



## Tax highlights

26 May 2014

### Contents:

#### Key developments

- Consultation update – employee share schemes and start-ups
- Meaning of “commercial parking station” for FBT purposes - Airline liable for FBT on parking provided to employees at airports

#### Weekly Tax News

- Business tax
- Employment taxes
- Individuals and family groups
- International tax

### Key developments this week

**Consultation update – employee share schemes and start-ups:** Treasury has now [confirmed](#) that issues raised in submissions in the employee share schemes and startups consultation process will be considered in context of the National Industry Investment and Competitiveness Agenda, which is due to make recommendations to the Government by mid-2014.

**Meaning of “commercial parking station” for FBT purposes - Airline liable for FBT on parking provided to employees at airports:** The Administrative Appeals Tribunal (AAT) has affirmed that Qantas Airways (the taxpayer) incurred FBT liabilities associated with car parking facilities provided to employees based at major airports during the 2007 to 2010 FBT years. In relation to car parking facilities provided to employees based at Canberra Airport however, the AAT upheld the taxpayer's contention that FBT liabilities did not arise.

Under section 39A of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986), an employer who provides parking for an employee is deemed to provide a ‘car parking benefit’ if certain conditions are met, including that:

- “a commercial parking station is located within a 1 km radius of the premises, on which the car is parked” [section 39A(1)(a)(ii)], and
- “the lowest fee charged by the operator of any such commercial parking station in the ordinary course of business to members of the public for all-day parking on the first business day of the FBT year is more than the car parking threshold” [section 39A(1)(a)(iii)].

Section 136(1) of the *FBTAA 1986* provides that:

*“**“commercial parking station”**, in relation to a particular day, means a permanent commercial car parking facility where any or all of the car parking spaces are available in the ordinary course of business to members of the public for all-day parking on that day on payment of a fee, but does not include a parking facility on a public street, road, lane, thoroughfare or footpath paid for by inserting money in a meter or by obtaining a voucher.”*

The dispute before the AAT centred on the meaning of “commercial parking station”, with the

taxpayer advancing several contentions as to why the short-term and long-term public car parks (public car parks) at each of the airports did not meet the statutory definition.

The taxpayer's primary contention was that the public car parks at each of the airports were not 'commercial parking stations' because they were not provided principally for use by commuters driving between home and work. The taxpayer argued that the car parking benefit provisions need to be construed by taking into account their context, purpose and legislative history (including amendments made to them within a few years of the *FBTAA 1986* enactment to ensure fair taxation treatment between benefits enjoyed by employees who were provided with car parking by their employer and other workers in the same vicinity who paid for parking and received no deduction for its cost). Construed on this basis, said the taxpayer, the provisions are intended to tax the provision of car parking by an employer to an employee who uses their car to commute to and from work, but only in cases where there is equivalent car parking available within 1km of the employer's premises that is a commercial car park with a primary purpose of providing parking to commuters travelling to and from work (and further, that the parking is provided to the employee in a location that gives the benefit significant value, such as the CBD). According to the taxpayer, this construction excludes the taxing of employer-provided parking if the only commercial car parking facilities within 1km are special purpose car parks that are intended and priced other than for commuter parking.

The AAT rejected this construction, noting that the *FBTAA 1986* is not expressed to, and does not seek to, differentiate car parking facilities by reference to any primary intended use or users. The fact that the *FBTAA 1986* does differentiate car parking facilities on the basis of certain expressly enacted criteria (e.g. hours of availability of parking spaces, range of customers able to use the spaces; where the spaces are located and payment method, etc) also assisted the AAT to conclude that the additional, un-enacted, basis for differentiation proposed by the taxpayer should not be read into the *FBTAA 1986*.

The AAT went on to reject two alternate contentions argued by the taxpayer. First, that the short term car park charges at some of the larger airports were intended as a disincentive to park on an all-day basis such that they were not available for all-day parking and could not therefore be 'commercial parking stations'. The AAT concluded that there was not sufficient evidence that such an intention existed, and noted that there were several possible advantages to using the short term car parks that might be reflected in the higher charges. Second, that the effective daily rate charged by the long term car parks at some of the airports, in the context of multiple days stays, was below the car parking threshold preventing satisfaction of the condition in section 39A(1)(a)(iii). The AAT described this contention as misconceived, on the basis that the daily fee contemplated by section 39A(1)(a) (iii) is a fee payable for being able to come and go from the car park on the day for which the fee is paid.

