

Ruling Compendium – TD 2015/12

This is a compendium of responses to the issues raised by external parties to draft TD 2014/D17 *Fringe benefits tax: when are the duties of the employment of an employee of a government body exclusively performed in, or in connection with, a public hospital or 'non-profit hospital' for the purposes of paragraph 57A(2)(b) of the Fringe Benefits Tax Assessment Act 1986?*

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1	The duties are performed 'in' the hospital at the physical location of the hospital facility The focus on physical location at paragraph 1 could prove misleading when practically administering this provision across a wide variety of services and situations. Ultimately, it is clear regardless of physical location the employee needs to be exclusively engaged in activities that enable the hospital to carry out its functions. To satisfy the 'in' criteria, it is considered more appropriate to require the employee to be working exclusively in and for the hospital. The functions performed must be genuinely managed and controlled by the hospital as evidenced, for example, by its organisation structure (and not simply parked there to gain the benefit of the exemption).	Noted. The focus on physical location has been refined for the purposes of the final Determination. This will now require that the duties of employment are performed at the physical location of the hospital facility where the activities of the hospital are being conducted. Further there will now be 2 other ways by which an employee may satisfy the requirement set out in paragraph 57A(2)(b).
1(a)	Statements in relation to the 'in' test make reference to the functions of a hospital when the requirement under paragraph 57A(2)(b) relevantly focuses on the 'duties of the employment'. It is considered that the example in paragraph 38 in relation to the 'in test' focuses on hospital functions rather than employment duties and adopts a narrow interpretation of these functions.	Noted. Given these comments, while clarifying the 'in' test a further test has been adopted at paragraph 2 of the final Determination. Paragraph 57A(2) will be satisfied where this additional test has been satisfied. That is, the duties are performed 'in connection with' a hospital such that the employee is engaged in duties that enable the hospital to carry out its functions.

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1(a) cont.	The example contrasts places such as a surgical theatre, a patient ward or a hospital administration office that are 'clearly recognisable as being part of the hospital facility where activities are conducted that allow the hospital to carry out its functions' with an office in a hospital building that is used for managing the construction of a new wing of the hospital which will not be part of such a facility. However paragraph 38 seems to be concerned with Example 3 where a State Department of Public Works project manager is working on a construction project for a new hospital building within the physical boundary of the hospital. It is acknowledged that it is appropriate to treat such employees as not supporting 'the hospital to carry out its functions' nor is such an employee under the direction, management and control of the hospital administration. It is suggested that a distinction needs to be drawn between an employee in a State Department (such as a Department of Public Works) and an employee in a hospital who performs activities relating to the physical attributes of the hospital, such as the management of construction, facilities management and capital works. It is submitted that it is unreasonably narrow to interpret the employment duties to exclude, without qualification, the construction of a new wing of a hospital (or any other activity associated with the physical or capital nature of a hospital).	Also paragraph 51 of the final Determination will clarify when a location such as a dedicated building, a separate floor or a room in a building at a hospital facility is not a place at a hospital facility where activities of the hospital are being conducted.

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1(b)	While Example 3 makes it clear parts of a hospital can be deemed to not be part of a public hospital an extra example may assist to show a case where a group of public hospital employees are working as part of the construction of a new ward or hospital building. As distinct from the outcome in Example 3, it is contended that these employees are performing duties in connection with the hospital as they are working towards replacing and integrating existing hospital services into the new building.	Agreed. Clarification has been provided in the final Determination. Example 10 has been added which includes various duties performed by members of staff at the hospital including the extension and installation of a specialised hospital computer system during construction of a new hospital building.
1(c)	The scrutiny of duties performed by each individual employee at each physical location in a public hospital can create significant administrative issues. Notwithstanding that basic services may not change, the manner in which hospital services are delivered continues to evolve requiring changes in the duties performed by hospital employees. An alternative interpretation is suggested, namely that duties must not only be performed in the physical location of a hospital facility but also for a hospital. The condition would put in place a requirement that the duties of an employee would be such that the employee comes under the direction, management and control of the hospital administration (Chief Executive Officer or Board of Management). Such a requirement accords with matters set out at paragraph 33.	Agreed. The 'in' test has been clarified and a further test has been adopted at paragraph 2 of the final Determination. Paragraph 57A(2) can be satisfied where this additional test has been satisfied. That is the duties are performed 'in connection with' a hospital when the employee is engaged in duties that enable the hospital to carry out its functions. Paragraph 57 of the final Determination explains when an employee is performing duties as a member of staff at a hospital. Such an employee would perform their duties as a member of staff under the direction, management and control of the hospital board of management or Chief Executive Officer.

