Tax Update Newsletter

March 2018

In this month's newsletter we take a look at some looming changes expected to happen in the tax world over the next couple of months, and discuss required preparations for such changes. And as usual, there's some interesting member Q&As worth checking out:

- Our **GST Feature article** discusses upcoming changes to the obligations of purchasers, expected to become operative from 1 July 2018.
- Single Touch Payroll (STP) reporting - are you ready? We take a look at who is effected, what payments need to be reported, and penalties that may be incurred.
- Eligibility: A timely reminder regarding obligations to lodge a 'taxable payments annual report' with the ATO.
- Q&A: An interesting member question regarding how GST applies to debt recovery costs.
- Q&A: Are personally accumulated frequent flyer points on business related purchases subject to FBT?
- And **lots more** in this month's content packed newsletter!

Webinar update
A reminder that the March monthly webinar has been **changed to Monday 16 April**, so don't forget to tune in to get a more detailed look into the articles covered in this newsletter, as well as ask any questions you may have.

FBT Training
Did you miss our FBT Roadshow? Not to worry - the webinar recordings are now available:

- Key FBT developments for Government and NFPs to be aware of in 2018
- Cars and Entertainment FBT issues for Government and NFPs

Finally, we are still running in-house FBT training sessions upon request, so if this is of interest to your organisation please contact us at admin@taxed.com.au or on 1300 607 478.

Happy reading.

Warmest regards,
The TaxEd Team

GST Article – Purchasers required to withhold and remit GST payable by vendors: the general operation of the proposed legislation

Purchasers need to be aware of their obligations to remit GST payable by vendors of land under proposed legislation which is currently before Parliament. Failure to do so will give rise to substantial penalties.

The legislation requires vendors to give certain notifications to purchasers. Vendors who fail to do so will incur substantial penalties.

Similar remittance and notification obligations are imposed on parties to long term leases – viz. a lease/licence for a term of at least 50 years. For convenience, this article focuses on sales of land rather than long term leases.

It should also be noted that remittance and notification obligations will apply to certain transfers of land which are made without consideration (e.g. supplies of land to which Div. 72 of the *GST Act* applies). For convenience, and as appears below, we include the persons receiving and making such transfers in our references to 'Purchaser' and 'Vendor' respectively.

The aim of the legislation is to ensure that the ATO receives payment of GST payable by Vendors of certain 'new residential premises' or certain 'potential residential land' (respectively within the meaning of the *GST Act*). In essence, the legislation seeks to prevent Vendors avoiding payment of GST on supplies of land where the Purchasers will not be able to claim input tax credits.

This article outlines the manner in which the withholding and notification obligations will apply to contracts made on and after 1 July 2018. In an accompanying article, we consider the manner in which the remittance and notification obligations will apply to contracts made prior to that date and where settlement occurs on or after that date.

Purchasers who must withhold and remit

Basically, where a person (Vendor) makes taxable supply (for GST purposes) of:

(a) new residential premises - other than those which are created through 'substantial renovations' (for GST purposes) of a building or which are 'commercial residential premises' (for GST purposes), or

(b) a block of 'potential residential land' which does not contain any building 'that is in use for a commercial purpose'

then:

the recipient of the supply (Purchaser) must pay an amount to the ATO.

The amount is discussed below. However, it is a statutory approximation of the GST which the Vendor is liable to pay in respect of the supply.

It will be recalled that the GST concept of 'potential residential land' is land which it is permissible (e.g. under town planning law) to use for residential purposes but does not contain any buildings that are residential premises (for GST purposes). As a note of caution - when dealing with vacant land in the context of a setting where both parties have a commercial/industrial/primary production focus in relation to its use, it may be easy to overlook the possibility that it may be technically permissible to use the land for residential purposes.

A block of 'potential residential land' may be either an appropriate broad acre lot on a property subdivisional plan or a more modest typical suburban-size lot - the size of the block is not relevant.

Note that the supply of land described in subparagraph (b) need not be the first sale of the block.

However, one entity may supply a block of potential residential land to another entity that is registered for GST and the latter is acquiring the block for a creditable purpose. In this case, the Purchaser is not required to remit an amount to the ATO.

Where the Purchaser has paid an amount to the ATO, the Vendor is entitled to a credit against the Vendor's GST liability for this amount. Note that the credit does arise unless the Purchaser has actually paid the amount to the ATO. Vendors need to ensure that the payment is actually made – it is not sufficient that the Purchaser has merely withheld an amount.

The amount to be paid to the ATO and when it is to be paid

The Usual Calculation Case

The usual calculation of the amount which the Purchaser has to pay to the ATO is discussed below. Two special cases are mentioned later.

The amount which the Purchaser has to pay to the ATO will be the prescribed fraction of the price which is specified in the contract (Contract Price) exclusive of normal settlement adjustments - i.e. the price stipulated in the contract and which will be adjusted on settlement for rates, land tax, body corporate charges etc.

Technically, the Vendor is liable to pay GST in relation to the specified price after it is increased/decreased for certain settlement adjustments. However, the amount payable by the Purchaser is calculated on the specified price only. The legislative concession is appropriate because the relevant adjustments may not be known at the time the Purchaser is obliged to make the payment.

Where there is not a Contract Price, the amount is calculated as the prescribed fraction of the amount which is the 'price for the supply' (for GST purposes). For instance, this situation arises where the consideration provided by the Purchaser is (or *semble* includes) a contra supply.

The prescribed fraction to be applied will depend on whether margin scheme applies to the supply of the land. If margin scheme applies, *prima facie* the fraction is 7%. However, this can be changed by legislative instrument. Where the margin scheme does not apply to the supply of the land, the fraction is $1/11^{th}$.

The Purchaser must pay the amount to the ATO on/before the day on which any of the consideration (other than consideration which is provided as a deposit) for the supply is first provided. In effect, a payment of first instalment of the consideration will trigger the Purchaser's obligation to pay the relevant amount to the ATO.

It appears that the whole of the relevant amount will be *prima facie* payable notwithstanding that the amount is more than the instalment. However, it is anticipated that the Commissioner will exercise a power conferred by the legislation to vary the date for payment, in order to enable the amount to be paid progressively so that the amount to be remitted is paid using sum(s) withheld from later instalments of consideration.

Technically, the legislation does not require an amount to be withheld but only imposes an obligation on the Purchaser to pay the requisite amount. However, the legislation enables withholding to occur by providing legislative protection (see s. 16-20 *TAA* Sched. 1) for Purchasers which do withhold the requisite amount from payments due to Vendors and remit that amount to the Commissioner of

Taxation. As in practice, Purchasers will withhold and remit the requisite amount, this article uses the term 'withholding amount" when referring to the amount to be remitted to the ATO and to the remittance obligation as a 'withholding obligation'. However, failure to withhold does not relieve the Purchaser of the obligation to remit.

