Happy New Financial Year!

As one financial year closes and a new commences, accounting personnel are turning their minds to PAYG summaries and opportunities for salary packaging.

This month's Tax Update has a bumper list of eight articles, including:

- salary packaging of home to work bus fares in an FBT exempt scenario
- a very recent rating categorisation case in NSW that should interest Councils – we intend to give the case further thought, with a view to addressing its relevance to other States and Territories in the July Update next month
- FBT aficionados will find a note on a substantial draft ruling relating to employee travel

As usual, we have included some generalised Q&As regarding some of the issues that our members have raised over the past month.

Live Online Webinar

Don't forget you can also join our Live Online webinar on Monday 10 July to get a more detailed look into the articles covered in this Update, as well as ask any questions you may have.

And a reminder that beginning next month (with our July Tax Update presented on Monday 7 August) **our live monthly webinar will take on a NEW format including a Feature Topic**. The Feature Topic will take on a specific tax issue to be discussed in detail. The 1st feature topic will take a look at the FBT treatment of tickets to entertainment events provided to employers that are given to/used by employees.

Membership - have you renewed?

Don't forget that membership expires this month so if you haven't already renewed, simply visit our website and follow the prompts.

Happy New (Financial) Year from the TaxEd Team!

Salary Packaging - Salary packaging of employee bus transport costs

Unless an employee is solely a 'work from home' employee, then travel to and from work is a necessity of working life. Many employees catch public transport to and from work to avoid the expense and traffic involved with driving.

If an employer has employees who regularly commute to and from work by bus, is it possible for this travel to be provided on a FBT free basis?

In Melbourne the metropolitan public transport utilises the MYKI system. A MKYI card can be purchased and loaded with MYKI money for use on trains, trams and buses within the metropolitan public transport network.

It is our understanding that it is possible for an employer to acquire and register a number of MYKI cards pre-loaded with MYKI money on them. The cards are then provided to staff by way of salary sacrifice for their use but remain the employer's property. As the MYKI money is used, the cards can be topped-up by way of further salary sacrifice by the relevant staff member.

If the employer provides these MYKI cards only to employees that commute to work on a bus, and then enters into a strict usage policy that the cards are only to be used for working days travel and obtains a declaration to that effect, can it be argued an exempt residual benefit has been provided?

Subsection 47(6) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) provides exemption for residual benefits consisting of the provision or use of a motor vehicle under certain limited circumstances.

Subsection 47(6) of the FBTAA states:

> '47(6) [Motor vehicle not for private use] Where:
>
> (a) a residual benefit consisting of the provision or use of a motor vehicle is provided in a year of tax in respect of the employment of a current employee;
>
> (aa) the motor vehicle is not:
>
> (i) a taxi let on hire to the provider; or
>
> (ii) a car, not being:
>
> (A) a panel van or utility truck; or
>
> (B) any other road vehicle designed to carry a load of less than 1 tonne (other than a vehicle designed for the principal purpose of carrying passengers); and
>
> (b) there was no private use of the motor vehicle during the year of tax and at a time when the benefit was provided other than:
>
> (iii) work-related travel of the employee; and
>
> (iv) other private use of the motor vehicle by the employee or an associate of the employee, being other use that was minor, infrequent and irregular;
>
> the benefit is an exempt benefit in relation to the year of tax.'

A motor vehicle is essentially defined as any motor powered road vehicle (including a 4WD) and so a bus would fall within this term.

As the bus is neither a taxi nor a car and will only be used to take employees between home and work, the determinative question to be considered is whether the benefit consists of the 'provision or use of a motor vehicle' in respect of employment.

The relevant individuals only obtain access to the bus transportation under salary sacrifice arrangements between themselves and their employer. Therefore, the relevant bus transportation is being used in respect of the employment of a current employee.

The word 'use' has a broad meaning. It is not restricted to situations where the employee has control of a vehicle. While the facts are that the bus will carry the employee on a pre-organised route and at pre-organised times enable the benefit to be described as the provision of transport, it does not alter the fact that the benefit will consist of 'the use of a motor vehicle'.

In *National Australia Bank v FCT* [1993] FCA 531, Ryan J noted that the specific inclusion of 'a taxi let on hire to the provider' in paragraph 47(6)(aa) of the FBTAA indicates that the legislature considered 'use of a motor vehicle' could include a passenger's travel in a taxi. As a passenger's travel in a bus is comparable to a passenger's travel in a taxi, these comments support the conclusion that bus transportation can also involve the 'use of a motor vehicle'.

In conclusion, where employer owned MYKI cards are provided to staff for their commuter use between home and work, it would appear reasonable to argue that the benefit being provided is an exempt residual benefit.

This conclusion would also appear to be the case in regards to the Go Card (Qld), Smart Rider (WA), Opal (NSW) and MetroCard (SA) systems to the extent the employer can be registered as the holder of the cards under those systems.

Note: It should be noted that, where employees commute by way of train or tram, the exemption will not be available, as trains and trams are not considered motor vehicles because they are not road vehicles.

Eligibility – Rating Categorisation: the Karimbla Case

The Sheahan J (NSW Land and Environment Court) has handed down the decision in *Karimbla Properties v Council of the City of Sydney et al* [2017] NSWLEC 75 ('*the Karimbla Case*').

Karimbla Properties ('Karimbla') contended that once earthworks commence on land which has approval for a residential project, the land should be classified as 'residential' for rating purposes.

Two of the respondent Councils contended that such land should be classified as 'commercial land development' until at least the residential construction was complete (i.e. an occupation certificate issued).

The third respondent Council contended that such land should only be classified 'residential' when a substantial portion of the residential units were actually occupied.

The dispute centred on interpretation of s 516 of the NSW *Local Government Act* ('LGA').

Essence of the Decision

Basically, the Court followed the decision in *Meriton Apartments Pty Ltd v Parramatta City Council* [2003] NSWLEC 309 (*Parramatta*), as urged by Karimbla, over the opposition of all the respondent Councils.

Categorisation of land as 'residential' (under the first limb of s 516) depended on the physical use of the land and that use was sufficiently manifested by commencement of construction of buildings that would be used for the purpose of residential accommodation. Where land is vacant (i.e. not any construction activity), the second limb of s 516 required consideration of its zoning and it was sufficient that the zoning includes the ability to develop land for residential purposes.

The fiscal implications of the case for Councils are exacerbated by Sheahan J's decision that:

- As decided in *Parramatta*, the Court was not constrained in determining its categorisation decision could take effect from the time the ratepayer had applied to the Council for review of the categorisation of the land as 'residential'. However, as per the *Parramatta* decision, the Court should normally exercise its discretion to determine the time from which the new categorisation took effect by holding it took effect from the time that the ratepayer applied to the Council for the re-categorisation.
- Certain NSW legislative impediments to seeking a refund of tax rates where 12 months had elapsed since payment had been made did not preclude recovery of overpayment of rates due to land being re-categorised from 'business' to 'residential'.
- The Court should not decline to order a refund of overpaid rates in the exercise of its discretion on the basis that the Karimbla had not notified the relevant Council of the change in categorisation within 30 days of the change occurring in accordance with s 524 LGA.

