With the football finals a distant (thankfully for some) memory and having rounded 'The Cup' corner, we are now in the home straight leading up to Christmas break. However, Parliament is not reducing its pace.

This month's leading articles deal with two proposed legislative initiatives that were introduced into Parliament during October:

- the much-mooted proposed reporting requirements – these will impose obligations on Commonwealth, State, local government, and various other government entities and will inform the ATO about a variety of activities in which (*inter alia*) other not-for-profit readers are likely to engage; and
- the curtailment of FBT concessions relating to meal entertainment and entertainment facility leasing.

As always, we welcome any comments and any suggestions for topics that you would like us to cover. We have received several suggestions, and responses to how best to meet these needs are under consideration. Please keep the suggestions coming!

Regards

Andrew Orange

TaxEd Team

Salary Packaging – Entertainment benefits to be amended

On 15 October 2015, the *Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015* was introduced into Parliament.

The purpose of this article is to outline the proposed amendments to FBT. Future articles will examine the practical implications for affected employers.

The Bill contains amendments to limit the concessional treatment of salary packaged meal entertainment benefits or entertainment facility leasing expenses 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 the 2017 FBT year, i.e. on 1 April 2016.

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.

Including entertainment benefits in the employee's reportable fringe benefits total

It is proposed to include entertainment fringe benefits in determining the employee's individual fringe benefits amount and reportable fringe benefits total by removing from the definition of 'excluded fringe benefit':

- the provision of meal entertainment which is provided under a salary packaging arrangement; and
- benefits that are wholly or partly attributable to entertainment facility leasing expenses which are provided under a *salary packaging arrangement*.

Entertainment benefits that an employer does not provide to an employee as part of a salary packaging arrangement will continue to be excluded benefits.

Removing access to elective valuation rules when valuing salary packaged entertainment benefits

The proposed amendments prevent the elective valuation rules for meal entertainment benefits and entertainment facility leasing expenses from being applied to value salary packaged entertainment benefits.

Accordingly, the elective valuation methods, namely the 50/50 split method and the 12-week register method, cannot be used to determine the taxable value of *salary packaged entertainment benefits*.

However, the elective valuation rules will continue to be available to calculate the value of entertainment benefits that fall within their current scope.

A cap on the total amount of salary packaged entertainment benefits

Exempt employers covered under section 57A of the FBTA Act

Since the proposed amendments will remove salary packaged entertainment benefits from being an excluded benefit, the grossed-up taxable value of these benefits will be relevant in determining whether, and by how much, the applicable cap (i.e. $17,000 or $30,000) applying to FBT exempt employers has been exceeded.

The proposed amendments limit the existing concessional treatment of *salary packaged entertainment benefits* for these employers by increasing the existing capping threshold by the lesser of:

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

Accordingly, employees of these employers will have a grossed-up cap of $5,000 each FBT year for salary packaged entertainment benefits that are eligible for the existing exemption. Where this cap is exceeded, any benefits may be taken into account under the existing caps before determining whether there is any excess that will 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.

GST – Third Party Reporting Legislation introduced into Parliament

In an earlier article reference was made to the previously announced plans to expand the regime for reporting of transactions to the Australian Taxation Office. A Bill (*Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015*) to give effect to this intention was introduced into Federal Parliament on 15 October and the associated availability of further detail makes it timely to revisit this area of taxation law. It is proposed to give an overview of the Bill at this stage and to address further matters in future articles.

In short, the Bill:

'...creates a new reporting regime requiring third parties to report on the following transactions:

- payments of government grants;
- consideration provided for services to government entities;
- transfers of real property;
- transfers of shares;
- transfers of units in unit trusts; and
- business transactions made through payment systems.'

How will the reporting affect you?

Some of our readers will be impacted by incurring an obligation to report. Other readers will have information relevant to them being reported. The Explanatory Memorandum (EM) accompanying the Bill notes (para. 4.12) that the following third parties are required to provide reports as outlined below:

(a) 'government related entities, other than local governing bodies, must report on government grants';

(b) 'government related entities must report on consideration they provide for services';

(c) 'states and territories must report on transfers of real property in their jurisdiction';

(d) 'the Australian Securities and Investments Commission (ASIC), market participants and trustees of trusts with an absolutely entitled beneficiary must report on transactions relating to shares and units of unit trusts';

(e) 'listed companies must report on transactions relating to their shares';

(f) 'trustees of unit trusts must report on transactions relating to their units'; and

(g) 'administrators of payment systems must report on electronic business transactions'.

