Payroll – Payroll tax on contractors: Can revenue offices impose additional payroll tax conditions that aren't legislated?

It may seem that the state and territory revenue offices have the final say. But can revenue offices impose additional conditions on taxpayers when these conditions aren't included in the relevant legislation? This article discusses the wider implications of the outcome of a recent case involving payments to contractors in Victoria.

The recent case of Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2) (2018) VSC 609 (the Case) has provided a friendly reminder to all state and territory revenue offices; when considering legislative exemptions for payments to contractors, it is not possible to impose additional conditions beyond those included in the legislation.

Case summary: Can the Commissioner impose a test that is not included in legislation?

The issue in the Case was the Victorian State Revenue Office's application of an exemption found in s. 32(2)(b)(iv) of the Victorian Payroll Tax Act 2007. The exemption provides that payments to a contractor will be exempt from payroll tax where the Commissioner is satisfied that the services are performed by a person who ordinarily performs services of that kind to the public generally in that financial year.

In Revenue Ruling PTA 021, the Commissioner expressed the considerations to be applied when determining whether the exemption was available. PTA 021 stated that the Commissioner needs to be satisfied that the contractor 'provides the services in the course of conducting a genuine independent business' and 'ordinarily renders those services to the general public'. PTA 021 then provided a list of factors that would be routinely expected of a genuine independent business.

The decision in the Case confirmed that it was not appropriate for the Commissioner to impose a genuine independent business test as the words of the exemption did not expressly impose that condition. Instead, the decision requires the exemption to be considered as written—does the contractor ordinarily performs services of that kind to the public generally in that financial year. Therefore, the exemption will be met where a contractor can demonstrably prove they ordinarily render services, of the kind provided to the principal, to the general public in the financial year regardless of the existence of traditional indicators of a business. This suggests a considerably lower threshold exists to that sought by Victorian State Revenue Office before the exemption is able to be satisfied.

Outcomes of the case decision

Victorian State Revenue Office has withdrawn PTA021 pending a re-write to accommodate the decision in the Case.

Payroll tax legislation in most other states and territories contain an equivalent exemption to s. 32(2)(b)(iv) and also have a revenue ruling adopting a treatment equivalent to that taken in PTA 021. It remains to be seen how the affected states and territories will react to the decision and the course of action taken by the Victorian State Revenue Office.

Taxpayers that have paid payroll tax on the less favourable interpretation of s. 32(2)(b)(iv) (or equivalent provision in other states and territories) may also need to consider whether an application for a payroll tax refund is warranted.

GST Q&A – Sponsorships, gifts and non-monetary contributions

Question

Council is inviting sponsorships for an annual event. There are various sponsorship packages available from $10,000 to $500 or less value. Each package entitles the sponsor to a variety of benefits. The basic package provides networking opportunities at the launch event, 2 x ticket allocation, name on program and recognition on website. The top sponsorship level includes use of their logo, ticket allocations, product displays, advertising etc. It is considered that because the sponsor is receiving a benefit, and not mere acknowledgement, GST will be applicable.

Sponsors can also provide products and services to fulfill the sponsorship package.

For example: $1,000 sponsorship package – $250 cash and $750 volunteer hours

The in-kind portion (or 100%) could be products/services provided by the sponsor e.g. first aid, media, consulting, fertilizer etc. It is possible the in-kind portion could be used as prizes at the event.

Will the in-kind portion of the sponsorship be subject to GST? If so, how do would we value it? Is there any different treatment depending on whether the sponsor is registered for GST?

Answer

There is a distinction between sponsorships and gifts.

According to GSTR 2012/2, a gift has the following characteristics and features:

- there is a transfer of a beneficial interest in property;
- the transfer is made voluntarily;
- the transfer arises by way of benefaction; and
- no material benefit or advantage is received by the giver (payer) by way of return.'

So, where an amount is paid with no expectation of material benefit or gain, it would be a gift.

In GSTR 2012/2, the ATO has ruled that mere recognition of the gift would not amount to a 'material benefit'. So, a statement like 'this payment was generously made by ABC Hardware' would be okay, but if you said 'this payment was generously made by ABC Hardware, suppliers of Australia's cheapest tools', that would be advertising and hence a 'supply'.