Whether to categorise land for rating purposes as 'residential' from commencement of earthworks

(i) Legislative Context

Section 516 of the LGA provides:

> 'Land is to be categorised as residential if it is a parcel of rateable land valued as one assessment and:
>
> (a) its dominant use is for residential accommodation (otherwise than as a hotel, motel, guest-house, backpacker hostel or nursing home or any other form of residential accommodation (not being a boarding house or a lodging house) prescribed by the regulations), or
>
> (b) in the case of vacant land, it is zoned or otherwise designated for use under an environmental planning instrument (with or without development consent) for residential purposes, or
>
> (c) it is rural residential land.' (underlining added)

Before rating land, Councils are obliged to declare the category of the land for rating purposes. The categorisation takes effect from the date specified in the declaration. Where a ratepayer's land changes in category, the ratepayer must notify the Council of the change within 30 days – s 524 LGA.

Ratepayers can apply to Council at any time for review of the rating classification – s 525 LGA. The Council can declare a particular classification shall apply and is deemed to declare the existing classification applies where the Council fails to make a decision within 40 days of application for re-classification.

A ratepayer can appeal (s 526 LGA) to the Court in relation to either/both of:

- the Council's actual/deemed classification decision, and
- the date on which the declaration is specified to take effect

Any appeal from the Council must be instituted by the ratepayer within 30 days after the declaration is made.

Section 527 LGA requires the Council to 'make an appropriate adjustment of rates paid or payable' by a ratepayer following re-categorisation of the ratepayer's land.

The Court noted (at para 60 and citing s 574(2) LGA) that ratepayers can appeal to the Court within 30 days of service of a rates notice on the ground that the rateable land has been wrongly categorised. However, query whether s 574(2) in fact prohibits appeals under s 574(1) on the ground of categorisation.

(ii) Whether land is 'residential'

The case considered each of the limbs in s 516(a) and (b).

Sheahan J held that the *Parramatta* case was directly relevant and that he was obliged to interpret the limbs in accordance with that decision. He went further, and endorsed the case as being 'correctly decided, and should and would be decided in the same way now'. He adopted its construction of s 516 and also adopted:

> 'its finding that activities implementing a development consent, which will lead to a residential development of a type not excluded by the section, dictate that the land in such circumstances be categorised for rating purposes as for "residential accommodation".'

In *Parramatta*, the Court rejected the Parramatta City Council's contention that the dominant use of land (s 516(a)) was determined by the ratepayer's purpose (of building development), which would have required the land to be categorised as used for business activity rather than residential activity. The Court was considering re-categorisation sought by Meriton and said:

> ' … use of the land must be for a purpose and that the erection of a building is the means in this case by which the land is made to serve that purpose … While intention to use vacant land is not sufficient, as was conceded by Meriton, the purpose of the use of the land is manifested by the commencement of building construction the use of which building is for the purpose of residential accommodation.
>
> … I consider that physical purpose for which land is used … [in the extended sense discussed in *Council of the City of Newcastle v Royal Newcastle Hospital* and *Council of the City of Parramatta v Brickworks Limited*]… must be determinative for rating purposes rather than another purpose of the owner/occupier in using the land, in this case undertaking the business activity of property development'.

In *Parramatta*, the Court was referring to 'physical use' in the extended sense discussed in *Council of the City of Newcastle v Royal Newcastle Hospital* [1957] HCA 15 and *Council of the City of Parramatta v Brickworks Limited* [1972] HCA 21. Those cases recognised that is possible for land to be used for (i.e. 'devoted to') a physical purpose without any physical activity occurring on the land.

The key point made in the *Parramatta* decision is that a ratepayer's intention that in the future the land will be used for residential purposes is not sufficient, the land must being physically used for that purpose at the time of re-categorisation to 'residential' is sought. Commencement of development works (e.g. excavation of the land as part of the process of constructing foundations) in relation to a residential building will constitute a sufficient physical use of the land for residential purposes.

In relation to s 516(b), the Court in *Parramatta* considered that the zoning requirement. It held that it was sufficient that the zoning of the relevant land allowed 'development of any kind, including residential, subject to obtaining development consent'. The point being made is that the ability to develop the land for non-residential purposes, in addition to the ability to develop the land for residential purposes, does not preclude the land meeting the s 516(b) test of being zoned for residential purposes.

In relation to the term 'vacant land' to which s 516(b) refers, Sheahan J adopted the *Macquarie Dictionary* definition applied in *Ulan Coal Mines Pty Ltd v Mid-Western Regional Council* [2013] NSWLEC 1167:

> 'Vacant
>
> 1. having no contents; empty; void.
>
> 2. devoid or destitute (of).
>
> 3. having no occupant: vacant chairs.
>
> 4. untenanted, as a house, etc.
>
> 5. not in use, as a room.
>
> 6. free from work, business, etc., as time.
>
> 7. characterised by or proceeding from absence of occupation: a vacant life.
>
> 8. unoccupied with thought or reflection, as the mind.
>
> 9. characterised by, showing, or proceeding from lack of thought or intelligence.
>
> 10. not occupied by an incumbent, official, or the like, as a benefice, office, etc.
>
> 11. Law
>
> a. idle or unutilised; open to any claimant, as land.
>
> b. without an incumbent; abandoned: a vacant estate (one having no heir or claimant).'

Refund of rates overpaid due re-categorisation of land as 'residential'

It is appreciated that local authorities will be especially interested in whether their annual budgets can be disrupted retrospectively, and possibly after elapse of several years, by re-categorisation decisions being made by the Court.

(i) When re-categorisation takes effect for rating purposes

In the *Parramatta* case, the Court said:

> 'The fact that an application [for re-categorisation] can be made at any time and that there is a 30 day limit for an appeal to be lodged under s 526(2) should not be interpreted as limiting the period of a declaration made by the Court to the date of the application for review made to the Council. Nothing in the legislation suggests such a limitation should be applied. How the Court's discretion is exercised in making any declaration sought will depend on the circumstances of each case. If the circumstances warrant a change in the rating category I consider it would generally be appropriate to make such a change from the time sought in the absence of "disentitling" conduct by the applicant.'

In the *Karimbla Case*, Sheahan J accepted that this was correct. In short, in the absence of 'disentitling circumstances', a Court should exercise its discretion to declare that re-categorisation took effect from the time application for change in categorization had been sought.

He had to consider a potential disentitling circumstance, as identified under the next heading.

(ii) Court's Discretion to order refund

Section 524 LGA provides that:

> ' A rateable person (or the person's agent) must notify the council within 30 days after the person's rateable land changes from one category to another.'

Karimbla conceded that its failure to comply with s 524 might entitle the Court to exercise its discretion to determine the re-categorisation should not apply from the time of application for re-categorisation.

The Councils contended that:

> '… a council on a 12-month financial cycle would self-evidently be prejudiced by having to find the resources in the current year to refund possibly a substantial sum accumulated over a number of previous years, particularly when they argue the difficulty in the so-called "catch-up" provisions (ss 511 and 511A). Councils' orderly financial management arrangements will be disrupted.'

Sheahan J held:

> 'I do not find the applicants' failure to notify to be "disentitling conduct" in this case. It has proven to be a costly oversight in some of the cases; it is often not adequately explained; and it possibly dates from 2009, but I do not accept that it ought disqualify the applicants from a refund.
>
> I need also note, in the context of discretion, the respondents' concession that the appeals were commenced "in time".'

It would appear that failure to notify a Council of the circumstance that development of land has commenced within 30 days of that commencement (and where a later request for re-categorisation to 'residential' is made) will not affect the Court's discretion to apply the re-categorisation from the time of the actual request for re-categorisation. The appeal to the Court from the Council's decision to refuse re-categorisation is a different issue and the appeal must be commenced (s 526 LGA) within 30 days after the Council makes the declaration (or *semble* the deemed declaration under s 525 LGA where the Council has not made an actual declaration within 40 days of the re-categorisation application).

