It's 'finals' week and, for some, there is the added distraction of a forthcoming long weekend. We expect that your mind will be focussed on matters aside from tax, just at the moment.

However, tax developments do not take a break. The September newsletter has a diverse range of topics – we look at GST and online bookings, some GST valuation issues, the reportable fringe benefit treatment of pooled cars, and FBT in relation to overseas conferences to mention a few.

May your team (or at least the one you have temporarily adopted) be victorious, and magnanimous in that victory – but have a great 'finals' weekend!

Don't forget to join us on 12 October for the online session.

Regards

Andrew Orange

TaxEd Technical Team

GST: Online Bookings and Tax Invoices

We are often asked how to obtain a tax invoice when using a booking website. In this article, we will use the simple example of an Australian GST-registered entity using one of the online booking sites to book accommodation at a hotel in Australia for one of its employees who will be travelling for work-related purposes interstate.

> Note: We have referred to Expedia/Wotif below, but similar issues may arise for any of the other sites. The GST implications of such transactions will depend on the facts and circumstances of each case and the specific terms and conditions. It is beyond the scope of this article to determine such GST implications.

More specifically, let's assume the following example facts:

- John works for City Council in Melbourne;
- John chooses to use the Expedia website by typing in 'www.expedia.com.au';
- John may not be aware, but he will be redirected to a website called 'www.expedia.com';
- John searches and finds suitable accommodation (City Hotel) for his business trip to Sydney;
- The website provides him with two options:
  - One option is to 'Pay Online Now'; and
  - The other option is to 'Pay Later at Hotel'.

The 'Pay Later at Hotel' option seems relatively uncontroversial, as a tax invoice is usually provided at checkout when payment is made.

The most common complaint is where the 'Pay Online Now' option is chosen - no tax invoice is issued by the online booking site, and the hotel may not provide a tax invoice, even if one is requested at the time of the stay.

From a commercial viewpoint, however, the purchasing procedures of the organisation making the booking could place a preference on which option is chosen. For example, there could be different approval processes to have the organisation 'Pay Online Now' vs 'Pay Later at Hotel'. Also, the 'Pay Later at Hotel' option assumes the guest will be paying, and generally they would do this by using a debit or credit card. If a personal credit card is used, the guest will need to be reimbursed via an employee reimbursement process - which may give rise to timing issues (time of payment to hotel vs time of reimbursement). Finally, if no tax invoice is received at all for the 'Pay Online Now' option, then business travellers would never choose this option, as this may result in a GST credit not being available for the cost of the hotel accommodation.

Why No Tax Invoice?

It seems the online booking websites (or at least some of them, for example Wotif, Expedia, etc.) have recently altered the terms and processes they apply with regard to issuing tax invoices. After a couple of quick internet searches, this was confirmed.

Expedia and Wotif have virtually identical terms and conditions published on their respective websites (unsurprising given that Expedia owns Wotif). By way of summary, and in the context of tax invoices, these contain the following terms:

- They offer a 'Pay Online Now' and a 'Pay Later at Hotel' option.
- The 'Pay Online Now' option is a prepaid hotel reservation, and when this option is chosen one of the Expedia Companies (e.g. Wotif) will charge your credit card immediately;

- The 'Pay Later at Hotel' is a postpaid hotel reservation, and when this option is chosen the hotel will charge your credit card in the local currency at the time of the stay - note that under this option, other matters such as hotel booking, tax rates, foreign exchange rates, etc. could change between the time of booking and the time of stay.

With regard to tax invoices the following paragraph is included:

> " If you are a business traveler and book using the Pay Online Now option (where available), you will not receive a tax invoice for your booking. Some of the Expedia Companies are not required to issue tax invoices for the Pay Online Now option. If you book using the Pay Later at Hotel option, you should receive a tax invoice from the hotel at the time of your stay. If you require a tax invoice, we recommend that you book using the Pay Later at Hotel option (where available)."

Again, it seems, using the 'Pay Later at Hotel' option is relatively uncontroversial. However, the problem appears to stem from the comments:

> "…you will not receive a tax invoice for your booking. Some of the Expedia Companies are not required to issue tax invoices for the Pay Online Now option".

Where the hotel is in Australia and is GST-registered, if a guest makes a booking directly with the hotel the supply by the hotel would be a taxable supply and a tax invoice should be provided by the hotel to the guest. If a tax invoice is not issued, and the guest requests a tax invoice, the obligation to issue a tax invoice would rest with the hotel.

