The team has been working hard on finalising the online Professional Certificate in FBT so watch this space as it will be available soon and we are also currently in discussion with the ATO in hopes of preparing a complimentary session on Single Touch Payroll for early 2017.

This month we take a look at the new FBT concession regarding log-books and fleet cars, the backpacker tax reforms, a recent case that is a timely reminder about new "GST" residential premises and other intriguing tax topics.

Again, don't forget to join Michael on Monday (7 November) for the live online session to hear more on this month's articles. You can register via the link at the bottom of this email.

Regards,

The TaxEd team

FBT – Simplified Approach for Calculating FBT for Fleet Cars

The operating cost method of calculating the FBT payable on a car fringe benefit requires more onerous paperwork to be kept than the statutory formula method. Part of this paperwork includes maintaining a log book of travel undertaken in the car for a minimum period of 12 weeks.

The logbook that is kept is then used for the purposes of assisting the determination of the relevant business use percentage applicable to the car. Where an employer has a large fleet of vehicles for which the log book method is utilised this can be a compliance burden.

The ATO has recently issued Practice Compliance Guideline *PCG 2016/10 - Fleet Cars: simplified approach for calculating car fringe benefits*. PCG 2016/10 provides an optional, simplified approach to working out the 'business use percentage' component of the operating cost method for employers with a fleet of 20 or more cars.

If an employer meets certain criteria specified in the guideline, the employer can apply an average business use percentage to all 'tool of trade' cars held in the fleet in the log book year and the following four years. If the criteria are satisfied the approach can be used starting in the 2016-17 FBT year.

The Guideline will apply to an employer if all of the following criteria are met:

1. The employer has a fleet of 20 or more cars.
2. The cars are 'tool of trade' cars.
3. The employees are mandated to maintain log books in a log book year.
4. The employer holds valid log books for at least 75% of the cars in the log book year.
5. The cars are of a make and model chosen by the employer, rather than the employee.
6. Each car in the fleet had a GST-inclusive value less than the luxury car limit applicable at the time the car was acquired.
7. The cars are not provided as part of an employee's remuneration package (for example, under a salary packaging arrangement), and employees cannot elect to receive additional remuneration in lieu of the use of the cars.

In regards to the second criterion, at first instance one may think that the term 'tool of trade' cars refers to cars that are traditional workhorse vehicles such as utes, dual cabs, panel vans and the like. However, this is not the case. For example, cars provided to sales representatives where they are subject to extensive business use fall within the guideline.

For the purposes of the fifth criterion, a car will be taken to have been chosen by the employer if selected by the employee from a limited list of cars nominated by the employer, such as for the purposes of meeting work, health and safety requirements.

If an employer meets the above criteria, it can apply an 'average business use percentage' to all tool of trade cars held in the fleet in the log book year and the following four years.

The average business use percentage is calculated by:

- gathering all log books kept for each car in the fleet;
- determining which of those log books are valid;
- confirming the employer has valid log books for at least 75% of the cars in the fleet; and
- calculating the average of the business use percentages determined in accordance with each of the valid log books.

The calculation for the purposes of the last dot point can be undertaken by either summing the percentages determined by each of the valid log books and dividing by the number of valid log books, or by summing the business kilometres recorded in each valid log book and dividing by the total kilometres recorded in each valid log book. Whilst the Guideline does not explicitly state that the higher percentage can be used, given that the ATO accepts both methods it appears that this is the situation.

This simplified approach can be applied for a period of five years in respect of the fleet provided the fleet remains at a minimum of twenty cars.

The approach outlined in the Practical Compliance Guideline is commendable and should be a useful approach for employers with large car fleets that adopt the operating cost method.

Two matters that are not entirely clear in our view are the third and fourth criteria. Is it a requirement that employees are directed to keep a log book in the same year for all the cars in the fleet, or where log books are currently in existence, can these be used in addition to current year log books?

We are endeavouring to clarify this requirement and will advise any update in a future edition.

GST – A Reminder about New Residential Premises and Other GST and Property Transaction Issues

A recent Administrative Appeals Tribunal case provides a timely reminder of the some of the basic rules regarding the possible GST implications when new residential premises are constructed, initially leased, and subsequently sold. This particular taxpayer learned a great deal about what this means in terms of any GST liability on sale, the implications for input tax credits (ITCs) incurred on construction and other costs and what needs to happen if you wish to/or use the margin scheme. Unfortunately, the taxpayer also learned about taxation penalties!