(iii) Recovery of Imposts Act - not relevant

Sheahan J noted that the *Recovery of Imposts Act 1963* (NSW) had not been considered in *Parramatta*. However, he held that this Act did not prevent the Karimbla recovering the overpayment of rates which resulted from the re-catorisation from 'busines' to 'residential'.

He observed that Karimbla was making a claim based on statutory rights (ss. 526-527 LGA), rather than basing its claim on restitution principles, to which the Act was directed. Section 2(1) of the Act prevents a taxpayer from commencing proceedings to recover (on restitutionary grounds) tax where a period of 12 months has expired after payment.

He added that if the Act had applied, the exception in s 2(2) in respect of proceedings 'brought pursuant to any specific provisions of any Act' would also have enabled Karimbla to recover the overpaid rates.

(iv) Court's Power to order refund

One of the Councils contended that the Court lacked jurisdiction to order a refund of rates. Sheahan J held that he had the power to order refund of the overpaid rates. The power arose as ancillary to the express jurisdiction conferred on the Court.

Conclusion

It will be interesting to see whether the respondent Councils will further appeal the interpretation of s. 516 LGA that has now accumulated a line of authority beginning with the *Parramatta* case where, as Sheahan J notes, the principles of that case have been endorsed in *Peabody Pastoral Holdings Pty Ltd v Mid-Western Regional Council* [2013] NSWLEC 86 and *SH Camden Valley Pty Ltd v Camden Council* [2015] NSWLEC 104.As noted above, the *Karimbla Case* also deals with additional issues relating to recovery of overpaid rates that had not been considered in earlier decisions.

Payroll – A reminder about Reportable Superannuation Contributions

Payroll – Reportable Super – what is reportable

The Basic Position

An amount which an employer has contributed to superannuation for an employee in respect of an income year is reportable where the employee had the ability to influence the contribution in one of two ways – s. 16-182 in Sched. 1 *Taxation Administration Act 1953* (TAA). It is sufficient that the employee is able to influence the size of the contribution amount. Alternatively, it is sufficient that the employee is able to influence the way the amount is contributed, so that the employee's assessable income is reduced.

Clearly, an employee is unable to influence the size or the way in which superannuation guarantee contributions are made. These are not reportable employer superannuation contributions (RESCs).

Influence over size of contribution

The prime example an employee influencing size of the contribution is an employee salary sacrificing an amount into superannuation. The employee may request the employer to pay a specified amount or a specified proportion of wages/salary to the employee's super fund in lieu of payment of that amount to the employee.

The influence may be actual or to be reasonably expected. The Explanatory Memorandum (EM) relating to RESCs gives the following example of the latter:

> 'Example 3.14
>
> Wei is an employee of TKU Pty Ltd (TKU). During negotiations of Wei's common law employment contract, TKU offered Wei increased contributions to superannuation as part of a range of employment-related benefits. These contributions, which equate to $10,000 of Wei's total remuneration, were provided as part of a remuneration package that Wei was allowed to consider and discuss with TKU. TKU made it clear to Wei that he could negotiate the contents of the additional incentives and that other benefits may be provided. These dealings are evidence to suggest Wei might reasonably have been expected to have had capacity to influence the amount of contributions being made on his behalf. The $10,000 contribution is in addition to contributions being made by TKU under superannuation guarantee law. TKU would be expected to record the $10,000 superannuation contribution as RESC.'

An employee is statutorily deemed to be unable to influence the size of certain superannuation contributions where the employer is required by an industrial instrument (Australian law, award, order, determination or industrial agreement under such law) or the rules of the fund to make the contribution. The employee must not be able or be reasonably expected to influence the content of the instrument/rules in so far as it/they provide for the requirement to contribute or the size of the contribution to be made – s. 16-182(5) Sched.1 TAA.

The Explanatory Memorandum appertaining to s. 16-182(5) gives the following illustration:

> 'Example 4.2
>
> Rodger's employer is required to make an employer contribution for Rodger's benefit under the deed of the superannuation fund into which Rodger's employer contributes. This deed is subordinate legislation under a provision of state legislation. The amount of the contribution is prescribed in the deed and is based on the amount of personal superannuation contribution made by Rodger. For example, Rodger can elect to contribute 0 per cent, 5 per cent or 8 per cent of his salary as a personal after-tax contribution. The deed requires that if Rodger elects to contribute 0 per cent, 5 per cent or 8 per cent, his employer must contribute 9 per cent, 11.5 per cent or 13 per cent respectively. Rodger elects to contribute 8 per cent of his salary as a

personal after-tax contribution. His employer contributes 13 per cent to Rodger's superannuation as required.

None of the amount the employer contributes is a reportable employer superannuation contribution as the additional employer contributions are required by an Australian law. Neither Rodger nor his employer has capacity to influence the requirement for the additional contribution to be made or its size as the contribution and its amount are determined by the deed. None of Rodger's personal after-tax superannuation contributions are reportable employer superannuation contributions as they are made from his assessable income.'

It is important to note that Rodger's election in regard to the quantum of his contribution related to the amount that he was to pay out of his after-tax income. Section 16-182(2) Sched 1. TAA provides that an amount is not a RESC to the extent that is included in the employee's after-tax income. If Rodger had made his 8 per cent contribution out of his pre-tax income, this would have been an RESC.

Influence over way in employer contributions are made

Some superfund rules, especially those of defined benefit funds, require members to make contributions from their after-tax income. These contributions may be set at a specified percentage of employment income, although in some cases, the members may determine the amount of the contribution. While contributions from after-tax income are not RESCs, employee exercise of an election in the rules to contribute out of pre-tax income would give rise to RESC. The following EM example illustrates this:

'Example 3.19

Rhonda's employer makes superannuation contributions on Rhonda's behalf to a defined benefit fund. The employer contributions are applied to a pool to fund the liability of the entire fund. In addition, the rules of the fund require Rhonda to make a member contribution equal to 7 per cent of ordinary time earnings. Ordinarily, this member contribution would be made from Rhonda's assessable income. However, the rules of the defined benefit fund were recently amended so that individuals may elect to contribute their member contribution from pre-tax salary or wages. Rhonda exercises this option and the 'grossed-up' amount of her member contribution is deducted from her pre-tax salary or wages so that Rhonda makes the same net contribution to her employer's defined benefit fund as she would have made if the member contribution were made from assessable income. The total 'grossed-up' amount of the contribution is RESC because it represents the amount that Rhonda has elected to have made from pre-tax salary with the effect that her assessable income is reduced.'

Absence of influence

Industrial agreements may also require employers to contribute to employee superannuation in excess of the required superannuation guarantee amount. Where the agreement is made at arm's length and there was not any reasonable capacity of the employee to influence the terms of the agreement, the contribution would not be RESC. The following example given in the EM indicates that an employee's vote in favour of an agreement negotiated by an industrial union does not constitute influence:

'Example 3.17

Costa is an employee of PQZ Pty Ltd (PQZ). Costa's employment conditions are governed by an industrial agreement that was negotiated between Costa's employer and the union representative. Costa was not involved in the negotiations and had no involvement in the preparation of the agreement, aside from voting on it. The terms of the agreement require PQZ to contribute 15 per cent of Costa's ordinary time earnings to superannuation. However, PQZ's payroll system pays 15 per cent of Costa's total remuneration (including overtime). PQZ's payroll system does not allow for superannuation contributions to be made on an employee's ordinary time earnings alone. Because Costa has not influenced further contributions to be made on his behalf or influenced contributions to be made in such a way that his assessable income is reduced, Costa has no RESC for the income year.'