Whether something is a material benefit has been considered in various ATO private binding rulings (PBRs).

PBR 45236 states that 'mere acknowledgment of a person's contribution does not constitute a material benefit. Likewise, if a contributor is given something of trifling or insubstantial value, such as a sticker or plastic lapel badge, that will also not be a material benefit.'

Whether a ticket to a VIP event is of 'trifling or insubstantial value' is a question of fact. We note that PBR 5847 states that 'by providing advertising and free tickets, you are making a taxable supply to the sponsor who provides a monetary payment as consideration for this supply.' Therefore, payments that receive a VIP ticket are unlikely to be considered a donation or gift, and GST is likely to apply.

Regarding sponsorship, we note that a fundamental concept in GST is whether there is a 'supply for consideration'. Where consideration is money, the question is whether the money is being paid in relation to, or in return for, a supply. Sponsorship usually refers to situations where the person making the payment (in cash or in kind) is receiving some form of advertising or commercial benefit (e.g. signage rights, reference in promotional materials etc.). Where such transactions are between GST-registered entities, they are generally subject to GST. If the sponsor is not GST-registered, any supplies made by that entity would generally not be subject to GST. However, where a supply is made by Council (who is GST-registered) it would be subject to GST, irrespective of the GST registration status of the recipient.

Non-monetary valuations

According to GSTR 2012/2, 'where the consideration is non-monetary, the amount of GST is based on the GST inclusive market value of the consideration, which is the market value of the consideration without any discount for GST payable.'

GSTR 2001/6 'provides reasonable methods for determining the GST inclusive market value of that non-monetary consideration and provides guidance when this valuation should be done.'

FBT – Electronic log book requirements

Physical log books that require manual entry can be tiresome for both employees and employers. Thankfully, there is another way—electronic log books! But how can you ensure that these new log book systems are meeting legislative requirements? Read on to find out.

What makes an electronic log book valid?

The operating cost method requires both log book records and odometer records to be recorded in a log book year.

S. 136(1) of the FBTAA defines 'log book records' as:

'**log book records**, in relation to a car held by a person (in this definition called the **holder**), in relation to a period, means a daily log book or similar document in which, in respect of each business journey:

(a) that is undertaken in the car during the period; and

(b) that the holder, or a person acting on behalf of the holder, chooses to record in the document for the purpose of demonstrating the pattern of use of the car during the period;

an entry setting out particulars of:

(c) the date on which the journey began and the date on which it ended; and

(d) the respective odometer readings of the car at the beginning and end of the journey; and

(e) the number of kilometres travelled by the car in the course of the journey; and

(f) the purpose or purposes of the journey;

is made in the English language at, or as soon as reasonably practicable after, the end of the journey.'

The above definition requires that the relevant record be 'a daily log book or similar document' and that the relevant entries are 'made in the English language at, or as soon as reasonably practicable after, the end of the journey'.

CR 2013/66 analyses the 'Navman' electronic log book system where the business use or private use details for the journey are input by the driver onto the screen of the company's Navman system at the start of each car journey. The Navman system 'FBT Trip Report' provides its information in English.

As noted above, the definition of log book provides that the log book entry must be made at the end of the journey to which it relates, or as soon as reasonably practicable after the end of the journey. Paragraph 35 of CR 2013/66 states that:

'Although it is expected that the relevant entries will be made the same day the car journey was undertaken, it is accepted that in situations where it is not practical to generate a Navman system 'FBT Trip Report' on a daily basis, the period of making such entries may be extended. Therefore, provided the necessary entries are made or produced, at least weekly, it is considered that such circumstances will not alter the conclusion above.'

Therefore, the 'trip report' provided by the company's Navman system meets the necessary requirement of being a 'daily log book or similar document' and also meets the necessary requirement of having the relevant entries 'made in the English language at, or as soon as practicable after, the end of the journey'.

Are appropriate odometer records maintained?

The definition of 'odometer records' in s. 136(1) requires that odometer readings be recorded in relation to both the 'commencement of the period' and the 'end of the period'.

The company's Navman system 'FBT Trip Report' provides details of the odometer reading at the start of the car's first recorded journey and also the odometer reading at the end of the car's last recorded journey that were undertaken during each report period.