In relation to Canberra Airport, the AAT agreed with the taxpayer that restrictions on who could use the public car parking facilities meant that no FBT liability arose. Spaces at the Canberra Airport car parks were only available for use by airline passengers and persons greeting and fare welling them, and thus were not available to persons working in or near the airport. Without any all-day parking available within 1km of the taxpayer's premises, there could be no tax inequity as between the taxpayer's employees and others working in the

vicinity, making it inappropriate that the taxpayer should bear an FBT liability on the parking it provided. On this basis the AAT accepted, albeit hesitantly, the taxpayer's argument that, in the Canberra Airport context, the word 'public' in the definition of 'commercial parking station' should be construed as including employees of businesses, in order to exclude the airport car parks – click to view [Qantas Airways Limited and Commissioner of Taxation \[2014\] AATA 316](#) (20 May 2014).

[Back to top](#)

## Weekly tax news

### Business tax

**Review of the thin capitalisation arm's length debt test (ALDT) – submissions received:** The Board of Taxation (Board) has [published](#) submissions received in response to its [discussion paper "Review of the Thin Capitalisation Arm's Length Debt Test"](#) which was released on 16 December 2013. The Deloitte submission discussed the case for retaining the arm's length debt test (ALDT) for all industries, provided suggestions for improvements to the ALDT legislative provisions and suggestions for improvements in the application and administration of the ALDT. The Board is expected to provide recommendations in a report to the Government by December 2014.

**Inspector General of Taxation (IGT) reviews into the ATO's debt collection & tax practitioner services:** On 26 May 2014, the IGT [announced](#) the terms of reference for two reviews including a review into the [ATO's approach to debt collection](#) and a review into the [ATO's services and support for tax practitioners](#). Submissions for both reviews are due by 18 July 2014.

### Taxation Ruling (TD) scheduled for release on 28 May 2014:

- TD 2014/12: Which accounting principles must a financial report be prepared in accordance with in order to satisfy sections 230-150(1)(a), 230 210(2)(a), 230-255(2)(a), 230 315(2)(a) and 230 395(2)(a) of the *Income Tax Assessment Act 1997* (ITAA 1997). (These sections deal with elections in respect of the taxation of financial arrangements) . Previously issued as [TD 2013/D8](#).

[Back to top](#)

### Employment taxes

**Licensed plumbing workers not employees:** The AAT has found that licensed plumbing workers engaged by the applicant who carried on business to provide plumbing services as a sub-contractor were not 'employees' for superannuation guarantee purposes. The primary issue before the AAT was whether the workers were 'employees' of the applicant within either the ordinary meaning of the word or the extended definition in section 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGAA 1992).

In concluding that the workers were not employees within the ordinary meaning of the word, the AAT had particular regard to the evidence in relation to:

- The lack of control the applicant had over the work of the workers, as they were free to exercise their discretion on how many jobs to accept and how to perform the jobs

- The non-representation of the applicant by the workers
- The results character of the oral contract for engagement of the workers (i.e. the fact that the workers were remunerated based on the satisfactory completion of specified services instead of based on their time)
- The capacity of the workers to delegate work allotted to them
- The fact that the workers bore the commercial risk and responsibility for any poor workmanship or injury in the performance of work
- The significant ownership by the workers of tools and equipment which were used in the performance of work.

The AAT went on to consider whether the workers were 'employees' within the extended meaning in section 12(3) of the SGAA 1992 and concluded that they were not, as they did not work under a contract that was wholly or principally for their labour. This was on the basis that the workers assumed the risk in the performance of work and were able to delegate the work allocated to them – click to view [XVQY and Commissioner of Taxation \[2014\] AATA 319](#) (22 May 2014).

#### **ATO Interpretative Decisions (ATO IDs) relating to FBT released:**

- [ATO ID 2014/17](#): When a retail store employer provides an employee with a voucher/coupon entitling the employee to merchandise from a participating retail store of the employer, the employer has provided the employee with an 'in-house property fringe benefit' as defined in section 136(1) of the *FBTAA 1986* only when the employee redeems the voucher/coupon for merchandise at a participating retail store of the employer
- [ATO ID 2014/18](#): The cost of a map update of an in-built satellite navigation system is a 'car expense' within the meaning in section 136(1) of the *FBTAA 1986* as the expense is incurred in respect of repairs to or maintenance of the car.

**Back to top**

### **Individuals and family groups**

**Apportionment for section 23AG purposes not possible:** The Federal Court has refused an applicant's application for leave to re-open a case on the basis that his argument that section 23AG applied to exempt a portion of an amount from tax was weak.

The applicant in this case was the taxpayer in [Blank v Commissioner of Taxation \[2014\] FCA 87](#) where the Federal Court held that an amount received by the taxpayer to relinquish his rights in a profit participation plan on termination of his employment was ordinary income. The applicant filed an interlocutory application for leave to re-open his case to enable him to make submissions concerning the application of section 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936). Broadly, the applicant contended that a portion of the amount qualified as "foreign earnings derived by [the applicant] from... foreign service", and was therefore exempt from tax. In determining whether to grant leave to re-open the case, the Court noted that the strength of the applicant's argument was an important factor in answering whether the grant of leave to re-open was in the interests of justice.

