Tax Update Newsletter

February 2018

With the silly season well and truly behind us, hopefully you're well into the swing of things for 2018!

By the time you receive this we'll have wrapped up our FBT Roadshow for another year, with record numbers to our final face-to-face workshop today in Melbourne. But don't forget we've still got our two LiveOnline FBT webinars next week (March 7 & 8), so if you didn't get the chance to attend our face-to-face workshops then be sure to register for the online sessions.

With FBT being the flavour of the month we've got a number of interesting articles and Q&As for this issue:

- Our **feature article** discusses whether or not a section 57A employer pays FBT on non-salary packaged meal entertainment it provides to employees.
- An in-depth look at why the term 'Business Premises' is important in the FBT landscape.
- A short note regarding CGT main residence exemption.
- Our **featured Q&A** looks at whether or not a non-cash gift can be exempt from FBT.
- **And more below!**

Finally, still on FBT, we have had quite a number of our members express interest in some in-house face-to-face FBT training sessions, which are still available upon request. If this is of interest to your organisation please contact us at admin@taxed.com.au or on 1300 607 478.

Enjoy.

Warmest regards,
The TaxEd Team

FBT Article – Does a section 57A employer ever pay FBT on non-salary packaged meal entertainment it provides to employees?

Much effort goes into determining whether fringe benefits by way of meal entertainment are provided to employees.

Meal entertainment is entertainment by way of food, drink, and travel and accommodation in relation to such entertainment. For example, staff lunches at restaurants, the Christmas party and employee social events involving food and alcohol.

For employers exempt under s. 57A *FBTAA* (being employers subject to $30,000 and $17,000 capping rules), FBT is not payable by the employer in relation to non-salary packaged meal entertainment-type fringe benefits which are provided. This outcome occurs regardless of:

- whether an employer elects to use the special FBT valuation rules for meal entertainment;
- whether an employee has received fringe benefits in excess of the capping level applicable for that type of employer ($30,000 and $17,000); and
- whether the employee has salary packaged meal entertainment.

The outcome that FBT is not payable on non-salary packaged meal entertainment is due to s. 5B(1L) of the *FBTAA*. Section 5B(1L) operates such that a s. 57A employer disregards non-salary packaged meal entertainment when calculating its FBT liability.

Section 57A employers should ensure that FBT reporting processes do not inadvertently result in non-salary packaged meal entertainment fringe benefits being subject to FBT.

FBT Article – Why is the term 'Business Premises' important in the FBT landscape?

The term 'business premises' is relevant for a number of important FBT purposes including, but not limited to:

- the availability of a car for private use where the car is not at business premises of an employer;
- business premises in the context of car parking benefits;
- exemption for property provided and consumed on business premises; and
- exempt recreational and child care facilities located on business premises.

Business premises are defined in subsection 136(1) of the *FBTAA* as being:

> **"business premises",** in relation to a person, means premises, or a part of premises, of the person used, in whole or in part, for the purposes of business operations of the person, but does not include:
>
> **(a)** premises, or a part of premises, used as a place of residence of an employee of the person or an employee of an associate of the person; or
>
> **(b)** a corporate box; or
>
> **(c)** boats or planes used primarily for the purpose of providing entertainment unless the boat or plane is used in the person's business of providing entertainment; or
>
> **(d)** other premises used primarily for the purpose of providing entertainment unless the premises are used in the person's business of providing entertainment.

The crux of the matter in this instance is to determine that the premises or part of the premises in question are 'of the person' and used by the person whether in whole or part for business operations.

Paragraphs 4 to 13 inclusive of *TR 2000/4* fully explore the requirements in relation to premises of the person and business operations.

Consequently, unless any of the specific exclusions apply, premises are only 'business premises' in relation to a person if two requirements are met. The first requirement is that the premises or part of premises are 'of' the person. Secondly, the premises or part of premises must be used by the person, in whole or in part, for the purposes of their business operations.

Premises of the person

If a person has ownership of premises, or has exclusive occupancy rights as lessee of premises, the premises would ordinarily be described as premises of the person.