Example 3.17 also demonstrates that the limitations of an employer's payroll system which result in an additional amount being contributed is a further instance of absence of employee influence. The additional amount would not be an RESC.

Contrast, the foregoing example with the following instance, given in the EM, of an industrial agreement where the employer was not dealing at arm's length in negotiating the industrial agreement:

> 'Example 3.18
>
> Tula is an employee of MGK Pty Ltd (MGK). Tula's employment conditions are governed by an industrial agreement that was negotiated between Tula and the other employees of MGK (Tula's husband, Tony and their adult children, Michael and Rena). There was no external involvement in the negotiations of the agreement and it was not made at arms' length. The agreement requires MGK to contribute an amount equating to 15 per cent of employee total remuneration (including overtime) to superannuation. In Tula's case, her total remuneration is $66,000 per year but ordinary time earnings is only $60,000 per year. Tula's annual contribution from MGK is $5,940. However, under superannuation guarantee law, MGK is only compelled to pay $5,400 on behalf of Tula, being 9 per cent multiplied by $60,000. Because the contributions made on behalf of Tula and her fellow employees are required under the terms of an agreement that was not negotiated at arms' length, and which Tula had capacity to influence, then MGK must report the difference between the amount compelled by law and the amount paid under the industrial agreement as RESC. That amount is the difference between $5,940 and $5,400 (being $540).'

Combination of contributions that are influenced and not influenced

The following example, which is published on the ATO website, illustrates the common scenario of the combined payment of superannuation guarantee (a situation of absence of employee influence) and salary sacrifice (exercise of influence):

> 'Example 2:
>
> On 1 July 2014, Sally and Zoe started work with ABC Pty Ltd. They receive the same remuneration package of $40,000 a year. Zoe decides to enter into an effective salary sacrifice arrangement to contribute pre-tax income of $10,000, which is to be paid to her super fund.
>
> Where contributions are paid to a complying super fund, your earnings base may be reduced unless the salary sacrifice arrangement states otherwise. Your earnings base is the amount on which super contributions made by your employer are calculated.
>
> The collective agreement that ABC has with its employees require that ABC Pty Ltd pay 9.5% of total salary before the salary is reduced by any salary sacrifice amounts, and is paid in addition to salary sacrifice contributions. In working out Sally and Zoe's reportable employer superannuation contributions amount, ABC does the following calculation:
>
> **Zoe**

ABC records total employer super contributions paid on behalf of Zoe	$13,800
Salary sacrifice contributions	$10,000
ABC calculates 9.5% compulsory super contributions on $40,000	$3,800
ABC subtracts employer compulsory contributions from the total contributions made on behalf of Zoe to calculate reportable employer superannuation contributions amount	$10,000

> **Sally**
>
> ABC calculates Sally's 9.5% compulsory super contributions based on her salary of $40,000. ABC contributes $3,800 to Sally's super fund, and she has no reportable employer superannuation contributions.'

The quantum of the RESC - in which year is the contribution reportable?

Which is the correct year?

While an employee may appropriately influence the making of a contribution, there is a further question in relation to whether a particular contribution is to be reported in the payment summary for a given year.

If any employer pays a contribution to the employee's superfund before or after a particular year of income, the contribution may still be made in respect of that year of income and have to be included in the amount reported for that year. The determinant nexus 'in respect of' is found in s. 16-182(1) Sched. *1* TAA.

Consider the following case (based on Example 4.1 given in the Explanatory Memorandum for the Act that introduced the nexus requirement):

> 'Michael is an employee of JYU Pty Ltd (JYU). Michael has entered an effective salary sacrifice agreement with JYU that means 2 per cent of his fortnightly pay of the relevant income year is contributed to Michael's superannuation fund in addition to the compulsory 9 per cent superannuation guarantee contribution. JYU typically makes contributions to Michael's superannuation fund on the 25th day of the month after the month in which Michael's salary is paid. On this occasion, the 11 per cent contribution made on Michael's behalf, including the 2 per cent 'salary sacrificed' contribution, is made on 25 July following the relevant income year.
>
> Michael has capacity to influence the making of this additional 2 per cent contribution in a way that his assessable income is reduced so that it is a reportable employer superannuation contribution. Because the additional contribution made on 25 July is made in respect of the preceding income year, it will be considered a reportable employer superannuation contribution and included in income when determining Michael's eligibility for relevant means-tested government assistance payments for the previous income year.'

It will also be necessary to consider the converse circumstance and identify any salary sacrifice payments made in an income year and which relate to a preceding financial year. For instance a salary sacrifice payment from Michael's fortnightly pay for the previous year might have been made early in the current year and this amount should be backed out in calculating his RESC for the current year.

Why is it important to the employee for the employer to report the correct amount in the correct year?

Employers need to report the correct amount in respect of the correct year because the employee is likely to rely on the amount shown in the payment summary statement to complete the employee's income tax return (employee's ITR).

The amount shown in the employee's ITR for a particular year will affect the tax treatment of the employee in relation to that income year in respect of matters such as:

- Medicare levy surcharge threshold calculation;
- Medicare levy surcharge (lump sum payment in arrears) tax offset;
- all dependant tax offsets;
- senior Australians and pensioner tax offset;
- spouse superannuation contributions tax offset;
- small business income tax offset;
- superannuation co-contributions;
- deduction for personal super contributions;

- Higher Education Loan Program and Student Financial Supplement Scheme repayments;
- tax concessions for certain employee share schemes;
- deductions for non-commercial losses; and
- a range of Centre link and Child Support Agency benefits and obligations.

While not-for-profit sector employers may not immediately anticipate that their staff may be affected by some of these matters, this is irrelevant to the duty of care which their staff expect their employer will take in compiling this information. Legal considerations aside, there are good employer-employee relations to consider.

In any event, and in any particular year, employees who commence or leave part way through a financial year may have other income sources in a given year that make these relevant. Similarly staff, especially part-time staff, may have other sources of income in a particular year which makes these matters pertinent to them.

There is a penalty for failure to provide an employee with a payment summary. However, we will leave the topic of implications for provision of an inaccurate payment summary for another day.

Who is an 'employee' for RESC purposes?

For RESC purposes (s. 16-182(3) Sched.1 TAA), an 'employer' has the extended meaning given in s. 12 of the *Superannuation Guarantee (Administration) Act 1992* (SGA) except that s. 12(11) is to be disregarded (refer below). As a corollary, your organisation may have 'employees' that are not common law employees.

You should especially note that where your organisation engages certain contractors, it will be an employer (see s. 12(3) SGA) for RESC purposes. In particular, your organisation will be an employer of a person where it enters into a contract that is 'wholly or principally for the labour of the person'.

A similar separate, but possibly overlooked, extended category of employer is also worth highlighting. A payment to a person for performance/presentation or participation in the performance/presentation of 'any music, play, dance, entertainment, sport, display or promotional activity or similar activity involving the exercise of intellectual, artistic … [etc.] skills' makes the payer an employer (s. 12(8)(a) SGA). Payment to a person to provide services in connection with those activities (s. 12(8)(b) SGA) and payment to a person who is paid to perform services in connection with 'making a film, tape or disc or of any television or radio broadcast' (s. 12(8)(c)) also make the payer an employer.

