**Happy first day of Winter one and all!**

It may be getting chilly but don't be left out in the cold when it comes to getting the tax support you need, when you need it!

In this month's update we cover an interesting FBT issue that arises where tickets to entertainment events are provided to employers by third parties. We also have a look at a number of Federal Budget announcements that will impact on members. As usual there are plenty of interesting Q&As and other articles for your consideration.

**It's time to renew your membership!**

By now your organisation's nominated contact should have received the 2017/18 TaxEd renewal email.

If you haven't received the email, renewing your TaxEd membership is easy - simply visit our website and follow the prompts at taxed.com.au/membership/.

**Why renew?**

- Your continued TaxEd membership gives your organisation access to the monthly Tax Update and Q&A service. We've seen members taking up extra modules for 2017/18 so they can ask a broader range of questions - it's great to see everyone getting the absolute most out of their memberships. For example, our Eligibility module is also now going into its third year with more and more members opting to take it up.
- Starting from July 2017, our monthly Tax Update live webinar will now include a Feature Tax Topic being selected and discussed in detail. Many of our returning members are opting to include the Tax Update webinar in their membership package due to the value of being involved in an interactive discussion in addition to having the content to read in their own time.
- As a current member your organisation will also continue to access up to 20% off tax training (view our upcoming training here). Training options include our National FBT Workshops (Feb-March 2018, dates TBC), a range of new GST training sessions and our July Superannuation session.

To see the full range of benefits you will receive from renewing your organisation's membership, visit our website at taxed.com.au/membership/.

We look forward to your feedback and working with you all in 2017/18.

# GST – GST and ATM, Credit Card and Debit Card Surcharges

There is a vast array of different fees charged by banks, financial institutions and related service providers giving rise to different GST treatments.

In this article we will look at the GST treatment of ATM fees and credit card and debit card surcharges.

We note that the ATO has issued public GST Ruling [GSTR 2014/2] setting out the ATO view on the GST treatment of ATM service fees, credit card surcharges and debit card surcharges.

## Summary of GSTR 2014/2

*ATM Fees*

ATM fees are generally not subject to GST - they are input taxed financial supplies.

The basis for this is due to a specific reference in subreg. 40-5.09(4A) of the *GST Regs* that deals with ATM fees. In this regard, the Ruling provides:

> '3. Under subregulation 40-5.09(4A) of the GST Regulations, a supply by an entity for a fee of not more than $1,000 is a financial supply if it is a supply of one or more of the following ATM services:
>
> - a withdrawal from an account
> - a deposit into an account
> - an electronic transfer from an account
> - advice of the balance of an account.
>
> 4. The term 'ATM services' in subreg. 40-5.09(4A) of the GST Regulations restricts the listed services to those performed through the use of an automatic teller machine (ATM).
>
> …
>
> 6. A fee imposed for an ATM service listed under subreg. 40-5.09(4A) of the GST Regulations is consideration for an input taxed supply.'

The ATO then goes on to explain that withdrawals made from systems other than an ATM (such as an EFTPOS system) are not covered by subreg. 40-5.09(4A). Paragraph 7 of the Ruling states:

> '7. A facility, machine or device that is used to access a payment system other than the ATM system (for example the payment system designated by the RBA as the EFTPOS system) is not used to provide an ATM service under subregulation 40-5.09(4A) of the GST Regulations.'

*Credit Card and Debit Card Surcharges*

The main point that the Ruling makes is that the credit card or debit charge surcharge forms part of the consideration of the underlying supply. Therefore, the GST treatment of the surcharge will follow the GST treatment of the underlying supply.

Also, the Ruling contains a number of useful examples which provide practical guidance and illustrate the GST treatment. We recommend you review these. By way of reference, Example 1 deals with a credit card surcharge for a taxable supply and Example 3 deals with a credit card surcharge for a GST-free supply.

We also note that, other than some minor differences (refer below), the ATO's view of the GST treatment of credit card surcharges and debit card surcharges as set out in GSTR 2014/2 is essentially the same. In this regard, paragraphs 8, 9 and 11 for credit card surcharges and paragraphs 29, 30 and 31 for debit card surcharges, are the same with regard to each of the following statements:

- the surcharge forms part of the consideration for the supply made by the merchant;

- there is sufficient nexus between the surcharge and the supply for the surcharge to be paid for the supply;
- the GST treatment of the surcharge follows the GST classification of the supply and forms part of the consideration for the taxable, input taxed or GST-free (depending on what is being supplied) supply;
- where the surcharge relates to more than one type of supply, the merchant can use any fair and reasonable method to apportion the surcharge to the respective supplies;
- the surcharge is additional consideration for the supply and is an 'adjustment event'; and
- where the underlying supply is a taxable supply, this additional consideration may cause an increasing adjustment for the merchant and a decreasing adjustment for the customer.

There are a number of differences dealt with in the Ruling. The first is a situation where late payment fees may be incurred on a transaction. This type of transaction illustrates the situation where the surcharge relates to two different supplies (Example 5 in the Ruling) as well as where apportionment is required (both Examples 4 and 5 deal with this). The second situation is where an entity may act as processing agent (Example 2 in the Ruling). Other relevant situations include supplies covered by Division 81 and surcharges where cash withdrawals are made.

We have provided commentary and references on each of these four scenarios below.

*Late Payment Fees*

It is worth noting that the Ruling (at paras. 12 and 13 for credit card surcharges and paras. 32 and 33 for debit card surcharges) states that where an amount is required to be paid by a specified date, and an additional fee or charge becomes payable if not paid by that date (e.g. a late payment fee), the additional charge is consideration for an input taxed financial supply (being an interest in or under a credit arrangement).

Accordingly, if a credit or debit card is used to pay for both the original amount and the late payment fee, the merchant can use any fair and reasonable basis to apportion the surcharge between the supplies. Such apportionment would be irrelevant where the original supply is also an input taxed supply, but would be relevant where it is either a taxable or GST-free supply.