Two Special Calculation Cases

In two special cases, the foregoing calculation and payment process is varied.

Special Case	Calculation of Withholding Amount	Time of Payment
Vendor makes a taxable supply to which Div. 72 of the *GST Act* applies - viz. a supply to a Purchaser which is an associate of the Vendor and is made either without consideration or for consideration below the 'GST inclusive market value' (for GST purposes) of the land.	10% of the 'GST exclusive market value' (within the meaning of the *GST Act*) of the supply.	Subject to the Commissioner's power of variation: • where the Vendor is transferring the land to an associate (i.e. the Purchaser) without consideration – the time the supply is made. • otherwise – the time of the first instalment (not being a deposit) is made, as per the Usual Calculation Case.
The Vendor makes: (a) multiple different supplies under a single agreement, with only one/some of which is/are a supply in respect of which the Purchaser has a withholding obligation; or (b) a composite supply which includes a taxable supply in respect of which the Purchaser has a withholding obligation.	Where it is possible to ascertain the amount (the 'reduced amount') which is attributable to the supply to which the withholding obligation applies, the purchaser has only to withhold the prescribed fraction of the reduced amount. Where it is not possible to ascertain the reduced amount at the time any consideration (not being a deposit) is first provided, the Purchaser must remit the prescribed fraction of the whole of the price.	As per the Usual Calculation Case.

While readers need to recognize the special cases exist so that timely detailed advice can be sought, they are not discussed in detail.

However, Vendors should recognise the second special case provides an incentive to assign a proportion of the price to the supply to which the withholding obligation applies. Failure to do so will result in a larger amount being withheld and an associated cash-flow disadvantage.

The Vendor's Obligation to notify

The legislation aims to reduce the compliance burden on Purchasers by requiring Vendors to give timely written notification of certain matters to Purchasers.

Key points for Vendors are:

(a) Subject to exceptions mentioned in points (b) and (c), the notification must be given in respect of supplies 'by way of sale or long term lease' of all residential premises (not merely supplies of new residential premises) and in respect of supplies of potential residential land. It is presently considered that the requirement for a supply being 'by way of sale' does not avoid the need to give a notice in respect of supplies for which consideration is not given and which, being made to associates, are taxable supplies under Div. 72.

(b) Notice is not required in relation to the supply of commercial residential premises.

(c) Notice is not required in relation to the supply of potential residential land where the Purchaser is registered for GST and is acquiring the land for a creditable purpose.

(d) The notice must state whether the Purchaser is required to pay an amount to the ATO in pursuance of the legislation. For example, a notice must be given in respect of the supply of existing residential premises (in contradistinction to new residential premises) and this would be a case in which the notice would state a payment is not required – the input taxed supply of existing residential premises does not trigger a payment obligation for the Purchaser.

(e) Very important practically, the notice must inform the Purchaser of (i) the amount the Purchaser is required to pay in respect the supply; (ii) when the amount is payable – either specifying the relevant date or more generally describing the time of payment such as 'time of settlement', *etc.*; (iii) the GST inclusive market value of so much of the consideration as is not expressed as an amount of money; and (iv) the Vendor's name and ABN. Regulations may prescribe other matters to be included in the notice.

(f) The notice must be 'given before making the supply'.

(g) Failure to give the notice is a strict liability offence (i.e. absence of fault is not relevant, apart from an honest mistake of fact) carrying a maximum of 100 penalty units (i.e. $21,000 - being currently $210 per penalty unit, with corporations liable to a maximum penalty of up to 5 times this amount). A failure to give the notice would include an omission to make one or more of the required representations or inaccuracy in making any of those representations.

(h) An offence is committed, even though the failure to give the notice occurs in respect of a supply (see point (a)) that does not give rise to a withholding obligation for the Purchaser.

(i) The failure to give the notice also constitutes an administrative penalty carrying 100 penalty units. The tax legislation contains provisions which prevent both the administrative penalty and a penalty for the offence being imposed. There are limited circumstances relieving a Vendor from the administrative penalty.

(j) Vendors may like to consider including the required notifications in contracts of sale to ensure they fulfil their notification obligations.

Several practical issues arise out of the foregoing.

Firstly, in relation to point (c), Vendors will need to ascertain whether the Purchaser is acquiring the land for a creditable purpose and, if so should consider seeking contractual confirmation of this and an appropriate contractual indemnity where the Vendor relies on inaccurate information supplied by the Purchaser.

Secondly, in relation to point (d), a similar issue arises. It was noted earlier that a Purchaser is not required to remit the requisite amount to the ATO where the Purchaser is acquiring potential residential land and the Purchaser is entitled to an input tax credit in relation to the acquisition.

A third issue is the requirement that the notice must be given before the supply is made. In the normal case of a sale of land under a standard contract, this is usually recognized as occurring (for GST purposes) at the time of settlement and it is anticipated a corresponding view of time of supply would apply for withholding purposes. In so far as the Purchaser is required to make the requisite payment to the ATO before the time of supply of the land, a Purchaser may want to consider a contractual term requiring the Vendor to provide the notice in a more timely manner. It is suggested below that the contract of sale might be structured to provide the requisite notice.

In connection with the Vendor's notification obligations, key points for Purchasers are:

- The Vendor's failure to provide the notice does not relieve the Purchaser of the obligation to pay the requisite withholding amount to the ATO.
- Where a Purchaser has not received the required written notice from the Vendor, the Purchaser will be able to obtain the protection of s. 16-20(1) *TAA* Sch. 1. Under this provision, the Purchaser's payment of an amount (as required by the legislation) to the Commissioner of Taxation discharges the Purchaser's liability to pay that amount to any entity other than the Commissioner.
- Where the Purchaser fails to pay the requisite withholding amount to the ATO in relation to new residential premises because (i) the Vendor has given a notice wrongly stating the premises were not new residential premises or wrongly stating a withholding payment is not required, and (ii) it was not unreasonable for the Purchaser to believe the notice was correct, then such circumstances are a defence to the failure to pay.

Example

The foregoing discussion is illustrated in the following example which is drawn from the Explanatory Memorandum in relation to the proposed legislation. The second part of the example in relation to use of a bank cheque anticipates the comments under the next heading.

Example — Withholding at settlement

Purchaser pays amount to the ATO

On 3 December 2018, Rick enters into a contract for the purchase of a new apartment from MortimerHomeCo for $700,000. The margin scheme does not apply to the sale.

The contract of sale included the required notice providing relevant details to enable Rick to withhold and remit the correct amount to the ATO at settlement. MortimerHomeCo advises Rick that he will be required to make a payment of $63,636, which is $^{1}/_{11}^{th}$ of the contract price of $700,000, on or before the day of settlement.