Other additions under s. 12 to the common law concept of an employer are:

- in relation to members (e.g. directors) of the executive body of a company or other body corporate - that company/body corporate;
- in relation to local government members who are subject to PAYG (i.e. an operative unanimous resolution under s. 446-5 of Sched.1 TAA) - the relevant local governing body;
- in relation to holders of positions under the Constitution or a Commonwealth, State or Territory law (other than local government members) - the Commonwealth or relevant State/Territory as the case may be;
- persons (except local government members) who, not being holders of positions noted in the preceding point, are in the service of the Commonwealth, a State or Territory - the Commonwealth or relevant State/Territory as the case may be; and
- in relation to Federal, State, and (internal)Territory legislature members - the Commonwealth, the relevant State or relevant Territory.

Further information

Further discussion of RESCs is available on the ATO website.

Payroll – Can cars provided under novated lease financing arrangements be excluded fringe benefits for FBT reporting purpose?

Regulation 8 of the *Fringe Benefits Tax Regulations 1992* prescribes benefits relating to 'pooled' or 'shared' cars as being excluded fringe benefits. Excluded fringe benefits are not included in an employee's Reportable Fringe Benefits amount.

Where a pooled or shared car exists during the year, the car benefit is an excluded fringe benefit in relation to each employee provided with a car benefit in relation to that car during the year.

In the FBT States and Territories Industry Partnership meeting held on 4 October 2016, the ATO indicated that in a situation where a vehicle is subject of a novated lease, the terms of the lease would require the employer to provide the specific car to a specific employee for private use. The ATO advocated that where another employee is given private use of the car the employer is nonetheless only providing the benefit to the employee who is party to the novated lease. The fringe benefit would only count against that employee and not the other.

Accordingly the ATO view is that the car is not a shared/pooled car.

Salary Packaging - The Commissioner's view of meal and travel allowances for 2017-18

The ATO has issued TD 2017/19 ('the Determination').

This sets out the ATO's annual review for 2017-18 of the maximum amount ('the reasonable amount') for certain travel and meal expenses paid to employees that it accepts employees can deduct, without being required to substantiate those expenses with receipts *etc.*

It should be noted that the 'Determination is not relevant to you where you do not receive an allowance to cover your expenses'.

Although this article focusses on the Determination, the latter should be read in conjunction with TR 2004/6. The significance of the Determination is set out in para 33 of TR 2004/6:

> 'In setting the reasonable amount for the purposes of this Ruling the Commissioner does not determine the amount of allowance an employee should receive or an employer should pay their employees. The amount of an allowance is a matter to be determined between the payer and the payee. The Commissioner determines the reasonable amount of travel and meal allowance expenses only for the purposes of the tax law, that is the amount that will be accepted for exception from the requirement to obtain and keep written evidence for substantiation purposes. It is not provided for the purpose of being used for employment or industrial relations purposes in setting the amount of allowances paid. The Commissioner is not entitled under the tax law to have any specific regard to the fairness or appropriateness of the allowance paid as part of any remuneration arrangement.'

While many readers will deal with industrial awards which fix allowances, it may be helpful to understand the ATO's treatment of allowances in the context of negotiating these and, more generally, in the context of making decisions regarding allowances where an award does not apply. However, note that the discussion of overtime meal allowances below relates to those which are 'bona fide overtime meal allowances' (defined in para 87 TR 2004/6) and which meet the further condition (see paras 9 and 17 of TR 2004/6) of being paid under a Commonwealth/State/Territory law or an award, order, determination or an industrial agreement in force under such a law.

The Determination specifies maximum amounts, at or below which employees will not be required to substantiate the expenditure by production of receipts, in relation to:

- 'Overtime meal expenses – for food and drink when working overtime';
- 'Domestic travel expenses - for accommodation, food and drink, and incidentals when travelling away from home overnight for work (particular reasonable amounts are given for employee truck drivers, office holders covered by the Remuneration Tribunal and Federal Members of Parliament)';
- 'Overseas travel expenses – for food and drink, and incidentals when travelling overseas for work'.

What TD 2017/19 and TR 2004/6 are intended to achieve

Where an employer pays an allowance ('the actual allowance') to an employee in respect of overtime meals or travel expenses, *prima facie* the employee will treat the receipt of the relevant actual allowance as income which has to be included in the employee's income tax return.

The employee will seek to claim a tax deduction for the expenditure which the actual allowance is intended to cover, on the basis the expenditure is incurred by the employee in order to gain his/her income. This article (like TR 2004/6) assumes the relevant employee's expenditure in pursuance of the

purpose for which the actual allowance is paid entitles the employee to an allowable deduction under the income tax legislation.

TR 2004/6 and the Determination set out circumstances in which the employee is relieved from having to provide 'detailed calculations, records or receipts' for expenditure (i.e. 'written evidence' mentioned in paras 13 and 92 of TR 2004/6). These circumstances are where the employee is seeking a deduction that does not exceed the reasonable amount as specified in the Determination.

Employees cannot automatically claim a tax deduction for the whole of the reasonable amount. A deduction is only available to the extent that the employee has actually spent/incurred the amount for which a deduction is claimed.

For instance, if an employee has obtained overnight accommodation for less than the applicable reasonable amount and is paid an actual allowance equal to the reasonable amount, the employee can only claim a deduction for the actual expenditure – this can lead to increasing the employee's taxable income by the surplus of the allowance over the expenditure incurred. As a further point to note, if the allowance is for a particular form of accommodation (say, hotel) and the employee obtains a different form of accommodation (say, caravan or hostel), the reasonable amount will not be relevant and the relief from substantiation will not be available.

Where an employee expends more than the reasonable amount, the employee will be required to substantiate the whole of the expenditure and not just the component of the expenditure in excess of the reasonable amount. TR 2004/6 (paras 14, 16 and 40) also recognises that, where an employee has incurred expenditure in respect of which an allowance has been provided, the employee can choose to claim a deduction for the reasonable amount only (i.e. forego a deduction of the excess over the reasonable amount), with a view to avoiding the need to substantiate the expenditure.

Where an employee is paid an allowance and the allowance is not shown on the employee's payment summary, the employee will not need to disclose the allowance as income and claim a deduction, provided the employee has actually spent the whole of the allowance in purchases for which the allowance was provided. Note, however, where the allowance is not shown in the employee's tax return, a deduction cannot be claimed – para 12 of TR 2004/6.

Overtime Meal Allowances

The foregoing comments are illustrated, in the context of the reasonable amount of $30.05 for overtime meal expenses, in Example 1 of the Determination:

> *5. Samantha works for the local government. She is asked to work overtime one night to complete an urgent task. Samantha works her 8 hour day followed by 4 hours of overtime. Samantha receives an overtime meal allowance of $14.98 pursuant to her agreement which is shown on her payment summary. During the overtime Samantha takes a rest break to get a meal and returns to continue her overtime. Samantha spends $20 on her meal.*
>
> *6. Because Samantha has spent less than the reasonable amount for overtime meal expenses, she can claim a deduction for the $20 she spends and she is not required to substantiate the expenditure (for example, get and keep the receipt for the meal).*
>
> *7. If Samantha's tax return is checked by the ATO she may be asked to explain her claim for deduction. To do this, Samantha would show that she worked overtime, that she was paid an overtime meal allowance under an industrial instrument, that she correctly declared this allowance as income in her tax return, and that she costed her meal at $20 based on the cost of the curry and drink she purchased from a nearby Thai restaurant.*
>
> *8. If Samantha had spent more than the reasonable amount and wanted to claim the higher amount that she spent, she would need to get and keep the receipt for the meal.*

9. If Samantha's overtime meal allowance was not shown on her payment summary and she fully spent the allowance, she can choose to leave it out of her tax return and not claim a deduction for the meal she purchases when working overtime.

