully, we can expect some well-considered proposals for further reflection and evaluation.

In this month's newsletter, there is a comment on a wish by a part of the non-profit sector for re-introduction of 'death duties'. Amongst the other topics, the TaxEd Team address GST errors and the FBT implications of overpayment of employee remuneration. The ATO has also announced it is considering the need for further guidelines regarding various issues with cars and particularly when private use of 'workhorse' vehicles is minor, infrequent and irregular.

As always, the Team welcome your email comments on matters discussed and suggestions on future content.

Regards

Andrew Orange

TaxEd Team

GST – Correcting GST Errors

Soon after the introduction of the GST regime the Australian Taxation Office (ATO) issued a GST Fact Sheet titled 'Correcting GST Mistakes'. This Fact Sheet provided an administrative process for taxpayers to correct certain mistakes on their next Business Activity Statement (BAS). This was a very pragmatic approach and was welcomed by taxpayers and their tax agents. In the absence of such an approach, technically any errors identified would have required the taxpayer to go back and amend each BAS to correct the mistake.

Unsurprisingly, there were limitations and conditions to be met based on the annual turnover of the taxpayer and the extent of the mistake. The annual turnover determined the time limit and there was also a correction limit. Broadly:

- where the mistake gave rise to an overstatement of GST, the taxpayer could correct it in a later BAS provided the mistakes identified fell within the time limit; and
- where the mistake gave rise to an understatement of GST, the taxpayer could only correct it in a later BAS provided the mistakes identified fell within both the time limit and the correction limit.

For example, where a taxpayer's annual turnover was less than $20m the time limit was 18 months' worth of BASs (such as 6 quarterly BASs, or 18 monthly BASs) and the correction limit was $5,000.

Mistake vs Error

Somewhere along the way (essentially in 2013), the ATO changed its terminology from 'mistake' to 'error' and the ATO issued its most recent publication on this - a legislative determination titled 'Goods and Services Tax: Correcting GST Errors Determination 2013'. The ATO has also issued a document on its website simply titled 'Correcting GST Errors' (issued May 2013).

So is there any substance in the terminology change? Well, not really. The determination defines a GST error to be 'a mistake you made in working out your net amount for a tax period that would, if it was the only mistake made in the tax period, have resulted in your net amount or assessed net amount being overstated or understated'.

A debit error is, in effect, an error that gives rise to an understated amount of GST. That is, an underpayment of GST. A credit error is in effect an error that gives rise to an overstated amount of GST. That is, an overpayment of GST.

General Limitation

The application of these correction rules is subject to the broader legislative four year rule (see: s. 105-55 and s. 155-35 in Sch1 *TAA 1953*). Also, a taxpayer cannot use these correction rules where the GST error relates to a matter subject to compliance activity by the ATO (e.g. a verification check, review or audit).

Time Limits and Value Limits

If the taxpayer has made a GST credit error (i.e. overstated GST net amount) this can be corrected on a later BAS provided the error occurred:

- within the credit time limit; and
- the taxpayer has not previously corrected the error in another BAS.

Practically, GST credit errors are able to be made on a later BAS provided that the error is included in a BAS that starts within the four year general review period. Below is an ATO example:

> 'Example 3: Four year period of review
>
> ABC Ltd, a monthly lodger, made a GST error in the September 2013 reporting period that resulted in an overstatement of its assessed net amount for that reporting period. As that activity statement was lodged and the net amount assessed on 1 October 2013, ABC Ltd can correct that GST error on an activity statement for a reporting period that starts between 1 October 2013 and 2 October 2017.'

Note: This is a significant change from the former administrative rule, where the time limit for taxpayers with an annual turnover of less than $20m was 18 months.

If the taxpayer has made a GST debit error (i.e. understated GST net amount) this can be corrected on a later BAS provided the error occurred:

- within the debit error time limit;
- within the debit error value limit;
- the taxpayer has not corrected the error in another BAS; and
- the error is not the result of recklessness or intentional disregard of a GST law.

The time and value limit components are set out in the table below:

<table>
<tr><th>Current GST turnover</th><th>Debit error time limit</th><th>Debit error value limit</th></tr>
<tr><td>Less than $20 million</td><td>The error must be corrected in a GST return that is lodged within 18 months of the due date of the GST return for the tax period in which the error was made.</td><td>Less than $10,000</td></tr>
<tr><td>$20 million to less than $100 million</td><td rowspan="4">The error must be corrected in a GST return that is lodged within 12 months of the due date of the GST return for the tax period in which the error was made.</td><td>Less than $20,000</td></tr>
<tr><td>$100 million to less than $500 million</td><td>Less than $40,000</td></tr>
<tr><td>$500 million to less than $1 billion</td><td>Less than $80,000</td></tr>
<tr><td>$1 billion and over</td><td>Less than $450,000</td></tr>
</table>

With regard to the debit error value limit, this is a net amount which allows credit errors to be offset against debit errors.

