Happy New Year for 2018 (it's February already)!

Yes, it's the 1st of February already, but given that this is the first issue of the TaxEd Newsletter for 2018, we'd like to take this opportunity to wish you a Happy New Year. Hopefully you're well rested and geared up to tackle another busy year in Tax.

To kick things off for 2018, the FBT season is right around the corner and we've got some interesting articles and Q&As this month to get the ball rolling:

- A variation on a previous article regarding the salary packaging of bus travel from home to work, and whether this can extend to other forms of commuting such as e-bikes.
- A follow up and more detailed look at last issue's article regarding minor infrequent and irregular private use of 'exempt' vehicles.
- An employee wins a lucky door prize of $1000 - should this be declared as a gift and subject to FBT?

You'll also be aware that our in-demand TaxEd FBT Roadshow is back for 2018 and starting in February. This series includes both face-to-face and online sessions, so don't miss out on booking your spot.

A number of our members have also requested in-house face-to-face FBT training sessions, which are available upon request. If this is of interest to your organisation please contact us at admin@taxed.com.au or on 1300 607 478.

For any **payroll** enthusiasts out there, we've got an interesting Q&A for you regarding taxation implications to consider from an organisational restructure. On that note, TaxEd in conjunction with TaxBanter and the ATO will jointly present a webinar on Single Touch Payroll in March, which is one not to miss.

Plus lots more below!

Happy reading.

Warmest regards,
The TaxEd Team

FBT Article - Practical Compliance Guideline PCG 2017/D14, the detail

Under the FBT rules the use of certain eligible vehicles is an exempt benefit where the private use of those eligible vehicles by current employees during an FBT year is limited to work-related travel, and other private use that is 'minor, infrequent and irregular'.

The ‘million-dollar question’ over the years is what is considered minor, infrequent and irregular usage?

The ATO acknowledges there has been inconsistency and uncertainty as to methods used by employers to ensure compliance with the car-related exemptions leading to additional compliance costs especially when the private travel is relatively low.

To reduce these compliance costs and provide certainty, draft Practical Compliance Guideline 2017/D14 explains when the Commissioner will not apply compliance resources to determine if private use of the vehicle was limited for the purposes of the car-related exemptions.

When finalised, the draft Guideline will apply to car and residual benefits provided in the 2018 FBT year and later years.

An employer may choose to rely on the draft Guideline if:

(a) the employer provides an ‘eligible vehicle’ to a current employee;

(b) the vehicle is provided to the employee to perform their work duties;

(c) the employer takes all reasonable steps to limit private use of the vehicle and has measures in place to monitor such use;

(d) the vehicle does not have any non-business accessories;

(e) the vehicle had a GST-inclusive value less than the luxury car tax threshold at the time the vehicle was acquired;

(f) the vehicle is not provided as part of a salary packaging arrangement and the employee cannot elect to receive additional remuneration in lieu of the use of the vehicle, and

(g) the employee uses the vehicle to travel as outlined below.

The travel mentioned in item (g) is travel:

(i) between their home and their place of work and any diversion adds no more than two kilometres to the ordinary length of that trip;

(ii) no more than 750 kilometres in total for each FBT year for multiple journeys taken for a wholly private purpose, and

(iii) no single, return journey for a wholly private purpose exceeds 200 kilometres.

An ‘eligible vehicle’ for the above purposes is:

- a vehicle designed to carry a load of greater than 1 tonne; or
- the vehicle is a panel van, utility (ute) or other commercial vehicle (that is, one not designed principally to carry passengers).

If you, as an employer, choose to rely on the draft Guidelines:

(i) you do not need to keep records about your employee's use of the vehicle that demonstrate that the private use of the vehicle is 'minor, infrequent and irregular', and

(ii) the Commissioner will not devote compliance resources to review that you can access the car-related exemptions for that employee.

While the guidance is useful and welcome, there is no specific instruction on how an employer is to ‘take all reasonable steps to limit private use of the vehicle’ nor how to monitor whether the permitted usage guidelines are being adhered to.

We imagine these issues have been raised by various industry bodies and we hope they will be factored into the finalized Guideline.

FBT Article- Employee provided with a salary packaged e-bike

In one of last year's newsletter items, we featured an article regarding the ability for an employee to be provided with FBT-free bus travel from home to work. Can this concession extend to other forms of commuting, such as use of an e-bike?

The answer to this question is, yes!

It is our understanding an e-bike consists of a bicycle-like frame fitted with an electric motor. The engine provides support when the rider is actively pedalling.

The motor is powered by a light lithium-based battery through an electronic speed controller. No registration or drivers licence is required to ride an e-bike.

Although there is no legal obligation to carry an odometer on an e-bike, every e-bike is equipped with a speedometer and odometer as a by-product of the technology used to control the engine.

The ATO recently published its views on the FBT consequences of an employee wanting to salary sacrifice, by way of novated lease, an E-bike.

