As this newsletter reaches you, the 2017/18 Federal Budget night (7:30pm AEST, Tuesday 9 May) is less than a week away!

As always, TaxEd will provide our valued members with a comprehensive (and complimentary) summary of how the Budget will affect the Government and Not-for-profit sectors. Your TaxEd Federal Budget summary will hit your inbox on Wednesday morning, 10 May.

If you (or anyone in your organisation) would benefit from more in-depth discussion of the implications of the Federal Budget, we encourage you to register for **TaxBanter's live online webinar** which will take place at **10am AEST, Wednesday 10 May** – **click here for registration information**.

TaxEd membership renewal for 2017/18 is also fast approaching. TaxEd expects to issue 2017/18 renewal notices by the end of May so keep your eye out.

As always we are here to provide training and support for your team needs no matter what time of year.

We've been receiving some great Q&As from members particularly in the FBT and GST areas and it is terrific to see you all making the most of your membership.

Warm regards,

The TaxEd team

GST – Non-resident suppliers of services

For a supply to be a taxable supply all of the following conditions need to be met:

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

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

Where the supplier is a non-resident and the supply is of services (that is, not a supply of goods or real property) then GST may not apply at all particularly if:

- the supplier is not GST-registered and not required to be GST-registered per condition (d); and/or
- the supply is NOT connected with the indirect tax zone per condition (b).

When a non-resident is required to register for Australian GST purposes.

Entities are required to be GST-registered in Australia where they carry on an enterprise (anywhere) and exceed the GST registration turnover threshold (A$75,000 per annum, or A$150,000 per annum for not-for-profit entities).

Generally, it is the value of taxable supplies that counts towards the threshold. One of the conditions for a supply to be a taxable supply is that 'the supply is connected with the indirect tax zone' (refer s. 9-5(c)). This is usually a relevant test for non-resident entities dealing with Australian customers.

Connected with the Indirect Tax Zone

The rules for determining whether a supply is connected with the indirect tax zone (ITZ) are set out in s. 9-25 including separate rules for the supply of goods (to, from and within the ITZ), real property (located in the ITZ), and everything else (that is, things other than goods or real property).

As the heading notes, in this article we will be concentrating on the supply of things other than goods or real property. Also, the reference to the ITZ is essentially a reference to Australia but excluding certain external territories and specific installations. Therefore, for simplicity, in this article we will refer to the ITZ as 'Australia'.

Subsection 9-25(5) provides that a supply of anything other than goods or real property will be connected with Australia if:

(a) the thing is done in Australia; or
(b) the supplier makes the supply through an enterprise that the supplier carries on in Australia; or
(c) all the following apply:
    (i) neither paragraph (a) or (b) apply in respect of the thing;
    (ii) the thing is a right or option to supply another thing; and
    (iii) the supply of the other thing would be connected with Australia; or
(d) the recipient of the supply is an Australian consumer.

The only amendment to the above provision in recent GST law changes was the inclusion of paragraph (d). While we will not be dealing with this aspect in any detail in this article, paragraph (d) is a key component of the so-called 'Netflix' tax. That is, where an entity (for example, a non-resident entity, such as Netflix) makes a supply to an Australian consumer such supplies will be connected with Australia and therefore fall within the Australian GST regime. Prior to this amendment such a supply would typically not have been connected with Australia under any of the other paragraphs of s.9-25(5). We

note 'Australian consumer' is a defined term, essentially referring to an individual who is not acquiring the thing for any business purpose. (Therefore supplies such as a movie downloaded from an overseas supplier where the download is done by an Australian private consumer will fall within the Australian GST regime.)

Subsection 9-26(1) was also recently introduced and insofar as it is relevant to a non-resident making a supply to an Australian business recipient it provides that:

A supply is not connected with Australia if:

(a) the supplier is a non-resident; and
(b) the supplier does not make the supply through an enterprise that the supplier carries on in Australia; and
(c) it is a supply covered by an item in the table.

Item 1 in the table is referred to as an 'inbound intangible supply' and is described as 'a supply of anything other than goods or real property if:

(a) the thing is done in the indirect tax zone; and
(b) the recipient is an Australian-based business recipient of the supply.'

An entity is an 'Australian-based business recipient' if the entity is GST-registered, an enterprise of the entity is carried on in Australia, and the entity's acquisition is not solely of a private or domestic nature.

Conclusion

Therefore, where an Australian-based GST-registered entity makes an acquisition of a service from an overseas supplier, and the entity is making that acquisition in the course of carrying on its enterprise and is not solely private or domestic in nature, the supply will not be connected with Australia. As such the supply made by the non-resident will not be subject to GST.

Additional Comment

For completeness, we note that the above analysis concludes that a 'service' supplied by an overseas supplier and meeting the conditions in s. 9-26(1) will not be connected with Australia. It should also be noted, however, that the entity making the acquisition from the overseas supplier should also consider whether the reverse charge provisions will apply. While a detailed analysis of the reverse charge provisions is beyond the scope of this article, these broadly apply where the Australian-based GST-registered business recipient is making the acquisition otherwise than solely for a creditable purpose - for example, where the acquisition relates to making input taxed supplies. In such cases the entity making the acquisition of the imported service will be subject to GST under the reverse charge rules, and then will separately need to determine the extent to which it is entitled to GST credits.

GST – GST-free child care: extension to certain childcare that is outside the ambit of s. 38-145 of the GST Act

On 5 April 2017, *GST-free Supply (Child Care) Determination 2017* was registered. The Determination supersedes the *GST-free Supply (Long Day Care and In-home Care) Determination 2017* which was registered on 23 March 2017.

Background

The *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* inserted a new streamlined s. 38-150 into the *GST Act* to ensure that, in the limited cases where child care is provided by a kind of service that may not hold approval under the family assistance law, but is nevertheless in receipt of Commonwealth funding for child care related purposes, supplies of child care made by the service remain GST-free if they are specified in a determination made by the minister responsible for child care.

