This month's Newsletter continues discussion of the FBT changes in relation to meal entertainment. The team is working on a comprehensive summary of the practical transitional and salary packaging issues raised by the changes, with a view to issue early in 2016.

Two recent 'charity' cases feature in articles that will especially interest our Eligibility and Payroll module readers. There is a further short note about a possible pleasant surprise that some NFPs may have overlooked.

The TaxEd team will take a break over the Christmas period and will return in the new year with the January newsletter. The New Year will also bring the eagerly anticipated TaxEd FBT Roadshows – see the note below for dates.

The Team wishes you a not-too-taxing break and all the best for the New Year.

Regards

Andrew Orange
TaxEd Team

Salary Packaging – Entertainment benefits to be amended

The *Tax and Superannuation Laws Amendment (2015 Measures No 5) Bill 2015* received Royal Assetn on 30 November 2015. The measures relating to changes to salary packaged meal entertainment and entertainment facility leasing expenses (EFLE) are now law.

Last month's newsletter article outlined the proposed changes. The purpose of this article is to outline the practical implications for affected employers.

To recap the changes, the Bill contains the proposed amendments to limit the concessional treatment of salary packaged meal entertainment benefits or EFLEs by:

- removing the reporting exclusion for salary packaged entertainment benefits;
- removing access to elective valuation rules when valuing salary packaged entertainment benefits; and
- introducing a cap on exempt or concessionally taxed salary packaged entertainment benefits available to certain employees.

The proposed amendments are to commence from 1 April 2016, i.e. for the 2017 FBT year.

For the purposes of the proposed amendments, a *salary packaging arrangement* means an arrangement under which a benefit is provided to an employee if:

(a) the benefit is provided in return for the employee agreeing to a reduction in the employee's salary or wages that would not have happened apart from the arrangement; or

(b) the arrangement is part of the employee's remuneration package, and the benefit is provided in circumstances where it is reasonable to conclude that the employee's salary or wages would be greater if the benefit were not provided.

Abolition of reporting exclusion

Having to report salary packaged meal entertainment and EFLE on an employee's payment summary has an obvious impact in that further administration will be required to monitor and track such expenditure.

Current payroll systems and/or financial ledgers will most likely need to be modified so as to be able to cater for the tracking of individualised packaged meal entertainment and EFLE benefits provided on or after 1 April 2016.

From the employee's perspective the inclusion of salary packaged meal entertainment and EFLE benefits on their payment summary will add to their 'adjusted taxable income' for the purposes of income testing against various social security benefits, child support and other taxes and charges (e.g. Medicare Levy surcharge).

No 50/50 or 12 week register option

The removal of the Division 9A valuation methodologies - i.e. the 50/50 split and 12 week register methods - for salary packaged meal entertainment and EFLE benefits will ultimately result in two meal entertainment and EFLE ledger systems being maintained.

This is because non-salary packaged meal entertainment and EFLE can still be valued using one of those two elective methods.

As with the abolition of the reporting exclusion, current payroll systems and/or financial ledgers will most likely need to be modified so as to be able to cater for the tracking of individualised packaged meal entertainment and EFLE benefits provided on or after 1 April 2016.

Cap on concessional FBT treatment for meal entertainment and EFLE benefits

This third change is the one that most tax commentators and experts were expecting given recent coverage of the perceived overuse of this concession to fund, essentially tax-free, certain personal entertainment such as restaurants, fully inclusive holiday packages, function centre costs, etc.

To address the situation a grossed up cap of $5,000 is to be introduced for employees of certain FBT exempt and rebatable employers. The type of FBT exempt employers targeted are:

- Public Benevolent Institutions ($30,000 cap)
- Health Promotion Charities ($30,000 cap)
- Public and not-for-profit hospitals ($17,000 cap)
- Public ambulance service ($17,000 cap)

The effect of this amendment is to provide each employee of the above listed employers with a separate single gross-up cap of $5,000 each FBT year for salary packaged meal entertainment. Where this cap is exceeded, any benefits may firstly be taken into account under the existing caps before determining whether there is any excess to be taxed.

Rebatable employers

Similar to exempt employers above, the proposed amendments will limit the existing concession by increasing the capping threshold of $30,000 by the lesser of:

- $5,000; and
- an employee's total grossed-up taxable value of salary packaged entertainment benefits.