From a practical perspective, we especially draw attention to the reporting obligations of items (a) and (b). These are discussed in more detail below. In the case of not-for-profit readers whose transactions will be subject to reports, each of the transactions envisaged by items (a) to (g) will be potentially relevant – these range over dealings with government entities, investments and income earning activities.

It will be noted that item (d) comprises three categories of reporting entities. They all focus on transactions relating to financial securities and each of the three categories will provide information to the ATO which will complement the others' information. The three categories are:

(i) ASIC;

(ii) certain participants (e.g. share brokers) in an Australian financial market – this ensures the ATO is provided with full information relating to dealings within those financial markets; and

(iii) basically, nominee shareholders – more particularly, this category comprises 'a trustee of a trust (other than a unit trust)' – this entity is required to report changes to the type, name or number of any shares in a company or units in a unit trust where the shares or units are held as trust assets and 'to which one or more entities are absolutely entitled as beneficiaries of the trust', unless 'the trustee gives an income tax return for the year in which the transaction was entered into'.

It appears from the EM (para. 4.20) that the initial practical focus will be directed to obtaining information primarily relating to income tax compliance. As noted below, the form in which the Bill is drafted enables information appertaining to an extensive range of Commonwealth taxes to be sought by the ATO. The EM envisages that, at this initial stage, there will be less focus on collecting information that is solely relevant to other types of taxes such as GST, excise duty, withholding tax etc. However, it will be appreciated that information relevant to income tax liability will, in many circumstances, also be relevant to assessing GST liability and will inform ATO evaluation of an entity's GST compliance.

Reports on Government Grants

Local governing bodies are excepted from the need to report on grants. The rationale for the exception is that 'grants [made by local governing bodies] are rarely assessable for income tax purposes'. Given that the reporting regime is intended to enable the ATO to monitor disclosure of transactions with taxation consequences and is, at this stage, primarily focussed on ensuring amounts assessable to income tax are disclosed by taxpayers, the position is understandable.

With the exception of local governing bodies, 'Government related entities' (GST concept) are required to report grants. The reporting entities will include Commonwealth, State and Territory governments and certain entities they have established to carry on an 'enterprise' (GST concept).

While tax exempt entities may be the recipients of grants, the legislation recognises that the particular income taxation status of a recipient will generally be outside the knowledge of the grantor. The grantor is required to report all grants, 'even though the grant may not ultimately be taxable in the hands of the recipient, or the recipient is exempt from taxation' (EM at para. 4.46).

The EM notes (para. 4.45) that entities reporting grants 'only need to provide information on grants made to entities that have an Australian Business Number. It appears that grants given to entities that do not have an ABN are assumed to be low value amounts that 'are rarely assessable'.

The legislation does not define the term 'grant'. The EM discussion of the concept will provide a useful future touchstone in determining whether a grant exists, with the result that a reporting obligation arises.

Reports on Consideration for Services Provided

Government entities that provide consideration for the supply of services will need to provide a report to the ATO in respect of the supply. Use of contractors and consultants are prime examples of the circumstances in which this reporting obligation will arise.

The key points to note are:

(a) The entities to whom this reporting obligation applies are any 'government related entity' as defined for purposes of GST. This includes a 'government entity' (as defined for ABN/GST purposes), a local governing body established under a State or Territory law, and certain organisations that are established by the Commonwealth/State/Territory to carry on an 'enterprise' (as that term is used for GST/ABN purposes).

(b) Reports are required where consideration is provided for the supply (as defined for GST purposes) of services or, where there is a mixed supply of goods and services, partly for the supply of services. However, consideration provided solely for the supply of goods, or for the supply of services merely incidental to the provision of goods, does not give rise to any reporting obligation.

The EM gives the following illustration of an incidental supply of services:

> 'A local council orders 1700 black pens from an office supply company and pays an additional fee for delivery.
>
> Delivery of the pens constitutes a service. However, since this service has been provided incidentally to the provision of the goods, it does not need to be reported.'

(c) The Bill adopts the GST concept of 'consideration'. This includes:

- any payment, or any act/ forbearance in connection with a 'supply (in the GST sense of 'supply') ; or
- any payment or act/forbearance in response to or for the inducement of such a supply.

'Consideration' is not limited to monetary payments but could take the form of non-cash benefits and constructive payments. As a result, it will be necessary to identify the benefits which a contractor is to receive in payment for /inducement for /in response to providing services to the government entity.