> **Note:**
>
> Supplies of child care by services approved under the *A New Tax System (Family Assistance) (Administration) Act 1999*, as supplies of child care provided by approved services are already GST-free under s. 38-145 of the *GST Act*.

The Legislative Instrument — which was made by the Minister for Education and Training under s. 38-150(2) — ensures that the following child care provided by services that do not hold approval under the family assistance law remain GST-free, provided that the supplier is eligible for Commonwealth funding in respect of the care:

- in-home care; and
- centre-based child care.

Comment:

In-home care means child care provided to one or more children that takes place in the home of one of the children being cared for.

The *GST-free Supply (Child Care) Determination 2017* ensures that the following supplies of child care provided by services that do not hold approval under the family assistance law, but which receive Commonwealth funding, remain GST-free:

- in-home care; and
- centre-based care.

The Determination commences on 5 April 2017.

FBT – Base value of a gifted vehicle

We were recently requested to consider the case of a TaxEd member organisation who had acquired a car by way of gift. That is, no payment was made for the car (including stamp duty on transfer which was paid by the donor).

The car was subsequently allocated to an employee who had full commuter use of the vehicle for the FBT year and garaged the vehicle at their residence overnight for the full FBT year. No log book was kept as there was no work-related travel undertaken by the employee.

Under normal circumstances this is a clear car fringe benefit, however, as no cost was incurred in acquiring the car and can it be argued that the FBT base value is nil to the employer?

In analysing this question the starting point is to determine whether the car is 'held' by the provider for FBT purposes. The provider in this case is the employer and based on the facts provided, as the car was gifted to the employer the employer is the owner of the car and is therefore taken to 'hold' the vehicle.

The next step is to ask whether the car is used, or is taken to be available for private use of an employee. The car was used for private purposes by the employee and in addition, is taken to be available for private use due to the home garaging of the vehicle. As such, this criterion is met.

So what is the base value then?

The definition of cost price for base value purposes clearly refers to expenditure incurred by the provider of the car, i.e. expenditure incurred by the employer. So, strictly speaking, the cost price is zero as the car was gifted to the employer.

However, this sounds too good to be true, doesn't it? For those of you reading this article nodding your head in agreement you are correct.

Section 13 of the *FBT Act* overcomes this deficiency. The purpose of s. 13 is to ensure that the value of a car fringe benefit is determined on the basis of expenditure under arm's length transactions. It also requires a market value to be attributed to property or services which may have been obtained at arm's length but for which no expenditure was incurred.

Given the operational effect of s. 13, the base value of the car will be based on the employer being deemed to have incurred expenditure in acquiring it equal to its market value at the time of transfer.

Eligibility – Foreign resident capital gains withholding payments – Concession re NFP vendors

On 6 April 2017, the Legislative Instrument *PAYG Withholding variation for foreign resident capital gains withholding payments – income tax exempt entities* (Legislative Instrument) was registered as F2017L00390.

Background

Purchasers and transferees of certain types of CGT assets must withhold an amount under Subdiv 14-D of Schedule 1 to the *TAA* where they acquire the asset from a foreign resident and the asset is:

- taxable Australian real property (TARP);
- an indirect Australian real property interest; or
- an option or right to acquire these types of property or interests.

The amount payable to the Commissioner under the withholding regime is generally 10 per cent of the asset's purchase price. However, s. 14-235(5) of Schedule 1 to the *TAA* provides the Commissioner with a discretion to vary the amount, or classes of amounts, payable.

The purpose of this Legislative Instrument is to avoid unnecessary withholding in circumstances where no income tax will be payable by the seller of the relevant property.

Legislative Instrument

The Legislative Instrument varies to nil the amount that would otherwise have to be paid to the Commissioner under s. 14-200 of Schedule 1 to the *TAA* where certain acquisitions of taxable Australian property occur from income tax exempt entities. (Broadly, an exempt entity in s. 995-1(1) of the *ITAA 1997* is an entity all of whose ordinary income and statutory income is exempt from income tax, or an untaxable Commonwealth entity.)

The entity must provide the purchaser with evidence that they are an income tax exempt entity — either in the form of:

- a private binding ruling issued by the ATO confirming that the entity is income tax exempt in the year in which the transaction occurs; or
- documentation showing that the entity is endorsed for income tax exemption as a registered charity under item 1.1 of s. 50-5 of the *ITAA 1997.*

The Legislative Instrument removes the need for an income tax exempt entity to make an application for a variation under s. 14-235(2) of Schedule 1 to the *TAA*.

In summary- Key Points:

- Legislative Instrument *PAYG Withholding variation for foreign resident capital gains withholding payments – income tax exempt entities* — registered on 6 April 2017 — removes the requirement for a purchaser to withhold an amount in certain circumstances where it acquires taxable Australian property from an income tax exempt entity.
- For nil withholding to apply, the vendor entity must provide to the purchaser either:
  - evidence of a private binding ruling confirming its income tax exemption for the year in which the transaction occurs; or
  - documentation showing that it is endorsed for income tax exemption as a registered charity under s. 50-5 of the *ITAA 1997*.

Payroll – PBR on who is an employee for Super Guarantee Purpose

This article looks at a private binding ruling (Authorisation Number: 1013103814672 - 'the PBR') that considers whether a person was an employee for purposes of the superannuation guarantee legislation. It deals with the status of a salesperson who receives only commission payments.

The ruling usefully considers factors (and identifies associated case law) in determining whether the person was a common law employee and demonstrates the process of weighing up such factors to reach a conclusion.

The ruling also considers the statutory extension of the concept of an employee to include a person engaged 'under a contract that is wholly or principally for the labour of the person'.

