CR 2015/10 - Income tax: provision of accommodation by Shell Korea Ltd to employees who are residents of Australia for tax purposes

Class Ruling

Income tax: provision of accommodation by Shell Korea Ltd to employees who are residents of Australia for tax purposes

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.

[Note: This is a consolidated version of this document. Refer to the Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions 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 provision(s) dealt with in this ruling are:

- Section 15-2 of the *Income Tax Assessment Act 1997* (ITAA 1997), and
- Section 23L of the *Income Tax Assessment Act 1936* (ITAA 1936).

Class of entities

3. The class of entities to which this Ruling applies comprises employees of Shell Korea Ltd who:

- are residents of Australia within the meaning of that expression in subsection 6(1) of the ITAA 1936
- are employed on the Floating Liquefied Natural Gas technology project (the project) in the Republic of Korea, working on a rotational fly-in-fly-out basis, and
- while employed on the project, stay in accommodation provided by their employer.

In this Ruling, persons belonging to this class of entities are referred to as project employees.

Qualifications

4. The Commissioner makes this Class Ruling based on the precise arrangement identified in the Class 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 10 to 28 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.

7. This Ruling does not deal with how the taxation law applies to any benefit provided by Shell Korea Ltd to the project employees other than the accommodation provided under the scheme.

Date of effect

8. This Ruling applies from 1 July 2013 to 30 June 2019. 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.

10. Shell Korea Ltd (SKL) was incorporated in Hong Kong and is wholly owned by Royal Dutch Shell plc (RDS). It is a tax resident of the Republic of Korea (South Korea) with no employees or assets located in Australia. All its business activities will be carried on outside Australia.

11. RDS companies are developing the Prelude Gas Fields in the Browse Basin, 475km north-northeast of Broome, Western Australia.

12. The project involves using Floating Liquefied Natural Gas (FLNG) technology, with construction of the FLNG facility by an independent third party consortium taking place in shipyards in Geoje, South Korea. Once construction is completed and the FLNG facility becomes operational, the FLNG facility will be moved from Geoje to the Browse Basin.

13. While the facility is being constructed in Geoje, SKL will employ staff for the project to work in operations readiness and to assist in the construction project so as to develop a firm understanding of the technology. The nature of employment in Geoje on the FLNG facility is unique to this particular project.

14. The project employees will have been employees of an RDS group company or will be hired specifically for the project. They will attend Geoje on a rotational roster basis travelling from their home base in Australia, working in Geoje for 28 consecutive days then returning to Australia for 28 days off.

15. All project employees will have spent 8-10 weeks in training in Perth, as employees of Shell Australia Pty Ltd (Shell Australia) or another RDS group company, before being deployed to Geoje.

16. At this time the employees will have their employment with Shell Australia or another RDS group company terminated, and their employment with SKL will commence.

17. Once the FLNG facility becomes operational, project employees will have their employment with SKL terminated and may recommence employment with other companies in the RDS group.

18. Other workers (who are not part of the class of entities) will also be engaged to work on the project. These may be:

- Australian based staff who are needed in Geoje for longer than 12 months. They will be employees of SKL and will reside in Geoje on a permanent residential basis for the duration of the project. These employees will be responsible for managing ancillary functions related to the project such as design and accounting and most of these employees are not expected to be based on the facility once it is operational in the Browse Basin.
- Australian based staff who are needed in Geoje for less than 12 months. They are generally expected to be employees of Shell Australia who will be seconded to SKL for the duration of their time in Geoje.
- employees of RDS based in countries other than Australia.

19. Before the FLNG facility becomes operational, project employees will be required to undertake further training to obtain the knowledge and skills necessary to operate the facility once it is moved to the Browse Basin. Most of this training will take place on or near the facility in Geoje, with some training sessions in seminar rooms. While training, project employees will work 12 hour shifts for 28 days, on a rotational basis with other project employees.

20. When the facility moves into 'testing' mode, project employees will operate the facility in shifts in the same manner as they will once the facility is fully operational. This will involve operating the facility continuously, with project employees working daytime or night time 12 hour shifts.

21. Project employees will be provided with accommodation at no cost for the duration of their stay in Geoje. Basic one or two bedroom apartments will be rented by SKL and made available to the employees. Each apartment will be shared by two or four project employees with one or two employees using the accommodation during each roster cycle. Project employees cannot choose who they share with.