Under the scheme the employer will enter into a lease with the e-bike supplier and provide the use of the bike to an employee as part of a salary sacrifice arrangement by way of novation.

The ATO concluded:

1. A car benefit will not arise from an employee's use of an e-bike as the e-bike is not a car.
2. A property benefit will not arise from an employee's use of an e-bike as the e-bike supplier retains the ownership of the e-bike.
3. A residual benefit will arise from the employee's use of an e-bike.

Notwithstanding a residual benefit arises, the ATO goes on to state that the residual benefit that arises from an employee's use of an e-bike may be an exempt benefit under s. 47(6) if the private use of the bike is restricted to:

- travel to and from work;
- use that is incidental to travel in the course of performing employment-related duties; and
- non-work-related use that is minor, infrequent and irregular.

So, there you go! All employers with 'wannabe Cadel Evans' within their employee ranks can perhaps initiate a directive to allow staff to live a healthier lifestyle if they so choose and take the stress of our already overloaded public transport systems! All this with the bonus of no FBT applying.

It should be noted, however, that where the above conditions for exemption are not met, the taxable value of the fringe benefit can be calculated using either:

- the proportion of total operating costs that relate to private use, or
- a cents per kilometre basis if there is extensive business use.

GST Article – Commissioner rejects the Aquatic Air concept of 'recipient'

The Commissioner of Taxation (Commissioner) has issued a Decision Impact Statement (the DIS) in which the Commissioner rejects Brereton J's view of s. 38-10(5) GST Act set out in *Aquatic Air Pty Ltd v Siewert* [2015] NSWSC 928 (the *Aquatic Air Case*). The Court's comments relate to the identification of the recipient of a supply.

Section 38-10(5) provides that a supply is GST-fee where it is provided by an ambulance service 'in the course of the treatment of the recipient of the supply'. While the section is very specific, the requirement that the recipient of the supply must have a certain character occurs in other provisions which make supplies GST-free (e.g. the second limb of the GST concept of 'medical service', numerous health-related supplies identified in s. 38-10(1), *etc.*). As a result, Brereton J's comments potentially have import beyond s. 38-10(5).

In the *Aquatic Air Case*, a company (Wingway) contracted to provide air ambulance services to regional hospitals and area health services. The Court identified the issue and set out its conclusion in the following paragraphs:

> '... the essential question is, who is the recipient of the supply – the hospital that contracts the ambulance service, or the patient. Often – probably usually – an ambulance will be called by a person other than the patient. Hospitals often arrange for specialist attendances and investigations on patients. It seems to me that in each of those cases, the recipient of the supply is, at least ordinarily, the patient – not the person who calls the ambulance, nor the hospital that arranges the specialist investigation. Likewise, it seems to me that the recipient of the supply of an air ambulance service, although it might be arranged by the hospital, is the patient. It is the patient, not the hospital, who is transported. It is the patient, not the hospital, who receives the benefit of the service. It is the patient who usually ultimately pays. But even if it is the hospital that pays, the GST Act recognises that the recipient of a supply is not necessarily the person who pays for it: s 9-15(2) provides:
>
> "It does not matter whether the payment ... was made by the recipient of the supply."
>
> For those reasons, and while minds may reasonably differ on the question, in my view, upon the proper construction of s 38-10(5), Wingaway was an ambulance service, and the services it supplied were supplied to the patients it transported, in the course of their treatment. Such services were therefore exempt within s 38-10(5), and as at 30 June 2011 – more than a year before the assessment issued – Wingaway did not have a liability for GST, even though such a liability arose upon the issue of the assessment on 23 July 2012.' (underlining added)

Brereton J's closing remark that GST 'liability arose upon the issue of the assessment' may be disregarded for present purposes. It relates to the definitive nature of an assessment in respect of which an objection was not pursued – the making of an assessment without objection by the taxpayer is conclusive of evidence of liability of the taxpayer.

The DIS notes that, on appeal, the Court of Appeal did not express a view as to the correctness of Brereton J's observations regarding Wingway's GST liability.

In the DIS, the Commissioner observes that Brereton J's view on s. 38-10(5) was *obiter dicta* and, as a result, was not binding on the Commissioner. The Commissioner re-affirms his (long held) view of tripartite arrangements as set out in *Goods and Services Tax Ruling GSTR 2006/9: supplies*. In particular, the Commissioner regards the hospital (not the transported patient) as the recipient of the air ambulance supply for which the hospital contracted. However, the Commissioner does accept that

Brereton J was correct on the further point that holding an Air Operator's Certificate was not a precondition to Wingway making GST-free supplies.