Application

It should be noted that the determination only applies to GST errors that occurred on or after 1 July 2012.

General Comments and Conclusion

Care must be taken to ensure that this process is only used to correct GST errors or mistakes. There are other mechanisms in the GST law to deal with matters such as GST adjustment events or GST change-in-use adjustments.

In the absence of the rules allowing correction in future BASs, taxpayers would be required to go back and amend each previous BASs where a mistake has been identified, which would typically trigger general interest charge and/or penalties. Also, with GST being a transaction tax, significant additional administrative time may be required to amend prior BASs.

These rules regarding correcting GST mistakes/errors are a useful tool for taxpayers and tax agents, and it is worthwhile reviewing the ATO documentation and examples available.

GST – When digital products and services are purchased from overseas suppliers: changes to the GST regime

Legislation to collect GST on digital products and services supplied to Australians from overseas suppliers has been introduced into Parliament. There is a lengthy accompanying Explanatory Memorandum **(EM)**. If passed, the legislation will have effect from 1 July 2017 (but there are some transitional provisions which deal with supplies that straddle this date.)

You may recall that we drew your attention to this in this newsletter in June 2015 (see: *The 'Netflix Tax' will catch more than just movies*).

The basic architecture of the draft legislation has been retained. However, it is timely to take a quick look at the proposed amendments, as it has now moved through various consultation processes and, while it has also been referred to the Senate Economics Legislation Committee, it is anticipated that Parliamentary passage should occur without major alteration.

For entities that are registered for GST, the impact of the proposed changes is likely to be at the margin rather than at the core. Nevertheless, we recognise that our readers are essentially GST-registered entities and therefore this article considers the proposed legislation from that perspective. It neither addresses the issues that an overseas supplier will face in complying with the legislation, nor does it consider the perspective of a recipient that operates outside Australia.

Key Propositions

The fundamental propositions of the legislation can be summarised as follows:

- The new provisions extend the existing legislation. They relate to supplies that are not taxed under the existing regime, largely without diminishing the current processes whereby GST is collected.
- The proposed rules provide for collection of GST where a supplier (foreign supplier) does not have a presence in Australia (or do anything in Australia) such that its supply of the relevant digital products and services would currently not be subject to GST. In particular, the provisions relate to supply of 'anything other than goods or real property', which under the current GST law (see s 9-25(5) *GST Act*), is not connected with the indirect tax zone (ITZ) - this article refers to such a thing as an overseas intangible. You may also recall that the ITZ is essentially a reference to the part of Australia to which GST applies, that is all of Australia but excluding Australia's external territories.
- The proposed rules apply differently depending on the status of the recipient. There are essentially three different scenarios:
    1. Supplies made to final consumers – that is, to an entity that is not GST-registered or to an entity that is GST-registered but does not make the acquisition to any extent for the purpose of carrying on an enterprise;
    2. Supplies made to GST-registered entities where the purpose of the acquisition relates wholly to the enterprise being carried on and the acquisition is solely for a creditable purpose; and

3. Supplies made to GST-registered entities where the purpose of the acquisition does NOT relate wholly to the enterprise being carried on or the acquisition is only partly for a creditable purpose.

With regard to Scenario 1, and by way of illustration, the EM provides the following example (hence the reference as a so-called Netflix tax):

> 'Example 1.1: Offshore supply of streaming of video on demand
>
> Global Movies, a non-resident carrying on an enterprise, supplies Fellini with video on demand services. The supply is not performed in Australia and Global Movies does not carry on an enterprise in Australia. Fellini is a resident of Australia and lives in Perth. Fellini does not carry on an enterprise and is not registered for GST.
>
> The supply made by Global Movies is connected with the ITZ as a result of the amendments. This reflects the fact that:
>
> - the supply is made to Fellini who is a resident of Australia (not being resident in an external territory); and
> - Fellini is not registered for GST.'

If Global Movies is required to be registered for GST (and if, as expected, absent any GST-free character), the supply to Fellini will be a supply on which the supplier will need to remit GST to the ATO.