The Applicable Legislation

Subsection 12(1) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) provides:

> 'Subject to this section, in this Act, ***employee*** and ***employer*** have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):
>
> a. expand the meaning of those terms; and
>
> b. make particular provision to avoid doubt as to the status of certain persons.'

Subsection 12(3) extends the concept of 'employee' for SGAA purposes:

> 'If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.'

The PBR explained the interaction of these provisions as follows:

> 'While the term 'employee' which is defined in section 12 of the SGAA, includes common law employees, it also extends to include workers who are engaged under a contract wholly or principally for their labour. This employment relationship is often referred to as a 'contract *of* service'. This relationship is distinguished in Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee*? (SGR 2005/1), from a 'contract *for* service which is typically a contractor and principal type of relationship and did not attract an SGC liability.
>
> Therefore, it is necessary to consider not only whether there is a common law relationship of employer/employee between the parties, but also, if the common law test is not met or is inconclusive, whether the expanded definition of 'employee' in subsection 12(3) of the SGAA applies. If a worker is not an employee under subsections 12(1) or 12(3) of the SGAA, their status is described as an independent contractor and there is no SG obligation.
>
> The task of defining the characteristics of the contract of service - the employment relationship - has been the subject of much judicial consideration. As a result, some general tests have been developed by the courts to assist in the determination of the nature of the relationship. However, defining the contractual relationship between the employer and employee could be difficult and will depend on the facts of each case.
>
> Accordingly it is necessary to determine the true nature of the whole relationship between the principal and the workers, as to whether there was a common law employer and employee relationship, or whether the workers meet the expanded definition of employee under subsection 12(3) of the SGAA.'

It will be noted that s. 12 contains several extensions to the common law concept of employee. Subsection (3) is a commonly encountered extension. The facts being considered did not raise the other more narrow extensions.

Facts considered by PBR

The PBR summarised the circumstances which it addressed, as follows:

'A request for a private ruling was lodged on behalf of the Principal in respect of whether a superannuation guarantee liability arises for the Worker.

- The Principal sells and installs a product.
- The Principal entered into a verbal agreement with the Worker for the Worker to negotiate the sale of its product.
- The Worker was engaged through word of mouth on a friend's recommendation.
- Under the terms of the agreement the Worker would be entitled to a commission payment from the Principal, over a base price for the sale of the product.
- The Worker provided an invoice with an ABN for their commission. The commission varied from sale to sale.
- The Worker is an individual sole trader and has an ABN.
- The Worker was not an apprentice, trainee, trades assistant of a labourer.
- The Worker could engage the services of other parties as they could carry on any other form of business and/or employment of their choosing.
- The Worker was not obligated to sell the product for the Principal as they could carry on any other form of business and/or employment of their choosing.
- The amount of commission paid to the Worker was based on the sale price they negotiated in excess of the base price; the commission varied with each sale.
- If the Worker did not sell the product, they received nil payments from the Principal.
- It is noted, that if the Principal was not paid for a sale negotiated by the Worker, the Worker did not get paid commission.
- The Worker did not require specific equipment, tools or plant outside of general office equipment.
- The Worker required only minor items of office equipment (e.g. phone, desk, computer), which they purchased.
- They owned a motor vehicle that was used to travel to customers in the Workers home state.
- The Worker did not carry out physical work; fixing problems, defects or damage.
- The Worker under the agreement was paid by the Principal for interstate travel costs incurred by the Worker when visiting customers, including hire car, accommodation and flights.
- The Principal provided office consumables to the Worker and paid for the Worker's business mobile phone usage costs.
- The Principal has other workers that are engaged on the same or similar basis.
- The Worker provided services to at least one other business, whilst under the arrangement with the Principal.
- The Worker received no training.
- The Worker determined the hours of work and the Principal had no say.
- The Worker was not required to attend business meetings or meetings with clients.
- The Principal did not schedule tasks for the Worker and the Worker was not supervised.
- The Worker did what it took to sell the product. This could be a phone call or several visits to the customer.
- The Principal did not schedule tasks for the Worker and they were not supervised.
- The Worker did not advertise their own business or the Principal's business, on any of the assets/equipment/tools used by the Worker.
- The Principal provided a t-shirt with the company logo to the Worker to wear when visiting clients. The Worker also had a business card with the Principal's logo.
- The Worker did not submit quotes, as the product was made available to the Worker at a minimum price. Whatever the Worker sold the product for over that minimum price, was the amount they invoiced the Principal. If they couldn't achieve that amount, then there was no sale. Copies of the invoices for several months have been provided.
- As the majority of the Worker's travel for work was interstate, the Worker did not pay their own interstate travel expenses. The Worker lived in one state and their expertise was required in

another state; They received payment and reimbursements for flights, car hire accommodation and meal costs when required to travel interstate and phone bill for work calls. The Principal also paid for the printer paper and ink.

- In relation to work performed by the Worker, the company insurances only covered the product the Worker sold and the installation. The Worker was responsible for other insurances such as compensation, private accident insurance, public liability insurance, etc.
- The Principal stated the following in respect of vehicle use by the Worker:
  - Whether the vehicle is actually needed to perform the Worker's tasks or is simply a convenience is open to interpretation.
  - The Worker may choose to use a motor vehicle to travel without it being necessary.
  - The Worker certainly did not require a motor vehicle to carry equipment or tools of trade.
- The Worker was providing services to at least one other business at the same time they were selling the Principal's product under their arrangement with the Principal.
- The Worker has established their own business. The Worker was operating this business at the same time they were providing services to the Principal up until the time they ceased their relationship with the Principal. This business provides services directly in competition with the Principal. They also use the same suppliers as the Principal.'