So why the confusion when the hotel booking is made via an online booking site?

Whether the booking is made directly with the hotel or via a booking site, in both circumstances the hotel is providing accommodation to the guest. It would be reasonable for the guest to assume that, irrespective of the method of payment chosen, the guest has paid for the provision of a hotel accommodation supply and, where that supply is a taxable supply, the guest would be entitled to receive a tax invoice. The issue therefore becomes one of understanding the nature of the relationship that the booking sites (e.g. Expedia/Wotif) has in these transactions.

By way of background, we note the GST law contains special rules for dealing with GST and the issue of tax invoices where agents are involved. So, using the above example, if it is assumed that the hotel is making its supply to the guest though an agent (i.e. Expedia/Wotif), then either the hotel or Expedia/Wotif can issue the tax invoice to the guest. If a tax invoice is not provided, and a tax invoice is requested, then either the hotel or Expedia/Wotif would be required to issue a tax invoice (but both must not issue separate tax invoices). The issue this raises is whether the hotel is making its supply through Expedia/Wotif as its agent. That the terms and condition make no mention of Expedia/Wotif acting as agent for anyone is not necessarily conclusive (as many agency arrangements operate on an undisclosed basis). However, if Expedia/Wotif is not acting as agent for the hotel and/or the hotel is not making its supply through Expedia/Wotif as agent, then the conclusion would be that the hotel becomes the only entity that can issue the tax invoice.

Other matters that may contribute to the GST implications include whether the relevant Expedia/Wotif entity is GST-registered or required to be GST-registered. Again, this will depend on the characterisation of the supplies being made by Expedia/Wotif and to whom those supplies are made (e.g. booking fee charged to guest, booking fee charged to hotel, etc.).

It is not immediately clear why Expedia/Wotif takes the stance that it will not issue a tax invoice where the 'Pay Online Now' option is chosen.

It also seems unreasonable that a guest booking accommodation at a hotel in Australia would not be able to receive a valid tax invoice either from the booking site or the hotel irrespective of which payment option is chosen.

Meanwhile, and in the absence of any reasonable explanation of why Expedia/Wotif (or similar online booking organisations) are not required to provide a valid tax invoice, guests booking accommodation via online booking sites should choose the 'Pay Later at Hotel' option. Alternatively, they could book directly with the hotel.

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GST: Valuation

On occasions, liability for GST will be affected by the value that the taxpayer ascribes to the asset that is supplied by the taxpayer. This is especially pertinent where the margin scheme is being applied to the sale of land which was acquired prior to the commencement of GST on 1 July 2000.

If an overstated pre-GST value is used, this will result in calculation of an understated margin. Due to understatement of the margin, there will be an understatement of associated GST and the supplier will potentially be liable for an administrative penalty and interest.

The tax legislation imposes an administrative penalty where the taxpayer makes a statement to the Commissioner of Taxation (e.g. in a Business Activity Statement (BAS)) that is false or misleading in a material particular. Most statements made in a BAS would affect the taxpayer's tax position and it follows would involve a material particular. The false or misleading nature can arise due to a positive misstatement or due to the omission of information.

The legislation contains a defence against imposition of the penalty. Where the taxpayer who has made the misstatement has taken reasonable care in connection with making the wrong statement, the taxpayer is not liable for the penalty. In essence, reasonable care requires the taxpayer to take the degree of care that 'a reasonable person would exercise in the taxpayer's circumstances in order to fulfil their tax obligations'.

There is a further ground of defence where a taxpayer uses a registered tax agent or BAS agent (tax agent). Where the taxpayer has given the tax agent 'all relevant taxation information', the tax agent makes the false or misleading statement, and the wrongful nature of the statement did not result from recklessness or intentional disregard of the law by the tax agent, then the taxpayer will not be liable for the wrongful statement made on the taxpayer's behalf.

The foregoing discussion foreshadows the need for a taxpayer to take reasonable care in determining the value of supplies where the value will impact on GST liability. This will apply whether the taxpayer is preparing the BAS or is providing a tax agent with all 'relevant information' in order to do.