The facts of this case, *FKYL and Commissioner of Taxation (Taxation)* (14 October 2016), are not particularly complicated. However, it appears the taxpayer was blissfully unaware of the implications of the GST system on the type of transaction being undertaken.

In summary, the taxpayer purchased four blocks of vacant land (ostensibly under the margin scheme), built four residences, and attempted to sell each of the residences but at the same time leased each for use as residential premises for varying periods of time before selling the premises (generally to the tenant). None of the properties were leased for more than five years.

The taxpayer was registered for GST but did not claim any ITCs on the purchase of the properties and did not remit any GST on sales of three of the properties. The taxpayer did remit GST on the sale of one property and appeared to have claimed ITCs on construction costs of all properties.

The taxpayer claimed to have sold the properties on a 'margin scheme' applicable basis. However, it was unable to produce the required written agreement with the respective purchasers, despite being granted an extension of time to provide the written agreements.

So what are the lessons from this case?

(a) A supply in the course or furtherance of an enterprise/a taxable supply?

A taxpayer that is registered for GST is ostensibly accepting that it is carrying on an enterprise and therefore a supply made by it is in the course or furtherance of an enterprise which is being carried on. It would follow under normal GST principles that any supply made would be a taxable supply, unless GST-free or input taxed.

In any event, the acquisition of four blocks of land and the construction of four residences for sale (albeit the premises were rented pending sale) would comprise an enterprise.

(b) Why are residential premises that are rented prior to sale subject to GST?

As to whether the sale of the properties was a taxable supply - that would be the outcome unless the sale was input taxed or GST-free.

Subdivision 40-C of the *GST Act* deals with sales of residential premises. Section 40-65 relevantly provides:

'(1) A sale of real property is input taxed, but only to the extent that the property is residential premises to be used predominately for residential accommodation (regardless of the term of occupation).

(2) However, the sale is not input taxed to the extent that the residential premises are:

(a) commercial residential premises; or

(b) new residential premises other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998.'

Section 40-75 of the *GST Act* provides that residential premises are new residential premises if they have not previously been sold as residential premises **and** have not, for a period of at least five years, been used for making supplies that are input taxed because of s. 40-35(1)(a). Subsection 40-35(1)(a) confirms that a supply of residential premises by way of lease is input taxed.

In this instance none of the properties had been leased for use as residential premises for a period of five years and accordingly the properties were new residential premises for GST purposes. It does not matter that the taxpayer had owned the land on which the premises were constructed for more than five years.

Using the margin scheme

Section 75-5 of the *GST Act* confirms that that the margin scheme applies in working out the amount of GST payable if, inter-alia, the vendor and the recipient have agreed in writing that the margin scheme is to apply.

Even though the ATO have discretion to allow the taxpayer to secure such written agreement post settlement, ordinarily this agreement is found in the contract of sale.

If the written agreement is not present, full GST applies (i.e. 1/11th of sale price).

If the margin scheme is available, the GST liability is 1/11th of the margin, being the difference between the sale price and land acquisition price.

A further caution exists in that the eligibility to use the margin scheme is also dependent on the GST basis on which that taxpayer acquired the land. In this case, as the land was acquired under the margin scheme and so potentially it could be sold under the margin scheme.

The implication for input tax credits on construction costs

Section 11-5 of the *GST Act* defines a creditable acquisition.

It provides:

'You make a creditable acquisition if:

(a) you acquire anything solely or partly for a creditable purpose; and

(b) the supply of the thing to you is a taxable supply; and

(c) you provide, or are liable to provide, consideration for the supply; and

(d) you are registered, or required to be registered.'

Certain acquisitions may be acquired only partly for creditable purpose and s. 11-30 expressly recognises this possibility.

Certain acquisitions are expressly excluded from creating an entitlement to ITCs. In the case of land purchased under the margin scheme, an ITC is not available for any GST embedded in the purchase price. Section 11-30 confirms an acquisition of a freehold interest in land is not a creditable acquisition if the supply of the interest was a taxable supply under the margin scheme.