Once again, and without wanting to sound like a broken record, the introduction of this cap will lead to increased administration and compliance costs to implement.

Is this the end of salary packaged meal entertainment?

FBT employers subject to the capping thresholds and rebatable employers will have some serious thinking to do insofar as deciding whether or not the allowance of salary packaging in regards to meal entertainment and EFLE benefits will continue to be available from 1 April 2016 onwards.

Many employers are already bogged down with paperwork and administration and the introduction of these changes will only add to this.

Will it be worth it to continue to allow salary packaging of meal entertainment and EFLE benefits? Only the particular organisation itself can decide that in view of the impact it will have not only themselves but also on the impact on their staff.

Should an organisation make the decision to continue to allow the salary packaging of meal entertainment and EFLE benefits, will it mean the *de facto* end of the 50/50 or 12 week register valuation methodologies for the organisation?

In the next edition we will take a look at whether any particular strategies can be implemented to try and beat the 1 April 2016 deadline.

Eligibility – Review of correlation of your activities and objects

In focussing on day to day activities and reacting to opportunities and suggestions emerging from staff, it is possible to depart from the image that your organisation presented to the Australian Tax Office (ATO) or other authority (e.g. State/Territory Revenue Office) when applying for a tax concession. As the ATO /Revenue Office will have granted concessional status on the basis of the information presented by the organisation, any departures from this image could be problematic.

Two recent cases, mentioned below, emphasise that registration for Commonwealth tax concession is not definitive.

When activities undertaken do not align with an organisation's objects

The first case, *The Study and Prevention of Psychological Diseases Foundation v Commissioner of Taxation* , is an instance of extreme non-compliance with conditions for a tax concession.

In that case, The Study and Prevention of Psychological Diseases Foundation (the Foundation) was endorsed as:

- entitled to income tax exemption from 1 January 2005 – on the basis that it was a 'charitable institution';
- entitled to receive gift deductible donations from 1 January 2005 - on the basis that it was a 'charitable institution whose principal activity is to promote the prevention or control of diseases in human beings';
- entitled to GST concessional treatment from (at least) 1 July 2005 – on the basis that it was a 'charitable institution'; and
- entitled to certain fringe benefit tax concessions from (at least) 1 July 2005 – on the basis that it was 'a health promotion charity'.

The Foundation's sole object was: '…for public benefit and charitable purposes, in seeking to promote the prevention and control of psychological diseases in human beings and therefore setting out to ultimately create the Ideal Human Environment …'. The Foundation's Constitution further elaborated on its function as 'primarily to operate and fund a research team that functions 7 days a week, 24 hours a day, whose purpose is to research psychological disease by studying a cross section (sic) of human behaviour in a variety of emotional, social and physical conditions, circumstances and environments'.

In 2011, the Tax Commissioner informed the Foundation that the Commissioner was not satisfied that the statutory requirements entitling the Foundation to the endorsements listed above had been met. The Commissioner revoked the endorsements retrospectively from 1 January 2005, as he concluded that the Foundation had not met the statutory requirements from the outset. The effect of the revocation was to render the Foundation liable to pay tax during the period in which it had treated itself as exempt from tax. The Commissioner imposed penalties and also imposed an interest charge on the unpaid tax.

The Foundation referred the Commissioner's decision to the Administrative Appeals Tribunal (AAT) for review.

The AAT decided in 2013 that the Foundation was 'not at any relevant time (being any time since January/July 2005) a charitable institution' and that the it's 'principal activity was not, at any relevant time, to promote the prevention or control of diseases in human beings.' The Foundation was not carrying on research, it was being conducted for the personal benefit of its members (it was funding members' personal living expenses), its 'actual activities do not coincide with the stated objects in its Constitution', and it did not fulfil the charitable purposes it asserted.

On appeal from the AAT, the Federal Court decided (in 2015) that it was open for the AAT to reach this conclusion. The Federal Court emphasised that the Foundation failed to meet the technical concept of a charity because its actual activities did not reflect its charitable object. It is not sufficient that an organisation has wholly charitable (in the technical sense) objects/purposes, the organisation's actions must be wholly directed to attainment of those charitable objects/purpose. (As an aside, and outside the ambit of the case, this is not to say that indirect pursuit of a charitable object through raising funds to be used in direct charitable activities will necessarily be problematic at a Commonwealth tax level. We propose to discuss the technical concept of 'charity' in a later newsletter.)