Readers may find the comment at para 7 of Example 1 slightly confusing and appreciate elaboration. Although the Determination relieves employees from having to provide substantiation of the amount of expenditure, the ATO can still require (see para 3 of the Determination and see further at para 39 of TR 2004/6) the employee to show:

- the employee spent the money in performing his/her work duties (for example, in travelling away from home overnight on a work trip);
- how the employee worked out his/her claim (for example, in the context of travel, he/she kept a diary);
- the employee spent the money himself/herself (for example, using the employee's credit card statement or other banking records) and were not reimbursed (for example, a letter from his/her employer); and
- the employee correctly declared the allowance as income in the employee tax return.

Domestic Travel Allowances

In connection with the relief from substantiation of both domestic travel allowances (discussed under this heading) and overseas travel allowances (discussed under the next heading), note the comment at para 18 of TR 2004/6:

> 'For domestic or overseas travel allowance expenses to be considered for exception from substantiation, the employee must be paid a bona fide travel allowance [which is a concept identified at paras 60 and 86 of TR 2004/6, and see generally paras 53 *et seq*]. The allowance must be paid to cover work-related travel expenses incurred for travel away from the employee's ordinary residence, undertaken in the course of performing duties as an employee (subsection 900-30(3) of the ITAA 1997) and which involves sleep away from home. The work-related travel expenses must be for accommodation, or food or drink, or expenses incidental to the travel.' (emphasis omitted)

The Determination specifically (Tables in para 17) gives reasonable amounts for domestic travel expenses in relation to accommodation (daily rates – short stays in commercial establishments like hotels, motels and serviced apartments), meals (separate rates for breakfast, lunch and dinner), and expenses incidental to travel. The amounts are given for visits to capital cities, country centres regarded as high cost, Tier 2 country centres, and other country centres in respect of three salary/wage bands:

- $119,650 and below;
- $119,651 to $21,950;and
- $212,951 and above

The Determination provides employees with guidance (see paras 15 and 16) for claiming deductions where the period of travel only includes part of a day.

Note that the reasonable allowances for domestic travel mentioned above are not applicable to employee truck drivers, office holders covered by the Remuneration Tribunal or Federal members of Parliament. The Determination observes that TR 2004/6 (paras 66 to 69) provides that 'claims made by office holders covered by the Remuneration Tribunal are considered to be reasonable amounts if they do not exceed the rate of allowances set by the Remuneration Tribunal for that office holder'. Reasonable amounts for Federal Parliamentary members are discussed in para 70 and 71 of TR 2004/6.

The Determination makes special provision for employee truck drivers who receive a travel allowance (further guidance is available in TR 2004/6, especially at para 72 *et seq*). It also notes that employee

truck drivers who do not receive a travel allowance or are owner-drivers 'must substantiate all travel expenses with written evidence'.

Overseas Travel Allowances

The Determination specifies reasonable allowances for overseas travel – see paras 31 to 43. Attention is especially drawn to the requirements for overseas travel records (the nature of these is discussed in TR 2004/6 at para 82 and para 91) and the need to substantiate fully expenditure on overseas accommodation.

The Determination states:

> '31. If you are travelling overseas and are away from your usual residence for 6 or more nights in a row, you must still keep travel records even if you rely on the reasonable amounts and don't have to substantiate your expenses. Travel records may include ticketing information, diary entries or other information setting out the nature of your travel, the day and time it began, how long it lasted and where you travelled.
>
> 32. Reasonable amounts are provided for 3 salary levels. Salary excludes any allowances received. Use Table 6 if your salary is $119,650 and below. Use Table 7 if your salary is between $119,651 and $212,950. Use Table 8 if your salary is $212,951 or more.
>
> 33. Reasonable amounts are given for:
>
> - meals (showing breakfast, lunch and dinner), and
> - expenses incidental to travel.
>
> Any expenditure on accommodation overseas must be fully substantiated.'

Eligibility - Industry Ombudsman – an industry regulator or charitable?

In *Telecommunications Industry Ombudsman Ltd v Commissioner of State Revenue* [2017] VSC 286, the Victorian Supreme Court was asked to consider whether the Telecommunications Industry Ombudsman is a charity for Victorian payroll tax purposes.

KEY POINTS

- The Court held that wages paid by the Telecommunications Industry Ombudsman (TIO) — a non-profit organisation — to its employees were exempt from payroll tax

because:

- the dominant purpose of the TIO — which was to provide a free, independent dispute resolution service to the public — fell within the fourth head of charity, i.e. 'beneficial to the community'; and
- the wages were paid to persons engaged:
  - exclusively in work of a charitable nature; or
  - in the furtherance of a charitable purpose.
- The 'dominant purpose' of an organisation should be determined on a holistic basis having regard to its activities as well as the objects stated in its governing documents.

Issue

Whether wages paid by the TIO to its employees were exempt from payroll tax pursuant to s. 48 of the *Payroll Tax Act 2007* (Vic). This turned on whether:

- the TIO was a non-profit organisation having as its whole or dominant purpose a charitable purpose, and if so;
- wages were paid to persons engaged exclusively in work of a charitable nature for the TIO.

Facts

The TIO was established in 1993 to provide a free, independent dispute resolution service for small business and residential consumers with unresolved complaints about their telephone or internet service in Australia. It was establish as a company limited by guarantee. Service providers (carriers) were required — under telecommunications legislation — to enter into TIO's dispute resolution scheme. This entailed becoming members of TIO.

Broadly, the Constitution of the TIO stated that its object was to operate the relevant scheme and to appoint an Ombudsman with power on behalf of the TIO to investigate and facilitate the resolution of complaints about the provision or supply of a carriage service.

The evidence before the Court indicated that the core function of the TIO was dispute resolution. However other ancillary functions included investigating systemic issues, conducting policy and research activities — including making submissions to the telecommunications regulators — issuing publications, undertaking outreach activities for Aboriginal communities and people with disabilities, and various industry engagement activities with stakeholders with the aim of reducing complaints and improving telecommunications services.

The evidence also indicated that every staff member of the TIO was involved in dispute resolution, either directly or in a supporting capacity.

The Commissioner rejected the TIO's application for an exemption from payroll tax for the relevant period.

Relevant Legislation

Section 48 of the *Payroll Tax Act 2007* (Vic) provided:

> '48 Non-profit organisations
>
> (1) Wages are exempt wages if the Commissioner is satisfied that the wages are paid or payable —
>
> (a) by any of the following —
>
> …
>
> (iii) a non-profit organisation having as its whole or dominant purpose a charitable, benevolent, philanthropic or patriotic purpose (but not including a school, an educational institution, an educational company or an instrumentality of the State); and
>
> (b) to a person engaged exclusively in work of a religious, charitable, benevolent, philanthropic or patriotic nature for the institution or non-profit organisation.'

Contentions

The Commissioner contended that the only evidence upon which the Court should rely to determine the purpose of the TIO was its Constitution and Memorandum and Articles of Association and that:

- the stated purpose of the TIO under its governing documents was to operate and administer a regulatory scheme for the investigation and determination of complaints about telecommunications carriage services — as required by statute; and
- on the authority *of Law Institute of Victoria v Commissioner of State Revenue* , that purpose was not a charitable purpose. This was because the TIO was properly characterised as a 'regulator' of (or within) the telecommunications industry.