Settlement occurs on 6 June 2019. Rick's conveyancer makes a payment to the ATO at settlement of $63,636 (being the GST component of the purchase), and notifies the ATO of a payment of the withholding amount.

Because Rick has paid $63,636 to the ATO, he does not have to provide this amount to MortimerHomeCo, even though the contract price states that the consideration includes the $63,636.

MortimerHomeCo receives a credit for this amount in its June BAS, and does not then have to make a payment of the amount when paying its net amount for the tax period ending 30 June.

Payment by bank cheque at settlement

Assume that Rick's conveyancer does not make a payment to the ATO directly, and instead provides a bank cheque made out to the ATO to MortimerHomeCo for $63,636.

Rick is protected from penalties if MortimerHomeCo does not provide this amount to the ATO as the bank cheque

Example — Withholding at settlement
for the required amount has been provided at settlement and his conveyancer keeps a record of that exchange. MortimerHomeCo forwards the cheque to the ATO on the same day. When the cheque is received by the ATO, MortimerHomeCo gets a credit for this amount in its June BAS and does not then have to make a payment of the amount when paying its net amount for the period. *Examples 5.3 and 5.5 of the Explanatory Memorandum*

Penalties for failing to withhold and GIC

If the Purchaser fails to pay the requisite amount to the ATO, the Commissioner can impose an administrative penalty equal to the amount that should have been paid – s. 16-30 *TAA* Sch. 1.

However, as noted above – where the Purchaser fails to pay the requisite withholding amount to the ATO in relation to new residential premises because (i) the Vendor has given a notice wrongly stating the premises were not new residential premises or wrongly stating a withholding payment is not required, and (ii) it was not unreasonable for the Purchaser to believe the notice was correct, then such circumstances are a defence to the failure to pay.

Where, on or before the day on which payment is required, the Purchaser provides the Vendor with a bank cheque which is payable to the Commissioner and in the requisite withholding amount then (notwithstanding the Vendor does not deliver the cheque to the Commissioner) the provision of the bank cheque is a defence – see proposed s. 16-30(3) *TAA* Sch. 1.

Where the Purchaser fails to pay the requisite withholding amount to the ATO at the required time, the Purchaser will incur GIC (i.e. general interest charge) liability.

Purchaser to notify ATO of withholding/remittance

As noted in the earlier example, the Purchaser is obliged to notify the ATO of the withholding/ remittance of the requisite amount.

Under the proposed legislation (see proposed amendments to s. 16-150 TAA Sch. 1), notification is to be given in the 'approved form' and is to be given:

- on or before the day specified in a legislative determination which is issued by the Commissioner; and
- in the absence of such legislative determination, on or before the day on which the amount is due to be paid (regardless of whether it is paid).

Note that the notice must be given irrespective of whether payment is made.

Apart from the use of bank cheques as noted under the preceding heading, payments are to be made (s. 16-85 TAA Sched. 1) in accordance with the Purchaser's general withholding payment obligations, namely:

- in the case of large withholders (for general tax administration purposes) – electronic payment; and
- in the case of medium and small withholders (for general tax administration purposes) – electronic payment or other means approved in writing by the Commissioner.

Technical Information

The proposed legislation is contained in Schedule 5 of the Treasury Laws Amendment (2018 Measures No. 1) Bill 2018.

There is an Explanatory Memorandum in relation to the Bill.

Conclusion

Having regard to the profile of our readers' organizations, we anticipate that purchase, sale or transfer of new residential premises would be relatively rare. However, purchases of blocks of potential residential land would be a common occurrence. As a result, the exception to the withholding obligation arising where a Purchaser is registered for GST and is acquiring the block for a creditable purpose is likely to be a relevant factor in many but not all circumstances in which the organizations are Purchasers.

Looking at the legislation from the reciprocal perspective of selling/transferring land, the breadth of the circumstances in which Vendors must give a notice is likely to make the notification obligation a matter which our readers will need to keep to the forefront of their minds.

As a practical matter, it suggested that both Vendors and Purchasers should strive to ensure the contract of sale contains the written notification which the Vendor is required to provide to the Purchaser. This is especially pertinent to instalment contracts, as it presently appears the statutory obligation to provide the written notice prior to settlement does not ensure that the notice will be received by the Purchaser before the time at which the remittance must be made (vis. at the time the first instalment (exclusive of the deposit) is payable).

Where there is a land transfer to which Div. 72 of the *GST Act* applies, the transferor (i.e. Vendor) and the transferee (i.e. Purchaser) should ensure that the requisite notice is provided in a timely way. Indeed, a gratuitous transfer of relevant land to an associate now comes at a 'cost' of the transferee having to make a cash payment to the ATO and the parties to the transfer may want to consider whether there should be an arrangement for a monetary adjustment between themselves.

Readers also need to consider the proposed legislation when contemplating granting or taking a long term lease of land.

Readers can anticipate an ATO publicity campaign alerting legal professionals and real estate agents to the operation of the proposed legislation once it becomes law. However, readers should proactively raise the application of the legislation with their legal and accounting/financial advisers when consulting them in relation to any sale/purchase/transfer of land or grant/taking of a long term lease and obtain detailed specific advice.

GST Article – Purchasers required to withhold and remit GST payable by vendors – the transitional operation of the proposed legislation

In an accompanying article, we have looked at:

- the obligations of purchasers and transferees of land to which Div. 72 of the *GST Act* (a 'Purchaser'); and
- the obligations of vendors and transferors of land to which Div 72 of the *GST Act* (a 'Vendor')

to withhold and remit to the Australian Taxation Office, GST payable by the Vendors in relation to the supply of certain land to the Purchaser. The obligations are set out in legislation currently before Parliament and, basically, relate to land that is 'new residential premises' or 'potential residential land'. It is expected that the obligations will be enacted and come into effect from 1 July 2018.

The obligations will also apply to parties entering into long term leases (i.e. leases for 50 years or more).

This article assumes that reader has read the accompanying article.

The accompanying article considered the general operation of the legislation – in short, it deals with the manner in which the proposed legislation will apply to a transaction. This article recognises that some transactions will involve contracts made prior to 1 July 2018 and are settled (or in the case of long term leases, entered into pursuant to earlier contracts) on or after that date.

The default position

Subject to the transitional provisions below, the Purchaser's withholding obligation and the Vendor's notification obligation will apply in relation to supplies for which any of the consideration is first provided (other than consideration provided as a deposit) on or after **1 July 2018**, whether or not the supply was entered into before, on or after the commencement of the Bill comprising the proposed legislation.

