What's on this month?

What a busy month it's been in September - with Melbourne teams dominating both footy codes and summer on the horizon, things are definitely starting to heat up.

For the FBT aficionados our feature article this month looks at the reimbursement of mortgage payments to employees relocated for work purposes and whether it is possible to access the living away from home accommodation exemption.

We also take a look at GST and the going concern concession - when it can be used, why people use it and what to watch out for. The article considers a recent AAT decision regarding how GST applies on a contract for sale of land where the parties had agreed to treat the supply as a 'going concern'.

Again we've had some interesting Q&As:

- Car allowance paid to employees - are these allowances subject to PAYG withholding?
- The treatment of car allowance in relation to business travel - what's required when it comes to PAYG Withholding and Payment Summary reporting?
- Employee salary sacrificing with regards to income protection insurance and life insurance policy costs - will this result in a fringe benefit tax liability?
- Plus plenty more!

September Webinar with focus topic: GST & Going Concern

For a more detailed look into the issues covered in this month's update, and with a particular focus this month on **GST & the going concern concession**, don't forget to join our Live Monthly Update webinar on Monday 9 October.

Enjoy!
the TaxEd Team

FBT Article – can the reimbursement of an employee's mortgage payment constitute an exempt living away from home accommodation benefit?

It is very common in the modern workforce for employees to be temporarily stationed in a town or city that is a considerable distance from where they and their family currently live. In the majority of these cases the employee will rent accommodation or is provided with accommodation rented by their employer in the new locality.

Employees temporarily relocated in such scenarios are considered to be living away from home for FBT purposes and, provided certain conditions are met, a number of benefits can be provided to them by their employer without a FBT liability arising.

Where the employee rents accommodation and has their rent either reimbursed or directly paid by their employer an expense payment benefit will arise. Section 21 of the *FBTAA* provides an exemption for such a benefit where:

- The expenditure is on accommodation for eligible family members;
- The accommodation is not provided while the employee is undertaking business travel ;
- The accommodation is required solely because the duties of employment require the employee to live away from home;
- The employee maintains a home in Australia; and
- The employee provides the employer with a declaration.

Rather than renting, the employee may see this as an opportunity to acquire a dwelling in the new locality that they can retain for investment purposes once their work relocation assignment has finished.

If such a purchase is made, can the costs of that accommodation paid for or reimbursed by the employer qualify for the s. 21 exemption?

The ATO's view is that the exemption is not available.

Their reasoning is that the term 'in respect of accommodation' contained in s. 21(b) of the *FBTAA* does not include the reimbursement or payment by the employer of mortgage expenses in respect of a dwelling purchased by an employee and used as a dwelling by the employee and members of the employee's family while they are living temporarily away from their usual place of residence Australia.

Such expenditure is essentially incurred in respect of acquiring the dwelling and is not expenditure in in accommodating the employee.

FBT Q&A – vehicle sold to employee for residual value

Question

We are wondering if there are any FBT implications on the sale of a previously leased Council vehicle to an employee. Our lease over the vehicle expired last month and the vehicle has since been sold to the employee for the residual value paid by Council to acquire the vehicle from the financier?

We are concerned that FBT will apply as the market value of the vehicle is greater than the residual amount we paid to acquire it.

Answer

The provision of property by an employer to an employee for nil consideration or at a discount to its market value in respect of that person's employment is a property fringe benefit under s. 40 of the *FBTAA*. In this regard 'property' means all tangible and intangible property. The provision of the Council vehicle would therefore appear to be a property fringe benefit.

Under the external property fringe benefits valuation rules, where the property has been acquired under an arm's length transaction by the employer, the FBT taxable value of the benefit is the cost price of the property reduced by the amount (if any) paid by the employee. This rule applies where the property is provided to the employee around the time when it was acquired by the employer.

In cases where a material time has elapsed since the property was first purchased by the employer such that the value of the property may have altered appreciably, the taxable value of the fringe benefit is the notional value (i.e. the amount that the employee could reasonably be expected to have paid) less any amount actually paid by the employee. In this case, the time period is insignificant and so the relevant starting point is the residual value paid by Council to acquire the vehicle.

The relevant question to ask is whether the acquisition of the vehicle by Council for its residual value is an arms length transaction?

In Taxation Determination TD 95/63, the Commissioner confirms that if the lease is a bona fide lease, the acquisition of the vehicle at the residual value is an arms length transaction and the taxable value of the property fringe benefit will be the amount of the residual payment less any employee contribution.