Whether the Worker is a common law employee

The Commissioner analysed (and weighed up) seven factors. The Commissioner concluded that the Worker was not a common law employee:

'The relationship between an employer and employee is a contractual one. It is often referred to as a contract *of* service. Such a relationship is typically contrasted with the independent contractor relationship that is referred to as a contract *for* services. An independent contractor typically contracts to produce the contracted result in return for an agreed payment, whereas an employee contracts to provide their labour (typically to enable the employer to achieve a result).

The Courts have considered the common law contractual relationship between parties in a variety of legislative contexts. As a result, a substantial and well-established body of case law has developed on the issue. Consideration should be given to the various indicators identified in judicial decisions. No list of factors is to be regarded as exhaustive and the weight to be given to particular facts will vary according to the circumstances. The totality of the relationship between the parties must be considered to determine whether, on balance, the worker is an employee or independent contractor.

In deciding whether an individual is a common law employee, there are a number of common law factors to consider. The common law factors we have considered are discussed below.

1. Terms of engagement

The fundamental task with respect to the terms of engagement test is to determine the nature of the contract between the parties. For this test, we must determine the nature of the contract between the parties. We will consider whether the contract is written or verbal and whether the terms and conditions are express or implied. These factors are important in characterising the relationship between the parties.

It might be argued that the parties' intention in forming a contract is not subjective, but an objective one; that is, the task is not to discover the intention of the parties involved but to decide what each could reasonably conclude from the actions of the other. In the observation made by Isaacs J in *Curtis v. The Perth and Fremantle Bottle Exchange Co Ltd* (1914) 18 CLR 17:

Where parties enter into a bargain with one another whereby certain rights and obligations are created, they could not by a mere consensual label alter the inherent character of the relations they have actually called into existence. Many cases have arisen where Courts have disregarded such labels, because in law they were wrong, and have looked beneath them to the real substance.

Therefore, simply defining someone as a contractor did not necessarily lead to the conclusion that the individual is providing services as part of an operation of their own independent business. In *Hollis v. Vabu Pty Ltd* (2001) 207 CLR 21 (*Hollis v. Vabu Pty Ltd*) it was noted that although no payments of annual leave or sick leave were given, and no superannuation deductions were made by Vabu in respect of the bicycle

couriers, the relationship between the parties was found not merely from these contractual terms. The system which was operated under and the work practices imposed by Vabu went to establishing 'the totality of the relationship' between the parties and it is this which is to be considered

Application of the common law to your case:

The Principal entered into an agreement (verbal) with the Worker. Under the terms of the agreement the Worker was empowered by the Principal to negotiate the sale of a product on its behalf. For each product on which the Worker negotiated a sale, they would be entitled to a commission payment from the Principal.

To calculate the commission the Principal provided the Worker with a base price at which the product had to be sold. The amount of commission paid to the Worker is then based on the sale price they negotiated in excess of the base price; the commission varied with each sale. If the Worker did not sell any of the products they received nil payments from the Principal. Also if the Principal was not paid for a sale negotiated by the Worker, the Worker did not get paid commission.

The Worker would provide an invoice with an ABN for their commission. Copies of invoices provided over a certain period showed the Worker's home address, their ABN and the total unit price over the base price, which were varying amounts.

The Principal advised that the Worker was engaged by word of mouth, on recommendation from a friend who said the Worker had experience in that field of work. The Principal has other workers engaged on the same basis.

The Worker was not an apprentice, a trainee, trades assistant or a labourer. The Worker is an individual operating as a sole trader and has an ABN. The Worker could engage the services of other parties to sell the product on behalf of the Principal.

The Worker was not obligated to sell the product for the Principal. The Worker could carry on any other form of business and/or employment of their choosing. Information provided in an email advised that the Worker was providing services to at least one other business at the same time they were selling the product under the arrangement with the Principal.

The Worker set their own hours and was not required to attend meetings. The Principal did not schedule tasks and they were not supervised.

Overall, we are satisfied that the terms of engagement test in isolation is more in favour of the notion that the relationship between the Principal and the Worker is one of principal and independent contractor.

2. Control

The extent to which the employer has the right to control the manner in which the work is performed is the classic test for determining the nature of a working relationship. A common law employee is told not only what work is to be done, but how and where it is to be done. With the increasing usage of skilled labour and consequential reduction in supervisory functions, the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it.

The mere fact that a contract may specify in detail how the contracted services are to be performed did not necessarily imply an employment relationship. A high degree of direction and control is common in contracts for services because the payer has the right to specify in the contract how the services are to be performed. Similarly, the right to supervise how the work is to be performed did not constitute a contract of service where the essence is one of independent contractor.

Paragraphs 36 and 37 of Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?* provides that while control is important, it is not the sole indicator of whether or not a relationship is one of employment. The approach of the Courts has been to regard it as one of a number of indicia which must be considered in determination of that question.

Even though the modern approach to defining the contractual relationship is to have regard to the totality of the relationship between the parties, control is still an important factor to be considered. This was recognised by Wilson and Dawson JJ in *Stevens v. Brodribb* ((1986) 160 CLR 16 at 36) (*Stevens v. Brodribb)*, where they state:

> In many, if not most cases, it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee.

Application of the common law to your case:

The following information is relevant to the working relationship with the Worker and the extent to which the Principal had the right to control the manner in which the work was performed:

- There was no written contract between the Principal and the Worker and no direction as to the hours of work. The Worker did what it took to sell the product. This could be a phone call or several visits to the customer but that is completely in their hands.
- There was also no obligation on the Worker's part to provide their services to the Principal.
- The Worker was not provided with training. There were no scheduled jobs or tasks as the Worker was able to determine their own hours of work and the Principal had no say in setting the hours of work.
- The Worker could engage the services of other parties to sell the products on behalf of the Principal.
- The Worker could carry on any other form of business and/or employment of their choosing.

Overall, we are satisfied that the control test in isolation is more in favour of the notion that the relationship between the Principal and the Worker was one of principal and independent contractor.

