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THE ATO'S FBT HITLIST

Fringe Benefits Tax **(FBT)** is a tax imposed on employers if they provide non-cash/fringe benefits to their employees. Commonly provided fringe benefits that may attract FBT include work cars made available to employees for private use, the provision of entertainment, such as meals at restaurants, tickets to sporting events, corporate boxes, office Christmas parties and regular Friday afternoon drinks.

The FBT period runs from 1 April to 31 March each year. Employers must self-assess and lodge an FBT return if required. For this FBT year, the Australian Taxation Office **(ATO)** has outlined the following list of FBT issues that attracts their attention:

- not lodging FBT returns (or lodging them late) to delay or avoid payment of tax;
- not reporting fringe benefits on business assets that are provided for the personal enjoyment of employees or associates;
- failing to report motor vehicle fringe benefits, incorrectly applying exemptions for vehicles or incorrectly claiming reductions for these benefits;
- claiming entertainment expenses as a deduction but not correctly reporting them as a fringe benefit, or incorrectly classifying entertainment expenses as sponsorship or advertising;
- mismatches between the amount reported as an employee contribution on an FBT return compared to the income amounts on an employer's tax return; and
- incorrectly calculating car parking fringe benefits due to either significantly discounting adequate evidence.

If an employer has an obligation to lodge an FBT return but has not done so, the ATO has the power to issue FBT assessments to the employer going as far back as possible. This is because the three-year amendment period that is generally available to employers that lodge their FBT returns is not triggered for employers that have never lodged FBT returns before. Some employers may lodge nil FBT returns every year to get around this issue and get 'the clock ticking'. However, lodging a nil FBT return may attract an ATO audit, and an administrative penalty and interest may be imposed where the employer is found to have an FBT liability.

The better solution is for an employer to have a system in place to identify fringe benefits provided to employees and seek advice from its tax adviser or accountant. In particular, employers should pay attention to the list of FBT issues under the ATO's radar as outlined above. If it is concluded that there is no FBT liability, a non-registered employer is not required to do

anything. If the employer is registered for FBT but has no FBT liability, an FBT non-lodgement advice form should be prepared and submitted to the ATO.

Finally, it is a common mistake to assume that FBT does not apply to the private use of business assets (such as, company cars) by business owners that operate their businesses out of companies or trusts. The definition of an 'employee' for FBT purposes is wide enough and could include the business owners even if they are not paid wages/salaries from their businesses.

If you have any queries on FBT in general, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711**.**

SUPERANNUATION GUARANTEE AMNESTY BILL FINALLY PASSES INTO LAW

The Super Guarantee Amnesty provides a once-off opportunity for employers to self-correct historical SG non-compliance dating from 1 July 1992 to 31 March 2018. Quarters post-March 2018 are not eligible for the amnesty.

The amnesty allows employers to claim tax deductions for payments of SG charge or contributions made during the amnesty period to offset SG charge, as well as remove the administrative component and the Part 7 penalty that may otherwise apply in relation to SG non-compliance.

The amnesty period will start from 24 May 2018 and end six months from the date the bill receives Royal Assent (which has yet to occur).

One of the amendments to this bill also limit the Commissioner's ability to remit penalties for historical SG non-compliance, where an employer fails to disclose information relevant to their historical SG shortfall. This is intended to strengthen the operation of the amnesty through legislated minimum penalties on employers who fail to come forward.

It is therefore important that all employers who believe they may have historically either paid superannuation late or missed payments for employees during the periods covered by the amnesty to revisit their records and lodge the appropriate SG charge statements during the amnesty period which depending on when the bill receives royal assent could be anywhere from September 2020 to November 2020.

Failure to do so will see full penalties applied, which in many cases when combined with interest charges end up being more than the outstanding Superannuation Guarantee liability. Employers who have made payments late without lodging the appropriate SGC Charge statements should also lodge statements those during the Amnesty period as late payment without completing the statements are effectively treated as unpaid until the statements have been lodged.

If you have any questions in relation to the SGC amnesty, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711**.**

CAN A VACANT BLOCK OF LAND BE AN ACTIVE ASSET FOR THE PURPOSES OF ACCESSING THE SMALL BUSINESS CGT CONCESSIONS?

One of the basic conditions for the purposes of accessing the Small Business CGT Concessions **(the CGT Concessions)** is the requirement that the asset disposed of is an 'active asset used in the course of carrying on a business'.