While the case relates to a charity, the point is that any organisation which is granted a tax concession has to be conscious of the conditions on which the grant is made and should periodically review its compliance with those conditions. Non-compliance with conditions is relevant not only going forward after ATO detection but also there is the spectre that historical non-compliance can have retrospective effect.

In the Foundation's context there was a substantial retrospective tax exposure and attendant cash flow implications. The Foundation was not entitled to the tax concession from the outset. The more common scenario is where an organisation which was initially entitled to concessional tax treatment has changed its activities/constitution in such a way that it has ceased (from the date of the change) to be entitled to be endorsed for a particular tax concession.

Some actions you might consider taking

Management of concessionally-taxed organisations should always be mindful of the circumstances which are pre-requisite to continued enjoyment of the tax concession. In particular, any proposed change in an organisation's constitution or any significant proposed change in activities should be assessed from the perspective continued compliance with the basis on which on the tax concession was granted.

It would also advisable to periodically check that your organisation's current activities are consistent with the terms of its entitlement to tax concessions on which it relies - organisations evolve and the evolution may occur in subtle increments. Your checks should include a review of the materials that your organisation issues (e.g. website, newsletter, brochures, annual reports, advertisements etc.), as these give revenue authorities insights into its activities. Contemplation of any proposed changes to your organisation's constitution should always include consideration of their potential impact on access to tax concessions.

When your organisation applied for a tax concession it will have provided the revenue authority with information about its then current/proposed activities. The application form in which the tax concession was sought will have identified the organisation's character to the revenue authority. Prudence suggests that the review should include considering whether there is ongoing compliance with statements made in the application and the relevance of any departure. You should also consider whether current legislation (or case law interpreting that legislation) has made any changes affecting ongoing entitlement to the concession.

It is likely that the information provided in support of the application will have included reference to website material and other documents that your organisation issued at the time. Recently formed and new organisations will have described their proposed activities. In virtually all cases, an applicant for special tax treatment will have provided the revenue authority with a copy of its constitution – the revenue authority will have been especially interested in the objects (purposes) for which the organisation was founded to pursue and whether the organisation was a not-for-profit body. The latter concept refers to the prohibitions on the organisation's ability to pay/apply its assets for the benefit of members while the organisation is an operating body and also when the organisation ceases to exist (i.e. wound-up).

By periodically stepping back and taking stock of an organisation's continuing compliance with the conditions pre-requisite for the tax concession, non-compliance can be detected, remedied early, and (in general) the likelihood of revenue authority intervention reduced. In so far as the Commonwealth Tax Commissioner's powers of revocation are discretionary, it is anticipated that an organisation's conscientious attention to compliance would be a factor in support of a favourable exercise that discretion. However, periodic review is not a substitute for senior management awareness of, and proactive oversight of, the issue.

The ATO website provides various tools to assist members of the public in meeting their tax obligations. The ATO has produced an Endorsement Review Worksheet for Income Tax Exempt Charities.

State/Territory and Local Government concessions should not be overlooked

Not-for-profit organisations may be eligible for a range of concessional tax treatments under State and Territory legislation. For example, they may be eligible for land tax, payroll tax and stamp duty concessions. In some jurisdictions, there may be local government rates concessions or concessions relating to fees and charges. It is beyond the scope of this article to comment on these. However, it would be prudent to monitor compliance with the conditions on which the concessions arise, especially those of material financial significance to your organisation.

Another case of interest

It was noted above that there have been two recent cases that demonstrate registration for a tax concession is not definitive. The second case is the Victorian Supreme Court payroll tax decision of *Law Institute of Victoria v Commissioner of State Revenue*. This case is the subject of a separate article in this month's newsletter.