In other circumstances, for example, where a person has non-exclusive possession of premises, the person satisfies this requirement if they have a right to possession of the premises, at least to the extent necessary to enable the conduct thereon of their business operations.

Meaning of 'business operations'

The term 'business operations' in the definition of 'business premises' includes a wide range of activities. The activities include those undertaken by a person in the ordinary course of carrying on a business. They also include those activities that, although not undertaken in the ordinary course of carrying on a business, are nevertheless undertaken in the course of carrying on a business. Profit making activities that fall short of being a business are also included in 'business operations' if they have a business or commercial character.

Take the following example we recently considered on the Q&A service.

> *A local council owns the building premises in which Council offices are located. In the foyer of the building there is a café area that is leased to an independent third party business. The leased area only includes the food preparation and serving area.*
>
> *Located around the café are tables and chairs that are situated in the foyer break-out area. Council provides staff with food and drink when having impromptu meetings in the foyer break-out area.*
>
> *Is the food and drink property provided on business premises of Council and therefore eligible for exemption as an exempt property benefit under section 41 of the FBT Act?*

In the above example it appears clear Council has ownership of the foyer break-out area surrounding the leased café area and therefore this would constitute business premises of Council.

Meetings held with staff in the foyer break-out area would fall within business operations of Council and so exemption should be available under section 41 of the *FBTAA*.

If, in the facts of the example, the third party lease also covered the surrounding table and chair break-out area then does the answer change?

In our view, the answer would most likely change as the premises would now be more appropriately business premises of the third party café operator and used in their business operations. This would result in the property exemption not being available to Council.

As can be seen, it is important to have an understanding of this important term as an incorrect understanding could mean you, as an employer, are missing out on potential FBT concessions and/or exemptions or, heaven forbid, underpaying FBT!

FBT Article – CGT main residence exemption to be removed for foreign residents

From time to time a proposed law change comes up that may not be exactly FBT related but can have an impact insofar as employer-employee relations are concerned.

The Government has introduced amending legislation that will, if implemented as currently drafted, remove the capital gains tax (CGT) main residence expedition for foreign residents as and from 7:30pm AEST at 9 May 2017.

In summary, the proposed rules have the effect that the main residence exemption is removed if the owner is a foreign resident for tax purposes on the date of the event (i.e. the date of sale).

A foreign resident for this purpose is a non-resident for income tax purposes. This can often be the case for employees who are posted overseas for extended periods.

Alarmingly, there does not appear any proportionate method available for foreign residents in circumstances where the owner was a resident and non-resident during the ownership period.

However, existing properties held before this date will be grandfathered until 30 June 2019.

How does this impact your FBT return as an employer you may ask? It doesn't BUT if you currently have staff stationed overseas this could impact them and so it is prudent as their employer that they be notified of the change.

FBT Q&A – Gifts to long serving employees

Question

Could you please confirm whether a gift worth $800 provided to a long serving employee is exempt from fringe benefits tax.

Answer

When recognising long service of an employee, non-cash awards to employees in recognition of services of not less than 15 years are an exempt benefit - refer section 58Q of the *FBTAA*. It is noted a payment in cash form would simply be considered salary or wages.

To qualify for the exemption the following conditions must be satisfied:

- A long service award benefit must be provided to an employee.
- The award is for a recognised long service period.
- Notional taxable value of the award must not exceed the threshold.
- Threshold calculation where there is only one recognised long service period.
- Threshold calculation where there is more than one recognised long service period.

The exemption limit is set as follows:

$1,000 + ($100 × (**RLS** − 15))

RLS is the number of whole years of service so essentially the exemption is $1,000 for the first 15 whole years of service plus $100 for each additional whole year of service after that.

FBT Q&A – Daily lowest fee charged by commercial car parking station?

Question

How do you determine the lowest fee charged by a commercial car parking station for all day parking where the car park offers daily, weekly and other periodical rates?