Transitional arrangements for pre-existing contracts

There are two classes of pre-existing contracts. The two classes and their treatment are:

(a) contracts entered into prior to 1 July 2018 **and** where the consideration for the supply is first provided before 1 July 2020 – the obligation of the Purchaser to withhold and remit and the obligation of the Vendor to give notice do not apply to these contracts; and

(b) contracts entered into prior 1 July 2018 **and** where the consideration for the supply is first provided on or after 1 July 2020 – the Purchaser is required to withhold and remit the requisite amount to the ATO and the Vendor is required to give the relevant notice to the Purchaser.

Example — Supply subject to transitional rule
Jamie enters into a contract with Hal Developments on 22 June 2018 to purchase a new apartment for $750,000. Settlement for the property takes place on 15 March 2020, and no consideration is provided before that date. As settlement takes place before 1 July 2020, Hal is not required to notify Jamie of the withholding requirement, nor is Jamie required to withhold. Hal Developments must remit any GST payable as a result of the supply to the ATO on its next BAS. If settlement were delayed by six months, and the premises settled on 15 September 2020, Hal would be required to provide a notice to Jamie, indicating that a withholding obligation applies in relation to the property. Jamie would satisfy the withholding obligation by providing a bank cheque for the amount of the withholding payment to Hal at settlement, which Hal's solicitor would then provide to the ATO. *Source: Examples 5.8 and 5.9 of the draft Explanatory Material*

Further Transitional arrangements – special provision for certain existing property development agreements

A transitional rule will also be available for existing property development agreements which have an agreed distribution or 'waterfall' payment arrangement.

> Note:
>
> Under waterfall payment arrangements, funds are distributed on the basis that a party will use those funds to discharge their GST liability to the Commissioner. However, as a result of the proposed withholding obligation, it will not be necessary to make such a distribution (because the Purchaser has already withheld GST from the Vendor). In that case, if the existing distribution arrangement is in place, the arrangement may provide for the party to whom the distribution would be made to obtain a windfall gain.

Broadly, transitional relief will be provided for an arrangement that was entered into before 1 July 2018, if the following four application conditions are met:

1. The arrangement — which also deals with the distribution between the parties to the arrangement — must have been entered into before 1 July 2018 between an entity making a taxable supply to which the proposed legislation applies and one or more entities, at least one of which is supplying (or is to supply) development services in relation to the real property.
2. In relation to the distribution of the consideration: (i) an amount must be required to be distributed to the supplier for the payment of the supplier's liability to GST for the taxable supply, which is to take into account any relevant entitlement to ITCs; or (ii) distributions of the consideration, between the parties, must be adjusted to take into account the supplier's GST liability.
3. The distributions under the arrangement, assuming that an amount has been withheld, would not leave the parties in the same position as they would have been in if there was no withholding obligation.
4. A withholding payment (i.e. a withholding amount has been paid) has been made in relation to the taxable supply.

Example — Supply subject to the further transitional rule

Hamilton Enterprises owns a large parcel of land that they intend to develop into a multi-staged residential village, consisting of houses, townhouses and high-rise apartments. Hamilton wants to retain control over the land.

On 1 July 2015, Hamilton enters into a PDA with William Developments that outlines the development process and how the money from each of the sales of new properties would be distributed between Hamilton and William. **(Condition 1)**

The arrangement provides for 20 per cent of the purchase price to be distributed to Hamilton from the trust account as a priority. The balance of the amount is to be distributed to William as a fee for its development services. The distribution between the parties is set in a way that takes into account Hamilton's GST liability. **(Condition 2)**

If the withholding obligation did not apply, and someone purchased a new apartment from Hamilton for $1.1 million Hamilton would receive $220,000 and William would receive $880,000 under the distribution. In this scenario, Hamilton will have a GST liability of $100,000 and William will have a liability of $80,000 for the supply of development services. Hamilton will be eligible to claim an input tax credit of $800,000 so that its net GST liability is $20,000.

After GST has been paid, Hamilton receives a net $200,000 and William receives a net $800,000. The total GST paid to the ATO is $100,000.

If withholding did apply, and a purchaser paid $1,000,000 into the trust account held on behalf of Hamilton and William, the distribution without any modification would be $220,000 (20 per cent of the purchase price) and $780,000 respectively.

Hamilton is also entitled to a $100,000 credit, so is not in the same position as it would have been in had the withholding measure not applied. Similarly, William has received $100,000 less from the distribution, and is also not in the same position. Accordingly, it is necessary to apply the transitional relief where a withholding payment is made. **(Condition 3)**

Jade buys a new apartment from Hamilton for $1.1 million, inclusive of GST. Jade pays $1.0 million of the purchase price into the trust account held on behalf of Hamilton and William. Jade pays $100,000 to the ATO as a withholding payment. **(Condition 4)**

Because Jade has made a payment to the ATO, when amounts are being distributed from the trust account Hamilton is taken to have been distributed the amount of the payment. This means that Hamilton will only receive a further $120,000 as a distribution, and William will receive $880,000.

Hamilton will have a GST liability of $100,000 on the supply of the property and William will have a GST liability of $80,000 for its development services. Hamilton will be eligible to claim an input tax credit of $80,000 so that its net GST liability is $20,000. Hamilton receives a $100,000 credit for the withholding payment, which entitles it to an $80,000 refund from the ATO when it lodges its BAS.

At the end, William receives $800,000, Hamilton receives $200,000 and the ATO is paid $100,000. This places the parties in the position they would have been in had the withholding obligation not applied.

Source: Example 5.10 of draft Explanatory Material

GST Article – Payments between Clubs and Councils

Transactions involving Clubs (e.g. local sporting clubs) and Councils are relatively common, usually due to the Clubs being allowed to use Council property (e.g. sporting fields) and/or buildings. Such situations may mirror typical commercial transactions, but often they do not.

Scenario

In this article we explore some of the GST issues that arise in a scenario where:

- Council owns a building which is being used by a Club;
- the Club would like some improvements made to the building;
- Council pays for the improvements which total $77,000 (including GST);
- the Club is not registered for GST;
- Council is GST-registered; and
- the Club has agreed to pay council a contribution/reimbursement of $70,000.

The specific issue to be addressed by Council is whether to invoice the Club $70,000 (including GST) or to invoice them for $70,000 without GST.

As if often the case, the GST outcome depends on the specific facts and circumstances of each transaction and these may be able to be determined based on any written (or verbal agreements) entered into between the parties. However, it may also depend on the conduct of the relevant parties, or how the transaction is undertaken.

Based on the above facts, it appears that Council has agreed to do some works to the property that Council owns, but is also seeking a contribution from the Club.

If we assume that Council contracts directly with the builder to carry out the works, and pays the builder $77,000 (including GST), then Council would claim a $7,000 GST credit (provided Council holds a tax invoice). The net cost to Council would be $70,000.