Payroll – Further Developments re Payroll Tax and Charities – the Law Institute Case

The recent payroll tax decision of *Law Institute of Victoria v Commissioner of State Revenue* dealt with a not-for-profit organisation claiming to be exempt from payroll tax (PRT) on the basis that salaries and wages that it paid were exempt wages under the Victorian PRT concession applicable to non-profit organisations. The Law Institute of Victoria (LIV) contended that it was within the ambit of s. 48 of the *Payroll Tax Act 2007* Vic. (PRTA) as that section applied both immediately before and after the amendment on 1 July 2012. The amendment was aimed at ensuring non-profit organisations which engaged in commercial activities were not given a PRT cost advantage over commercial organisations with whom they competed.

The LIV argued that it was 'a non-profit organisation having as its … dominant purpose a charitable … purpose', as that expression is used in s. 48 of the PRTA. (Section 48 embraces non-profit organisations ranging over those with whole/dominant charitable, benevolent, philanthropic, or patriotic purposes; religious institutions; and public benevolent institutions. Certain educational bodies and State instrumentalities are excluded.) It also argued that it met the further requirement that the wages were paid 'for work of a kind ordinarily performed in connection with the … charitable … purposes of the institution or body' (pre-1 July 2012) and the post-1 July 2012 corresponding requirement of wages being payable 'to a person engaged exclusively in work of a … charitable … nature for the institution or non-profit organisation.'

The trial judge found that the LIV did not surmount the hurdle of the first requirement of dominant purpose. As a result, the second requirement was not considered in detail.

Basically, the LIV contended its dominant purpose was 'to promote the development of the law and the legal profession for the benefit of the public', with any benefits derived by members of the LIV being incidental to (although an important and necessary consequence of) the pursuit of that objective.

The Commissioner of State Revenue (the Commissioner) argued the requisite dominant purpose was absent. While recognising that the LIV engaged in the charitable purpose it identified, he contended that it also undertook independent (i.e. separate and distinct) non-charitable purposes. He categorised the non-charitable purposes as, broadly, the provision of services to its members and acting as agent for certain statutory bodies which were charged with regulating/discipline of the legal profession. In relation to the latter category, the Commissioner emphasised the financial support which the statutory bodies provided to the LIV in connection with its regulatory activities and also the fact that the LIV was exercising a statutory regulatory power.

The Court rejected the LIV's contention that s. 48 was concerned with a 'dominant' activity in the sense of an activity that was 'a prevailing or ruling characteristic'. The Court preferred the Commissioner's contention that 'dominant' referred to the need for a charitable purpose to be the main objective of the organisation, with any other objects/purposes the organisation being incidental to the main objective. Those other objects/purposes could not be separate and distinct objects or purposes - they had to be objects or purposes that were only pursued as part of the process of pursuing/achieving the main object.

In reaching this conclusion, the Court relied on the conventional concept of the nature of a 'charity'.

The Court looked for the dominant purpose by first considering the LIV's objects (as set out in its constitution) as a whole. If the constitution of an organisation did not identify one of the objects as primary/main object, the Court considered the next step was to consider the organisation's objects and activities together in a holistic way, in order to determine its primary object(s). It found that the LIV's membership activities constituted 'a substantial independent objective of the LIV' and the LIV's regulatory work for certain statutory bodies was 'a major and … independent activity' of the LIV, with neither being incidental/ancillary to the pursuit of the LIV's charitable activities.

Some practical observations

While the case involved some interesting technical issues, readers will be interested in practical matters.

From a practical perspective, it is noteworthy that the Court declined (paras 129 & 130) to place any reliance on the registration (since July 2013) of the LIV with the Australian Charities and Not-for-Profits Commission (ACNC) as a charity. The trial judge observed that ACNC registration did not assist in interpreting the LIV's status under s. 48 of the PRTA because the ACNC status 'was achieved pursuant to a separate and distinct framework and criteria'.

In seeking the dominant purpose, the Court's attention was directed to the activities which the LIV undertook, the nature and extent of employees' engagement in the various activities, the relative proportions of the LIV's revenue receipts and expenses in relation to its various activities, the extent to which the organisation's website was devoted to member-only material (in contrast to publicly accessible material), benefits only available to LIV members (such as referral to members of professional enquiries from the public, discounts in respect of purchase of legal materials, access to professional specialist accreditation, discounts for members negotiated with third party suppliers, etc.) and the organisation's own views of its role/function in its publications such as its annual reports. This demonstrates the breadth of matters that might be raised for factoring into identification of the dominant purpose of an organisation.

