TR 95/D8 - Income tax: deductibility of fringe benefits tax

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Draft Taxation Ruling
Income tax: deductibility of fringe benefits tax

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TR 94/26

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Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office.

DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings which represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling. Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office.

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What this Ruling is about

Class of person/arrangement

1. This Ruling applies to taxpayers who are employers and liable to tax imposed under section 5 of the *Fringe Benefits Tax Act 1986* ('fringe benefits tax') and liable to instalments of tax under section 102 of the *Fringe Benefits Tax Assessment Act 1986* ('fringe benefits tax instalments').

2. It describes the way we think subsection 51(1) of the *Income Tax Assessment Act 1936* ('the Act') applies to claims for fringe benefits tax (including instalments) by taxpayers who are employers. Specifically, this Ruling is concerned with the question of when fringe benefits tax and fringe benefits tax instalments are 'incurred' for the purposes of subsection 51(1).

3. Prior to the repeal of subsection 51(4A) of the Act, no deduction was allowable under subsection 51(1) for fringe benefits tax. The repeal of subsection 51(4A) applies to fringe benefits tax (including instalments) payable for the fringe benefits year of tax commencing on 1 April 1994 and all subsequent years.

Ruling

4. Where fringe benefits tax or fringe benefits tax instalments are incurred in gaining or producing assessable income or are necessarily incurred in carrying on a business (which generally will be the case), the amount of that tax or those instalments deductible under subsection 51(1) will be the total amount of that tax or those instalments that is incurred in the income tax year of income, and which is properly referable to that year.

5. Fringe benefits tax is incurred by an employer at the end of the fringe benefits tax year. It is at that point in time that there is a 'fringe benefits taxable amount' upon which fringe benefits tax is imposed under section 5 of the *Fringe Benefits Tax Act*.

6. Fringe benefits tax instalments are incurred when the liability for these instalments of tax arises. We think an employer comes under a presently existing liability for these instalments when they have a 'notional tax amount' for the purposes of Division 2 of Part VII of the *Fringe Benefits Tax Assessment Act 1986*. Section 110 provides generally that the 'notional tax amount' will be equal to the amount of the previous year's fringe benefits tax. Accordingly, it is generally the case that an employer is liable to pay instalments in a current fringe benefits tax year if the employer had a fringe benefits tax liability for the previous fringe benefits tax year.

7. A fringe benefits tax amount incurred in relation to a relevant fringe benefits tax year is offset by any associated fringe benefit tax instalments amount incurred in the previous income tax year and deductible in that earlier year.

8. For the income tax year ended 30 June 1994 this means, in most cases, that an employer will be able to claim as a deduction under subsection 51(1) their fringe benefits tax instalment referable to the fringe benefits tax quarter ended 30 June 1994 (i.e., the instalment which became due and payable on 28 July 1994).

9. In the income tax year ending 30 June 1995 (and similarly in succeeding income tax years), this means, in most cases, that an employer can claim as a deduction under subsection 51(1):

> the amount of their actual fringe benefits tax liability for the fringe benefits tax year ending 31 March 1995,
>
> **less:** the instalment referable to the June 1994 fringe benefits tax quarter,
>
> **plus:** the instalment referable to the June 1995 fringe benefits tax quarter.

Date of effect

10. This Ruling only applies to the year of income which includes 1 April 1994, and all subsequent years. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Explanations

Subsection 51(1) - the relevant principles

11. Following the repeal of subsection 51(4A) of the Act, a deduction for fringe benefits tax or fringe benefits tax instalments will be allowable to taxpayers where it represents an outgoing that meets the conditions of subsection 51(1).

12. Where fringe benefits tax or fringe benefits tax instalments can be said to have been incurred in gaining or producing assessable income, or necessarily incurred in carrying on a business for that purpose, the main issue concerning the amount to be allowed as a deduction will be how much of this outgoing has been 'incurred' in a particular year of income.