In terms of other acquisitions the taxpayer made, entitlement to an ITC is determined by the extent to which the taxpayer made the acquisition for a creditable purpose. The concept of a creditable purpose does not extend to acquisitions made for the purpose of making input taxed supplies.

In this case, certain acquisitions related to construction of the properties and others (non-construction costs) related only to the period of time in which the properties were rented. Residential rental is an input taxed supply.

The following treatments were accepted.

Construction costs – in accordance with normal ATO practice, ITCs in relation to construction costs were able to be retained, however apportionment was required. In this instance the apportionment basis allowed ITCs to be retained in the proportion to which the sale proceeds bear to total revenue from the use of the properties (i.e. sale revenue and rental revenue).

Non-construction costs – the taxpayer had claimed ITCs for expenses related to renting the property prior to sale. Those ITCs were disallowed because they related to expenses for making input taxed supplies.

The end result

It appears the taxpayer learned a lot about the 'in's and out's' of GST on these types of transaction.

Unfortunately in addition to having to make good the GST shortfall, the taxpayer had to pay for the privilege of the lesson by way of a 25% administrative penalty.

Payroll – The Bears Case: Implications of Payments Made for the Use of Image

The recent Queensland Supreme Court decision in *Brisbane Bears – Fitzroy Football Club Limited v Commissioner of State Revenue* (the Bears Case) in relation to application of payroll tax (PRT) has broader implications than might appear from a cursory reading of the case.

While the case is immediately concerned with PRT, it also prompts thought in respect of implications, from an employer's perspective, of matters such as liability for superannuation guarantee charge and PAYG. From the perspective of a payment recipient, it prompts consideration of application of the personal services income tax regime.

While the case was concerned with an AFL club, one might also consider its potential reach to other sporting codes with professional participants (players or officials). However, its potential reach is not limited to sports, but extends to other occasions on which an individual (or his/her corporate entity) enter into licences for use of the individual's image ostensibly as an arrangement separate from performance of the individual's day to day professional duties.

What the Case Decided

In the Bears Case, Bond J had to determine whether PRT was applicable to certain payments made by the Club to its players and coaches. It is convenient to focus on the players, with the comments being equally applicable to the coaches.

The individual players (or, in some instances, an entity related to a player) had entered into Additional Service Agreements (ASAs), which were agreements separate from their contracts to play football for the Club.

The Club contended that – to the extent:

1. the ASAs provided for payments to be made by the Club to the relevant player (or relevant related entity);
2. the ASAs 'granted the Club the rights to use and/or exploit the images of the relevant employees; and
3. the payments were consideration for the use and/or exploitation of those image rights';

the payments were not payments made in respect of services performed or rendered by employees of the Club and, it followed, were not taxable wages for PRT purposes.

Bond J concluded that the facts of the case did not support the Club's contentions. The ASAs did not provide for the Club to make payments for the use and exploitation of image rights. The payments were payments in relation to marketing and promotional services rendered or performed by the players and, as such, constituted wages – with PRT being payable on those wages. In the case of payments made to a player's related entity, the anti-avoidance provisions subjected the payment to PRT.

The Basis for the Decision

The ASAs utilised templates that contemplated separate identification of:

- fees for Additional Services (i.e. non-playing services), being services to be specified in the relevant agreement ; and
- fees for the use of the Player's Image, being uses to be specified in the relevant agreement.

The Additional Services were basically promotion and marketing services. However, the ASAs stated that the fees for Additional Services entitled 'the Club to use the Player's Image for purposes related to or connected to the Additional Services'. (As an aside, we note that the terms in which the ASA dealt with the Additional Services, in requiring due diligent faithful and efficient performance by the player and the player complying with all lawful Club orders or directions, was indicative of employment.)

The concept of the Player's Image was defined as including the Player's name, photograph, likeness and identity.

The Additional Services were identified in a series of promotional activities that would inevitably involve some degree or other of use of the Player's Image (as defined) as an incident to the player actually performing the activity concerned, so that the Player's Image was '… integral to the performance of the promotional services'.

It appears that separate fees for image use were specified in only a few ASAs. In these instances, the use of image was also associated with the player's actual performance of particular promotional activities.

