As we enter FBT season we have taken a different approach to this month's newsletter. We have received a number of great FBT Q&As and have included the best ones for you in this month's issue.

The increased coverage of Q&As is in addition to other topics we take a look at this month including where parking a car at an airport may not be a fringe benefit and the outcome in the GST and Uber case. The FBT Q&As deal with issues including log books, salary sacrifice, hot desks and pooled cars.

We also have our two FBT webinars being conducted next week, so be sure to register if you haven't already attended a face to face session. Alternatively, if your organisation would like TaxEd to come to your premises to deliver FBT training, give us a call or an email.

Don't forget you can also join Michael Doran Live Online on Monday 6 March to get a more detailed look into the articles covered in this newsletter, as well as ask any questions you may have.

Warm regards,

The TaxEd team

FBT – Corporate bailment agreement; availability for private use

A car fringe benefit is provided if, at any time on a day, a car owned or leased by the employer (or associate or arranger) is used for a private purpose, or is available to the employee or associate for private use.

A car will be taken to be available for private use (irrespective of whether it is actually used) if:

1. the car is garaged or kept at or near a place of residence of the employee or their associate; or
2. the car is not at business premises of the employer and either:
   (a) the employee is entitled to apply the car to a private use;
   (b) the employee is not performing the duties of his or her employment and has custody or control of the car; or
   (c) the employee's associate is entitled to use or has custody or control of the car.

Item 1 above is quite straightforward. If the car is garaged at or near the employee's residence it is deemed to be taken to be available for private use regardless of the purpose for which it was taken home by the employee.

Item 2 was addressed in Taxation Determination TD 94/16 where the car is kept in safe storage while the employee is travelling. In his determination, the Commissioner considers that where:

(a) the employer's car is kept in safe storage away from the employee's place of residence; and

(b) the employer's car is not at the employer's business premises; and

(c) the custody and control of the car has been removed from the employee and from the associates of the employee; and

(d) the employee is not entitled to use the car for private purposes and an associate of the employee is not entitled to use the car,

the car will not be taken to be available for the employee's private use, unless the condition in paragraph d. is not consistently enforced

The first example in the determination is as follows:

> *'An employee who is provided with a car by her employer leaves the car in a commercial storage facility (e.g. an airport parking station) while on an interstate business trip. The employee cannot leave the car on the employer's premises because there are no car parking facilities available. The commercial storage facility is not in the vicinity of the employee's residence. The car will not be taken as being available for the employee's private use if the employer removes the control and custody of the car from the employee (e.g. takes the car keys) and enforces a prohibition on the private use of the car by the employee or any associate of the employee.'*

If the employee is travelling to the airport with his or her family for the purpose of a two week holiday, the million dollar question is: how they are expected to get the car keys to their employer so as to remove custody and control of the car from them?

A recently issued ATO class ruling may provide a solution. The ruling examines the consequences of an employer entering into a corporate bailment agreement (CBA) with an airport carpark operator (ACO).

ACO will enter into a CBA with employers whereby ACO will take possession, but not ownership, of a car provided for the private use of an employee, or an associate of an employee, while it is parked in the ACO parking facility. ACO's facility is not located at or near the employee's place of residence.

Under the terms of the agreement a person who has authority to act for the employer is able to make a booking, using the ACO website telephone or email, to park the car in the ACO parking facility for a nominated period.

When a booking is made the employer must specify the registration number of the car. The booking will only be valid for the car that has that registration number. The booking is confirmed when ACO emails or telephones, a booking confirmation to the employer or representative of the employer.

The bailment period commences when the employee or associate of the employee or nominated representative delivers the car to the parking facility and the keys are surrendered to ACO. ACO will provide a tax invoice/receipt to the employee or associate of the employee.

The bailment period ends when ACO delivers the car and its keys back to the employee or associate of the employee or nominated representative. To obtain the car the employee or associate of the employee or nominated representative must provide:

- the docket issued when the car was parked at the car park;
- photo identification or drivers licence;
- receipt issued by ACO; or
- any other evidence of ownership authority or ACO deems satisfactory.

During the bailment period:

- ACO will have exclusive use and possession of the car;
- ACO will not be subject to any instructions or directions by the employer or employee, except those requiring observance of the terms of the agreement;
- the employee, or associate of the employee, is prohibited from using the car for any purpose; and
- the car will only be moved or driven to enable ACO to perform parking services.