22. Project employees will return to the same apartment on each of their visits to Geoje. They can leave some belongings in the apartment when they return to Australia if they desire.

23. Project employees will arrive at the accommodation shortly before the commencement of their 28 day work cycle and vacate the property shortly after the conclusion of their 28 day roster.

24. The apartments are located near the shipyards, minimising travel time to the shipyards for project employees and making shift changeovers more efficient.

25. Some project employees are expected to retain their Australian residences and reside in them when they are home for their 28 day period and therefore will be unlikely to sub-let or let their Australian residences while they are away for 28 days working in Geoje. However, other project employees may not retain a residence in Australia.

26. Project employees' spouses, partners and children will not be relocated to Geoje and therefore will generally be expected to remain at the employee's home base in Australia.

27. SKL may provide project employees with other benefits in relation to the scheme. This Ruling only deals with the taxation treatment of the accommodation provided.

Ruling

Whether section 23L of the ITAA 1936 applies to the accommodation provided

28. Section 23L of the ITAA 1936 will not apply to the accommodation provided by SKL to the project employees.

Whether the provision of accommodation gives rise to an assessable amount under section 15-2 of the ITAA 1997

29. Section 15-2 of the ITAA 1997 will not apply to the provision of accommodation provided by SKL to the project employees.

Commissioner of Taxation
11 February 2015

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.

Whether section 23L of the ITAA 1936 applies to the accommodation provided

30. Section 23L of the ITAA 1936 provides that certain benefits in the nature of income are not assessable:

> (1) Income derived by a taxpayer by way of the provision of a fringe benefit is not assessable income and is not exempt income of the taxpayer.
>
> (1A) Income derived by a taxpayer by way of the provision of a benefit (other than a benefit to which section 15-70 of the *Income Tax Assessment Act 1997* applies) that, but for paragraph (g) of the definition of ***fringe benefit*** in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986*, would be a fringe benefit is exempt income of the taxpayer.
>
> (2) Where:
>
> (a) in a year of income, a taxpayer derives income consisting of one or more non-cash business benefits (within the meaning of section 21A); and
>
> (b) the total amount that is applicable under section 21A in respect of those benefits does not exceed $300;
>
> the income is exempt income.

31. The term 'fringe benefit' is defined in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA). One of the requirements is that it be a benefit provided by an employer in respect of the employment of the employee. The term 'employer' in subsection 136(1) includes a 'current employer'. A 'current employer' is defined as a person who pays, or is liable to pay, salary or wages.

32. 'Salary or wages' is also defined in subsection 136(1) of the FBTAA. The term is relevantly defined to be a payment from which an amount must be withheld under one of a number of specified provisions in Schedule 1 to the *Taxation Administration Act 1953* (TAA) which deal with payments to employees, company directors and office holders.

33. An entity will be an employer for FBT purposes if it makes a payment to an employee, company director or office holder that is subject to withholding obligations. SKL is not resident in Australia but is providing benefits and making payments of salary or wages to Australian resident employees.

34. Taxation Determination TD 2011/1 considers whether a non-resident entity:

- is required to withhold Pay As You Go (PAYG) amounts from salary and wages paid to an Australian resident employee for work performed overseas, and
- is subject to obligations under the FBTAA in relation to benefits provided to an Australian resident employee in relation to work performed overseas.

35. A non-resident employer that pays an Australian resident for work performed overseas must withhold an amount in accordance with section 12-35 of Schedule 1 to the TAA if the non-resident entity has a sufficient connection with Australia. The nature of a sufficient connection is a matter of statutory interpretation having regard to the PAYG withholding provisions in the TAA. Where a non-resident entity pays an Australian resident for work performed overseas, the non-resident will have a sufficient connection to Australia if they have a physical business presence in Australia. A non-resident entity will have a physical business presence in Australia if the non-resident carries on an enterprise or income producing activities (or part of such enterprise or activities) in Australia and has a physical presence in Australia.

36. If there is a withholding obligation, obligations under the FBTAA will arise in relation to benefits provided to an Australian resident employee in respect of the employment of the employee. If there is no withholding obligation, amounts paid to the employee by the non-resident entity for work performed overseas will not be 'salary or wages' as defined in subsection 136(1) of the FBTAA and no obligations under the FBTAA can arise for the non-resident entity in relation to benefits provided to that employee.