The ASAs contemplated a record being compiled during the AFL season of a player's appearances and of each use of image provided under the relevant player's ASA. The record was intended to 'set out the total of all amounts paid under the player's … [ASA] for the season, attributed as between the market value for the player's marketing and promotional services and the market value for use of the player's image'. However, the records did not make this distinction but treated payments for use of image as assigned to a particular type of marketing or promotional activity or to a category of appearance.

Bond J concluded that the agreed facts and records produced to the Court were 'consistent with the contractual authorisation of the use of the player's Image for purposes related or connected to the player's actual performance of promotional or marketing activities …'. It should also be noted that Bond J viewed the ASAs in the context of a contractual framework (notably the tripartite agreement between the AFL, the AFL Players' Association and the AFL clubs) that contemplated the provision of promotional services.

Implications of the Case

Three points for thought and a caveat emerge from the *Bears Case*:

- Where use of a person's image is an intrinsic (although a contractually-acknowledged separate) part of the provision of promotional services for which payment is made, one is not entitled to dissect the payment into:

  (a) an amount that does not attract PRT – being referrable to use of the image ; and

(b) an amount that does attract PRT - being a balance amount which is referrable to the physical part of promotional activities.

- Where a *pro-forma* agreement contemplates differentiation between:

  (a) provision of promotional services for which identifiable consideration is to be paid; and

  (b) provision of entitlement to use a person's image for which separate consideration is to be paid,

  it is important to complete the pro-forma agreement in a manner that recognises that distinction, if distinct fiscal consequences are to attach to the separate amounts of consideration. It is also important to maintain records, especially records which the agreement envisages, that give effect to that distinction.

  Action Point:

  The case indicates the desirability for timely internal audit of the manner in which pro-forma template documentation has been completed and records kept. A pro-active response may be appropriate.

- If the consideration (whether unwittingly or otherwise) has been paid for the provision of promotional services rather than for use of image, the fiscal ramifications may not only include increased PRT but may also extend to other taxes. In particular, superannuation guarantee charge and PAYG issues and, possibly, PSI issues might need to be considered.
- Caveat – the case implicitly raises, but does not consider, the extent to which Image (as defined in the relevant ASA) is capable of being the subject of a standalone obligation with its own fiscal consequences, rather than merely being an incident of a promotional activity.

Payroll – PRT Exemption for Schools

Another interesting payroll tax case was recently handed down - *The National Institute of Dramatic Art v Chief Commissioner of State Revenue*.

The case considered the NSW Revenue Office decision not to grant The National Institute of Dramatic Art (NIDA) a PRT refund on the basis that some, or all, of its wages were PRT exempt.

Specifically, NIDA contended that the wages payable by it were exempt wages for the purposes of the *Payroll Tax Act 2007* (NSW) pursuant to cl 12(1)(c) of Sch 2 to that Act. It should be noted this clause preserves a PRT exemption that was included in the NSW PRT legislation in force prior the PRT harmonisation and the introduction of the *Payroll Tax Act 2007* (NSW). The 2007 Act includes an exemption at s. 48 (discussed later in this article) that is directed to an end similar to cl 12 (1)(c).

NIDA sought to rely on cl 12 (1)(c), presumably on the grounds it was of wider application than s. 48 – we explore that issue later in the article.

Clause 12 (1)(c) provides:

> '**12 Continuation of certain exemptions - religious institutions, public benevolent institutions, non-profit and charitable organisations**
>
> (1) Wages are exempt wages for the purposes of this Act if they are paid or payable by:
>
> ...
>
> (c) by [sic] a non-profit organisation (other than a school or college, statutory body or an instrumentality of the State) having as one of its objects a charitable, benevolent, philanthropic or patriotic purpose, to a person in respect of time when the person is engaged in charitable, benevolent, philanthropic or patriotic work of the non-profit organisation, being a non-profit organisation in existence immediately before the repeal of the Pay-roll Tax Act 1971,...'

It was accepted that NIDA is a non-profit organisation and has as one of its objects a charitable purpose.

The OSR rejected the refund on the ground that NIDA is a school or college within the meaning of cl 12(1)(c) and that therefore the exemption does not apply. The Court affirmed the decision.

The legal issues in question included whether the exclusion in cl 12(1)(c) was directed to a non-profit organisation having as one of its objects a charitable purpose, which was to be characterised as a school as opposed to such a body that merely conducted a school as part of it operation. In the latter case, as argued by NIDA, the exemption from PRT for wages paid in the 'school activity' applied, however in the former case it would not. The meaning of 'school' in the context of the Act was also the subject of consideration given the nature or subject matter taught at NIDA.