The TIO contended that:

- its dominant purpose should be determined holistically, having regard to its objects and the activities it had undertaken since formation;
- it was an ombudsman, not a 'regulator' of members of the telecommunications industry. Unlike the Australian Communications and Media Authority (ACMA) or ACCC, the TIO only had the power to make binding decisions — not to enforce compliance; and
- alternatively, if the TIO was found to be a 'regulator', there was no general doctrine which excludes from charitable purposes 'regulatory objects'.

Decision

The TIO's dominant purpose — namely, the purpose of providing a free, independent dispute resolution service to residential and small business consumers of telecommunications services— was a charitable purpose because it was:

- beneficial to the community and therefore fell within the fourth head of charity;
- within the Preamble to the Statute of Elizabeth; and
- not affected by its corporate structure.

Accordingly, the TIO's dominant purpose was charitable pursuant to s. 48(1)(a)(iii).

The second limb of s. 48(1) was satisfied since:

- all wages were paid to persons engaged exclusively in work of a charitable nature for the TIO; and

- to the extent that the TIO staff were involved in activities that may not be considered intrinsically charitable — such as administrative support — the activities were 'charitable in character because they were carried out in furtherance of a charitable purpose.'

Reasons

(i) Charitable purpose

Having regard to its objects, history and activities, the dominant purpose of the TIO was to provide a free, independent dispute resolution service to residential and small business consumers of telecommunications services. This was an 'essential service', was beneficial to the public and therefore came within the fourth head of 'charity' at common law — being for 'purposes beneficial to the community'.

The TIO's dispute resolution services were charitable because they:

- promoted the telecommunications industry by increasing consumer confidence in the industry; and
- relieved the 'public purse' by lessening the case work in courts and tribunals.

The Court accepted that the TIO's role as an industry ombudsman was different to that of a telecommunications regulatory body such as the ACCC or ACMA, but noted that regulatory or disciplinary objects would not necessarily render an organisation's purposes non-charitable.

The narrow approach to the determination of the purposes of the TIO — dominant or otherwise — is not supported by the authorities:

- 'The enquiry to be undertaken in ascertaining whether an entity is an organisation having at its dominant purpose a charitable purpose is an assessment which has regard to the objects, purposes and activities of the subject entity. The cases have recognised that this task is one undertaken in a holistic way' — Digby J in Law Institute of Victoria v Commissioner of State Revenue.
- In Aid/Watch, the High Court held that an organisation whose 'activities are apt to contribute to the public welfare, being for a purpose beneficial to the community within the fourth head identified in Pemsel' was a charitable institution.

The Court held that the TIO was not precluded from having a dominant charitable purpose merely because it:

- operated in the context of a statutory scheme;
- its purposes were aligned with government policy; and
- was incorporated as a company.

(ii) Wages paid exclusively for charitable purposes

The Court accepted the TIO's evidence that all wages paid to staff during the relevant period were to:

- persons engaged exclusively in work of a charitable nature; and
- TIO staff who were involved in activities that may not be considered intrinsically charitable—such as administrative support — but which activities were 'charitable in character because they were carried out in furtherance of a charitable purpose': *FCT v Word Investments Ltd*.

Eligibility – Victorian Payroll Tax changes for Regional Employers

Regional Victoria Employers – Reduced Payroll Tax Rate

The *State Taxation Acts Amendment Act 2017* implements the key measures announced in the 2017/18 Victorian State Budget. The measures include a payroll tax change that provides direct benefits for certain 'regional employers' and indirect benefits for customers of those businesses.

Effective from 1 July 2017, employers in regional Victoria where at least 85% of the employer's taxable wages are payable to regional employees (for a month or during a financial year) will now be subject to a reduced payroll tax (PRT) rate of 3.65%. All other employers will continue to pay PRT at a rate of 4.85%. The PRT exemption threshold was also raised from $575,000 to $625,000 effective 1 July 2017.

A 'regional employee' is defined as being an employee of a 'regional employer' who, in a month, performs services for the employer, mainly in 'regional Victoria'.

'Regional Victoria' is defined as having the same meaning under the *First Home Owner Grant Act 2000* (FHOG). This is the 48 rural based municipal councils outlined in Schedule 1 FHOG plus the 6 Alpine Resorts set out in the *Schedule of the Alpine Resorts Act 1983*.

As explained in more detail below, whether an employer is a 'regional employer' depends on the location of its 'registered business address' or it if it does not have one, its principal place of business (PPB). The 'registered business address' is, basically, the relevant employer's address for service of notices as shown in the Australian Business Register (ABN Register).

A 'regional employer' is an employer who has an ABN and a registered business address located in regional Victoria. Alternatively, where the employer does not have an ABN, it is a 'regional employer' if its PPB is located in regional Victoria.

If an employer carries on a business under a trust, the employer's registered business address is the trust's registered business address. Alternatively, where the trust does not have an ABN but the trustee has an ABN, the relevant address is the trustee's registered business address.

If an employer's registered business addresses is located in and outside of regional Victoria at the same point in time, the location where that employer is based at that point is where its PPB is located and this is to be determined by reference to the state of affairs existing during the month in which the relevant wages are paid or payable. If more than one location in Victoria would qualify as an employer's PPB during a month that location is to be determined on the last day of that month.

Where members of a payroll tax group include regional employers, the group's payroll tax (after subtracting the relevant deduction) is calculated based a proportion of the total taxable wages paid or payable by members who are regional employers and members who are not regional employers at the relevant payroll tax rate.

For example, a group consists of 3 employers who have been given approval to lodge a joint return. Employer 1 paid wages of $400,000 for the financial year, Employer 2 (who is a regional employer) paid wages of $300,000 and Employer 3 paid wages of $200,000. The total wages paid by the three group employers for the financial year is $900,000. The deduction amount for the financial year is $600,000. Therefore, the wages liable to payroll tax are $300,000. One-third of the total taxable wages is paid by the regional employer (Employer 2). Therefore, one-third of the wages liable to payroll tax ($100,000) is assessed at the regional employer tax rate of 3·65% and the remaining two-thirds ($200,000) is assessed at the tax rate of 4·85% (source: Explanatory Memorandum to the Bill).

In addition, from July 1, 2017, the payroll tax-free threshold will increase from $575,000 to $625,000, and from July 1, 2018, the threshold will increase again to $650,000. The increased in threshold applies to all businesses.

The above combination of changes will provide payroll tax savings for regional Victorian businesses.

However, customers of such businesses should also be aware of these savings when negotiating supply contract pricing, particularly where labour is a key cost component of what is being supplied. As a practical matter, customers will need to use the limited publicly accessible information from the ABN Register (see ABN Lookup) and their commercial knowledge of suppliers as a guide in identifying whether the payroll tax concession is likely to be applicable to their supplier.

Across Australia, State and Territory Governments are increasingly offering payroll tax incentives to assist employment in targeted geographical areas and for specific labour types (such as apprentices or new hires).

FBT - When are deductions allowed for employees' travel expenses?

The 'typical' employee working arrangement has varied over the years, with more and more individual's choosing to live in an area that is not necessarily close to where they work.

Employee travel arrangements have also changed over time with more and more people working form home as well as more and more people commuting to their work location at the start of the working week and returning home for the weekend.

Why is this an issue for income tax-exempt employers? The reason is that if the nature of an employee's home to work travel can be classed as work related, significant FBT and salary packaging benefits are to be obtained by use of the 'otherwise deductible' rule.