The Nature of the Reporting Obligations

The Bill applies in a wide variety of circumstances. Accordingly, it has been framed in a manner that enables the ATO to determine the precise information to be provided, through the mechanism of requiring information to be given in the 'approved form'.

However, the Bill sets parameters as to the type of information that the ATO can require. It is useful to consider briefly, these parameters in order to anticipate the type of information that will be required.

For present purposes (which are unlikely to involve market participants referred to in category (d) above), the parameters are:

1. The information 'must relate to the identification, collection or recovery of a possible 'tax-related liability' of a party to the transaction' (e.g. the grant, the provision of consideration for supply of a service, etc.) to which the report relates.

   Note:

   The term 'tax-related liability' refers to a pecuniary liability to the Commonwealth arising directly under a taxation law ...'. It will include a liability to pay tax under a law administered by the Commissioner of Taxation and will include income tax, GST, excise duty etc. The EM recognises that 'pecuniary liability' is not confined to tax but would include administrative penalties that may be imposed on a taxpayer. Further guidance on the concept of a 'tax-related liability' is set out in s. 250-10 of Schedule 1 to the *Taxation Administration Act 1953*.

2. Information relating to identifying parties to a transaction may be sought.

3. In relation to information sought from States and Territories in relation to transactions relating to land, the ATO may request tax file numbers of the parties to the transaction.

The general tenor of the EM is that the reporting entity is not expected, in reporting, to determine whether a party to a transaction is liable to pay tax (e.g. see para. 4.18 of the EM). As a result, the reporting entity may be reporting information that will not, in fact, be pertinent to a tax-related liability of a party to a transaction. For example, the fact that a party to a transaction is exempt from paying income tax will not, as a general rule, relieve the reporting entity from providing information relating to the imposition of income tax.

The ATO is empowered to exempt entities from having to report or from having to report in relation to particular classes of transactions specified by the ATO. In certain circumstances an entity which is dissatisfied with an ATO decision exempting it, or refusing to exempt it, from providing a report can object to the decision and pursue formal review processes if the ATO maintains the decision on objection.

At first glance, the former circumstance of a reporting entity being dissatisfied with a decision to exempt it from reporting may seem odd. One circumstance which might prompt objection is the time and cost in identifying and excluding relatively isolated transactions from a systematised reporting process.

Consequences of Errors made in Reporting

The EM recognises that an error made in providing a report can expose the person making the statement (e.g. the reporting entity) to an administrative penalty for provision of false or misleading information. It contemplates that the existing administrative penalty regime will apply (see EM at para. 4.22).

Furthermore, the draft legislation imposes an express obligation on a reporting entity to correct an error in a report 'no later than 28 days after the entity becomes aware of the error'.

Timing of Reports – for which periods are reports to be prepared and when are the reports due?

Timing of reports involves two issues – identification of the period to which a report relates and when reports are to be provided.

Reporting Period

Reports are to be provided in respect of each financial year. The ATO is empowered to vary the reporting period by legislative instrument. With two exceptions, the first reporting period will be the financial year 2017-18 (i.e. reporting of transactions occurring after 1 July 2017). The exceptions are reports by States and Territories in relation to transactions relating to land and reports by ASIC. These entities will need to report the transactions occurring after 1 July 2016, with the result that the first reporting period is the financial year 2016-17.

In order to provide a degree of certainty in the initial stages of implementing the reporting regime, the ATO's power to vary the length of reporting periods is not operative, in most cases, until 1 July 2020. The exceptions relate to reporting by States and Territories in respect of land transactions and reporting by ASIC. In these cases, the variation power is operative from 1 July 2016.

The EM indicates that reporting periods may be varied in the future as evolution of technology and systems allow accommodation of such change.

Reporting Dates

The Bill provides for reports to be given to the ATO on or before the 31st day after the ending the period to which the report relates. The ATO has power to vary the due date by legislative instrument.

In order to provide certainty in the initial stages of implementing the reporting regime, the ATO does not (subject to two exceptions) have this amending ability until 1 July 2020. The exceptions allow the ATO to vary the 31 day period at any time on or after 1 July 2016 in the case of States and Territories reporting transactions in relation to land and in the case of reporting by ASIC.

GST – Revisiting the Division 81 tiebreaker rules

The ATO issued a Class Ruling (CR 2015/67) on 26 August 2015 dealing with the GST treatment of waste management services (WMS) supplied by NSW councils. This Ruling addresses the GST treatment of the supply of WMS by councils on or after 1 July 2015, and replaces CR 2013/19.