If we focus on recipients that are GST-registered, Scenario 2 above would account for the majority of acquisitions that take place. That is, the GST-registered entity would be making the acquisition solely in carrying on its enterprise and not relating to making any input taxed supplies (i.e. 100% creditable purpose). In these circumstances, the proposed rules will not apply. The foreign supplier would not be treated as making a taxable supply and would not be subject to GST, and the GST-registered entity making the acquisition would not be entitled to any GST credit (as there is no GST in the price paid for the supply).

The situations where GST-registered entities need to understand these proposed rules is described in Scenario 3, where the GST-registered entity makes an acquisition in carrying on its enterprise but the acquisition is not made solely for a creditable purpose (e.g. the acquisition is private or domestic in nature, or it relates to the entity making input taxed supplies). In such cases, the existing reverse charge rules (found in Division 84) will apply. The EM provides the following example:

> 'Example 1.3: Supplies made to entities that are registered
>
> John, an individual resident in Australia, carries on business as a financial adviser in Australia as a sole trader and is registered for GST.
>
> John purchases accounting software from Numbers Inc, a non-resident entity that does not carry on an enterprise in Australia. John intends to use this software partly to assist in his business but also partly for his own private and domestic purposes.
>
> The supply of the software to John by Numbers Inc. is not connected with the ITZ as a result of these amendments. Even though John has acquired the software for a partly private purpose, because he is registered for GST and has acquired it at least partly for the purpose of an enterprise he carries on, he is not an Australian consumer in relation to the supply.
>
> However, if the supply is not otherwise connected with the ITZ, John will be subject to the reverse charge rules in Division 84.'

Where Division 84 applies, the recipient is required to account for GST on the acquisition (at 10% of the consideration provided) and then determine the extent of the creditable purpose to calculate the GST credit entitlement. Using Example 1.3 above, and assuming the amount charged to John for the software was A$1,000, John would have a GST liability under the reverse charge rules of A$100 (being 10% of $1,000). If we assume that John is acquiring the software 80% for use in his enterprise and 20% for private purposes, John would only be entitled to claim a GST credit of $80 (being 80% of $100).

Some other aspects of the proposed legislation that are worth noting include:

Non-resident GST registration

Where a foreign supplier makes supplies that are caught by the proposed amendments, the foreign supplier is subject to the normal GST registration requirements – that is, the foreign supplier would only be required to register where it makes supplies greater that the GST registration turnover threshold.

Electronic Distribution Platform Operator

The proposed rules also make note that, with the increased use of the internet by consumers to buy goods and services, a number of large electronic markets and stores have emerged, and in many cases, the operators of these platforms allow other entities to make supplies through the store or market to consumers. The platform operators are, in effect, providing distribution services to these suppliers.

Where the foreign supplier makes suppliers to Australian Consumers through an electronic distribution platform and the operator controls at least one of the following:

- authorising billing;
- authorising delivery of the supply; or
- setting the terms and conditions under which the supply is made,

then the GST liability for the supply will rest with the operator of the platform, and not the foreign supplier.

Safeguards and Penalties

The proposed rules acknowledge that it may be difficult for a foreign supplier (or a platform operator) to accurately determine the status of the recipient. Accordingly, safeguards are proposed to protect the suppliers. Provided the supplier takes reasonable steps to obtain information concerning whether the recipient of the supply is an Australian Consumer, and having taken these steps reasonably believes that the recipient is not an Australian Consumer, the foreign supplier can treat the supply as having been made to an entity that is not an Australian Consumer. Even if it is later found not to be accurate, the supplier will gain protection.

Similarly, there are penalties where an Australian recipient makes false or misleading statements misrepresents that it is not an Australian Consumer. Further, if the recipient is GST-registered but is making an overseas intangible acquisition wholly for a private purpose, they would also be subject to new rules extending the scope of the reverse charge rules.

Limited GST Registration Entity

The proposed rules also acknowledge that entities that are only required to be registered because they make inbound intangible consumer supplies are likely to have a more remote link with Australia than other entities that are required to be registered for GST. In many cases, while such entities may make supplies to Australian residents, they will otherwise have nothing to do with Australia and have no ITCs.

Therefore, to allow more simplified administration for such entities, they may elect to be a limited registration entity. If so, these limited registration entities will have no entitlement to ITCs, no entitlement to an ABN, will not be listed on the Australian Business Register, will have quarterly tax periods, and cannot elect to pay GST by instalments.

Tax Invoices

As an overseas intangible supply made to an Australian Consumer will not give rise to any input tax credit entitlement to the recipient, it is proposed that such suppliers will not be required to issue a Tax Invoice (alleviating another compliance activity).