13. For most outgoings to have been incurred, it is necessary that they represent a presently existing pecuniary liability (*Nilsen Development Laboratories Pty Ltd & Ors v. FC of T* (1981) 144 CLR 616; 81 ATC 4031; 11 ATR 505; *Coles Myer Finance Pty Ltd v. FC of T* (1992-1993) 176 CLR 640; 93 ATC 4212; (1993) 25 ATR 95). This does not mean that the liability has to be payable immediately or that it cannot be defeasible (*Nilsen Development Laboratories*; *FC of T v. Australian Guarantee Corporation Ltd* (1984) 2 FCR 483; 84 ATC 4642; 15 ATR 982; *Australian and New Zealand Banking Group Ltd v. FC of T* 94 ATC 4026; (1994) 27 ATR 559).

14. In order to determine whether or not a presently existing pecuniary liability has arisen it is necessary to closely examine the source of the liability. Such an examination will be on the basis of a 'legal or jurisprudential analysis', rather than a commercial view of the rights and obligations of the relevant parties (*Coles Myer Finance*; *Australian and New Zealand Banking Group*).

15. This may require a careful analysis of such material as contracts (*Ogilvy and Mather Pty Ltd v. FC of T* 90 ATC 4836; (1990) 21 ATR 841 and *FC of T v. Woolcombers (WA) Pty Ltd* 93 ATC 5170; (1993) 27 ATR 302) or industrial awards (*Nilsen Development Laboratories*), or relevant legislation (*Australian and New Zealand Banking Group*).

16. On some occasions it may also be necessary to determine how much of an outgoing that is generated from the existence of a presently existing pecuniary liability, is referable to a year of income and how much might be referable to another year of income (*Coles Myer Finance*; *Australian and New Zealand Banking Group*). Our general views on the implications of the High Court decision in *Coles Myer Finance* are set out in Taxation Ruling TR 94/26. Paragraphs 7 to 11 and 28 to 30 of that Ruling describe our understanding of how to identify how much of a liability of a revenue nature is 'properly referable' to a particular income tax year of income.

Nature of the liability for fringe benefits tax

17. Liability for fringe benefits tax arises under Commonwealth legislation. Under section 5 of the *Fringe Benefits Tax Act*, 'tax is imposed in respect of the fringe benefits taxable amount of an employer of a year of tax'. Section 3 of this Act provides that the *Fringe Benefits Tax Assessment Act* is incorporated and shall be read as one with the *Fringe Benefits Tax Act.*

18. The expressions 'fringe benefits taxable amount', 'employer' and 'year of tax' are all defined in subsection 136(1) of the *Fringe Benefits Tax Assessment Act*. Section 66 of this Act is the key provision by which a person liable to pay fringe benefits tax is identified. That person is the employer. However, a necessary prerequisite for the operation of section 66 is that, for each fringe benefits year of tax, commencing on 1 April each year (paragraph 136(1)(a) of the definition) there is a 'fringe benefits taxable amount'.

19. Generally, the scheme for assessment of fringe benefits tax is that an employer, for each year of tax, has to calculate their 'fringe benefits taxable amount' only once. Under section 68 of this Act they are required to furnish a return, and under section 70 they are required to specify on that return the amount of the 'fringe benefits taxable amount' and the amount of tax payable on that amount. The requirement to furnish a return under section 68 does not arise if the Commissioner has required a return to be furnished under section 69 and the employer has complied with that request.

20. The 'fringe benefits taxable amount' is, 'in the ordinary case, the sum of all the values allocated by the [*Fringe Benefits Tax Assessment*] Act to the various "fringe benefits" provided by the employer in the current tax year': per Hill J in *Tubemakers of Australia Ltd v. FC of T* 93 ATC 4207 at 4210; (1993) 25 ATR 183 at 187. His Honour was referring to the old definition of 'fringe benefits taxable amount', and not to the new definition of this phrase contained in new section 136AA of the *Fringe Benefits Tax Assessment Act*.

This new section was introduced by the *Taxation Laws Amendment (Fringe Benefits Tax Measures) Act 1992*, to facilitate the 'grossing up' method now used to calculate the amount of fringe benefits tax payable. The relevant phrase to which his Honour's remarks now relate is 'aggregate fringe benefits amount', as defined in subsection 136(1).

