The August wrap up

This month we've got quite the range of articles and some great Q&As:

- We look at the GST implications for councils imposing developer contributions - a taste of one of a range of issues that will be covered in the upcoming training sessions on GST & Property for Government & NFPs.
- A recent determination allowing the ability to rely on corporate credit cards without the need for a tax invoice - and some implications for the taxpayer
- Further developments on last month's Single Touch Payroll article
- An interesting Eligibility case study regarding charity payroll tax exemption

Some very interesting questions continue to come through the Q&As - this month we look at:

- FBT - an interesting case looking at car fringe benefits by way of novated lease
- GST - the new rules relating to supplies made to non-residents, and whether these supplies are subject to GST
- The sale of goods by a council on behalf of community members - who pays GST?

Live Online Webinar with focus topic: GST & the Margin Scheme

For a more detailed look into the articles covered in this update, you can also join our Live Monthly Update webinar on Monday 11 September where you can also ask any questions you may have about the various topics covered.

This month's webinar will have a particular focus on GST & the Margin scheme – a refresher on what it is, how it works and when it can be used so don't forget to join us live!

Membership - have you renewed?

Don’t forget that membership renewals are due, so if you haven’t already renewed, simply visit our website and follow the prompts.

Happy reading
the TaxEd Team

GST Article – GST implications of Developer Contributions

The GST law contains special rules that apply in specific circumstances. Examples are Division 81 dealing with Australian taxes, fees and charges, and Division 82 which deals specifically with transactions relating to rights to develop land.

It is relatively common for Councils to impose conditions to development approvals, and such conditions may require either an in-kind or cash contribution from the Developer.

In-Kind Developer Contributions

The intent of Division 82 (as per s. 82-1) is as follows:

> 'GST does not apply to transactions for making supplies (commonly referred to as in kind developer contributions) in return for the supply by an Australian government agency of a right to develop land.'

For completeness, we also refer to s. 82-5(1) which provides:

> 'The supply, by an Australian government agency, of a right to develop land is not treated as consideration for another supply if the other supply complies with requirements imposed by or under an Australian law."

Given the above, consider, by way of example, the following scenario:

- A developer (the Developer') applies to Council for development approval for a specific property.
- The Developer would be required by Council to pay an application fee (assume: not subject to GST, being a fee covered by Division 81 of the GST law).
- If the application is successful, Council would provide the Developer with approval to develop the property.
- Let's assume that in granting the approval, Council imposes some conditions, one of which is that the Developer is required to make an in-kind contribution to Council.
- Let's also assume that the in-kind contribution comes in the form of building a road.
- Developer and Council are both GST-registered.

Ignoring the payment of the application fee (which we have assumed is covered by Division 81 and not subject to GST), in the above example, the transactions taking place are:

1. Council is granting the Developer a right to develop the property subject to the condition that the Developer builds a road.
2. Developer is supplying a completed road to Council in return for the right to develop the land.

It is essentially a barter or contra supply.

Assuming the cost of the road to the Developer is $1.1m (including GST), if Division 82 did not exist then the Developer would need to account for GST when it supplies the road to Council. From the Developer's perspective it is agreeing to make a supply of a completed road and in return receives consideration being the right to develop the property (which, in this example, and as the parties are dealing with each other at arm's length, has a value of $1.1m).

The effect of Division 82, however, is that the supply made Council being the right to develop the property is not treated as consideration for another supply (i.e. the supply of the road) but only if the supply of the road 'complies with requirements imposed by or under an Australian law'. Assuming the approval is granted under local government laws, and those laws require the contribution of capital works such as the completed road, then this condition would appear to be met.

Cash Developer Contributions

In the above example, if instead of providing a completed road the Developer was required to provide a cash contribution, then it appears that such contributions would be covered by Division 81. That is, assuming under the local government laws Council is allowed to impose such cash contributions as a condition of development approval, then the amount received would be not be consideration pursuant to the operation of s. 81-10(1) and s. 81-10(4) being a fee or charge that relates to the provision of a permission, authority or licence under an Australian law. (Alternatively it may be exempt under s. 81-15 by virtue of paragraph 81-15.01(1)(f) of the GST Regulations.)

Conclusion

The above provisions apply neatly where there is a specific cash contribution for a nominated amount. They also apply neatly where there is an in-kind contribution and that is all that is supplied. We are aware that there may be some situations where the in-kind contributions go beyond what is required by the development approval conditions. The GST treatment of such situations is beyond the scope of this article, but may depend on a combination of what is being supplied and the specific application of local government laws.

