Foreign resident capital gains withholding tax is attracting considerable attention with the 1 July 2016 introduction approaching. It appears that efforts of some professional legal bodies to defer its operation, as noted in our last newsletter, have not been successful. We provide further information on the tax this month, including ATO advice in relation to two clarification requests that we have made. There are likely to be more clarifications in the pipeline, so stay tuned to further newsletters.

Whilst on the face of it, the name of the tax may lead TaxEd members to think it is not applicable, but be warned – sales and purchases of Australian land and certain other assets **by anybody** are impacted and require action to be taken.

Other topics considered this month include an update on the status of one touch payroll proposals, the GST treatment of supplies between government related entities, and fuel tax credit apportionment.

On the subject of fuel tax credits, we remind you that TaxEd has arranged a series of two webinars to help your staff with both basic and more advanced FTC knowledge requirements deal with this area of tax – we refer you to the note below for more details.

Regards

Andrew Orange

TaxEd Team

Eligibility – Foreign Resident Withholding Tax – commences on 1 July 2016 – further information

Last month (Withholding Tax – Get a certificate and make it go away?), we drew attention to the application of a withholding tax which all prospective vendors of real property and vendors of certain other property (e.g. certain shares or trust units) need to consider. It was noted that foreign resident capital gains withholding tax (FRWT) affects government and other NFP entities. We continue the discussion of FRWT this month, including consideration of additional information recently issued by the ATO.

Applications for Clearance Certificates and withholding variations

Last month's article discussed the need for clearance certificates.

The ATO has updated its website and has published pdf forms to enable:

- application to be made for clearance certificates - form and instructions for its completion; and
- application to be made for a variation in the withholding amount - variation form and instructions for its completion.

The ATO has foreshadowed the online application process will be operative from 27 June 2016. It asks that the pdf forms be used only by vendors that "expect that the contract will be signed and settled within the first two weeks of July 2016".

(i) Clearance Certificate Applications

It is not entirely clear whether a certificate has to be obtained prior to the date of contract in order to be valid - a valid certificate has to be produced to the purchaser on or prior to completion of the contract. On one view of the legislation, it appears that the certificate has to be current at the date of contract.

In response to our query, the ATO have informed us that:

> '… the ATO will allow a vendor to apply for a …[clearance certificate] at any stage, including after the contract has been signed. The certificate is not able to be backdated and consequently the ATO is allowing a clearance certificate to be valid as long as it is provided to the vendor prior to settlement, and that the date it is provided is within the period of the validity. Both the vendor and purchaser are taken to have met their requirements under the measure at that point.' (underlining added)

In the course of the response, the ATO drew attention to its following website material:

> 'It is the vendor's responsibility to provide the purchaser with the clearance certificate and ensure it is valid.
>
> For the purchaser to rely on the clearance certificate the:
>
> - name of the vendor on the certificate must match the name on the certificate of title (unless proof of name change is provided)
> - date the certificate is given to the purchaser must be a date that falls within the clearance certificate period.
>
> When a purchaser receives a clearance certificate from a vendor and sees that is it valid, they can rely on it and not withhold. There is no need for the purchaser to question the residency of the vendor.
>
> …
>
> The purchaser may rely upon the clearance certificate as being valid as long as the date it is made available to the purchaser is within the clearance certificate period stated on the certificate.' (underlining added)

The ATO have further advised that the 12 month period of the clearance certificate starts from the date of issue, as it is unable to make the date retrospective. The ATO 'will be looking at the potential of a system build change for the 2017-18 year to allow for retrospective dates to be provided on the clearance certificate.'

We refer you generally to the ATO's website (e.g. see under 'Valid clearance certificate') in relation to the circumstances in which the purchaser can rely on a clearance certificate and ensure any certificate obtained by your organisation conforms. Also note, the ATO's comment: 'The name on the clearance certificate must match the name on the Certificate of Title. The purchaser does not have to accept the clearance certificate if there is a discrepancy.'

We have sought ATO clarification of the manner in which local authorities and other government entities that are not companies for purposes of the *Corporations Law 2001*, are required to complete the pdf form. The ATO recognises that the existing pdf form instructions may cause confusion and is looking into their modification. In the meantime, we have been informed that:

> 'Where a vendor selects Other as their entity type they should proceed directly to Section I as Sections E F G and H are not relevant to them (and that is how the electronic form will work).'

(ii) Variation applications

It is expected that variation applications will not be relevant to our readers. It is more likely that your organisation will, as purchaser, encounter the result of a variation application.