3. Integration

Another significant factor in establishing the nature of a contractual relationship at common law is to determine whether the worker's services are an integral part of the employer's business (under a contract of service as an employee) or providing services as an individual carrying on his or her own business (under a contract for services as an independent contractor). This is known as the 'integration' test.

If the worker's services are an integral and essential part of the employer's business that engages them, they are considered by the courts to be a common law employee. If the worker is providing services as an individual carrying on their own business, they are an independent contractor.

It is necessary to keep in mind the distinction between a worker operating their own business and a worker operating in the business of the payer. The worker needs to be running their own business or enterprise and have independence in the conduct of their operations.

In *Montreal v. Montreal Locomotive Works* [1947] 1 DLR 161, Lord Wright said:

> ...it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

Similarly, in *Stevenson, Jordan and Harrison Ltd v. MacDonald and Evans* [1952] 1 TLR 101 Denning LJ said:

> ...under a contract of service, a man is employed as part of the business, and his work is done as a integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

The professional skills involved in carrying out the work are also a useful guide in determining whether a person is carrying on their own business or not. The provision of professional skills or skilled labour may imply that the contractor is able to make an independent career by selling that skill. In the case of a contractor with an independent career, it may be implied that the contractor is able to conduct their own business using those skills.

This was highlighted in *Hollis v. Vabu Pty Ltd* at paragraph 48, where the court said in relation to bicycle couriers hired by Vabu:

> The couriers were not providing skilled labour or labour which required special qualifications. A bicycle courier is unable to make an independent career as a free-lancer or to generate any 'goodwill' as a bicycle courier…

Consideration may also be given to whether the worker could be expected to generate goodwill in their own right. If the benefits from the creation of goodwill flow to the worker then this would indicate that they are an independent contractor. Alternatively, if goodwill flows to the principal, this suggests an employer/employee relationship.

It is therefore necessary to consider whether the worker is providing services as part of the principal's business (under a contract of service as an employee) or providing services as part of their own business (under a contract for services as an independent contractor).

Application of the common law to your case:

Information provided by the Principal stated that the Worker was not required to attend mandatory meetings within the Principal's business or with the Worker's customers. The Worker did what it took to sell the product. This could be a phone call or several visits to the customer but that was completely in the Worker's hands. No jobs/tasks to be carried out by the Worker were scheduled by the Principal. The Worker was not supervised.

The Worker was an individual operating as a sole trader and had used their skills before they worked for the Principal as they had previously worked in the same field.

The Worker could engage the services of other parties to sell the product on behalf of the Principal. The Worker was not obligated to sell the product for the Principal. The Worker could carry on any other form of business and/or employment of their choosing. The Worker was providing services to at least one other business at the same time they were selling the Principal's product under the arrangement with the Principal

The Worker was also operating their own business for a period of time, at the same time they were providing services to the Principal up until the time they ceased their relationship with the Principal.

The Worker was supplied with a t-shirt and a business card both with logos promoting the Principal's business. The Principal paid the worker for printer paper and ink.

The Principal did not advertise the business on any of the assets/equipment/tools used by the Worker other than the t-shirt and business card. The Worker did not advertise their business on any of assets/equipment/tools they used.

Overall, we are satisfied that the integration test in isolation is more in favour of the notion that the relationship between the Principal and the Worker was one of principal and independent contractor.

4. 'Results' test

Under a results based contract, payment is often made for a negotiated contract price, as opposed to an hourly rate. The meaning of the phrase 'producing a result' means the performance of a service by one party for another where the first mentioned party is free to employ their own means (that is, third party labour, plant and equipment) to achieve the contractually specified outcome. The essence of the contract has to be to achieve a result and not to do work.

Satisfactory completion of the specified services is the result for which the parties have bargained. That is, a payment becomes payable when, and only when, the contractual conditions have been fulfilled.

Where the substance of a contract is to achieve a specified result, there is a strong indication that the contract is one for services. In *World Book (Australia) Pty Ltd v. FC of T* 92 ATC 4327 (*World Book (Australia) Pty Ltd v. FC of T)* Sheller JA said:

> Undertaking the production of a given result has been considered to be a mark, if not the mark, of an independent contractor.

While the notion of 'payment for a result' is expected in a contract for services, it is not necessarily inconsistent with a contract of service. For example, the Full Court of the Supreme Court of South Australia in the decision of *Commissioner of State Taxation v. Roy Morgan Research Centre Pty Ltd* (2004) SASC 288

(*Commissioner of State Taxation v. Roy Morgan Research Centre Pty Ltd)*, found that interviewers who were only paid on the completion of each assignment not on an hourly basis, were employees and not independent contractors. It was found that the workers were paid for their time spent and labour, and not to produce a result.

Having regard to the true essence of the contract, the manner in which payment is structured will not of itself exclude genuine result based contracts. For example, there are results based contracts where the contract price is based on an estimate of the time and labour cost that is necessary to complete the task, or may even be calculated on that basis, subject to reasonable completion times. Generally, where a worker submits quotes or issues invoices for each job to the principal, this would be consistent with operating their own business. Nonetheless, the issuing of invoices is not necessarily determinative of the nature of the relationship.

Accordingly, the contractual relationship as a whole must still be considered to determine the true character of the relationship between the parties.

Application of the common law to your case:

As mentioned above the Principal provided the Worker with a base price at which the product had to be sold. For each product on which the Worker negotiated a sale they would be entitled to a commission payment from the Principal.

The Worker would generate commission based on the amount by which the sale price to the customer exceeded the base price set by the Principal.

If the Worker did not sell any products they received nil payments from the Principal. The Worker was not paid by the hour and was only paid when they achieved a result that attracts a commission. Also if the Principal was not paid for a sale negotiated by the Worker, the Worker did not get paid commission.

