Welcome to the November edition of the TaxEd newsletter – our last for 2017 as we begin wrapping up for another year.

Most people will be looking forward to end-of-year functions with much anticipation, however, finance staff also need to view these through the 'FBT gaze'. This edition includes an article by TaxEd expert, Rob Power, to help guide you through the FBT provisions as they apply to these functions and how to deal with them.

Still on FBT, our popular '**TaxEd FBT Roadshow**' has had dates announced for 2018 - Click here for more details!

Training will be presented by TaxEd Directors and technical experts, Michael Doran and Rob Power; and will cover key issues Government and NFP employers need to consider when preparing to lodge your 2018 FBT return. What's new? What perennial FBT issues do you need to consider? You will also have the opportunity to discuss some of the real-life FBT questions raised through our Q&A service. These sessions are not to be missed!

This latest edition of the newsletter helps you plan as you turn your attention to 2018 – perhaps planning to undertake some education? The ATO has issued a reminder that an adult and community education (ACE) course may not always attract a GST-free status – read on to review the requirements.

We also discuss new GST legislation expected in time for the new financial year; along with a reminder about the basic nature of 'new residential premises'. There is also an article detailing concerning issues identified with financial reporting by charities and NFPs.

Read some of the Q&As we've received from members and how they are being addressed – allowances, volunteers, funeral costs, inter-council charges, utilities – it's all here!

From all of the team here at TaxEd, we wish everyone the safest and happiest of holidays and look forward to working with you again in 2018.

Warmest regards,

The TaxEd Team

FBT ARTICLE - 'F' for Festive Season means 'F' for FBT!

When it comes to entertainment type expenditures the rules for income tax-exempt employers are different to those faced by for-profit or non-income tax exempt employers. As a result, it is critical that the rules are understood and applied correctly.

The key rules concern:

1. the concept of a Tax Exempt Body Entertainment fringe benefit - it is necessary to understand what it is and how is it treated, and
2. where something is not a Tax Exempt Body Entertainment fringe benefit, the FBT treatment which might apply.

Tax Exempt Body Entertainment Fringe Benefits

A tax exempt body entertainment fringe benefit arises where:

- a person incurs non-deductible exempt entertainment expenditure;
- the expenditure is in respect of the provision of entertainment to an employee or associate; and
- the entertainment is in respect of the employment of the employee

The key issues for an income tax exempt employer to identify are:

- what is 'entertainment'
- whether the entertainment deductible or would it be if the employer was not income tax exempt.

What is entertainment?

For fringe benefits tax purposes 'entertainment' means the provision of entertainment by way of food or drink or recreation and accommodation or travel in connection with or to facilitate the provision of the entertainment

Recreation includes amusement, sport and similar leisure time pursuits

It is generally fairly simple to tell whether something is entertainment in nature. In Taxation Ruling TR 97/17, the ATO suggest taxpayers apply the four part test:

1. Why - why is the food being provided?
2. What – what type of food or drink is being provided?
3. Where – where is the food or drink provided?
4. When – when is the food being provided?

Common examples of entertainment include:

- business lunches and drinks, cocktail parties and staff social functions;
- providing entertainment to staff, clients, etc., by way of access to sporting or theatrical events, sightseeing tours, holidays and so on; and

- accommodation and travel when it is provided in connection with or to facilitate activities such as entertaining clients, staff, etc., over a weekend at a tourist resort, or providing them with a holiday.

An end of year staff function would, in virtually all situations, fall within the concept of entertainment and so finance staff responsible for preparing the annual FBT return need to be aware of the implications. Where entertainment is being provided as part of the function, a tax-exempt body entertainment fringe benefit will arise and rarely will an exemption or reduction in taxable value be available.

Income tax paying employers have the benefit of two common exemptions in regards to end of year financial functions cost where they are not using the 50/50 or 12 week register method to value their entertainment costs. These are the: (i) minor benefit exemption; and (ii) the business premises property exemption. Unfortunately, these are not available to income tax-exempt employers.

The minor benefits exemption as it applies to entertainment

Only in two situations can tax exempt body entertainment fringe benefits be exempt under the minor benefits rule in relation to a tax-exempt employer.

Firstly – where the provision of entertainment to employees is incidental to the provision of entertainment to outsiders and, if a meal is provided, it can only consist of light refreshments (Alcohol can be provided without jeopardising the exemption). This could apply, for example, where a community event consisting of some finger food and drinks are provided by the employer and some employees attended as well.

Secondly - where entertainment is provided to an employee (or an associate of the employee) on the employer's premises at an event undertaken to acknowledge the special achievement of the employee, the entertainment may also qualify for the minor benefits exemption. For example a drinks function conducted on the employer's premises to acknowledge a special achievement by an employee may benefit from this exemption. Please note though that if the entertainment is also provided to other employees who attend the event that entertainment would not qualify for the exemption.