Ruling

During the bailment period both the employee and the associate of the employee are not entitled to use the car for any purpose and do not have custody or control of the car.

During the bailment period, the car is not taken to be available for the private use of the employee or an associate of the employee.

During the bailment period, there is not any availability of the car which constitutes a benefit and consequently, there is not a car benefit for FBT purposes.

The ruling provides employers with an opportunity to seek out airport parking providers that provide such bailment agreements. This is particularly relevant for employers where staff provided with employer held cars take extended travel periods.

GST – The Uber Decision and its implications

The Federal Court has held that provision of transport by an uberX Partner (i.e. an Uber driver) to an uberX Rider (i.e. the passenger) was the supply of taxi travel for purposes of the GST Act - *Uber BV v FCT* [2017] FCA 110.

Griffiths J summarised the case in the opening paragraph of his decision:

> 'At the heart of this proceeding is the question whether persons who are Uber drivers are required to be registered for GST purposes. The issue is one of statutory construction. Enterprises with a turnover of less than $75,000 do not need to register for GST but there is a special rule or exemption, created by s 144-5 ... [of the GST law] ... which has the effect that taxi and limousine operators are required to be registered regardless of turnover. That provision requires a person who is carrying on an enterprise to be registered for GST purposes "if, in carrying on your enterprise, you supply taxi travel" (s 144-5(1)). The phrase "taxi travel" is defined in s 195-1 of the GST Act as meaning "travel that involves transporting passengers, by taxi or limousine, for fares". In simple terms, the core issue is whether, in carrying on the enterprise of providing uberX services to passengers (who are known as "uberX Riders"), uberX drivers (who are known as "uberX Partners") supply "taxi travel" as defined. If so, they must register for GST purposes.'

The case specifically sought a declaratory order that, on 11 September 2015, Mr Brian Colin Fine did not supply taxi travel within the meaning of s. 144-5(1). We note that Mr Fine drove a Honda Civic.

It is sufficient for this article to indicate that the court concluded:

- that the word 'taxi' is sufficiently broad in its ordinary meaning to encompass the uberX service supplied by Mr Fine on 11 September 2015;
- that, at that time, Mr Fine was supplying travel that involved transporting passengers by taxi for fares; and
- that service constituted taxi travel within the meaning of s. 144-5(1).

We note for completeness that, although not necessary, the Court also concluded that the Honda Civic vehicle used by Mr Fine 'on the relevant day is not a luxury car, with the consequence that Mr Fine was not on that day supplying a service which involved travel by limousine. That is not to deny, however, that the position may be different in a case of other uberX Partners who do use luxury cars in providing uberX services.'

The ATO was quick to react to the decision, updating pages on its website titled 'Providing taxi travel services through ride-sourcing and your tax obligations' on the same day that the Uber decision was handed down (17 February 2017). In that document, under the heading 'GST consequences of providing ride-sourcing services', the ATO states:

> 'If you are providing ride-sharing services, you are providing taxi travel services. This is because you make a car available for public hire and use it to transport passengers for a fare.
>
> Under GST law, if you carry on an enterprise and provide taxi travel services in that enterprise, you are required to be registered for GST regardless of your turnover.
>
> **Are you carrying on an enterprise?**
>
> An enterprise is an activity done in the form of a business.

> If you provide ride-sourcing services to the public you are likely to be carrying on an enterprise. This is particularly the case if you operate in a business-like manner where, for example, you provide invoices to your customers.
>
> If you operate infrequently or your activities are not commercial, you may not be carrying on an enterprise.'

It is the last comment that is of some relevance and importance.

Practically, it would be expected that the vast majority of entities signing up to be uberX drivers would be doing so as an enterprise or with an intention to carry on an enterprise. In such circumstances, they would be required to apply for an ABN and, based on the Uber decision (and pending any appeal), would be required to be GST-registered.

Technically, however, it may be possible for an uberX driver to be operating sufficiently infrequently that their activities do not amount to an enterprise. This is a question of fact and, if this is the case, the consequences for the uberX driver are:

- they would not be entitled to an ABN;
- income tax deductions may not be available for costs incurred by the uberX driver; and
- the uberX driver would not be able to issue a tax invoice.