Whilst Class Rulings relates to a defined class of entities in relation to a precise scheme CR 2015/67 confirms a very important point in relation to how the Division 81 tiebreaker rules apply.

In CR 2015/67 the ATO changed the view it originally expressed in CR 2013/69 that the supply of replacement garbage bins was dealt with by the Division 81 tiebreaker rules and as such held to be consideration.

We examine the tie breaker rules below and why the ATO needed to change the position originally adopted.

Regulation 81.15.02 provides that

> Where the payment of an Australian fee or charge is covered by both
>
> > Regulation 81.10.01(1)(a), (b), (c), (d), (e), (f), or (h) (which treat certain payments as consideration)
>
> and
>
> > Regulation 81.15.01 (which treats certain payments as not consideration)
>
> then
>
> > Regulation 81.10 should prevail (ie the payments are consideration).

However for the Tiebreaker rule to even need to be considered the payment must be covered by both provisions.

In CR 2015/67 the matter under consideration was the payment for the supply of replacement rubbish bins provided by local councils.

This supply was not covered by both Regulation 81.10 and Regulation 81.15.

Regulation 81.15.01(1)(a) specifically includes (as not consideration) a fee for "... the supply, exchange or removal of bins or crates used in connection with kerbside collection of waste".

Regulation 81.10 however only deals with payments that would not otherwise be consideration as provided by section 81-10(4) and (5) of the GST Act.

Section 81-10(4) deals with payments that are broadly described as "permissions" and section 81-10(5) deals with payments related to matters broadly described as "information and record-keeping". The supply of a rubbish bin is clearly not covered by those sections.

The ATO's original views that the tiebreaker rules applied (presumably on the basis that Regulation 81.10.01 (h) applied being a supply that could also be made by other than an Australian Government Agency) was therefore incorrect as the underlying payment was not covered by either of section 81-10(4) and 81-10(5). Regulation 81.10.01(h) was not applicable (even assuming it could have applied to the payment).

It might be timely for taxpayers to review whether any other treatment of payments as consideration under the tie-breaker rules has proceeded on the correct basis that the payment was in fact covered by Regulation 81.10 which pre-supposes the payment is covered by either of section 81-10(4) or 81-10(5).

GST – The Commissioner's hunt for omitted transactions - data matching initiatives

On 6 October 2015, the ATO announced that it was undertaking specific data matching activities in the following areas:

- credit and debit cards;
- motor vehicle registries;
- online selling;
- specialised payment systems; and
- ride-sourcing.

We expect that the vast majority of our readers will already have systems in place to ensure taxable supplies made via transactions within the ambit of the above data matching programs are disclosed. However, we suggest the ATO announcement is a timely reminder to review whether your organisation makes supplies (or conversely acquisitions) through any of transaction modes being targeted by the ATO, to ensure that these transactions feed into your process of accounting for GST (including obtaining all input tax credits to which it is entitled to claim).

We understand the ATO's focus relates to detecting any GST or other tax liability that is not being disclosed. However, as part of your organisation's review of its activities, you may also like to take this opportunity to check not only are its input tax credits being captured, but also supporting tax invoices for these are being obtained and "filed".

The table below summarises the specific data matching activities that the ATO is undertaking in relation to the relevant data matching program.

Data matching programs	Data matching activities
Credit and debit cards	The ATO obtains data from the following banks and institutions: ■ American Express Australia Limited ■ Australia and New Zealand Banking Group Limited ■ Bank of Queensland Limited ■ Bendigo and Adelaide Bank Limited ■ BWA Merchant Services Pty Ltd ■ Commonwealth Bank of Australia ■ Diners Club Australia ■ Westpac Banking Corporation. ■ National Australia Bank Limited ■ St George Bank ■ Tyro Payments Limited
Motor vehicle registries	The ATO has obtained data from all state and territory motor vehicle registering bodies to identify all motor vehicles sold, transferred or newly registered, where the transfer and/or market value was $10,000 or greater.
Online selling	The ATO has obtained details of online sellers from online selling sites who have sold goods and services of $10,000 or more where the data owner or its subsidiaries: ■ operates a business in Australia that is governed by Australian law; ■ provides an online market place for businesses and individuals to buy and sell goods and services; ■ tracks the activity of registered sellers; ■ has clients whose annual trading activity amounts to $10,000 or more; and ■ has trading activity for the years in focus.
Specialised payment systems	The ATO obtains data from the various providers, such as PayPal Australia, EzyPay and BPAY, on electronic payments made through specialised payment systems to Australian businesses. This data is analysed in conjunction with data collected through the credit and debit-card data matching program.