The minor benefits rule as it applies to benefits other than entertainment

Where the benefit does not consist of entertainment it is possible the minor benefits rule applies to exempt the benefit subject to consideration of the minor benefit criteria.

If gifts are provided by an income tax-exempt employer to employees and/or their associates at the end of year function, it is possible for the value of the gift to be an exempt minor benefit – refer Example 4, paragraph 52 of Taxation Ruling TR 2017/7.

Property consumed on employer premises on a working day exemption

Where expenditure does not amount to entertainment but nevertheless results in the employee getting a benefit, the 'property consumed on employer premises on a working day' exemption may be available.

The exemption applies where property (food and drink) is provided to and consumed by an employee on the employer premises on a working day.

The exemption only applies to benefits received by employees and therefore where an employee's family members also received this type of benefit FBT may still be payable on that part of the benefit. However it is possible the minor benefits exemption could apply.

This exemption would cover benefits such as morning and afternoon teas and light lunches for example provided during a lunch meeting.

However, where the property provided amounts to meal entertainment then the benefit will be a Tax Exempt Body Entertainment fringe benefit and will be ineligible for the exemption.

Concluding comments

As can be seen, the opportunity for an income tax-exempt employer to be able to provide the end of year function on an FBT free basis is extremely limited.

It should be noted, however, that the provision of non-salary packaged meal entertainment is exempt from FBT when provided by public benevolent institutions, health promotion charities, public hospitals, non-profit hospitals and public ambulance services.

GST Article - Ho, Ho - Oh! More Withholding Obligations

Treasury has published an exposure draft of legislation (the Draft Bill) requiring purchasers of certain land to withhold part (being a proxy amount of GST payable by the vendor) of the price and to remit that part to the ATO. Notification obligations are imposed on both purchasers and vendors.

Timetable for enactment of legislation

The proposed legislation was mooted in the 2017-18 Budget. It is expected that it will be enacted prior to 30 June 2018. The Draft Bill provides that it will take effect from the beginning of the quarter following the date on which the enacting Bill receives Royal Assent.

The object of the Draft Bill is to ensure that the GST payable by the vendor on taxable supplies of real property is actually paid to the ATO. The Explanatory Materials (EM) for the Draft Bill notes that some property developers have been circumventing GST liability by going into liquidation without payment of GST, although over the course of the development they have claimed input tax credits.

Mindful that the Draft Bill is an exposure draft only, this note aims to alert you to its main features, without exploring any detail. However, we recognise that some contracts within the purview of the legislation will be created ahead of its final form being determined and we raise some matters that, based on the current proposal, you might like to consider. However, the detailed transitional provisions (discussed later under 'Matters for further thought') allow a transitional buffer that is expected to provide relief in respect of short/medium term contracts.

Two fundamental points to note

The withholding obligation being considered relates to GST. It is a separate withholding obligation to the capital gains tax (CGT) withholding obligation imposed on purchasers that has been the subject of previous newsletter articles and is already operative.

In short, when entering into and performing contracts involving the acquisition of land, purchasers will need to consider two categories of withholding – one associated with GST and one (in operation) associated with CGT.

The GST withholding obligation applies to purchasers whether or not those purchasers are registered/required to be registered for GST. The Draft Bill is aimed at ensuring the ATO receives payment of the GST payable by vendors. Accordingly, the GST status of the purchaser is irrelevant and, if the purchaser is registered for GST, the purchaser will not account for the withheld amount through the purchaser's BASs.

Obligations for Purchasers

When withholding required

The Draft Bill does not apply to purchasers *per se* but to recipients of taxable supplies of land. With few exceptions, taxable supplies require consideration, so it is convenient to refer to the obligation being imposed on 'purchasers'. However, it should be noted that the withholding obligation applies whether the consideration is monetary or non-monetary – for instance it will apply where the parties exchange land either with or without a monetary adjustment.

The withholding obligation ('GST withholding obligation') only arises where the land ('the Relevant Land') supplied is either:

- 'new residential premises' as defined in s. 40-75 of the GST Act; or
- 'potential residential land' (defined in s. 195-1 GST Act) that is both (i) included in a 'property subdivision plan' (s. 195-1 GST Act) <u>and</u> (ii) has 'not previously been sold as potential residential land included in the property subdivision plan'.

In short, the legislation applies where land is developed with a view to residential use and the supply of the land is the first supply following completion of the development. However, the legislation empowers the Commissioner of Taxation ('Commissioner') to make legislative instruments excluding land from the ambit of the withholding requirement.