GSTR 2006/9 discusses the application of GST in tripartite circumstances (i.e. where multiple parties are involved) at paras 114 *et seq*. The following propositions (set out at para. 117) provide a useful framework within which to analyse tripartite arrangements:

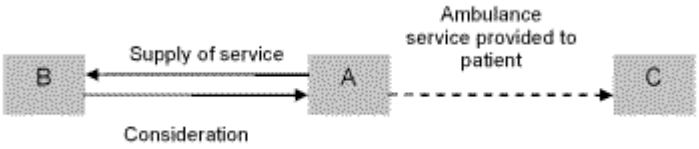
Proposition	**Description**
Proposition 11	*The agreement is the logical starting point when working out the entity making the supply and the recipient of that supply (see paragraphs 119 to 122)*
Proposition 12	*Transactions that are neither based in an agreement that binds the parties in some way nor involve a supply of goods, services, or some other thing, do not establish a supply (paragraphs 123 to 129)*
Proposition 13	*When A has an agreement with B for B to provide a supply to C, there is a supply made by B to A (contractual flow) that B provides to C (actual flow) (paragraphs 130 to 176)*
Proposition 14	*A third party may pay for a supply but not be the recipient of the supply (paragraphs 177 to 216)*
Proposition 15	*One set of activities may constitute the making of two (or more) supplies (paragraphs 217 to 221)*
Proposition 16	*The total fact situation will determine the nature of a transaction, the entity that makes a supply and the recipient of the supply (paragraphs 222 to 246)*

The key point to note is the distinction between the person to whom a supply is made and a person who benefits from (or pays for) the supply. They are not always the same person.

Example 4 (GSTR 2006/9 at para. 157 *et seq*.) is especially pertinent in the context of Brereton J's remarks:

> *A, a supplier of ambulance services, enters into an agreement with B, a hospital, under which A agrees to provide ambulance services as and when B requests them and B agrees to pay for the services. B is not an Australian government agency. The obligations under the agreement between A and B are binding.*
>
> *Pursuant to the agreement, A transfers C, a patient, from hospital B to another hospital. The transfer of C is in the course of C's treatment and B pays A to provide A's services to C.*

The recipient of A's supply of ambulance services is hospital B. A's supply is made to B and provided to C.



68.

One of the requirements under subsection 38-10(5) for a supply of an ambulance service to be GST-free is that the service is supplied in the course of treating the recipient of the supply. As hospital B is the recipient of the supply, not the patient, and there is no treatment of the hospital, the supply of the ambulance service is not GST-free.

Eligibility Article – "DGRs – Times are a changing"

Key Points

The main changes at a glance:

- allowing all non-government DGRs to be automatically registered as a charity with the Australian Charities and Not-for-profits Commission ('ACNC') from 1 July 2019, with a 12-month transitional period;
- abolishing the public fund requirements;
- integrating the DGR registers and Overseas Aid Gift Deduction Scheme with the ACNC charity register; and
- introducing External Conduct Standards — to be enforced by the ACNC — to strengthen oversight of overseas activities.

An quick overview of existing entitlement to Deductable Gift Recipient Status

At present, DGR status is, generally speaking, accessed (under Div. 30 ITAA 1997) through an organisation:

(i) falling within a general category set out in Subdivision 30-B and completing the applicable statutory endorsement process; or

(ii) being specifically identified by name in Subdivision 30-B.

The first (and main) subset of general category organisations are those meeting specified legislative criteria.

The second subset of general category organisations are those admitted to registers which are administered by four different Government departments:

- The Department of Foreign Affairs and Trade administers the Overseas Aid Gift Deduction Scheme and register;
- The Department of Social Services administers the Register of Harm Prevention Charities.
- The Department of the Environment and Energy administers the Register of Environmental Organisations.
- The Department of Communications and the Arts administers the Register of Cultural Organisations.

At present, some Deductable Gift Recipient organisations will be registered with the ACNC (i.e. under the *Australian Charities and Not for Profit Commission Act 2012* – the 'ACNC Act'). For instance, this is one of the criteria of some of the general categories for endorsement as a Deductible Gift Recipient (DGR). Some DGRs will have chosen to be registered with the ACNC, without this being a requirement for obtaining DGR status. Other DGRs may have opted not to register or, not being a charity, are unable to register.

The significant points to note are that, at present:

(i) not all DGRs will be registered with the ACNC, and so are not subject to its superintendence; and

(ii) some DGRs will be registered with the ACNC (i.e. have to meet its reporting requirements) while also having to meet additional reporting requirements due to being included in one of the four departmental registers.

Summary of the Announced Changes

On 5 December 2017, the Minister for Revenue and Financial Services, Kelly O'Dwyer, announced that the Government will reform the administration and oversight of organisations with DGR status. These reforms are designed to enhance the role of the ACNC, strengthen governance arrangements, and reduce administrative complexity.

The changes announced as part of this package of reforms include:

1. All non-government DGRs will be automatically registered as a charity with the ACNC from 1 July 2019. There will be a 12-month transitional period to assist current non-charity DGRs with compliance. The Commissioner will have the power to exempt DGRs from this requirement in certain circumstances.