In your case, as the price paid by the employee for the vehicle was equal to the amount Council paid to acquire it under an arms length transaction, no fringe benefit tax arises as no discount has been provided to the employee.

FBT Q&A – What is meant by the term 'payload' of a vehicle?

Question

We are looking for guidance as to what constitutes the 'payload' of a vehicle.

We have been working off the manufacturer's compliance plate, however we have been told that if the dealer installs accessories, e.g. canopy, bull bar, that the payload will then be reduced from that stated on the compliance plate.

This could mean the difference between buying certain models of the same vehicle that may or may not qualify as being principally designed to carry passengers.

Answer

The payload or carrying capacity of a vehicle simply means the maximum load your vehicle can carry as specified by the manufacturer. It is calculated by deducting your vehicle's Kerb Mass from its Gross Vehicle Mass (GVM) and what's left is the amount of stuff (including passengers) you can load into it.

Miscellaneous Taxation Ruling MT 2024 provides the following formula to calculate the carrying capacity of a vehicle:

Maximum loaded vehicle weight (e.g. gross vehicle weight/mass).

Less:

Unladen vehicle weight (e.g. basic kerb weight/mass) as per Australian Design Rules. This is the weight of the vehicle with a full capacity of lubricant, coolant and fuel together with spare wheel, tools (including jack) and installed options. It does not include the weight of goods or occupants.

In regards to installed options, it seems that items that are not standard options for the particular vehicle model being acquired are added to the unladen weight. The following ATO private binding ruling appears on point and provides a good analysis of the issue:

ATO private binding ruling No. 1012 873792262.

Salary Packaging Q&A – Income protection and life insurance policy costs

Question

Our organisation is planning to allow salary sacrifice for our employees in regards to their income protection insurance and life insurance policy costs. We will reimburse these policy costs and reduce their pre-tax salary accordingly. Can you please let me know if it will result in a fringe benefit tax liability or is there a specific exemption that applies?

Answer

Income protection insurance taken out by an individual is an item of expenditure that the individual can claim as an income tax deduction on the basis the premium is being paid in order to derive an amount that will be assessable income if paid to the insured individual.

As the individual can claim an income tax deduction, where an employer pays or reimburses the employee's premium, although the payment/reimbursement is an expense payment fringe benefit, the otherwise deductible rule will apply to reduce the taxable value of the benefit to zero. As such, no FBT will be payable.

Life insurance premiums on the other hand are not deductible on the basis that a life insurance payout is not assessable income of the recipient. In this case the otherwise deductible rule is not available and FBT will apply. There is no specific exemption available that we are aware of.

GST Article – I choose going concern but if … then I want the margin scheme to apply

The recent (31 August 2017) AAT decision *MSAUS Pty Ltd as the Trustee for Melissa Trust v Commissioner of Taxation* considered a contract for sale of land which consisted of standard NSW contract for the sale of land with special clauses. The Commissioner was demanding the purchaser (MSAUS Pty Ltd) pay GST in accordance with Division 135 of the *GST Act*.

Nature of the Contract

The contract related to the sale of a strata title apartment in a hotel complex. The vendor had leased the apartment to a serviced apartment operator (Operator) and was selling the apartment to the purchaser (Purchaser) subject to the lease. At the time the contract was entered into, it was unclear whether the relationship between the Purchaser and the Operator after settlement entailed the Purchaser making an input taxed supply to the Operator.

In these uncertain circumstances, the vendor and the Purchaser wanted to treat the supply of the apartment as a going concern if the Purchaser would not make an input taxed supply to the Operator. However, the vendor and Purchaser wanted to treat the sale as subject to the margin scheme if the Purchaser made input taxed supplies to the Operator. The rationale for their desire for different treatment depending on whether the Purchaser did, or did not, make an input taxed supply to the Operator following settlement was their desire to prevent Division 135 applying to the Purchaser.

Division 135

Basically, Division 135 provides that where:

- a person makes a supply of a going concern (in this case, the vendor was supplying an enterprise in the form of a lease); and
- the recipient of the supply (in this case, the Purchaser) intends that some or all of the supplies which the recipient will make through the enterprise (in this case, the supply of the benefit of the lease to the Operator) will be supplies that are neither taxable supplies nor GST-free supplies,

then the recipient (i.e. the Purchaser) has an increasing adjustment.

The amount of the increasing adjustment is $1/10^{th}$ of part of the price of the supply of the going concern. The relevant part of the price is determined by the extent to which the recipient will make supplies through the enterprise that are neither taxable supplies nor GST-free supplies. Put simply, if Division 135 applied to the Purchaser and the Purchaser only made input taxed supplies to the Operator, then the increasing adjustment would be $1/10^{th}$ of 100% of the price which the Purchaser had paid for the apartment.