37. All the business activities of SKL are carried on outside of Australia. It will not have any employees working in Australia and will not have any assets or physical presence in Australia.

38. Therefore, SKL will not have a sufficient connection with Australia and will not be subject to the withholding provisions in Schedule 1 to the TAA, in relation to payments made to the project employees. As there will be no withholding obligations, there will also be no obligations under the FBTAA in relation to the benefit (accommodation) provided by SKL to the project employees.

39. As payments made to the project employees are not 'salary or wages' for the purposes of the FBTAA, the benefits provided will not be the provision of a 'fringe benefit'. Accordingly, subsections 23L(1) and 23L(1A) of the ITAA 1936 will not apply.

40. A non-cash business benefit is defined in subsection 21A(5) of the ITAA 1936 as:

> property or services provided after 31 August 1988:
>
> (a) wholly or partly in respect of a business relationship; or
>
> (b) wholly or partly for or in relation directly or indirectly to a business relationship.

41. As the accommodation is not provided in respect of a business relationship, they are not a non-cash business benefit, and subsection 23L(2) of the ITAA 1936 will not apply.

42. Accordingly, section 23L of the ITAA 1936 will not apply to the accommodation provided by SKL to the project employees.

Whether the provision of accommodation gives rise to an assessable amount under section 15-2 of the ITAA 1997

43. Where a benefit does not fall within the scope of the FBTAA, section 15-2 of the ITAA 1997 may apply to include the value of the benefit in a taxpayer's assessable income.

44. Section 15-2 of the ITAA 1997 provides that:

> **15-2 Allowances and other things provided in respect of employment or services**
>
> (1) Your assessable income includes the value to you of all allowances, gratuities, compensation, benefits, bonuses and premiums *provided to you in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by you (including any service as a member of the Defence Force).
>
> (2) This is so whether the things were *provided in money or in any other form.
>
> (3) However, the value of the following are not included in your assessable income under this section:
>
> (a) a *superannuation lump sum or an *employment termination payment;
>
> (b) an *unused annual leave payment or an *unused long service leave payment;
>
> (c) a *dividend or *non-share dividend;
>
> (d) an amount that is assessable as *ordinary income under section 6-5;
>
> (e) *ESS interests to which Subdivision 83A-B or 83A-C (about employee share schemes) applies.
>
> Note: Section 23L of the *Income Tax Assessment Act 1936* provides that fringe benefits are non-assessable non-exempt income.

45. None of the exclusion in subsection 15-2(3) of the ITAA 1997 applies to the provision of benefits to the project employees.

46. Accommodation is provided to the project employees in Geoje in respect of or in relation to their employment. The provision of that accommodation is not in the nature of an allowance, a gratuity, compensation, a bonus or a premium. However, section 15-2 of the ITAA 1997 will apply to include the value of the provision of the accommodation in the assessable income of the project employees if it is considered to be a benefit to those employees.

47. Courts have considered whether an employee has received a benefit in respect of their employment in a number of cases involving former paragraph 26(e) of the ITAA 1936 (the predecessor to section 15-2 of the ITAA 1997). It is not necessary that there be a direct payment by the employer to the employee. In one decision, *Case L54* 79 ATC 399; (1979) 23 CTBR(NS) *Case 61,* the Board held that the amount of private school fees paid by the employer for the child of the employee was a financial benefit and assessable to the employee under former paragraph 26(e) of the ITAA 1936, even though the amount was paid directly to the school.

48. Accommodation provided by an employer for their employee is usually considered to be a benefit to the employee. In considering whether the value of share options was assessable in *Donaldson v. Federal Commissioner of Taxation* 74 ATC 4192; (1974) 4 ATR 530 (*Donaldson*), Bowen CJ stated: 'Items rendered assessable income by sec. 26(e) have to be regarded according to their nature, whether they are meals, use of quarters, or option rights.'

49. In *Case T76* 86 ATC 1076; *Tribunal Case 3* (1986) 17 ATR 1187, the taxpayer was required, as a condition of his employment, to live in a house provided at a mine rescue station. The taxpayer owned a home elsewhere and would have preferred to live there. It was held that paragraph 26(e) of the ITAA 1936 was applicable even though the occupation was the result of a condition of employment.