Therefore, the ATO concludes that the Navman system 'FBT Trip Report' satisfies all the relevant requirements of the definition of 'odometer records' as defined in s. 136(1).

What are the benefits?

The advantages of an employer being able to utilise an electronic log book system in cars provided to employees is obvious: many of the required log book entry requirements are automatically recorded by the system through GPS technology.

The main requirement of the employee is to properly record the business journey with sufficient detail. Usually, there is a menu item which contains a list of common business journeys and the employee merely selects the entry appropriate to the current trip.

The benefits of an electronic log book system are there to be seen. The use of these systems by employers will generally result in more accurate log book entries and odometer records which should satisfy the curiosity of even the most stringent ATO auditor.

FBT Q&A – Are paid days over the shutdown period subject to FBT if the staff aren't required to take annual leave?

Question

Our organisation has decided that the days during our holiday shutdown period that are not public holidays days (four days) will be paid days that will not require use of annual leave. This is a gesture of good will to recognise that 2018 has been a particularly challenging year and will not set a precedent in relation to the holiday period closure in future.

Entitlement for paid days that do not require the use of annual leave is limited to ongoing and fixed-term staff (pro-rata for part time staff). Casual and sessional staff are not entitled to be paid for this period. Will this incur FBT?

Answer

1. In our view, the 'benefit' being provided in this circumstance is the payment of salary and wages to staff for days on which they should be utilising accrued leave. Therefore, the 'benefit' is the payment of salary and wages which are specifically excluded from the definition of fringe benefit.

2. Further, when the four days of leave are eventually used by the staff members, this will also be specifically excluded from the definition of fringe benefit.

3. On this basis, no FBT arises in the scenario you have presented.

GST Q&A – Are credit and debit card surcharges subject to GST?

Question

Our current practice is that GST is applicable to the surcharge on all payments made by credit and debit card. Could you please confirm that this is correct? If not, what should the correct treatment be?

Also, could you please confirm that when we refund a purchase made by credit or debit card, we are refunding the surcharge as well.

Answer

4. The ATO provides the following guidance regarding credit card surcharges in GSTR 2014/2:

5. '8. A credit card surcharge imposed by a merchant on a customer for a credit card transaction forms part of the consideration for the supply of the goods or services made by the merchant. There is a sufficient nexus between the surcharge and the supply of the goods or services for the surcharge to be paid for the supply.

6. 9. The credit card surcharge forms part of the consideration for a taxable, input taxed or GST-free supply depending on the GST treatment of the supply of the goods or services in question. Where a surcharge is imposed on payment for more than one supply, the merchant can use any fair and reasonable method to apportion the surcharge to the respective supplies of goods or services.'

7. Based on this, the GST treatment of the surcharge follows the GST treatment of the underlying transaction. Therefore, if the underlying transaction is a taxable supply and subject to GST, the surcharge component will also be subject to GST. If the transaction is GST-free, then so is the surcharge.

8. For example, where a taxable supply is made for $1,100 (including GST) with a surcharge of 2%, the total price payable would be $1,122. The amount retained after paying the surcharge to the bank and GST to the ATO would be $1,000 (i.e. total price of $1,122 less GST of $102 and surcharge to the bank of $20).

9. Whether you refund the surcharge when refunding a purchase will depend on the terms of your refund policy. If you are only required to refund the amount net of surcharge fees, then only $1,100 would be refunded. If you are required to refund the whole amount paid (i.e. $1,122) and the bank does not refund its surcharge, then you would be out of pocket for the amount of the surcharge.

Eligibility – Accessing charity land tax and stamp duty concessions

You may consider your organisation is a charity because you focus on charitable works. However, do you provide your members with social benefits or insist they meet certain ethical standards? If so, you need to consider how these decisions may affect your ability to access charity concessions, including land tax and stamp duty concessions.

The concessions

In Victoria, land is exempt from land tax where the Commissioner determines that 'it is used by a charitable institution exclusively for charitable purposes' (s. 74 *Land Tax Act 2005*).

In *Lions Club of Northcote Inc. v Commissioner of State Revenue (Review and Regulation)*[2019] VCAT 75 (Lions Case), the relevant land was owned by the Lions Club of Northcote Inc. (the Lions Club) and comprised an 'opportunity shop'. It was not disputed that the land was used exclusively for charitable purposes. VCAT (the Tribunal) had to decide whether the Lions Club was a charitable institution.