As noted earlier, the parties wanted to avoid Division 135 applying. They wanted the sale of the apartment only to be a going concern if Division 135 would not in fact apply. If Division 135 would apply to the Purchaser, they wanted the margin scheme to apply to the sale of the apartment.

How the parties sought to avoid Division 135 applying

You will recall that in order for a supply to be made as a going concern, one of the requirements is that the supplier and the recipient must 'have agreed in writing that the supply is a supply of a going concern' – see s. 38-325 (1)(c) of the *GST Act*.

You will also recall that in order for the margin scheme to apply to a supply of land, the parties to the supplier and recipient of the supply must:

- have agreed in writing that the margin scheme is to apply (s. 75-5(1)) *GST Act*; and
- the written agreement must have been made 'on or before the making of the supply' or 'within such further period as the Commissioner allows' – s. 75-5(1A).

The parties sought to comply with these provisions by:

(a) completing the standard land contract by, on the first page of the contract, checking the boxes which signified (i) that sale was not a taxable supply, (ii) the sale was made a GST-free supply because it was going concern and (iii) the margin scheme did not apply; and

(b) inserting a special condition which provided that the sale was a taxable supply and the parties agreed that the margin scheme applied to the sale in certain circumstances. Those circumstances were: (i) the first page of the contract stated the supply is GST-free because the sale is the supply of a going concern; (ii) the supply of the apartment under the lease to the Operator is a supply of residential premises (but not a supply of commercial residential premises), and (iii) the apartment is to be used predominantly for residential accommodation (regardless of the term of accommodation). The clause confirmed that if the margin scheme applied the price specified in the contract was the price inclusive of GST.

It will be noted that requirements (ii) and (iii) of subparagraph (b) identify that the lease of the apartment constitutes the Purchaser making input taxed supplies (i.e. lease of residential premises – s. 40-35 *GST Act*) to the Operator. Requirement (ii) reflects application of s. 40-35(1)(a) and requirement (iii) reflects application of s. 40-35(2)(a).

The Issue

The issue the Tribunal had to determine is less interesting (more limited in its relevance) than the Tribunal's incidental comments.

The issue was whether the way in which the parties had structured their contract amounted:

(a) solely to an agreement that the supply was going concern – this was the Commissioner's view, or

(b) was an agreement that the supply was only a going concern in certain circumstances and in other circumstances was a supply to which the margin scheme applied and, in the circumstances which occurred, was in fact a supply to which the parties had agreed the margin scheme applied – this was the Purchaser's position.

The issue was essentially one of contractual interpretation. The Tribunal took notice of the High Court's decision in *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49. That case demonstrated the uncertainty which the parties faced when making their contract in 2006.

The Tribunal considered the Purchaser's interpretation of the contract was correct. The parties had effectively agreed that the margin scheme applied to the sale. The Commissioner was not entitled to only consider the manner in which the parties had completed the check boxes on the first page and to disregard the special clause as an inconsistent agreement. The special clause was not inconsistent with what was said on the first page when the contract was read in the context of the issue which had been determined by the High Court in the MBI Properties Case.

The Interesting Point

The interesting point of the Tribunal's decision is the remark (at paragraph 35):

> I accept the conditional agreement in clause 47.6.6 [i.e. the special clause] to apply the margin scheme was an agreement made *on or before the making of the supply* in accordance with s 75-5(1A)(a). The fact the contingency was not activated until a later event is beside the point: the clause embodying this aspect of the agreement was in place 'on or before the making of the supply' in accordance with the requirements of s 75-5(1A)(a). (text in brackets added)

Contracts which provide for supplies to be made as going concerns need to deal with the possibility that the supply will not meet the test for a supply to be GST-free as a going concern (s. 38-325). The events of failure are either:

- the purchasers are not registered or required to be registered for GST at the time the supply is made; or
- the supplier has failed to carry on the relevant enterprise 'until the day of the supply'.

A third, less common circumstance, is that the parties belatedly realise that the supplier is not supplying the recipient 'with all of the things that are necessary for the continued operation of the enterprise'.

The usual contractual fall back position is that contract provides for the consideration to be grossed-up for GST and for the supplier to provide a tax invoice to the recipient of the supply.

The Tribunal's comment indicates that there is scope for an alternate fall back position. It is anticipated that by careful drafting of the contract, in a case where the margin scheme can apply, the parties can provide for its default application.