Notwithstanding the above, we note the ATO's ride-sharing document states under the 'What you need to do' heading that:

> 'If you do not have an Australian business number (ABN) and are not registered for GST, you must get an ABN and register for GST as soon as possible.'
>
> and
>
> 'If a passenger requests a tax invoice, not just an invoice, for a fare over $82.50 (including GST) you must provide one. If the facilitator cannot do this on your behalf, use a tax invoice book with your ABN on it.'

As an aside to the foregoing, there is a general requirement for a person making a payment (payer) to withhold (and remit to the ATO) 49% of a payment where the person receiving the payment (payee) makes a supply to the payer in the course of an enterprise carried on in Australia and does not quote an ABN. The withholding obligation is subject to several exceptions, one which is where the payer is not acquiring the supply in the course of an enterprise. Another exception is where the amount is below the threshold for provision of a tax invoice (as discussed below). Given these exceptions, one might anticipate the question of the need to withhold part of uber payment will not commonly arise, but at present it appears the uber system does not accommodate this requirement.

Implications - Tax invoices for Uber Travel

As a practical matter, based on the above it would be difficult for Uber drivers to contend that they do not need to register for GST and take the position that that their provision of transportation is not subject to GST. In particular, they will not be able to claim that they do not need to provide a tax invoice where this is requested and the general (threshold) exception, which is noted below, does not apply. Again we note that the ATO's ride-sharing document states under the 'What you need to do' heading that 'If a passenger requests a tax invoice, not just an invoice, for a fare over $82.50 (including GST)

you must provide one. If the facilitator cannot do this on your behalf, use a tax invoice book with your ABN on it.'

It does not matter that the Uber driver is not in fact registered for GST. A supply is a taxable supply, even if the supplier is not registered. It is sufficient (s.9-5(d)) that the person who makes the supply is required to be registered.

Under s. 29-70(2) a supplier of a taxable supply must provide a tax invoice within 28 days after the recipient of the supply requests provision of a tax invoice, failing which the supplier is subject to a penalty. However, as noted above, there is a threshold exception where a supplier does not need to provide a tax invoice where the fee inclusive of GST does not exceed $82.50.

In order to claim an input tax credit (ITC) for Uber travel, users will *prima facie* need to hold a tax invoice. However, corresponding to the threshold exception noted above, a tax invoice is not needed in order to claim an ITC (s. 29-80(1)) where the GST inclusive amount does not exceed $82.50.

In summary, Uber riders seeking an ITC for Uber travel will need to request a tax invoice for Uber travel where the fee exceeds $82.50 (i.e. $75 + GST of $7.50).

Commonly, as a matter of good governance, both commercial and NFP organisations will require staff to provide evidence of travel expenses even where the threshold is not met and if a tax invoice cannot be obtained, other documentary evidence of payment will be required before reimbursement by their employer. In the Uber decision, evidence was given to the Court referring to the passenger receiving an electronic receipt (for the amount debited to the passenger's credit card or PayPal account) by email at the conclusion of the ride, and this should be sufficient documentary evidence.

Implications - What happens if tax invoice is requested but not received?

The ATO has issued the following advice to users whose request for a tax invoice is not met:

> 'As a passenger in ride-sourcing, you only need a tax invoice for fares over $82.50. If you do not receive a tax invoice for fares of over $82.50 immediately when you ask the ride-sourcing driver for a tax invoice, the driver has 28 days to give you the tax invoice.
>
> If the driver does not give you a valid tax invoice within the 28-day period or gives you an incomplete tax invoice, you can ask us for permission to claim the GST credit.
>
> To request permission to claim the credit, you can:
>
> email us at GSTmail@ato.gov.au
> write to us at
> Australian Taxation Office
> PO Box 3524
> ALBURY NSW 2640'

We suggest that it would be prudent to ensure that evidence of the actual receipt of the service and payment for the service (e.g. the electronic receipt for payment emailed to the passenger) is retained and available to support the request.

However, the ATO notes:

> 'If the driver does not give you a valid tax invoice within the 28-day period or gives you an incomplete tax invoice and you want to claim a GST credit, contact us for advice. In many instances your credit card statement details will be sufficient. It would be ideal if you capture the details of the car number plate and report a concern to us.'

Implications - Is Uber travel taxi travel for FBT purposes?