50. However, a different approach was taken in the more recent decision in *Case V60* 88 ATC 434; *AAT Case 4241* (1988) 19 ATR 3413. In this case the Administrative Appeals Tribunal found that the provision of accommodation to three employees was not a 'benefit' within the meaning of former paragraph 26(e) of the ITAA 1936 where their duties required them to live in close proximity to their workplace. Two of the three employees in that case had rented out their usual homes while occupying the employer provided accommodation. All three of the taxpayers lived in the employer provided accommodation with their families.

51. In considering the decision in *Case T76* Purvis J stated (at 450):

> The Tribunal, with respect, there appears to be not directing its attention to the proper question, namely, whether in a case where a taxpayer is obliged to occupy a residence for the benefit of the employer and against his own will, and he has his own home, the taxpayer has a 'benefit' allowed given or granted to him at all. … It is clear that a prerequisite to the application of sec. 26(e), 26AAAA and 26AAAB is the existence of a benefit. … The sections cannot apply where a benefit is not seen to exist at all.

52. Purvis J agreed with the following submission of the taxpayers (at 447):

> On behalf of the taxpayers it was submitted that assistance is obtained from *Tennant v. Smith* and *Read v. Cattermole* in that the concern evidenced by such cases is the taxing of someone who is receiving rent-free occupation. What is essential, it is submitted, and to be borne in mind when considering sec. 26(e) of the Income Tax Assessment Act is the question 'Is there a benefit that has been allowed, given or granted?' It is odd, it was submitted, to talk about an employer granting premises when what he is doing is requiring someone to occupy them for the employer's purposes. In the subject applications there has to be someone near the mine to attend to any emergency. There has to be someone at the colliery to ensure that the maintenance work is done 24 hours a day. It is essential, it was submitted, from the employer's point of view, that this occupation exists. It is not a matter of saying here is an employer who has granted something to his employee or given something to his employee. It is something that is required by the employer of the employee. It is therefore the performance of the employer's services rather than an additional remuneration or benefit, of the employee.

53. In concluding that paragraph 26(e) of the ITAA 1936 did not apply, Purvis J found (at 451) that 'the section requires that in order for there to be a benefit to a taxpayer he must be allowed, given or granted something that is of value to the taxpayer'. Also (at 452), a benefit 'must be a reward or remuneration for services and an incident in the relevant sense of the employment'.

54. The nature of employment in Geoje on the FLNG facility, which is unique to this particular project, means that the project employees are required to work day or night time 12 hour shifts for 28 consecutive days, before returning to their home base in Australia for their rostered days off.

55. The project employees are allocated an apartment near to their place of employment that they must share with another project employee chosen by SKL. Although the employees do benefit from the accommodation in the sense that they must sleep somewhere, SKL benefits as the location of the apartment makes shift changeovers more efficient for SKL. The hours of duty of the project employees means minimal time is spent in the apartment. At the conclusion of their rostered days of work they must vacate the apartment, leaving only minimal possessions in storage, as the apartment is then used by another two project employees. The family of a project employee cannot be accommodated in the apartment.

56. In these circumstances it is considered that the provision of the accommodation to the project employees is not a reward to those employees. Nor is it in the nature of remuneration for services. Instead, the occupation of the accommodation is for the benefit of SKL and is in furtherance of the performance of the project employees' contracts of service.

57. Accordingly, section 15-2 of the ITAA 1997 will not apply to the accommodation provided to the project employees, as it is not a benefit to those employees.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TD 2011/1

Subject references:

- Board fringe benefits
- Fringe benefits tax
- Salary and wages income

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 21A
- ITAA 1936 21A(5)
- ITAA 1936 23L
- ITAA 1936 23L(1)
- ITAA 1936 23L(1A)
- ITAA 1936 23L(2)
- ITAA 1936 26(e)
- ITAA 1997
- ITAA 1997 15-2
- ITAA 1997 15-2(3)
- ITAA 1997 15-70
- FBTAA 1986 136(1)
- TAA 1953
- TAA 1953 Sch 1
- TAA 1953 Sch 1 12-35

Case references:

- Case L54 79 ATC 399; (1979) 23 CTBR(NS) Case 61
- Case T76 86 ATC 1076; Tribunal Case 3 (1986) 17 ATR 1187
- Case V60 88 ATC 434; AAT Case 4241 (1988) 19 ATR 3413
- Donaldson v. Federal Commissioner of Taxation 74 ATC 4192; (1974) 4 ATR 530

ATO references

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