In short, vendors who are not entitled to have a clearance certificate (i.e. are non-residents for Australian tax purposes) may be able to satisfy the ATO that having an amount of 10% of the price withheld by the purchaser would exceed the vendor's capital gains tax liability in respect of the sale of the property. In such circumstances, a vendor can apply for a variation of the 10% rate and provide the purchaser with a certificate from the ATO enabling the purchaser to calculate the amount withheld at the lower rate specified in the certificate, rather than at the rate of 10%.

For further information on variations, see under "Variations" on the ATO website and the variation form and instructions for completion mentioned above.

Exemption where real property valued at under $2m

The previous article noted that withholding is not required in respect of purchase of real property where the interest acquired is valued at under $2m. The ATO has provided refined information on which the market value is determined - see the discussion of market value in the ATO's answers to common questions.

Basically, market value of an interest in real property can be identified as follows:

- Where the vendor and purchaser are dealing at arm's length and where one of the three situations arise (vis. the purchaser is not registered for GST, the supply of the property is not a taxable supply or the supply is input taxed): the purchase price (before any settlement adjustment such as for rates, taxes and strata levies *etc.*) can be used as a proxy for market value.
- Where the vendor and purchaser are dealing at arm's length, the purchaser is registered for GST, and the supply of the property is a taxable supply: the purchase price (before any settlement adjustments such as for rates, taxes and strata levies *etc.*) less the input tax credit (calculated on the assumption the purchaser is acquiring the property wholly for a creditable purpose) can be used as a proxy for market value.

The identification of market value where the parties are not dealing at arm's length or where one party is making a gift to the other, will be discussed next month as part of a broader consideration of withholding tax in the context of gifts and sales for less than market value.

Eligibility – Exploring the requirements for income tax exemption and concessional FBT status for community service organisations.

An ACNC registered charity enjoys, inter alia, income tax exemption and access to the FBT rebate.

Where an organisation fails in a bid to secure registration as charity, the alternate category of an organisation established for community service purposes (which provides access to equivalent income tax and FBT concessions) should be explored.

Unlike organisations seeking registration as a charity, community service organisations can self-assess income tax exemption under section 50-10 and 50-70 of the Income Tax law and FBT rebate entitlement under section item 5 of the table in 65J(1) of the FBT law.

Prior to self-assessing entitlement to income tax exemption and FBT rebate status it is important to consider the characteristics an organisation needs to exhibit in order to qualify as an organisation established for community service purposes. (Note – The ATO has developed a useful self-review sheet which is recommended for use by organisations considering the applicability of exemption under the community services head of exemption.)

For the purposes of this article, we limit discussion to encompass consideration of the concept of an organisation established for community service purposes and, more specifically, what is not covered.

The income tax law was changed in 1990 to provide income tax exemption for organisations that undertake activities for the benefit or welfare of the community but that are not charitable. It is now a requirement for income tax exemption and access to the FBT rebate that an organisation seeking status as a charity must be a registered charity with the ACNC. Entitlement to registration as a charity requires, *inter alia*, the organisation be established for charitable purposes and any other purposes be incidental to those charitable purposes. Some useful reading on what in encompassed by the concept of charitable purposes pursuant to the *Charities Act 2013* can be viewed here.

Since 1990, the question has been considered in many cases as to whether an organisation is established for community services or whether it merely undertakes works that, whilst benefitting the community, are undertaken for other purposes.

Several key observations emerge from the cases (including income tax and FBT cases involving Navy Health, Victorian Healthcare Association, Victorian Womens Lawyers Asscociation) and ATO pronouncements. They are also well summarised in Tax Determination TD 93/190. The key observations are:

- The organisation's purposes must be altruistic.
- The organisation must exist to directly benefit the community.
- Indirect benefit to the community by an organisation that exists to serve its members purposes is not likely to bring the organisation within the exemption.
- The organisation's object and activities must be considered.

From a governance perspective, it is very important that an organisation has robustly considered whether it is in fact an organisation established for community service purposes. In the cases noted above, whilst all of the organisations certainly provided indirect benefit to the community, ultimately none were considered to be established for community service purposes. Instead, the organisations were held to be established to pursue objects/confer benefits for the founders/members.

It can be a fine line!

FBT – Rates and Thresholds for 2016/17

The following FBT rates and thresholds apply for the 2016/17 FBT year.

A variety of ATO rates and thresholds can be found at the ATO website.

Key rates and thresholds for TaxEd members are:

- FBT rate: 49%
- FBT rebate rate: 49%
- Type 1 gross up: 2.1463
- Type 2 gross up: 1.9608
- Capping thresholds – Section 57A FBT exempt employers being PBIs, HPCs: $31,177 plus $5,000 meal entertainment
- Capping thresholds – Section 57A Public hospitals, non-profit hospitals and public ambulance services: $17,667 plus $,5000 meal entertainment
- Capping thresholds - Section 65J Rebateable employers: $31,177 plus $5,000 meal entertainment
- Car parking threshold: $8.48
- Benchmark interest rate: 5.65%
- Non-remote area housing indexation factors: TD 2016/1
- LAFHA food and drink reasonable amounts: TD 2016/4
- Cents KM rates for private use of vehicles other than cars: TD 2016/3.