21. There is no requirement in the ordinary case, under the *Fringe Benefits Tax Assessment Act,* for an employer to calculate their 'fringe benefits taxable amount', other than in connection with determining the content of their return this Act requires to be furnished. Nor can a 'fringe benefits taxable amount' exist for a fringe benefits tax year until the end of that year, in the ordinary case, because there cannot be a sum of the taxable values of all fringe benefits in relation to an employer for that year until that time. Such an amount is necessary to calculate their 'aggregate fringe benefits amount', and hence their 'fringe benefits taxable amount'.

22. When the annual return is lodged with the Commissioner the usual case is that the amount (including a nil amount) of the 'fringe benefits taxable amount' of the employer of the year of tax and the amount (including a nil amount) of fringe benefits tax payable on that amount, are deemed to constitute an assessment of tax made by the Commissioner (the 'deemed assessment'), at the time of lodging the return (section 72, *Fringe Benefits Tax Assessment Act*).

23. Under section 68 of the *Fringe Benefits Tax Assessment Act* the annual return is required to be lodged with the Commissioner not later than 28 days after the end of the fringe benefits tax year (which, under subsection 136(1), is 31 March), or such later date as the Commissioner may allow. Nevertheless, where an employer at 31 March can establish that they have a 'fringe benefits taxable amount' on which an amount of fringe benefits tax is payable, we think that under the statutory scheme just described, they will have a presently existing liability at that time, for that amount of tax.

24. We do not consider that a presently existing liability for fringe benefits tax, in the ordinary case, can arise before the time when a 'fringe benefits taxable amount' comes into existence for a particular employer at the end of their fringe benefits tax year. Thus, the earliest time we think the liability for fringe benefits tax can arise is at the end of the fringe benefits tax year on 31 March.

25. Conversely, we do not think that an employer need establish that the liability for fringe benefits tax is 'due and payable' under the statutory scheme, before it can be said that they have incurred an outgoing equal to the amount of the tax owing. Subsection 90(1) of the *Fringe Benefits Tax Assessment Act* does speak of the need to establish that there is an amount of 'tax assessed' before there can be

any amount that is due and payable. If there is such an amount that has been assessed, then it is due and payable 'on the twenty-eighth day after the end of the year of tax' (i.e., 28 April). However, the primary source of liability for fringe benefits is section 5 of the *Fringe Benefits Tax Act*, and the essential prerequisite specified there for the existence of this liability is the existence of a 'fringe benefits taxable amount'.

A contrary view

26. The view has been expressed that liability for fringe benefits tax is incurred as it accrues, that is to say, as and when fringe benefits are provided say, by an employer to their employee. Most proponents of this view argue that this accrued liability can be calculated on a daily accruals basis.

27. Proponents of this view argue that at the time of the provision of a 'fringe benefit' (as defined in subsection 136(1), *Fringe Benefits Tax Assessment Act*) to an employee, all of the factors required to ascertain the 'taxable value' of that benefit are generally present or ascertainable, even if there are further actions required to precisely determine their amount. It is said that an employer, at the end of their income tax year of income, can make an 'reasonable estimation' (see the decisions in *RACV Insurance v. FC of T* [1975] VR 1; 74 ATC 4169; (1974) 4 ATR 610; *Commercial Union Assurance Co of Australia Limited v. FC of T* [1977] 14 ALR 651; 77 ATC 4186; (1977) 7 ATR 435).

28. *State of Queensland v. Commonwealth of Australia* (1986-1987) 162 CLR; 87 ATC 4021; 18 ATR 158 involved a challenge to the constitutional validity of the *Fringe Benefits Tax Act 1986* and the *Fringe Benefits Tax Assessment Act 1986.* In this case Gibbs CJ did say (CLR 92, ATC 4308, ATR 168) that:

> 'As I have said, the tax imposed by these Acts on the State as employer, is measured by the taxable value of the fringe benefits provided to its employees. The tax is attracted by the giving of the benefits.'