Data matching programs	Data matching activities
Ride-sourcing (While we expect our readers will not be making ride-sharing supplies, we especially note they may be acquiring ride-sourcing services.)	The ATO obtains data from financial institutions to match against ATO records to identify ride-sourcing drivers to assist them and to ensure that they are correctly meeting their registration, lodgment, reporting and payment obligations. On 7 October 2015, the Commissioner published a notice of a data matching program to identify individuals who may be engaged in ride sourcing services during the 2013–14 to 2015–16 income years. The ATO will obtain the following data from the source entities: 1. payee account name; 2. payee BSB; 3. payee account number; 4. date of payment to the payee; and 5. amount of payment to the payee. The purpose of this data matching program is to ensure that taxpayers are correctly meeting their tax obligations in relation to ride sourcing payments. These obligations may include registration, lodgment, reporting and payment responsibilities.

FBT – Whether exempt residual benefit includes an employee keep fit class

On 7 October 2015, the Commissioner issued ATO ID 2015/25. It states that a residual benefit that arises where an employee participates in a fitness class provided by the employer on the employer's premises will not be an exempt benefit under s. 47(2) of the *FBTA Act*.

Under s. 47(2), where 'a residual fringe benefit provided to a current employee in respect of his or her employment consists of ... the provision or use of a recreational facility', the benefit is exempt.

Facts

The employer entered into an agreement with a fitness instructor for the running of weekly fitness classes for employees in a room on the employer's business premises. The room contained gymnasium equipment and a carpeted open space. As part of the fitness class, the employee of the employer could use the gymnasium equipment in the room.

Decision

The residual benefit that arises from the participation of an employee in a fitness classes on the employees premises is not an exempt benefit under s. 47(2) because the benefit provided to the employee is the participation in a fitness class and not the provision, or use, of a recreational facility as required by s. 47(2).

Reasons

The benefit that arises from the employee's participation in the fitness class is a residual benefit and will only be exempt under s. 47(2) if the benefit consists of the provision, or use, of a recreational facility located on the business premises of the employer (or if the employer is a company, a company that is related to the employer).

'Recreational facility' is defined in s. 136(1) of the *FBTA Act* to mean ... 'a facility for recreation, but does not include a facility for accommodation or a facility for drinking or dining'. 'Recreation' is defined in s. 136(1) of the *FBTA Act* to include:

(a) amusement;

(b) sport or similar leisure-time pursuits; and

(c) recreation or amusement provided on, or by means of, a vehicle, ship, vessel or aircraft.

It is also relevant to consider the ordinary meaning (below) of the term 'recreation' because the definition in s. 136(1) is inclusive:

- refreshment by means of some pastime, agreeable exercise, or the like;
- a pastime, diversion, exercise, or other resource affording relaxation and enjoyment.

ATO ID 2009/141 discusses the meaning of the term 'facility' in the context of the definition of entertainment facility leasing expenses and, in summarising the dictionary, income tax and FBT definitions, states:

> 'The word facility, as described in each dictionary definition above, and as used in the income tax and fringe benefits tax definitions above is of wide meaning. It is accepted that the term 'facility' as it is used in the definition of 'entertainment facility leasing expenses' also has a wide meaning

that includes buildings, part of buildings or other structures used for the purpose of the provision of entertainment.'

(Note - ATO ID 2009/141 deals with whether an employee hiring a marquee for use at the employee's home for the provision of entertainment is a facility as used in the definition of 'entertainment facility leasing expenses' under s. 136(1) of the *FBTA Act*.)

Accordingly, a similarly wide meaning would apply to the term 'facility' in the context of a 'recreational facility', which can include buildings, part of buildings, structures or items, such as food or drink vending machines or pool tables.

In this case, the room in which the fitness class was being conducted was a recreational facility and the exercises could involve the gymnasium equipment located in the recreational facility. However, the relevant **benefit** provided by the employer to the employee was the participation in the fitness class rather than the provision, or use, of a recreational facility. Accordingly, the residual benefit arising from the provision of the fitness classes was not an exempt benefit under s. 47(2) of the *FBTA Act*.