This newsletter contains a separate article which discusses the GST concepts of 'new residential premises' and 'potential residential land'.

Where a purchaser is required to withhold an amount, the purchaser must (see existing s.16-150 and proposed s. 16-150(2) of the Schedule 1 to TAA) notify the Commissioner of the payment. The notification is a two-stage process, with initial notification required to be made at least 5 days prior to the date on which the withheld amount is due to be paid to the Commissioner.

Amount to be withheld

The amount to be withheld is 1/11 of the GST-inclusive price of the taxable supply.

However, where:

(a) the taxable supply consists of the supply of Relevant Land and other supplies; and

(b) at the time the withheld amount is to be paid to the ATO (see below), it is practicable to ascertain the amount ('Reduced Amount') that is the GST- inclusive price for the supply of the Relevant Land,

then the amount to be withheld is 1/11th of the Reduced Amount.

Where the margin scheme is applied to the supply of the Relevant Land, it is likely that the amount withheld will exceed the GST payable by the vendor. As noted below, the Draft Bill enables the vendor to obtain a refund of the excess from the ATO.

There is a more problematic issue for a purchaser which provides the whole or part of the consideration for the supply of the Relevant Land by way of non-cash consideration.

For instance, a purchaser may be providing property ('contra supply') to the vendor in exchange for a taxable supply of Relevant Land. In some cases:

(a) the consideration provided by the purchaser will consist of the contra supply and either not any monetary consideration or monetary consideration less than the amount the purchaser is to withhold;

(b) the contra supply will be a taxable supply of land that is Relevant Land – in which case, the vendor will have a GST withholding obligation that may or may equal the amount the purchaser is to withhold;

(c) the contra supply will be a taxable supply of property that is not Relevant Land – in which case, the vendor will not have a GST withholding obligation;

(d) the contra supply will not be a taxable supply – in which case, the vendor will not have a GST withholding obligation

Where the purchaser is providing a contra supply, the purchaser will be required to withhold and remit moneys to the ATO which could exceed:

- any cash consideration payable by the purchaser to the vendor - see Case (a); and/or
- any amount that vendor is required to withhold in respect of the contra supply and remit to the ATO in respect of the purchaser's contra supply of property to the vendor - see Cases (b), (c) and (d)

Purchasers may need to deal with this scenario of insufficient cash consideration (Case (a)) or insufficient opportunity for an agreed off-set (Cases (b), (c) and (d)) through appropriate contractual arrangements, to ensure they are not out of pocket.

When amount must be paid

The withheld amount is to be paid to the ATO on or before:

(a) the day on which <u>any</u> of the consideration (apart from the deposit) for the taxable supply that comprises/includes the Relevant Land is <u>first</u> provided; or

(b) if the Commissioner issues a legislative instrument specifying another day for payment, that other day.

Under normal contracts (i.e. consisting of payments of only a deposit and a settlement sum in exchange for transfer of title), it appears that the withholding obligation arises at settlement.

It is envisaged that the payment obligation may be problematic for a purchaser acquiring land under an instalment contract. Especially, complying with item (a) may trigger an obligation to pay the whole of the amount to be withheld, although this amount may exceed the instalment payable.

It is to be hoped that this scenario will be addressed by a legislative instrument noted in item (b). The EM states (para. 1.20):

> ' ***To avoid any unintended consequences, the Commissioner may by legislative instrument vary for types of supplies the day by which the payment is to be made to the Commissioner. This may include by varying the number of payments that are to be made to the Commissioner, so that the payments may be made by instalments on multiple different specified days. For example, where consideration is provided in instalments a withholding payment may be made by the end of the day for each instalment.'***

However, this statement is tempered by an immediately following EM comment which suggests the power will be used with circumspection and leaves room for some residual doubt:

> ' ***This power to vary the payment day is expected to be only used if small payments are required under a contract <u>over an extended number of years</u> such as the Land Rent Scheme in the Australian Capital Territory. Generally, in other situations payment would need to be made by the end of the day that the first amount of consideration is provided other than as a deposit.' (underlining added)***

Pending clarification of the position, purchasers may like to consider appropriate contractual arrangements to ensure the vendor bears the ultimate liability and cash flow implications of the purchaser's withholding obligations. It is appreciated that a vendor would resist this – the Draft Bill is bringing forward the time at which GST is paid to the ATO and, in effect, increasing the amount of the instalment otherwise payable by the purchaser.