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2	The duties are performed 'in connection with' the hospital While agreeing with the approach that the meaning of the word 'connection' is both wide and imprecise and that under the 'in connection with' test, essentially, the employee is engaged in activities that allow the hospital to carry out its functions there is a concern with the language in Example 5 (Ahmed). Example 5 refers to an employee of a Shared Services group providing IT services to 'all areas of the Department of Health', including 'public hospital services, ambulance services, public dental services and primary health care programs'. The language in Example 5 adopts an interpretation of the functions of a public hospital that may be inconsistent with the established and accepted administrative arrangements in the different jurisdictions that are covered by this Determination.	Agreed. Example 5 has been adjusted in the final Determination to avoid confusion as to what is or is not a hospital function. Example 5 in the final Determination clearly and simply makes the distinction between the delivery of public hospital services and services which are not hospital related such as government relations areas. This allows the conclusion to be maintained that Ahmed is not exclusively engaged in duties that enable a hospital to carry out its functions.
2(a)	Paragraphs 40 to 45 attempts to provide an explanation of what is meant by the phrase 'duties of the employment exclusively performed in connection with a hospital'. That is where the duties may not be performed within the physical location of the public hospitals. It is suggested this is where there maybe inconsistencies of treatment across jurisdictions and these inconsistencies are not sufficiently covered in the current examples. It felt that it would be of enormous benefit if the final Determination could indicate the type of services provided off-site which may also be considered 'exclusively in connection with' the hospitals covered by this determination.	Agreed. Example 10 has been added to the final Determination. Example 10 includes various duties performed by different members of staff placed at public hospitals.

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2(a) cont.	Example 2 (Clare) deals with non-direct public hospital functions. However the final Determination should also cover other non-direct public hospital based functions including: • pathology courier driver who go from site to site collecting samples; • employees providing their services to patients in a general practitioner clinic; • working on a major project to replace an existing hospital computer system; • Child and Youth health services provided in shopfronts and schools linked to a public hospital; • universities as part of teaching hospitals; • Residential care places in hospitals (including aged care).	
2(b)	The words 'in connection with' should be taken to mean that the employee's duties must be a necessary part of fulfilling the objectives of the hospital, as opposed to having perhaps some benefit or relevance to hospitals. This requires a distinction between necessary hospital support functions such as pathology, IT, procurement, transaction finance services, payroll, laundry, biomedical engineering etcetera and those other services which are more governmental or departmental. Examples of the latter include strategic planning, regulatory and compliance, standard setting, protocols, policy, governmental relations, inter-sector liaison, funding agreements, workforce planning, IT systems and software development, data management, performance monitoring and review, audit, capital works (unless managed and controlled directly by the hospital/health service).	Noted. However, notwithstanding that basic services may not change, the manner in which hospital services are delivered in the different jurisdictions continues to evolve and this obviously results in changes in the duties performed by members of staff of hospitals. The principles set out in the final Determination can be applied to different factual circumstances each of which cannot be covered in examples in a Determination. Further guidance has however been provided in the final Determination. Example 10 has been added which sets out various duties performed by members of staff who are government employees which would be performed 'in connection with' a public hospital.