29. It seems to us however, that his Honour did not specifically have in mind, in making these remarks, the issue of when liability for fringe benefits tax arises. The tenor of his remarks is equivalent to saying no more than that income tax is attracted by the derivation of income. Actual liability for income tax, however, is to be found in the statutory scheme for assessment and service of a notice of assessment (see, for example, *Clyne v. DFC of T* (1981) 150 CLR 1; 81 ATC 4429; 12 ATR 173; *DFC of T v. Taylor* 83 ATC 4539; (1983) 14 ATR 567).

30. We consider the view that liability for fringe benefits tax arises at the time of provision of a fringe benefit to an employee does not pay sufficient regard to the statutory scheme by which liability for tax

under the *Fringe Benefits Tax Act* arises. Our views on this statutory scheme have been set out earlier in this Ruling. Under this scheme, we believe liability for fringe benefits tax arises only once a year, when the 'fringe benefits taxable amount' comes into existence at the end of the fringe benefits tax year.

31. However, because of the view we take of the nature of an employer's liability for fringe benefits tax instalments, the amount we consider to be deductible under subsection 51(1) of the Act regarding such instalments will quite often approximate the amount believed to be deductible according to this contrary view.

FBT instalments - nature of the liability

32. The statutory scheme for imposing tax on the provision of fringe benefits is complemented by a set of provisions dealing with the collection of this tax. Division 2 of Part VII of the *Fringe Benefits Tax Assessment Act* provides for a system for collection of fringe benefits tax by instalments (see section 102). This system creates a liability for the fringe benefits tax instalments that is initially separate from the liability for fringe benefits tax.

33. Section 102 provides that an employer is liable to pay, in accordance with Division 2, three instalments of tax in respect of each standard fringe benefits tax year of tax. The amount of those instalments can only be ascertained under section 111 if there is a 'notional tax amount'. Section 110 provides generally, that the 'notional tax amount' will be equal to the amount of the previous year's fringe benefits tax. Specifically, for the fringe benefits tax year commencing on 1 April 1994, section 110 provides that the 'notional tax amount' will generally equal 1.93 times the previous year's fringe benefits tax (paragraph 110(1)(c)).

34. Subject to Division 2 of the *Fringe Benefits Tax Assessment Act*, section 103 provides that 3 instalments are due and payable on 28 July, 28 October and 28 January in the fringe benefits tax year. Reference to sections 109 and 111 makes it clear that these instalments were designed to relate to the three monthly periods ending on 30 June, 30 September and 31 December respectively.

35. We believe that if this previous year's fringe benefits tax amount has been established, which in the ordinary case will be evidenced by a deemed assessment upon the furnishing of the fringe benefits tax return (see paragraph 23), then a liability for all three fringe benefits tax instalments will have arisen (no later than 28 April in the ordinary case). A debt comes into existence at this time because of the existence of the prerequisite 'notional tax amount' even though the

instalments themselves are payable at a later time, i.e, on the dates specified in section 103.

36. Notwithstanding that separate liabilities are created for fringe benefits tax instalments initially and then for the related actual fringe benefits tax, the statutory scheme provides for the instalments liability to be subsumed or merged into the actual fringe benefits tax liability. Thus section 104 provides for the crediting of instalments paid against the actual fringe benefits liability when it is assessed. And section 105, which deals with cases where instalment liabilities have not been paid, operates to remove those liabilities in certain situations, generally when the actual fringe benefits tax for that fringe benefits tax year is assessed.

37. It is important to recognise the initial separation and subsequent merger of the fringe benefits tax and fringe benefits tax instalments liabilities. The latter is very important when considering the calculation of the total amount of the deduction an employer can claim under subsection 51(1) of the Act, in any year of income, relating to the eventual amount of fringe benefits tax due (see paragraphs 46 to 49).

The amount of fringe benefits tax instalments referable to a particular year of income

38. The liability for fringe benefits tax instalments may come into existence in a particular income tax year of income, but it will be rare for it to be wholly discharged in that year. For example, an employer may have calculated their fringe benefits taxable amount and the fringe benefits tax payable on that amount for the fringe benefits year of tax ending on 31 March. If their income tax year of income ends on the following 30 June they will know by that time what their 'notional tax amount' is and consequently what amounts of fringe benefits tax instalments are due and payable on 28 July, 28 October and 28 January, i.e., the amounts that will be discharged in the next income tax year.

