


***TD 2013/D4 - Fringe benefits tax: when an employer reimburses an amount of expenditure incurred by an employee to a third party, under a salary sacrifice (or similar) arrangement with that employee, where that expenditure is notionally subject to Division 35 of the Income Tax Assessment Act 1997 (ITAA 1997), is the amount included under paragraph (a) of the 'income requirement' in subsection 35-10(2E) increased when applying the 'otherwise deductible rule' in section 24 of the Fringe Benefits Tax Assessment Act 1986 (FBTAA)?***

 This cover sheet is provided for information only. It does not form part of *TD 2013/D4 - Fringe benefits tax: when an employer reimburses an amount of expenditure incurred by an employee to a third party, under a salary sacrifice (or similar) arrangement with that employee, where that expenditure is notionally subject to Division 35 of the Income Tax Assessment Act 1997 (ITAA 1997), is the amount included under paragraph (a) of the 'income requirement' in subsection 35-10(2E) increased when applying the 'otherwise deductible rule' in section 24 of the Fringe Benefits Tax Assessment Act 1986 (FBTAA)?*

This document has been finalised by TD 2013/20.



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## Draft Taxation Determination

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Fringe benefits tax: when an employer reimburses an amount of expenditure incurred by an employee to a third party, under a salary sacrifice (or similar) arrangement with that employee, where that expenditure is notionally subject to Division 35 of the *Income Tax Assessment Act 1997* (ITAA 1997), is the amount included under paragraph (a) of the ‘income requirement’ in subsection 35-10(2E) increased when applying the ‘otherwise deductible rule’ in section 24 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)?

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This publication is a draft for public comment. It represents the Commissioner’s preliminary view about the way in which a relevant taxation 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.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don’t have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### Ruling

1. Yes. The amount included under paragraph (a) of the ‘income requirement’ in subsection 35-10(2E) of the ITAA 1997 when applying the ‘otherwise deductible rule’ in section 24 of the FBTAA is increased by the amount of the reimbursement.
2. To apply the ‘otherwise deductible rule’ in section 24 of the FBTAA the employer needs to determine the notional deductibility of the relevant expenditure, on the assumption that it has not been reimbursed.

3. In the case of the employee in question this requires also calculating, on the hypothesis of no reimbursement, whether for the relevant income year of the employee, the total of the four amounts in subsection 35-10(2E) of the ITAA 1997 is less than \$250,000. The first of these amounts in paragraph 35-10(2E)(a), is the 'taxable income' of the employee, adjusted by disregarding any non-commercial loss or 'excess' arising under subsection 35-10(2) (refer to the closing words of subsection 35-10(2E)).

4. When notionally applying paragraph 35-10(2E)(a) of the ITAA 1997 the hypothesis section 24 of the FBTA is based on, concerning no reimbursement, has an associated effect in the case in question, of assuming also that the salary sacrifice (or similar) has not operated to reduce the salary amount of the employee by the amount of the reimbursement.

5. This means that in applying the otherwise deductible rule in section 24 of the FBTA the employee's adjusted taxable income for the purposes of paragraph 35-10(2E)(a), is greater than what it is actually, by the amount of the reimbursement.

6. The hypothesis of no reimbursement also means that in applying section 24 and subsection 35-10(2E) of the ITAA 1997, the amount of the reimbursement is not taken account of, when calculating the employee's '\*reportable fringe benefits total' for the income year in question, for the purposes of paragraph (b) of subsection 35-10(2E).

### Example

7. An employee has a salary sacrifice arrangement for an income year with their employer, in respect of which their taxable income before any operation of this arrangement (and before any business activity deductions), is \$260,000.

8. The employee also carries on an (unrelated) business activity in this year, for which the real property test in Division 35 of the ITAA 1997 is met. The employee incurs expenditure attributable to this business activity for the income year, of \$120,000, but derives no assessable income from it during the income year. The employee's circumstances are such that if they do not satisfy the '\$250,000 income requirement' in subsection 35-10(2E) the excess of otherwise allowable deductions attributable to the business activity over any assessable income from it, will need to be deferred under subsection 35-10(2).

9. Under the salary sacrifice arrangement the employer agrees to reimburse the employee's business activity expenditure of \$120,000 prior to 31 March of the relevant year. The employer reimburses the employee's expenditure of \$120,000 as an external expense payment fringe benefit and provides the remaining \$140,000 as salary. Assuming no other income and deductions, the employee's taxable income is \$140,000, disregarding any operation of Division 35 of the ITAA 1997.

10. Under section 23 of the FBTA the taxable value of the fringe benefit provided is \$120,000. The grossed-up amount in calculating the employee's '\*reportable fringe benefits total' in relation to the taxable value of \$120,000 is \$224,304.

11. The taxable value (and hence, '\*reportable fringe benefits total') will be reduced if section 24 of the FBTA applies. That section applies on the assumption that the expenditure of \$120,000 has not been reimbursed. The consequences of this assumption for the purposes of section 24 are:

- there is no expense benefit provided and the amount included under paragraph 35-10(2E)(b) is nil;

- section 51AH of the *Income Tax Assessment Act 1936* (ITAA 1936) does not apply, so the employee can notionally deduct the amount of \$120,000 under section 8-1 of the ITAA 1997, but then this amount is disregarded for the purposes of paragraph 35-10(2E)(a) as an 'excess' arising under subsection 35-10(2); and
- under paragraph 35-10(2E)(a), the employee's adjusted taxable income is \$260,000; it is not reduced under the salary sacrifice arrangement.