A number of member-based organisations are invested with statutory regulatory powers/functions through delegations by statutory instrumentalities. While these organisations may operate below the payroll tax liability threshold so that PRT is not an issue, the LIV decision may have a more wide-ranging implication. It should be borne in mind that the Court drew upon on the concept of 'charity' in determining the test enshrined in s. 48 PRTA. Reversing the perspective - such organisations (or organisations which are considering accepting a delegation of statutory power) may like to consider whether their existing (or prospective) statutory regulatory power impacts on a claim for 'charity' status and, indirectly, any associated income tax concessions. It will be interesting to see whether the ACNC expresses any view in relation to the LIV Case and especially whether it finds a logical 'cross-over' that the Court disclaimed.

GST – ATO publications and level of protection

There are many forms of assistance that the ATO provides, both orally and in writing, about the laws administered by the Federal Commissioner of Taxation (the Commissioner). The main laws conferring powers or functions on the Commissioner are set out in Appendix 2 of the Commissioner of Taxation Annual Report 2014-15 and include for example, the *Australian Business Number Act, Goods and Services Tax Act, Income Tax Assessment Act*, various Superannuation Acts, *Excise Act*, etc.

In accordance with *Taxpayers Charter*, the ATO aims to provide accurate, consistent and clear advice and guidance to help taxpayers understand their rights, entitlements and meet their obligations with respect to the laws administered by the Commissioner.

The level of protection (as to a tax liability, penalties and interest charges) afforded to taxpayers who rely on each form of ATO advice or guidance varies depending on the type of information, the law it covers and the reason for the mistake.

This article considers some of the more common forms of ATO guidance and advice and the extent to which taxpayers that rely on this advice are protected.

Publications on the ATO website

The ATO publishes a range of written guidance on its website to help taxpayers understand their tax obligations and entitlements. Examples of public guidance publications include media releases/speeches and minutes from various consultative forums such as the:

- National Tax Liaison Group;
- Not-for-profit Advisory Group;
- GST Advisory Group;
- FBT States and Territories Industry Partnership.

For a list of all consultation groups and corresponding minutes refer to the following link: Consultation Groups.

Publications on the ATO website provide general assistance and cannot cover all possibilities or the circumstances of every taxpayer. Accordingly, they are not legally binding on the Commissioner.

The level of protection afforded to taxpayers who rely on such publications is set out in practice statement PSLA 2008/3. Broadly, unless otherwise stated in the document, a taxpayer who relies in good faith on written guidance that is found to be incorrect or misleading and whose circumstances are not materially different from those described in the document, remains liable for any underpaid tax. However, they will be protected against false and misleading statement penalty (administrative penalty) that might otherwise arise and also from any interest charges if the guidance is not out of date and the taxpayer relies on it reasonably and in good faith.

Media releases/speeches and minutes from various consultative forums that are published on the ATO website would ordinarily be publications approved in writing by the Commissioner. If they are so approved, and provided that they are not stated to be non-binding, they provide the same level of protection as mentioned above.

Rulings

The ATO's advice on the application of the laws administered by the Commissioner is generally provided in the form of a binding ruling and encompasses public, private, oral and class rulings, as well as administratively binding advice.

A ruling confers the highest level of protection for taxpayers and legally binds the Commissioner in relation to a taxpayer if the ruling applies to the taxpayer and the taxpayer relies on it. If the ruling is later found to be incorrect, a taxpayer is protected from paying tax that would otherwise be payable under the law and from administrative penalty and interest charges.

The level of protection afforded to taxpayers who rely on the various forms of binding ruling is also outlined in practice statement PSLA 2008/3.

Public rulings

A public ruling is a legally binding written advice, representing the Commissioner's considered and decided position on how a relevant provision applies to taxpayers in general or to a class of taxpayers.

The ATO publishes many different types of public rulings and the type of ruling is indicated in the title, for example:

- TR – taxation ruling;
- TD – taxation determination (short form ruling);
- GSTR – GST ruling;
- MT – Miscellaneous taxation ruling;
- SGR – Superannuation guarantee ruling;
- CR – class ruling;
- PR – product ruling.