2. The Public fund requirements will also be abolished.

   Comment: - Currently, various DGR general categories require establishment of a public fund to receive tax deductible donations.

3. The DGR registers and Overseas Aid Gift Deduction Scheme will be integrated with the ACNC charity register and duplicative reporting requirements will be abolished. The ACNC will also provide a central location for applications and reporting.

4. The ACNC and ATO will receive additional funding to review a greater number of DGRs for ongoing eligibility, where risks are identified.

5. To strengthen oversight of overseas activities, the Government will issue External Conduct Standards to be enforced by the ACNC.

6. The Government will not proceed with the unlegislated 2009–10 Federal Budget measure *Philanthropy — reforming the 'in Australia' requirements that apply to tax exempt entities*. The Government considers that this unenacted measure could prevent many DGRs from conducting legitimate activities outside Australia.

Comment: - The2009-10 Budget measure proposed that: 'The Government will amend the 'in Australia' requirements in Division 50 of the *Income Tax Assessment Act 1997* to ensure that Parliament retains the ability to fully scrutinise those organisations seeking to pass money to overseas charities and other entities.'

It was a response to the High Court decision in *Commissioner of Taxation v Word Investments Ltd*. That case 'held that charities may be pursuing their objectives principally "in Australia" even where they merely pass funds within Australia to another charitable institution that conducts its activities overseas'. The measure was intended to 'reverse the decision that charities and other income tax exempt entities can direct funds to overseas projects outside the current restrictions'.

7. Treasury's DGR discussion paper of June 2917 identified a number of proposals drawing on various past reviews, including the 2016 Parliamentary Inquiry into the Register of Environmental Organisations. The Government will not mandate a level of remediation by environmental organisations, however, the existing reporting requirements of DGRs currently on the four departmental registers — including environmental reporting requirements — will be collected by the ACNC in the Annual Information Statement.

8. To improve transparency for both the ACNC and Australian donors, the ACNC will publish charities' declarations of political expenditure to the Australian Electoral Commission and relevant criminal activities of charities' staff or responsible persons in the Annual Information Statement.

9. The Register of Cultural Organisations' (ROCO) eligibility criteria will be amended to enable organisations that promote Indigenous languages to be endorsed as DGRs.

10. The Government will consult on details of the implementation of these DGR reforms.

The changes in context

The media release issued by Minister O'Dwyer, and summarised above, was fairly general in nature.

Pending issue of more detailed information, it is useful to consider the media release in the context of the issues identified in Treasury's DGR discussion paper of June 2017 and to which passing reference has already been made.

Some Matters for Consideration

Given the brevity of the material in the Ministerial announcement, we are currently constrained in making observations on matters for action. There does not appear to be any need for precipitate action but Board members and other responsible people within DGRs need to be made aware of the reforms and to be ready to deal with them, as they emerge in more detail.

At this stage, several broad points occur to us:

- If your organisation is a DGR that is not currently registered with the ACNC, you will need to consider the implications of the proposed automatic registration noted in Point 1. For instance, consideration will need to be given to compliance with the standards which the ACNC expects of its registrant organisations and their personnel, the administrative processes needed to put in place to meet ACNC reporting requirements, *etc.*

- Organisations that are not eligible to register with the ACNC will need to monitor the development of the Commissioner's exemption process - both its scope and mechanics. Depending on the ambit of the exemption, a DGR may ultimately want to consider whether it will need to make adjustments to its constitution/activities/ objects to enable it register in order to maintain its DGR status.

- All DGRs should look to their ongoing entitlement to DGR status. While any DGR should regularly consider whether its activities entitle it to ongoing DGR status, the reform proposal (see Point 4) anticipates more auditing of this by the ATO and ACNC. Organisations evolve and their constitution and original intentions, which respectively originally envisaged conduct entitling them to DGR status, may be inconsistent with practices that have developed, so reconciling current practice and entitlement to DGR status should be undertaken periodically. As the ACNC will be funded for audit activity, organisations should also consider their compliance with ACNC standards/expectations, including its expectations of an organisation's personnel such as its requirements for being a 'responsible person'.

- Allied with the previous comment, note the proposal in Point 8 to publish certain information and the desirability of avoiding embarrassment through public revelations.

Eligibility Article – Revocation of charity registration – Waubra Foundation v Commissioner of Australian Charities and Not-for-profits Commission

The Commissioner of Australian Charities and Not-for-profits Commission's (ACNC) revoked certain charity sub-type registrations of the Waubra Foundation (Waubra). Following The Commissioner's rejection of Waubra's objection, Waubra referred the Commissioner's decision to the Administrative Appeals Tribunal (Tribunal) - *Waubra Foundation v Commissioner of Australian Charities and Not-for-profits Commission* .