39. We consider that there is a need, in such situations, to determine the extent to which the liability for fringe benefits tax instalments is referable to the year in which the liability arises and the extent to which it is referable to the year in which it is likely to be discharged (*Coles Myer Finance*; *Australian and New Zealand Banking Group*).

40. There is little by way of judicial guidance on how this apportionment is to be made and the nature of the statutory liabilities under examination in this Ruling is certainly different from the nature of the financing transaction liabilities in *Coles Myer Finance*. Thus, there is no direct link, for example, between these statutory liabilities

and the provision of any goods or services, as described in paragraphs 11 and 29 of Taxation Ruling TR 94/26.

41. However, for the purposes of TR 94/26 we think that these liabilities accrue periodically, in the sense that they stem from a statutory framework that provides for them to arise and exist for a certain period of time before their discharge. Therefore, in terms of applying paragraph 7 of TR 94/26, it is appropriate to ask how much of the outgoing represented by these liabilities for fringe benefits tax instalments is 'properly referable' to the particular income tax year in question (*Coles Myer Finance; Australian and New Zealand Banking Group*).

42. Alternatively, we also think that there is sufficient similarity between the nature of these liabilities and the liability considered by the Full Federal Court in *Australian and New Zealand Banking Group* (see paragraph 9 of TR 94/26). In that case the liability arose under the statutory framework provided by the *Accident Compensation Act 1985 (Vic)*. There was no question that this liability would result in the direct provision of any goods or services to the taxpayer in that case. Rather, the liability of the taxpayer, as a 'self-insurer', was one imposed under the statute, to pay compensation to a worker or a worker's dependents when the worker had suffered an injury.

43. Notwithstanding the nature of this liability, Hill J (with whom Northrop and Lockhart JJ agreed), still found it appropriate to consider the question of how much of the liability incurred was referable to the particular year of income in question. This question was answered by resorting to the evidence of accounting experts, which demonstrated that, for accounting purposes, all of the liability that covered claims for injuries suffered in that year, whether reported or not, would be referable to that year (ATC 4034; ATR 569-570). Accounting evidence in that case therefore provided the basis on which to decide whether a liability incurred is referable to a particular year of income.

44. We think the statutory scheme described earlier in this Ruling for the imposition and collection of fringe benefits tax instalments provides its own natural basis for answering the question of how much of the outgoing represented by the sum of these liabilities is referable to a particular income tax year of income. As noted already, this scheme is directed at spreading the collection of fringe benefits tax over the fringe benefits tax year. Thus, the first instalment relates to the quarter ending on 30 June, the second instalment relates to the quarter ending on 30 September and the third and final instalment relates to the quarter ending on 31 December.

45. In the case of an employer with an income tax year ending on 30 June, for example, it would be appropriate to say that it is the amount of the June quarter instalment that is referable back to that year, even

though it is not payable until 28 July, and that the September and December quarter instalment amounts are referable to the next year of income.

Calculation of the deductible amount

46. In most cases an employer will know by 30 June what the amount payable on 28 July will be, and for the first year for which this Ruling applies (i.e., the year of income in which 1 April 1994 occurs, which will generally be the year ended 30 June 1994), the June quarter instalment will therefore be the only amount that will be deductible under subsection 51(1). This is because we consider the liability for fringe benefits tax to which this June quarter instalment relates does not arise until 31 March 1995 at the earliest, that is to say, for the above example, in the next income tax year.

47. Generally, employers for the year ended 30 June 1995 will discharge their fringe benefits tax instalment liabilities by making payments on the dates specified. At the conclusion of the fringe benefits tax year on 31 March 1995 they will calculate their liability for fringe benefits tax and in the ordinary case, be required to make a payment of the difference between that liability and the sum of the instalments they have already paid. It is at this point that the subsequent merger of the fringe benefits tax instalment liabilities into the liability for fringe benefits tax becomes critical to the calculation of the amount that can be claimed as a deduction under subsection 51(1).