Answer

A pre-condition to having a car parking fringe benefits tax liability is that the employer-provided car parking is located within a 1km radius from a commercial car parking station that charges more than the car parking threshold for all day parking.

The car parking threshold for 2017/18 is $8.66.

'All day parking' is the parking of a single period for a continuous period of more than 6 hours within the hours of 7am to 6pm.

TR 96/26 confirms that where a car park offers periodical rates such as weekly or monthly parking rates it is possible to consider these rates when determining the lowest all day parking rate. exceeds

Paragraph 40 of TR 96/26 provides the following formula to be used when determining the lowest day rate where a periodical fee is charged.

Total fee divided by Number of business days in period = Daily rate

Business days do not include Saturday and Sunday and public holidays (in that location).

For example, assume there was only one commercial car park within a 1km radius of the employer provided parking that charged $9 a day for all day parking (pay per day). However if that car park also offered a monthly fee for parking of $180 and there 24 working days in a month the lowest day rate charged by car park rate would be $7.50, which does not exceed the car parking threshold.

This approach to determining the lowest fee payable for all day parking by a commercial car park can also be used to determine the taxable value of car parking fringe benefits.

Returning to the above example, assume there was now a 2nd car park (Car Park B) within a 1km radius from the employer-provided car parking which charges $9 a day for all day parking and does not offer periodical rates.

Due to the lowest fee payable for all day parking at Car Park B exceeding the car parking threshold, the employer may have an FBT liability for car parking (subject to all other conditions being satisfied). However the $7.50 rate may be used when determining the lowest daily rate for the purposes of valuing the fringe benefits.

FBT Q&A – Payment of telephone bills of employees in remote locations

Question

We locate employees in remote locations, either permanently or on a living away from home basis. Due to the lack of mobile phone coverage, we require the employee to install a telephone land line in order that they can contact us and we can contact them. If we pay the employee's phone bill will FBT apply?

Answer

Paying the employee's phone bill will result in an expense payment fringe benefit arising.

The extent to how much FBT will be payable will depend on whether the taxable value can be reduced by way of the 'otherwise deductible' rule – refer TD 93/96.

The lack of mobile phone coverage is unfortunate, as it would seem, based on the facts provided, that if the employee's mobile phone costs were paid/reimbursed, FBT exemption would apply in accordance with section 58X of the *FBTAA*.

Insofar as land lines are concerned, the ATO will allow an 'otherwise deductible' claim for line rental where the employee was required to be on-call. Although your employees may not be on-call, it would seem reasonable to conclude that the requirement they be contactable is equivalent to the requirement for them to be on-call.

Phone calls that are work-related should also be considered 'otherwise deductible'. The following is an extract from the, now withdrawn, Miscellaneous Taxation Ruling MT 2021 insofar as establishing the business usage percentage:

> ***QUESTION***
>
> *Where an employer contributes a proportion of a telephone account, how can the business proportion of the expense be verified when the cost of individual calls cannot be verified by a subscriber without incurring substantial additional cost and inconvenience by making trunk calls? Is the employer required to verify business calls?*
>
> ***ANSWER***
>
> *To establish the business proportion of the expense, the employee is required to give the employer a declaration in a form approved by the Commissioner specifying what percentage of the expense would be deductible for income tax purposes. The percentage specified by the employee can be based on a reasonable estimate of the business component of the account. If the employee's estimate appears excessive to the employer having regard to the nature of the employee's duties, the employer should seek an explanation from the employee.*

It is noted that telephone service connection/re-connection fees are specifically exempted by section 58D of the *FBTAA* where an employee is living away from home or required to relocate for work purposes.

FBT Q&A – Car parking provided by employers subject to the s. 57A exemption

Question

We are a PBI and provide car parking on a no-charge basis to our employees. The parking is located on our premises and employees primarily drive to work and then home again - the car generally remains parked all day. There is a nearby commercial car park (500m away) that charges $10 a day for 'all day' parking. We understand the car parking threshold in 2017/18 is $8.66.