FBT – Employee obtaining benefits through fraudulent activity

Consider a scenario whereby an employee obtains benefits in the course of their employment from the use of their employer's funds where the employer is unaware of the benefit and the funds were obtained fraudulently by the employee.

An example could be the payment of a private airfare or the reimbursement of private expenses by the employee accessing employer funds in a fraudulent manner.

Does a fringe benefit arise?

This issue is addressed by the ATO in their Interpretative Decision ID 2003/458. In that ATO ID, the ATO focus on the term 'provide' insofar as the providing of a benefit to an employee. In relation to a benefit, 'provide' is defined in the FBT Act to include something, which is 'allowed, conferred, given, granted or performed.'

The ATO refers to the ordinary definition of the term 'provide' in the *Australian Oxford Dictionary,* 1999, Oxford University Press, Melbourne, which defines these terms in the following manner:

- Allow - 'permit (a practice, a person to do something, a thing to happen etc)'
- Confer - 'grant or bestow'
- Give - 'transfer the possession freely'
- Grant - (see Confer)
- Perform - 'carry into effect'

The ATO takes the view that what is common to the definition of each of these terms is that a decision is consciously made by a person to do something for or to another person.

Where no decision is consciously made by a person to allow, confer, give, grant or perform something for or to another person, for the purposes of the FBT Act, a benefit is not 'provided' by an employer.

The ATO concludes that, where a benefit is obtained from an employer through fraudulent activity by an employee , in the absence of a conscious decision by the employer to provide the benefit, the benefit obtained will not be a fringe benefit for the purposes of subsection 136(1) of the FBTAA.

Conversely, where an employer condones an employee obtaining a benefit through fraudulent activity, the condoning of the activity will be regarded as a conscious decision by the employer to provide the benefit.

FBT – Employee on two contracts – remote area

The FBT law provides for remote area housing benefits to be exempt from FBT. To access this exemption, the accommodation and the place of employment must be in a remote area. In situations where an employee works in both remote and non-remote areas under the one employment contract, these conditions are unlikely to be satisfied.

Situations can arise where employers have entered into two separate employment contracts with the same employee. One contract covers the work undertaken in the remote area (perhaps a nightly caretaker role where the accommodation is provided) whilst the other contract covers the work carried out in the non-remote area (perhaps an administrative role during the day).

In the 6 November 2015 FBT States/Territories Industry Partnership Meeting, the ATO accepted that a separate employment contract for a different position that requires the employee to work in a remote area should be considered separately to any other employment contract which the employee may have with that employer. Subject to meeting the other requirements of the remote area housing benefit exemption, this would allow remote area accommodation which is provided to the employee in respect of their position that requires them to work in a remote area to fall within this FBT exemption.

The guidance provided in the minutes provides the opportunity for an employer to ensure that, where an employee is to commence duties in a dual capacity role and one role is in a remote area, each role is catered for separately by way of a separate contract of employment.

Fuel Tax Credits – Get Apportionment right and save - PCG 2016/8

In early May 2016, the Australian Taxation Office released Practical Compliance Guideline 2016/8 (PCG 2016/8) regarding apportionment for Fuel Tax Credits (FTC) which provides claimants with assistance for apportionment for FTC. PCG 2016/8 replaces the now withdrawn Practice Statement Law Administration 2010/3 (PSLA 2010/3).

The change is part of the ATO's process of transforming the old system of Practice Statements into guidelines which set out a more practical administrative approach to assist taxpayers in complying with relevant tax laws. PCG 2016/8 provides some guidelines which, if followed by taxpayers in good faith, will be adhered to by the Commissioner in his administration of the law.

The majority of the content of PCG 2016/8 has not changed significantly from PSLA 2010/3 and the fundamental principle for apportionment methodologies remains that they must be fair and reasonable in an entity's circumstances. However, there have been several minor amendments as a result of changing approaches to apportionment methodologies.

Apportionment for FTC purposes has taken on more significance in recent years since the 2012 decision of the Administrative Appeals Tribunal in the Linfox Case which has led to increased entitlement for fuel used to operate the auxiliary equipment of road transport vehicles. The Linfox Case confirmed that it is only the portion of fuel that is used *'in a vehicle, for travelling on a public road'* which is subject to the Road User Charge. Practically, this means that, in order to maximise FTC entitlements, taxpayers must apportion their fuel usage between fuel used for travelling on public roads (lower FTC entitlement) and fuel used to operate the auxiliary equipment of those vehicles (higher FTC entitlement). Where vehicles have separate fuel tanks for operation of their auxiliary equipment, this can be a straight-forward process. However, where the auxiliary equipment is powered by the main engine of the vehicle, or where drivers do not separately record fuel put into tanks for the auxiliary equipment, a fair and reasonable method of apportionment is required in order to calculate FTC entitlement.