Victorian stamp duty does not apply to transfers of land to a corporation that is established for a charitable purpose (s. 45 *Duties Act 2000*). In *Rotary Club of Melbourne Inc. v Commissioner of State Revenue* [2018] VSC 699 (Rotary Case), the broad issue before the Court was whether the Rotary Club of Melbourne Inc. (Rotary) was a corporation that was established for charitable purposes.

The cases noted above may have a wider relevance than the specific legislation considered. The relevant provisions are not the only Victorian charitable concessions. Charitable concessions may also arise under the legislation of other states and territories.

Especially, it should not be overlooked that the cases may need to be considered in the context of Commonwealth charitable concessions, even though the Commonwealth concept of a charity has been defined in legislation.

The nature of a charity

For a body to be a charity, it must only have objects (i.e. purposes) which are charitable. Where a body has an object which is charitable, the body does not lose its charitable status merely because non-charitable benefits arise incidentally in pursuing that object.

Conversely, where a body has an object that is non-charitable, the non-charitable object will still preclude the body being a charity even though pursuit of that object has the incidental outcome of providing a benefit that is charitable in nature.

Usually, state law relies on the concept of charitable purpose that has evolved (and continues to evolve) through case law. The Commonwealth has codified the concept for the purposes of its laws, although the codification is based on principles drawn from case law.

Case law has established three specific heads (i.e. classes) and a general head of charitable objects. The Lions Case and the Rotary Case both considered the general head – fundamentally, the object must be for

the benefit of the public at large rather than for the benefit of individuals. (Note: There is a further general head requirement that the benefit must be also be one broadly contemplated by the preamble to a particular historical UK Act, but the need for the benefit to have a public character was the key concern of the two cases.)

The Cases

The Tribunal and Court respectively concluded that some of the objects of the Lions Club and some of Rotary's objects were not charitable. This conclusion precluded them being charities for purposes of the relevant concession even though their other objects were charitable.

The Lions Club's objects included promoting friendship among club members and requiring members to observe high ethical standards in their personal/business dealings with both members and non-members. The Tribunal concluded these were ends in themselves (i.e. independent objects) and were not merely requirements/activities which were ancillary to pursuing other, charitable, objects. The objects of friendship and observance of ethics in the conduct of each member's personal/business affairs were outside the general head of charity.

The Rotary Case, which also involved objects directed at the promotion of ethics, was slightly more complex. Rotary argued that the relevant objects aimed to promote ethics in personal/business dealings by the general community. The Commissioner contended that the relevant objects focussed on Rotary members (Rotarians) meeting high ethical standards in their personal and business dealings with fellow members and with other members of the community.

The Court concluded that the Commissioner's interpretation was correct – the Rotary objects promoted high moral standards being met by Rotarians, rather than Rotary having the aim of uplifting the moral standards of the community. Any uplifting of community personal/business ethical standards through the community experience of the ethical behaviour of Rotarians was only incidental to the object of promoting that behaviour. The Court observed that if Rotary had an independent object of encouraging the community to meet high personal/business ethical standards, this would be a charitable object.

The Court recognised that ethical personal/business behaviour of Rotarians as leaders within the community conferred a benefit on the community generally. However, Rotary had not demonstrated to the Court that the promotion of ethical behaviour by Rotarians was a means to the charitable end of conferring a benefit on the community. In the circumstances, the Court held that encouragement of Rotarians to act ethically was an end in itself – Rotary was acting as a private members club in requiring its members to meet ethical standards.

Practical points to consider

Community organisations seek charitable status to access state, territory and Commonwealth tax and other concessions. However, members often value the social aspects (friendship, fellowship/companionship, socialising, entertainment etc.) that flow from joining such organisations. Persons motivated to assist the community might also be motivated to value observance of high ethical or other standards in their personal/business dealings and by those with whom they want to associate. In these circumstances, sometimes organisations that are intended to carry out charitable purposes are established with objects that also reflect the social and ethical aspirations of their founders.