Public rulings can be accessed via the ATO Legal database. The Legal database provides taxpayers access to the legal and policy information that is used by the Commissioner when making decisions such as legislation and supporting material, case decision summaries (details of important decisions made by the ATO), practice statements (directions to ATO staff on how to apply the laws administered by the Commissioner), tax related case law etc.

The following are some examples of public rulings published on the Legal database with regard to the not-for-profit sector:

- income tax and fringe benefits tax rulings for religious institutions (TR 92/17), exempt sporting clubs (TR 97/22), public libraries, public museums and public art galleries (TR 2000/10), public benevolent institutions (TR 2003/5) and members of governmental commissions or councils (IT 2014);
- goods and services tax rulings for adult and community education courses (GSTR 2000/27), financial assistance payments (GSTR 2012/2) etc.

Product and Class rulings

Product rulings and class rulings are two forms of public ruling that apply to defined schemes and defined classes of entities.

A product ruling is a public ruling for participants (or potential participants) in a particular scheme such as an investment scheme. It gives investors certainty about tax benefits that are legally available if the arrangement is implemented exactly as it has been outlined in the ruling.

A product ruling is not a guarantee of the commercial or financial viability of the product.

Types of products the ATO has been asked to rule on include:

- forestry managed investment schemes (for example, blue gums, pine, sandalwood);
- agribusiness projects (for example, vineyards, olives, fruits, nuts);
- financial products;
- other miscellaneous products like wind farms or donation schemes.

A class ruling is a public ruling for a particular class of taxpayers about a particular scheme (such as a ruling for employees about an employer-provided retirement scheme). Class rulings prevent the need for a private ruling to be sought by, or on behalf of, each taxpayer within the class of entity affected by the scheme. In such cases, those seeking a class ruling should make a full and true disclosure about the existing or proposed arrangements.

The following are some examples of class rulings published on the Legal database and the class of entities to which they apply:

- CR 2007/23 – this applies to referees and umpires officiating in competitions held at the Warwick Leisure Centre Western Australia ;
- CR 2007/24 – this applies to Rugby League Officials officiating in rugby league matches played in the Western Australia Rugby League competition;
- CR 2009/40 – this applies to representative public dentists employed by community health services under the Medicare Teen Dental Plan;
- CR 2012/51 - this applies to Doxa Cadetship Program made by the Doxa Youth Foundation;
- CR 2015/7 – this applies to clubs and societies co-ordinated by the University of Sydney Union etc.

Oral rulings

An oral ruling is an expression of the Commissioner's opinion of the way in which a relevant provision applies or would apply to an individual taxpayer (refer to PSLA 2008/3 for the list of relevant provisions). Oral rulings will not be given on business matters, complex matters, or matters that the Commissioner has either already ruled on or is in the process of considering for the taxpayer.

Private rulings

A private ruling is the Commissioner's written expression of how a relevant provision applies, or would apply, to a particular taxpayer in relation to a specified scheme. A private ruling therefore provides certainty about how a relevant provision applies to the taxpayer's particular circumstances.

A private ruling applies to the entity ('the rulee') which applied for the ruling or on whose behalf another entity applied for the ruling.

The Commissioner is legally bound by a private ruling if the rulee chooses to rely on the ruling.

However, where a scheme covered by the ruling is not implemented or carried out in the manner set out therein, or if material facts were omitted from the ruling application, or were misleadingly or inaccurately stated, the Commissioner is not legally bound by the ruling. In this instance, a taxpayer is no longer protected from paying tax that would otherwise be payable under the law or from administrative penalty and interest charges.

To improve the integrity of its advice processes, the ATO publishes edited versions of all written private binding ruling advice on the Register of Private Binding Rulings (Register). According to practice statement PS LA 2008/4, the Commissioner is not bound by an edited version of the written private binding rulings published on the Register.

Importantly, an edited version is not intended to provide a taxpayer with advice or guidance; is not a publication approved in writing by the Commissioner; and does not set out a general administrative practice of the Commissioner.

It is only the written private binding ruling advice that is provided to the taxpayer (from which the edited version is created) that is binding on the Commissioner, and only for the taxpayer to whom it applies. Therefore, a taxpayer that relies on information contained in an edited version which is incorrect or misleading is not protected from tax that would otherwise by payable or repaying an otherwise overpaid entitlement, interest or administrative penalty.