Waubra focused on the adverse health effects attributed to wind turbines in wind farms (amongst other industrial noise sources). The case specifically centred on whether or not Waubra's activities reflected a purpose of promoting the prevention or control of diseases in human beings and a purpose of promoting or protecting human rights.

Facts

The facts of the case were:

- Waubra was established in March 2010 as a not-for-profit entity with a significant focus on the adverse health effects attributed to wind turbines in wind farms and other industrial noise sources.
- From 1 October 2010, Waubra was endorsed as a deductible gift recipient (DGR) for income tax purposes on the basis that it was a charitable institution whose principal activity is to promote the prevention or the control of diseases in human beings. As a DGR, donations to Waubra would be tax deductible by the donor.
- Following the establishment of the ACNC, Waubra became registered as a charity under two subtypes: (a) entity with another purpose that is beneficial to the community; and (b) institution whose principal activity is to promote the prevention or the control of diseases in human beings.
- Following the introduction of the *Charities Act 2013* (Cth) and certain transitional provisions, as of 1 January 2014, Waubra became registered as a charity under 4 subtypes listed in s. 25-5 ACNC Act. The first three were – (a) Item 1 - Entity advancing health; (b) Item 7 - Entity promoting or protecting human rights; and (c) Item 12 - Entity advancing public debate. The fourth subtype was: Item 13 - Institution whose principal activity is to promote the prevention or the control of diseases in human beings.
- Waubra's registration as a health promotion charity (that is, under Item 13) was of importance as it permitted continued access to deductible gift recipient status. (*Comment:* From 3 December 2012, DGR status based on prevention or control of diseases in human beings has also dependent on the relevant entity being registered with the ACNC.)
- The ACNC reviewed Waubra's registration and in December 2014 concluded that Waubra had never satisfied the requirements to qualify for registration under Item 7 and Item 13 – predominantly on the basis that there was insufficient scientific evidence that 'the ill-health complained of is caused by the physiological effects from wind turbines [or] that there are

human diseases called "wind turbine syndrome" or "vibroacoustic disease"'. Accordingly, these registrations were revoked with effect from 1 January 2014 and 11 December 2014 respectively.

- The ACNC rejected Waubra's objection to this decision on two grounds. Firstly, Waubra's activities were considered to be primarily information sharing and advocacy relating to concerns about infrasound, low frequency noise and vibration from wind farms, and the possible effects which these may have on human health. Secondly, the weight of scientific evidence did not support the existence of diseases or adverse health effects caused by emissions from wind farms or other sources of infrasound, low frequency noise or vibration.

In the Tribunal, Waubra contended that its principal activity was the promotion of control of prevention of diseases, as it:

1. 'received and responded to complaints of noise related health effects';
2. 'raised awareness of the effects of longterm (sic) exposure to industrial noise or vibration by making publicly available information on the health risks posed by such exposure and establishing networks between complainants and researchers';
3. 'funded or arranged for appropriate acoustic measurements to be carried out inside complainants' homes';
4. 'provided advice to noise complainants to record their sleep patterns and/or to seek out medical assistance in relation to the health effects associated with their noise complaints, as raised with the applicant';
5. 'provided advice on avoiding exposure to excessive noise by moving away from the complainants' home and the noise source [and] [a]rranging for alternative accommodation to assist complainants in that respect';
6. ' lobbied and encouraged others to lobby government, health bodies, planning authorities and noise regulators for improved regulations regarding noise and vibration and to encourage enforcement of existing regulations'; and
7. ''encouraged and assisted with research aimed at quantifying complainants' noise exposure and working with acoustic experts to develop and improve acoustic testing equipment and techniques'.

The Decision

The Tribunal's lengthy decision considered in detail the meanings of 'disease', 'to promote' and 'purpose'.

The Tribunal noted:

- Item 13 contemplates that an institution may have more than one activity and, therefore, the question is whether the institution's *primary* activity is to promote the prevention or control of diseases in human beings.
- Item 13 focuses on the activity of *promoting*, and not on the activities of *preventing* or *controlling* of diseases (which arguably would instead come under the Item 1 'advancing health' sub-type of charity).
- The range of activities that are included in 'promoting' is broad (but not unlimited), and would incorporate 'action to further medical and public knowledge of the potential adverse effects on human health of a particular activity or exposure'.
- It is not essential that the activities of an institution to promote the prevention or the control of diseases should be successful.
- Item 13 does not require that the disease be an established or accepted disease. It may be sufficient that 'credible or plausible evidence that a condition exists, or that a causal relationship exists between a particular activity or exposure and an adverse health condition'.

Despite the Tribunal's broad interpretation of the Item 13 sub-type requirements, the Tribunal found against Waubra. While the Tribunal accepted that 'the promotion and facilitation of research, the dissemination of the results of research, and awareness raising' were significant aspects of Waubra's activities, the Tribunal was of the view that its principal activity was that of responding to requests for assistance by those who were suffering noise related health effects. Had the mix of activities been skewed less towards responding to these requests, the Tribunal indicated that a different result may have arisen.