We note the Uber decision was confined to analysis for GST purposes. In such circumstance, it should not automatically be considered that the decision makes Uber transport services 'taxi travel' for the purposes of the FBT Act. Under s. 136 of the *FBT Act*, 'taxi' is defined as 'a motor vehicle that is licensed to operate as a taxi'.

Where vehicles used by Uber drivers are not subject to a licensing regime governing their operation as a taxi, it appears that they are not taxis for FBT purposes. (Care should be taken in this regard, however, as different licensing regimes and definitions may apply in each State or Territory.) The Uber Case turned on the Court's conclusion that the reference to 'taxi' in the *GST Act* was a reference to 'taxi' in the ordinary sense of the word and it did not refer to a taxi in the sense of being a vehicle subject to any State or Territory regulatory regime. In this regard, the following comments of the Court (at paras 135 and 141) are especially relevant:

> '... I consider that the words in s 195-1 should be given their ordinary, everyday meanings and not a trade or specialised meaning (including one which reflects what Dr Abelson describes as a "regulatory concept"). I accept the Commissioner's submission that the ordinary meaning of the word "taxi" is a vehicle available for hire by the public and which transports a passenger at his or her direction for the payment of a fare that will often, but not always, be calculated by reference to a taximeter. ...
>
> ...
>
> Secondly, I do not accept that the "regulatory concept" of "taxi", as described by Dr Abelson coincides with the ordinary meaning of the word "taxi". The ordinary meaning of the word "taxi", as is reflected in various dictionary definitions, is expressed at a higher level of generality than the "regulatory concept" identified by Dr Abelson. I accept the Commissioner's submission that there is no basis for concluding that the Parliament intended persons who offer supplies which are affected by the *GST Act* closely to analyse State or Territory legislation governing the provision of taxi or limousine services. ...'

Under s. 58Z of the *FBT Act*, 'taxi travel' is an exempt benefit in certain circumstances. We note that taxi travel is not expressly defined in the FBT law. However, it appears that travel using Uber vehicles may not qualify as such an exempt benefit on the basis it is not a taxi as defined for FBT purposes.

Eligibility – Recent Developments at a Glance: February 2017

(1) Service Concession Arrangements: Grantors - draft AASB Standard

The Australian Accounting Standards Board has issued a draft AASB standard Service Concession Arrangements: Grantors (Fatal-Flaw Review Version) (the Draft). The AASB seeks comments by 14 March 2017.

The objective of the draft Standard is to prescribe the accounting for a service concession arrangement by a grantor that is a public sector entity.

A service concession arrangement is defined in Appendix A of the Draft:

> 'A **contract** between a **grantor** and an **operator** in which:
>
> (a) the **operator** has the right of access to the **service concession asset** to provide public services on behalf of the **grantor** for a specified period of time; and
>
> (b) the **operator** is compensated for its services over the period of the **service concession arrangement**.'

A service concession asset is:

> 'An asset used by the **operator** to provide public services on behalf of the **grantor** in a **service concession arrangement** that:
>
> (a) the **operator** constructs or develops, or acquires from a third party or is an existing asset of the **operator**; or
>
> (b) is an existing asset of the **grantor** or an upgrade to an existing asset of the **grantor**.'

A high level introductory overview is available on the AASB website.

The AASB notes that the final Standard is expected to be released in May 2017. It is to be effective from 1 January 2019, with earlier application permitted.

(2) The ATO's Expectations of the NFP Sector (and, conversely, what the NFP Sector can expect from the ATO)

The ATO has set out its expectations of the NFP Sector in relation to tax matters and conversely what the NFP Sector can expect of the ATO.

It has also outlined how it detects and deals with organisations that 'do not do the right thing'. In particular, the ATO notes that the following aspects of the activities of charities and deductible gift recipients attract its attention:

- not applying income and assets solely for the purpose for which the organisation is established, for example private benefits to individuals;
- making incorrect claims for franking credit refunds; or
- incorrectly advertising that donations to an organisation are tax deductible when the organisation is not endorsed as a deductible gift recipient.

(3) Nil Activity Statements must still be lodged

The ATO has noted that 'failure to lodge an activity statement, even one with zero obligations, may delay processing and result in penalties'. This applies to all periods.