We refer you to Example 5 in the Ruling and particularly to para. 25, which provides the following explanation with regard to late payment fees:

*'Example 5: Credit card surcharge - incurred after supply*

*22. Stephanie acquires $220 worth of paper supplies for her business from her newsagent. Her newsagent allows Stephanie 30 days to pay her account before imposing late payment fees. The supply of the paper by the newsagent is a taxable supply under section 9-5 and the acquisition by Stephanie is a creditable acquisition under section 11-5. The newsagent imposes a surcharge of 2% of the price if payment is made using a credit card.*

*23. Ten days later, Stephanie pays her account with her newsagent using her credit card. The newsagent imposes a surcharge of $4.40 being 2% of $ 220. The surcharge has a sufficient nexus with the supply of the paper to be regarded as being paid for the supply.*

*24. As the total consideration for the supply of the paper is $224.40, the newsagent has a GST liability of $20.40 and Stephanie is entitled to an input tax credit of $20.40.*

*25. However, if Stephanie had paid her account after the 30 day period had expired and incurred a late payment fee, the newsagent would have made an input taxed supply of an interest in or under a credit arrangement to Stephanie. If Stephanie paid both the $220 and the additional late payment fee using her credit card and incurred the credit card surcharge, a portion of the surcharge will also have a sufficient nexus to be regarded as being paid for the input taxed supply of the interest in or under* *the credit arrangement. The newsagent can use any fair and reasonable method to apportion the surcharge between the supplies.'*

For a specific example on the apportionment process (including calculations), please refer to Example 4 in the Ruling.

***Processing Agent***

Paragraph 10 of the Ruling states:

'10. An entity may act as an agent for a third party that supplies goods or services to the customer, but make a separate supply to the customer of processing the transaction including accessing the relevant payment system to authorise the transaction. Where the entity imposes a credit card surcharge for the processing service, the surcharge has a sufficient nexus with the supply of the service to be regarded as being paid for that supply. The credit card surcharge does not form part of the consideration for the supply of the goods or services made by the third party.'

We refer you to Example 2 in the Ruling in the context of agents which states:

*'Example 2: Credit card surcharge - agent*

*16. John purchases a concert ticket from a ticket agent over the internet using his credit card. John pays $110 for the ticket with an additional $11 credit card surcharge. Under the terms of the arrangement, the ticket agent acts as an agent for the concert promoter when supplying the ticket to John. The ticket agent also makes a separate supply of processing services to John which includes accessing the relevant payment system to authorise the payment. The $11 credit card surcharge is consideration for the taxable supply of processing services the ticket agent makes to John.'*

We note that the Ruling only makes reference to this processing agency relationship in the context of a credit card surcharge but does not include an equivalent with regard to the comments on debit card surcharges. However, we cannot see any reason why the same concept would not also apply where an agent processes a debit card transaction.

*Division 81*

The Ruling makes specific comments on situations where credit card surcharges are imposed on supplies covered by Division 81. Given the relevance of such supplies, we have included in full below paragraphs 26 to 28 from the Ruling:

'Credit card surcharge on payment of taxes, fees or charges subject to Division 81

26. A credit card surcharge imposed on a customer in respect of a credit card transaction used for the payment, or the discharging of a liability to make a payment, of an Australian tax or an Australian fee or charge subject to Division 81 has the same treatment under Division 81 as the payment of the tax, fee or charge in question.

*Example 6: Payment for an Australian fee or charge subject to Division 81*

*27. Jenny obtains a drivers licence from the relevant State government agency for $100. The agency also imposes an additional 2% credit card surcharge for customers who pay using a credit card. When Jenny uses her credit card to pay for the licence, the agency charges Jenny $102.*

*28. Under subsection 81-10(1) and subsection 81-10(4 ), the fee for the drivers licence is an Australian fee or charge that is not the provision of consideration. As the credit card surcharge of $2 was incurred in paying, or discharging the liability to make a payment of, an Australian fee or charge, it has the same treatment under Division 81 as the payment of the fee or charge and is therefore also not consideration for a supply.'*

Again we note that the Ruling only includes specific comments regarding Division 81 on credit card surcharges. It does not make similar comments for debit card surcharges. Despite the lack of commentary, we cannot see any reason why consistent analysis would not also apply to debit card surcharges.

*Debit Cards and Cash Withdrawals*

The Ruling deals with two situations where a debit card is used to make cash withdrawals.

The first situation is where the merchant imposes a surcharge on a customer for only withdrawing cash through a debit card. Such transactions will be a treated as a taxable supply, on the basis that the merchant is supplying the customer with the service of accessing the relevant payment system through the use of the terminal to authorise the transaction.

The second situation is where a fixed debit card surcharge is imposed by a merchant where the transaction involves the customer both making an acquisition of goods/services and also withdrawing cash. The Ruling considers that the surcharge forms part of the consideration for the supply of goods/services. The basis for this treatment is that the surcharge is fixed, and the surcharge is not increased, if the customer exercises the option to make a cash withdrawal at the time of acquiring the goods or services.

*Credit/Debit Card Surcharges and Tax Invoices*

As noted above, generally a credit/debit card surcharge is treated as part of the consideration for the underlying supply. If the underlying transaction is a taxable supply, GST will apply to the surcharge component as well.

So what does this mean when it comes to issuing tax invoices?

Often the surcharge is applied after the relevant tax invoice is produced. A common example is when you receive a restaurant bill and the waiter comes over to your table with the EFTPOS machine to process your credit card payment. The total amount including the surcharge will be included on the credit card receipt but, unless the bill (usually a tax invoice) is also updated, it would only show the original amount net of the surcharge.

Curiously, while GSTR 2014/2 provides a number of useful examples, the Ruling is in fact silent with regard to tax invoices. We therefore need to consider how these rules may apply.

Let's assume the original tax invoice for a taxable supply is issued for the normal price excluding any surcharge – for example, $110 (including GST of $10). Assuming a credit card surcharge of 2%, there would be an additional amount payable of $2.20 (including $0.20 GST). Ideally, if the surcharge occurs at the same time as the acquisition, then you could request an updated tax invoice for the total amount ($112.20 including $10.20 GST).

However, we note that, as the surcharge changes the consideration, it would also be an adjustment event. As such, instead of changing the tax invoice the supplier could issue an adjustment note and this would also appear to be sufficient for you to claim the GST component as a credit.

Whether you are requesting a tax invoice or adjustment note, the supplier generally has 28 days from the date of request in which to provide it.