Other Proposed Changes

The Bill also makes the following proposed changes with regard to GST treatment of cross-border transactions between businesses:

- updating the test for when an enterprise is carried on in the ITZ so that it is better aligned with key GST concepts; and
- relieving foreign suppliers of the obligation to account for GST on certain supplies by:
    - shifting the responsibility for identifying and paying a GST liability to the recipient, where the recipient is registered for GST and carries on an enterprise in the ITZ;
    - switching off the GST liability for certain supplies between non-residents;
    - extending the GST-free rules to certain supplies made to non-residents; and
    - removing the GST registration requirements for non-residents that only make GST-free supplies through an enterprise carried on outside the ITZ.

We note that most of these proposed changes have emanated from The Board of Taxation Review released in May 2010, and formed part of Government announcements in December 2013 to proceed with some of the recommendations.

We intend to include an article in next month's newsletter where we will address the above proposed amendments in more detail.

FBT – FBT Treatment of overpaid salary

A loan fringe benefit arises from a loan to an employee (or associate of an employee) on which a low rate of interest (or no interest) has been charged during the FBT year. A low rate of interest is one that is less than the statutory rate of interest. The rate for the 2015–16 FBT year is 5.65%.

The term 'loan' is defined as including:

(a) an advance of money;

(b) the provision of credit or any other form of financial accommodation;

(c) the payment of an amount for, or on account of, on behalf of or at the request of a person where there is an obligation (whether expressed or implied) to repay the amount; and

(d) a transaction (whatever its terms or form) which in substance effects a loan of money.

The breadth of the meaning of the term loan is therefore very wide and in the ATO's view, would include an arrangement whereby an employee is required to repay an amount of salary or wages incorrectly paid to them. The following example is taken from Taxation Determination TD 2008/10:

> **'Example**
>
> 5. Julia works as a public servant in a government department (the employer). Julia is paid her salary on a fortnightly basis by direct credit into her bank account. During the period 5 July 2006 through to 31 January 2007 (2006-07 FBT Year) Julia temporarily performed duties at a higher pay scale level. A review of the higher duty payments to Julia by the employer's human resources section in early March 2007 identified that Julia had, in error, mistakenly been paid a number of amounts totalling $7,200 during the period that she performed duties at the higher pay scale. Julia was not legally entitled to the mistakenly paid amounts. The circumstances are such that Julia has an obligation to repay the $7,200 paid by mistake.
>
> 6. The employer subsequently advises Julia that she is required to repay the mistakenly paid amounts. Julia advises her employer that she is unable to immediately repay the $7,200. As such, on 1 April 2007 Julia's employer agrees to allow one year for Julia to repay the $7,200. The agreement is that the period will be interest-free and there will be 12 monthly instalments of $600 payable on the last day of each month commencing on 30 April 2007. Julia adheres to the repayment schedule over the 12 month period.
>
> 7. The employer's allowing of time from 1 April 2007 for Julia to repay the $7,200 gives rise to a loan benefit in the 2007-08 FBT year under subsection 16(1). The benchmark interest rate for the 2007-08 FBT year is 8.05% and as such the 'notional amount of interest' on the loan is calculated as $312 for the 2007-08 FBT year. The actual interest on the loan is nil for the 2007-08 FBT year that is, the employer has not charged the employee any interest on the loan. The loan benefit cannot be an exempt benefit under section 58P as the 'notional taxable value' of the benefit is not less than $300.'

The views expressed in Taxation Determination TD 2208/10 were vigorously debated between the ATO and the various professional and legal associations. The profession argued strongly that no benefit arises where there is an obligation to repay an amount of overpaid salary. However, the ATO were adamant the arrangement to allow repayment over time fell within the definition of loan as noted above.

In many cases, where the overpaid salary is not a large amount, it is likely that the minor benefit exemption would be available. However, this could be impacted by the instances of overpayments by a particular employer.

FBT implications can also arise should the employer decide to waive the outstanding liability. Should an employer release an employee from the obligation to repay the loan in whole or in part, a debt waiver fringe benefit will arise - refer Taxation Determination TD 2008/11 example below:

> '**Example**
>
> 2. Sam works as a public servant in a government department (the employer). Sam is paid her salary on a fortnightly basis by direct credit into her bank account. During the period July 2007 through to February 2008 (2007-08 FBT Year) Sam temporarily performed duties at a higher pay scale level. A review during March 2008 of the higher duty payments made to Sam was undertaken by the employer's human resources section. The review established that Sam had, in error, been mistakenly paid three amounts of $500 to which she was not legally entitled. The circumstances are such that Sam has an obligation to repay the three amounts paid by mistake. In April 2008, the following FBT year, Sam's employer waives her obligation to repay the three mistakenly paid amounts of $500.'