The Worker would provide an invoice with an ABN for their commission. Copies of invoices provided over a three-month period showed the Worker's home address, their ABN and the total unit price over the base price, which were varying amounts.

Overall, we are satisfied that the results test in isolation is more in favour of the notion that the relationship between you and the workers was one of principal and independent contractor.

5. Delegation

The power to delegate or subcontract (in the sense of the capacity to engage others to do the work) is a significant factor in deciding whether a worker is an employee or independent contractor. If ant person is contractually required to personally perform the work, this is an indication that the person is an employee.

If the contract did not expressly require the worker to personally perform the services, an independent contractor has the capacity to delegate or subcontract all (or some) of the work to others. Where the worker delegates, they are responsible for remunerating that worker.

In the case of *Neale (DFC of T) v. Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 at 425; 6 AITR 201 at 202, the High Court interpreted the words 'a contract which is wholly or substantially for the labour of the person to whom the payments are made' to decide that if a contract leaves a person completely free, if he or she chooses, to engage others to perform the work on his or her behalf means that the payments are not payments under a contract for labour. That is so even if the contractor actually did perform the work personally and had no intention of doing otherwise.

> If the contract leaves the contractor free to do the work himself or employ other persons to carry it out the contractual remuneration when paid is not a payment made wholly or at all for the labour of the person to whom the payments are made. It is a payment made under a contract whereby the contractor has undertaken to produce a result...

When an employee asks a colleague to take an additional shift or responsibility, the employee is not responsible for paying that replacement worker; rather the employee has merely substituted or shared the workload.

However, a clause in the contract may permit the worker to delegate the task to another worker subject to approval of the principal, as the principal may not want an unknown worker to be working on their site or who may not be suitably qualified.

In the case of *Bowerman v. Sinclair Halvorsen Pty Ltd* [1999] NSWIRComm 21, Bishop J said:

> The fact that any substitute driver had to be approved by the company did not give the respondent [the principal] control over that delegation… the company surely had the right to be confident that any substitute driver was competent to do the job and maintain the "integrity" of the company as Mr Coomb put it.

Therefore, under a contract for services, the emphasis is on the performance of the agreed services (achievement of the 'result'). A person who has a right to delegate work (whether or not that right is exercised in practice) did not work under a contract wholly or principally for their labour. Unless the contract expressly requires the service provider to personally perform the contracted services, the contractor is free to arrange for his or her employees to perform all or some of the work or may subcontract all or some of the work to another service provider.

Application of the common law to your case:

The Principal has stated that the Worker was not obligated to sell the product for the Principal, as they could carry on any other form of business and/or employment of their choosing. The Worker was an individual who operated as a sole trader and had an ABN. The Worker was not an apprentice, trainee, trades assistant or labourer. The Worker could engage the services of other parties to sell the product on behalf of the Principal.

Overall, we are satisfied that the delegation test in isolation is more in favour of the notion that the relationship between you and the workers was one of principal and independent contractors.

6. Risk

Generally speaking, employers are vicariously liable for negligence and injury caused by their employees. However a principal will not be liable for negligence or injury caused by an independent contractor.

The higher the degree to which a worker is exposed to the risk of commercial loss (and the chance of commercial profit), the more they are likely to be regarded as being independent. Typically, a worker who derives piece rate payments and sustains large outgoings would be so exposed. The higher the proportion of the gross income of the worker which is required to be expended in deriving that income, and the more substantial the assets which the worker brings to the tasks, the more likely that the contract is for service, or a contract with an independent contractor.

As stated by McKenna J in *Ready Mixed Concrete (South East) Limited v. Minister Pensions and National Insurance* [1968] 2 QB 497 at 526:

> …the owner of assets, the chance of profit and risk of loss in the business of carriage are his and not the company's.

Another consideration of risk is the liability for the cost of rectifying faulty work. That is, the key underlying consideration is whether the individual is exposed to commercial risk in terms of a liability to cover the cost of rectifying defective work. This is consistent with the focus on the chance of profit and the risk of loss as a traditional indicator that a worker is an independent contractor conducting their own business.

Carrying their own insurance and indemnity policies is an indicator that a worker is engaged as an independent contractor.

Application of the common law to your case:

In relation to work performed by the Worker, the Worker was responsible for paying insurance such as worker's compensation, private accident insurance and public liability insurance,

The Principal's insurance only covered the product the worker sells and the installation.

In relation to this, neither the Worker nor the Principal made a claim against any of these policies.

The product was made available to the Worker at a minimum price; whatever the worker sold the product for over that minimum price was the amount they invoiced the Principal for. If the Worker couldn't achieve that amount, then there was no sale. The Worker was therefore in charge of theirs own profits or loss for the product sold.

The Worker paid for the establishment of a home office, including all relevant office equipment. However, the Principal provided office consumables to the Worker and paid for the Worker's business mobile phone usage costs. They also paid or reimbursed interstate travel expenses such as flights, car hire accommodation and meal costs.

Overall, we are satisfied that the risk test in isolation is more in favour of the notion that the relationship between you and the workers was one of principal and independent contractor.

7. Capital - Provision of tools and equipment and payment of business expenses.

A worker who has been integrated as an employee into the business is more likely to be provided with the tools and equipment required for his or her work by the employer. Furthermore, the employer is often also responsible for the business expenses incurred by the worker, since the worker has been integrated into the employer's business.

Independent contractors carrying on their own business often provide and pay for their own assets, tools, equipment, maintenance costs and other expenses. Usually, they will have factored these costs in their overall fee or will seek separate payment for such expenses from the principal.

In *Stevens v. Brodribb* at 36-37, the High Court observed that working on one's own account (as an independent contractor) often involves:

> The provision of him by his own place of work or of his equipment, the creation of him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion…

Application of the common law to your case:

The Worker paid for the establishment of a home office, including all relevant office equipment. However, the Principal provided office consumables to the Worker and paid for the Worker's business mobile phone usage costs.