As noted above, payment of a deposit *per se* does not trigger an obligation to withhold. The EM reference (para. 1.19) to forfeiture of deposit indicates that forfeiture does not give rise to withholding obligations:

> ' ***Money that is held as a deposit is generally not considered to be consideration*** (within the meaning of the GST Act)***, unless the deposit is forfeited or is applied as consideration for the supply. When an entity provides consideration to another entity as a deposit, the entity does not face a withholding obligation at that time. <u>If that deposit is later forfeited, the intention is not to apply the withholding obligation on the day the deposit is forfeited (even though this will be consideration), as that consideration would have been originally provided as a deposit.</u> Instead, the withholding obligation will apply to the first payment of consideration that is provided other than as a deposit. This is expected to simplify compliance for purchasers. The withholding obligation also applies for the first payment if it includes both a deposit and any additional amount of consideration.' (underlining added)***

Effect of payment to ATO

The Draft Bill is intended to interact with existing payment provision in s. 16-20 of Schedule 1 to the TAA, which deems the purchaser to have been discharged from liability to pay to the vendor the amount which purchaser has remitted to the ATO.

The Draft Bill does not give a purchaser which has remitted a withheld amount to the ATO, any right to recover that amount from the ATO where the contract does not settle. In particular, where the purchaser has remitted an amount to the ATO (e.g. under an instalment contract) and the contract is subsequently terminated, close attention may need to be given to the manner in which a purchaser recoups the amount remitted.

Obligations and rights of Vendors

Obligations of Vendors

Under the Draft Bill, a supplier (i.e. the vendor) that makes a taxable supply of residential premises or potential residential land is required to give the purchaser notice (the 's. 14-255 Notice') of the matters listed in the proposed s. 14-255. The function of the notice is to assist purchasers to meet their withholding obligation and this is especially reflected in the first key element mentioned below.

It will be observed that the notice has to be given in relation to any taxable supply of 'residential premises', and not merely in the case of taxable supply of 'new residential premises'. The circumstances in which residential premises are classified as new residential premises can be problematical and the s.14-255 Notice useful to the purchaser. At this stage, we have not considered the extent to which a purchaser would be protected by acting on the s. 14-255 Notice.

The key elements of the s. 14-255 Notice are statements as to:

- whether the purchaser is required to withhold and remit an amount on account of GST to the ATO;
- the amount to be remitted;
- the time at which the remittance is to be made; and
- where some of the consideration for the supply is non-monetary, the GST-inclusive market value of that non-monetary consideration.

The s. 14-255 Notice has to be given at least 14 days before making the supply. Normally the time of supply would be settlement, but may be earlier in some circumstances.

A withholding obligation may arise prior to settlement (e.g. as in the case of an instalment contract). In such circumstance, and in order to ensure that the s. 14-255 Notice is available in a timely way to assist the purchaser, a purchaser may like to consider imposing a contractual obligation on the vendor to provide the s. 14-255 Notice by a specified time.

The Draft Bill will have cash flow implications for vendors. They will no longer have the use of the GST amount between the 'normal' time of collection from purchasers and the time the vendor is required to remit this to the ATO in connection with lodgement of the relevant BAS. Vendors may wish to consider whether this loss of cash flow warrants any commercial response.

Rights of Vendors

The Draft Bill envisages that a vendor making a taxable supply of Relevant Land will account for GST in the usual way under the GST Act. However, the vendor will be entitled to a credit for the withheld amount paid by the purchaser (see proposed s. 18-60 of Schedule 1 to *TAA*) rather than, as currently occurs, the vendor remitting this amount when lodging the vendor's BAS.

Note that the vendor is entitled to a credit only where the purchaser has paid the withheld amount to the ATO. The vendor is not entitled to a credit merely because the purchaser has withheld an amount. While timely payment of the withheld amount might be relatively assured as part of the settlement process, assured payment of the withheld amount triggered by an instalment might be more problematical.

Although not a substitute for proper monitoring the purchaser's discharge of its withholding obligations, a vendor may like to consider whether the contract should provide for the purchaser to indemnify the vendor in respect of the failure to pay the withheld amount and the associated exposure of the vendor to penalty and interest for non-payment of the GST due at the time of lodgement of the vendor's BAS.

Where the margin scheme applies to a supply of Relevant Land, it is expected that the withholding amount remitted by a purchaser to the ATO will exceed the corresponding amount of GST payable by the vendor.

Subject to certain conditions, the Draft Bill (see proposed s. 18-85 of Schedule 1 to TAA) entitles a vendor to obtain a refund of the excess from the Commissioner. It also enables a vendor to seek a refund of an amount that a purchaser has paid in error to the Commissioner as a withholding amount.