Editor's Note:

There are a wide range of specific GST rules that relate to property transactions involving Government and not-for-profit entities. For an in-depth analysis of such rules we are currently running all-day face-to-face workshops on GST & Property for Government & NFPs. Click here for more information and/or to register. If you can't make to it one of the workshops, we are also running live online webinars on GST Property Fundamentals (one hour) and GST Property Advanced (two hours), with discounts if you book both online sessions as a series.

GST Article – Claiming ITCs in reliance on corporate credit card information

Key Points:

- On 14 August 2017, WTI 2017/5 titled *Goods and Services Tax: Waiver of Tax Invoice Requirement (Corporate Card Statements) Legislative Instrument 2017* (the Legislative Instrument) was registered.
- The Legislative Instrument — which applies to tax periods commencing on or after 14 August 2017 — relieves entities from the tax invoice requirements for the purposes of claiming ITCs. Instead, the entity can rely on a corporate card statement which satisfies the information requirements in the Legislative Instrument.
- The Legislative Instrument repeals and replaces previously registered instruments which are substantially the same.

Overview

Section 29-10(3) of the *GST Act* enables the Commissioner to issue written determinations that possession of a tax invoice is not a pre-requisite to claiming an input tax credit (ITC) in circumstances that are specified in the determination. Issue of such a determination does not relieve the recipient of the supply from accurately claiming an ITC, it merely relieves the recipient of holding supporting evidence of the acquisition in the form of tax invoice.

WTI 2017/5 essentially re-states earlier determinations that enable an entity which uses corporate credit cards issued by certain credit providers specified in the determination to use the credit statement as supporting evidence of supply in lieu of a tax invoice. The credit card statement must contain certain information in order to qualify for such use.

Ability to rely on corporate credit cards without the need for a tax invoice

A corporate cardholder is not required to hold a tax invoice for a creditable acquisition for the purposes of attributing an ITC for the creditable acquisition to a tax period if at the time the cardholder lodges its GST return/BAS for the tax period:

(a) the cardholder holds a corporate card statement that meets the clause 9 information requirements (see below) which records the creditable acquisition;

(b) the cardholder has in place an effectively regulated corporate policy that ensures the cardholders use the statement accurately to claim ITCs – see clause 13; and

(c) the requirement to hold a tax invoice in relation to the acquisition where the statement shows an estimated GST amount — or there is an error in relation to the acquisition — does not apply (see clauses 8(1)(c) and 11(b); and

(d) the corporate card provider:

  - meets the accuracy requirements in clause 12, i.e. if it has reason to consider any information set out in relation to the transaction or an estimated GST amount is not accurate, the corporate card provider/acquirer must not include that information on the corporate card statement; and
  - uses either of the two methods identified in clause 8(2) to provide the requisite transaction information.

One method is having in place an accurate method of obtaining or calculating the transaction information required (clause 8(2)(b)). Under the alternate method – the signed statement method — the corporate card provider/acquirer obtains a signed statement from the supplier that provides the information required by clause 10 (see clause 8(2)(c)).

Note that point (c) above, in effect, precludes reliance on a credit card statement as sufficiently evidencing the supply where the credit card supplier has estimated the GST applicable on the supply due the merchant accepting the credit card in payment of mixed supplies (i.e. taxable supplies and GST-free/input-taxed supplies) or taxable supplies where the GST is not $1/11^{th}$ of the purchase price.

Corporate card statement information requirements

The corporate card statement may be used to claim ITCs for a creditable acquisition if the statement contains all the information as required by clause 9 of the Legislative Instrument, namely:

(a) the date of issue of the corporate card statement;

(b) the identity or ABN of the cardholder;

(c) the name(s) of the person(s) or department(s) that uses the corporate card to purchase the creditable acquisition, or in the case of fuel cards, the vehicle identifier;

(d) for the particular transactions containing the creditable acquisition:

- (i) the date the cardholder acquired the supply;
- (ii) the identity of the supplier, or driver ID for a supply of taxi travel;
- (iii) the ABN of the supplier;
- (iv) the Branch Registration Number of the supplier (where applicable);
- (v) a brief description of the supply or, if that is not available, a description or recognised code identifying the supplier's industry;
- (vi) the GST payable; and
- (vii) the total amount paid.