The majority of the work the Worker undertook was interstate. The Worker's expertise was required in another state. The Worker did not pay their own interstate travel expenses. The Principal paid or reimbursed interstate travel expenses such as flights, car hire accommodation and meal costs.

The Principal paid the Worker for consumables used by the Worker that being a t-shirt, a business card both with the Principal's business logo and printer paper and ink.

The Worker did not carry out physical work. Their generation of income was not dependent on the use of tools. They required only minor items of office equipment (e.g. phone, desk, and computer) which they purchased. The Worker used a motor vehicle to travel and they owned the vehicle.

The Principal states the following:

- Whether the vehicle is actually needed to perform the Worker's tasks or is simply a convenience is open to interpretation.
- The Worker may choose to use a motor vehicle to travel without it being necessary.
- The Worker certainly did not require a motor vehicle to carry equipment or tools of trade.

Overall, we find that the capital test in isolation is inconclusive of the notion that the relationship between you and the workers was one of principal and independent contractor.

Our conclusion regarding the common law definition of employee

We have considered the relationship between the Principal and the Worker under seven common law factors. On six of the factors we found that the tests were more in favour of the notion that the relationship between the Principal and the Worker was one of principal and independent contractor.

Consequently we consider on balance that the results under section 12(1) of the SGAA are that the relationship is one of principal and independent contractor.'

Whether the Worker was an employee due to working under a contract that is wholly or principally for the labour of the person - s.12(3) SGAA

The PBR considered the application of s. 12(3) of the SGAA. As mentioned above, that subsection provides:

> If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

The PBR noted the subsection had been considered in SGR 2005/1:

> 'SGR 2005/1 explains when an individual is considered to be an 'employee' under section 12 of SGAA.
>
> Paragraph 78 of SGR 2005/1 states that where the terms of the contract, in light of the subsequent conduct of the parties, indicate that:
>
> - the individual is remunerated (either wholly or principally) for their personal labour and skills;
> - the individual must perform the contractual work personally (there is no right to delegate); and
> - the individual is not paid to achieve a result.
>
> The contract is considered to be wholly and principally for the labour of the individual engaged, and he or she will be an employee under subsection 12(3) of the SGAA.'

The PBR applied the following analysis of the three dot points and found that, as some the requirements were not met on the facts, the Worker was not an 'employee' under the extended definition:

> **'Wholly or principally for labour**
>
> In this context, the word "principally" assumes its commonly understood meaning, that is chiefly or mainly, and labour includes mental and artistic effort as well as physical toil.
>
> A contract may be partly for labour and partly for something else, such as the supply of goods, materials or hire of plant or machinery. Subsection 12(3) of the SGAA only applies if the contract is wholly or principally for labour.
>
> The Worker was paid commission on an amount above the base rate set for each product sold. If the amount above the base rate was not achieved the result was the Worker received nothing.
>
> Based on the available facts and evidence, we consider that the Worker was paid primarily for their own labour and skills.
>
> **The individual must perform the duties themselves**
>
> As discussed earlier, we consider that the facts and evidence (common law element of delegation) indicate that the Worker did have the right to delegate work to others.
>
> **Not paid to achieve a result**
>
> As discussed earlier, we consider that the facts and evidence (common law element of results) indicate that the Worker was paid for a result.
>
> **Our conclusion regarding the expanded definition of employee**
>
> Accordingly, as the Worker did not satisfy all three components of the expanded definition under subsection 12(3) of the SGAA, he did not meet the expanded definition of employee as set out under subsection 12(3) of the SGAA.'

Overall Conclusion

The PBR concluded:

> 'Upon taking into account of all the available facts and evidence, the Commissioner considers that with respect to work performed for the Principal, the Worker did not meet the definition of an employee for the purposes of the SGAA under either common law or the expanded definition provided under subsection 12(3) of the SGAA.
>
> Accordingly as the Worker is not an employee of the Principal, ordinary time earnings usually the amount an employee earns for their ordinary hours of work which includes commissions, did not apply to the Worker. As the Principal did not have an obligation to pay superannuation contributions for the benefit of the Worker under the SGAA, the Principal also did not have an obligation to pay superannuation contributions on the commission paid to the Worker.'

A postscript - reliance on Published PBRs:

Published PBRs are edited versions of rulings given to specific taxpayers. Other taxpayers cannot rely on such edited versions in determining their own tax affairs. The PBR notes:

> The advice in the Register has been edited and may not contain all the factual details relevant to each decision. Do not use the Register to predict ATO policy or decisions.

However, published PBRs provide insight into ATO thinking and the analysis is often a valuable starting point for a taxpayer's own thinking and identification of issues. If a taxpayer seeks to rely on conclusions in a published PBR, the taxpayer should consider seeking a specific private ruling for its benefit.

FBT Q&A – Earliest holding time

Question

We recently sold a number of our fleet cars to a leasing company at market value then leased them back from the leasing company. The cars did not leave our premises and are still registered under our business name. The subject cars are all aged less than 4 years old.

Do we retain the original base values of the vehicles for FBT calculation or can we calculate a new base value which could be determined by the sale price of the vehicle?

Answer

In determining the base value of a particular car held by a particular person, it must be the value as determined at the earliest holding time.

In this case, you owned the vehicles and have essentially sold and leased back the same vehicles. So originally the cars were held in an ownership capacity and now are held in a lessee capacity for FBT purposes.

At the earliest holding time the cars were owned by you and so the base value is your cost price at this point in time.

The sale and lease back arrangement has not altered the earliest holding time in respect of each of the particular cars and so the original base values should continue to be used.

FBT Q&A – When are higher education course fees 'otherwise deductible' for FBT purposes?

Question

We have had a number of staff take on further higher education study during the FBT year. In all cases study leave under our current study leave policy has been approved, as it was accepted the course would be of benefit to the employee in undertaking their duties. Are such study costs otherwise deductible?