The vendor and purchaser may like to consider whether the contract for supply of the Relevant Land should deal with the payment of an amount paid in error as a withholding amount. As noted previously, it appears that the Draft Bill does not give a purchaser any right to recover such an amount. It also appears that a purchaser's payment of an amount in excess of the applicable withholding amount does not give rise to a discharge of any liability owed by the purchaser to the vendor.

Matters for Further Thought

The Draft Bill contemplates (see cl 23) that it will apply to supplies of Relevant Land for which any consideration (not being a deposit) is <u>first</u> provided on or after 1 July 2018.

It expressly envisages that it applies to supplies which meet this condition and are made pursuant to contracts entered into prior to 1 July 2018. However (see cl 24), the provisions of the Draft Bill will not apply to supplies made under a pre-1 July 2018 contract where the consideration (other than a deposit) for the supply is first provided before 1 July 2020. Clause 24 also relieves a vendor under a pre-1 July 2018 contract from having to give the s. 14-255 Notice, even though the consideration is first provided on or after 1 July 2020 – purchasers should especially note the absence of this reminder of their obligations.

For immediate purposes, the key point is that where:

- a contract is made prior to 1 July 2018; and
- the consideration (other than a deposit) is first provided on or after 1 July 2020,

then vendors and purchasers should consider the Draft Bill closely and monitor any mooted changes.

They may like to consider whether an appropriate contractual provision should be sought in order to address the effects of the Draft Bill. Matters for consideration include:

- the need for a purchaser to pay the requisite withholding amount where the purchaser is not required to pay an equal monetary amount to the vendor at that time;
- the rights of a purchaser to recoup from a vendor amounts that the purchaser has paid to the ATO where the contract is terminated prior to settlement;
- the cash flow implications for a vendor and whether this should be reflected in pricing of supplies;
- whether the purchaser should indemnify the vendor for any failure to pay the withheld amount to the ATO;
- the manner in which an amount paid in error as a withholding amount is treated.

Some instances of the forgoing matters have been identified earlier in this article.

Conclusion

As the Draft Bill provides reasonably generous transitional arrangements, the Draft Bill is unlikely to require immediate action for most readers. However, it is important to be aware of both the limitations of the transitional arrangements and the fundamental features of the proposals, so that the structuring of transactions potentially affected by the prospective legislation can be addressed in a timely way.

All readers will need to monitor developments generally, as proposals proceed from exposure draft into legislation.

GST Article – Some comments on 'New Residential Premises' and 'potential residential land'

A separate article in this month's newsletter discusses the proposed requirement that a purchaser will withhold an amount which is a proxy for GST on supplies of 'New Residential Premises' and 'potential residential land'.

This article briefly reminds readers about the basic nature of 'new residential premises' and then looks at the less frequently encountered concept of 'potential residential land'.

Legislative references are to the provisions of the GST Act.

Concept of 'New residential premises'

For GST purposes, 'residential premises' is defined as:

> '… land or a building that:
>
> (a) is occupied as a residence or for residential accommodation; or
>
> (b) is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation ;
>
> (regardless of the term of occupation or intended occupation) and includes a floating home.'

Notwithstanding the reference to 'land' in the definition, the Commissioner of Taxation ('Commissioner') regards the concept as not extending to vacant land – see GSTR 2012/15. However, vacant land may be recognised as 'potential residential land' (refer below).

Section 40-75(1) of the GST Act provides that residential premises are *prima facie* 'new residential premises' where they:

(a) 'have not been previously sold as *residential premises (other than *commercial residential premises) have not previously been the subject of a *long term lease'; or

(b) 'have been created through *substantial renovations of a building'; or

(c) 'have been built, or contain a building that has been built, to replace demolished premises on the same land'.

* Defined terms for GST purposes.

The basic position set out in subparagraphs (a) to (c) is subject to several qualifications.

The key one is that residential premises are not 'new residential premises' where the premises have only been used to make input taxed supplies by way of residential renting under s 40-35(1)(a) for the period of at least 5 years. If subparagraph (a) alone applies – the period must have elapsed since the time the premises first became residential premises. If subparagraph (b) applies – the period must have elapsed since the premises was last substantially renovated. If subparagraph (c) applies – the period must have elapsed since the premises were built.

The Commissioner has issued a ruling, GSTR 2003/3 ('the Ruling'), that discusses the circumstances in which a sale of real property is the sale of new residential premises.

In the Ruling, the Commissioner takes the view that the 5 year period of making input taxed leasing supplies must be continuous. In other words, the period must comprise actual input taxed tenancies, broken only (if at all) by short periods during which tenants are actively sought. Where an incomplete period is interrupted by personal use of the premises (e.g. undertaking renovations) or by leaving the premises vacant without active seeking of tenants, such interruption necessitates re-commencing calculation of the 5 year period.