Accordingly, depending on a taxpayer's particular circumstance, it may be more prudent for a taxpayer to make their own request for a private ruling. This will give certainty to the level of protection as to their tax liability, administrative penalty and interest charges.

Taxpayers are required by the law to keep certain records and generally, these records must be in English and must be kept for five years.

Taxpayers are also expected to be truthful and to exercise reasonable care in the conduct of their income tax affairs. The amount of care that is expected of a taxpayer is that of a reasonable person in the taxpayer's circumstances that would take to meet their obligations. A failure to exercise reasonable care may result in the imposition of administrative penalty and interest charges.

To avoid the risk of making a statement that is false or misleading and therefore potential administrative penalty and interest charges, taxpayers should retain evidence of what ATO source materials that may have been relied upon to meet their tax obligations (for at least five years). This will also assist taxpayers in demonstrating reasonable care has been taken in the conduct of their income tax affairs.

Eligibility – Certain Not-for-Profit Entities Entitled to Cash Refunds of Franking Credits

Companies operating in Australia are generally required to pay tax at the rate of 30% on their profits (28.5% for small businesses).

When a company pays a dividend it can pass on the benefit of any income tax that it has paid, through franking the dividend. A franked dividend will entitle the shareholder to a franking credit (also known as an 'imputation credit') as shown in the dividend statement which the company issues to the shareholder. The franking credit can be off-set against the shareholder's own tax liability.

However, if the shareholder is an organisation which is a tax exempt registered charity, it will not have paid tax. In these circumstances where there is no tax liability against which the franking credit can be off-set, the franking credit would potentially be wasted. The income tax legislation contains special provisions that enable such shareholders to require the Australian Taxation Office (ATO) to refund the franking credits as a cash payment to these organisations.

There are also special provisions enabling shareholders that are certain deductible gift recipients (i.e. a 'DGR') or developing country relief funds to obtain cash refunds of franking credits that cannot be utilised by off-set against income tax liability.

Franked dividends can also pass through other entities. For example, it is possible for a company to a pay a franked dividend to a trust and for the trust formally to pass the whole or part of the franked dividend to a beneficiary. In this instance, the beneficiary is generally placed in a position corresponding to that of shareholder in the company for purposes of utilising the franking credit.

Towards the end of each income year, the ATO writes to entities that applied for and received a refund of franking credits in the prior income year and provides them with a 'refund of franking credits application package'. The package needs to be completed and returned to the ATO in order for the refund to be paid.

Applications for a refund of franking credits cannot be made electronically. Organisations that have not previously applied for a refund or who did not receive their personalised application for refund of franking credits package and which are in receipt of franked dividends can contact the ATO (telephone 1300 130 248) and order a refund application package.

Although there is a no time limit on the initial application for a refund of franking credits for a particular year, if the franking credit attached to dividend income is paid on or after 1 July 2013, the organisation will be subject to time periods (generally two or four years) within which to amend to their refund claim if the original claim was incorrect.

Further information on eligibility for a cash refund is available on the ATO website.

FBT Q&A – Employee contribution towards non-business accessories

Question:

An employer will fit non-business accessories (towbars) to cars that are provided to employees as car fringe benefits. The accessories are fitted at the time of purchase and the costs are included in the tax invoice provided by the car dealer to the employer.

The employer requires employees to make a cash contribution to them for 50% of the accessories' cost and installation.

How are these cash contributions treated for FBT purposes?

Answer:

The definition of 'cost price' for car base value purposes includes: 'the amount of any additional expenditure incurred by the person for or in relation to the fitting of non-business accessories to the car at or about the time when the car was acquired by the person, reduced by the amount of any reimbursement of the whole or a part of that expenditure paid, at or about the time when the expenditure was incurred, by a recipient of a car benefit in relation to the car'.

Based on the above definition, the cash contribution will result in a reduction to the base value of the car.

FBT Q&A – Vehicle designed to carry a load of 1 tonne or more

Question:

We have recently acquired a dual cab vehicle that we cannot find listed on the ATO's website as being a vehicle eligible for FBT exemption. How can we determine if the vehicle is designed to carry a load of 1 tonne or more such that it is not considered a 'car' for FBT purposes?