The Tax Office (ATO) has recently reiterated the need for care. It has cautioned against taxpayers making their own valuations or using people without adequate qualifications. The ATO observes:

> ' The majority of taxpayers who use a qualified valuer or equivalent professional for taxation purposes will generally not be liable to a penalty if they have provided the valuer with accurate information where the valuation ultimately proves deficient.'

In addition to providing accurate information to the valuer for the purpose of making the valuation, the taxpayer should challenge the valuer on any point that the taxpayer has reason to consider constitutes a false or misleading statement - including any failure of the valuer to comply with any legal requirement of which the taxpayer is aware (e.g. use of any valuation methodology that is inconsistent with the applicable law). It is not sufficient merely to refer the matter to a valuer - the taxpayer needs to review the advice and ensure that the taxpayer is not aware of any deficiency in the advice.

The ATO gives the following illustration of a false and misleading statement in a GST context:

> ' Bob the builder engaged a professional valuer to determine the value of land held before 1 July 2000. The valuation was used to calculate the GST payable on the sale of the developed land.
>
> The valuation was invalid because it did not comply with the requirements of the GST act (sic). After commissioning a new valuation, the Commissioner assessed Bob on additional GST.
>
> Although the valuation was invalid, Bob had taken reasonable care. He engaged a professional valuer and was unaware of the flaws in the valuation.
>
> If correcting a valuation or using a different valuation results in more GST being payable, administrative penalties and/or the general interest charge may apply. However, where a genuine mistake is made, no administrative penalties will apply.'

The ATO also makes clear that the valuer needs to be given clear instructions in relation to the purpose/intended use of the valuation. One may observe that this is essential if the valuer is to be expected to apply any legislative or general law requirements relevant to the intended use.

The ATO has recently published comments on the process of instructing valuers, including a suggested form of instruction. While each taxpayer will need to consider the appropriateness and sufficiency of the ATO's comments and form, these may constitute a useful starting point or a benchmark from which taxpayers can review their existing practices in dealing with valuation issues. Note that the ATO's material has been prepared with a wide cross-section of tax valuation issues in mind and is not confined to the GST context.

Having obtained a valuation, what can you do where you still have some reservations?

One option is to apply for a private ruling. This is a course that should not to be undertaken lightly and it may be especially appropriate to seek professional tax advice before applying for a private ruling. The ATO has recently published some comments on seeking market value private rulings. The comments note that a ruling can be sought without submitting a valuation (this will involve paying for the work of a valuer) or, in certain circumstances, seeking ATO confirmation of valuation that the taxpayer has obtained (which the ATO observes will generally be less costly).

GST: The Rio Tinto Services Case, remote housing for employees

Rio Tinto Services Ltd v FCT **- Taxpayer's remote area housing costs for employees were not creditable acquisitions**

On 24 August 2015, the Full Federal Court unanimously dismissed the Taxpayer's appeal.

Issue and Court's Conclusions

The issue on appeal was whether the Taxpayer was entitled to input tax credits (ITCs) for GST paid on acquisitions made by members of the GST group in relation to the supply of residential accommodation to its workers in the remote Pilbara region. This turned on whether the acquisitions were creditable acquisitions under s. 11-15 of the GST Act.

The Court held that the Taxpayer's acquisitions in providing and maintaining remote area housing for its employees were not made for a creditable purpose because they fell within the terms of s. 11-15(2)(a) of the GST Act.

The Court rejected the Taxpayer's contention that the proper application of s. 11-15 of the GST Act entitled it to a credit to the full extent that its acquisitions related to the carrying on of its mining enterprise. It found that the acquisitions were unquestionably related wholly to the making of input taxed supplies of residential premises by way of lease.

Facts

The Taxpayer, Rio Tinto, was the representative member of a GST group, which included Hamersley Iron Pty Ltd (Hamersley) and Pilbara Iron Company (Services) Pty Ltd (PICS).

The group supplied residential accommodation by way of lease to workers in the Pilbara region. In doing so, the Taxpayer incurred costs in relation to the construction and/or purchase of residential premises, as well as maintenance of the properties.

Supply of residential premises by way of lease is an input taxed supply pursuant to s. 40-35(1)(a) of the GST Act.

The contentions

The Taxpayer contended that the acquisitions were made wholly for a creditable purpose — because the supply of residential accommodation was a necessary and essential part of its mining enterprise — and therefore it should be entitled to ITCs pursuant to s. 11-15(1).

