CR 2011/71 - Fringe benefits tax: NSW State Owned Electricity Corporations that reimburse their employee's domestic electricity expenses

Class Ruling

Fringe benefits tax: NSW State Owned Electricity Corporations that reimburse their employee's domestic electricity expenses

Contents Para

This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation* Administration *Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- subsection 62(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA); and
- the definition of 'in-house residual expense payment fringe benefit' in subsection 136(1) of the FBTAA.

All legislative references in this Ruling are to the FBTAA unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies are the corporations owned by the NSW State Government that operate in the NSW electricity market. These entities are listed below:

- AusGrid (formerly EnergyAustralia);
- Endeavour Energy (formerly Integral Energy);
- Essential Energy (formerly Country Energy);
- Macquarie Generation (Macquarie);
- Delta Electricity (Delta) consisting of Delta West and Delta Coastal power stations;
- Eraring Energy (Eraring); and
- TransGrid.

Within this Ruling these corporations are called State owned corporations.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 18 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

Date of effect

8. This Ruling applies from 1 March 2011. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- the Class Ruling application dated 29 March 2011.

10. Prior to 1 March 2011, seven State owned corporations operated in the NSW electricity market. Three of the seven corporations were generation corporations (Macquarie, Delta and Eraring). Three were retail and distribution network corporations (the corporations now known as AusGrid, Endeavour Energy and Essential Energy). The other was a transmission network corporation (TransGrid).

11. On 15 December 2010, as part of the NSW Energy Reform Strategy, the NSW State Government announced the sale of a number of NSW electricity assets to the private sector. As a result of the sales:

- the right to trade the electricity output of the Delta West and Eraring power stations has been contracted to two private sector companies (Gentraders); and
- the retail arms of the three retail and distribution network companies have been sold to two private sector companies.

12. The NSW State Government continues to own the seven State owned corporations, the existing power stations and the electricity transmission networks. However, the former retail and distribution network corporations which are responsible for the operation and maintenance of the electricity reticulation networks have been renamed.

13. Each of the State owned corporations are an associate of the State Government and the other State owned corporations.

14. The electricity generated in NSW is traded on the National Electricity Market (NEM). The NEM is the wholesale market for the supply and purchase of electricity that is managed by the Australian Energy Market Operator. Once in the NEM, the electricity is available for purchase by retail companies to meet the demand of their customers.

15. Prior to the sale of the NSW electricity assets all of the electricity generated by the State owned generation corporations was traded on the NEM by a State owned corporation.

16. Following the sale of the NSW electricity assets the State owned corporations will continue to trade the electricity generated by the Macquarie and Delta Coastal power stations on the NEM, but the Gentraders will trade the electricity generated by the Delta West and Eraring power stations. Consequently, the NEM will consist of electricity traded by State owned corporations, the Gentraders, the Snowy Mountain generators and interstate generators.

17. Employees of the State owned corporations are able to enter into a salary sacrifice arrangement with their employer for the reimbursement of their domestic electricity accounts.

18. Following the sale of the NSW electricity assets the employees will purchase their domestic electricity supplies from a private sector company which is neither the employer, nor an associate of the employer.

Ruling

19. The reimbursement of the domestic electricity expenses of an employee of a State owned corporation will be an 'in-house residual expense payment fringe benefit' as defined in subsection 136(1).

20. As an 'in-house residual expense payment fringe benefit' the reimbursement will be an 'eligible fringe benefit' for the purposes of subsection 62(1).

Commissioner of Taxation
20 July 2011

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Will the reimbursement of an employee's domestic electricity account be an 'in-house residual expense payment fringe benefit'?

21. Subsection 136(1) defines an 'in-house residual expense payment fringe benefit' as follows:

> **'in-house residual expense payment fringe benefit'**, in relation to an employer, means an expense payment fringe benefit in relation to the employer where:
>
> (a) the recipients expenditure was incurred in respect of the provision of a residual benefit (other than a benefit provided under a contract of investment insurance) by a person (in this definition called the **'residual benefit provider'**);
>
> (b) if the residual benefit provider is the employer or an associate of the employer – at or about the time that, if the residual benefit had been a residual fringe benefit, would have been the comparison time, the residual benefit provider carried on a business that consisted of or included the provision of identical or similar benefits principally to outsiders;
>
> (c) if the residual benefit provider is not the employer or an associate of the employer:
>
> (i) the residual benefit provider purchased the benefit from the employer or an associate of the employer (which employer or associate is in this definition called the **'seller'**); and
>
> (ii) at or about the time that, if the residual benefit had been a residual fringe benefit, would have been the comparison time, both the residual benefit provider and the seller carried on a business that consisted of or included the provision of identical or similar benefits principally to outsiders; and
>
> (d) documentary evidence of the recipients expenditure is obtained by the recipient and that documentary evidence, or a copy, is given to the employer before the declaration date.