The Court concluded that the apportionment of the amount into two portions, one being exclusively for foreign service and the other being exclusively for service in Australia, so as to enable the former to trigger the exemption from tax afforded by section 23AG(1) of the ITAA 1936 was neither appropriate

nor possible. The Court reached this position by noting that:

- First, section 23AG(1) requires the foreign earnings to be derived from foreign service, which in the Court's view, meant exclusively from foreign service
- Secondly, the amount is a "single, undissected amount" and cannot be apportioned because the amount was not calculated by reference to days of service
- Thirdly, section 23AG(1) does not contain the words "to the extent to which" such as to accommodate a dissection or apportionment of the kind contemplated by section 8-1 of the ITAA 1997
- Fourthly, the Court was of the view that, if an apportionment was intended, it would have been provided for in the statute.

Accordingly, the Court refused the applicant's leave to re-open his case – click to view [Blank v Commissioner of Taxation \(No 2\) \[2014\] FCA 517](#) (22 May 2014).

#### **Refinements to the income tax law in relation to deceased estates – administrative treatment:**

The ATO has [released](#) its administrative treatment in relation to the proposed amendments to the CGT provisions for deceased estates, which were announced in the [2011-12 Federal Budget](#) and then modified in the [2012-13 Federal Budget](#) including:

- Reducing compliance costs by ensuring the deceased's tax return does not need to be amended as the taxing point will be recognised by the entity transferring the asset
- Modifying application dates for minor changes announced in the 2011-12 Federal Budget
- Broadening the scope of the integrity provisions to also apply to assets passing via survivorship.

These changes are proposed to apply to CGT events happening on or after the day the legislation receives Royal Assent, except for the roll-over that will apply where an intended beneficiary dies before administration is completed. This change will be backdated to apply to CGT events that happen in the 2006-07 and later income years.

The ATO has advised that they will accept tax returns as lodged during the period up until the proposed amendments pass Parliament and past year assessments will not be reviewed until the outcome of proposed amendments are known.

**ATO small business webinars:** The ATO has [released](#) registration information on 13 topics via webinar for small business.

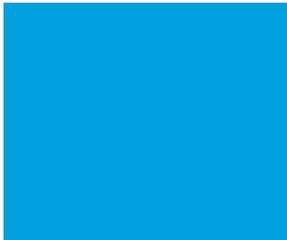
**ATO self-managed super fund trustees' webinar:** The ATO has [released](#) registration information for webinar sessions on the role and responsibilities of trustees of self-managed super funds.

**[Back to top](#)**

#### **[International tax](#)**

##### **Taxation Ruling (TR) scheduled for release on 28 May 2014:**

- TR 2014/2: The application of the ships and aircraft article of Australia's tax treaties to taxable income derived under section 129 of the ITAA 1936 by a non-resident ship owner or charterer. Previously issued as [TR 2013/D5](#)



**Dbriefs Bytes:** Deloitte Dbriefs Bytes is a short weekly video summary of the significant international tax developments impacting the Asia Pacific region – click to view the latest [Dbriefs Bytes](#).

[Back to top](#)

## Contacts



### **David Watkins**

Partner – Tax Services

Email: [dwatkins@deloitte.com.au](mailto:dwatkins@deloitte.com.au)

Tel: +61 (0) 2 9322 7251

This publication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively the “Deloitte Network”) is, by means of this publication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this publication.

This document and the information contained in it is confidential and should not be used or disclosed in any way without our prior consent.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see [www.deloitte.com/au/about](http://www.deloitte.com/au/about) for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

#### About Deloitte

Deloitte provides audit, tax, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries, Deloitte brings world-class capabilities and deep local expertise to help clients succeed wherever they operate. Deloitte’s approximately 170,000 professionals are committed to becoming the standard of excellence.

#### About Deloitte Australia

In Australia, the member firm is the Australian partnership of Deloitte Touche Tohmatsu. As one of Australia’s leading professional services firms, Deloitte Touche Tohmatsu and its affiliates provide audit, tax, consulting, and financial advisory services through approximately 5,400 people across the country. Focused on the creation of value and growth, and known as an employer of choice for innovative human resources programs, we are dedicated to helping our clients and our people excel. For more information, please visit our web site at [www.deloitte.com.au](http://www.deloitte.com.au).

Liability limited by a scheme approved under Professional Standards Legislation.

Member of Deloitte Touche Tohmatsu Limited

© 2014 Deloitte Tax Services Pty Ltd.