The Commissioner was of the view that the Taxpayer was not entitled to ITCs because the acquisitions had a direct and immediate connection with the input taxed supply of residential accommodation, and therefore fell within the exclusion in s. 11-15(2)(a).

Decision

The Full Federal Court unanimously dismissed the Taxpayer's appeal and held that the acquisitions in question all related wholly to the making of the supply of residential premises by way of lease. As a result, the Taxpayer was not entitled to claim ITCs in respect of any of the remote area housing costs, as the relevant acquisitions were not creditable acquisitions.

Reasons

The Full Court considered the interpretation of s. 11-15(1) and s. 11-15(2)(a). It found that the inquiry called for by the latter section — referred to by the Court as the 'exclusion or blocking provision' — is the extent to which the acquisition relates to making supplies that would be input taxed. This is irrespective of the extent to which the thing had been acquired in carrying on the enterprise.

This means that s. 11-15(2)(a) requires a precise identification of the relevant acquisitions and a factual inquiry into the extent to which they relate to the making of supplies that would be input taxed. The inquiry is not into the relationship between the acquisition and the enterprise more broadly.

Further, interpretation of s. 11-15(2)(a) does not turn upon a characterisation of the purpose of the supplier, but upon a characterisation of the extent to which the acquisition relates to the subsequent supply. In this case, an examination of the acquisitions revealed unquestionably that they all related wholly to the making of supplies that would be input taxed, albeit that they did so for the wider purpose of the enterprise.

GST: The 4 year time limit on Input Tax Credits

The recent cases of *Trustee for SBM Trust v Federal Commissioner of Taxation* (August DIS) and *S.E Sedgwick & Y.E Sedgwick and Commissioner of Taxation* confirm the need for taxpayers to be very mindful of the 4 year time limit for claiming input tax credits.

In both cases the taxpayers were denied input tax credits on the basis the 4 year time limits had expired.

In the *SBM Trust* Case input tax credits related to acquisitions in 2005 and 2006 that were the subject of revised BAS claims in 2012.

The ATO denied the claims (on the basis the 4 year time limit had expired) and the AAT confirmed the ATO's decision.

The key issues from the *SBM Trust* Case are:

- the 4 year time limits (which were embedded in legislation that had an effective date of 7.30pm 12 May 2009) apply equally to input tax credits related to acquisitions made pre and post the effective date; and
- the 4 year limit is fixed and there is not any discretion provided to the ATO as to its basic operation.

In the *Sedgwick* Case the taxpayers lodged revised BASs and sought to include input tax credits outside of the 4 year time limit.

The ATO denied the claims and the AAT confirmed the ATO's decision.

The key issues from the *Sedgwick* case are:

- the 4 year time limits are fixed and provide a 4 year period in which to revise the BAS in which the input tax credits should have been attributed (regardless of whether a Tax Invoice is held at that time);
- attribution is determined by whether a taxpayer uses accruals or a cash basis of reporting GST;
- the 4 year period commences on the day after which you were required to lodge the BAS in relation to the tax period in which the input tax credits should have been attributed (a monthly GST taxpayer is ordinarily required to lodge a return 21 days after the end of the month and a quarterly GST taxpayer is ordinarily required to lodge a return 28 days after the end of a month); and
- where the ATO extended the BAS lodgment date the later date applies.

Practical issues

Where the possibility of a claim for previously unclaimed input tax credits exists, immediate regard should be had as to how the 4 year time limit will impact any possible claim.

To ensure an entitlement to the credits exist, action must be taken within the 4 year time limit.

For example, a monthly GST taxpayers using accruals basis will cease to have an entitlement to credits as follows:

- Credits attributable to BAS Period: September 2012;
- September 2012 BAS due - 21 October 2012;
- 4 year time limit – starts 22 October 2012 and ends 21 October 2016.

FBT: Overseas Conferences & the otherwise deductible rule

Incidences of employees attending work-related conferences in an overseas or exotic location has increased substantially in recent years.

Attendance at such conferences raises the issue of the extent to which the taxable value of an employer's payment or reimbursement of costs incurred by the employee in connection with attending the conference is to be reduced under the 'otherwise deductible rule'. (Broadly, the FBT provisions enshrining this rule provide for a reduction in the taxable value because the employee would have been entitled to a tax deduction if the employee had paid and not been reimbursed for the cost.) Where an employee's self-education activities are intertwined with recreational/holiday activities, tax deductibility requires consideration of the appropriate apportionment.