12. On this basis, the employee does not satisfy the income requirement in subsection 35-10(2E), subsection 35-10(1) is satisfied, so that the loss deferral rule in subsection 35-10(2) does apply.

13. Therefore, for the purposes of section 24 of the FBTAA, no part of the expenditure of \$120,000 is a once-only deduction and the expense payment fringe benefit has a taxable value of \$120,000.

**Date of effect**

14. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will 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 Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**29 May 2013

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## Appendix 1 – Explanation

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

### Explanation

15. Where an expense payment benefit provided in respect of the employment of an employee qualifies as an ‘external expense payment fringe benefit’, section 23 of the FBTAA provides that the taxable value is the amount of the relevant payment or reimbursement.
16. The taxable value worked out under section 23 of the FBTAA may be reduced under section 24 which is headed, ‘Reduction of taxable value – *otherwise deductible rule*’.
17. The broad effect of section 24 of the FBTAA depends on the hypothesis that the relevant employee did not have their expenditure reimbursed. The actual position for the employee is that because their expenditure has been reimbursed, section 51AH of the ITAA 1936 applies to deny actual deductibility of the expenditure to them.
18. This hypothetical or notional unreimbursed expenditure is called ‘gross expenditure’ in section 24 of the FBTAA. Section 24 then asks whether this gross expenditure is a ‘once-only deduction’, which:
- ... would, or would if not for section 82A of the Income Tax Assessment Act 1936, and Divisions 28 and 900 of the Income Tax Assessment Act 1997, have been allowable to the [employee] under either of those Acts in respect of the gross expenditure ...
19. Where there is no ‘recipients portion’ as defined in the FBTAA (which will broadly be the case where the full amount of the expenditure is reimbursed), the taxable value of the expense payment fringe benefit is reduced under subsection 24(1) of the FBTAA by the amount of the ‘once-only deduction’, referred to also in the subsection as ‘the gross deduction’.
20. Draft Taxation Ruling TR 2013/D1 *Fringe benefits tax: otherwise deductible rules and Division 35 of the Income Tax Assessment Act 1997* (‘TR 2013/D1’) applies where an employer provides an external expense payment fringe benefit, within section 23 of the FBTAA, to their employee, where the employee’s expenditure associated with that fringe benefit would be subject to the loss deferral rule in subsection 35-10(2) of the ITAA 1997, on the assumption that this expenditure has not been reimbursed.
21. The employee’s actual position, where they cannot claim a deduction for the expenditure, because of section 51AH of the ITAA 1936, means there is no deduction to which Division 35 of the ITAA 1997 might otherwise apply. The hypothetical position however, is, on the assumption that there has been no reimbursement of the expenditure, that a deduction might be allowable. The application of Division 35 therefore is only a notional one, for the purpose of determining whether any reduction of the taxable value of the fringe benefit arises under section 24 of the FBTAA.
22. The circumstances of employees covered by this Draft Determination are such that if they do not satisfy, on this notional basis, the ‘income requirement’ in subsection 35-10(2E) of the ITAA 1997, the excess of otherwise allowable deductions attributable to their business activity over any assessable income from it, will be deferred under subsection 35-10(2) (refer to the conditions for this in subsection 35-10(1)).

23. Draft Taxation Ruling TR 2013/D1 explains that if subsection 35-10(2) of the ITAA 1997 does notionally apply in this fashion, then the expenditure in question will not give rise to any 'once-only deduction' for the purposes of section 24 of the FBTAA.

24. The assumption of no reimbursement required by section 24 of the FBTAA has a related effect when determining whether or not the employee does satisfy the income requirement in subsection 35-10(2E) of the ITAA 1997, or not. This is that it also needs to be assumed that the salary sacrifice arrangement, of which the reimbursement is an integral part, has not operated, to the extent of the reimbursement, to reduce the assessable income of the employee.

25. In other words, the amount included under paragraph 35-10(2E)(a) of the ITAA 1997 is not reduced as a result of the salary sacrifice (or similar) arrangement, when determining whether the employee satisfies the income requirement, as one of the steps in applying section 24 of the FBTAA to calculate any reduction of the taxable value set by section 23 of the FBTAA.

## Appendix 2 – Your comments

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26. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at [www.ato.gov.au](http://www.ato.gov.au)

Please advise if you do not want your comments included in the edited version of the compendium.

<b>Due date:</b>	<b>26 June 2013</b>
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<b>Address:</b>	<b>Australian Taxation Office 12 Woniara Road HURSTVILLE NSW 2220</b>

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10; TR 2013/D1;

*Subject references:*

- deductions & expenses
- expense payment fringe benefits
- FBT expense payment
- FBT expense payment fringe benefit
- FBT otherwise deductible rule
- fringe benefits
- fringe benefits tax
- losses
- non commercial losses
- reductions of taxable value

*Legislative references:*

- FBTA 1986 23
- FBTA 1986 24
- FBTA 1986 24(1)
- ITAA 1936 51AH
- ITAA 1997 8-1
- ITAA 1997 Div 35
- ITAA 1997 35-10(1)
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(2E)
- ITAA 1997 35-10(2E)(a)
- ITAA 1997 35-10(2E)(b)

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ATO references

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Income Tax ~~ Losses ~~ non commercial