Analysis

The GST treatment between Council and the Club depends on the arrangement/conditions. As the Club is making a payment to Council, the question is whether Council is making a taxable supply to the Club in return for that payment. For there to be a taxable supply (by Council) there needs to be sufficient nexus between any supply made and the consideration or payment.

On the face of it, it is difficult to see that Council is making any supply to the Club, as the contribution paid by the Club does not entitle them to any special rights in relation to the use of the facilities (they already are allowed to use them). Mere access to upgraded building is unlikely to be seen as a material benefit to the Club, and on the face of it, it seems that the contributions are voluntary. Therefore, on the basis of the facts provided, it seems unlikely that the contribution from the Club would amount to consideration for a supply, and hence be taxable.

However, the position would be different if there is a contract in place between Council and the Club, which states that the Club has requested the works and Council has agreed to construct it PROVIDED the Clubs make the agreed contribution. The difference is subtle, but the fact that the works are being done pursuant to a request from the Club, and are provided on condition that the Club make the contribution appears to establish the necessary connection between the supply (the building works) and

the consideration (the contribution from the Club). In these circumstances Council would be making a taxable supply to the Club and the contributions would attract GST.

In these circumstances, and on the basis of there being sufficient nexus between a supply and the payment, Council would be making a taxable supply to the Club and the contribution would attract GST. Therefore, if the Council issues an invoice of $70,000 to the Club, Council will have a GST liability of $6,363 (being 1/11th of $70,000). The result is that Council would be out of pocket by $6,363 (that is, Council has paid the builder $70,000 net of GST and has only recouped $63,636 from the Club).

If Council is making a taxable supply, Council would need to invoice the Club $77,000 inclusive of GST. Council would have a GST liability of $7,000 and the net result for Council would be neutral.

If Council is not making a taxable supply, then commercially Council would invoice $70,000, and the net result for Council would be neutral.

FBT Article – FBT rates and thresholds for 2018-19 FBT year

The Commissioner of Taxation has issued tax determinations setting various rates and thresholds for the 2018-19 FBT year.

In summary these are:

- **Non-remote housing** - The indexation factors for the purpose of valuing non-remote housing for the fringe benefits tax year commencing 1 April 2018 are: NSW - 1.024; Vic. - 1.018; Qld - 0.999; SA - 1.004; WA - 0.924; Tas. - 1.040; NT - 0.932; ACT - 1.016 – See **TD 2018/1** and refer s. 28 *FBTAA*.
- **Benchmark interest rate** – 5.20% (replaces the rate of 5.25% that applied in FBT year commencing 1 April 2017) – See **TD 2018/2.**
- **Reasonable amount for Food and Drink** - Weekly amounts (for locations in Australia) that the Commissioner considers reasonable under s. 31G *FBTAA* for food and drink expenses incurred by employees receiving a living-away-from-home-allowance fringe benefit: 1 adult - $265; 2 adults - $398; 3 adults - $531; 1 adult and 1 child - $332; 2 adults and 1 child - $465; 2 adults and 2 children - $532; 2 adults and 3 children - $599; 3 adults and 1 child - $598; 3 adults and 2 children - $665; 4 adults - $664. For larger family groupings, add $133 per additional adult and $67 per additional child. ('Adult' – person who has attained the age of 12 years before the beginning of the FBT year.) – See **TD 2018/3.** (Note: TD 2018/3 also contains tables that can be used to determine reasonable amounts for food and drink expenses incurred by employees whilst outside Australia and receiving a living-away-from-home allowance)
- **Private use of a motor vehicle other than a car** - Rates to be applied on a cents per km basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car: Engine capacity 0- 2500cc – 54 cents; Engine capacity over 2500cc – 65 cents; and Motorcycles – 16 cents – See **TD 2018/4**.
- **Exemption threshold for purposes of s. 135C *FBTAA*** - $8,552 (replaces the amount of $8,393 that applied in the year commencing 1 April 2017) – See **TD 2018/5**.

Payroll Article – Single Touch Payroll Reporting: Are you ready?

Single Touch Payroll (STP) reporting was introduced in December 2014 as part of the Government –wide Digital by Default program and is intended to streamline employer's payroll reporting. It is also expected to improve the ATO's ability to monitor pay-as-you-go withholding (PAYGW) and superannuation guarantee (SG) compliance activities

Information reported through the STP will:

- be used to pre-fill an employee's tax returns and certain labels in an employer's business activity statement (BAS);
- be displayed in the Tax Agent, BAS Agent, and Business Portals; and
- allow for the sharing of data with other Commonwealth agencies.

Who is affected/STP reporting timeline

From 1 July 2018, employers with 20 or more employees ('substantial employers') will be required to report electronically, using STP enabled software, certain payroll information to the ATO at each payday.

> Note:
>
> Whilst employers generally make payments to employees on a regular payment cycle, there may be some circumstances when employers make irregular or *ad hoc* payments, such as employment termination payments (ETP life benefit). If the ETP life benefit payment is not made as part of a substantial employer's regular pay cycle, the employer may report it as an out-of-cycle-payment (i.e. on the day the payment is made) or include it in their next regular pay event report.

The reportable payroll information is discussed below.

Superannuation contributions will also need to be reported by means of such software to the ATO at the time the contributions are paid.

If an employer is part of a wholly-owned company group, the employer must include the total number of employees employed by all member companies of that wholly-owned group.

In relation to employers with 19 or less employees, the Government intends that from 1 July 2019 all employers should adopt STP reporting. This is subject to the relevant legislation (vis. *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*) being enacted.

When do employers do a head count

Employers will need to undertake a head count of the number of employees on their payroll on 1 April 2018. A head count is required - it is not a case of calculating the number of full time equivalent employees.

Once an employer is a substantial employer, the employer will be required to report under the STP even if the number of employees drops below 20, unless the employer applies for and is granted an exemption.

If an employer becomes a substantial employer at any time after 1 April 2018, the employer will be required to report under the STP at the next pay cycle and/or when SG contribution are paid.

Employers who have not, at any time on or after 1 April 2018, been a substantial employer can choose to report under the STP.

Note that STP rules do not override an employer's obligation to withhold or to provide for SG. If an employer is subject to the PAYGW system for the first time on or after 1 July 2018, it must still register for PAYGW before it can lodge STP reports under the STP-enabled software.

Head count inclusions and exclusions

The following employees are included in the headcount:

- full-time employees;
- part-time employees;
- casual employees who are on the employer's/group's payroll on 1 April and worked any time during March;
- employees based overseas;
- any employee absent or on leave (paid or unpaid);
- seasonal employees who are on the employer's/group payroll on 1 April and worked any time during March unless both of the conditions described below apply.

