


CR 2003/19 - Income Tax and Fringe Benefits Tax: GAP Activities Program

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Class Ruling

Income Tax and Fringe Benefits Tax: GAP Activities Program

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- subsection 6(1) of the *Income Tax Assessment Act 1936* ('ITAA 1936');
 - sections 6-5 and 6-10 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
 - sections 35, 36, 37, 47 and 136 of the *Fringe Benefits Tax Assessment Act 1986* ('FBTAA 1986'); and
 - Subdivision 12-B of Schedule 1 to *Taxation Administration Act 1953* ('TAA 1953').

Class of persons

3. The class of persons to which this Ruling applies is host organisations who employ foreign school leavers who have come to Australia for a period of at least 6 months to work as participants in the program conducted by GAP Activity Projects (GAP) Ltd.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described below at paragraphs 10 to 19 in this Ruling.
6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling:
 - (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - (b) this Ruling may be withdrawn or modified.
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Date of effect

9. This Class Ruling applies to all amounts paid to, and the provision of fringe benefits to, GAP participants by the host organisations on or after 1 October 2003. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore, the Class Ruling only applies to the extent that:
 - it is not later withdrawn by notice in the *Gazette*;
 - it is not taken to be withdrawn by an inconsistent later public ruling; or
 - the relevant tax laws are not amended.

Arrangement

10. The arrangement that is the subject of the Ruling is described below.

11. GAP Activity Projects (GAP) Ltd is an international educational charity, registered in the United Kingdom, which offers 18-20 year old students the opportunity to live and undertake activities in a different culture and country for up to a year. Approximately 75 United Kingdom school leavers per year spend 6-12 months with Australian host organisations. As the program is expanded, school leavers from other countries are expected to participate.

12. The GAP program is targeted towards young persons who have completed their home country's equivalent of Australia's Year 12. The participants wish to undertake a program of personal growth and development in a structured environment. On completion of their GAP program, the participants return to their home countries.

13. The GAP participants are placed with a host organisation in Australia. The host organisation is a school. Whilst on the program the GAP participants are expected to undertake a range of tasks for the host organisation and be available to work for up to 45 hours each week.

14. Tasks performed by the GAP participants can vary widely depending on the skills and interests of the participants and the programs offered by the host organisations. Tasks performed by the participants at boarding schools include, for example, boarding and pastoral care supervision, helping with sports coaching, music, art, craft and drama assistance, clerical work, library duty, helping with language lessons, field trips and excursions and assisting with after school care.

15. Commencing 1 October 2003 the host organisation will pay each GAP participant an amount of approximately \$148 per week for the period the GAP participant is working for the host organisation.

16. The host organisation also provides accommodation in a bed-sit or shared room in a boarding house. Accommodation is usually only provided while the GAP participant is taking part in the activities at the host organisation.

17. Under the arrangement the host organisation will also provide participants with at least 2 meals per day. Where the host organisation has communal eating areas (boarding schools) the meals are prepared and eaten in the communal areas. Commencing 1 October 2003, the host organisation will require that the GAP participant make a

contribution towards the cost of the meals. The contribution will be set at a minimum of \$2.00 per meal.

18. The GAP participants are subject to a significant degree of control whilst undertaking their work during the placement. The host organisations are required to have a staff member designated to be in charge of the GAP participant. The GAP participants are informed that they may be asked to assist a teacher or supervisor in the class room or to take small groups. They are also informed that they will work under the supervision of a qualified staff member.

19. The GAP participants are expected to behave and be treated as members of staff, and normal staff privileges, such as use of the staff room, are generally extended to them by the host organisation. The GAP participants are integrated into the school community as staff members rather than as students of the school or students on work experience.

Ruling

20. The GAP participant is an employee of the host organisation. The amounts paid weekly by the host organisation to the GAP participant constitute salary or wages and is assessable as ordinary income of the GAP participant under section 6-5 of the ITAA 1997.