Answer:

The term 'car' for FBT purposes is defined as a motor vehicle designed to carry a load of less than one tonne and fewer than nine passengers. It follows that if the particular vehicle acquired has a carrying capacity of 1 tonne or more, it will not be a 'car' as defined and therefore falls for consideration as a residual benefit.

Miscellaneous Taxation Ruling MT 2024 provides guidance at paragraph 11 about determining the carrying capacity of a vehicle. Paragraph 11 states:

> ' … the designed load capacity of a motor vehicle is to be taken as the gross vehicle weight as specified on the compliance plate by the manufacturer (basically the all-up loaded weight), reduced by the basic kerb weight of the vehicle. For this purpose, basic kerb weight is synonymous with unladen weight, as specified in the Australian Design Rules, being the weight of the vehicle with a full tank of fuel, oil and coolant together with spare wheel, tools (including jack) and installed options. It does not include the weight of goods or occupants.'

Where the gross vehicle weight exceeds the basic kerb weight by 1,000 kgs (i.e. 1 tonne) or more the vehicle will be considered designed to carry a load of 1 tonne or more and thus will not be a 'car' as defined.

GST Q&A – Employee contribution towards non-business accessories

Question:

An employer will fit non-business accessories (towbars) to cars that are provided to employees as car fringe benefits. The accessories are fitted at the time of purchase and the costs are included in the tax invoice provided by the car dealer to the employer.

The employer requires employees to make a cash contribution to them for 50% of the accessories' cost and installation.

How do these cash contributions affect the employers input tax credit entitlement on purchase of the car?

Answer:

The employee's cash contribution to the employer is essentially reducing the consideration paid for the fitting of the non-business accessory and therefore reduces the employer's ITC entitlement if this occurs in the same BAS period.

If the employee's payment is received in a subsequent BAS period it will be treated as a decreasing adjustment in the later period.

Payroll Q&A – Offset of Superannuation Guarantee Contributions against Superannuation Guarantee Charge

Question:

Are employers able to offset late payment of a superannuation guarantee (SG) contributions against their superannuation guarantee charge (SGC)?

Answer:

Employers who fail to pay the minimum amount of SG contributions for their employees by the due date have to pay SGC. This charge is made up of the SG shortfall calculated on an employee's salary and wages, an interest component (currently 10% per annum on the SG shortfall) and an administration fee ($20 per employee, per quarter).

Employers are required to pay the SGC and lodge a SGC statement with the ATO by the due date. The due dates for SGC payment/lodgment can be found at the following link: SGC payment and lodgment dates. The ATO will transfer the SG shortfall amount and any interest to the employee's superannuation fund.

Failure to lodge the SGC statement or pay the SGC by the due date may give rise to a late lodgment penalty of 200% of the amount of SGC payable and general interest charge (GIC). The Commissioner may in certain circumstances remit the penalty and/or GIC. Guidelines for the Commissioner's discretions are set out in Practice Statements PS LA 2011/28 and PS LA 2011/12.

Note that the [*Exposure draft Superannuation Guarantee Legislation Amendment (Simplification) Bill 2015*] proposes to simplify the SGC including aligning the late lodgment penalty with the administrative penalties in the *Tax Administration Act 1953*. (Further information in relation to the proposed simplification is contained in the TaxEd Newsletter for August 2015.)

Where an employer has subsequently made a late payment of the SG amounts to their respective employees' superannuation fund and the payment was made on or before the relevant due date for payment and lodgment of their SGC, this late payment can be used to reduce their SGC liability. In this case the employer will need to pay the difference to the ATO by the relevant due date. For this to occur, the employer will have to lodge a late payment offset election with the ATO.

This is best illustrated by the following example:

> Employer A has failed to make its June quarter SG contributions by 28 July 2015. This contribution was subsequently paid by the employer directly to its respective employees' superannuation funds on 1 August 2015 (late payment). Because Employer A has failed to make its June SG contribution by the due date, it is liable for SGC. Employer A must pay this SGC and lodged the relevant SGC statement with the ATO by 28 August 2015. Since the late payment was made on or before 28 August 2015, Employer A can apply the late payment to reduce its SGC liability and pay the difference to the ATO by the due date. To claim this offset, Employer A must also lodge a late payment offset election with the ATO (preferably on or before 28 August 2015).