Implications

For an accruals taxpayer who chooses to rely on the Legislative Instrument to claim ITCs, the ITCs will be attributed to the tax period in which all or part of the consideration was provided.

☞ **Note**

The Legislative Instrument is not applicable to low value transactions (i.e. transactions that do not exceed $75) as there is no requirement to hold a tax invoice. Although it offers relief from the administrative burden of satisfying the tax invoice requirements for every creditable acquisition over $75, the purchaser will still need to be able to show that the ITC claimed relates to something acquired for a *creditable purpose* — i.e. it was acquired in carrying on an enterprise, and it does not relate to the making of input taxed supplies and it is not of a private or domestic nature.

Further Information:

The ATO has issued an explanatory statement in relation to the determination.

Salary Packaging Article – Superannuation guarantee salary sacrifice integrity measures introduced to protect employee entitlements

Superannuation guarantee salary sacrifice integrity measures have now been tabled by the Federal Government by way of an Exposure Draft. The '*Treasury Legislation Amendment (Improving Accountability and Member Outcomes) Bill 2017: superannuation guarantee (salary sacrifice integrity measures*)' proposes amendments to ensure that an individual's salary sacrifice contributions cannot be used to reduce an employer's superannuation guarantee (SG) obligations.

The laws will apply to quarters beginning on or after 1 July 2018.

Background

Currently, salary sacrificed amounts can count towards employer contributions that reduce an employer's charge percentage. In addition, employers can calculate SG obligations on (lower) post salary sacrifice amounts unless precluded by an industrial award or employment contract that requires SG to be determined on some other amount (i.e. gross package, pre salary sacrifice).

Proposed amendments

The draft Bill proposes amendment to ensure that amounts that an employee salary sacrifices to superannuation do not:

- reduce an employer's SG charge; or
- form part of any late contributions an employer makes that are eligible to be offset against the SG charge.

The proposed amendments distinguish between the mandatory and salary sacrificed components of an employer contribution, so that only mandatory contributions — i.e. a minimum of 9.5 per cent of ordinary time earnings (OTE) or higher amount specified in a workplace agreement/award — reduce the SG charge.

Note - Employers will (from 1 July 2018) be required to include salary sacrificed amounts in the OTE base.

SG entitlements will be calculated on the pre-salary sacrifice base. As individual superannuation guarantee shortfalls for an employee are calculated on the quarterly salary or wages base, the pre-salary sacrifice base will be the sum of:

- the total salary and wages paid by the employer to the employee for the quarter (noting that salary sacrificed amounts do not form part of an employee's salary or wages); and
- any contributions made in the quarter under a salary sacrifice agreement.

Example (refer Example 1.1 of the Explanatory Memorandum to the draft Bill)

> Pablo has quarterly OTE of $15,000 which would ordinarily generate an entitlement to $1,425 in SG contributions ($15,000 x 9.5 per cent).
>
> He salary sacrifices $1,000 a quarter, expecting his superannuation contributions to rise to $2,425 for that quarter.
>
> However, his employer uses the sacrificed amount ($1,000) to satisfy part of the employer's SG obligation, and only makes a total contribution of $1,425 (consisting of the employee's $1,000 salary sacrificed amount and $425 employer mandatory contribution).
>
> Under proposed s. 23(2) of the *SGA Act*, sacrificed OTE contributions will not reduce the charge percentage. Therefore, the charge percentage would be reduced by 2.83 per cent ($425 / $15,000 x 100). As the employer is required to contribute 9.5 per cent, they must contribute an additional 6.67 per cent to meet their SG obligations.

The employer's contribution of $425 creates a shortfall of $1,000 (6.67% x $15,000), which is the amount of the employee's salary sacrificed amount.

Under proposed s. 23(2), sacrificed OTE or sacrificed salary and wages contributions will not reduce the charge percentage.

Pablo's employer will need to contribute $2,425 in total (comprised of $1,425 mandatory employer contributions and $1,000 employee salary sacrificed amount) to avoid a shortfall under s. 19 and imposition of the SG charge.

Salary Packaging Article – Developments in STP and SGC

STP Update

In last month's newsletter we provided an update on Single Touch Payroll (STP), highlighting progress towards the implementation of STP for employers with 20 or more employees from 1 July 2018.

This month's news is that the Federal Government has decided that employers with 19 or fewer employees will have to move to STP a year later — i.e. from 1 July 2019. Smaller organisations to which this extension will apply will need to factor the transition into their forward planning.