Employers where overpayments of salary occur commonly need to be vigilant in ensuring the correct FBT treatment of such overpayments is being complied with.

FBT – The ATO is considering the 'workhorse' vehicle exemption and the minor, infrequent and irregular private use requirement.

The Australian Taxation Office has announced it is seeking input as to whether further guidance is required to supplement the current car fringe benefit public advice contained in the publication *Fringe benefits tax - a guide for employers*.

This development follows on from recent press focussed on issues with the widespread use of the 'workhorse' vehicle exemption and uncertainty regarding when private use is such that the minor, infrequent and irregular condition is satisfied.

Current ATO guidance on private use (other than home to work travel) that is minor, infrequent and irregular is found in:

- MT 2024 where it accepts "…occasional use of the vehicle to remove domestic rubbish"; and
- Fringe benefits tax - a guide for employers where it accepts "…a trip to pick up some furniture and take it to the employee's home".

Further guidance on this issue is long overdue and would be welcomed by employers.

It would be imagined the minor, infrequent and irregular requirement has been more liberally applied in many instances/industries than intended by the ATO. Whether any retrospective compliance activity will follow this process is unknown.

Employers should always be mindful that where the minor, infrequent and irregular exemption has been applied (for less than one tonne load carrying vehicles) and this is successfully challenged by the ATO, the fall-back position will be the vehicle is taxable under the statutory formula method in the absence of a compliant log-book being held.

For vehicles that are not cars for FBT purposes (e.g. more than one tonne load carrying vehicles including many dual cabs) the 'residual benefit' exemption that applies is also subject to the non-home to work private use being minor, infrequent and irregular. Where this requirement is not met and business use is not extensive, the ATO are of the view the cents per kilometre approach to determining taxable value does not apply and any FBT liability should be determined on an 'operating cost' type approach (with a basis of determining business/private use such as a log book or similar record of travel being required). The home to work travel would become private use where the exemption is not available. There is no meaningful guidance on what is 'extensive' business use which is also a matter of some concern.

Submissions are due by 15 April, 2016.

In addition to the minor, infrequent and irregular issue the ATO is also seeking input regarding whether (and how it should be provided) further guidance is also required in the areas of:

- the meaning of 'earliest holding period';
- the meaning of 'applied to own use' in the context of 'cost price' as relevant to the statutory formula FBT calculation; and
- the application of the carve out for certain ambulance, police and firefighting vehicles and workhorse vehicles more generally.

This will be an issue we will be monitoring closely and covering in upcoming newsletters.

If you require any clarification of the minor, infrequent and irregular issue, we note it will be covered in an upcoming TaxEd webinar on 17 March, see *FBT 2016 Cars: everything you need to know*.

Eligibility – Thar's a pot of gold in them thar Estates! Is there? Really?

Tim Costello is reported in *Pro Bono* to have said that 'At least $100 million in additional donations could be going straight to charity if the Federal Government green lights the idea of estate duties'. According to the *Pro Bono* article, he bases this figure on 35% estate tax applying to deceased estates with a (net) value in excess of $5m.

In what appears to be a concerted push by some elements of the not-for-profit sector for introduction of death duties, the *Pro Bono* article calls in aid statements by personnel from the Community Council of Australia and the social-agenda based The Australia Institute. The article also invokes the *Henry Tax Review* (the detailed analysis of the Henry Tax Review is found in Volume 2) in support.

It is not immediately clear that imposition of a bequest tax will generate 'additional' donations.

Case 1- the undecided donor

Suppose a person (a testator) will leave an estate that is subject to bequest tax at 35% and is considering whether to make a donation of $100.

- It is not self-evident that the testator, faced with his/her estate paying bequest tax, would make a donation, while in the absence of the tax, the testator would not make any donation.
- Tax deductibility of gifts is important. To pursue the example - in the absence of a deduction against liability for bequest tax, the testator would have a cost of $35 in the form of bequest tax when making the $100 gift (i.e. a total outlay of $135).
- Deductibility facilitates gifts. However, following one line of analysis, it seems to be going too far to suggest that a bequest tax impost produces additional donations. One can consider two scenarios of testator considering the terms of his/her Will:
  - (a) A testator fixated on providing for specific beneficiaries - Such a testator whose deceased estate was not subject to tax would not make the gift. However, the same testator, when faced with the prospect of his/her estate paying bequest tax at 35%, would leave an estate with $65 in hand for distribution to the specific beneficiaries by paying the tax and nothing in hand by making the gift - testator's decision: pay the tax and at least have $65 remaining in the deceased estate.
  - (b) A testator who is motivated to respond to need of others and with pre-tax capacity of $100 - Such a testator would give the whole of this amount whether or not a bequest tax existed, because there would not be any 'cost' in the form of tax. (As the next example illustrates, one cannot assume such donor testator would be motivated by a bequest tax to make a gift of more than $100.)
- Conclusion: Whether a donation is made turns on the disposition of the testator, rather than the existence or absence of the tax.