Whether this is a commercially realistic alternative (including the extent of any gross up for the margin amount of GST) will depend on the negotiating strengths of the parties and the commercial context in which the supply is being made. One might anticipate it would be a rare circumstance.

However, the readiness of the Tribunal to take a broad view of the circumstances in which the timing requirement for agreeing to use the margin scheme is met, should be mentally filed away to be brought out when some situation calls for flexibility, as it did in the MSAUS case.

GST Q&A – GST and land improvements

Question

Council recently sold a (almost vacant) block of land. The land contains a redundant concrete water tank which will need to be demolished and removed by the purchaser. Once this is done, the land will be suitable for residential development.

Could you please advise whether this land sale would satisfy the requirements of a taxable supply (assuming that the normal requirements for making a taxable supply are satisfied).

Answer

Generally a supply of real property by a GST-registered entity (such as a Council) would be a taxable supply unless the supply meets the specific conditions of being either an input taxed supply (e.g. 'old' residential premises) or GST-free (e.g. supply by a government entity with no improvements on the land via s. 38-445).

The ATO has issued GSTR 2006/6 setting out its guidelines on what constitutes improvements on the land. This is a question of fact, and will depend on what (if anything) has been done to the parcel of land sought to be sold. Paragraph 10 of GSTR 2006/6 summarises the effect of the relevant provision as follows:

> '10. Under subsection 38-445(1), if the Commonwealth, a State or a Territory makes a supply of land on which there are no improvements and the supply is of a freehold interest or long-term lease, it is GST-free unless the land has been previously supplied as a GST-free supply under section 38-445.'

For a detailed discussion of what the ATO considers constitutes improvements on the land, we recommend reviewing GSTR 2006/6. By way of summary, however, we refer to paragraphs 22 to 24:

> '22. Applying this principle means that, for there to be 'improvements on the land':
>
> • there must have been some human intervention;
>
> • the human intervention must have been physically located on the land; and
>
> • that human intervention must enhance the value of the land at the relevant date for ascertaining whether there are improvements on land.
>
> 23. Where there has been a number of human interventions on the land it is necessary to establish whether any of the human interventions enhance the value of the land. If any of the human interventions located on the land enhance its value at the relevant date, then there are improvements on the land. This is regardless of whether the net value of the human interventions enhances the overall value of the land.
>
> 24. Determining whether a human intervention enhances the value of the land entails an objective test. This means that whether an intervention enhances the value should not be determined by reference to use or intended use by either the supplier or the recipient.'

With regard to the water tank, it would depend on whether this is considered as enhancing the value of the land. On the basis that you have referred to it as redundant and it would need to be removed, there would appear to be an argument that, at the time of the sale, it does not currently enhance the value of the land (and where the purchaser would be required to remove it, then it would probably detract from the value).

GST Q&A – GST and deposits

Question

My question relates to deposits paid by Council to hire a facility. Currently, when Council pays a deposit, GST is also paid. It is my understanding that GST is not applied when a deposit is paid, but rather calculated after the service has been granted and the final balance is paid. Some clarification would be appreciated. Thanks.

Answer

Genuine security deposits are not treated as consideration for GST purposes, until such time that the deposit is either forfeited or applied as all/part of the consideration for the supply. Assuming the amount being paid is a genuine deposit, the deposit is not subject to GST (this is often referred to as 'outside scope', and technically it is not GST-free).

See Division 99 of the *GST Act*, and also GSTR 2006/2.

Division 99 contemplates two types of security deposit, referred to in GSTR 2006/2 as follows:

> '15. One type of arrangement involves a contract for the purchase of real property, goods or services (a 'purchase contract'), where the recipient pays a deposit to secure their obligations under the contract.
>
> 16. The other type of arrangement in which a security deposit may be paid involves a contract for the hire of goods, where the supplier requires a deposit (or bond) to be paid to secure the payment of periodic rental instalments and/or the return of the goods on time and in good condition. In this Ruling, we will refer to lease, rent, hire-only and bailment arrangements as 'hire arrangements'.'

Paragraph 20 of the Ruling goes on to set out the features required for a deposit to be a security deposit covered by Division 99, namely:

> '20. For a payment to be considered a 'security deposit' for the purposes of Division 99, it should have the following characteristics:
>
> - be held as a security for the performance of an obligation: see paragraphs 21 to 30;
> - the contract, conduct and intent of the parties to the contract must be consistent with the payment being a security deposit: see paragraphs 31 to 50;
> - be at risk of forfeiture upon failure to perform the obligation: see paragraphs 51 to 64; and
> - be a reasonable amount: see paragraphs 65 to 108.'