The conditions mentioned in the last dot point are:

(i) the employer had fewer than 20 employees for at least 10 months out of the preceding 12 months (i.e., from 1 June 2017 to 1 April 2018); and

(ii) The employer reasonably expects to have fewer than 20 employees for at least 10 months out of the 12 months immediately after 1 April 2018.

If an employer is part of a wholly-owned company group, the group will need to satisfy these conditions before the exemption for seasonal workers apply. Although the relevant employer is not required to apply or notify the ATO for seasonal workers exemption, a record of the decisions should be kept.

The following employees are excluded:

- any employees who ceased work before 1 April 2018;
- casual employees who did not work in March 2018;
- independent contractors;
- staff provided by a third-party labour hire organisation;
- company directors;
- office holders; and
- religious practitioners.

The Need to upgrade Payroll software

Substantial employers will need to upgrade their existing payroll software or acquire compatible software to fulfil their STP reporting obligations. Under STP reporting, reports must be lodged in the approved form and this contemplates lodgement using STP-enabled software. Reports lodged in a different manner will constitute a failure to lodge in the approved form.

However, the ATO has announced that it will grant deferral for eligible software providers who may not be completely STP ready, by way of issuing a deferral reference number ('DRN'). Employers who are covered by a DRN will not be required individually to apply to the ATO for a deferral.

Eligible software providers who have been granted a DRN are required to communicate that number to their employer customers. The ATO has indicted that it will provide information on its website for employers to validate the deferral date if they received an ATO initiated DRN from their software provider.

For those employers who are not covered by a DRN, they or their registered tax agents may also request deferral in certain situations. Employers can apply for a deferral using the online *STP – employer deferral request* (NAT 74985) – available on the ATO website under 'Employer deferrals'.

Employers who are not substantial employers and choose to voluntarily report under the STP may do so by lodging their first report via the STP-enabled software. This will constitute notification to the ATO that the employer has entered the STP system.

Payments that need to be reported through the STP

For STP purposes, there are a number of withholding payments that must be reported. Mandatory reportable payments are generally paid through the payroll process and include salary and wages, directors' remuneration, termination payment (ETP life benefit), annual leave, *etc.*

There is a second category of payments which may be voluntarily reported through STP. These include payments covered by a voluntary agreement, payments under labour hire arrangements, termination payment (ETP death benefit) *etc*.

A third category of payments that cannot be so reported. These broadly include payments that are generally not paid through the payroll process or payments made to recipients who are not employees of the payer. Payments made through payroll software that are not withholding payments (e.g. partnership distributions, payments to suppliers etc.) cannot be included in STP.

Further details of the above payment categories (and the implications of reporting these through STP) are outlined on the ATO website: What-you-need-to-report-through-STP.

In addition, superannuation contributions will also be reported electronically under the STP at the time the contributions are paid.

As a practical matter, it should be noted that the ATO will compare the superannuation amounts reported with information received from superannuation funds and where there is a significant variance the ATO will contact the employer. However, STP does not override the associated penalty regime. The SG charge will continue if employers do not meet their SG obligations. If an employer does not meet its PAYGW and SG obligations, the ATO may still ultimately recover these amounts from directors.

Penalties and Errors

The ATO has indicated that during the first 12 months, employers will be exempt from an administrative penalty for failing to report on time, unless the employer has been advised by ATO (by way of a written notice) that a failure to report on time in the future may attract a penalty.

The STP legislation does not contain any provisions regarding how and when an error should be corrected. The ATO website states a grace period will be given to employers to correct errors made on their STP report without being liable for a penalty. For example, where an employee's YTD information last reported does not reflect the information in the payroll system, the employer should submit the latest information by the earlier of 14 days after the error is identified, or the next pay event for the employee (e.g. monthly pay cycle).

Where the amounts that the ATO has pre-filled at certain labels of an employer's BAS do not reflect the employer's payroll records for that activity statement period, the employer will need to correct those amounts when it complete its BAS. Regardless of any grace period, all corrections are required to be made by 14 July after the end of the income year, otherwise penalties will apply.

What will change?

Employees will be able to view their payment information in ATO online services, which they will access through their myGov account.

Employers will be exempt from giving payment summaries, provided they have made and lodged a finalisation declaration form as part of their STP reporting for each employee for which payment summaries exemption is sought. This declaration form can be lodged at any time during the financial year or up to 14 July after the end of the income year. As a practical matter, employers should consider alerting/reminding their employees to the changed end of financial year process where a payment summary will no longer be provided.

However, the ATO has indicated that additional time will be provided for employers to make a finalisation declaration for a particular employee in their first year of STP reporting as follows:

- Employers who start reporting in the 2018 financial year will have until 14 August 2018.
- Employers who start reporting in the 2019 financial year will have until 31 July 2019.

Conclusion

The ATO has published an STP Checklist - Single Touch Payroll Checklist.pdf.

Currently, STP is relevant only for Commonwealth employer obligations (i.e., PAYGW and SG contributions). The STP rules do not have any relevance to State-based employer obligations (e.g. payroll tax or workers compensation). Accordingly, whether an employer reports to the ATO under the STP will not affect their State-based payroll tax/workcover obligations. The STP also has no effect on an employer's existing obligation to report SG contributions under SuperStream. Employers are still required to provide standard choice form to employees within 28 days of the employee commencing employment.

Eligibility Article – 'Taxable payments' annual reporting for Government entities: a timely reminder

Government entities of all levels (federal, state or local) need to be aware of their upcoming obligation to lodge a 'taxable payments annual report' with the ATO for the year ending 30 June 2018.

In essence, the legislation requires affected Government entities to report annually to the ATO payments made during the year that are wholly or predominantly for services. Such entities (apart from local governing bodies) are also required to report grants paid to people or organisations that have an Australian Business Number (ABN).

This article outlines which Government entities are affected by the taxable payments annual reporting regime, directs attention to payments that are not reportable, and summarises the information that they are required to report.

Background

In the 2013 income year, obligations were introduced for the Building and Construction industry to report payments made to contractors to combat a general deficiency in reporting by contractors.

Similar obligations have been introduced with effect from 1 July 2017 for Government entities in relation to payments made for services and for grants to persons and organisations with ABNs.

The purpose of these reporting obligations is to improve the ATO's data gathering, matching and review processes to help combat under-reporting and omission of income by recipients of such payments, rather than to combat any non-compliance by affected Government entities.

Who is affected?

Under these provisions 'government related entities' (within the meaning of s. 195-1 of the *GST Act*) that have not been specifically excluded (refer below) are required to lodge a taxable payments annual report each year (the first year being the year ended 30 June 2018). Such entities include:

(a) Federal government departments;

(b) Executive or statutory agencies (for purposes of the Commonwealth *Public Service Act 1999*);

(c) State or territory government departments and agencies;

(d) Statutory authorities;

(e) Local governing bodies established by or under state or territory law;

(f) Government-owned corporations.