22. Therefore, the reimbursement of an employee's domestic electricity account will be an 'in-house residual expense payment fringe benefit' if the following conditions are satisfied:

(i) the reimbursement of the domestic electricity account is an 'expense payment fringe benefit';

(ii) the employee's expenditure is incurred in respect of the provision of a residual benefit (other than a benefit provided under a contract of investment insurance) by the 'residual benefit provider';

(iii) either the requirements of paragraph (b) are satisfied (if the 'residual benefit provider' is the employer or an associate of the employer), or the requirements of paragraph (c) are satisfied (if the 'residual benefit provider' is not the employer or an associate of the employer); and

(iv) the employee obtains 'documentary evidence' of his or her domestic electricity expenditure and provides that 'documentary evidence' or a copy to the employer before the 'declaration date'.

(i) Will the reimbursement of an employee's domestic electricity account be an 'expense payment fringe benefit'?

23. An 'expense payment fringe benefit' is defined in subsection 136(1) as meaning a 'fringe benefit' that is an 'expense payment benefit'. Section 20 states what constitutes an 'expense payment benefit'.

24. Paragraph 20(b) states:

> Where a person (in this section referred to as the **'provider'**):
>
> (a) … ; or
>
> (b) reimburses another person (in this section also referred to as the **"recipient"**), in whole or in part, in respect of an amount of expenditure incurred by the recipient;
>
> the making of … the reimbursement referred to in paragraph (b), shall be taken to constitute the provision of a benefit by the provider to the recipient.

25. Under the scheme, an employee who enters into an effective salary sacrifice arrangement[1] with his or her employer will be reimbursed for the amount incurred on the employee's domestic electricity account. These reimbursements will be expense payment benefits under paragraph 20(b).

26. In basic terms, a 'fringe benefit', as defined in subsection 136(1), is a 'benefit' provided to an employee (or associate) by an employer (or associate) or a third party under an arrangement with the employer (or associate) in respect of the employee's employment and such benefit is not otherwise exempted.

[1] The meaning of what is an effective salary sacrifice arrangement is discussed in Taxation Ruling TR 2001/10 Income tax: fringe benefits tax and superannuation guarantee: salary sacrifice arrangements

27. As the reimbursement will be provided to an employee under the terms of an effective salary sacrifice arrangement it is clearly provided in respect of the employee's employment. Therefore, the reimbursement will be an 'expense payment fringe benefit' as it is not otherwise exempt.

(ii) Is the employee's expenditure incurred in respect of the provision of a residual benefit (other than a benefit provided under a contract of investment insurance) by the 'residual benefit provider'?

28. Under section 45 a benefit is a residual benefit if the benefit is not a benefit by virtue of Subdivision A of Divisions 2 to 11.

29. Section 156 deems that the supply of electricity or gas through a reticulation system will not constitute the provision of property. Therefore, the supply of electricity will not come within Division 11. Nor will the supply of electricity come within Divisions 2 to 10. Therefore, the provision of the electricity will be a residual benefit.

30. As the electricity is a residual benefit and is not provided under a contract of investment insurance this second condition will be satisfied.

(iii) Are the requirements of either paragraph (b) or paragraph (c) of the definition satisfied?

31. For paragraph (b) to apply the 'residual benefit provider' must be the employer or an associate of the employer. The 'residual benefit provider' is the person who provides the electricity to the employee. This will be a private company.

32. As the private companies that sell electricity to residential customers in NSW are not the employer, or an associate of the employer, the relevant requirements to consider are those contained in paragraph (c) of the 'in-house residual expense payment fringe benefit' definition.

33. Paragraph (c) contains two subparagraphs that must be satisfied.

Is subparagraph (c)(i) satisfied?

34. Subparagraph (c)(i) states:

> the residual benefit provider purchased the benefit from the employer or an associate of the employer (which employer or associate is in this definition called the **'seller'**)

35. Neither the terms 'purchased' nor 'from' are defined in the FBTAA and so they must take on their ordinary meaning. *The Macquarie Dictionary*, multimedia version 5.0.0, provides the following definitions:

> **purchase**
>
> *verb (t)* (**purchased**, **purchasing**)
>
> **1.** to acquire by the payment of money or its equivalent; buy.
>
> **from**
>
> *preposition*
>
> **1.** a particle specifying a starting point, and hence used to express removal or separation in space, time, order, etc., … , source or origin, …

36. The 'in-house residual expense payment fringe benefit' definition was inserted into the FBTAA by *Taxation Laws Amendment (Fringe Benefits and Substantiation) Act* – Act No. 139 of 1987. This Act gave effect to various changes of a concessional nature that had been announced by the Federal Government following the enactment of the FBTAA. This included an amendment to the FBTAA 'to extend the concessional valuation rules applying to in-house fringe benefits to include purchases of an employer's products through independently owned retail outlets'.