In relation to Item 7 (promotion or protecting human rights), the Tribunal also found against Waubra. The following broad comments comparing the 'purpose' requirement of Item 7 to the 'principal activity' requirement in Item 13 are noteworthy:

> 'Whereas the determination of an entity's principal activity requires, predominantly, consideration of the entity's actual activities, including its day-to-day activities, the determination of an entity's purpose or purposes requires consideration of all the matters from which the purpose or purposes may be inferred. The statement of objects of the entity in its constitution are important in this respect. Naturally, an entity's actual activities will be relevant to the enquiry, as any constitution must be "read in light of the history of its formation and the activities which the entity has undertaken since".'

It concluded that the overall impression was that the promotion or protection of human rights was merely incidental to Waubra's actual purposes of pursuing concerns about the health effects of wind farms, rather than being a separate purpose and concern of Waubra.

Action Points

Entities which are registered under either Item 13 or 7, or those seeking to be registered under these Items, should review their activities and supporting documentation to ensure alignment with the findings of this decision.

In particular, entities should be mindful of the distinction between 'primary activity' and 'purpose'

The decision highlights that:

- For Item 13 sub-types, the *primary* activity must be seen to be the promotion of the prevention or control of diseases in human beings – it is not sufficient that this merely be *an* activity of the entity;
- For Item 7 sub-types, the purpose must be more than an incidental purpose arising from the other activities of the entity.

More generally, the case is a reminder that all charities should regularly review their activities (including their website/publicity material and other aspect of their public appearance), supporting documents, and constitutions to ensure that they continue to meet the entitlement to relevant ACNC registration and the taxation character they claim to have.

Payroll Article – Payroll Update

Super Contributions

The ATO is modifying the process users of the Small Business Superannuation Clearing House (SBSCH) will use to access the SBSCH service. Points to note:

- The ATO has advised: "The Small Business Superannuation Clearing House (SBSCH) will join ATO online services on 26 February 2018 and will no longer be accessible with the current user ID and password authentication".
- The existing system is available until COB on Monday February 2018 – full transitional details (including transitional closure of the payment system and registering for access to the new system) are set out on the ATO website.
- The ATO has provided a decision tool to assist in deciding the manner in which SBSCH is accessed when it joint the ATO online services in February 2018.
- For general eligibility to use SBSCH – see here.

ATO appealing to Court of Public Opinion - ATO to publicise business tax indebtedness

The Federal Government has released an exposure draft of legislation which enables the ATO to disclose business tax debts to credit reporting bureaus "where the businesses have not effectively engaged with the ATO to manage the debt". The release follows an announcement in the 2016-17 Mid-Year Economic and Fiscal Outlook that this approach to unpaid tax debts would be taken.

The legislation provides some protection mechanisms, such as:

- informing the taxpayer of the intention to disclose before the disclosure occurs – to allow the taxpayer to engage with the ATO and avoid the disclosure;
- the disclosure will apply to debts with a specified maturity (e.g. proposed at least 90 days overdue) and exceeding a specified threshold (e.g. proposed at least $10,000)
- limitations designed to strike a balance between transparency of tax indebtedness and fairness – e.g. expected disputed tax debts and tax debts being paid by instalments will not be disclosed.

The Government is seeking comment on the exposure draft by 9 February 2018.

Check your payroll tax is being remitted by your contracted payroll processor

The Western Australian Government has advised that some outsourced payroll processors have been receiving moneys from employers on account of payroll tax (PRT) but not remitting these to the Government. The non-payment has been identified through audit.

It has urged employers:

- to seek evidence from their payroll processors that funds provided by employers to the processors have been remitted; or
- to seek confirmation from the WA State Government that payment has been received.

All employers (not just those liable for WA PRT) who outsource their payroll processing may like to take the opportunity of this alert and check the scam identified by the WA Government does not extend to other jurisdictions or other payments.

Notifiable Data Breaches Scheme (NDB Scheme) - commences 22 February 2018

The NDB Scheme requires certain organisations to notify individuals whose personal information has been the subject of a data breach that is likely to result in serious harm. The Notification must also be given to the AIC.

The NDB Scheme is outlined on website of the Office of the Australian Information Commissioner (AIC).

It is expected that payroll units of organisations will already be mindful of the sensitivity of the personal data they hold, whether the organisation is subject to the NDB Scheme or not. It may be that other parts of the organisation (e.g. human relations units) will also hold personal data.