Examples of vehicles with auxiliary equipment include cement trucks, garbage trucks, refrigerated vans and trailers, air-conditioned buses, mobile cranes, vacuum excavation trucks, mobile shredders and elevated work platforms. However, fuel used in auxiliary equipment also includes fuel use by prime mover trailers or heavy rigid trucks for operation of a range of equipment, either directly or via hydraulics – for example: side tippers, rear tippers, tailgate loaders, cranes, winches, pumps (water, fuel, gas) and air-conditioning units for prime mover sleeper cabs.

Apportionment is not only required for distinguishing between fuel used for travelling and fuel used to operate auxiliary equipment, it is also needed to distinguish between travel on public roads (lower FTC entitlement) and travel on private roads (higher FTC entitlement). Private roads include, for example, roads on private property, farms, mine sites, construction sites, forestry roads, national parks roads and infrastructure access roads.

PCG 2016/8 allows taxpayers to use any apportionment methodology which is fair and reasonable in its circumstances but also provides a number of examples of methodologies which the Commissioner considers are fair and reasonable – for example, the constructive, deductive, percentage use and estimate use methods. Most methods involve the use of one or more measures to ascertain fuel consumption - including odometer readings, fixed route distances, kilowatt hours, hours of operation, meter readings, engine monitoring systems, manufacturer's specifications, fuel consumption trials, GPS technology and driver refuelling records. For claimants with large fleets, the Commissioner also accepts the use of sampling as a fair and reasonable means of apportionment.

If your business operates any heavy vehicles with the above equipment or, if your vehicles travel on both public and private roads, but you only claim the lower road transport FTC rate (currently 13.36 cents per litre) for the entirety of the vehicles' fuel usage, you may have a refund entitlement for fuel acquired in the last four years. With the Road User Charge currently set at the rate of 26.14 cents per litre, apportioning fuel usage by applying the principles outlined in PCG 2016/8 has the potential to provide your business with significant cash savings, both retrospectively and on an ongoing basis.

Note:

The matters referred to above will be discussed in more detail in TaxEd's upcoming FTC webinars: FTC - basic entitlement and claim procedures on 16 June 2016 and FTC – maximising your entitlement and using apportionment methodologies on 23 June 2016.

Payroll – Reportable Super - what is reportable (Part 2)

This article resumes discussion of reporting of superannuation payments on the employee's payment summary at year end. Part 1, last month, considered the basic position. In particular, it noted that an employee's ability to influence the amount of the contribution or to influence the way in which the amount is contributed so as to reduce the employee's assessable income were alternative key determinants for inclusion of a contribution as a reportable employer superannuation contribution (RESC) on the payment summary.

The quantum of the RESC - in which year is the contribution reportable?

Which is the correct year?

While an employee may appropriately influence the making of a contribution, there is a further question in relation to whether a particular contribution is to be reported in the payment summary for a given year.

If any employer pays a contribution to the employee's superfund before or after a particular year of income, the contribution may still be made in respect of that year of income and have to be included in the amount reported for that year. The determinant nexus 'in respect of' is found in s. 16-182(1) Sched. *1 Taxation Administration Act 1953* (TAA).

Consider the following case (based on Example 4.1 given in the Explanatory Memorandum for the Act that introduced the nexus requirement):

> 'Michael is an employee of JYU Pty Ltd (JYU). Michael has entered an effective salary sacrifice agreement with JYU that means 2 per cent of his fortnightly pay of the relevant income year is contributed to Michael's superannuation fund in addition to the compulsory 9 per cent superannuation guarantee contribution. JYU typically makes contributions to Michael's superannuation fund on the 25th day of the month after the month in which Michael's salary is paid. On this occasion, the 11 per cent contribution made on Michael's behalf, including the 2 per cent 'salary sacrificed' contribution, is made on 25 July following the relevant income year.
>
> Michael has capacity to influence the making of this additional 2 per cent contribution in a way that his assessable income is reduced so that it is a reportable employer superannuation contribution. Because the additional contribution made on 25 July is made in respect of the preceding income year, it will be considered a reportable employer superannuation contribution and included in income when determining Michael's eligibility for relevant means-tested government assistance payments for the previous income year.'

It will also be necessary to consider the converse circumstance and identify any salary sacrifice payments made in an income year and which relate to a preceding financial year. For instance a salary sacrifice payment from Michael's fortnightly pay for the previous year might have been made early in the current year and this amount should be backed out in calculating his RESC for the current year.