(4) AUSkey Access - Changes to Firefox

The ATO has advised:

> 'From 7 March 2017, the latest version of Mozilla Firefox (version 52) will not support AUSkey. A browser extension is now available for Windows users to access services that require an AUSkey in preparation for the Firefox upgrade. Mac users will need to change browsers, for example Google Chrome, with the Chrome browser extension.'

The ATO website provides detailed information on what you need to do, including a link for downloading the browser extension mentioned above.

(5) AUSkey Security

The ATO has issued the following alert:

> 'We have detected criminal activity where identity thieves have fraudulently obtained AUSkeys linked to businesses. They have used these to access the portals, lodge activity statements and change account details for refunds.
>
> We were able to take preventative action quickly. These AUSkeys have been cancelled and we are working with the affected businesses to protect their online security and monitor activity on their accounts.
>
> To help protect your practice from identity theft, we recommend you take the following steps:
>
> - use Access Manager regularly to check people's level of access to the portals is appropriate
> - cancel AUSkeys (in AUSkey Manager) for people who no longer work for you
> - immediately disable or remove a person's account if you have any concerns about their activities
> - ensure that each person who deals with us online on behalf of your practice has their own AUSkey
> - keep passwords secure – they must not be shared
> - report any unknown or suspicious AUSkeys by phoning 1300 287 539 between 8.00am and 6.00pm, Monday to Friday.'

(6) Fuel Tax credits changes - need to check correct rate applied

Fuel tax credit rates increased for fuel acquired from 1 February 2017 - more information is available.

Detailed information on rates is available on the ATO website.

(7) Fundraising - Compliance with State/Territory Legislation

While Commonwealth legislation governs access to Commonwealth tax concessions for charities (including the ability of an organisation to obtain gift deductible fund status), State and Territory legislation affects the ability to raise funds sought for charitable purposes.

The ACNC has compiled a series of facts sheets (one for each State and Territory) directing charities to State and Territory legislative requirements with respect to fundraising.

FBT Q&A – Log book 'purpose of journey' description

Question:

We utilise the operating cost method to determine our car fringe benefits liability. We are experiencing difficulties with obtaining valid entries for the 'purpose of the journey' requirement for the log book entries.

We are considering the use of a detailed legend whereby employees could write a number in the purpose of the journey area in the logbook and this would correspond to detailed description of the journey in the legend corresponding to that number.

In your opinion, would this information be sufficient to use for tax purposes? We would include a copy of the legend at the front of the log book.

Answer:

As a general rule, an entry recording the purpose of a journey should be sufficiently descriptive of the purpose of the journey to enable it to be characterised as a business journey and to correlate broadly with the distance travelled. It is best practice for this to be written up as part of the specific log book entry itself.

However, the fact that a particular journey is of a kind ordinarily associated with the employment duties of the employee is a relevant consideration in determining the extent of detail required for this purpose. For example, in our view it would be acceptable for an accountant working in Melbourne who is required to visit a client's premises in suburban Essendon during working hours to record the purpose of the journey as 'Client visit Essendon'.

Provided the legend outlining the various trip types is descriptive of the particular journey, and the journey is of a kind ordinarily associated with the employee's employment duties, then this should be sufficient.

FBT Q&A – Pooled car: use of car by two or more employees

Question:

We provide a car to an employee to enable them to commute between home and work. During the day the same car is allocated to the pool car fleet and is used by several other employees purely for work related purposes during work hours. Is this car excluded from FBT reporting?

Answer:

A pooled or shared car is a vehicle that is provided by an employer for the private use of two or more employees. The fringe benefit reporting exclusion operates where the provision of the vehicle by the employer results in a car benefit, or a benefit that would be a car fringe benefit if it were not an exempt benefit (e.g. a minor benefit), for more than one employee during the FBT.

It is not necessary that the sharing or pooling of the car occur simultaneously between current employees. The requirement is that a car fringe benefit, or a benefit that would be a car fringe benefit if it were not an exempt benefit, arises in respect of the car in regards to two or more employees where the usage of the car is under the direction or consent of the employer.

The business use travel by other employees during work hours does not constitute private use. As such, in our view the car is NOT a pooled car as the car is only being provided for the private use of one employee only.

FBT Q&A – Are mayors and councillors employees for FBT purposes?

Question:

Could benefits provided to local government Mayors and Councillors be subject to fringe benefits tax?

Answer:

An employee for FBT purposes is essentially an individual that is entitled to receive salary or wages. The term salary or wages includes payments to employees, directors and office holders that are subject to pay as you go withholding (PAYGW).

