Ashurst Australia
5 March 2015

Human Resources Tax Bulletin

December 2014 to February 2015 Human Resources Tax developments

WHAT YOU NEED TO KNOW

This bulletin outlines significant Australian developments in human resources taxes during December 2014 to February 2015, which might impact your business.

- **Pay-roll Tax**
  - *Chief Commissioner of State Revenue v Seovic Civil Engineering Pty Ltd*, and *Edgely Pty Ltd v Chief Commissioner of State Revenue* have been handed down both of which relate to the grouping/de-grouping of taxpayers under the *Payroll Tax Act 2007* (NSW).
  - The NSW Civil and Administrative Tribunal in *Levitch Design Associates Pty Ltd ATF Levco Unit Trust v Chief Commissioner of State Revenue* has confirmed payroll tax assessments issued to the taxpayer for the 2009 financial year, and has set aside assessments issued for the 2008, 2010, 2011 and 2012 financial years.
  - The NSW Government has published the *Payroll Tax Rebate Scheme (Jobs Action Plan) Regulation 2015* (NSW) which prescribes the matters to which the Minister must have regard in designating an employer as a designated employer for the purposes of the *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011* (NSW).
- **Fringe benefits tax**
  - The Full Federal Court in *Commissioner of Taxation v Qantas Airways Limited* has overturned the AAT decision and has found that the taxpayer was liable for FBT in relation to parking provided to employees at a Canberra airport.
- **Employee Share Schemes**
  - The Federal Government has proposed improvements to the tax treatment of employee share schemes to apply from 1 July 2015.

Relevant area	At a glance
Payroll tax	**Grouping/de-grouping of taxpayers for payroll tax purposes** The following cases in relation to the grouping/de-grouping of taxpayers for payroll tax purposes have been handed down: • *Chief Commissioner of State Revenue v Seovic Civil Engineering Pty Ltd* [2014] NSWCATAP 94 (**Seovic Civil Engineering**); and • *Edgely Pty Ltd v Chief Commissioner of State Revenue* [2015] NSWCATAD 16 (**Edgely**). In Seovic Civil Engineering, the Chief Commissioner of State Revenue was successful before the Appeal Panel of the NSW Civil and Administrative Tribunal (**Appeal Panel**) in relation to the grouping/de-grouping of three taxpayers under the *Payroll Tax Act 2007* (NSW) (**Payroll Tax Act**). The Tribunal decision was previously covered in our March 2014 to May 2014 HRT Developments Bulletin. The Appeal Panel has confirmed that the discretion exercised by the Tribunal to de-group the members could not apply in the circumstances. The Appeal Panel found that the Tribunal should have concluded that one of the businesses was not carried on independently of and was connected with the carrying on of the businesses of the first and second respondents. In doing so, the Tribunal failed to consider material factors which established a connection and control between the carrying on of the group's business arrangements between group members. Similarly in Edgely, the New South Wales Chief Commissioner sought to enforce payroll tax assessments for the period 1 July 2002 to 30 June 2007. After an audit in 2006 of the affairs of Edgely Pty Ltd (the **taxpayer**), Transtar Express Pty Ltd (**Transtar**) and Nitestar Express Pty Ltd (**Nitestar**), the Chief Commissioner grouped the companies for payroll tax purposes. On 19 October 2012, the taxpayer lodged an objection to the assessments contending they should not have been grouped with Transtar and Nitestar. The taxpayer argued that it had not paid any "taxable wages" nor did it carry on a business activity during the relevant period. The Tribunal found that the business carried on by the taxpayer was not carried on substantially independently of, and was substantially connected with, the carrying on of the business of Transtar and Nitestar. The Tribunal held that as the taxpayer had developed and leased property to the related companies and had earned regular income, this would satisfy the profit making and regularity criteria to establish that a business activity was conducted by the taxpayer during the relevant period. Further, the Tribunal held that even if the taxpayer did not have employees and was not paying taxable wages, they can still be subject to a payroll tax liability if the company forms part of a payroll tax group with other related businesses. Accordingly, the payroll tax assessments for the period 1 July 2002 to 30 June 2007 were affirmed.
	Application of contractor exemptions The NSW Civil and Administrative Tribunal (**Tribunal**) in *Levitch Design Associates Pty Ltd ATF Levco Unit Trust v Chief Commissioner of State Revenue* [2014] NSWCATAD 215 has confirmed a payroll tax assessment issued to the taxpayer for the 2009