In order to access charitable tax concessions, care is needed in formulating the formal objects which are set out in the organisation's constitution. It is important to ensure that fulfilling a social function, or members meeting ethical or other standards, are not presented as ends in themselves. (Note: In relatively rare cases,

one can envisage fulfilling a social function might be a charitable object. For example, it might be argued that an organisation which is established to meet the needs of socially disadvantaged people and with membership open to all would be a charity.)

Where an organisation is a unit within a group of like organisations or subject to an umbrella governing body, it is also necessary to consider the principles that govern the group and have formally (or informally) been adopted by the organisation. Those principles may affect the charitable character of the specific organisation seeking charitable status. For example, see the Commissioner's reference to the *Code of Ethics for Lions Clubs in Australia* in presenting his argument in the Lions Club Case.

It should also be noted that, in determining whether an organisation has only charitable objects, the actual activities of the organisation also need to be considered. Care is necessary in planning an organisation's activities so that the organisation as an entity is not pursuing social or other objects. (Note: In this case, the organisation is distinct from, say, a social group comprising people who are also organisation members.)

For example, your organisation may be arranging a member lunch or dinner. Some of the questions you may need to ask include:

- Can it be shown that this activity is incidental to achieving the organisation's charitable objects?
- Is this a social occasion that, being an end itself, would jeopardise the charitable status of the organisation?
- Is the lunch or dinner an incidence of discussing/planning the organisation's future activities? (However, please note the Tribunal's comments regarding the dinner meetings of the Lions Club)
- Assuming the function will generate a net amount of funds for the organisation, could the activity be viewed as fundraising that is incidental to achieving the charitable objects?

These are just a few considerations for those seeking to access concessions for charities.

FBT Q&A – Is the provision of a VW Crewvan an exempt benefit?

Question

Will a Volkswagen Crewvan TSI220 be considered a car benefit for FBT purposes? It is a 5-seater vehicle and has a carrying capacity of less than 1 tonne. The use of the vehicle by the employee is limited to work use and home-to-work travel. I believe it could be considered as an 'other goods carrying vehicle' or 'other passenger carrying vehicle'.

If it is considered a car fringe benefit, is it an 'exempt car benefit' where the use criteria is met? Would it be classed as a 'panel van' for these purposes?

Answer

The definition of car is 'a motor vehicle (except a motor cycle or similar vehicle) designed to carry a load of less than 1 tonne and fewer than 9 passengers'. Based on the specifications sheet of the Volkswagen Crewvan TSI220 (the Crewvan), the Crewvan is a car as defined.

The question then becomes whether it can qualify as an exempt car benefit. According to s. 8(2) of the *FBTAA*:

A car benefit provided in a year of tax in respect of the employment of a current employee is an exempt benefit in relation to the year of tax if:

(a) the car is:

(i) a taxi, panel van or utility truck, designed to carry a load of less than 1 tonne; or

(ii) any other road vehicle designed to carry a load of less than 1 tonne (other than a vehicle designed for the principal purpose of carrying passengers); and

(b) there was no private use of the car during the year of tax and at a time when the benefit was provided other than:

(i) work-related travel of the employee; and

(ii) other private use by the employee or an associate of the employee, being other use that was minor, infrequent and irregular.

Based on its looks and design, the Crewvan could arguably be a panel van for the purposes of (a)(i) above. However, without labouring this point, we could also consider whether the vehicle would be eligible under (a)(ii).

Using the formula in MT 2024, a seating capacity of 5 x 68kgs = 340kgs. When compared to the payload of 719kgs, the seating capacity is less than 50%. Therefore, the Crewvan is not designed for the principal purpose of carrying passengers.

Given the above, it would appear eligible for exemption under s. 8 of the *FBTAA*.

Salary Packaging Q&A – Can an employee salary package low-value expenditures and claim the minor benefits exemption?

Question

One of our employees has queried whether she can salary package a range of less than $300 in expenditures and claim the minor benefits exemption, meaning there would be no FBT payable and it would be therefore be very tax effective for her. Is this possible?