It is beyond the scope of this article to advert to the other qualifications. However, in so far as they focus on transactions that (for anti-avoidance reasons) are deemed not to constitute a previous sale as 'residential premises' to which s. 40-75(1) (a) refers, they may be especially relevant in sophisticated development arrangements.

Concept of 'Potential residential land'

'Potential residential land' is land which 'it is permissible to use for residential purposes, but that does not contain any buildings that are residential premises'. As noted earlier, 'residential premises' is, itself, a defined term.

To date, the legislative relevance of the concept of 'potential residential land' has been limited to being an element in defining a GST-free supply of land under s. 38-475. Essentially, this provision enables an entity to transfer farm land which does not contain a residence to an associate for construction of a residence.

The concept has attracted very minimal ATO comment, with PBRs referencing residential and rural residential zoning as being indicative of potential residential land, but without providing any further guidance or clarification.

The exposure draft of GST withholding legislation sets out the circumstances in which a purchaser of land is required to pay an amount to the ATO on account of the vendor's GST liability in respect of he supply of the land. The aim of the legislation is to prevent property developers avoiding liability to pay GST by going into liquidation before remitting GST to the ATO. Consistent with this object, the legislation focuses on land that consists of taxable supplies of new residential premises and potential residential land.

The definitional touchstone of permissibility for use for residential purposes is potentially broad.

The exposure draft Explanatory Material notes that the concept "includes land that has been zoned for use for residential premises under a law of a State or Territory but does not contain any current residential premises' (underlining added). It appears that it is sufficient that the land can be used for residential purposes, although it might also be permissible to use the land non-residential purposes.

An interesting question arises where part of a parcel of land is zoned for one set of uses which includes residential purposes and another part of the parcel is zoned for a different set of uses which exclude residential purposes (e.g. promotion of the environment). Policy considerations attending the exposure draft might suggest that such parcel is 'potential residential land' but query whether such policy considerations can influence interpretation of an imported concept that pre-dates the exposure draft.

While the definition includes vacant land, it appears that land which contains buildings that are not residential premises can also be 'potential residential land'. For example, the sale of an existing factory/warehouse following rezoning from exclusively industrial use to residential use arguably falls within the concept and, unless the further exposure draft criteria such as 'inclusion in a property subdivision plan' is construed as a limiting factor, might fall within the ambit of the exposure draft.

GST Article – GST-free adult and community education providers

The ATO has provided a reminder regarding when an adult and community education course may not attract GST-free status.

The key criteria for GST-free treatment as an adult and community education (ACE) course are that the course:

- must be likely to add to the employment-related skills of its students; and
- must be provided by a recognised ACE course provider, delivering the course to students directly or through the course provider's employees or representative.

An ACE course is considered likely to add to the student's employment-related skills if it:

- specifies the employment-related skills participants will acquire in its course objectives;
- clearly sets out how participants will learn the skills, before the course begins; and
- teaches skills reasonably likely to be used at work, or in a business, occupation, profession, or trade, rather than for a hobby or recreation.

However the course must not:

- be provided by or for an employer to their employees;
- be provided by or for an organisation to their members, except for general community organisations with few restrictions on membership;
- be private or individual tuition, and
- be one of the following courses (that are defined separately and may be GST-free in their own right) – (i) secondary, tertiary, or special education; (ii) an English language course for overseas students; (iii) a first aid or lifesaving course; or (iv) a tertiary residential college course.

A recognised ACE course provider includes:

- a higher education institution;
- a body recognised or funded by a State or Territory authority, as a provider of ACE courses; and
- a body corporate operating on a not-for-profit basis having always met and maintained the standards for ACE course providers required by relevant State or territory authorities.

It is permissible for a recognised ACE course provider to use a 'representative' to deliver an ACE course under contract to it without jeopardising the GST-free status, as the supply is taken to be made by the ACE course provider directly to the student.

However the ATO has provided a 'reminder' in relation to arrangements where a third party acquires the rights to deliver courses which would have been GST-free if the provider of the course had been an ACE course provider.

The ATO reminder is reproduced below (ACE refers to adult and community education course).