In regards to office holders, s. 12-45 *Taxation Administration Act 1953* (TAA) provides that an entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as a member of a local governing body where there is in effect, in accordance with s. 446-5 *TAA*, a unanimous resolution by the body that the remuneration of members of the body be subject to withholding under this Part.

In other words, local government Mayors and Councillors will not be considered employees for FBT purposes (and therefore no FBT payable on benefits provided to them) unless the Council has made the above resolution to have payments made to them subject to PAYGW.

FBT Q&A – Whether the work of Councillors with home office and hot desk in Council Chambers is itinerant

Question:

The following question is asked in the general context of whether car logbooks should treat trips from a councillor's home to Council as being business in nature.

Is Councillor's work itinerant in the following circumstances:

- Councillors currently work from a home office and are provided with hot desks to work at the Council Chambers, when required.
- In order to fulfil their role, councillors are often required to drive to community functions and to meetings with council employees, residents, industry representatives and community groups.
- Councillors are required to attend several work locations every day and these locations vary on successive days.

In your opinion, do these facts suggest that a councillor is an itinerant worker? Would your opinion change if councillors were to have a designated office space at the Council Chambers, in addition to their home office?

Answer:

Travel to and from work is normally private use, even if the employee does minor jobs on the way. There are few circumstances where travel between home and work may count as work travel. However, itinerancy is one of those exceptions.

Identifying whether an employee's work is of an itinerant nature is determined according to the individual's circumstances, which is explained in TR 95/34. In the Ruling the following characteristics are listed as indicating itinerancy:

(a) 'travel is a fundamental part of the employee's work...

(b) the existence of a "web" of work places in the employee's regular employment, that is, the employee has no fixed place of work...

(c) the employee continually travels from one work site to another. An employee must regularly work at more than one work site before returning to his or her usual place of residence...

(d) other factors that may indicate itinerancy (to a lesser degree) include:

(i.) the employee has a degree of uncertainty of location in his or her employment (that is, no long term plan and no regular pattern exists)...

(ii.) the employee's home constitutes a base of operations...

(iii.) the employee has to carry bulky equipment from home to different work sites...

(iv.) the employer provides an allowance in recognition of the employee's need to travel continually between different work sites...'

Based on the background facts you have provided, it is considered the Councillor's travel would be of an itinerant nature and therefore a business journey in accordance with TR 95/34.

If the Councillors were to have a dedicated office at the council chambers then travel direct from home to the office would most likely be private travel unless, it can be shown that their home office remains a base of operations in which case it may be arguable the travel is between two related places of work.

FBT Q&A – Council access to minor benefit exemption (s. 58P)

Question:

In relation to s. 58P exemption (minor benefit), can you please clarify when a Council can utilise this? Currently, the minor benefits exemption for tax exempt body entertainment benefits is utilised. However, the minor benefits exemption is only used on a limited basis for other benefits.

Answer:

Section 58P of the *FBTAA* exempts certain benefits from FBT that can be characterised as minor. Minor benefits are benefits that are less than $300 in value, and which are provided infrequently and/or are difficult to record and value.

TR 2007/12 Fringe benefits tax: minor benefits sets out the Commissioner's views on the application of this provision.

As stated in paragraph 8 of TR 2007/12:

> 'A minor benefit is an exempt benefit under section 58P where:
>
> - the notional taxable value of the minor benefit is less than $300; and
> - it would be concluded that it would be unreasonable, having regard to the specified criteria in paragraph 58P(1)(f), to treat the minor benefit as a fringe benefit.'

The five specific criteria are:

- infrequency and irregularity with which associated identical or similar benefits are provided;
- sum of the notional taxable values of the minor benefit and associated benefits which are identical or similar to the minor benefit;
- sum of the notional values of any other associated benefits;
- practical difficulty in determining the notional taxable values of the minor benefit and any associated benefits; and
- circumstances surrounding the provision of the minor benefit and any associated benefits.

You should refer to TR 2007/12 as it goes through a number of scenarios of where the minor benefit exemption can apply.

Insofar as tax-exempt body entertainment benefits are concerned, the minor benefit exemption can only be used in two specific situations:

1. The provision of entertainment to the employee or associate must be merely incidental to the provision of entertainment to outsiders (broadly, persons who are neither employees of the employer nor associates of employees) 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 recognising the special achievements of the employee in a matter related to his or her employment.