Superannuation Guarantee Update

In other news, the Government has announced that in order to give the ATO near real-time visibility over superannuation guarantee (SG) compliance by employers, it will implement measures to:

- require superannuation funds to report contributions received more frequently, at least monthly, to the ATO. This will enable the ATO to identify non-compliance earlier and to take prompt action;
- improve the effectiveness of the ATO's recovery powers, including strengthening director penalty notices and use of security bonds for high-risk employers, to ensure that unpaid superannuation is better collected by the ATO and paid to employees' super accounts'; and
- give the ATO the ability to seek court-ordered penalties in the most egregious cases of non-payment, including employers who are repeatedly caught but fail to pay SG liabilities.

Directors of NFPs should be aware that the tax law imposes the same obligations on them as are imposed on their 'for profit' counterparts. Simply because an organisation may be pursuing philanthropic or community benefits rather than profits does not relieve directors of the need to ensure their organisation meets its tax obligations. While many NFPs fall within income tax exemption provisions, such organisations continue to have other tax obligations, notably those arising in relation to employees (e.g. withholding tax from employee wages and salaries and remitting this to the ATO, making compulsory superannuation guarantee contributions in respect of their employees, *etc.*)

The *Taxation Administration Act* reinforces an organisation's tax obligations by, in effect, making directors personally liable for any failure to withhold and remit PAYG amounts or for any failure to make compulsory superannuation guarantee contributions (SG contributions) on behalf of employees. The personal liability is created through the mechanism of director penalties.

For instance, consider the case of SG contributions in respect of employees which must be paid to their nominated fund by the 28th day of the month following the end of the quarter to which the payments relate (the required payment date). Failure to pay the required SG contributions by the required payment date has the following consequences:

- The organisation becomes liable to pay tax in the form of the superannuation guarantee charge (the SGC) which is equal to the unpaid compulsory superannuation, as well as interest of 10% (from the commencement of the quarter to which the payment relates) and an administrative charge.
- The organisation must inform the ATO of this tax liability — called the SG shortfall — by lodging a superannuation guarantee statement (SG Statement) within the period of a further month (i.e. by the 28th day of the second month following the end of the quarter to which the unpaid SG contributions relate - the 'Due Lodgement Date'). If the SG Statement is not lodged on time, the organisation is exposed to a penalty in the amount of 200% of the tax.

- If the SG contributions are merely late, the organisation still has a liability to pay the SGC but may be able to offset the late payments against the SGC. Alternatively, the late payment of SG contributions may be carried forward as a prepayment of SG contributions for the same employee.
- An SG Statement should be lodged even if the SG contributions are paid after the required payment date because this is the mechanism by which the late payment can be offset against the SGC.
- Each director is personally liable to pay a penalty (i.e. a director penalty equal to the unpaid tax) on and from the Due Lodgement Date.
- The Commissioner can recover the penalty from a director personally by first giving written notice (the Liability Notice) to the director – once 21 days have elapsed from the date of giving the Liability Notice, the Commissioner can commence proceedings to recover the penalty from the director.
- The only way that a director can avoid the penalty (i.e. have the penalty remitted) is by ensuring that the unpaid amount is reported to the ATO in the SG Statement and one of the following actions occurs (i) the debt is paid; (ii) the organisation is placed into administration before the end of the 21 day period or (iii) the organisation commences to wind up before the end of that period.
- If the unpaid SGC has not been reported to the ATO within three months of the due date, the director penalty can only be remitted by payment. In other words, failure to lodge the SG Statement within 3 months precludes the directors seeking protection through appointing an administrator or commencing winding-up the organisation.

In short, directors should satisfy themselves that their organisation has systems in place to ensure that SG contributions are made by the 28th day of the month following the end of the quarter to which those compulsory contributions relate. Directors should require actual evidence that payment has been made and not merely assurances from their accounting personnel that it will be done.

As noted above, failure to pay SG contributions can set in train a process of further steps that need to be taken, substantial interest and substantial penalties being incurred by the organisation, and eventually (but definitely in the near term) the prospect of a director's personal liability to pay the tax.

Directors should not assume that provided they act within the 3 month period following the date on which the SG Statement is required, they will be protected. There have been instances where a Liability Notice has been given and a Court has held the Liability Notice is effective although it has not come to the attention of a director, so the 21 day period following it has elapsed without the directors acting by appointing an administrator or commencing winding up of the organisation and the directors were thereafter precluded from obtaining protection.