> *ACE courses delivered by an independent third party*
>
> *A recognised ACE course provider may sell the rights to deliver an ACE course to an independent third party to on-sell to students.*
>
> *The sale may involve, for example, the right of the independent third party to deliver the ACE course for a set period and the seller retaining some rights over the course, such as branding.*
>
> *This sale is subject to GST because the ACE course provider is selling the rights and materials to deliver an ACE course.*
>
> *The independent third party's sale of the ACE course to students is subject to GST because they are not a recognised ACE course provider.*
>
> *Example*
>
> *Byrne College, an ACE provider, developed course content and materials for an ACE course.*
>
> *Byrne College sells the right to the course content and materials to Jobs For You Pty Ltd for an annual payment over 10 years.*
>
> *Under the sale agreement, the course retains Byrne College branding and the college sets the course fee.*
>
> *Jobs For You Pty Ltd does not provide any services to Byrne College. They independently sell and deliver the course to students.*
>
> *As they are not a recognised ACE course provider, GST is payable on their sales of the course to students.*
>
> *Byrne College must also pay GST on their sale of the course to Jobs For You Pty Ltd, as they are selling the rights to deliver an ACE course.*

Eligibility Article – Accounting issues faced by Charities and NFPS

With an estimated 600,000 NFPs operating in Australia and some 60,000 ACNC registered charities a recent Australian Accounting Standards Board research report into the Financial Reporting Requirements Applicable to Charities identified some concerning issues.

The report Financial Reporting Requirements Applicable to Charities (October 2017) concluded '*…the financial reporting framework governing the charitable sector is in need of reform…unnecessary complexity, inconsistent and uncertain requirements, and financial reports that are not focused on the needs of their stakeholders.'* The full report can be viewed at: *http://www.aasb.gov.au/admin/file/content102/c3/AASB_RR_05_10-17.pdf*

The report discloses key metrics of the Australian charitable sector as:

- Managing net assets > $180 billion
- Generating $134 billion total income
- Employing 1.2 million people
- Estimated three million volunteers

The report analyses the multiple (and often inconsistent) layers financial reporting imposed under Federal and State Legislation, depending on the legal structure used to conduct the entity and where the entity operates.

We recommend the report as a very useful information source for charities, and for NFPs more broadly, that are exploring the scope of financial reporting obligations.

FBT Q&A – Provision of Uniforms to Council Volunteers

Question

We are a council and we have a register of volunteers who assist with various events held in the city at times and are provided training in order to undertake 'meet and greet' duties. Currently two of the volunteers undertake 'meet and greet' activities at the airport.

The airport has asked if they could seek more volunteers from our register to expand this.

The airport proposes to provide these volunteers with their own airport uniforms.

My questions are:

1) are there any FBT implications for council as a result; and

2) will the volunteers be able to claim an income tax deduction for cleaning costs associated with the airport uniform?

Answer

In order for there to be FBT implication for Council the volunteers would need to be considered employees of Council.

For the volunteers to be considered employees of Council they would need to be in receipt of payments from which Council is liable to deduct pay as you go withholding (PAYGW).

Where a payment is made to a volunteer in respect of incidental or out of pocket expenses and those payments are not related to the volunteer's income earning activity, the payments are considered reimbursements rather than allowances. As such, no PAYGW is required.

If this is the case with your volunteers they will not be Council employees and so no FBT liability should arise.

It could be the case they are employees of the airport but we do not have the details of this relationship. If they are in receipt of assessable income from the airport then they may have an entitlement to claim their uniform maintenance costs against this income.

FBT Q&A – Allowance paid to Council staff camping close to work site

Question

Council's 'Bridge Gang' will be working on a bordering Council's bridge which is over 200km away from their depot. The job is expected to take 1 to 2 weeks to complete, so the gang will be camping at a caravan park near the job site for the duration (they will provide their own camper/caravan and food). Council will pay them a per day allowance to cover their costs and compensation for living away from home. Can this allowance be classed as a living away from home allowance or would it be a travelling allowance subject to Income tax?

Answer

The scenario you describe is very similar to the facts in the Roads and Traffic Authority case where a camping allowance was found not to be a living-away-from-home allowance as the expenses would have been deductible had they been incurred by the employee. The factors taken into account in account at arriving at the decision included:

the employee was required by the employer, as an incident of their employment, to live close by their work;

the employee was only living away from home for relatively short periods of time;

the employee did not choose to live at the places where the camp sites were located; and

the employee had a permanent home elsewhere.

There is also an example in the recent draft taxation ruling concerning home to work travel deductibility that is very similar on facts that concludes the costs incurred to be deductible to the employee. Refer example 5 of the daft ruling TR 2017/D6.

Given that the employees' costs are likely to be considered deductible no LAFHA can be paid. The allowance paid to them will be an assessable allowance subject to income taxation.

FBT Q&A – Contribution to funeral costs of deceased employee

Question

As part of our Enterprise Bargaining negotiations we have been asked to consider making a grant of up to $3000 towards funeral costs of an employee who dies while in current employment with us.

What are the FBT implications of such a payment if we were to agree to the proposal?

Presumably GST would only apply if we paid the funeral costs directly.