However, the NDB Scheme imposes obligations for dealing with data breaches. Attention is especially drawn to the following aspects of the Scheme that are set out on the AIC website:

- The Notifiable Data Breaches scheme under Part IIIC of the ***Privacy Act 1988*** (Privacy Act) establishes requirements for entities in responding to data breaches. It applies to agencies and organisations that the Privacy Act requires to take steps to secure certain categories of personal information. This includes Australian Government agencies, businesses and not-for-profit organisations with an annual turnover of $3 million or more, credit reporting bodies, health service providers, and TFN recipients, among others.
- 'The NDB scheme applies to Tax File Number (TFN) recipients in relation to their handling of TFN information (s 26WE(1)(d)). A TFN recipient is any person who is in possession or control of a record that contains TFN information (s 11). TFN information is information that connects a TFN with the identity of a particular individual (s 6).'
- 'A TFN recipient may also be an APP entity or credit provider. In certain circumstances, entities that are not otherwise covered by the Privacy Act, such as state government bodies, may also be authorised to receive TFN information and will be considered TFN recipients.' (underlining added)
- 'The NDB scheme applies to TFN recipients to the extent that TFN information is involved in a data breach. If TFN information is not involved, a TFN recipient would only need to comply with the NDB scheme for breaches of other types of information if they are also a credit provider or APP entity.'

If your organisation has not already done, it should determine whether it is subject the NDB Scheme as a matter of priority. The broad foregoing discussion is not a substitute for detailed investigation of your organisation's status. If the Scheme is applicable, your organisation should develop plans and processes to meet its Scheme obligations.

GST Q&A: Are input tax credits available on meal entertainment expenses?

Question

Is an input tax credit available for the following FBT-related expenditure?

- Food or drink that does not amount to meal entertainment, but is an exempt property benefit as it was consumed by an employee, on a work premises and on a work day.

- Expense payments or property benefits (in the form of employee gifts) that are exempt under the minor benefit exemption.

Answer

GST credits are usually available to an employer provided the acquisition is made in the course of carrying on the enterprise and does not relate to making input taxed supplies. However, there are special rules in the GST law that alters this where entertainment expenses are involved. In such cases, the income tax deductibility is relevant and this may depend on the FBT treatment of the expense.

NOTE: When applying these GST rules the income tax exempt status of employers is ignored and instead the rule is applied assuming the employer was not income tax exempt.

There are some further potential complications due to there being slightly different FBT rules regarding the application of exempt benefits depending on whether the employer is a tax-exempt or not-for-profit employer as compared to a non-income tax exempt employer.

Broadly, if the benefit is entertainment (including meal entertainment) then the general rules are:

- If subject to FBT = deductible = GST credit available.
- If NOT subject to FBT (e.g. exempt benefit) = non-deductible = NO GST credit available.

If the expense does not amount to entertainment, then a GST credit is generally available irrespective of whether the benefit is subject to FBT or exempt.

Therefore, entertainment for employees is generally treated as:

- FBT/deductible/GST credit available.

Entertainment for clients is generally treated as:

- No FBT/non-deductible/No GST credits.

With regard to the second part of the question, relating to expense payment benefits and property benefits that are in the form of employee gifts, on the assumption that the benefits referred to are not entertainment, GST credits would be available.

FBT Q&A – Employer provided road tolls

Question

Staff who are provided with private use vehicle rights have access to a toll account facility where tolls for private travel can be incurred. The toll account is paid by charges made on a corporate credit card.

The private toll costs incurred are not reimbursed to us by the employee.

Are these tolls an expense payment fringe benefit? If so, can the minor benefit exemption apply as private toll costs are incurred on an infrequent basis with cost not exceeding $300 on any one trip?

Answer

If the toll account facility is the employer's account, then the road tolls are most likely residual benefits rather than expense payment benefits.

Either way, it will be a taxable fringe benefit unless the minor benefit exemption or the otherwise deductible rule can apply.

The $300 minor benefit exemption requires that the relevant benefits be provided at a taxable value of less than $300 and that it be provided on an infrequent and irregular basis. Accordingly, the $300 minor benefit exemption would only be available for tolls provided to an employee on an *ad-hoc* basis, which is not part of or in connection with a salary sacrifice agreement. If these parameters are not met, then the benefit is not considered to be provided on an infrequent and irregular basis and no entitlement to the $300 minor benefit exemption would be available.

FBT Q&A - Door prize won by an employee

Question

If a staff member attends a third party conference and wins a lucky door prize to the value of $1,000 (entry was based on providing a feedback form for the conference), would this need to be declared as a gift and subject to FBT as being over the $300 minor benefit threshold?

Answer

It is difficult to see how the employer would have an FBT liability in the scenario you have presented.