Salary Packaging Q&A – Recipients Payment

Question:

Can an employee make employee contributions towards the provision of their car benefit by paying car running costs directly from their after-tax dollars?

Answer:

Yes.

The recipient's payment in relation to a car is the sum of:

i. any expenses incurred by the recipient to the provider or employer in relation to the car - this is commonly done through payroll by way of an after-tax deduction from the employee's salary/wage payment; or

ii. car expenses in respect of fuel and oil if documentary evidence or a declaration is given to the employer before the declaration date and other car expenses if documentary evidence is provided before the declaration date incurred directly by the recipient.

A 'car expense' in relation to a car includes expenses in respect of registration, insurance, repairs, maintenance and fuel.

Salary Packaging Q&A – Payments against mortgage

Question:

Can an employee enter into an effective salary sacrifice arrangement whereby an agreed amount per pay period is paid directly into their home loan redraw facility?

Answer:

Provided the salary sacrifice arrangement complies with the Commissioner's guidelines in TR 2001/10 the ATO will accept such an arrangement.

For a benefit to be an expense fringe benefit the employer must be making a payment in relation to an 'obligation' of the employee and that the payment is in respect of 'expenditure incurred' by the employee.

The ATO considers an arrangement for the employer to repay the employee's loan account (with or without redraw facility) is considered to be an 'expense payment fringe benefit' provided by the employer to the employee. The full amount borrowed by the employee is viewed as the obligation of the employee, which has been partially met by the employer.

GST Q&A – supply or grant?

Question:

Where repairs/maintenance work is undertaken for a NFP community group on premises owned by the group and there is a requirement the beneficiary make payment is it a supply or grant?

Answer:

Where there is requirement for the beneficiary to reimburse the provider for repair/maintenance works completed, it is very difficult to mount any argument that the reimbursement is anything other than consideration for a supply and, thus, the supply is taxable under the basic GST rules.

GSTR 2012/2 demonstrates that a number of factors need to be considered as to whether a supply is made for consideration in the context of grants of financial assistance:

(i) Grants can be made by way of cash payment and where the recipient of the cash may be taken to make a supply such that the cash is taken to be consideration for that supply.

(ii) Alternatively, grants can be made by way of an in-kind provision to the grant recipient. Where a grant takes the form of an in-kind provision, it is necessary to consider two separate matters:

- whether the in-kind provision is a supply made by the grantor to the grant recipient (and if so whether the recipient gave any consideration); and
- whether the in-kind provision also represents consideration provided by the 'grantor' for a separate supply made by the grant recipient to the grantor..

In this case, the matter ultimately falls for consideration under the basic GST rules, because provision of the repair/maintenance is provided for cash consideration and does not appear to be provided under any grant programme undertaken by the provider of the repair/maintenance services.

Payroll Q&A - Is 'annual leave loading' 'ordinary times earnings' for SGC purposes?

Question:

An award provides that employees are entitled to a 17.5% annual leave loading.

Is the 'annual leave loading' ordinary times earnings for Superannuation Guarantee purposes (assuming superannuation payable is determined by the SGC rules and not otherwise stipulated in an award).

Answer:

Where we focus only on the minimum SGC requirements (i.e. whether minimum super has been provided on Ordinary Times Earnings) paragraphs 35 and 238 of SGR 2009/02 provide some guidance and the ATO view as to whether annual leave loading is included in 'ordinary times earnings' (OTE). These paragraphs state:

> '35. The principle in paragraph 32 of this Ruling does not extend to extra payments by way of 'leave loadings', and like payments, that are demonstrably referable to a notional loss of opportunity to work overtime, or similar.'
>
> '238. By way of exception an annual leave loading that is payable under some awards and industrial agreements is not OTE if it is demonstrably referable to a notional loss of opportunity to work overtime. However, the loading is always included in 'salary or wages'.'

The ATO website also suggests annual leave loading is not OTE and specifically includes 'annual leave loading' in a list on the website as not being OTE although caution should be taken as the condition stipulated in SGR 2009/02 is not repeated and general material on the ATO website is not binding (see - http://calculators.ato.gov.au/scripts/net/SGCalculatorWeb/help/Amount.aspx?ms=Businesses)

The answer to the question therefore depends on whether the inclusion of annual leave loading in the award is intended to cover the notional loss of opportunity to overtime. If it is intended to do so, then the OTE does not include the leave loading. If it is not intended to do so, OTE will include the leave loading.