21. The host organisation as the payer of the salary or wages has a PAYG Withholding obligation under section 12-35 of the TAA 1953.

22. When a GAP participant is required to live away from his or her usual place of residence solely to undertake duties of employment under the GAP program and is provided with accommodation by the host organisation during the course of the program, the benefit of the accommodation provided is exempt from fringe benefits tax (FBT) when a declaration pursuant to subsection 47(5) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) is provided to the host organisation.

23. The provision of meals as part of the employment arrangement is a board fringe benefit under section 35 of the FBTAA. The taxable value of a board fringe benefit is \$2.00 per meal under section 36 of the FBTAA. Where a GAP participant makes a contribution of \$2.00 per meal to the host organisation, the taxable value will be reduced to nil pursuant to section 37 of the FBTAA.

Explanations

Are the GAP participants employees?

24. The common law meaning of the term ‘employee’ was stated definitively by the High Court in *Stevens v. Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16. The High Court made it clear that there is no single objective test, which will give the answer as to whether a worker is an employee. Rather, ‘it is the totality of the relationship between the parties which must be considered’. In appraising the totality of the relationship, it is necessary to examine all the terms of the contract and form a view as to whether the person is on balance working in the service of another, that is, as an employee.

25. Various features have been identified by the Courts as indicators of an employment relationship. The key indicators are listed in Taxation Ruling TR 2000/14. Many of the key indicators in the ruling were also considered by the High Court in *Hollis v. Vabu* (2001) 207 CLR 21¹. The classic test for determining whether the relationship is one of employee and employer is the control test. Mason J in *Stevens v. Brodribb*² explained that the focus of the control test in the modern context is on the right to exercise control rather than the actual exercise of control. Thus, where a person is capable of being directed or controlled in the manner in which his or her work is performed, then that is an indication that the person is an employee. The decision in *Hollis v. Vabu*³ found that the existence of control, although not the sole indicator of an employer/employee relationship, is one of the most important indicators that such a relationship exists.

26. The GAP participants are subject to a significant degree of control when undertaking their work during their placement. While a GAP participant may have some discretion in how he or she performs his or her duties, the nature of the duties, for example, helping with sports coaching or undertaking boarding and pastoral care supervision, are such that the discretion would be limited. The discretion in the conduct of their duties by the GAP participants is consistent with that which would be present in a large number of employment relationships.

27. Another factor considered by the majority as an important indicator of an employment relationship in *Hollis v. Vabu* was the

¹ In *Hollis v. Vabu*, the majority of the High Court found that the bicycle couriers engaged by a courier company were common law employees.

² At page 29

³ The High Court decision can be contrasted with the earlier court decisions where a similar degree of control was not considered to be as important an indicator as other indicia.

significant degree of integration of the couriers into the business of the company. The majority found that⁴:

‘[T]he facts show that couriers were presented to the public and to those using the courier service as emanations of Vabu. They were to wear uniforms bearing Vabu’s logo.....Further, Vabu required that all couriers ‘should be clean shaven unless that person is bearded’.....The effect of Vabu’s system of business was to encourage pedestrians to identify the couriers ‘as a part of [Vabu’s] own working staff.’

28. The GAP participants are integrated into the school community as staff members rather than as students of the school or students on work experience. The expectation that the GAP participants will be treated as staff members and must present themselves to the students as staff members suggests that there is a significant degree of integration of GAP participants into the school community as staff members. This is another strong indicator that the GAP participants are employees.

29. The presence of a significant degree of control that the host organisations have over the GAP participants and the high level of integration of the participants in the school as staff lead to a conclusion that the GAP participants are common law employees. It is clear from the *Hollis v. Vabu* decision that the indicia of integration and control are the most important indicia for determining the status of workers and that it will be a rare case indeed where there is a significant degree of integration and control yet the workers are not employees.