37. Prior to the amendments, the in-house rules did not apply to expense payment fringe benefits, or to property and residual fringe benefits provided by a third party under an arrangement with the employer or an associate.

38. In explaining the fringe benefits to which the in-house rules would apply after the amendments were enacted, the Explanatory Memorandum (EM Extract) stated:

> The Bill will also extend the range of fringe benefits that qualify for the in-house concessional valuation rules. At present, property and residual fringe benefits only qualify as in-house fringe benefits where the goods or services, etc., are provided to the employee (or an associate) by the employer or an associate of the employer. Under the proposed amendments, property and residual fringe benefits provided by a third party by arrangement with the employer (or associate) will also qualify where the goods, etc., were purchased by the third party arranger from the employer (or associate) in the ordinary course of business.
>
> A further category of fringe benefits will also now qualify for the in-house concessions. The new category will, broadly, comprise expense payment fringe benefits where the employee receives a reimbursement of expenditure incurred in respect of the purchase of goods, etc., of a kind supplied to the public in the ordinary course of the employer's business. For example, where an employee of a petroleum company purchases the company's brand of petrol from an independently owned retail outlet at the usual retail price and the employee subsequently receives a reimbursement of a percentage of that retail price from the employer, that reimbursement will qualify as an in-house expense payment fringe benefit.

> …
>
> The effect of the amendments will be that irrespective of whether a staff discount is provided directly as a property or residual fringe benefit or indirectly as an expense payment fringe benefit, the taxable value will be the same.

39. As set out in the EM Extract, in broad terms, the intention of the amendments was to ensure that irrespective of the form of the arrangement adopted to provide a staff discount, the in-house concessions will apply where an employee receives a staff discount for the purchase of the employer's (or associate's) products. In so doing, the amendments made it possible for the in-house concessions to be utilised by an employer whose products are sold by an independent retailer.

40. Although the example given in the EM Extract is of an employee of a petroleum company, the provisions should not be seen as being limited to the petroleum industry or to the particular kinds of arrangements that existed in the petroleum industry at the time the amendments were introduced.

41. Following the sale of the NSW electricity assets, an employee of a State owned corporation will not be able to purchase electricity from a State owned corporation as the retail arms have been sold to private sector companies and it will not be possible for an employee to purchase electricity directly from a State owned generation corporation. Instead, the employee will purchase the electricity from an independent retailer. As such, it will be a situation to which the amendments were intended to apply.

42. However, the EM Extract also indicates an intention for the in-house concessions to be restricted to situations in which the in-house concessions would have applied if the benefit had been a property fringe benefit or a residual fringe benefit, rather than an expense payment fringe benefit.

43. The definitions of 'in-house property fringe benefit' and 'in-house residual fringe benefit' in subsection 136(1) both contain a requirement for the provider of the benefit to acquire the benefit directly from the employer (or associate) where the provider of the benefit is not the employer nor an associate of the employer. As this is consistent with the ordinary meaning of 'purchase' and 'from' set out in paragraph 35, it follows that this same requirement will also apply in relation to an expense payment fringe benefit.

44. The electricity generated in NSW is traded on the NEM. The NEM is distinctive because all electricity output is centrally pooled. Following the sale of the NSW electricity assets the central pool will comprise electricity traded by State owned corporations, the Gentraders, the Snowy Mountain generators and interstate generators.

45. As the electricity is pooled it is not possible to physically trace the particular electricity that is sold on the NEM by the State owned corporations. However, it is possible to conclude on the basis of the way in which the market is structured that a portion of the electricity traded on the NEM by the State owned corporations will be purchased by each of the retailers. Therefore, it is accepted that the retailer from which the employee purchases electricity will purchase electricity from a State owned corporation during the relevant period.

46. However, for the same reason it can also be concluded that each retailer will also purchase electricity from an entity which is not a State owned corporation. Therefore, following the sale of the NSW electricity assets the retailer from which the employee purchases electricity will purchase electricity from both the employer (or an associate) and an unrelated entity.

47. Given the nature of the electricity market it is not possible to positively identify whether the electricity sold to the employee was part of the portion that the retailer purchased from the employer or an associate of the employer. Therefore, it is necessary to make an assumption as to the source of the electricity that was sold to the employee.