Case 2 - the initially intending donor

Conversely, suppose a person (testatrix) who (in the absence of tax) is contemplating a testamentary gift of $100, having decided that the remainder of her estate (say, $700) is sufficient to provide for the advancement of her children. With a bequest tax of 35%, the $700 provision for her children is reduced by $245, leaving only $455 available for them. One might anticipate that the testatrix, desirous of providing for her children, would consider the wealth needs of the children (assessed at $700) and forego making the gift. At best, she might still make the gift of $100, recognising that the tax of $35 on this amount will be recouped as a deduction and she is only denying her children $65 and they will have to be content with $455.

What about not-for-profits that do not have a gift deductible status for Estate tax?

A further point should not be overlooked. Only certain not-for-profit bodies would be able to receive gifts for which the donor receives a deduction, if existing gift deductible provisions are to be replicated in the context of designing a tax on bequests.

The Henry Tax Review recognises the scope of gift deductibility for purposes of a tax on bequests would need to be considered as part of the design of the tax.

Getting to the nub of the debate

Pro Bono adverts to some social justice/tax policy issues that the interviewees raise. This might be where the real debate should start. In this short note, it is not feasible to repeat those points or investigate responses that might be raised.

At this stage, it is thought our readership would appreciate a synopsis of the comments in the Final Report of the Henry Tax Review (*Henry*) to which the *Pro Bono* adverts. *Henry's* detailed analysis of taxation of bequests is found in [Section A3]() of Chapter A of Volume 2.

Henry concluded:

> 'While no recommendation is made on the possible introductions of a tax on bequests, the Government should promote further study and community discussion of options.'

Henry identified its key observations as being:

- 'A bequest tax would be a relatively efficient means of taxing savings'. However, an efficiency cost would occur for taxpayers who were saving to provide for their descendants, rather than merely saving for their own retirement.

  (In this context 'efficient'/'efficiency' is used in the technical tax/economic sense of the tax not inducing the taxpayer to act in a particular way due to the existence of the tax. Ideally, in tax theory, a tax should not have an efficiency cost - in short, a tax should not alter a taxpayer's choice of behaviour.)
- A tax on bequests would have a limited consequence of increasing labour supply (prospective beneficiaries would not look forward to such large inheritances) and savings (prospective beneficiaries might be more inclined to save rather consume.)
- 'A tax on bequests would fit well with Australia's demographic circumstances over the coming decades.' This reflects *Henry's* conclusion that Australia's household wealth is becoming increasingly concentrated in a small proportion of Australians as Australia's population ages overall.
- *Henry* considered that '… a bequest tax would be complex' - anti-avoidance provisions (including a tax on gifts made to family members etc. during life-time of the person making the gift) would be required. *Henry* recognises that there would be 'significant administration and compliance costs' respectively for the taxing authorities and members of the Australian public who will need to consider the application (and implications) of the tax.

- 'A tax on bequests should not be levied at very high rates'. Australians should not be deterred from saving with the object of making bequests. This necessitates a substantial tax-free threshold in combination with a low flat rate above the threshold. Bequests to spouses would need special concessions.

  (Note that *Henry* envisages that owner-occupied housing would be within the ambit of the tax.)

- A tax on bequests could be structured in several possible ways:

  (i) A tax on the whole of the donor's estate (i.e. taxing the estate as a single unit) - an 'estate tax';

  (ii) A tax on the inheritance - each person who receives a benefit would have to account for tax on that benefit.

  Note:

  The rationale of Design (ii) - Design (ii) reflects different estates of any given size may have to be divided amongst a different number of beneficiaries and the amount of tax should be determined by the size of a beneficiary's share rather than the size of the overall estate.

  Refinement of Design (ii) - In the course of analysis, *Henry* adverts to a refinement of Design (ii) whereby the beneficiary is taxed on the accumulation of the beneficiary's inheritances over the beneficiary's lifetime at progressive rates rather than the same rate for any inheritance - an 'accession tax'. (With progressive rates, a higher rate applies to the portion above a particular level of accumulated inheritance.)

  Henry notes that are advantages and disadvantages for each of Design (i) and (ii), but leans towards Design (i).