In support of NIDA's argument, it highlighted another exemption directed to certain schools and which is found in cl 4 of Sch 2 of the Act. This is the exemption for wages paid by a school that provides education at or below, but not above, the secondary level of education where the school is carried on by a not-for-profit body.

NIDA argued this exemption supported a view that the exemption in cl 12 (1)(c) should be read as providing exemption where the organisation was not characterised as a school but merely conducted a school as part of it operations.

Despite some apparent reservations, the Court supported the OSR decision that NIDA was to be characterised as a school as opposed to a not-for-profit organisation having charitable objects that operated a school as an adjunct to its core activities.

The Court cited many factors in support of this characterisation:

- NIDA was registered initially as a higher education provider with the NSW Department of Education and Training and later with the Australian Government's Tertiary Education Quality and Standards Agency as a higher education provider.
- NIDA describes itself as Australia's National Education and Training Institution for the Dramatic Arts.
- NIDA offered degrees of Bachelor of Dramatic Art in Acting, Design, Production, and Production Crafts, Properties and Costume. It offered a graduate Diploma of Dramatic Art (Directing) and an Advanced Diploma of Dramatic Art in Scenery Construction.
- NIDA offered a range of short-term and part-time courses in the Arts offered through its Open Program, including acting on stage and for the camera, singing, costume, production, writing and direction. The courses were available for children, adolescents and adults and were available at different levels.
- NIDA offered Vocational Education and Training in areas such as musical theatre.
- NIDA offered courses for business executives seeking to improve their communication skills.

NIDA's essential argument was that, as part of its activities, it conducts a college or school but that it should not itself be characterised as a college or school. Rather, its essential character is that of a promoter of the arts. It contended that this is a charitable purpose and that all of its activities are directed towards that purpose and all of its wages are thus exempt under cl 12(1)(c).

Revenue took the view that NIDA is a school or college within the meaning of cl 12(1)(c).

The Court considered the ordinary meaning of 'school' is broad and that an institution where people, whether young, adolescent or adult, are instructed in some area of knowledge or activity is a school, so that not only NIDA's undergraduate and graduate programs involve the conduct of a school or college, but its broader activities such as, at least, its Vocational Education and Training Division and NIDA's Open Program, involve the conduct of a school or college.

The Court also had regard to NIDA's constitution, as reproduced below:

> '**NIDA's Constitution**
>
> The principal purpose of the Company is to promote and encourage expertise in the practice, knowledge, appreciation, understanding and enjoyment of drama, music, opera, ballet and any other art of the theatre

in all their expressions including film, television, multimedia and other forms of technology and media whether now known or developed in the future, either directly or indirectly, by:

(a) teaching training and instructing persons and promoting education and research;

(b) establishing and conducting schools lectures, courses, seminars, workshops and other forms of education in any format including face to face, flexible and online formats;

(c) conferring degrees, diplomas, certificates or other awards;

(d) awarding scholarships, fellowships, bursaries and other financial assistance; and

(e) presenting plays, opera, ballet and any other form of theatre art,

anywhere in the world.'

The Court also referred to the characterisation by NIDA of itself as a school to be found in its annual reports, including the objectives laid out by it in a 10 year development plan which is reproduced below and that describe its activities.

The focus of these descriptions is on NIDA contributing to the arts primarily through its education and training programs.

'**Objectives of the 10-year development plan**

NIDA will continue to enhance its international standing as a centre for education and training at an elite level and facilitate practice-based research.'

Ultimately the Court found:

'I would characterise NIDA as being a school or college, even if it were necessary to choose between its being a school or college on the one hand, or being a promoter of the dramatic arts on the other. Of course the two are not mutually exclusive.'

One interesting matter that ultimately did not require consideration, given the decision, was the scope the of the exemptions that cl 12(1)(c) and s. 48 confer.

Section 48 provides:

'(1) Subject to subsection (2), wages are exempt wages if they are paid or payable by any of the following:

...

(c) A non-profit organisation having as its sole or dominant purpose a charitable, benevolent, philanthropic or patriotic purpose (but not including a school, an educational institution, an educational company or an instrumentality of the State).