You may need to review your current use of the minor benefit exemption for tax-exempt body entertainment, given the very narrow ability to use the exemption.

FBT Q&A – Application of s. 58X (provision of certain work related items) where supplemental warranty purchased

Question:

For each of the following scenarios, can you please advise if FBT would be attracted:

1. A Council pays for electronic portable devices and provides to employees for use at home. Can the exemption of 58X *FBTAA* be used and can this be extended to include warranties?
2. If, for example, the electronic portable devices cost an employee $1,000 with warranties an additional $100. Would FBT be attracted if the Council was to reimburse the employee $1,100 via an allowance through payroll?
3. Same as scenario (2), however, the Council reimburses an employee via the accounts payable department. Could section 58X *FBTAA* still be used or the otherwise deductible rule?

Answer:

Item (1):

Section 58X of the *FBTAA* exempts from FBT the following items where the item is primarily for use in the employee's employment:

- a portable electronic device;
- an item of computer software;
- an item of protective clothing;
- a briefcase;
- a calculator; and
- a tool of trade.

The ability to use the portable electronic device at home does not preclude the exemption from applying, provided the primary employment related usage test is met.

The exemption under s. 58X covers a warranty included in the cost of the device but not an additional/extended warranty that incurs an additional cost.

Item (2):

If the allowance paid via payroll is in effect a reimbursement then no FBT will be payable for the $1,000 device cost under s. 58X. The additional warranty cost of $100 will not be exempted under s. 58X but could possibly be an exempt benefit under s. 58P, provided it is not part of a salary sacrifice arrangement.

Refer to TR 92/15 for a discussion on the distinction between an allowance and a reimbursement. Note that a reimbursement should not be shown on the employee's payment summary as it is not assessable to the employee.

Item (3):

See answer for Item (2) above.

FBT Q&A – Whether an insurance excess is included in a car expense calculation under s. 10

Question:

In relation to Car Fringe Benefits where the taxable value is calculated under Section 10 of the Fringe Benefits Tax Assessment Act 1986 - Operating Cost Method, are insurance excesses payable by the insured to the insurer or smash repairer included in the car expenses calculation?

Answer:

In general terms, for FBT purposes the operating cost of a car consists of car expenses, registration and insurance costs.

It is difficult to see how the insurance excess would not be considered an insurance cost to do with the car. As such, it appears that the insurance excess can be included as an operating cost for the purposes of determining the FBT liability.

FBT Q&A – Salary Sacrifice for cost of skin checks

Question:

We would like to know that staff can salary sacrifice the payment that they pay for skin checks?

Answer:

Staff can salary sacrifice any expense item which they incur, provided the employer agrees to it and the benefit is sacrificed from prospective salary (i.e. salary yet to be earned).

The real issue here is whether the skin checks attract FBT. It is likely the expenditure could qualify for exemption as work related medical screening/preventative health care - refer section 58M *FBTAA*.

For this exemption to apply the following general conditions must be met:

1. The benefit is an expense payment benefit, a property benefit or a residual benefit;
2. Work-related preventative health care is provided to the employee;
3. The purpose of the preventative health care must be wholly or principally to prevent the employee from suffering work-related trauma; and
4. The preventative health care must be made available to all employees at risk of suffering work-related trauma.

We would need you to provide further information addressing the above criteria in order to ascertain with more certainty whether the exemption is available.

Another possibility, provided the cost is less than $300, is the minor benefit exemption, particularly if the test is a once a year screening.

GST Q&A – Application of s. 38-445 where selling part of land

Question:

Council has sold an interest in part of a freehold property which Council owned to an adjoining landowner. The freehold property backs onto the adjoining landowner's property, and has a large water drain running across the block.

Due to the lack of community access to the block, Council has sold the portion of land between the adjoining landowner's rear boundary up to (but not including) the drainage infrastructure. It appears that the adjoining landowner's fence was already constructed on the Council's property before this transaction.

Questions on the GST treatment of this sale:

1. For the purposes of s. 38-445 *GST Act*, in terms of there being 'no improvements on the land', is Council able to look only at the portion of land being sold to the adjoining owner? That is to say, this would exclude the drainage infrastructure erected by Council and the land on the other side of the drainage infrastructure, and only require the land subject to sale to be tested for any improvements.
2. If so, would the construction of the fence by the adjoining land owner prevent Council from accessing s. 38-445, even though this improvement was undertaken by the adjoining landowner encroaching on Council property?