From a practical viewpoint, and on the basis the surcharge relates to an underlying taxable supply and is considered an adjustment event, where the amount of the surcharge is below $75 then it appears there is no requirement for the supplier to provide a tax invoice/adjustment note, as this would be below the nominated threshold (see s. 9-80(2) and GST Reg. 29-80.02). We further note that support for this approach can be found at paragraph 16 of GSTR 2013/2 which states that where 'the amount of the decreasing adjustment does not exceed $75 (or such higher amount as the GST Regulations may specify)' this is one of the circumstances in which an adjustment note is not required to be held.

Therefore, for the example above, the original tax invoice for $110 would be used to support the GST credit claim.

As an adjustment note is not required for the surcharge component, you should be able to claim the GST component of the surcharge without holding a tax invoice/adjustment note. However, to support such a claim it would be prudent to ensure you have sufficient evidence of the amount that was charged and the transaction to which it relates.

In the context of the restaurant bill referred to above (or other similar circumstances) when making such acquisitions it would be wise to always ask for a copy of the credit/debit card receipt, as this may be the only evidence you have of the surcharge.

# Eligibility – Federal Budget Implications for NFPs

The Federal Budget presented on 9 May 2017 contained several taxation-related matters that will impact on, or otherwise interest, NFPs. Some matters will be relevant to all NFPs and others will have a more limited audience.

## (a) Matters for all NFPs to Note

*(i) Foreign Resident Capital Gains Withholding Changes*

The parameters governing application of Foreign Resident Capital Gains Withholding will change from 1 July 2017.

In previous newsletters (e.g. May 2016 and June 2016) we alerted you to the need to consider the Foreign Resident Capital Gains Withholding regime.

The Budget proposes two changes:

- **Most Importantly**: The withholding threshold (at which the scheme commences) will reduce from $2m to $750,000 for contracts entered into on or after 1 July 2017. Under this more modest threshold, one might expect that most transactions will be caught.

  Note: We understand that for contracts made prior to 1 July 2017 and settled on or after this date, the existing threshold of $2m will apply.
- The amount to be withheld will also increase from 10% to 12.5%, with effect from 1 July 2017.

These changes warrant more detailed comment and are dealt with in a separate article in this month's newsletter.

*(ii) First Home Saver Scheme (FHSS)*

All employers should be aware that an employee may seek to salary sacrifice amounts for payment into the employee's superannuation fund for the purpose of accumulating an amount as a deposit on a first home.

We have provided a briefing for employers in a separate article in this month's newsletter.

## (b) Matters of more specialised interest

*(i) GST Change - Purchasers of new residential properties to remit GST*

The Federal Government proposes that from 1 July 2018, purchasers of newly constructed residential properties or new subdivisions will be required to remit GST directly to the ATO as part of the property settlement process. (Note: It is not contemplated that remittance process will involve any payment through the purchaser's BAS. The payment will be made to the ATO as a settlement activity in much the same way as other debts of a vendor in respect of a property are paid to the vendor's creditor on settlement.)

At present vendors who are liable to pay GST are responsible for remitting this, with remittance being required at times determined by whether the vendor accounts for GST on a cash or accruals basis.

While this measure will be likely to affect organisations as purchasers, they should experience minimal impact given the use of solicitors or other conveyancing professional attending to settlement of property purchases. However, we recognise that some of our readers will be affected as vendors.

At a practical level, the change will have adverse cash flow implications for vendors. Under the current regime they have the use of the GST component of settlement moneys in the period between settlement and the due lodgement date of their BAS for the tax period that includes the settlement date.

It is understood that purchasers will not only be expected to remit GST where this is calculated on the normal basis of 1/11th of the price, but also where the vendor is applying the margin scheme. At present, purchasers would not be aware of the quantum of GST in the latter situation and arrangements to obtain the information will be needed. One might expect the legislation will provide for vendors to disclose this amount in addition to a general authorisation for purchasers to withhold and remit the GST to the ATO from the moneys otherwise payable at settlement.

It will also be interesting to see the manner in which the legislation deals with instalment contracts, where the vendor is expected to account for GST on instalments made prior to settlement. In this scenario, one might expect that either GST would have been paid in whole (e.g. vendors accounting for GST on the accruals basis) or in part (vendors accounting for GST on the cash basis) prior to settlement. For instance, will vendors who have failed to account be subject to full withholding by the purchaser on settlement (necessitating some form of clearance certificate akin to the Foreign Residents Capital Gains Withholding Tax system)?

*(ii) GST Change - removing double taxation of digital currency such as Bitcoin*

At present, a person using digital currency (such as Bitcoin) is subject to GST twice when it is used to make acquisitions.

Firstly, supply of digital currency can be a taxable supply, with the result that GST may be paid on its purchase. Secondly, when digital currency is used to purchase a thing, GST may be charged on the purchase.

While GST is not problematic for readers who are able to claim input tax credits in relation to the relevant purchases, this will not be case for all digital currency users. It is proposed from 1 July 2017 that the purchase of digital currency will no longer be subject to GST.

For organisations that use digital currency and can claim ITCs for its purchase, the key point is to monitor the implementation of the proposed change and to recognise that ITCs will not arise on purchase.

*(iii) Measures contributing to Housing Affordability*

We recognise that some of our readers work in fields where housing affordability is particularly important and want to be aware of matters that affect such affordability.

The Budget proposes several measures directed to making housing more affordable:

- ***Measure encouraging investment in affordable residential housing*** *(proposed commencement 1 January 2018)* - Australian resident taxpayers who invest in qualifying affordable housing will be entitled to a greater CGT discount of 60% rather than the standard discount of 50%. In effect such taxpayers will be able treat 60% (rather than 50%) of any capital gain as not subject to tax. At present only limited detail of the concept of qualifying affordable housing is available - the property must be:
    (i) provided to low to moderate income tenants, with rent charged at a discount below private rental market rate;
    (ii) managed through a registered community housing provider; and
    (iii) held for a minimum of 3 years.
- ***Measure encouraging investment in affordable residential housing*** *(proposed commencement FY 2017-18)* - Managed Investment Trusts (MIT) will be authorised to invest in affordable housing and to treat this as a passive investment, with associated application of the CGT regime. More particularly, investors in an MIT will be able to access tax concessions where:

(i) the MIT makes the housing available for rent for at least 10 years;

(ii) the housing is provided to low to moderate income tenants, with rent charged below the private rental market value; and

(iii) the MIT derives at least 80% of its assessable income from affordable housing in an income year.