48. Because of this merger we think that the amount deductible can only be based, after this time, on the actual amount of the final liability for fringe benefits tax that becomes due and payable. As well, the very fact that there has been some spreading of the initial liability relating to the fringe benefits tax instalments requires that the amount claimed as a deduction recognises that an amount has already been allowed as a deduction in the prior year. The calculation of the amount of fringe benefits tax deductible for the year ended 30 June 1995, in the ordinary case, will therefore be the amount of the liability for fringe benefits tax that arises after 31 March, less the amount of the June 1994 quarter instalment already claimed.

49. For the income tax year ended 30 June 1995 the total amount of fringe benefits tax (including instalments) deductible under subsection 51(1), in line with our approach for the year ended 30 June 1994, will also include the amount of the June 1995 quarter instalment. Under this view any refund received under section 104 of the *Fringe Benefits Tax Assessment Act* does not enter the calculation at all of the total amount deductible under subsection 51(1).

Examples

Year ended 30 June 1994

50. Steelco Ltd, an employer and manufacturer of various steel products, has an income tax year of income ending on 30 June. For the fringe benefits tax year ending on 31 March 1994 it calculates its fringe benefits taxable amount and the fringe benefits tax due and payable on that amount is $103,627.

51. No part of the amount of $103,627 is allowable as a deduction in their income tax return for the year ended 30 June 1994 because of the operation of subsection 51(4A) of the *Income Tax Assessment Act*.

52. A fringe benefits tax return for the year ending 31 March 1994 is lodged and tax of $50,000 is paid on 28 April 1994 (being the difference between the tax assessed of $103,627 and amounts previously paid by way of instalments). As a result of Steelco lodging this return the amount of tax that has been assessed for the purposes of section 110 of the *Fringe Benefits Tax Assessment Act*, for the 'immediately preceding year of tax' is $103,627 (the 'previous year's tax' for the purposes of subparagraph 110(1)(c)(ii)). For the fringe benefits tax year beginning on 1 April 1994, the amount of their 'notional tax amount' is therefore 1.93 times $103,627 or $200,000.

53. As at 30 June 1994 Steelco knows that it is liable to pay 3 fringe benefits tax instalments of $50,000 each, due and payable on 28 July 1994, 28 October 1994 and 28 January 1995 (sections 103, 109 and 111, *Fringe Benefits Tax Assessment Act*).

54. For the income tax year ended 30 June 1994 they can claim a deduction under subsection 51(1) of the *Income Tax Assessment Act*, for the June quarter instalment of **$50,000**, as this is the amount of the liability for fringe benefits tax instalments referable to this income tax year.

Year ended 30 June 1995

55. The 3 instalment amounts are paid on the dates they are due. For the fringe benefits tax year ending on 31 March 1995 Steelco calculate their fringe benefits taxable amount and the fringe benefits tax due and payable in respect of this amount is $160,000.

56. After crediting the amounts paid as instalments, totalling $150,000, Steelco has to pay only a further $10,000 to discharge their total liability for fringe benefits tax for this year.

57. As for the preceding income tax year, Steelco can calculate that as at 30 June 1995 they have a liability for 3 fringe benefits tax instalments (where a deemed or default assessment has issued). For the fringe benefits tax year ending 31 March 1996 these instalments, as the result of the lodging of an 'employer's estimate' (section 109 and subsection 112(1)) are $40,000 each (subsection 110(5)).

58. For the income tax year ended 30 June 1995 Steelco can claim a deduction under subsection 51(1) of the *Income Tax Assessment Act*, for the balance of the now merged liability for fringe benefits tax instalments and fringe benefits tax, for the fringe benefits tax year ended 31 March 1995. This will be the amount of $160,000 less the $50,000 claimed in the income tax year ended 30 June 1994, that is $110,000. They can also claim the amount of the liability for fringe benefits tax instalments for the fringe benefits tax year ending 31 March 1996 that is referable to this income tax year. This will be the June quarter instalment amount of $40,000.

59. The total amount Steelco can claim as a deduction for the year ended 30 June 1995, in connection with the provision of fringe benefits is therefore **$150,000** ($160,000 less $50,000 plus $40,000).

Your comments

60. If you wish to comment on this Draft Ruling, please send those comments

by: 23 March 1995

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Commissioner of Taxation

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