Weekly payments are ordinary income

30. Under subsection 6-5(1) of the ITAA 1997 an amount is assessable income if it is income according to ordinary concepts (ordinary income).

31. In determining whether an amount is ordinary income, the courts have established the following principles:

- whether receipts ought to be treated as income must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as a statute dictates otherwise;
- whether the payment received is income depends upon a close examination of all relevant circumstances; and
- whether the payment received is income is an objective test.

⁴ At pages 42-43

32. Relevant factors in determining whether an amount is ordinary income include :

- whether the payment is the product of any employment, services rendered, or any business;
- the quality or character of the payment in the hands of the recipient;
- the form of the receipt, that is, whether it is received as a lump sum or has an element of periodicity, recurrence or regularity; and
- the motive of the person making the payment.

33. The host organisations make the weekly payments to the GAP participants in return for the GAP participants performing work as required by the host organisations in accordance with the GAP program. The payments are clearly in the nature of salary or wages. Although the amount received each week is small, it is nevertheless assessable income under ordinary concepts.

PAYG withholding obligation

34. The GAP participant is an employee and the payment received is considered to have the characteristics of being salary or wage. Section 12-35 of Schedule 1 to the *Taxation Administration Act 1953* requires that an entity should withhold an amount from salary or wages it pays to an individual as an employee.

Accommodation

35. The provision of accommodation to an employee may create either a housing fringe benefit or a residual fringe benefit and the employer may be liable to pay FBT. However, where the accommodation is provided solely by reason that the employee is required to live away from their usual place of residence in order to perform their duties of employment, subsection 47(5) of the FBTA will operate to exempt the accommodation from FBT. It will be a question of fact whether a GAP participant is living away from his or her usual place of residence. Consideration of the individual's circumstances will be necessary. What is meant by 'usual place of residence' is discussed in paragraph 46 of this ruling.

36. In order that the exemption under subsection 47(5) of the FBTA applies, the GAP participant must provide the host organisation with a declaration in a form approved by the Commissioner. Such declaration must state:

- the participants usual place of residence; and
- the place at which the participant actually resided while living away from his usual place of residence.

Meals

37. Meals that are provided to GAP participants will constitute a board fringe benefit under section 35 of the FBTAA. Section 36 of the FBTAA determines that the taxable value of a board fringe benefit will be \$2.00 per meal. This taxable value may then be reduced in accordance with section 37 of the FBTAA, by way of a contribution by the employee. In this case the \$2.00 contribution per meal made by the participant to the host organisation will reduce the taxable value of the meal to nil.

Are the participants residents for tax purposes?

38. The definition of 'resident' is found in subsection 6(1) of the ITAA 1936. Residency status is a question of fact. The primary test for deciding the residency status of an individual is whether the individual resides in Australia according the ordinary meaning of the word 'resides'. The other tests are the:

- domicile and permanent place of abode test;
- 183 day test; and
- Commonwealth superannuation fund test.

39. If the GAP participants can be considered to reside in Australia under ordinary concepts, residency status is established and the other three tests need not be considered (Taxation Ruling TR 98/17 at paragraph 33).

40. As there is no definition of the word 'reside' in Australian income tax law, the ordinary meaning of the word needs to be ascertained. The Macquarie Dictionary defines 'reside' as 'to dwell permanently or for a considerable time; have one's abode for a time' and the Shorter Oxford English Dictionary defines it as 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place'. Certain facts and circumstances that describe an individual's behaviour in Australia may assist in determining whether an individual resides in Australia. These factors include intention or purpose of presence, family and employment ties, and social and living arrangements. No single factor is necessarily decisive. The weight given to each factor varies depending on individual circumstances.

41. The length of time the individual is in Australia is also relevant. The Commissioner's view in TR 98/17 is that six months is a considerable time when deciding whether the individual's behaviour is consistent with residing here (at paragraph 22).