Apportionment for self-education travel is always tricky, especially where the self-education occurs overseas.

The Australian Taxation Office (ATO) is focusing on overseas conference claims and will scrutinise such claims closely.

Its general approach in relation to apportionment of airfares is as follows:

1. If the travel is principally to attend the conference and private pursuits are incidental - 100% 'otherwise deductible'.
2. If there is a dual purpose of the travel being conference and holiday - then 50% 'otherwise deductible'.
3. Where the private pursuits are significant - no deduction is available.

In regards to accommodation, it is generally only the accommodation while attending the conference that is 'otherwise deductible'.

Take the following example.

Example

An employee is seeking reimbursement of airfares and accommodation for a work-related conference to be held in London from 8 to 11 December. He leaves on 27 November and returns on 14 December.

In this case there are 4 conference days out of a total of 17 days away, so it would seem at best a 50% deduction entitlement would apply to the airfares on the basis there was dual intention of attending the conference and having a private holiday.

Only accommodation for the 4 days at the conference would be considered 'otherwise deductible'.

ATO private ruling 1011376830175 has an excellent summary of apportionment of overseas travel costs. (The private ruling refers to an ATO public ruling (TR 98/9) which deals with deductibility of self-education expenses. While not necessarily exhaustive of the ATO's materials on self-education, reference to this public ruling may also be helpful.)

As a final comment, remember that where the travel is more than 5 nights a travel diary must be kept by the employee in addition to other substantiation requirements.

FBT: Dual Cabs & Utes

The *FBT Act* allows an exemption for certain vehicles provided to employees where the only private travel undertaken by the employee is limited to travel that is 'work related' and other private travel that is minor, infrequent and irregular.

'Work related' travel is defined as:

(a) travel by the employee between:

(i) the place of residence of the employee; and

(ii) the place of employment of the employee or any other place from which or at which the employee performs duties of his or her employment; or

(b) travel by the employee that is incidental to travel in the course of performing the duties of his or her employment'.

Where a vehicle is designed to carry a load of one tonne or more, then the vehicle is not a 'car' for FBT purposes so the provision of such a vehicle is a residual benefit. Such a vehicle is eligible for exemption with no other qualifications, apart from the work related and other private travel restrictions.

Only certain cars are eligible for the exemption. A '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.

A car will only be eligible for the exemption if it is panel van or ute; or a vehicle not designed for the principal purpose of carrying passengers.

Panel vans and utes, by their very design, are not built principally to carry passengers. Insofar as dual cab type vehicles are concerned, a detailed discussion of their eligibility for the exemption can be found in Miscellaneous Taxation Ruling MT 2024.

Where it is established that a car is eligible to be considered for the exemption, there are still the 'work related' and other private travel restriction requirements to be met.

A commonly asked question on the TaxEd Q&A service and in face-to-face training sessions is how an employer can ensure that a vehicle eligible for exemption is only being used for home-to-work travel and other private travel that is minor, infrequent and irregular?

Modern day dual cabs and utes are very comfortable vehicles compared to their predecessors of twenty years ago and their use as a domestic vehicle for shopping, camping trips away etc. is within the same expectations of a family sedan or wagon.

In response to the question of ensuring compliance, consideration could be given to the following matters:

- First and foremost, where employers are providing these types of vehicles or allowing an employee to salary sacrifice these types of vehicles on the basis the vehicle will be used in accordance with the FBT exemption, a policy of use must exist and be agreed to by the employee.
- Where the arrangement is a salary sacrifice, the employment paperwork should contain appropriate clauses to enable the employer to recoup any additional FBT payable in the event the relevant vehicle has not been used in a manner that warrants application of the FBT exemption.
- Apart from physical surveillance, an employer could undertake regular odometer checks.
- Consistent with current ATO techniques, for vehicles that are fitted with an e-tag, the employer could review e-tag accounts in order to identify travel undertaken outside of normal working days.

Although the above may seem intrusive, it is the employer that is liable for any additional FBT payable.

With the ever increasing popularity of these types of vehicles among employees that do not work in traditional trades where such vehicles are needed, it is only a matter of time before the ATO increases their audit activity in this area.