Answer

Prima facie all the requirements of a car parking fringe benefit appear to be met. However, it should be remembered that for a PBI employer (and, in fact, for all employers entitled to FBT exemption under s. 57A subject to the $30,000 or $17,000 caps) car parking is excluded from the calculation of the employers FBT liability.

As such, despite the fact that the conditions of a car parking fringe benefit are met there is no FBT payable regardless of whether an employee has exceeded the $30,000 or $17,000 cap.

Salary Sacrifice Q&A – Bonus paid as superannuation contribution

Question

We are seeking to get employees to enter into an Enterprise Bargaining Agreement.

To provide some encouragement, we are contemplating offering a cash bonus to employees who agree (payable if the employee agrees and once EBA is ratified) but would like to consider whether it may be possible for employees to instead to receive a one-off superannuation contribution. Is this possible?

Answer

Where the bonus is paid in cash, it could be expected to be salary and wages and subject to PAYGW and income tax in the hands of the employee.

It is possible for an employer and employee proactively to agree that any bonuses to be earned may be paid in the form of benefits (employer superannuation contributions) such that the ATO would accept the scenario as an effective salary packaging arrangement.

It is critical, however, such agreement is made before the employee has earned (become entitled to) the bonus.

The following extract from ATO ruling TR 2001/10 explains the significance of the fact that the agreement to salary sacrifice is in place before income (i.e. the bonus) is earned.

> ***SSAs that involve bonus entitlements***
>
> • *97. An entitlement to a bonus under an employee performance payment plan may be satisfied by the provision of salary or wages by the employer or the provision of other benefits. Bonuses under such plans that will be paid in the form of salary or wages, or for which the choice exists for payment to be made in such a form, may be the subject of an effective SSA, provided that an entitlement to be paid the bonus does not yet exist. An entitlement to be paid a bonus which is payable where certain conditions are met exists once those conditions are met. Where a bonus is discretionary, the decision to pay a bonus creates an entitlement to be paid salary or wages. In accordance with the position stated at paragraph 77 above, benefits provided in exchange for bonuses payable in the form of salary or wages under an effective SSA do not form part of the assessable income of the employee under section 6-5 or 6-10 of the ITAA 1997.*
>
> • *98. Once there is an entitlement to be paid a bonus, which under the employment contract is to be paid as salary or wages, then such an amount cannot be the subject of an effective SSA. That the bonus is not paid for a period of time may effect the time of derivation of income but does not affect its nature as assessable income. If the bonus is held in any reserve or account until released at the direction of the employee, it will be taken to have been received by the employee under subsection 6-5(4) of the ITAA 1997. Any provision of benefits in lieu of payment would be an ineffective SSA and the amount of the benefit would have the character of salary or wages.'*

GST Q&A – Whether sale of leased commercial property is a going concern

Question

We are selling a commercial property which is currently leased to a local fitness organisation. The property is being sold with the lease in place. Can you please confirm whether this sale can go ahead as Supply of a Going Concern, so that we can avoid GST?

Answer

Yes, where a commercial property is sold subject to lease, the sale of the property is capable of being treated as a GST-free supply of a going concern.

For a supply to be a GST-free supply of a going concern the following conditions need to be met (refer to s. 38-325 of the GST law):

- the supply is made for consideration;
- the recipient is registered or required to be GST-registered; and
- the supplier and recipient have agreed in writing that the supply is of a going concern.

The term 'supply of a going concern' is defined (in s. 38-325(2) of the GST law) as a supply under an arrangement under which:

- the supplier supplies to the recipient all of the things that are necessary for the continued operation of an enterprise; and
- the supplier carries on, or agrees to carry on, the enterprise until the day of the supply.

Therefore, a sale of real property which is subject to lease is capable of meeting the definition of 'supply of a going concern' provided that the lease remains in place at the time of settlement, and is therefore capable of being continued after that time. This is considered to be an enterprise of leasing.

Also refer to the ATO's public ruling on supplies of a going concern, GSTR 2002/5.