Answer

S. 58P of the *FBTAA* sets out the terms of the minor benefits exemption. S. 58P provides that a minor benefit may be an exempt benefit where:

- the notional taxable value—broadly, the amount that would be the taxable value if the benefit was a fringe benefit—of the minor benefit is less than $300 (s. 58P(1)(e)); and
- it would be concluded that it would be unreasonable to treat the minor benefit as a fringe benefit, having regard to the following criteria set out in s. 58P(1)(f):

a. the infrequency and irregularity with which 'associated benefits' could reasonably be expected to be provided;
b. the amount that is, or might reasonably be expected to be, the sum of the notional taxable values of the minor benefits, provided in the current FBT year, or any other FBT year;
c. the practical difficulty for the employer in determining the notional taxable values in relation to the current FBT year of the minor benefits or associated benefits; and
d. (s. 58P(1)(f)(V)) the circumstances surrounding the provision of the minor benefit or associated benefits, including but not limited to:

i. whether the benefit concerned was provided to assist the employee with an unexpected event; or
ii. whether the benefit concerned was provided otherwise than wholly or principally by way of reward for services rendered, or to be rendered by the employee.

TR 2007/12 sets out the ATO's thinking regarding the application of s. 58P. The ATO is firmly of the view that the considerations required by s. 58P(1)(f)(V) are such that a benefit received as a result of a salary sacrifice arrangement (SSA) is not eligible for the minor benefit exemption. This is because the benefit is received in lieu of salary and thus wholly or principally by way of reward for services rendered.

The knock-out punch is delivered by the ATO at paragraphs 243 and 244 of the TR 2007/12, where it is stated:

243. The provision of benefits through a SSA forms part of the total remuneration package of an employee. Therefore, it is clear that, under these arrangements, benefits (together with salary) are provided wholly or principally as a reward for services rendered.

244. In considering the criteria in paragraph 58P(1)(f), and in particular the circumstances in which a benefit is provided under a SSA, a reasonable conclusion would be that all such benefits are not exempt benefits under section 58P.

Eligibility – Fuel tax credit rates have increased

Fuel tax credit rates have increased, with the new rates applying for fuel acquired from 4 February 2019.

New rates

Fuel tax credit rates have increased, with the new rates applying for fuel acquired from 4 February 2019. We have reproduced the previous and current fuel tax credit rates in the table below. For a complete list of the fuel tax credit rates from 1 July 2018 to 30 June 2019, refer to QC 55811.

		Used in heavy vehicles for travelling on public roads		All other business uses (including to power auxiliary equipment of a heavy vehicle)*	
Eligible fuel type	**Unit**	**Previous Rates** (1 August 2018 - 3 February 2019)	**Current Rates** (4 February 2019 - 30 June 2019)	**Previous Rates** (1 August 2018 - 3 February 2019)	**Current Rates** (4 February 2019 - 30 June 2019)
Liquid fuels, for example diesel or petrol	cents per litre	15.4	15.8	41.2	41.6
Blended fuels: B5, B20, E10	cents per litre	15.4	15.8	41.2	41.6
Liquefied petroleum gas (LPG) (duty paid)	cents per litre	0.0	0.0	13.4	13.6
Liquefied natural gas (LNG) or compressed natural gas (CNG) (duty paid)	cents per kilogram	0.0	0.0	28.2	28.5
Blended fuel: E85	cents per litre	0.0	0.0	13.065	13.210
B100	cents per litre	0.0	0.0	4.1	4.2

***Note:** Claims for packaging or supplying fuels can use the 'all other business uses' rate for the appropriate eligible fuel type.

How often do the rates change?

Fuel tax credit rates are indexed bi-annually, in February and August, in line with CPI. The rates for fuel used in heavy vehicles that travel on public roads may also change in July due to the annual review of road user charges. Annual increases in excise duty rates on biofuels also causes rate changes in July.

Need help with fuel tax credits?

The ATO provides various information sheets and tools to assist you in calculating your fuel tax credits:

- Fuel tax credit eligibility tool – Helps you determine which of your business activities are eligible for fuel tax credits and the relevant rates that apply.
- Fuel tax credit calculator – Helps you calculate the fuel tax credit amount reported on your BAS.
- Record keeping – Outlines the record keeping requirements to support your fuel tax credit claims.
- Simplified fuel tax credits – Outlines the simplified methods available for entities that claim less than $10,000 in fuel tax credits in a year.

Of course, you also have access to the TaxEd Q&A tool if you would like any further assistance with fuel tax credits.