Payroll: Pooled cars and Reportable Fringe Benefits

A frequently raised issue is whether "pooled cars" are required to be shown as Reportable Fringe Benefits.

We examine the issue below.

Sections 135M, 135N, 135P and 135Q of the *FBT Act* form the basis of the Reportable Fringe Benefits regime.

The provisions combine to require reporting on an employee's Payment Summary of the grossed–up taxable value (at the Type 2 gross-up rate) of an employee's individual fringe benefits amount where that amount exceeds $2,000 for the year.

The individual fringe benefits amount is defined at s. 5P not to include an excluded fringe benefit.

An 'excluded fringe benefit' includes a benefit prescribed by the FBT Regulations.

The FBT Regulations (at Regulation 8) state that a 'car benefit' is a prescribed benefit if:

- the benefit is a car benefit for FBT purposes or would be if it were not an exempt benefit (for example, an exempt minor benefit, being use of vehicle for private purposes due to an emergency); and
- the car is applied to or available for the private use of more than one employee.

Key issues

1. The vehicle must be a 'car' for FBT purposes (a vehicle designed to carry a load of less than 1 tonne and fewer than 9 passengers);
2. Private use of a vehicle in an FBT exempt context can be considered when determining whether private use by more than one employee exists;
3. Where the 'private use by more than one employee' test is satisfied at any point in the year, the exclusion applies to the car for the full year;
4. The private use test is met where the car is applied (i.e. actually used for private purposes) or 'available' for private use;
5. The exclusion must be considered on a car by car, and year by year basis; and
6. The law does not explicitly require, but the ATO publicly advocates, that the employer must direct or consent to the private use of the car by each employee.

Eligibility: Protecting Sensitive Information

The Australian Charities and Not-for-Profit Commission (ACNC) has issued a draft 'Interpretation Statement: Withholding or removing Commercially Sensitive Information from the ACNC Register' (Draft Statement).

The ACNC Commissioner seeks public comment on the draft by COB on 26 October 2015.

Background

Entities subject to regulation by the ACNC may consider that some of the information they provide to the ACNC is sensitive and not appropriate for publication as part of the Register. Charities that engage in commercial activities as a source of funding will need to be especially alert to disclosure of information that can be used by their competitors (who, being wholly commercial entities, may well not be subject to a corresponding disclosure obligation).The Register is held on the ACNC website and is publicly searchable without payment of a fee.

The information that can be included in the Register is set out in s. 40-5 of the *Australian Charities and Not-for-Profits Commission Act 2012* (the ACNC Act). Aside from essentially formal information, the Register includes:

(a) the following details in respect of each responsible entity (e.g. a director, committee member of the governing body of the charity, a trustee of the charity etc.) of each registered entity:

  (i) the name of each responsible entity;

  (ii) the position held by the responsible entity in relation to the registered entity;

(b) 'information statements given by registered entities under Division 60 (except to the extent (if any) that information in an information statement is classified, in the approved form mentioned in section 60-5, as "not for publication")';

(c) 'financial reports, and any audit or review reports, given by registered entities under Division 60';

(d) 'the details of the following matters (including a summary of why the matter arose, details regarding any response by the relevant registered entity and the resolution (if any) of the matter):

  (i) each warning issued to a registered entity by the Commissioner under Division 80;

  (ii) each direction issued to a registered entity by the Commissioner under Division 85;

  (iii) each undertaking given by a registered entity and accepted by the Commissioner under Division 90;

  (iv) each injunction (including interim injunctions) made under Division 95;

  (v) each suspension or removal made under Division 100'; and

(e) 'any other information:

  (i) that the Commissioner is authorised to collect under a provision of … [the ACNC Act]; and

  (ii) that is specified in the regulations'.

In the present context, item (c) is particularly noteworthy.

The ACNC Commissioner is empowered to withhold information from publication on the Register where the Commissioner *inter alia* (s 40-10(2) (a)) considers the information is both:

- commercially sensitive and
- has the potential to cause detriment to the entity to which it relates or to an individual.

This power is tempered by the statutory recognition (s 40-10(3)) of the need for the Commissioner to consider whether the public interest in the Register including the information [which is the subject of a non-publication request] outweighs the likely adverse effect of' publication.