MIT investors who are resident taxpayers will be taxed at their marginal rates with capital gains remaining eligible for the CGT discount (discount to rise to 60% from 1 January 2018). Non-resident investors will be subject to a final withholding tax of 15% (rather than 30%).

- ***Measure restricting the level of foreign ownership in new housing developments*** *(proposed to apply to applications for New Dwelling Exemption Certificates made after the budget night announcement)* - The Federal Government proposes to limit the extent to which foreign residents can compete with Australian residents in purchasing housing in new housing developments.

  (i) It will do this by only giving developers pre-approval to sell 50% of housing in new developments to foreign residents.

  (ii) (For the technically-minded, this will be done by imposing the 50% limit as a condition in New Dwelling Exemption Certificates issued after the budget night announcement. New Dwelling Exemption Certificates are issued to developers and act as pre-approval for sales of new dwellings to foreign residents - they remove the need for foreign residents to seek their own foreign investment approval. Prior to the budget, such certificates did not impose a cap on sales to foreign residents.)

- ***Measure encouraging foreign residents to make residential property they own available for rent , thereby increasing the number of dwellings available for rent*** *(proposed to apply to foreign persons who make a foreign investment application for residential property after the budget night announcement )* - Foreign owners of residential property who made the foreign investment approval application in respect of their residential purchase after the budget night announcement will be liable to pay an annual charge where the property is not occupied or genuinely available for rent for at least 6 months in a year. The charge will be equivalent to the relevant foreign investment application fee imposed on the property at the time it is acquired (i.e. will be at least $5,000).

- ***Measure denying foreign residents and temporary tax residents access to capital gains tax relief on sale of their main residence*** (*proposed to apply to apply to sales after the budget night announcement but grandfathered application (operative 30 June 2019) to properties held at the time of the budget night announcement)* - Denying foreign residents and temporary tax residents capital gains tax relief that will remain available to Australian residents, will allow Australian residents to more effectively compete in the purchase of housing.

- ***Measure reducing tax depreciation benefits from holding residential investment properties*** *(proposed commencement 1 July 2017)* - Owners who purchase residential investment properties will no longer be able to claim depreciation for plant and equipment purchased by a previous owner but only for plant and equipment which the taxpayer has purchased. The cost of plant and equipment acquired from previous owners will be included in a new owner's cost base for CGT purposes.

While this is not put forward as contributing to housing affordability, we observe that it reduces the tax benefits for investors and correspondingly marginally reduces investor pricing pressure through reducing the attractiveness of investment in residential property. It is principally directed to closing an avenue for artificial manipulation of tax benefit.

- ***Measure countering incentive to hold residential investment property as a means to fund holiday/recreational travel*** *(proposed commencement of 1 July 2017)* - Some property investors were blurring holiday/recreational travel with travel to inspect rental properties. Property investors will be denied deductions for their personal travel costs to inspect rental properties, although reimbursement of third party inspection costs (e.g. real estate agent fees) will remain deductible. While this measure is presented as an integrity measure, we anticipate it will make investments in holiday localities marginally less attractive with associated marginal reduction in competition to acquire residential properties.

# Eligibility – Foreign Resident Capital Gains Withholding Tax: Implications of the Budget Proposals

## Summary of Key Practical Points:

1. Many transactions that are outside the ambit of Foreign Resident Capital Gains Withholding Tax (in its current form) will fall within its scope from 1 July 2017, if the threshold change which was announced in the 2017–18 Federal Budget is enacted.
2. For contracts made after 30 June 2017 and providing for acquisition of land, easements, leases other taxable Australian real property or company title interests - seek clearance certificates (or, if applicable, provide the required exemption evidence) where the market value of the relevant property equals or exceeds $750,000.
3. For contracts made on or before 30 June 2017 and providing for acquisition of land, easements, leases other taxable Australian real property or company title interests - continue to adopt existing practices of obtaining clearance certificates (or, if applicable, providing the exemption evidence).
4. For transfers (or other acquisitions) of land, easements, leases, other taxable Australian real property, or company title interests made after 30 June 2017 but not made pursuant to a contract - seek clearance certificates (or, if applicable, provide the required exemption evidence) where the market value of the relevant property equals or exceeds $750,000.
5. Review standard agreements/documentation, office administration practices, and office administration manuals for Foreign Resident Capital Gains Withholding Tax compliance implications which arise due to the proposed changes.
6. Monitor legislative action giving effect to the Budget Proposals.
7. Ensure your external/internal professional advisers are aware of the proposals.

## The Budget Proposals

The Federal Budget of 9 May 2017 proposes two changes to Foreign Resident Capital Gains Withholding (FRCGW) Tax. It contemplates the changes will take effect on 1 July 2017.

The proposed changes are:

- **Most Importantly**: The present withholding threshold of $2 million will be reduced to $750,000 for contracts entered into on or after 1 July 2017 and
- The tax rate will increase from 10% to 12.5%, with effect from 1 July 2017.

## Significance of the Changes to the Threshold

*Reminder of the nature of FRCGW*

The term 'foreign resident' in the name of the tax is misleading. Basically, purchasers of:

(i) taxable Australian real property;

(ii) indirect Australian real property interests (e.g. certain interests in entities that directly/indirectly hold certain Australian real property), or

(iii) rights/options in relation to such real property or such interests

are *prima facie* currently required to remit tax (10% of the purchase price) to the ATO, irrespective of whether the vendors are Australian residents or foreign residents. Although the tax has to be remitted by the purchaser, the purchaser is able to remit the tax out of the moneys payable to the vendor under the sale contract.

Taxable Australian real property incudes vacant or improved land in Australia, leases of land/buildings in Australia, easements, and certain mining/quarrying/prospecting rights.