	financial year, and has set aside assessments issued for the 2008, 2010, 2011 and 2012 financial years. The taxpayer carried on the business of designing and branding dental surgeries and healthcare centres, and employed interior designers, graphic designers and architectural consultants to provide services under contract. Mr Wright, an architectural consultant, had provided architectural services to the taxpayer for the years 2008- 2012 (**Tax Period**). The taxpayer was issued with payroll tax assessments for the Tax Period relating to amounts paid to Mr Wright. The Chief Commissioner was of the view that the arrangement between Mr Wright and the taxpayer was a "relevant contract" and the payments were "wages" under section 32 (1)(b) of the Payroll Tax Act. The taxpayer objected to the assessments. The objections were disallowed and the taxpayer filed an application for a review with the Tribunal. The Tribunal held that the arrangement between the taxpayer and the architectural consultant met the description of "relevant contract". The arrangement was found to be a contract under which the taxpayer, in the course of a business carried on by the taxpayer, is supplied with "services of persons for or in relation to the performance of work". By attending the taxpayer's client's site or otherwise supplying services to the client, Mr Wright supplied architectural services to the taxpayer under the "contract", as those services were work related and the taxpayer was supplied with them in the course of carrying on its business. Although the Tribunal found that the arrangement between the taxpayer and Mr Wright qualified as a "relevant contract" , it held that exception under s 32(2)(b)(iv) of the Payroll Tax Act applied. To qualify for the exemption the taxpayer must prove that for each financial year, Mr Wright ordinarily performed services to the public generally in that financial year of the kind supplied to the taxpayer. This test was satisfied between 2008, 2010, 2011 and 2012 as Mr Wright's provision of services to the taxpayer was in the range of 58- 81 per cent of his total earnings. The same was not found for the 2009 financial year as Mr Wright generated over 90 per cent of its total earnings from the taxpayer. Accordingly, the exemption could not be satisfied for that year. Accordingly, the Tribunal remitted the 2008, 2010, 2011 and 2012 financial year assessments back to the Commissioner for determination, and confirmed the assessment for the 2009 financial year. Further, there was no remission of interest or reduction of penalty in relation to the 2009 assessment.

NSW payroll tax rebate

The NSW has published the *Payroll Tax Rebate Scheme (Jobs Action Plan) Regulation 2015* (NSW).

Under the *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011* (**Payroll Tax Rebate Act**), certain employers may be eligible for a rebate amount of $3,000 in relation to the first year of employment of a fresh start employee whose employment with a designated employer was terminated because of a prescribed redundancy.

The objects of the Regulation are to prescribe the matters to which the Minister must have regard in designating an employer as a "designated employer" and to prescribe the kind of redundancy that is a "prescribed redundancy" in relation to which an employee may be a fresh start employee for the purposes of the Payroll Tax Rebate Act.

Qantas car parking facilities subject to fringe benefits tax

The Full Federal Court in *Commissioner of Taxation v Qantas Airways Limited* [2014] FCAFC 168 has allowed the Commissioner's appeal and found that the taxpayer was liable for fringe benefits tax (**FBT**) in relation to parking provided to employees at a Canberra airport.

In the first instance, the AAT found that the car parking facilities provided to employees by Qantas Airways Limited (**taxpayer**) were subject to FBT for the relevant years excluding the car parking spaces at Canberra Airport. This was because the car park facilities at Canberra Airport were not available in the ordinary course of business to members of the public. The AAT decision was previously covered in our March 2014 to May 2014 HRT Developments Bulletin.

Between 2007 and 2010 the taxpayer provided car parking facilities to their employees, whose primary places of work were at or very near the airports (except for Canberra airport). Each of the airports had long term and short term car parking facilities that were available for use upon payment of fees without any further restriction as to eligibility of user. The car parks were located within a one kilometre radius of the premises and the lowest fee charged for all day parking exceeded the threshold, bringing about a potential FBT liability.

All of the car parks at the airports (except Canberra) were "*commercial parking stations*" for the purposes of the *Fringe Benefit Tax Act 1986* (**FBTA**). The AAT found that as the Canberra Airport parking was not available to the public, section 39A(1)(a)(ii) of the FBTA was not satisfied and there was no liability for FBT.

The Court considered the meaning of the word "public". In doing so, the Court found that although there were restrictions on who was able to use to car parks, they were still considered public car parks as the car spaces were available to any member of the public on restricted terms.

The Court found that it was irrelevant if the employees could use the car spaces at Canberra airport, as the existence of a nearby commercial parking station was only relevant for determining the value of the benefit provided to the employees.

Employee Share Scheme – exposure draft legislation released

As reported in our Tax Alert dated 15 October 2014 and Company Law & Governance Update dated 16 December 2014 the Federal Government has proposed improvements to the tax treatment of employee share schemes (ESS) to apply from 1 July 2015.

Draft legislation released on 14 January 2015 provides more detail about the proposed changes and also some unexpected but welcome surprises, including:

- confirmation that taxation of options can be deferred until the option is exercised provided there are disposal restrictions;
- the latest deferred taxing point will be extended from 7 years to 15 years for all shares and options subject to deferred taxation (not just those covered by the start-up company concessions), although cessation of employment will continue to be a deferred taxing point;
- the significant ownership rule will be relaxed so that the ESS tax rules still apply if an employee holds up to a 10% interest in a company (taking into account shares that an employee has a right to acquire where that right is covered by the ESS tax rules);
- it will generally be easier to obtain a refund of tax where tax has been paid on an option that lapses;
- the "default" valuation rules to work out the market value of options have been updated and should generally be more favourable; and
- the Commissioner of Taxation will have the ability to approve optional methods for working out the market value of an asset (including shares and options issued under the ESS), which will be binding on the Commissioner.

The details about the concession for start-up companies are broadly as expected, although it has now been confirmed that the discount for shares must be less than 15% and the exercise price for options must be at least equal to the market value of an ordinary share at the time the option is acquired.

No transitional provisions are proposed, so it would appear that employers will need to design ESS and issue new shares or rights under those ESS on or after 1 July 2015 for the new rules to apply.

Contacts

Geoffrey Mann
Partner
Melbourne
T: +61 3 9679 3366
E: geoffrey.mann@ashurst.com

Karen Czarny
Lawyer
Melbourne
T: +61 3 9679 3784
E: karen.czarny@ashurst.com