KPMG LLP
777 Dunsmuir Street
Vancouver, BC, V7Y 1K3
Canada

Telephone (780) 429-7300
Fax (780) 429-7379
www.kpmg.ca

PRIVATE & CONFIDENTIAL Date October 30, 2017

To Eric Peraro
Executive Director
Community Social Services Employers' Association

From Pam Prior
Hayley Maschek

Cc Carol Chiang

Subject **Taxable Benefit Analysis of the Reimbursement of Class 5 Driver's License Cost**

You have asked us to consider whether a reimbursement of the cost of a Class 5 driver's license to an employee (the "Reimbursement") by Community Social Services Employers' Association ("CSSEA") constitutes a taxable benefit under the *Income Tax Act* (Canada)[1] (the "Act").

Unless otherwise indicated, all terms have the meaning assigned thereto by the Act and all section references are to the Act.

Facts and Assumptions:

1. Some of CSSEA's employees are required to hold a valid Class 5 driver's license to work under a collective agreement.
2. A recent arbitration resulted in a ruling that CSSEA is required to reimburse the "standard cost" of such licenses, which is equal to the annual cost of the license.

Analysis:

The Act requires an employee to include in income from employment, "benefits of any kind whatever received or enjoyed" by the employee by virtue of their employment.[2] This provision is meant to apply broadly so as to catch nearly any benefit received by a person from their employer. While certain specific benefits are then carved out from this general rule, none of these carve-outs should be applicable with respect to the Reimbursement.

[1] RSC, 1985 c 1 (5th Supp).

[2] Paragraph 6(1)(a).

In essence, an amount will be included in an employee's income where:

1. a benefit exists;
2. which has been received by the taxpayer (or a person they do not deal at arm's length with, such as certain family members); and
3. receipt of the benefit was in respect of employment.

The second and third requirements in paragraph 6(1)(a) are generally straight forward. Where there is a "benefit" (discussed further below), whether the employee or someone not at arm's length with the employee has received the benefit should be relatively clear. Further, where there is an employee/employer relationship and a benefit is provided by the employer which is received by the employee, there are very few situations wherein the benefit would not be considered to be received "in respect of" the employment.

With respect to the first requirement, the existence of a benefit, the conclusion becomes less clear. In defining a benefit, the courts have determined that this means "an economic advantage that is measurable in monetary terms".[3] However, the courts have found that that such economic advantage is only considered a benefit to the employee where they are the *primary beneficiary* of the benefit. Determining who the primary beneficiary of a benefit is should be a highly fact-specific inquiry which takes into account all of the circumstances relating to the potential benefit. Incidental enjoyment of a benefit that primarily benefits the employer does not cause a product or service to become a taxable benefit.[4] Thus, where an employee gets a benefit, this should not be a benefit as long as the primary beneficiary of the product or service is the employer.

The primary beneficiary of a benefit can only be determined with regard to all the circumstances. In particular one must consider the type of benefit, and the employment (role and responsibilities) of the individual receiving the benefit.

Ultimately, the question will be one of use. From a practical perspective, personal use of a driver's license may be difficult to monitor and it may therefore be difficult to prove that there is only incidental personal use of a driver's license by employees. The Canada Revenue Agency ("CRA") has commented that where an employer reimburses the standard cost of a driver's license to an employee, such reimbursement will be treated as a taxable benefit to the employee, notwithstanding the fact that the employees drove the employers vehicles daily and could not without the license perform the requirements of the job.[5] However, the CRA's interpretation does not consider cases where the employee might not be the primary beneficiary of a Class 5 driver's license. While one could envision such situations (e.g. if the employee did not otherwise own or have access to a vehicle for personal use and would therefore only use the driver's license in carrying out employment duties), determining the primary beneficiary of the Reimbursement on an employee-by-employee basis would likely be impractical, if not impossible.

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[3] *Lowe v R*, 1996 2 CTC 33 at para 9.

[4] See for example *Lowe, supra* and *McGoldrick v R*, 2004 FCA 189.

[5] CRA Document Number 2011-0424791E5.

As such, CSSEA should treat the Reimbursement as a taxable benefit to the employees and make the appropriate payroll withholdings thereon. As a cash payment is being made, the Reimbursement would also be subject to Canada Pension Plan and Employment Insurance contributions.

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The opinion contained in this correspondence is based on the facts, assumptions and representations stated herein. You have represented to us that you have provided us with all facts and circumstances that you know or have reason to know are pertinent to this correspondence. If any of these facts, assumptions or representations are not entirely complete or accurate, it could have a material effect on our opinion. Our opinion takes into account the applicable provisions and judicial and administrative interpretations of the relevant taxing statutes, the regulations thereunder and applicable tax treaties. Our opinion also takes into account all specific proposals to amend these authorities or other relevant statutes and tax treaties publicly announced prior to the date of our opinion, based on the assumption that these amendments will be enacted substantially as proposed. Our opinion does not otherwise take into account or anticipate any changes in law or practice, by way of judicial, governmental or legislative action or interpretation. These authorities are subject to change, retroactively and/or prospectively, and any such changes could have an effect on the validity of our opinion and may result in incremental taxes, interest or penalties. Unless you specifically request otherwise, we will not update our opinion to take any such changes into account.

Our opinion is limited to the conclusions specifically set forth herein and KPMG expresses no opinion with respect to any other federal, provincial or foreign tax or legal aspect of the transactions described herein. It should be noted that the Canada Revenue Agency and/or the relevant provincial tax authority and/or a foreign tax authority and/or any other governmental tax authority (collectively a Tax or Revenue Authority) could take a different position with respect to these transactions in which case it may be necessary for you to defend this position on appeal from an assessment or litigate the dispute before the courts, including one or more appellate courts, in order for our conclusions to prevail. If a settlement were reached with a Tax or Revenue Authority or if such appeal and litigation were not, or were not entirely, successful, the result would likely be different from the views we express herein. Unless expressly provided for, KPMG's services do not include representing Client in the event of a challenge by a Tax or Revenue Authority or litigation before any court.

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