For purposes of the threshold change, the only indirect Australian real property interest that needs to be considered is a company title interest. A company title interest exists where a company owns land or a building or part of a building erected on land and a right of occupancy of the land, building or part of a building arises from holding (or having a contract to purchase) shares in the company.

Currently, purchasers of taxable Australian real property or a company title interest with, in either case, a market value of at least $2 million have to remit 10% of the purchase price to the ATO, unless the Commissioner has issued a clearance certificate and this is held by the purchaser at the time of settlement (i.e. the time at which the transfer of title occurs).

While the above reflects the general relevance of the $2 million threshold, special rules define the value which is to be compared to the threshold in some situations. For instance, a special rule exists where the thing acquired is a joint ownership interest in real property or mining/quarrying/prospecting right.

It will be recalled that the $2 million threshold and clearance certificate exclusion mechanisms do not apply to some transfers of CGT assets. In particular, there is a different system for relieving purchasers of the obligation to remit FRCGW tax in relation to the purchase of CGT assets which are indirect Australian real property interests that are not company title interests and CGT assets which are rights/options to either such indirect interests or to Australian real property.

*Implications of the change to the threshold*

The Treasurer has proposed that the $2 million threshold will be reduced to $750,000 from 1 July 2017.

As a result, many more resident vendors will have to obtain a certificate of residency from the ATO and give this to their purchaser.

The ATO website clarifies the proposed transitional application of the changes. The proposed lower threshold of $750,000 will apply only to contracts entered into on or after 1 July 2017. By contrast, the $2 million threshold will continue to apply to pre-1 July 2017 contracts that are settled on or after that date.

The second proposed change is an increase in the rate of tax from the current 10% of the contract price to 12.5%. The ATO website states that this increased rate will apply to contracts entered into on or after 1 July 2017. According to the ATO website clarification, the existing 10% withholding rate will continue to apply to contracts entered into before 1 July 2017, 'even if they are not due to settle until after 1 July 2017'.

In summary, where taxable Australian real property or a company title interest is sold <u>with the transfer occurring on or after 1 July 2017</u>, it is proposed:

- for contracts made prior to 1 July 2017, the purchaser will have to withhold tax of 10% of the contract price and remit this to the ATO, unless either:
    - the market value of the relevant Australian real property/company title interest is less than $2 million; or
    - where the market value is $2 million or more, the vendor gives the purchaser a clearance certificate issued by the Commissioner; and
- for contracts made on or after 1 July 2017, the purchaser will have to withhold tax of 12.5% of the contract price and remit this to the ATO, unless either:

- the market value of the relevant land is less than $750,000; or
- where the market value is $750,000 or more, the vendor gives the purchaser a clearance certificate issued by the Commissioner.

Generally (and more technically), the tax amount is calculated using the first element of the acquirer's CGT cost base of the thing acquired - a point which will assist understanding the discussion under the next heading. However, the ATO accepts that the contract price (in the case of sales of vacant/improved land, exclusive of settlement adjustments for rates etc.) is a proxy for the first element amount.

Brief reference should also be made to the situation where the transfer of title is not made pursuant to contract of sale.

*Transfers made without consideration and Transfers made without antecedent Contract*

In some situations, an entity will transfer taxable Australian real property or a company title interest either without consideration (e.g. a gift) or for consideration but without previously entering into a contract. It should be remembered that FRCGW will apply in these scenarios. In relation to the first scenario, although the recipient of the transfer (transferee) of the property does not receive any consideration from which it can withhold tax, the transferee must still remit the tax.

In these situations, the transferor and the transferee will need to be mindful that in relation to a transfer occurring on or after 1 July 2017, it is envisaged that the transferee will automatically not incur a liability only where the market value of the Australian real property/company title interest being transferred (or other value applicable in the particular circumstances) is below $750,000. Where the relevant value is at or above the $750,000 threshold, a clearance certificate will normally be required.

More generally, FRCGW applies to acquisitions (for CGT purposes) of taxable Australian real property under certain transactions. These can also occur by means other than transfers of title to property. For instance, grants of easements or grants of leases. It is expected that the $750,000 threshold will also be relevant to such grants made on or after 1 July 2017.

Due to constraints of length, further elaboration is not possible. However, you may find the ATO's discussion of leases helpful. The following ATO comment in relation to the present legislation is especially pertinent in the present context:

> 'The purchaser is required to withhold and pay to … [the ATO] 10% of the first element of the CGT asset's cost base.
>
> The obligation to withhold will only arise if a lease premium is paid for the grant of a lease, as the premium forms part of the first element of the cost base. Even where a premium is paid, withholding is only required if the market value of the lease is $2 million or more. …
>
> Any assignment of a lease that doesn't involve the payment of a premium will not give rise to a withholding liability.' (underlining added)

*A Brief Note concerning Certain Not-for-Profit Transferors/Grantors*

As a general addendum to the foregoing, it is timely to also recollect that the Commissioner has issued determinations which reduce withholding tax to nil in some situations.

The *PAYG Withholding variation for foreign resident capital gains withholding payments – income tax entities* determination (issued in March 2017) is a recent instance of this. Where relevant income tax exempt entities provide the specified evidence of their income exempt character (the required exemption evidence) to a purchaser/grant recipient, the purchaser/recipient is relieved from the need to remit FRCGW tax. The determination was discussed in last month's newsletter.

The required exemption evidence may not necessarily be easier to obtain than a clearance certificate. It is either:

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

It is important to note that the relief only applies to transfers/grants made by an income tax exempt entity and does not provide relief in relation to transfers/grants made to such an entity.

### Further Comment on the change in tax rate

In addition to the application of the change in tax rate as described in the discussion above, you should be mindful that the new tax rate will apply to:

- acquisitions (for CGT purposes) of all indirect Australian real property interests, not just to company title interests; and

- acquisitions (for CGT purposes) of rights and options to acquire taxable Australian property or indirect Australian real property interests.