(2) The wages must be paid or payable:

(a) for the work of a kind ordinarily performed in connection with the religious, charitable, benevolent, philanthropic or patriotic purposes of the institution or body, and

(b) to a person engaged exclusively in that kind of work.'

As the Court noted:

> 'The wages that are exempt under s. 48 are those payable to a person engaged exclusively in a work of a kind ordinarily performed in connection with such a purpose of the non-profit organisation, whereas under cl 12(1)(c) wages are exempt when payable to a person in respect of the time when he or she is engaged in charitable, benevolent, philanthropic or patriotic work of the organisation.'

The narrower scope of s. 48 explains why NIDA pursued exemption under cl 12(1)(c) and not s. 48.

One wonders whether the issue it has revealed may mean the transitional window provided by cl 12(1)(c) may soon be closed in favour of letting s. 48 do the work moving forward.

Readers are referred to our recent article on the Grain Growers case which dealing with s. 48 in order to explore where the PRT exemption may stop for wages paid by a charity but where the work itself is not '...of a kind ordinarily performed in connection with such a purpose of the non-profit organisation'. The Grain Growers case is on appeal!

One other important lesson emerging from this type of decision is the need for language used in corporate material (PR, website, strategic plans etc.) to be considered in the light of the implications for securing or retaining tax exemptions and concessions that revolve around the characterisation of an entity's purpose.

On a final note, this is a NSW PRT case and care needs to be taken when considering the likely outcome of this type of situation under other State PRT legislation and, in fact, other State and Federal tax exemption and concessions more generally.

Payroll – Backpacker Tax Reforms

How is the government proposing to tax backpackers?

As heralded in a press release on 27 September 2016, various Bills that propose to change the way and the rate at which backpackers are taxed were introduced in the House of Representatives on 12 October 2016. These Bills were passed on 17 October 2016 and are now before the Senate.

On the surface, the proposed legislative changes represent a backflip by the Federal Government on their 2015-16 budget announcement of a 32.5% tax rate on earnings up to $37,000. The announced rate is replaced with a lower 19% tax rate - a concession to the industries that employ these workers. However, the Government is, to a degree, using smoke and mirrors, as there is a superannuation sting that applies when these workers leave Australia (discussed below).

These proposed measures create a new class of taxpayer – a working holiday maker ('WHM'), similar to a temporary resident. A WHM is defined as someone holding a Subclass 417 (Working Holiday) visa, a Subclass 462 (Work and Holiday) visa or certain related bridging visas.

All holders of these visa categories will be taxed under these rules – removing the difficult test of determining whether someone is an Australian tax resident. More cynical observers would suggest that part of the reason for doing this is to prevent backpackers assuming they are Australian tax residents for the duration of their stay and thereby benefiting from the $18,200 tax free threshold that applies to Australian residents.

What is happening to superannuation?

What many people do not realise is the Government's cash grab on departing Australia superannuation payments tax will now be up to (and often will be) an astonishing 95% of the backpacker's superannuation interest.

Different tax rates apply to the various parts of the superannuation interest that can be accessed when temporary residents (such as backpackers) leave Australia.

In simple terms, there are usually 2 major components to the superannuation interest. The first is a tax free component which will remain tax free. However, of the taxable component, a 95% tax rate will apply to the element taxed in the fund (currently this is 38%). This will comprise almost all of the superannuation interest paid to backpackers when they leave Australia, given that superannuation guarantee ("SG") payments will be the major and probably only superannuation contributions made on their behalf whilst they are in Australia. This effectively means that WHMs that are employees for SG purposes will see just about all their super end up in government coffers, once they leave Australia.

Assuming backpackers are employees for SG purposes, and they earn more than $450 per month, this will effectively see tax at a minimum of approximately 25.7% on the total salary package - somewhat reversing the benefit of the lower marginal income tax rate. This will create a strong incentive for backpackers and organisations for which they work to classify their working relationship as something other than an employment relationship for SG purposes.

It is worth noting that the definition of an 'employee' for SG purposes is broader than the common law concept and is extended to include a contract that is wholly or principally for the labour of the person. This expanded definition would be expected to apply to the much of work undertaken by backpackers, given the typical nature of the work they do. Organisations would obviously prefer to engage backpackers under a relationship that does not amount to them being an employee for SG purposes so that they can offer a higher rate and thereby attract more WHMs. Any TaxEd clients considering hiring backpackers should keep in mind the expanded definition of employee for SG purposes and not fall into this trap.