For the benefit to be a 'fringe benefit', the definition of 'fringe benefit' in s. 136(1) of the FBT Act requires the benefit to be provided by one of the following:

- the employer;
- an associate of the employer;
- an arranger – vis. (see subparagraph (e) of definition of 'fringe benefit') a person (the arranger) other than the employer, or associate of the employer under an arrangement covered by paragraph (a) of the definition of 'arrangement' between (i) the employer or an associate of the employer and (ii) the arranger or another person, or
- a person other than the employer or an associate of the employer, if the employer or associate (i) participates in or facilitates the provision or receipt of the benefit, or (ii) participates in, facilitates or promotes a scheme or plan involving the provision of the benefit and, in either case (i) or (ii), the employer, or associate knows or ought reasonably to know that the employer or associate is doing so – subparagraph (ea).

Paragraph (a) of the definition of 'arrangement' in s. 136(1) of the FBT Act provides that 'arrangement' means:

> an agreement, arrangement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable, or intended to be enforceable, by legal proceedings.

Accordingly, a fringe benefit will not arise unless there is an agreement of some kind between the employer and a third party. The prize in this scenario does not appear to meet this condition. It was purely won by chance.

Alternatively, subparagraph (ea) of the definition of 'fringe benefit' is only satisfied if the employer:

- either (i) participates in or facilitates the provision or receipt of the benefit, or (ii) participates in, facilitates or promotes the scheme involving the provision of the benefit, and
- knows or ought reasonably to know that it is so participating, facilitating or promoting the benefit.

Once again it is difficult to see how the employer has met the above requirements. The prize was purely won by chance.

Salary Packaging Q&A - Request to salary sacrifice in-house products/services

Question

Our Payroll unit has received a query from a staff member who would like to salary sacrifice 'up to $500 of employer product and service', in accordance with a clause of the relevant employment award which provides:

'An employee covered by the agreement may elect to sacrifice a proportion of their award salary to a complying superannuation scheme of their choice, subject to compliance with any State or Commonwealth Government directive and legislation. Employees may also sacrifice a proportion of salary in respect of some fringe benefits. In these instances the employee is to meet the administrative costs. Examples include:

- *superannuation;*
- *a laptop computer;*
- *a briefcase;*
- *calculator;*
- *work-related computer software;*
- ***up to $500 of employer product and service.'***

What is the FBT consequence of providing this salary sacrifice arrangement? Is there any benefit to the employee?

Answer

It would appear the reference to an employee being able to salary sacrifice 'up to $500 of employer product and service' is designed to allow the employee to access the 'in-house benefit' FBT reduction which is set out in s. 62 of the FBT Act. The current threshold for this concession is $1,000, but prior to 1 April 2007 it was $500 per employee.

An 'in-house fringe benefit' means an in-house property fringe benefits, in-house residual fringe benefits, in-house property expense payment fringe benefits and in-house residual expense payment fringe benefits.

Broadly, an in-house fringe benefit is one that relates to goods or services provided to an employee or associate that are identical or similar to those supplied to the public in the ordinary course of business of the employer.

However, the in-house benefit FBT reduction under s. 62 does not apply to in-house fringe benefits provided on or after 22 October 2012 under a salary packaging arrangement unless the transitional provisions apply. The transitional provisions provide that the above changes do not apply to an 'existing salary packaging arrangement' until the earlier of:

- 1 April 2014, or
- the date it was materially varied.

An 'existing salary packaging arrangement' is a salary packaging arrangement entered into by the employer and employee before 22 October 2012.

Prima facie, it would appear that FBT would be payable on the $500 of benefits provided.

Payroll Q&A - Is a payment able to be treated as a genuine redundancy?

Question

Council is currently working through a organizational restructuring process.

What are the likely taxation implications for Council's employees given the process below:

Certain employees, where there position will no longer be required, are provided with the following options:

1. Redundancy;
2. If redundancy is rejected, redeployment into a suitable position;
3. If they are not able to be redeployed into a suitable position, they will be placed in the redeployment pool until they gain a position or until a set date. If they have not received a position by the set date they will be offered a redundancy.

Answer

In relation to this type of scenario the following issues should be considered:

1. The scenario exhibits the characteristics of a genuine redundancy arrangement and therefore all or part of any termination payment should be eligible for tax free treatment with the tax free component being a base amount plus $ per year x number of full years service. Calculation of the tax free amount is detailed at the ATO website.
2. **Other parts** of the termination payment should be taxed appropriately as either :

a. an ETP - click here to see more information re tax treatment of ETP see; **or**

b. as lump sum payments for unused annual and long service leave (click here to see more information re these types of payments).

3. If an employee in the redeployment pool is made redundant at the set date we would consider the treatment outlined above is equally applicable (ie a tax free component will exists being the base amount and years of service. We are aware of ATO private rulings that support this approach where a temporary re-deployment option such as the one you propose exists but where no successful outcome is obtained by a set date and the employee is terminated.

We would note there are some special rules regarding where ETPs exceed certain caps and these should be considered in the circumstances of each employee. Click here to see more information on the ETP cap rules.

We also note there are rules requiring the ETP to be paid within 12 months of termination which we assume will occur.