- There are numerous other design issues. The existence of concessions and exemptions will increase the complexity of the tax and increase the risk to the theoretical tax design goals of efficiency and equity.

  (*Henry* uses the term 'equity' in the tax design sense. Taxpayers who have equivalent ability to pay tax should pay equivalent tax - horizontal equity. A Taxpayer who has greater ability than another person to pay tax should not only pay more tax than that other person but should pay tax at a higher rate - vertical equity envisages a progressive tax rate.)

As to be expected, *Henry* uses technical terminology as shorthand and structures the analysis around conventionally recognised tax design goals. Apart from goals of efficiency and equity (concepts discussed above), reference is made to the tax design goal of simplicity (as to be expected, the opposite of complexity). As one textbook author neatly phrases the concept:

> 'Simplicity is the legal simplicity and the ability to predict what the amount of tax on a particular transaction will be. Ease of collection and low administrative costs may also be seen as a manifestation of simplicity.'

In short, a tax should be simple to understand and simple to assess.

Henry identifies other tax design goals of sustainability and consistency with other policy objectives.

Sustainability refers to the amount of tax being 'a predictable revenue stream over time'.

Armed with the foregoing broad introduction, we hope you will find the *Report of the Henry Tax Review* something that is not intimidating. If you are not inclined to dive in, you can be assured that we will monitor any debate on taxation of bequests.

A tax on bequests raises many issues. One that might need particular attention is the interaction of a tax on bequests and the prospective ultimate incidence of capital gains tax on estate assets. Another issue might centre around business succession and the effect that a bequest tax (and associated gift tax) might have on breaking up the business such as the family farm, industrial operation etc. - this might warrant further thought in the context of thresholds, especially given practices where family members work for low remuneration in expectation of inheritance.

Henry appears to recognise the first issue is one that needs to be considered. Importantly, *Henry* also notes the need to consider the interaction of a bequest tax and superannuation benefits arising on death. Other issues are recognised in Section A3-3.

The recent reaction in commercial circles to proposals by the Federal Opposition for changes to negative gearing and reduction in concessions for capital gains might suggest the focus will remain on these topics and there will be little appetite for broaching a re-introduction of a tax on bequests, with the complexity that such a tax involves.

GST Q&A – GST registration and ABN's for Trusts

Question:

We are currently setting up a contract with a Company that is not registered for GST. However, the ABNs that have been provided for payments to be made relate to a Trust where the entity type is listed as a 'Discretionary Trading Trust' and is registered for GST but trading as a different company name, also registered for GST.

My question is: Which entity is Council making the payment to?

Answer:

Identifying ABNs and GST registrations for trusts, and entities involved with trusts such as corporate trustees, can be confusing.

A trust is treated as a separate entity for GST purposes and will have its own ABN, usually showing up in the Australian Business Register as 'The Trustee for the XXX Trust'.

Where the trust has a corporate trustee, the company may have a separate ABN (as the company is a separate entity to the trust). Sometimes, however, a company that solely acts as a corporate trustee may not have its own ABN.

For GST purposes a trust is a separate entity. Where the trust is carrying on an enterprise - for example as a discretionary trading trust - the trust is the entity that would be required to be GST-registered. Where that trust has a corporate trustee, often the company will not be GST-registered (e.g. where it is only acting as trustee and does not otherwise carry on an enterprise or exceed the GST registration turnover in its own capacity as a company).

We suggest that for contractual purposes you clarify what entity the Council is entering into the contract with (and in what capacity - e.g. the contract may be with the company, but the company may be acting in its capacity as trustee for the trust). Once this is determined, the terms of the contract should determine the entity that Council is required to pay.

GST Q&A – GST and dividends

Question:

Council received a dividend payment for shares held in a company. Can you confirm if GST applies to this income?

Answer:

Where an entity holds shares in a company, and the shareholder receives a dividend, the payment (or receipt) of the dividend is not subject to GST. The amount received is generally treated as a transaction that falls outside the GST system, or outside scope.

The ATO has provided the following response on its website:

> '4.7. Are dividends received from shares subject to GST?
>
> Non-interpretative – straight application of the law

The receipt of a dividend is not a supply. GST is not applicable.'

FBT Q&A – Redundancy outplacement training sessions

Question:

A group of employees have been made by redundant by their employer. As part of their redundancy package, the employer provided reimbursement for outplacement sessions to assist in a career transition, giving them advice on how to write a resume, job interview coaching and job planning.

Is this type of reimbursement subject to FBT?

Answer:

The Tax Office considers that outplacement services provided to employees who are made redundant fall within the definition of work-related counselling.