Why is it important to the employee for the employer to report the correct amount in the correct year?

Employers need to report the correct amount in respect of the correct year because the employee is likely to rely on the amount shown in the payment summary statement to complete the employee's income tax return (employee's ITR).

The amount shown in the employee's ITR for a particular year will affect the tax treatment of the employee in relation to that income year in respect of matters such as:

- Medicare levy surcharge threshold calculation;
- Medicare levy surcharge (lump sum payment in arrears) tax offset;
- all dependant tax offsets;
- senior Australians and pensioner tax offset;
- spouse superannuation contributions tax offset;
- small business income tax offset;
- superannuation co-contributions;
- deduction for personal super contributions;
- Higher Education Loan Program and Student Financial Supplement Scheme repayments;
- tax concessions for certain employee share schemes;
- deductions for non-commercial losses; and
- a range of Centre link and Child Support Agency benefits and obligations.

While not-for-profit sector employers may not immediately anticipate that their staff may be affected by some of these matters, this is irrelevant to the duty of care which their staff expect their employer will take in compiling this information. Legal considerations aside, there are good employer-employee relations to consider.

In any event, and in any particular year, employees who commence or leave part way through a financial year may have other income sources in a given year that make these relevant. Similarly staff, especially part-time staff, may have other sources of income in a particular year which makes these matters pertinent to them.

There is a penalty for failure to provide an employee with a payment summary. However, we will leave the topic of implications for provision of an inaccurate payment summary for another day.

Who is an 'employee' for RESC purposes?

For RESC purposes (s. 16-182(3) Sched.1 TAA), an 'employer' has the extended meaning given in s. 12 of the *Superannuation Guarantee (Administration) Act 1992* (SGA) except that s. 12(11) is to be disregarded (refer below). As a corollary, your organisation may have 'employees' that are not common law employees.

You should especially note that where your organisation engages certain contractors, it will be an employer (see s. 12(3) SGA) for RESC purposes. In particular, your organisation will be an employer of a person where it enters into a contract that is 'wholly or principally for the labour of the person'. Reference was made to this category of employer in a TaxEd article last year, which may be a useful starting point for any further consideration.

A similar separate, but possibly overlooked, extended category of employer is also worth highlighting. A payment to a person for performance/presentation or participation in the performance/presentation of 'any music, play, dance, entertainment, sport, display or promotional activity or similar activity involving the exercise of intellectual, artistic … [etc.] skills' makes the payer an employer (s. 12(8)(a) SGA). Payment to a person to provide services in connection with those activities (s. 12(8)(b) SGA) and payment to a person who is paid to perform services in connection with 'making a film, tape or disc or of any television or radio broadcast' (s. 12(8)(c)) also make the payer an employer.

Other additions under s. 12 to the common law concept of an employer are:

- in relation to members (e.g. directors) of the executive body of a company or other body corporate - that company/body corporate;
- in relation to local government members who are subject to PAYG (i.e. an operative unanimous resolution under s. 446-5 of Sched.1 TAA) - the relevant local governing body;
- in relation to holders of positions under the Constitution or a Commonwealth, State or Territory law (other than local government members) - the Commonwealth or relevant State/Territory as the case may be;
- persons (except local government members) who, not being holders of positions noted in the preceding point, are in the service of the Commonwealth, a State or Territory - the Commonwealth or relevant State/Territory as the case may be; and
- in relation to Federal, State, and (internal)Territory legislature members - the Commonwealth, the relevant State or relevant Territory.

The need to disregard s. 12(11) has limited relevance. The section deals with the exclusion, for super guarantee purposes, of employment of persons providing certain services of a domestic or private nature. As a result of this SGA exception being disregarded, their employers may RESC obligations.

Further information

Further discussion of RESCs is available on the ATO website.

Payroll – Single Touch Payroll

Background

On 28 December 2014, the previous Minister for Small Business, Bruce Billson, and the Assistant Treasurer, Josh Frydenberg, announced that the Government will cut red tape for employers by simplifying tax and superannuation reporting obligations through 'Single Touch Payroll' (STP).

What is Single Touch Payroll?

Under STP, employers will be required to electronically report in real time payroll and superannuation information, including ordinary times earnings, PAYG withholding (PAYGW) and superannuation guarantee (SG) data, when employees are paid, using Standard Business Reporting-enabled software.

An employer will have the option of making optional real time payments of PAYGW and SG contributions if they choose, but this will not be mandatory.