In *John Holland v Commissioner of Taxation* [2015] FCAFC 82, the Full Court of the Federal Court unanimously allowed the taxpayer's appeal from a single judge of the Federal Court in relation to the FBT taxable value of flights paid for by the taxpayer and taken by the taxpayer's employees for travel between Perth airport and Geraldton under certain fly-in fly-out arrangements.

Fundamental to the Full Court's decision to allow the flights as deductible work related travel was the fact that, under the relevant employees' terms and conditions of employment, they were considered to be at work once they reached Perth airport. As a result, any travel undertaken from that point was 'on' work and not to work.

Since the decision, the ATO has revisited a number of their old travel/living away from home rulings and has issued draft taxation ruling TR 2017/D6 Income tax and fringe benefits tax: when are deductions allowed for employees' travel expenses? ('the Ruling'). It is expected that the revisited old rulings will be withdrawn when the Ruling issues in final form.

Under the Ruling, in determining whether travel is undertaken in performing an employee's duties, the following factors are to be considered:

(a) whether the work activities require the employee to undertake the travel;

(b) whether the employee is paid, directly or indirectly, to undertake the travel;

(c) whether the employee is subject to the direction and control of their employer for the period of the travel, and

(d) whether the above factors have been contrived to give a private journey the appearance of work travel.

There are a number of examples in the Ruling covering various work travel scenarios including:

- Working regularly in two or more locations
- Living away from home
- International secondees to Australia
- Fly-in fly-out

The Ruling is quite comprehensive and detailed. With it being issued at the very end of June, a full analysis of its extensive contents must be postponed until next month's newsletter.

If you have staff that fall within any of the above listed travel scenarios, then you should read the Ruling to see whether the FBT outcome you are currently applying is the consistent with the ATO's current thinking.

Of course, the Ruling is presently a draft and we anticipate there will be significant input from accounting and other professional bodies as to its contents or lack thereof. As with all draft rulings, there is an ATO contact officer listed, who can be contacted with any specific queries/input you may have.

In the meantime it will be a case of watch this space.

GST Q&A - What items are included in calculating GST turnover?

Question

Quick question regarding GST turnover - can you please advise what items are included in calculating council's GST turnover.

Answer

'GST turnover' is defined in the GST law with reference to whether a particular turnover threshold is met (or not met) e.g. GST registration turnover threshold, cash accounting turnover threshold, *etc.* The key elements of GST turnover are then broken down into 'current GST turnover' and 'projected GST turnover'.

s. 188-15(1) defines 'current GST turnover' as:

> 'Your current GST turnover at a time during a particular month is the sum of the values of all the supplies that you have made, or are likely to make, during the 12 months ending at the end of that month, other than:
>
> (a) supplies that are input taxed; or
>
> (b) supplies that are not for consideration (and are not taxable supplies under section 72-5); or
>
> (c) supplies that are not made in connection with an enterprise that you carry on.'

s. 195-1 defines 'consideration', for a supply or acquisition, to mean any consideration, within the meaning of ss. 9-15 and 9-17, in connection with the supply or acquisition.

Section 9-15 refers to what is 'consideration' and s. 9-17 expands this definition but also excludes certain amounts, e.g. supplies from a government related entity to another government related entity, gifts to a non-profit body, *etc*. There is also a note to s. 195-1 which further alters the general definition by excluding amounts covered under certain sections including ss. 81-5, 81-10 and 81-15 (from Division 81).

For completeness, 'projected GST turnover' (s. 188-20) is defined similarly to 'current GST turnover', but instead this relates to the sum of the values of all the supplies that you have made, or are likely to make, during the current month and the next 11 months.

Also, there are other specifically listed amounts that are disregarded from either or both of current and projected GST turnover, such as:

- supplies not connected with the indirect tax zone (i.e. Australia);
- some insurance claim settlements;
- amounts subject to the reverse charge rules in Division 83; and
- (for projected GST turnover only) supplies of capital assets, or supplies on ceasing an enterprise or substantially and permanently reducing the size or scale of the enterprise .

Based on the above, an entity would calculate current GST turnover as follows:

> **Step 1**: identity the value of ALL supplies made during the 12 months up to the end of the current month;
>
> **Step 2**: exclude any input taxed supplies (e.g. residential rental supplies and financial supplies);
>
> **Step3**: exclude any amounts which are not consideration (e.g. due to ss 9-17, 81-5, 81-10 and 81-15); and

Step 4: exclude any other specifically listed items (e.g. supplies not connected with Australia, insurance settlements, *etc.*).

Note: For Councils, we expect Step 3 would exclude significant amounts charged, including rates, and fees and charges covered by Division 81.

Salary Packaging Q&A - Salary sacrifice of remote area accommodation contribution

Question

We provide accommodation (a house we own) to an employee at reduced market rent of $100 per week. The conditions set out in section 142(2E) and section 142 (1A) of the FBT Act are satisfied, i.e. the accommodation is in a remote area, it is the employee's principal place of residence, *etc.* The employee wishes to salary sacrifice the $100 rent payment.

Questions:

1. Are we liable to pay FBT on 50% of the $100 salary sacrifice, as only 50% is exempt under the remote area rent concession?
2. Please confirm there would be no FBT payable by us on the difference between the market rent and the $100 rent payment received from the employee.

Answer

Given you, as the employer, own the house, the arrangement you have described appears to be exempt from FBT under section 58ZC as a remote area housing benefit. As such, the rental arrangement with the employee doesn't really have any effect on the FBT payable by you.

If you are agreeable, we see no problem with the employee salary sacrificing the $100 rent payment as this does not impact the FBT outcome in our view.

FBT Q&A - FBT return amendment rules

Question

We have recently discovered that we have been paying FBT on 'workhorse' vehicles that qualify for FBT exemption. It seems this has gone unnoticed for about 5 years or so.

Are we able to request that our previous FBT returns be corrected and the extra FBT we have paid be refunded?

Answer

Like its Income Tax Act sibling, the Fringe Benefits Tax legislation contains specific rules insofar as amendment of FBT assessments is concerned.

Section 74 of the FBT Act enables the Commissioner to amend an assessment, either increasing or decreasing the liability of the employer, at any time within three years of the original assessment date.

An 'assessment' for FBT purposes is deemed to have been made upon lodgement of the FBT return.

In addition to the above general 3 year amendment period, the following specific provisions apply:

1. Where the employer has not made a 'full and true disclosure', and there has been an avoidance of tax, the assessment may be amended within six years of the original assessment date.
2. Further, an assessment may be amended at any time depending on whether the Commissioner is of the opinion that the avoidance of tax is due to fraud or evasion.

If you use a tax agent, the simplest way to amend the prior year returns is to have your agent lodge an amended FBT return for the affected year.

If you self-lodge, then we would recommend you request the amendments in writing via formal letter.

Unfortunately for those FBT assessments that fall outside the 3 year time-frame, the Commissioner will not be able to issue amended assessments.

FBT Q&A - Gift cards and vouchers valued at $300 or more

Question

Suppose we are giving a Gift/Voucher card to staff member for reward/recognition, and we give these types of Gift/Voucher cards on an infrequent and irregular base. However, the notional taxable value is equal to or greater than $300. Is the gift card/voucher subject to FBT?

Answer

Where the value is $300 or more then the minor benefit exemption cannot be accessed. In order for the minor benefit exemption to be accessed the notional taxable value of the benefit must be less than $300.

On this basis it would appear FBT is payable.