What are the changes to employers' registration requirements?

In addition to the normal PAYGW registration requirements, all organisations hiring WHMs will need to register as a 'registered working holiday maker employer' by the time the entity is first required to withhold an amount from such withholding payments or within such further time as the Commissioner allows. This will benefit employers as a separate PAYGW schedule with lower withholding rates applicable to WHMs will be able to be used and this is obviously what the backpackers will want. If the employer does not register, they face the risk of penalties (up to 20 penalty units for failing to register by the time required) and a higher rate of withholding (based on the WHM being classed as a non-resident for tax purposes where they pay tax at 32.5% from the first dollar of income earned rather than the 19% applying to WHMs) will likely apply.

Within 30 days of the entity making the application, the entity will be notified of whether it has been registered as a working holiday maker employer and if registered the date it takes effect. The Australian Business Registrar will then make this information publicly available on the Australian Business Register so that WHMs can check the registration status of a potential employer prior to entering into a working relationship. As stated above, this will allow the registered working holiday maker employer to withhold at the lower rates that apply to WHMs and this is what the WHMs will want.

Other changes

Associated measures that are included in this raft of reforms include:

- Providing a further incentive for WHMs to come to Australia by reducing the visa application charge for Subclass 417 (Working Holiday) visas and Subclass 462 (Work and Holiday) visas from $440 to $390;
- Increasing the passenger movement charge by $5 from $55 to $60 that applies to all passengers (not just backpackers) when leaving Australia. Although this sounds small, according to the modelling, this is the biggest offset to the cost of reducing the income tax rates.

Proposed Timing of the Reforms

The lower income tax rate is proposed to apply from 1 January 2017. However, the changes to visa application charges, passenger movement charges and the departing Australia superannuation payments tax generally apply from 1 July 2017.

FBT Q&A – The 'Associate' definition as it applies to two Local Councils

Question:

We are a local council and we have seconded one of our staff members to another local council within the same State for a 12 month period. The individual will remain our employee for this period and we will continue to pay and withhold from the employee's salary & wages as required. If the other council provides the individual with certain benefits, are we exposed to FBT on the provision of these benefits?

Answer:

The term 'associate' is defined by reference to the *Income Tax Assessment Act 1936*. Section 159 of the *FBT Act* modifies the way in which that definition applies and also extends the meaning of 'associate' in other ways.

Section 159(2) extends the income tax definition of 'associate' to include companies that are related and to deem the following:

- the Commonwealth is an associate of each authority of the Commonwealth
- an authority of the Commonwealth is an associate of each other authority of the Commonwealth
- a State is an associate of each authority of the State
- an authority of a State is an associate of each other authority of the State
- a Territory is an associate of each authority of the Territory
- an authority of a Territory is an associate of each other authority of the Territory.

Where the Commonwealth or a State or Territory is deemed to be an associate of its authorities, and the authorities to be associates of each other, under section 159, then section 159(3) provides that fringe benefits are provided as though those associates were companies and were related to each other.

The ATO takes the view that a local council is an authority of the State for the purposes of the FBT associate definition. As such, two local councils will be associates of each other.

For the purposes of the query, the council of which the individual is an employee will be subject to FBT on any benefits provided by the other council to which the employee has been seconded. This is because the definition of fringe benefit includes a benefit not only provided by the employer but, also, an associate of the employer.

Payroll Q&A – How Will Employers Report Reportable Fringe Benefits Under the Single Touch Payroll (STP) Proposals?

Question:

One of the advantages of the Single Touch Payroll (STP) initiative is for employers to do away with the need to issue Annual Payment Summaries to employees given the ATO will have the relevant information by way of what is provided to it under the STP system.

What is the position though for Reportable Superannuation Contributions and Reportable Fringe Benefits?

Answer:

The explanatory material outlining the STP proposal confirms:

> 'It is not mandatory for reportable employer superannuation contribution (RESC) and reportable fringe benefit (RFB) amounts to be reported through STP, however an employer may choose to do so by 14 July. In these circumstances, the employer would not be obliged to provide an annual payment summary covering these amounts.'