The benefits of STP will be as follows:

- eliminate paper-based reporting of payroll information by requiring businesses to report digitally instead;
- eliminate reporting of PAYGW through activity statements and payment summaries;
- allow employees to access payroll information throughout the year through their *myGov* account, as well as their End-Of-Financial-Year (EOFY) summary to assist them in preparing and lodging their income tax return — available data will be pre-filled in tax returns;
- streamline TFN declarations and Super Choice forms by providing a digital channel to simplify the process of bringing on new employees;
- allow new employees to electronically supply their details through an online government portal directly to their employer's payroll software (alternatively, a new employee's details could be entered directly into the employer's payroll software and the details validated by the ATO);
- notify superannuation funds and government agencies, such as the Department of Human Services, when an employee ceases employment;
- allow the ATO to more effectively identify instances of non-compliance with the PAYGW and SG regimes.

Software requirements

In order to utilise STP, employers will be required to have Standard Business Reporting-compatible software. This may require businesses to either purchase or upgrade existing software, potentially at an additional cost.

On 21 December 2015, the Minister for Small Business and Assistant Treasurer, Kelly O'Dwyer, announced that, to assist with the transition to STP, the Government will provide businesses with a turnover of less than $2 million a $100 non-refundable tax offset to acquire or upgrade STP-enabled software. The offset will apply from 1 July 2017 and will be available for software purchases or subscriptions made in the 2017–18 income year.

Where to from here?

During 2015, the ATO undertook consultation with representatives from large businesses, industry and software developers. Policy design workshops were held in April 2016.

It is proposed that:

- a pilot program will be conducted in the first half of 2017;
- from 1 July 2017, all businesses will be able to commence STP reporting, with the option to make voluntary payments; and
- from 1 July 2018, employers with 20 or more employees will be required to use STP-enabled software for reporting to the ATO.

The Government will make a decision on the date from which employers with less than 20 employees will be required to use STP-enabled software after the pilot is completed.

On 12 May 2016, the ATO advised on its website that, as the Government assumed a caretaker role from 9 May 2016 ahead of the Federal Election on 2 July 2016, the continuation of this measure will be a matter for the incoming government to decide.

Further information is available on the ATO website.

What do I need to do now?

- If you currently have an electronic payroll system — discuss STP-enabled software requirements with your software providers as they will have commenced preparations to upgrade your existing software.
- If you don't currently have an electronic payroll system — begin making initial enquiries as to which STP-enabled software system may be suitable for your business.
- Keep monitoring the ATO website for further developments.
- Await the incoming government's next step and the resumption of policy design later this year.

Payroll – NSW extends Payroll Tax exemption for local councils

Legislation recently passed by the NSW Parliament extends the existing NSW payroll tax (PRT) exemption for wages paid by a wholly owned subsidiary of a local Council. The legislation has now received Royal Assent and the change is effective 11 May 2016.

Under the changes, where an entity is wholly owned by more than one local Council, wages paid by the entity may be entitled to PRT exemption as if it were a wholly owned subsidiary of a single local Council.

Prior to the amendment, the exemption was only available in NSW where the entity was a wholly owned subsidiary of a single local Council.

For wages paid by the entity to be entitled to PRT exemption, they must be wages for work that would have attracted the exemption if paid directly by a local Council or wholly owned subsidiary thereof.

The relevant provisions impose conditions on accessing the exemption in NSW. These are discussed below.

Section 59 of the *Payroll Tax Act 2007* requires the work to be subject of written agreement between the subsidiary and Council and the agreement to include provisions such that the subsidiary notionally charges Council any PRT that would have been payable but for the exemption. Section 60 confirms that wages paid for certain activities are not eligible for exemption whether paid by a Council or a subsidiary.

As noted in a previous TaxEd article, despite attempts to harmonise PRT legislation, this is an area where Councils in each State and Territory need to be mindful of differences in treatment. Issues to consider in NSW (and elsewhere) include:

- for NSW Councils - do the changes apply?
- for all Councils - what wages are excluded from the scope of any Council related exemption despite being paid by a Council (or subsidiary thereof if the rules in that State/Territory extend to that level); and
- whether any labour supplied through employment agents to a local Council or subsidiary thereof may also enjoy PRT exemption and if so, whether hourly rates payable by Council implicitly reflect the PRT exemption available to the employment agent.

TaxEd Members with any specific State or Territory related PRT questions in this area should use their subscription to the payroll tax module Q&A service to obtain further information.

We confirm our previous commitment to prepare a more detailed article summarising the rules in each State and Territory in an upcoming TaxEd newsletter.

GST – Payments between Government related entities

Taxable Supplies Generally

An entity makes a taxable supply where the following conditions are met:

(a) the supply is made for consideration;
(b) the supply is made in the course or furtherance of carrying on an enterprise;
(c) the supply is connected with Australia; and
(d) the entity making the supply is registered or required to be registered.

However, a supply is not a taxable supply to the extent it is GST-free or input taxed.