With regard to what is a reasonable security deposit for hire arrangements, see paragraphs 88 to 93 of the ruling:

> 'A reasonable amount for a hire arrangement
>
> 88. The question of reasonableness for a security deposit under a hire arrangement is a question of fact. It is to be determined by looking at the arrangement entered into and the intention and conduct of the parties at the time of entry into the contract.
>
> 89. As the deposit in a hire arrangement is security against the late return of, non-return of, or damage to the hired goods, it may be reasonable for the deposit to be considerably higher than an amount which may be reasonable under a purchase contract. This is because the supplier carries a risk of the goods being damaged or the goods not being returned by the recipient.
>
> 90. What is reasonable as a deposit in a hire arrangement is always dependant upon the facts and circumstances of each particular arrangement. It is the Commissioner's view that an amount is reasonable if it acts as an inducement to return the hired goods without undue wear and tear and does not include the hire fee within it.
>
> Example 10: Hire of equipment

91. John hires some trestles, valued at $400, for two weeks from Bob's Equipment Hire Services Ltd (BEHS). He pays a hire charge of $110, which is subject to the ordinary GST attribution rules. He also pays $220 as a security deposit knowing that all or part of this sum will be forfeited if he does not return the trestles.

92. In the circumstances the deposit is reasonable and is a security deposit.

93. When John returns the trestles on time and in good condition, his deposit is refunded to him. The return of the deposit does not have any GST consequences for either BEHS or John.'

Trust this helps.

Payroll Q&A – Treatment of car allowance paid to employee re employer provided car

Question

Our organisation pays a lump sum car allowance to certain employees in relation to cars provided by the employer to the employee. Employees use these cars for business and private purposes. Are these allowances subject to PAYG withholding and how should they be shown for Payment Summary reporting purposes.

Answer

Section 51AF *ITAA 1936* provides that this type of allowance (where a car fringe benefit is being provided by employer) does not create a tax deduction for the employee.

As such, it needs to be included as income on the employees PAYG Summary.

As to where it appears – the following ATO guidance suggests it is required to be rolled up into gross payment received by the employee and shown as such on the Payment Summary (as opposed to being shown separately as an allowance). Source: https://www.ato.gov.au/Business/PAYG-withholding/Payments-you-need-to-withhold-from/Payments-to-employees/Allowances-and-reimbursements/Withholding-for-allowances/

See the extract from ATO website below:

Allowance type	Examples of allowances	Are you required to withhold?	Include on payment summary? If so, how?	Does super guarantee apply?
Allowances for non-deductible expenses	Part-day travel (no overnight absence from employee's ordinary place of residence) Meals (not award overtime meal allowance or overnight travel allowance) Motor vehicle for non-deductible travel – eg home to work, including cents per kilometre payments	Yes	Yes (include total allowance in gross payment)	Yes

Payroll Q&A – Treatment of cents per KM car allowance in excess of 5000kms

Question

Our organisation pays cents per KM car allowances in relation to business travel – we pay at a cents per KM rate above the ATO approved rate of 66 cents and the employees claim more than 5000kms per annum – what is required re PAYG Withholding and Payment Summary reporting?

Answer

The ATO position is set out at https://www.ato.gov.au/Business/PAYG-withholding/Payments-you-need-to-withhold-from/Payments-to-employees/Allowances-and-reimbursements/Withholding-for-allowances/

The position for all situations is shown below.

Allowance type	Are you required to withhold?	Include on payment summary? If so, how?	Does super guarantee apply?
Payments made by applying the approved (or a lower) rate to the number of kilometres travelled up to 5,000 business kilometres	No	Yes (show total allowance separately in allowance box with an explanation)	No
Payments made by applying the approved (or a lower) rate to the number of kilometres travelled in excess of 5,000 business kilometres	Yes (from payments for the excess over 5,000 kilometres)	Yes (show total allowance separately in allowance box with an explanation)	No
Payments made at a rate above the approved rate for distances travelled up to 5,000 business kilometres	Yes (from the amount which relates to the excess over the approved rate)	Yes (show total allowance separately in allowance box with an explanation)	No

In the situation in question the outcome is:

Allowance re 0-5,000KMs:

Withholding required on the excess of the cents per KM rate paid less 66 cents per KM.

Allowance re +5,000KMs:

Withholding required on full payment for KM’s in excess of 5,000.

In both cases the full allowance should be reported on the Payment Summary and Superannuation Guarantee is not applicable.