The ATO has various sources of information in relation to non-payment of compulsory superannuation. Not the least of these, are complaints by employees who do not receive notification that the SG contributions have been paid and reports from superannuation funds. As noted above, reporting by the latter to the ATO are to be made more frequent, so directors can expect closer scrutiny that their organisations (and they) are complying with the provisions of the superannuation guarantee legislation.

The foregoing is not intended to be a comprehensive description of SGC implications of non-payment of SG contributions. Directors should recognise that the non-payment will potentially have personal consequences for them and should consider seeking detailed advice where SG contributions are not paid on time.

Eligibility Article – Yet again, another case of an organisation unsuccessfully seeking payroll tax exemption as a charity

The recent case of *South Australian Chamber of Commerce & Industry Incorporated v Commissioner of State Taxation* (2017) SASC 127 continues a string of recent cases around Australia with employers seeking payroll tax exemption for wages paid under the exemptions available to charitable institutions.

In this matter the taxpayers were unsuccessful.

The taxpayer is a non-profit incorporated association. Its activities fall into five major areas:

1. Developing and advocating policies to government and opposition.
2. Providing services and products exclusively to members.
3. Selling commercial services to businesses and employers generally.
4. Conducting programs funded or subsidised mainly by government grants.
5. Providing apprenticeship and trainee services funded by government grants.

It is useful to consider the decision of Justice Blue as it succinctly summarises the issues that matters such as these will turn on:

'1. To be a charitable purpose within the meaning of s. 48 and under the general law, a purpose must be to provide a public benefit as opposed to a private advantage or benefit and it must fall within a recognised category of charitable purpose by reference to principle and authority (at [108]-[142]).

2. For the purpose of s. 48, the purpose of an institution governed by a board of directors is to be ascertained by reference to the institution's objects, the institution's activities, the institution's communications to members and what is said and done at board meetings. The subjective internal state of mind of individual directors not communicated to the board is irrelevant (at [170]-[173]).

3. To comprise a dominant purpose within the meaning of s. 48, the purpose must be the ruling, prevailing or most influential purpose. A charitable institution can have a non-charitable purpose provided that it is incidental to the charitable purpose. It can have a non-charitable purpose independent of its charitable purpose, but it must be so minor that the charitable purpose remains the ruling, prevailing or most influential purpose (at [179]-[180]).

4. The appellant has failed to prove that, on a stand-alone basis, its policy advocacy, member services or commercial services activities are undertaken for the purpose of advancing trade and commerce in South Australia (at [237], [247] and [256]).

5. The appellant has proved that, on a stand-alone basis, its dominant purpose in undertaking its subsidised programs and apprenticeship activities is to advance trade and commerce in South Australia (at [267] and [272]).

6. On a holistic assessment, the appellant has not proved that its dominant purpose is to advance trade and commerce in South Australia (at [278] and [299]).

7. For the purpose of s. 48(2), the reference to "work of a kind ordinarily performed" is a reference to work of a kind ordinarily performed by charitable institutions having the same charitable purpose as the institution characterised at the appropriate level of generality or specificity (at [324]).

8. If the appellant had proved that its dominant purpose is to advance trade and commerce in South Australia, it is likely that it would also have established that all wages were paid to persons engaged exclusively in and for performing work of a kind ordinarily performed in connection with its charitable purpose. However, it is not necessary or appropriate to decide that question on a hypothetical basis (at [342] and [347]).

9. Appeal dismissed (at [349]).'

This case further confirms the need for taxpayers that self-assess Payroll Tax exemption under the provisions of the payroll tax laws in each of the States and Territories to review and confirm that the organisation's objects and activities are such the organisation is a charitable institution and eligible for exemption.

The case also reminds of the need to ensure a further test may need to be satisfied. This further test is (if required under the laws of the particular State/Territory) that the wages for which exemption is sought are paid to an employee engaged exclusively in work of a kind ordinarily performed in connection with the charitable purposes of the organisation. It is possible that only wages paid to certain employees will qualify for exemption – recall the NSW Grain Growers case! We also refer you to a TaxEd summary we published in 2015 setting out the rules for payroll tax exemption in each State/Territory for wages paid by charitable institutions.