Paragraph (a) above is one of the fundamental concepts in the GST law - there must be a supply made for consideration. Referred to as the 'nexus test', not only must there be a supply and consideration, but there needs to be sufficient nexus that the supply is made for consideration. Both supply and consideration are defined terms, and in this article we are focussing only on consideration, and more specifically on whether payments made between government entities are consideration for GST purposes.

Consideration is defined widely in section 9-15 of the GST law. However, it is s. 9-17 (and more specifically s. 9-17(3)) that we will be focussing on in this article.

Context

Section 9-17 was introduced into the GST law via *Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012* (the Bill). By way of summary, s. 9-17 replaced the former s. 9-15(3) and the change came about due to the decision in *TT Line Co Pty Ltd v FCT* [2009] FCAFC 178 which considered the application of s. 9-15(3)(c).

Subsection 9-17(3) effectively replaces the former s. 9-15(3)(c).

According to the Explanatory Memorandum (the EM) of the Bill:

> '2.8 These amendments ensure that non commercial activities of government related entities are not subject to GST. This is achieved by treating a payment which meets certain conditions as not being the provision of consideration and therefore not subject to the basic GST rules.
>
> 2.9 A payment is not the provision of consideration where:
>
> - the payment is made by a government related entity to another government related entity for making a supply;
> - the payment is paid under a government appropriation or pursuant to specified intergovernmental health reform arrangements; and
> - the payment satisfies a non commercial test.'

Based on the above, the conditions to be met by a government related entity (GRE) can be summarised as follows:

1. there must be a payment from one GRE to another GRE (the GRE supplier);
2. the GRE supplier must be receiving the payment for making a supply;
3. the payment must either be paid under a government appropriation, or pursuant to specified intergovernmental health reform arrangements (essentially payments made under the National

Health Reform Agreement, or under an agreement to implement the National Health Reform Agreement);

4. the payment meets the conditions of what is referred to as 'the non-commercial test'.

For completeness, we also note that s. 9-17(4) provides that a payment is not the provision of consideration if the payment is made by one GRE to another GRE and the payment is of a kind specified in the GST Regulations.

Condition 1

This will be a question of fact. Suffice to say if there is a payment between two GREs this condition will be met.

Condition 2

The payment referred to must be made in return for a GRE making a supply.

By way of clarification, the EM provides:

> '2.15 These amendments require that the payment is made by a government related entity supplier for making a supply. It is not necessary that the supply is made to the government related entity making the payment. The supply may be made to the government related entity making the payment or to a third party. 'Government related entity' is defined in section 195-1 of the GST Act. [Schedule 2, item 2, paragraph 9-17(3)(a)]
>
> 2.16 GST will not apply to the payment made by a government related entity to another government related entity if the payment is not made for a supply. This is achieved under the basic rules in the GST Act, which require a supply to be made for GST to apply.'

Condition 3

For the purposes of this article we have focussed only on the general component (and not the National Health Reform Agreement component) of the condition.

Therefore, the payment must be made under a government appropriation. Unlike the former provisions, the new rules are broader in application. The payment simply must be covered under an appropriation. There is no longer any reference to the payment needing to be specifically covered by an appropriation - the GRE supplier does not need to be specifically named or fall within a part of class of GREs.

This condition will be satisfied where there is an appropriation and the terms of the appropriation authorise the payments to be made.

Condition 4 - the non-commercial test

Essentially, this test will be met where the sum of:

- the payment (or payments) relating to the supply; and
- anything that the GRE supplier 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 GRE supplier's anticipated or actual costs of making those supplies.

Again for clarification, the EM provides:

> '2.27 Whether or not the amount of the payment exceeds the government related entity supplier's anticipated or actual costs of making the supply, or supplies, is determined at the time at which the

amount to be paid is worked out rather than at the time of payment (if it is later). If the determination of the amount of the payment to be made takes place before the relevant supply, or supplies, are made, it will be necessary to base the calculation on the anticipated costs of making the supply, or supplies. The amount of the payment will commonly be calculated in consultation between the government related entity making the payment and the government related entity supplier. If the payment is calculated after the relevant supply, or supplies, are made, the calculation is based on the actual costs of making the supply, or supplies. Where the calculation is based on the anticipated costs of making the supply, or supplies, it is not necessary to subsequently determine the actual costs of making the supply, or supplies.

…

2.31 In the context of these amendments, the concept of cost includes the government related entity supplier's direct and indirect costs of making the supply or supplies, but does not include a return on capital or concepts of cost which are measured based on opportunity cost or forgone revenue. An absorption costing methodology is an example of a methodology that may be used to calculate the anticipated or actual costs of making the supply or supplies.'

Summary

Provided that payments made between GREs meet all of the above conditions, the payments will not be consideration for GST purposes, and the payments will not give rise to either a GST liability to the GRE making the supply or a GST credit to the GRE making the acquisition.