Answer

Whether higher education course fees result in a FBT liability or not depends on whether the employee would have been entitled to a deduction for the fees in their own capacity on the basis the course undertaken constitutes self-education.

The general principles used to determine the deductibility of self-education expenses are conveniently summarised by the Commissioner in TR 98/9 as follows:

- A deduction is allowable for self-education expenses if the taxpayer's income-earning activities are based on the exercise of a skill or some specific knowledge and the subject of self-education enables the taxpayer to maintain or improve that skill or knowledge.
- A deduction is allowable for self-education expenses if the subject of self-education leads to, or is likely to lead to, an increase in the taxpayer's income from current income-earning activities.

The active encouragement by the employee's employer to participate in a particular course of study is generally strong evidence to support the above.

If, however, the study will enable an employee to get employment, to obtain new employment or to open up a new income-earning activity (whether in business or in the employee's current employment) a deduction will not be available.

It should be noted that the effect of s. 26-20 of the *ITAA 1997* is that the following payments are not deductible and therefore cannot be 'otherwise deductible' for FBT purposes:

- a student contribution amount, within the meaning of the *Higher Education Support Act 2003,* paid to a higher education provider (within the meaning of that Act); or
- repayments of HELP loans, whether they be for:
    1. HECS-HELP
    2. FEE-HELP
    3. VET FEE-HELP
    4. OS-HELP
    5. SA-HELP

A student contribution amount is generally payable by the course enrolee in relation to HECS or HELP funded courses.

FBT Q&A – Is there a fringe benefit liability for parking provided to employees who commute using motorcycles?

Question

Certain car parking spaces are allocated to employees who commute using motorcycles – does this give rise to an FBT liability?

Answer

The Division 10A car parking fringe benefits FBT rules are predicated on the basis that a car is parked. A car is defined for FBT purposes as a motor vehicle (except a motor cycle or similar vehicle) designed to carry a load of less than 1 tonne and fewer than 9 passengers.

On this basis, parking of a motor cycle on employer premises cannot give rise to a car parking fringe benefit.

However, consideration must be given to whether any other category of fringe benefit may arise.

As with many benefits not specifically dealt with it by the other categories of fringe benefits, parking of a motor cycle could potentially be a residual benefit.

However, s. 58G provides an exemption for 'motor vehicle parking' that would otherwise be a residual fringe benefit.

The definition of a motor vehicle is any motor powered road vehicle.

Accordingly free motorcycle parking provided to employees will not give rise to an FBT liability.

FBT Q&A – Treatment of GPS installation costs

Question

Several years after a car was purchased, a GPS system was purchased and fitted to the vehicle. Do the costs that are incurred form part of the operating costs of the car for the year in which the device was purchased or is the cost added to the cost price of the vehicle?

Answer

The operating cost of a car is made up of the following items:

1. car expenses (other than insured repairs, registration, insurance and lessor's charges pursuant to the lease agreement);
2. registration and insurance expenses attributable to the holding period;
3. where the car is owned, deemed depreciation of cost price and non-business accessories;
4. where the car is owned, deemed interest at the statutory interest rate for the year applied to the depreciated value of the car.

The ATO has expressed the view in their NTLG FBT Sub-Committee Minutes of 30 May 2002 that where non-business accessories paid for by an employer are fitted to a leased car some time after the lease commenced, the costs are not 'car expenses' as defined, and are therefore not taken into account under the operating cost method.

Although the minutes referred to leased cars, fundamentally the principal would apply to cars that are owned as well.

In any case, whether the car is owned or leased, if the cost and installation of the unit is below $300 then perhaps the minor benefit exemption can be applied.

Note that such costs could be included in the cost price of a car if they were incurred at or around the time the car was acquired. In this case, given the gap before fitting the GPS, it does not appear that the cost can be added to the cost price of the car.

If the GPS is of a portable nature but is simply being fitted to the car for convenience, and if it is to be used primarily for employment purposes, could it be considered an exempt portable electronic device under s. 58X?

The ATO lists examples of portable electronic devices to include a mobile phone, calculator, personal digital assistant, laptop, portable printer, and portable global positioning system navigation receiver.

However, if the GPS is more of an 'in-dash' type unit then it is most likely going to be considered not portable for the purposes of the s. 58X exemption.

GST Q&A – What do we do when the ABN does not match the name of the company on the invoice?

Question

We currently use the ABN Lookup to verify creditor details prior to setting the creditor up in our system. What do we do when the ABN does not match the name of the company on the invoice? We have many cases of this occurring including where the ABN is registered to a trust and there is no relation between the name of the trust and the name of the company.

I wonder if you can advise what our obligation is as far as verifying the ABN details that we have been provided with prior to paying the creditor.

Answer

With regard to your comments that the ABN provided does not match their trading name, this is more common than many expect. This can occur for many reasons - often due to the business being operated by a trust with a corporate trustee: the trust is the entity carrying on the business and has its own ABN (the trust is a separate entity for ABN/GST purposes), but the trading name may be that of the trustee company (or a nominee company) which may not have its own ABN.

It is good business practice and worthwhile checking the ABN Lookup register, as in most cases this should clarify the name of the entity for the ABN quoted. However, in situations where the ABN does not match the name on the invoice, we recommend contacting the entity and asking them to clarify the name of the relevant entity making the supply and the nature of the relationship between that entity and the entity name used on the invoice.

In addition to the commercial issue of correctly identifying the entities that you are transacting with, from a GST viewpoint the main issue is whether you are holding a valid tax invoice so that you are entitled to claim available GST credits. It is also important that an appropriate ABN has been quoted to you. Otherwise, if you have not been quoted the correct ABN then you may have an obligation under the 'no ABN withholding' rules to withhold from the payment.