It is also interesting to make a very broad observation regarding the Chamber of Commerce and Industry of Western Australia Inc. payroll tax case of 2012. This case decided that exemption was available under Western Australian payroll tax laws for that organisation. However, the West Australian Government quickly moved to change payroll tax laws to ensure exemption for certain organisations was only conferred subject to additional Government approval requirements. The observation is intended as a reminder that the specifics of each organisation (objects and activities) need consideration in the context of the payroll tax provisions on the relevant State/Territory.

FBT Article – reimbursement/payment of staff 'working with children check' costs

The 'working with children check' (check) assists in protecting children from sexual or physical harm by ensuring that people who work with, or care for, them are subject to a screening process.

Unless an exemption applies, an individual must obtain a check to do child-related work. An individual is generally regarded as doing child-related work if they work within certain occupational fields and their contact with children is direct and part of their duties.

We are aware of TaxEd members that employ staff required to undertake the check. In many of these instances the cost of the check is reimbursed/paid by the employer.

The core issue here is whether the cost of the check is subject to FBT. We are not aware of any specific exemption for such costs. As such, unless the cost of the check is considered 'otherwise deductible' or is capable of exemption as a minor benefit (i.e. taxable value of < $300), the employer will have an FBT liability exposure.

Is the cost 'otherwise deductible'?

Based on ATO ***Private Binding Ruling 1012693348413*** and ***ATO Class Ruling 2001/38***, it appears such costs will be considered 'otherwise deductible' in the following situations:

- where the employee is an existing employee and is required to obtain the check in order to continue to derive assessable income in that position;
- where a new employee has recently derived assessable income from being continuously employed within the field of child-related employment; or
- where a renewal is required, the cost of the renewal is deductible to the employee where the employee is currently employed in a permanent, temporary or casual position and requires the renewed check to continue in that employment.

The cost of obtaining the initial check for a new employee who has not recently been continuously employed in the field of child-related employment is not deductible as it is considered to have been incurred 'too soon'.

Unfortunately, CR 2001/38 and private binding ruling 1012693348413 do not address access to the minor benefit exemption as these two documents only look at deductibility under the income tax law.

Where the cost of the check would not be considered 'otherwise deductible', then perhaps the fall back argument would be the application of the minor benefit exemption in section 58P of the *FBT Act* if the cost is less than $300.

FBT Q&A – Contribution towards employer FBT liability

Question

We have an employee provided with a car fringe benefit by way of a novated lease who chose not to contribute post tax employee contributions during the FBT period. This has resulted in a large FBT liability and associated reportable fringe benefits amount. The employee in question repaid us the FBT liability in May prior to lodgement of our FBT return. Can we use the repayment of this money as the contribution to remove the FBT liability and subsequent reportable fringe benefit amount?

Answer

The term 'recipient's payment' as is applies to determining the taxable value of a car fringe benefit reads as follows:

> 'in a case where expenses were incurred to the provider or employer during the holding period by recipients of the car fringe benefits by way of consideration for the provision of the car fringe benefits — the amount of those expenses paid by the recipients less any amount paid or payable to the recipients by way of reimbursement of those expenses'

Our concern is that the contribution made by the employer towards the employers FBT liability cannot be regarded as a recipient’s payment with the effect of reducing the taxable value of the car benefit provided.

The effect of section 136A of the *FBT Act* is that any amount paid in respect of FBT cannot also constitute consideration for the provision of a fringe benefit or any other matter. This means that an employee who bears the whole or part of an employer's FBT liability has not made a recipient's contribution which would have the effect of reducing the taxable value of a fringe benefit.

FBT Q&A – software provided to employee

Question

I have a query in relation to computer software that is provided to employees to perform their employment duties.

Where the employee is provided with two items of software, will the work related items exemption apply if:

- the software has identical functions; and
- the software is substantially different in nature?

Answer

The exemption provided by s. 58X of the *FBT Act* applies if the following 4 conditions are satisfied:

1. The item must be an eligible work related item.
2. The item must be primarily for use in the employee's employment.
3. More than one item, with substantially identical functions, cannot be provided in any one FBT year unless it is a replacement item.
4. An expense payment benefit, property benefit or residual benefit is provided to an employee.

In regards to Item 2, it only applies where the first item was provided earlier in the FBT year by way of expense payment or property fringe benefit. Further, from the 2017 FBT year, this condition does not apply to small businesses that provide employees with more than one work-related portable electronic device in the same FBT year.

The test for item 2 is one of 'substantially identical function'. This is not a defined term and so takes on its ordinary meaning.

The ATO have provided guidance on the term by way of an Interpretative Decision and National Tax Liaison Group Minutes.