### Practical Action

While amending legislation will be needed to give effect to the changes noted above, you should consider immediately updating your organisation's practices as follows:

- for contracts made after 30 June 2017 and providing for acquisition of land, easements, leases other taxable Australian real property or company title interests – seek clearance certificates (or, if applicable, provide the required exemption evidence) where the market value of the relevant property equals or exceeds $750,000;

- for contracts made on or before 30 June 2017 and providing for acquisition of land, easements, leases other taxable Australian real property or company title interests – continue to adopt existing practices of obtaining clearance certificates (or, if applicable, providing the exemption evidence); and
- for transfers (or other acquisitions) of land, easements, leases, other taxable Australian real property, or company title interests made after 30 June 2017 but not made pursuant to a contract – seek clearance certificates (or, if applicable, provide the required exemption evidence) where the market value of the relevant property equals or exceeds $750,000.

For most NFPs, transactions involving FRCGW tax will be handled by legal and accounting professionals. However, NFPs should be alert to the proposals for change and ensure these have come to the attention of their advisers.

More conceivably, transactions which will not receive such specialist attention would include those involving acquisitions of:

- indirect Australian real property interests; or
- acquisitions of rights/options to acquire taxable Australian real property or such indirect interests;
- acquisitions of taxable Australian real property by way of gift/otherwise without consideration.

Corporate re-structures and the detailed components of standard form agreements can be especially problematic.

You may like to review the following documents and adjust these for any implications of the proposed changes to FRCGW (noting, the need to check for the changes to be given legislative effect):

- standard agreements/documentation used by your organisation; and
- office administration manuals.

The legislative process needed to give effect to the changes should be monitored.

# Salary Packaging – First Home Super Saver: Employer briefing

**Summary of Key Practical Points:**

1. In the near future, employers can expect employees to begin enquiring about making salary sacrifice payments into their superannuation funds for the purpose of accumulating deposits for their first homes under the First Home Super Saver Scheme (FHSS).
2. The FHSS is a Federal Budget proposal only at this stage. It will require legislative enactment to enable the FHSS to operate. Draft legislation has not been issued at the time of writing. Assuming enabling legislation is enacted, employers should be mindful that it may not reflect the currently available information on FHSS.
3. Employers should monitor the legislative process (and decisions on administrative processes required to give effect to the legislative change) to ensure they are able to respond as soon as any enabling legislative change occurs and are aware of any departures from the current proposals.
4. Limitations will apply to amounts that can be contributed to superannuation with a view to accumulating a first home deposit and constraints will apply to withdrawal of moneys from superannuation to fund first home deposits. The material in this article draws on published general materials/indications and is not advice. It is provided as general background information to assist employers to better understand the proposal.
5. It is understood that contributions to superannuation with a view to accumulating a first home deposit can be made in modes apart from salary sacrifice. Other modes in which employees will be able to make contributions are as tax-deductible contributions made personally and non-deductible contributions made personally. However, all the modes will be subject to various limitations and constraints.
6. It is expected that the FHSS will involve employers having to collect information from their employees in relation to the intended purpose of a salary sacrifice contribution being made towards accumulation of an amount for use in meeting a first home deposit. This and other administrative detail is not presently known.
7. Aside from any legislative constraint on providing advice, it seems prudent for employers not to offer advice on the FHSS to their employees.
8. We have included some references to further information on FHSS that employees may like to review as part of any information gathering process.

Following the announcement of the Federal Budget on 9 May 2017, employers can expect employees to seek to salary sacrifice sums for payment into the employee's superannuation fund for the purpose of accumulating an amount as a deposit on a first home.

We stress that the FHSS is a proposal only and until legislation is enacted it will not apply and its actual nature will not be known. We provide a briefing on the proposal below

**The Fundamentals**

The fundamental elements of the FHSS are:

- From 1 July 2017, individuals will be able to make contributions to superannuation that can be used to pay a deposit on a first home.

    Note: Individuals who are employees will generally be able to make tax deductible contributions to superannuation outside the salary sacrifice regime from 1 July 2017. Previously, there was a constraint which prevented most employees doing so. As noted below, the budget proposal contemplates employees will also be able directly to make tax deductible contributions under the FHSS. However, the focus of this briefing is employees who want to salary sacrifice.

- The employee will only be able to make voluntary concessional (salary sacrifice/tax deductible) contributions up to $15,000 per year. It follows that compulsory superannuation guarantee contributions cannot count as FHSS amounts.
- The total amount of the voluntary concessional contributions towards a first home deposit will be $30,000. However, where a couple are saving for a first home, each of them will be able to make voluntary concessional contributions (of up to $30,000) to their own superannuation scheme - giving them capacity collectively to contribute up to $60,000.
- A voluntary concessional contribution made towards a first home deposit will count towards the employee's annual **concessional superannuation cap**. As noted in Treasury Fact Sheet 1.4, the total annual concessional contributions (i.e. compulsory employer contributions, voluntary concessional contributions for purposes of accumulating a deposit, and voluntary concessional contributions for the purpose of increasing an individual's superannuation balance to fund their retirement) of the employee cannot exceed $25,000 in 2017-18. Employees who exceed the permitted level will be subject to penalisation.
- Employees will also be able to make non-concessional (i.e. non-salary sacrifice/non-deductible) contributions towards FHSS in addition to concessional contributions. The Budget materials observe that employees might conclude that, in their circumstances, this is attractive - e.g. having regard to the manner in which income earned within a superannuation fund is taxed at the time it is earned by the fund, the rate of return within the fund, and the tax treatment of those earnings when they are withdrawn for use in paying a first home deposit. The initial making of a non-concessional contribution will not be taxed and withdrawal of the non-concessional contribution itself to pay a first home deposit will also not be taxed.

  Note: The amounts of non-concessional contributions made to superannuation which are made to augment a contributor's superannuation balance are capped. It is presently assumed that any non-concessional contribution that is made with a view to accumulating a first home deposit must also fall within the relevant **non-concessional cap** and total superannuation balance constraints. Employees making non-concessional contributions need to be mindful that there are adverse consequences where the cap is exceeded.
- The amount contributed (together with deemed associated earnings) will not be able to be withdrawn for a first home deposit until 1 July 2018.
- The ATO will administer the FHSS. It will determine the amount of contributions that can be released and direct superannuation funds to make payments accordingly.
- The ATO will also administer compliance mechanisms (to be developed in consultation with Treasury) to ensure that individuals withdrawing funds from superannuation actually use the withdrawal in paying a first home deposit.

*Comment on the first point*

In relation to the first point made above, a further observation needs to be made.