In *Commissioner of Taxation v Eichmann*,[1] the taxpayer carried on a business of building, bricklaying and paving. The taxpayer used a vacant block of land to store tools, materials and equipment used in the business. The tools, material and equipment were transported to and from the land on a daily basis. The taxpayer subsequently sold the land and sought to access the Concessions.

The Commissioner denied access to the Concessions on the basis that the land was not an active asset. The Taxpayer challenged the ATO's decision before the AAT.

The AAT decision

The Commissioner argued that the use of the land must be integral to the carrying on of the taxpayer's business. The AAT rejected this argument on the basis that the meaning of 'carrying on a business' includes a wide range of activities. The AAT placed importance on the extensive use of the land and the fact that tools, materials and equipment stored on the land were used in the taxpayer's business.

The taxpayer was successful in arguing before the AAT that the land was an active asset for the purposes of accessing the CGT Concessions.

The Commissioner appealed the decision to the Federal Court.

The Federal Court decision

The Federal Court considered the following two issues:

1. What constitutes 'use' for the purposes of the active asset test?
2. What is the appropriate level of connection of that 'use' to the relevant business?

In relation to the first question, the Court determined that the 'whole, or predominantly whole' of the asset needs to be used in the course of carrying on the business. Based on the facts of the case, the taxpayer satisfied this requirement.

In relation to the second question, the Court determined that the phrase 'used in the course of carrying on a business' requires the 'use' to have a 'direct functional relevance' to the relevant business. A 'direct functional relevance' requires the 'use' to have a direct nexus with the day-to-day activities of the business.

In the taxpayer's case, the Court held that the use of the land lacked the required nexus to the day-to-day activities of the business, and accordingly, the land was not an active asset for the purposes of accessing the CGT Concessions.

[1] *Commissioner of Taxation v Eichmann* [2019] FCA 2155.

Impact of Federal Court decision

The Federal Court has adopted a restrictive interpretation of the active asset test by introducing an additional sub-test, being the 'direct functional relevance' requirements to determine whether an asset is 'used' in the course of carrying on a business.

Following the decision in Eichmann, taxpayers will need to take extra care when determining whether the active asset test is satisfied.

If you have any queries on the CGT Concessions, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711**.**

DIRECTOR PENALTY NOTICE REGIME EXTENDED TO GST LIABILITIES

The current director penalty regime allows the Commissioner to recover unpaid superannuation guarantee (SG) charge and PAYG withholding for directors of a company.

From 1 April 2020, this regime has been extended to allow the Commissioner to recover from directors unpaid amounts of;

- a company's liability to pay net amounts of GST for a tax period (assessed GST);
- estimated GST;
- Instalments of GST; and
- Luxury car tax (LCT) & wine equalisation tax (WET).

The changes allow the Commissioner to make an estimate of the company's net GST liability on their BAS. If this is done and a Director Penalty Notice (DPN) is issued, the director has 21 days to ensure the amount is dealt with, otherwise the director will become personally liable.

The penalty can be remitted where the director complies with the obligation either before the DPN is issued or within 21 days of the notice being issued. However, where a company fails to lodge a BAS within three months of the lodgement due date, the directors of this company may receive a **lockdown DPN** penalty notice requesting that the estimated GST liability is paid by the directors personally. In these circumstances, the Commissioner has no discretion to remit the penalty and it is "locked down" in whole or part.

This means the directors are automatically liable to the ATO for the unpaid GST and will not be entitled to remittance of a DPN penalty if the company then goes into liquidation.

The following is a condensed view of the impact and possible actions directors can take to mitigate their personal risk:

- Be able to demonstrate that the company has documented risk mitigation procedures and that these are followed – e.g. ensure the company's Tax Risk Management & Governance (TRMG) policy is signed off and regularly reviewed;
- Directors to ensure that the companies they run pay their GST debts;

- Directors need to ensure ongoing compliance through appropriate internal controls and procedures; e.g. regularly review and check either internally or engage external reviews; and
- Ensure external GST advice is sort on significant and new business transactions – in particular transactions which no GST is payable (e.g. the sale of a business or property as a GST-free going concern). For these transactions, it would be prudent to ensure that a RAP opinion is on file to act as a defence. For certainty, obtaining a GST private ruling from the ATO confirming that the transaction is GST-free will

Company directors are obligated to ensure that the companies they run pay their tax debts or, if that is not possible, to promptly appoint a voluntary administrator/liquidator to the company.

With the extension of the DPN regime making directors personally liable for unpaid superannuation, PAYG, GST, LCT and WET, directors need to ensure the companies they operate have robust compliance systems in place – particularly for material /abnormal transactions.

If you would like assistance in conducting a GST systems health check on your company, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.