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3	Concurrent positions of employment It is contended that the explanation provided at paragraphs 3, 4, 46 and Example 6, when considering concurrent job positions, is incorrect. It is suggested that it is necessary to consider all of the duties of the employment of the employee <i>at the time the benefit is provided</i>. Therefore, for concurrent employment in more than one position with the <i>same employer</i> it is required that all of the duties across all positions must be for the required purposes. Clearly, there is no intention to attach the application of this concession to benefits provided from the amounts salary sacrificed from wages earned while in a hospital position. The intention is clearly that the requirements are met at the time the benefit is provided. This is clear from Examples 7 and 8. There is no benefit provided until the funds salary sacrificed are actually applied to provide a benefit. Examples 7 and 8 clearly require the employee to be working in the hospital position at <i>the time benefit is provided</i>, regardless of whether or not the funds used were salary sacrificed during the time the employee was working in a hospital position. For concurrent employees, it would be practically impossible to time the provision of benefits to only those days the employee was working in the hospital position, and absolutely impossible in the case of novated leases. Therefore, it is suggested that all of the duties of the employment of the employee need to be considered, and in Example 6, it is contended, clear paragraph 57A(2)(b) would not be satisfied.	Noted. While acknowledging the contentions put forward in relation to concurrent employment, it is considered that the preferred view is as set out in paragraph 46 of the draft Determination. Example 6 is also considered to correctly deal with an employee of a government body who has two concurrent jobs where one of the job positions satisfies paragraph 57A(2) and the other job position does not.

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4	Actual duties and generic statements of duty There may be circumstances where the 'duties of employment' of an employee as detailed in a statement of duties do not accurately describe or include the actual duties of employment. Generic statements of duty may include duties that are not undertaken by an individual, class or classes of employees and may be included on a statement of duties only for administrative purposes. Duties which are not undertaken 'in connection with a public hospital' and which are detailed in a statement of duties may therefore preclude an employee whose actual duties of employment are performed 'exclusively in connection with a public hospital', from accessing the FBT exemption cap. Accordingly, in considering the requirements of Section 57A(2) reference should only be made in the final Determination to the actual duties of employment of the employee.	Agreed in part. The final Determination will provide clarification at paragraphs 5, 60 and 61 in relation to the reliance an employer can place on actual duties and statements of duty. Where a departmental statement of duty is generic in nature and does not rule in or rule out hospital related duties reference should then be made to the employee's actual duties.
5	Relationships between some private not-for-profit hospitals and public hospitals Suggestion that paragraph 1 of the determination, when setting out the general intent of paragraph 57A(2), should acknowledge that there could be working relationships between some private not-for-profit hospitals and public hospitals.	Agreed. The working relationships between some private not-for-profit hospitals and public hospitals will be acknowledged at paragraph 42 of the final Determination.

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6	Definition of the term ‘public hospital’ Concerns were expressed that some of the examples implicitly deal with other elements of paragraph 57A(2)(b) relating to ‘employment duties’ and ‘hospital’ and, in particular, they adopt a narrower definition of hospital functions than has been long established by the Commissioner. It has been accepted by the Commissioner that the system of public hospital administration in districts or areas are public hospitals for the purposes of the FBT exemption. It was also suggested that a definition of ‘public hospital’ could reflect the current and evolving models of care. This would be prudent given that this Determination looks to ‘duties being performed in or in connection with’ a ‘hospital’.	Noted. A definition of the term ‘public hospital’ is not a matter that was intended to be dealt with by this Determination. Whether a Local Hospital network is ‘public hospital’ for the purposes of section 57A of the <i>Fringe Benefits Tax Assessment Act 1986</i> was a topic for a proposed related Determination which would have considered the term ‘public hospital’ in the current environment of delivering acute health care and associated care. Following a consultation process with relevant State and Territory entities it was agreed that a Determination was not required. The Commissioner will continue to work with those entities on an ongoing individual basis given the evolving models of care across different jurisdictions.
7	The exemption provided by subsection 57A(2) should not be available by virtue of location alone but should be inclusive of the award relating to that location.	Noted. The physical location test has been refined for the purposes of the final Determination. This test will now require that the duties of employment are performed at the physical location of the hospital facility where the activities of the hospital are being conducted. It is not considered appropriate however to link the physical location to an employee award relating to the location.