48. In so doing, it is relevant to take into account the intention of the legislation which broadly was to ensure that all purchases of an employer's (or associate's) in-house products by employees qualify for the in-house concessions irrespective of the form of arrangement adopted to provide the staff discount. Given this intention, it is reasonable to accept that the electricity supplied to the employee by the retailer will be part of the portion that the retailer purchased from the employer or an associate of the employer unless the facts of the particular situation indicate the retailer could not have purchased the electricity from the employer or an associate of the employer. For example, the in-house concessions will not apply if the facts show the employer sold all of their output to an entity which is not the retailer from which the employee purchased the product.

49. In considering the situation of the NSW electricity market following the sale of the electricity assets, there are no factors that indicate the electricity supplied to an employee by a retailer will not be part of the portion purchased from the State owned corporations on the NEM. Therefore, it is accepted that subparagraph (c)(i) will be satisfied following the sale of the NSW electricity assets.

Is subparagraph (c)(ii) satisfied?

50. Subparagraph (c)(ii) states:

> at or about the time that, if the residual benefit had been a residual fringe benefit, would have been the comparison time, both the residual benefit provider and the seller carried on a business that consisted of or included the provision of identical or similar benefits principally to outsiders

51. This subparagraph requires a consideration of whether the 'residual benefit provider' and the 'seller' carried on a business that consisted of or included the provision of identical or similar benefits principally to outsiders.

52. The 'residual benefit' provider will be a retailer that carries on a business that consists of or includes the provision of identical or similar benefits principally to outsiders.

53. 'Seller' is defined in subparagraph (c)(i) as being the employer or associate from which the 'residual benefit provider' purchased the benefit. This will be the State owned corporations that sold the electricity on the NEM. It is also accepted that these corporations carry on a business that consists of or includes the provision of identical or similar benefits principally to outsiders.

54. Therefore, subparagraph (c)(ii) will be satisfied.

(iv) Will the employee provide documentary evidence of the expenditure to the employer?

55. The employees will provide documentary evidence of their domestic electricity expenditure to the relevant employer.

Conclusion

56. As each of the conditions contained within the definition of 'in-house residual expense payment fringe benefit' are satisfied the reimbursement of the domestic electricity expenses of an employee will be an 'in-house residual expense payment fringe benefit'.

Will the reimbursement of an employee's domestic electricity account be an 'eligible fringe benefit' for the purposes of subsection 62(1)?

57. In general terms, subsection 62(1) enables the aggregate of the taxable values of the 'eligible fringe benefits' that are provided to an employee and his or her associates during an FBT year to be reduced by the lesser of the aggregate of the taxable values or $1,000.

58. 'Eligible fringe benefit' is defined in subsection 62(2) to mean an 'in-house fringe benefit' or an 'airline transport fringe benefit'.

59. 'In-house fringe benefit' is defined in subsection 136(1) to mean:

(a) an 'in-house expense payment fringe benefit';

(b) an in-house property fringe benefit; or

(c) an 'in-house residual fringe benefit'.

60. Where the reimbursement of the employee's domestic electricity expenses is an 'in-house residual expense payment fringe benefit' it will be an 'eligible fringe benefit' for the purposes of subsection 62(1).

Appendix 2 – Detailed contents list

61. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2001/10; TR 2006/10

Subject references:

- expense payment fringe benefits
- fringe benefits tax
- in-house expense payment fringe benefits
- in-house residual expense payment fringe benefits

Legislative references:

- FBTAA 1986 Div 2
- FBTAA 1986 Div 3
- FBTAA 1986 Div 3
- FBTAA 1986 Div 4
- FBTAA 1986 Div 5
- FBTAA 1986 20
- FBTAA 1986 20(b)
- FBTAA 1986 Div 6
- FBTAA 1986 Div 7
- FBTAA 1986 Div 8
- FBTAA 1986 Div 9
- FBTAA 1986 Div 10
- FBTAA 1986 Div 11
- FBTAA 1986 45
- FBTAA 1986 62(1)
- FBTAA 1986 62(2)
- FBTAA 1986 136(1)
- FBTAA 1986 156
- TAA 1953
- Copyright Act 1968

Other references:

- Explanatory memorandum to Taxation Laws Amendment (Fringe Benefits and Substantiation) Bill 1987
- The Macquarie Dictionary, multimedia version 5.0.0

ATO references
NO: 1-2U2SN2S
ISSN: 1445-2014
ATOlaw topic: Fringe Benefits Tax ~~ Expense payment fringe benefits