Answer:

We note that s. 38-445(1) refers to:

> 'A supply by the Commonwealth, a State or a Territory of land on which there are no improvements is GST-free if:
>
> (a) the supply is of a freehold interest in the land ...'.

It would therefore appear that the relevant portion of land is the freehold interest which is being supplied. Assuming Council will be arranging for a separate title of the portion of land to be supplied, then this is what would be tested.

We further note that s. 38-445(2) states that:

> '... the supply is not GST-free if, since 1 July 2000, the land has already been the subject of a supply that is GST-free under this section.'

For this response, we have assumed that this will be the first supply of the land by Council since 1 July 2000. That is, neither the larger title nor the newly created portion has been supplied since 1 July 2000.

The ATO has set out in GSTR 2006/6 its view of what comprises improvements on the land for the purposes of Subdivision 38-N (which includes s. 38-445) and Division 75 (dealing with margin scheme). The relevant comments can be found at paragraphs 22 to 24:

> '22. Applying this principle means that, for there to be 'improvements on the land':
>
> - there must have been some human intervention;

- the human intervention must have been physically located on the land; and
- that human intervention must enhance the value of the land at the relevant date for ascertaining whether there are improvements on land.'

23. Where there has been a number of human interventions on the land it is necessary to establish whether any of the human interventions enhance the value of the land. If any of the human interventions located on the land enhance its value at the relevant date, then there are improvements on the land. This is regardless of whether the net value of the human interventions enhances the overall value of the land.

24. Determining whether a human intervention enhances the value of the land entails an objective test. This means that whether an intervention enhances the value should not be determined by reference to use or intended use by either the supplier or the recipient.'

We note that paragraph 25 lists various items of human interventions, including 'fencing - internal or boundary fencing'.

Paragraphs 26 and 27 provide that '[t]o be an improvement, the human intervention must enhance the value of the land' and '[i]n some circumstances, a human intervention on land neither enhances nor decreases the value of land'.

Paragraph 32 states:

'Where there are a number of human interventions on the land, it is not appropriate to take a holistic approach to establishing whether there are improvements on the land. Instead, it is necessary to determine whether any of the human interventions enhance the value of the land. If any of the human interventions enhance the value of the land there are improvements on the land.'

For a supply made under s. 38-445(1), the time at which the improvements/value are to be tested is at the time of the supply.

Given the above, it will be a question of fact whether at the time of the supply, the fence (or any other human interventions on the land) enhances the value of the land (and this is something best answered by a professional valuer). If this is the case, then the supply will not be GST-free under s.38-445(1).

If there are human interventions, but they do not enhance the value, then based on the comments in GSTR 2006/6 the 'no improvements' component of s. 38-445(1) will have been met, and the supply will be GST-free.

GST Q&A – Sale of pre-1 July 2000 vacant land by local authority

Question:

Council has owned a piece of vacant land since before 1 July 2000. It proposes to sell the vacant land to a private purchaser.

As the land is vacant please confirm the sale will be taxable and if so can Council use the Margin Scheme or will full GST apply?

Answer:

Vacant land is generally subject to GST when sold by a GST-registered entity.

We note for completeness that if the land meets the conditions as set out in s.38-445 *GST Act* then it can be GST-free. Broadly the conditions are:

- there is a supply of a freehold interest in land;
- by the Commonwealth, the State or a Territory; and
- there are no improvements on the land.

For a discussion on whether there are 'no improvements on the land' see GSTR 2006/6.

Where Council is making a taxable supply of a freehold interest in land, as Council owned the land before 1 July 2000, Council would be eligible to apply the margin scheme. However, for the margin scheme to apply Council and the Purchaser would need to meet the relevant conditions including agreeing in writing to apply the margin scheme.

We also note that the issue of whether there are 'no improvements on the land' is also relevant when calculating the margin. In this regard we refer you to:

- Item 4 of s. 75-10(3) *GST Act*, which applies if there are no improvements on the land as at 1 July 2000; and
- s. 75-10(3A) in connection with obtaining a valuation to be used for margin scheme purposes.