'Work-related counselling' means, amongst other things, counselling provided to an employee by an employer which improves or maintains the quality of the performance of employees' duties. The counselling does not have to maintain or improve the quality of the performance of a particular employee, as long as it improves or maintains the quality of the performance of any of the organisation's employees.

Typical examples of outplacement services which fall within the meaning of work-related counselling would include:

- assistance in writing a resume and job application;
- guidance on seeking new employment;
- training for employment interviews and selection tests;
- the provision of any ancillary services in support of the primary services provided, e.g. the use the employer's telephone or office space.

The ATO considers the provision of outplacement services to employees made redundant improves or maintains the quality of the performance of the remaining employees. As such, these services fall within the definition of work-related counselling and are therefore exempt benefits under section 58M.

Refer to Taxation Determination TD 93/153 for a more detailed discussion of the ATO's position.

FBT Q&A – Log book 'purpose of trip' entries

Question:

An employee has completed their log book and in regards to their 'purpose of journey' have simply written 'business trip' or simply the word 'business' with the origin location and finishing location, does this render the log book invalid and unable to be used?

Answer:

One of the required entries for a logbook entry is the purpose of the journey, so as it can be identified as a business journey. Merely stating the starting and ending destination or writing 'business trip' is insufficient in my view to enable the purpose of the journey to be identified.

Technically this renders the log book unacceptable in assisting to determine the business use percentage of the relevant car.

However, if the staff member has supporting diary entries or other records whereby the trip can be identified as a business journey, then the ATO may exercise its discretion to accept the log book with the support of the other records.

Specific relief from the substantiation requirements exists in the form of a Commissioner's discretion under section 123B of the *FBT Act* which states that:

> 'The substantiation rules do not apply in relation to a benefit if the nature and quality of evidence that a person has satisfies the Commissioner that the taxable value of the benefit is not greater than the amount specified in the taxpayer's return for the FBT year as the taxable value of that benefit.'

It is suggested that a new log book commences to be kept and that employees are educated on the need to be more explicit with the description of their business journeys.

Eligibility Q&A – Deductibility of optional payment made to a DGR simultaneously with a payment to attend a fundraising function

Question:

The enquirer is a government body that conducts an art gallery, the ABC Gallery, under the auspices of the enquirer's ABN. The enquirer will hold a fundraising function in conjunction with the separate XYZ Foundation (which has its own ABN).

The Foundation is endorsed as a Deductible Gift Recipient (DGR). It is a public ancillary fund covered by Item 2 of the table in section 30-15 of the *ITAA 1997*.

Can you advise if the following proposal is acceptable under the DGR status of the foundation?

It is proposed to sell tickets to the fundraiser made up of two components:

- $P to ABC Gallery for the ticket to the fundraising function; and
- (Optional) $N as a DGR donation to the Foundation.

What is required to satisfy the ATO that the $N donation is an eligible tax deductible donation under the Foundations DGR status?

Answer:

It is understood that:

- The ABC Gallery (ABC) is holding a function for which attendees will pay $P per head in order to attend.

- ABC does not contemplate that attendees will be entitled to any income tax deduction in relation to any part of the attendance charge of $P.
- The XYZ Foundation (the Foundation) intends to solicit donations of $N per head from attendees. The payment of $N is optional – in particular, a person can attend the function on payment of the $P charged by ABC and without payment of any amount to the Foundation.
- Payment of the $N donation does not entitle an attendee to any benefit.
- The Foundation is a public ancillary fund covered by Item 2 of the Table in s 30-15 *ITAA 1997*.

Is the proposal acceptable under the DGR Status of the Foundation?

A monetary gift of $2 or more to an ancillary fund covered by Item 2 of the Table in s 30-15 is tax deductible. It should be especially noted that the monetary payment must be a gift. Given that the payment of $N will not entitle any person (whether the payer or otherwise) to a benefit as a result of making the payment, it is expected that the payment will be a gift and the test will be met.

What is required to satisfy the ATO that the $N donation is an eligible tax deductible donation under the Foundations DGR status?

The Foundation should ensure that:

- the optional nature of the payment is made clear in all advertising – i.e. prospective attendees should readily appreciate that the payment does not form part of acquiring the right to attend the function; and
- the Foundation is identified in all advertising soliciting an $N donation as the recipient of the donation.

In conformity with the Public Ancillary Fund Guidelines, the Foundation should issue (upon request) a receipt for each gift it receives. The receipt should include the Foundation's name, ABN, the name of the donor, the amount of the gift and state that the receipt is for a gift received by the Foundation.