Contents and Use of the Draft Statement

The Draft Statement focuses on the Commissioner's views of:

- the circumstances in which information is commercially sensitive;
- the circumstances in which publication has the potential to cause detriment;
- the process of balancing an organisation's needs (favouring non-publication) and the competing public interest of access to information; and
- the ability to tailor disclosure to particular needs - e.g. while the relevant information remains sensitive.

As an aside, in relation to the third dot point, the ACNC's comment at paragraph 4.7 is interesting and practical. Public interest includes the ongoing flow of information to the ACNC and the absence of appropriate safeguards to protect the sensitivity of information can inhibit that information flow.

Even if you are not motivated to make a submission, the Draft Statement is worth reading from the perspective of identifying types of sensitive matters that your organisation may not have previously thought about. It may also be a useful catalyst for undertaking a review of the information that your organisation provides and will (in the absence of a non-publication concession) be included in the Register. Consideration should not only be given to the material in the body of the Draft Statement, as the Appendices of examples and the ACNC's illustrative responsive positions are informative.

The Draft Statement is also worth reading to identify considerations which are within your organisation's control and may disincline the Commissioner to exercise her power to withhold material from publication. While you may want to take immediate action on these matters, you will still need to monitor the Draft Statement as it progressively evolves.

The Draft Statement notes that it is to be read in conjunction with the ACNC's 'Policy Statement: Withholding or Removing information from the ACNC Register (CPS2012/5)'. The ACNC has provided further guidance on its website in relation to withholding material from publication - e.g. see Withhold information from the ACNC Register.

For the most part, one might expect that information provided to the ACNC will not be sensitive or its publication potentially harmful. However, information should be vetted by appropriately senior management, so that any concerns can be identified, and the matter addressed, in a timely manner.

As a final remark, it should be borne in mind that the ACNC Act contains other provisions (e.g. ss. 40-10(2)(b) to (e)) which empower the Commissioner to withhold information from the Register.

Eligibility: Numeric Identifier

The Need for only one Numeric Identifier for Dealings with the Commonwealth from 1 July 2016

The Commonwealth Treasury has issued exposure draft legislation which provides that from 1 July 2016 all companies and other entities carrying on business will be able to use their Australian Business Number (ABN) as their only numeric identifier for all interactions with the Commonwealth. (For companies incorporated prior 1 July 2016, as a general rule, use of the ABN in lieu of an Australian Company Number (ACN) is dependent on the 9 digit ACN exactly forming the last 9 characters of the 11 digit ABN - which would normally be the case. The draft legislation also deals with the ability to substitute an ABN for a company's ACN in circumstances more widely than interaction with the Commonwealth.)

At present companies and other entities carrying on business require a tax file number (TFN) in relation to dealings with the Tax Office (ATO). Furthermore, at present, companies are issued with an ACN on incorporation and this is used as their numeric identifier in dealings with the Australian Securities and Investments Commission (ASIC).

Use of an ABN in lieu of a TFN will be optional. It is interesting to recall that TFNs were introduced for dealings with the ATO due to concern that creation of a universal identifier would constitute a risk to privacy.

Companies currently need to apply for an ABN following their incorporation. ABNs are issued by the Registrar of the Australian Business Register (ABR), which is a public searchable record. ABNs are needed by entities that register for GST. They are also used as an identifier in dealings with government for other purposes.

Under the draft legislation, the process of obtaining an ABN will also change in relation to companies incorporated on and after 1 July 2016. All such companies will be issued with an ABN.

The draft legislation does not compel a company in existence prior to 1 July 2016 to apply for an ABN.

Incorporation of Companies after 1 July 2016

A new company that is registered on and after 1 July 2016 will:

- only have an ABN, rather than an ACN or (as the case may be) an ACN and an ABN;
- be able to apply for a TFN; and
- will not be obliged to apply for a TFN, as it will be able to choose to use its ABN for taxation purposes in lieu of a TFN.

The exposure draft of the accompanying explanatory memorandum notes that ASIC will only be able to register a new company if 'an application for registration in the ABR has been lodged in respect of the proposed company and the Registrar has allocated an ABN to the [proposed] company'. The ABN application will need to be made by a person on behalf of the company that is to be incorporated, with the ABN taking effect in the ABR from the date of incorporation (i.e. the date of registration of the proposed company under the Corporations Act).

Companies may be incorporated by converting certain other pre-existing bodies (e.g. certain associations) into companies. Pre-existing bodies may already have an ABN and this will be used as the ABN of the company into which the existing body is converted.