Most organisations will be aware of their 'Government related entity' status.

However, some of the organisations included in one category (set out in para (e) of the definition of 'Government entity' in s. 41 *ABN Act*) may readily be overlooked. A part/section of certain Government entities or a unit/section that is a joint operation of two/more of certain Government entities may be a 'government entity' in its own right and have a reporting obligation separate from its parent body/bodies. More particularly, a part/section/unit that is not an 'entity', but has its own ABN, should especially consider its potential reporting obligations.

The similarity of the terms 'Government related entities' and 'Government entities' may be confusing. 'Government related entities' are defined in the GST Act as including 'Government entities', with the latter being defined in the ABN Act.

Who is excluded?

Certain government related entities that are not departments of the Commonwealth, a State or a Territory, have been specifically excluded by the Commissioner (via legislative instrument) from the requirement to report under this regime. The list is comprehensive and the detail is beyond the scope of this article. However, some examples that are anticipated to especially interest our readers include:

- Providers of education courses within the meaning of the *GST Act* (essentially schools, universities and TAFEs);
- Hospitals and providers of medical services (as defined in the *GST Act*);
- Certain child care providers;
- Water catchment authorities, catchment councils or natural resource management boards;
- Cemeteries;
- Certain child care providers;
- Community associations, including parents and friends associations;
- Trustees of trusts, or managers of funds, established for the public benefit or in the public interest;
- Community-based volunteer emergency services;
- Entertainment, recreation or sporting venues (including showgrounds and stadiums); and
- Aboriginal Land Councils.

Note that where a non-exempt government entity makes payments on behalf of an exempt government entity, the non-exempt government entity is still required to report the payment in its 'taxable payments annual report'. For example, if a school engages a contractor to re-surface its playing field, but the payment is made by an education department, the education department is required to report the payment, notwithstanding the school is contractually liable to make the payment.

What are the reporting requirements?

Under the requirements, Government entities of all levels are required to report payments made wholly or partly for services, including payments made to overseas suppliers and overseas governments.

Where payments are partly for goods and partly for services, the full amount of the payment is to be reported, unless the supply of services is merely incidental to the supply of goods. If a service is provided incidental to the provision of goods (e.g. a small delivery service fee is charged as a separate line item where goods are supplied), it is not necessary to report the fee for the provision of the incidental service.

In addition, federal and state or territory Government entities (but not local governing bodies) are also required to report grants (whether subsidies, rebates, sponsorships or similar arrangements) paid to people or organisations (including not-for-profit organisations) that have an ABN. For example, grants paid to primary school children will not be reportable. By contrast, a grant paid to a parent organization that has an ABN would generally (e.g. assuming the grant is not an excluded payment, as to which see below) be reportable.

Only payments and grants actually made in a particular income year are included in the report for that income year – i.e. reporting is on a cash basis, not on an accruals basis. This is regardless of when the service is actually provided.

Excluded payments

In relation to payments made for services and grants, the Commissioner (via legislative instrument) has excluded a number of payment/grant types from being reported. The list is comprehensive and its full detail is beyond the scope of this article. However, some examples which are especially anticipated to interest readers include:

- certain electronic payments (refer below):
- payments or grants made to other government related entities;
- payments for utilities such as electricity, gas, water, sewerage, telephone and internet services;
- payments for accommodation in commercial premises or in a hotel, motel, inn, hostel, boardinghouse, caravan park or camping ground;
- payments for leases of goods (for GST purposes); and
- payments for transportation of employees.

The exclusion for electronic payments is specific and needs to be considered carefully. On one hand, payments for services made to (i) a BPAY biller, (ii) by debit card/credit card (through a merchant acquiring system), (iii) by recurring direct debits, or (iv) via third party processors facilitating the foregoing types of payment need not be reported. (It is understood that recurring direct debits refer to situations in which a financial institution periodically deducts amounts from an account holder's account and pays the amounts to a biller.) On the other hand, electronic transfers of funds (EFT payments) where amounts are credited to the payee's bank account are (like cheque payments and cash payments) reportable. Accordingly, so called 'direct debit' arrangements (in particular) need to be considered carefully to determine whether they satisfy the requirements to be excluded payments.

For example in a local government context, it is understood that EFT payments of sitting fees and allowances to councilors will be reportable even though this process occurs on a regular basis.

PAYGW payments are generally excluded. However, payments made to suppliers of services who have not quoted an ABN (and, as a result, the recipient of the supply has a withholding obligation) can be reported either in the Taxable Payment Annual Report or in the relevant annual PAYG report. Such payments should NOT be included in both reports.

The ATO recognises that excising all excluded of payments from the Taxable Payment Annual Report may involve a relatively high administrative cost and therefore allows some leeway for inclusion of excluded payments. However, this does not extend to providing the ATO with the reporting entity's complete vendor payment file.

What needs to be reported, when and how?

Affected entities will be required to report details regarding the sender of the report, the details regarding the payer (the Government entity, who may also be the sender), and the following details (on a cash basis) for each supplier or grant recipient:

- ABN;
- name;

- address;
- certain identifying information such as phone numbers, bank account details and email address (if available);
- gross payments for the financial year, inclusive of Goods and Services Tax (GST);
- gross grant payments for the financial year (where the recipient receives multiple grants, each one must be reported separately);
- total GST included in the gross amount;
- whether a Statement (explaining the absence of an ABN) by a supplier was provided;
- date of payment for grants; and
- name of the grant or grant program.

As noted above some information need only be provided if this is known. The ATO has issued guidance for software developers in relation to information that must be provided and so reader's software should identify information that will need to be obtained and provided.

Note that where one supplier (say, a company) is substituted for another supplier (say, the individual who has transferred the individual's business to the company) during a reporting year, each supplier needs to be identified and the payments made to each supplier have to be reported separately. In effect, the reporting entity has to create separate records for each supplier.

It is appreciated that, in the above scenario, the business name under which the individual carried on business may have been transferred to the company. However, the existence of the two entities (individual and company) should be apparent from their distinct ABNs, even if formal notification of the change is not otherwise received. The ATO needs to identify the payments made to each supplier so that the appropriate tax consequences can be ascribed to the relevant supplier.

The above details must be provided in the 'taxable payments annual report' form and lodged online via the Business, Tax Agent or BAS Agent portals, or via standard business reporting software. No other format (e.g. spreadsheets that contain all the relevant data) can be used.

Affected entities must lodge the 'taxable payments annual report' annually, with the first year's lodgement (being for the year ended 30 June 2018) due by 28 August 2018. Third parties (such as tax agents) are able to lodge on behalf of affected entities.