While there will be a number of payments that readily meet the above conditions, each GRE will need to be careful to identify those payments made between GREs which do not meet all relevant requirements, or where some clarification may be required before being able to determine whether all the conditions are met.

Payments that do not meet the conditions and which are payments for taxable supplies would result in a number of administrative and compliance requirements, namely:

- needing to gross-up the payment for GST;
- issuing of tax invoices; and
- ensuring such payments are appropriately coded for accounting purposes.

FBT Q&A – Log Book retention requirements for operating cost method

Question:

A vehicle logbook was completed for a 12 week period during the 2011 FBT year. Is this log book valid for the 2011 FBT year plus another 4 FBT years (i.e. expiring 31 March 2015)?

If the log book is not valid for the 2016 FBT year and no new log book was completed would we apply a business usage percentage of zero? Are there any other options of carrying forward the percentage from the previous log book?

Answer:

Under section 162G of the FBT Act, a log book must be completed:

- for the first year that the employer uses the operating cost method;
- if none of the previous 4 years was a log book year (i.e. any previous log book is now 5 years old);
- if the employer elects to prepare a new log book; or
- if the Commissioner, by notice in writing, requires the employer to treat the year as a log book year.

The log book in this situation was completed and applied for the 2011 FBT year and can therefore be kept for the next four FBT years, that is. - up to and including the 2015 FBT year. The same log book cannot be used in order to determine the business use percentage for the 2016 FBT year.

To establish the business percentage of a car, log book records and odometer records must be maintained. Our concern is that if no log book has been kept for the 2016 FBT year the business percentage will be zero - refer sections 10A and 10B of the FBT Act.

We are not aware of any option of carrying forward the percentage from the previous log book although there is the ability to utilise the statutory formula method which should result in a better FBT payable outcome than a zero operating cost percentage.

FBT Q&A – Airfare costs for employee and family returning overseas

Question:

We have an employee who worked for us for almost five years under a 457 Business Visa sponsorship arrangement.

Upon completing his employment at our expense, and as part of the sponsorship obligations, the employee was reimbursed for the one-way economy airfares from Melbourne to the UK. This reimbursement was for tickets for the employee and his family.

Is this an expense payment fringe benefit, and if so, does it fit in to any of the exemption categories?

Answer:

The reimbursement of the airfares for the former employee and family constitutes an expense payment benefit.

However, it would seem that the benefit will be exempt by the operation of section 58F of the FBT Act.

Section 58F exempts from FBT certain costs incurred in connection with relocation transport. A condition of the exemption is that the transport is required solely because the employee is required to:

(a) live away from his or her usual place of residence in order to perform employment duties;

(b) return to his or her usual place of residence at the end of a period during which the employee lived away from that place in order to perform employment duties; or

(c) change his or her usual place of residence in order to perform duties of that employment.

The ATO have always generally accepted individuals in Australia on 457 visas as living away from home for FBT purposes. We are not aware of this treatment having changed.

As such, having completed his 457 visa assignment, the employee and his family are returning to their usual place of residence as per paragraph (b) above.

The reimbursement should therefore qualify for exemption.

GST Q&A – No ABN Withholding

Question:

We have a supplier whose ABN does not match their trading name. We have asked them to update the trading name or change their invoices to reflect what is registered with the ABR, but this has not been done. Can you please clarify what is the proper treatment in these circumstances?

Answer:

If an entity does not provide an ABN, and none of the 'No ABN' exemptions apply, the entity making the payment is required to make a 'No ABN withholding'. The current rate for such a withholding is 49%.

Click here for a link to the ATO website which provides some general information regarding No ABN withholding.

Common situations where an entity does not need to withhold where an ABN is not provided include:

- when the payment for the full supply is $75 or less, exclusive of GST;
- the supplier is not carrying on an enterprise; or
- the supplier provides you with a complete Statement from Supplier containing the appropriate information.

With regard to your comment that the ABN provided does not match the trading name, this is more common than many expect. This can occur for many reasons, but commonly due to the business being operated by a trust with a corporate trustee. The trust is the entity carrying on the business and has its own ABN. (As the trust is treated as a separate entity for ABN/GST purposes, the name is usually referred to as 'The Trustee for the XYZ Trust'). However, the trading name may be that of the trustee company (or a nominee company) either of which may not have its own ABN. Also, the trustee or nominee entity name may be completely different to the trust name.

In this regard, it would be worthwhile checking the ABN Lookup register as this should clarify the name of the entity for the ABN quoted. Also check the trading names, as these can also be listed under the relevant entity's entry.

Checking the ABN is also important to ensure that any tax invoice provided to you is valid so that you can claim GST credits (where you have an entitlement to do so).