ATO ID 2003/80 compares different types of window blinds as to whether they are substantially identical (a slightly different test in my view than substantially identical function).

At the NTLG FBT Sub-committee meeting of 14 August 2008 the ATO was asked how the requirement 'substantially identical function' was to be applied.

The ATO concluded it will be a question of fact as to whether items have substantially identical functions, even where both items fall within the same exemption category. It was noted that it will generally be an easy matter to determine that different items have substantially different functions but difficulties arise where items are similar in appearance and/or functionality. Where some functions are replicated in both, as in the case of iPads and mobile phones, those items would not have substantially identical functions and both would be considered as being eligible work related items.

Unfortunately, we could not find any discussion specifically in regards to software on this matter.

Our concern is that you have described the different software programs as having 'identical functions'. Without more facts it could be considered that they have 'substantially the same functions' – even though they are different in nature - and therefore the exemption is in jeopardy.

GST Q&A – GST and the recently changed GST-free rules

Question

We are a training organisation, and have a contract with an overseas business to do some training (in Australia) and research work. However, we are going to invoice the Australian subsidiary of the overseas entity. The agreement with the overseas entity has no GST clause and so the price includes GST.

Under the new rules relating to supplies made to non-residents in s. 38-190 Item (3)(c) of the *GST Act*, does this mean we can invoice the Australian entity GST-free?

The *GST Act* seems to indicate that a supply under an agreement entered into, whether directly, or indirectly, with a non-resident and the agreement requires it to be provided to another entity in Australia (e.g. the staff attending the course - some may be from the parent, others from the subsidiary) that it can still be GST-free?

Answer

Before getting to s. 38-190(3), the supply first needs to meet the conditions of Item 2 in the table of s. 38-190(1).

One of the conditions to be met in Item 2 is that the supply is made 'to a non-resident who is not in the indirect tax zone [i.e. Australia] when the thing supplied is done'. You have indicated that the contract is entered into with the non-resident, but the training would be provided to employees of either the non-resident or its Australian subsidiary, and the training would be conducted in Australia.

An employee of a non-resident that attends/receives training in Australia is likely to result in the non-resident being considered to be 'in Australia' in relation to the supply. On this basis, the above condition of Item 2 would not apply, and the supply would be subject to GST.

Where the training is provided to an employee of the Australian subsidiary, and assuming the conditions of Item 2 are met (e.g. via the contract with the non-resident), the supply would *prima facie* be GST-free under Item 2. Also, ss. 38-190(3)(a) and (b) would be met (i.e. contract with non-resident, but supply provided to employees of subsidiary in Australia), but s. 38-190(3)(c) would not be met (as the subsidiary is an Australian-based business recipient). Therefore, it appears that s. 38-190(3) would not apply to cause the supply to stop being GST-free.

Editor's Note: While the intention behind the recent changes to GST-free exports of services and the definitions of 'connected with the indirect tax zone' are intended to alleviate GST applying (essentially on business to business transactions), the new rules are often confusing. If in doubt, we recommend seeking specific advice.

GST Q&A – GST and selling things on behalf of local community members

Question

Our information centre sells products on commission for local community members. Can you please advise the GST treatment? That is, what happens when the monies go into our trust (we currently don't include GST)? Also, what happens if the local community member gives us a tax invoice when we make payment to them? The monies are receipted into trust but as far as we are concerned it is not our money.

Answer

The GST treatment will depend on the arrangements agreed to between Council and the community members.

You mention that the information centre sells products on commission. If this means that Council sells the products on behalf of the community members (at the prices set by the community members), then it would appear Council is acting as agent to sell the products on behalf of the community members. Any GST on such sales would generally be the responsibility of the community member.

If Council is entitled to receive a commission on such sales, then Council would generally need to raise an invoice (tax invoice) to the community member. For example, if Council sells something for $110 (including GST) for a community member, and Council is entitled to a 10% commission (e.g. $11), then the GST outcomes would be:

- Community member sale $110, and needs to pay $10 GST to the ATO;
- Council receives $11 commission, and pays $1 to the ATO (net $10 to Council);
- As the Community member has paid Council $11, it will have a GST credit entitlement of $1 provided it holds a tax invoice for this commission.

Net position for community member: $90 ($110 less $10 GST, less $11 commission, plus $1 GST credit).

Net position for Council: $10 ($110 cash received, less $99 paid to community member, less $1 GST to ATO).