42. GAP participants live in Australia for a period between six to twelve months. This fact indicates that the GAP participants are residents. The participants are aged between 18 and 20 and, in most cases, will have no dependants. Therefore the *family ties factor* (that is, the fact that they have moved here without their families) will not be relevant in most of these cases and will not preclude them from being residents under the ordinary definition.

43. The *intention or purpose of presence* factor will be decisive. TR 98/17 states that 'individuals who enter Australia to take up pre-arranged employment opportunities or courses of study may be residing here if their stay is consistent with living in Australia' (at paragraph 50). In *Miesegaes v. Commissioners of Inland Revenue* (1957) 37 TC 493, a case concerning an individual who was in the United Kingdom for educational purposes, the court concluded that residence in the United Kingdom was not only a part of, but the central and essential feature during that phase of the appellant's life. The GAP participants enter Australia specifically to take up a prearranged placement with a host organisation and their participation in the program whilst in Australia can be characterised as the central and essential feature of their life at that time.

44. The participants' *social and living arrangements* also indicate they are residing in Australia. The participants live in lodgings provided by the host organisation. As part of their activities they are required to enter into the life of the community of the host organisation. Their behaviour while they are in Australia is consistent with residing here.

45. After weighing up all the factors above, it is reasonable to conclude that the GAP participants are residents of Australia.

Fringe benefits tax – usual place of residence

46. Whilst GAP participants are residents of Australia for the purposes of the ITAA 1997, it may also be the case that GAP participants are living away from their usual place of residence. The Commissioner's guidelines with regards to 'usual place of residence' are contained in Miscellaneous Taxation Ruling MT 2030. The ruling states that a person will be regarded as living away from a usual place of residence if, but for having to change residence in order to work temporarily for his employer at another locality; the employee would have continued to live at the former place. It would be relevant in reaching that view that there is an intention or expectation of the

employee returning to live at the former place of residence on cessation of work at the temporary job locality (paragraph 14). Later at paragraph 22 it is stated that ‘Examples of employees on appointments of finite duration who will generally be living away from their usual place of residence are foreign nationals employed in Australia on a temporary basis Provided the appointment is for a limited period and the employee can be expected in the normal course to return to the same city or district of the home country to live, the employee may be treated as living away from his or her usual place of residence.’

Tax File Number (TFN)

47. The GAP participants are receiving salary or wages from which the host organisation is required to withhold income tax. If a GAP participant has obtained a TFN which is quoted to the host organisation, tax should be withheld at the resident rate of tax with TFN quotation. If the GAP participant has not obtained a TFN or chooses not to quote the TFN, tax should be withheld at the higher rate that applies in that situation.

Lodging of Income Tax Returns

48. The GAP participants are deriving ordinary income from which tax has been withheld. The GAP participants are required to lodge income tax returns. The salary or wages paid by the host organisation will form part of the assessable income of the GAP participants.

Detailed contents list

49. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

12 March 2003

Previous draft:
Not previously released in draft form.

Related Rulings/Determinations:
TR 92/1; TR 92/20; TR 97/16;
TR 98/17; TR 2000/14; MT 2030

Subject references:
- salary or wages
- assessable income
- accommodation
- meals

Legislative references:
- ITAA 1936 6(1)
- ITAA 1997 6-5
- ITAA 1997 6-5(1)
- ITAA 1997 6-10

- FBTA 1986 35
- FBTA 1986 36
- FBTA 1986 37
- FBTA 1986 47
- FBTA 1986 47(5)
- FBTA 1986 136
- TAA 1953 12-B of Sch 1
- TAA 1953 12-35 of Sch 1
- TAA 1953 Part IVAAA
- Copyright Act 1968

Case references
- *Stevens v. Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16
- *Hollis v. Vabu* (2001) 207 CLR 21
- *Miesegaes v. Commissioners of Inland Revenue* (1957) 37 TC 493

ATO References
NO 2003/002624
ISSN: 1445 2014