Technical Information

The legislation relating to this regime is contained in Subdivision 396-B of the *Taxation Administration Act 1953* (Cth), with the key operative provision being section 396-55. It is qualified by legislative determinations including those mentioned above.

Conclusion

Government related entities should establish whether they are excluded from complying with the reporting requirement. Entities that need to comply should review their internal reporting systems to ensure:

- payments which are not reportable can be excluded from the report;
- their systems capture all the required information; and
- their system can generate the report in the file format required by the ATO,

in order that they will be able to provide their report by 28 August 2018.

It is expected that commercial accounting software suppliers will update their products with the requisite functionality and users of such software should investigate the matter with their software providers.

Eligibility Article – Implications for NFPs on Labor proposal to end cash refunds on imputation credits

The recent Labor Party proposal to end cash refunds for imputation credits is attracting plenty of discussion.

As many income tax exempt NFPs (charities, DGRs) also enjoy cash refunds of imputation credits attached to dividends received from investments it is relevant to ascertain whether the Labor policy may impact rules permitting access to cash refunds of imputation credits for eligible NFPs exist under existing ATO rules.

The Labor policy confirms

> 'Labor's policy will only apply to individuals and superannuation funds, and therefore will not apply to bodies such as:
>
> - ATO endorsed income tax exempt charities; and
> - Not-for-profit institutions (e.g. universities) with deductible gift recipient (DGR) status.'

On this basis it appears eligible NFPs with dividend income will continue to be able to access cash refunds of imputation credits attached to the dividend income.

GST Q&A – GST and debt recovery costs

How does GST apply to debt recovery costs both incurred and charged to customers?

Question

Currently, we have a number of debts which are referred to a debt recovery agency. The agency charges fees associated with this action to recover their costs plus a margin. Council pays these fees to the agency and recovers the costs from the Customer. When the agency invoices Council there is GST on a portion of their fees.

Is there supply between the agency and Council for one part of the arrangement and between Council and the customer on the other part, or is Council purely acting as a conduit for the fees being charged by the agency, to be paid by the customer?

This will assist in determining if we should be claiming input tax credits on the invoice payable to the agency and if there should be GST on our invoice to the customer.

Answer

Based on your description of the arrangement, it appears that Council has engaged the debt recovery agency to assist Council in collecting the outstanding debts. Therefore, this appears to be a service provided by the agency to Council. On this basis, to the extent such invoices include GST, Council is the entity that would be entitled to claim input tax credits (provided the acquisition is made for a creditable purpose).

With regard to costs, these may be incurred by the agency on Council's behalf. Again, if such costs include any GST then Council is the entity that would be entitled to claim input tax credits (again, provided the acquisition is made for a creditable purpose).

Where Council recovers costs from the Customer in addition to the outstanding debt, it appears that such recovery would not be subject to GST. We refer to this Edited Private Ruling (EPR) where the ATO treats the amount recovered from the Customer as damages for loss, and refers to the ATO's public ruling GSTR 2001/4. While the EPR deals with a situation where there is a court order a similar outcome arises where a claim is made and damages are paid even though there is no court order/proceedings provided the amount is sought as damages for loss.

FBT Q&A – Accumulation of frequent flyer points by employee or employer purchase card

Question

If we allow an employee to accumulate personal Frequent Flyer Points on business related purchases, paid for on our employer-owned corporate purchase card, would it be subject to FBT?

Answer

In TR 1999/6, the ATO is of the view that flight rewards, with the following two exceptions, are not subject to FBT as they result from a personal (that is, non-employment) contractual relationship.

The first exception is where the person with the personal contract with the rewards provider, is also an employer and provides the flight reward received to an employee in respect of the employment. That is, under the conditions of the flight reward program, FBT only applies where the employer and employee have a family relationship (as generally only family members can be allocated rewards under the reward program) and the flight reward is received in connection with the employment.

The second exception is where, in respect of the employment of an employee, a flight reward is provided to an employee, or the employee's associate, under an 'arrangement' for the purposes of the FBT Act, which results from business expenditure.

The arrangement you have described could be at risk under the second exception above.

Under PSLA 2004/4 (GA) the following parameters are pre-requisites to the ATO considering action:

The arrangement is so contrived and artificial that it has no commercial purpose other than to allow the recipient to receive the rewards.

The nature of the arrangements suggests that the rewards are a substitute for income which would otherwise be earned.

The points accumulated exceed 250,000 points per annum.

You should review the arrangement in light of the above.

FBT Q&A – Payment of mobile phone allowance to staff

What are the FBT implications of providing staff with a monthly allowance to acquire their own phone outright or on contract, for use in connection with their employment duties?

Question

Currently staff are issued with a mobile phone which includes calls, data etc. The phone is required for their employment duties.

We are exploring the option of replacing the phone with an allowance per month for staff to go out and purchase their own phone, whether it be an outright purchase or on a contract.

Can you please advise the FBT implications (if any).

Answer

Currently, to the extent the mobile phones are primarily for work purposes, their provision is an exempt fringe benefit under s. 58X of the FBT Act.

The payment of an allowance is *prima facie* an assessable salary & wage type payment to the employee. The employee will then claim, in their own personal income tax return, a deduction for work related usage of the phone (i.e. calls and depreciation). No FBT applies as the allowance is not a fringe benefit.

Refer to Taxation Ruling TR 92/15 for a discussion on the difference between a reimbursement an allowance. If the allowance was structured as a reimbursement, then we are back in FBT territory and the s. 58X would be available to the extent the mobile phones are primarily for employment use.

FBT Q&A – Can a logbook be transferred to a replacement car?

Question

When a pattern of vehicle use is established using a 3 month logbook for one individual for a vehicle, can that pattern of use be transferred to a new vehicle when they have changed their vehicle? In other words, does a new logbook have to be kept for the new vehicle?

Answer

The following is taken form the ATO's FBT Guide for Employers:

> *Replacement cars*
>
> *'If you replace a car during the year, you may treat the replacement car as though it were the replaced car for the purposes of complying with the requirements of the operating cost method.*
>
> *If you maintained logbooks and odometer records during the year or in a previous year, you may transfer that percentage to the new car (if it remains appropriate) when estimating a business percentage for the replaced car.*
>
> *The transfer of a business percentage in this way is conditional on you recording in your business records the make, model and registration number of both cars and the date on which the replacement was made. These entries must be made before the due date for lodging your annual FBT return or, if you do not have to lodge a return, by 21 May. Odometer records you keep for the cars during the replacement year must show details of the odometer readings of both the replaced car and the new car on the replacement date.'*

The relevant section of the *FBTAA* is s. 162K.