Cancellation of ABNs

The exposure draft of the accompanying explanatory memorandum notes, at paragraph 1.29, that an ABN of a company registered under the Corporations Act will be incapable of cancellation by the ABR Registrar unless the company is deregistered. It appears that a company will not be able to seek voluntary cancellation of its ABN.

FBT Q&A - Provision of a rental car

Question:

Occasionally a company vehicle is submitted for extensive repairs, due to damage from an accident. The employee is provided with a rental vehicle at no cost during the time the vehicle is being repaired. Given that the employee has private use of the vehicle, would the rental car provided be deemed a fringe benefit and subject to FBT?

Answer:

It is difficult to consider that the provision of the rental car is anything but a fringe benefit, given the ability of the employee to apply the vehicle for private use.

It is considered the rental car provided would constitute a residual benefit. Valuing the residual benefit would be along the lines of costs to hire such a vehicle for the period that it is provided.

Where a rental car arrangement exceeds 30 days, the ATO generally accepts the arrangement be treated as a car benefit and valued in accordance with the car benefit rules.

If the hire period is short, and the value is less than $300, there may be an ability to rely on the minor benefit exemption.

FBT Q&A - Payment of remote area rent

Question:

We are an employer located in a remote location. We have made the decision to pay half of a new employee's private rent.

(See ATO Remote areas listing as to whether a particular location is considered remote for FBT purposes)

Half the rent will be paid by the employee from after tax wages and we will pay the other half direct to the landlord.

Is the portion of rent paid by us subject to FBT?

Answer:

The payment of half the employee's rent is an expense payment fringe benefit.

Under normal rules the taxable value of the benefit is equal to the amount of rent that has been paid by you as the employer.

To the extent the rent is in respect of remote area accommodation then the taxable value may be zero in the situation you have outlined. To be eligible for the concession, the common conditions set out in s. 142(2E) of the *FBT Act* must be satisfied while the employee is using the dwelling as his usual place of residence:

- it is *customary* in the particular industry for employers to provide housing assistance to employees; and
- it is *necessary* for the employer to provide or arrange housing assistance for employees for the following reasons:
    - the nature of the employer's business is such that employees are liable to frequent movement from one residential location to another;

- in the area in which the employee is employed, there is not sufficient suitable residential accommodation otherwise available; or
- because of the custom in the employer's industry to provide housing assistance to employees.

The following requirements as outlined in s. 142(1A) of the *FBT Act* must all be met:

- the unit of accommodation must be in a remote area when it was occupied by the employee;
- at the time he/she occupied the unit, the employee was a current employee of the employer and his/her usual place of employment was in a remote area;
- the common conditions set out in s. 142(2E) of the *FBT Act* must be satisfied during the period the employee occupies the dwelling as his/her principal place of residence (see above); and
- the lease or licence must not have been provided on other than arm's length terms and must not have been provided in order to gain the benefit of a concession under s. 60 of the *FBT Act*.

In relation to rent paid for a dwelling located in a remote area, a 50% reduction in the taxable value is available. The 50% reduction is equal to 50% of the rent incurred by the employee.

As you are paying half of the employee's rent liability, the taxable value will be reduced to zero - the reduction available is equal to the same amount.

This concession is explained in detail in ATO ID 2003/159.

Payroll Q&A - Correction of previous wage underpayment

Question:

A staff member retired and was paid out their leave entitlements.

It was recently discovered that the hourly rate used to determine the payout was incorrect, as it did not take into account an increase that occurred just prior to calculation of the payout.

The Payment Summary issued to the employee only reflected actual payments made to the employee in the 2014-2015 financial year.

The correction will be made by way of a further payment to the employee post 30 June 2015.

Can you confirm whether an adjusted Payment Summary is required to be issued the employee?

Answer:

The withholding and Payment Summary reporting obligations relate to the year in which the amounts are paid.

As such, where the amount is paid in a later year there is no need to revise the Payment Summary already issued.

Instead a Payment Summary for that later year is required to be issued.

There are special rules regarding how much tax to withhold, as a lump sum payment in these circumstances might attract higher withholding than would otherwise have been the average withholding rate for the employee. For further details, see the Australian Taxation Office discussion in 'Schedule 5 - Tax table for back payments, commissions, bonuses and similar payments'.