Treasury Fact Sheet 1.4 implies that employees whose employers do not permit salary sacrifice can make tax deductible superannuation contributions to their super fund for the purpose of assembling a first home deposit in the amounts as set out in the foregoing points. The Fact sheet states:

> "Individuals who are self-employed **or whose employers do not offer salary sacrifice** can claim a tax deduction on personal contributions, meaning savings effectively come out of pre-tax income." (emphasis added)

While this statement does not appear in the Budget Paper discussion (see Budget Paper No. 2 at p. 30), it is consistent with the position that from 1 July 2017 most employees will (within their concessional superannuation caps) be able to directly make tax deductible contributions to superannuation for purposes of augmenting their superannuation benefit balance.

We anticipate that employees will be attracted to salary sacrifice by the simplicity and convenience of this. Employees will also favour salary sacrifice due to deriving tax relief immediately, rather than suffering PAYG withholding and having to recoup tax via later lodgement of a personal income tax return.

*Illustration of treatment of salary sacrificed amounts*

As further background to understanding the operation of FHSS and the application of tax , it is worthwhile considering the following example given in Treasury Fact Sheet 1.4:

> ***Boosting Michelle and Nick's first home deposit***
>
> *Michelle earns $60,000 a year and wants to buy her first home. Using salary sacrifice, she annually directs $10,000 of pre-tax income into her superannuation account, increasing her balance by $8,500 after the contributions tax has been paid by her fund. After three years, she is able to withdraw $27,380 of contributions and deemed earnings on those contributions. Her withdrawal is taxed at her marginal rate (including Medicare levy) less a 30 per cent offset. After paying $1,620 of withdrawal tax she has $25,760 that she can use for her deposit. Michelle has saved around $6,240 more for a deposit than if she had saved in a standard deposit account. Michelle's partner Nick has the same income and also salary sacrifices $10,000 annually to superannuation over the same period. Together they have $51,520 that they can put towards a deposit, $12,480 more than if they had saved in a standard deposit account.*

It will be noted that contributions tax (in Michelle's circumstances, at 15%) is payable by the super fund on the concessional contributions. The super fund will pay tax on the super fund's earnings ascribed to the concessional contribution. When the amount of the concessional contribution and earnings (both less tax paid by the super fund) are withdrawn to pay a first home deposit, Michelle has to pay tax on that amount at her then marginal rate (plus Medicare levy) but she is entitled to a 30% off-set.

## The Practical Ramifications of FHSS for Employers

At this stage, the administrative processes in relation to the FHSS have not been determined. In these circumstances, the practical implications such as whether any categorisation information has to be collected from employees at the time of voluntary contribution and transmitted to the relevant superannuation fund are unclear.

We understand that if an employee makes a contribution to superannuation with a view to accumulating a deposit and does not withdraw the contribution to pay the deposit on a first home, the contribution will remain in the fund as part of the employee's normal retirement balance. As such, it may be that identification of a specific purpose at the time of contribution will not be required and the ATO will merely apply the above limitations when asked to authorise a withdrawal as noted in the second last dot point in the above discussion of the fundamental features of FHSS.

However, we think this could lead to problems and it is likely that employers will be required to include identification of the home deposit purpose of a salary sacrifice contribution to a super fund at the time the contribution is paid to the fund.

It is important to note that the legislation providing for the FHSS has not been enacted at this stage. Employers will need to monitor the legislative position, as employees may not appreciate that enabling legislation will be required before employers can give effect to any salary sacrifice request.

Aside from any legislative constraint on providing advice, it seems prudent for employers not to offer advice on FHSS to their employees. We have included some references to further information below that employees may like to review as part of any information gathering process.

**Further information**

Further information is available on the ATO website. The Treasury Fact Sheet that was mentioned earlier contains a link to material which it identifies as 'an online estimator to help people understand the advantages of saving for a home deposit through superannuation'.

# FBT – Ticket to ride!

Across our face-to-face training, online training and Q&As, we have noticed an increasing query rate in regards to the issue of staff being provided with tickets to various events. An example of this could include a local Council sponsoring a concert where the Council is provided with complimentary tickets by the organisers of the event.

If these complimentary tickets are allocated to staff members, on the face of it a FBT liability would appear to arise. But is this always the case?

## What benefit category does a ticket fall within?

A ticket entitling the bearer to attend a concert, movie or other function will generally be considered the provision of recreation and therefore entertainment. For tax-exempt bodies, the provision of entertainment has its own specific category - tax-exempt body entertainment fringe benefit (TEBEFB).

A TEBEFB arises where the provider incurs non-deductible exempt entertainment expenditure in providing entertainment to a person that is an employee or associate of an employee in respect of the employee's employment.

In determining the taxable value of a TEBEFB, it is so much of the non-deductible exempt entertainment expenditure incurred by the provider as is attributable to the provision of entertainment to the employee or associate concerned. In other words, it is essentially based on the amount of actual expenditure incurred by the provider in providing the benefit.

If we revert back to our earlier example of a Council being provided with complimentary tickets which it, in turn, allocates the staff, the critical questions to ask are:

1. Who is the provider of the benefit?
2. What expenditure did the provider incur in relation to providing the benefit?

The tickets in our example have been given to the Council and, as such, become the property of the Council. When allocated to staff members, it is our view the Council is providing the tickets and is therefore the provider for TEBEFB purposes.

In regards to the second question, as the tickets were given to the Council, the Council has incurred no direct expenditure in acquiring the tickets.

Based on the answers to the above two questions we are of the view that no TEBEFB arises as no expenditure has been incurred by the Council in respect of non-deductible exempt entertainment expenditure.

It would therefore appear reasonable to conclude that the provision of the ticket constitutes either a property or residual fringe benefit.

## Tickets as Property or Residual Fringe Benefits

*Does a fringe benefit liability arise if the tickets are not used by the employee and/or their associate?*

If the tickets are not used, a fringe benefit has not been provided, as the recipient of the ticket has not benefited from the entitlement to which the ticket relates.

*Does a fringe benefit liability arise if the tickets are used by the employee and/or their associate?*

If the tickets are used by the employee then a benefit is provided in the form of recreation (i.e. access to and attendance at the event).