Answer

The longstanding view of the Commissioner is that FBT does not apply to benefits provided in respect of a deceased employee. Taxation Ruling TR 1999/10a addendum states that: 'The fringe benefits tax system does not apply to benefits provided to relatives of deceased employees.'

In further support of the above, ATO Interpretative Decision 2006/159 discusses the outcome of an employer paying funeral expenses for a deceased employee in detail.

Given the above interpretation, if the 'grant' was be provided by way of a reimbursement of funeral costs up to the $3,000 limit, this should result in no FBT applying. One would also assume the amount would not be assessable income of the recipient (or deceased employee/their estate).

To the extent GST is included in the costs being reimbursed, an input tax credit should be able to be claimed on the basis the employer has made an acquisition connected with its enterprise.

If the grant was simply paid to the employee's family with no requirement for them to demonstrate how it was applied then no FBT should apply as per the previous reasoning. However, could the ATO argue the cash payment is a death benefit ETP?

This is an ideal issue that could be addressed by way of an ATO private binding ruling request.

GST Q&A - Charges between Councils

Question

Smith City Council (not its real name) needs to invoice several other Councils for their contribution towards an Emergency Management group that Smith City Council (SCC) is the administrator for. Should there be GST on these contributions?

Answer

As if often the case, the GST treatment will depend on the terms of the arrangement in place.

Based on your question, it appears that SCC is one of a group of Councils that have formed an emergency management group, for which SCC acts as the administrator. If, in the role of administrator, SCC seeks contributions from the other Councils (and from SCC) and SCC spends these funds for approved costs, and does so on behalf of all Councils, then it appears SCC is simply handling the funds as agent for/on behalf of the members. Where this is the case, the receipt of funds would not of itself be subject to GST, but when SCC spends these funds on behalf of all Councils, they would each have an entitlement to a proportion of the GST credits.

For example, if 10 Councils each contribute $1,000 (and pay it to SCC), total collected $10,000. The group approves payment of $4,400 for services (e.g. printing materials) and the balance of $5,600 remains available for future expenses. Based on the above comments, each Council has incurred $440 and would be entitled to a GST credit of $40. SCC would need to notify the Councils of what has been spent and the relevant portion for each Council so they can claim their respective GST credits. In this example, the initial amounts collected from each Council would not be subject to GST – they are a contribution to a central fund.

The situation would be different if SCC is providing services in its own right to the other Councils and invoicing them for those services. If this is the case, the amounts collected would be subject to GST.

GST Q&A - Utilities charges

Question

Council on-charges utilities costs (gas, electricity) to tenants of Council owned properties. In many cases these tenants are not registered for GST.

One utilities invoice has some GST-inclusive charges and some are GST-free. The other invoice is fully GST-free.

Questions:

- Does Council on-charge the GST, or as Council can claim the credit, does Council on-charge the GST exclusive amount?
- When Council invoices the tenant, should Council on-charge the full invoice amount plus GST?

Some guidance would be appreciated.

Answer

The GST treatment will depend on what has been agreed between Council and the tenant, including any terms of the rental agreement entered into. Therefore, the first step would be to review those documents.

Generally, however, the arrangement between a Landlord and a Tenant is for the Landlord to provide access to the premises, and for the Tenant to pay rent (which may be gross rent inclusive of outgoings *etc.*, or net rent plus outgoings). With regard to utilities the arrangements could be that the Tenant is directly responsible for its own utilities (e.g. phone) in which case the supplier (e.g. Telstra) will invoice the Tenant directly (and the Landlord is usually not involved).

For other costs, such as electricity, the Landlord may be invoiced for the total costs for the whole building, and the agreement requires the Tenant to pay for its respective portion. (If there is only one Tenant, they would likely be required to pay the full amount.)

Using electricity as an example, the charges to the Landlord will generally be subject to GST (and the Landlord will claim GST credits), and any charges to the Tenant would also be subject to GST.

For utilities such as water, however, it will depend on who is liable for what costs. Again, by way of example:

- Water usage charges are generally invoiced directly to the Tenant by the Water Company, so would not involve the Landlord;
- Water services charges are generally invoiced directly to the Landlord by the Water Company.

If the arrangement between the Landlord and Tenant is that the Tenant is required to pay rent plus outgoings, and the outgoings include water service charges, then even though the charge from the Water Company to the Landlord would be GST-free, the amount on-charged by the Landlord to the Tenant would generally be subject to GST. This arises as the arrangement between the Landlord and the Tenant is one of rental of the premises (which is subject to GST) the payment for which is comprised on a base rent plus an amount made up based on other charges (such as water service charges).

Refer to the ATO's ruling on agency, GSTR 2000/37 which provides comments and examples that may assist.