Although the provision of recreation falls within the definition of entertainment, on the basis the provision of the tickets does not constitute a TEBEFB, then depending on the cost of the ticket and the frequency/regularity with which they are provided to staff, access to the minor benefit exemption is available.

## Conclusion

Income tax-exempt employers should not automatically assume that a TEBEFB arises where a staff member is given tickets that the employer has obtained without direct expenditure.

It is recommended that employers keep a register of the provision and use of tickets by employees as this will provide a basis for determining whether access to the minor benefit exemption is available.

Of course tickets provided to clients, suppliers, or others who are not employees or associates of employees will not have any FBT repercussions.

In the absence of ATO materials dealing with the key point discussed above, we are in the process of obtaining a non-binding ATO opinion. We intend to revisit the matter on receipt of the ATO's opinion.

## FBT – Car Parking Thresholds for 2017/18

The following car parking threshold applies for the 2017/18 FBT year:

- Car parking threshold - $8.66 (up from $8.48 in the 2016/17 FBT year).

Employers are reminded that any liability for FBT on car parking involves ascertaining whether, on the first business day of the FBT year, the lowest fee charged for all day parking at any commercial car parking station located within 1km of the employer-provided car parking is more than the threshold. If the lowest fee charged is not more than the threshold, liability will not arise.

In considering what is lowest fee charged, it is permissible to use a periodic parking rate (i.e. weekly, monthly etc.) and divide by the number of business days in the period (business days excludes Saturday, Sunday and public holidays).

Further ATO information re car parking fringe benefits is available here.

# **Error! Reference source not found. Error! Reference source not found.** – GST and Recovering Land Tax from a Tenant

### Question

Would you please advise whether the Council is liable to pay its landlord GST on land tax for which the Council is reimbursing the landlord.

### Answer

Land Tax is imposed by the State Revenue Office (SRO) on the landlord and this charge is not subject to GST.

An arrangement between the landlord and the tenant (e.g. Council) is usually determined by the terms of the lease agreement. Generally, such arrangements are for the provision of the premises (by the landlord) in return for the payment of rent (by the tenant).

The amount of rent to be paid can be calculated by reference to a number of factors and may include costs and/or outgoings, including reference to items such as land tax.

For example, the total rent payable by the tenant could be comprised of a base rent plus specified outgoings:

Annual base rent $14,000

Plus Outgoings:

- Land Tax $2,000
- Rates $1,000
- Other $1,000

TOTAL RENT: $18,000 + GST

While the amount of rent payable by the tenant is calculated by reference to a land tax amount, it still forms part of the rent calculation. That is, the amount being charged to the tenant has the character of rent (not land tax). It is only the landlord that is actually liable to pay an amount characterised as Land Tax, and this amount is payable to the SRO.

As commercial rent is generally subject to GST, we expect in this case the amount being charged to Council on account of land tax should also be subject to GST.

# **Error! Reference source not found. Error! Reference source not found.** – Benefits provided to unpaid volunteers

### Question

Volunteer workers of our organisation are invited to functions throughout the year. Tickets to these functions are available for sale to the general public. One of the benefits of these functions includes attending a lunch and watching the football with the CEO and other senior members of our organisation. The volunteers are also able to invite additional guests to attend the function with them. Is this benefit subject to FBT?

### Answer

The FBT legislation extends the definition of 'employee' to include a person who receives non-cash benefits which, if paid in cash, would have been salary or wages.

The general effect of section 137 of the FBT Act is that such a person will be an employee for the purposes of the FBT Act where, if any benefit had been in the form of cash, that cash would have been salary or wages and that person would have been an employee.

The threshold dollar value of benefits where this anti-avoidance provision 'kicks in' lies is not set in concrete. Where the benefits are infrequent/irregular and not of significant value in total over the FBT year, one would expect the provision would not be invoked by the ATO.

# **Error! Reference source not found. Error! Reference source not found.** – Salary sacrifice of Council gym membership for family members

### Question

We are a local Council and we allow employees to use the Council owned and operated gym facilities and allow them to salary sacrifice the annual gym membership fee.

Employee's currently pay for a family member's gym membership via a payroll deduction, presently it is treated as a post-tax contribution from their salary such that no FBT arises.

Can we allow the employee to salary sacrifice the family member's membership fee from pre-tax salary?

### Answer

The FBT Act has a specific exemption for residual benefits constituting the provision or use by a current employee of a recreational facility located on their employer's business premises. This generally allows employees to salary sacrifice the cost of Council gym facilities with no FBT applying.

However, the exemption only covers current employees of the employer and does not extend to family members. Your current treatment in relation to family member memberships results in no FBT applying as the taxable value of the family members gym membership is offset by the after-tax employee contribution.

If you were to allow the employee to salary sacrifice the family members' membership, then FBT would be payable at the FBT rate which is likely to be higher than the employees personal income tax rate.

As such, it is recommended the current treatment for family memberships not change.

# FBT Q&A – Short term appointment in remote area: reimbursement of accommodation

### Question

A new employee has his accommodation expenses reimbursed. The accommodation is a B&B and is not owned or leased by us.

The accommodation is in a remote area according to the FBT legislation.

The employee is not from the local area and is employed by us for a short term (less than 12 month) project. We want to know the best way to pay for his accommodation so as to minimise our FBT exposure.

If we don't own/lease the accommodation we are reimbursing, is it still an exempt remote area housing fringe benefit?

### Answer

As you do not own or lease the accommodation, no housing benefit can be provided and therefore the remote area housing exemption is not available.

There is a 50% reduction available where an employer pays or reimburses an employee's remote area housing rent. However, one of the conditions for this to be available is that the accommodation is the employees 'usual place of residence'. Given the short term nature of the posting and that the employee is from a different area this may be difficult to demonstrate.

However, on the bass the assignment is short term and up to 12 months, there is a reasonably strong argument that the employee is living away from home.

Section 21 of the FBT Act provides an exemption for situations where an employer pays or reimburses an employee's accommodation during a period where they are living away from home. However, one of the conditions to be satisfied is that the employee is maintaining a home in the former locality.

Assuming the requirement to maintain a home in the former locality is met, a declaration will be required from the employee to this effect.