


TR 2000/4 - Fringe benefits tax: meaning of 'business premises'

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Taxation Ruling

Fringe benefits tax: meaning of ‘business premises’

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Preamble

*The number, subject heading, **Class of person/arrangement**, **Date of effect** and **Ruling** parts of this document are a ‘public ruling’ for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner. The remainder of the document is administratively binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Ruling is about

Class of person/arrangement

1. This Ruling considers what constitutes ‘business premises’ for the purposes of the *Fringe Benefits Tax Assessment Act 1986* (‘FBTAA’). The application of this concept is also explained, with particular emphasis on how it relates to the exemption granted in subsection 47(2) of the FBTAA for the provision of child care benefits. Unless otherwise noted, a reference in this Ruling to a statutory provision (e.g., a subsection) is a reference to the FBTAA. The class of persons to which this ruling applies is those employers who are affected by the definition of ‘business premises’ in the FBTAA.

Appearances of the words ‘business premises’ in the FBTAA

2. Various references are made throughout the FBTAA to the term ‘business premises’. Subsection 7(3) considers the availability of a car for private use where the car is not at business premises of an employer. Sections 39A and 39B refer to business premises in the context of car parking benefits. Section 41 provides an exemption for property provided and consumed on business premises. Subsection 47(2) exempts recreational and child care facilities located on business premises. Subsection 47(3) exempts the use of property ordinarily located on business premises and principally used directly in connection with business operations. Subsection 47(3) is affected by subsection 47(4A) which refers to ‘business premises’. Whilst in our explanation we particularly emphasise the application of the ‘business premises’ concept in relation to the exemption granted for the

provision of child care benefits, the explanation may be applied to the other provisions cited in this paragraph to the extent that it is relevant.

Ruling

Definition of ‘business premises’

3. Subsection 136(1) of the FBTA defines ‘business premises’ in relation to a person to mean ‘premises, or a part of premises, of the person used, in whole or in part, for the purposes of business operations of the person, but does not include:

- premises, or a part of premises, used as a place of residence of an employee of the person or an employee of an associate of the person; or
- a corporate box; or
- boats or planes used primarily for the purpose of providing entertainment unless the boat or plane is used in the person’s business of providing entertainment; or
- other premises used primarily for the purpose of providing entertainment unless the premises are used in the person’s business of providing entertainment.’

4. Consequently, unless any of the specific exclusions apply, premises are only ‘business premises’ in relation to a person if two requirements are met. The first requirement is that the premises or part of premises are ‘of’ the person. Secondly, the premises or part of premises must be used by the person, in whole or in part, for the purposes of their business operations.

5. It is a question of fact and degree as to whether particular premises are ‘business premises’ of a person. This can only be resolved by making a common sense judgment about the facts of each case and not by adopting any absolute rule.

Premises of the person

6. The first requirement necessitates an interpretation of the words ‘premises, or a part of premises, of the person’ found in the definition.

7. If a person has ownership of premises, or has exclusive occupancy rights as lessee of premises, the premises would ordinarily be described as premises of the person.

8. In other circumstances, for example, where a person has non-exclusive possession of premises, the person satisfies this requirement

if they have a right to possession of the premises, at least to the extent necessary to enable the conduct thereon of their business operations.

Meaning of ‘business operations’

9. The term ‘business operations’ in the definition of ‘business premises’ includes a wide range of activities. The activities include those undertaken by a person in the ordinary course of carrying on a business. They also include those activities that, although not undertaken in the ordinary course of carrying on a business, are nevertheless undertaken in the course of carrying on a business. Profit making activities that fall short of being a business are also included in ‘business operations’ if they have a business or commercial character.

10. Important to this Ruling is the question of whether the operations of facilities, such as child care facilities, are operations that would fall within the term ‘business operations’. In this context, the provision of benefits to current employees in the form of child care would be an important factor in recruiting, retaining and otherwise rewarding employees. Activities undertaken in connection with the provision of those benefits to employees would be ‘business operations’ of the employer.

Combining the two requirements: factors an employer needs to consider

11. Given that each case turns on its own facts, there is no absolute or conclusive test of whether particular premises are ‘business premises’ of a person. However, in order to determine whether premises are ‘business premises’, i.e., they satisfy the respective requirements of ‘premises of the person (*the employer*)’ and ‘used ... for the purposes of business operations of the person (*the employer*)’, an objective analysis of all the circumstances is necessary.

12. In making this analysis, an employer should carefully weigh all relevant matters, including the following factors that are especially relevant to determining whether each of the two requirements has been met:

- (a) *the control the employer has over the premises; and*
- (b) *the consistency of an employer’s actions and activities on the premises with those of normal business practices.*

Importantly, each factor should be considered in relation to each of the two requirements. Further, the factors must be considered in combination and as a whole, together with all other relevant matters.

13. Having regard to the above, where a person is carrying on 'business operations' on premises, the premises are their 'business premises' where in form and substance the person bears the rights and risks of possession of the premises associated with the conduct of the 'business operations'.

Child care facilities

14. Subsection 47(2) provides, *inter alia*, that where a residual benefit provided to a current employee in respect of his or her employment consists of the care of children of the employee in a child care facility and the child care facility is located on 'business premises' of the employer (or a related company if the employer is a company), the benefit is an exempt benefit.

15. The exemption is, therefore, only available to an employer in respect of children of current employees, provided the child care facility is located on the 'business premises' of the employer (or a related company if the employer is a company).

16. Further to the views expressed in paragraph 10, if an employer uses premises for operating a child care facility for current employees, the operations would be regarded as its 'business operations'. To be the employer's 'business premises', the employer must also be the person who has a right to possession of the premises, at least to the extent necessary to enable the conduct of the relevant business operations.

17. Clearly then, an employer must conduct the child care operations on its own account (or through an agent) on its premises to be eligible for the exemption. Alternatively, if the employer is in a group of related companies and the child care facility is not on 'business premises' of the employer, then the child care facility must be located on 'business premises' of a related company.

18. Given the broad meaning of 'business operations', the exemption can apply, not just where the premises are used for a child care facility and other business operations, but also where the premises are used exclusively for operations of a child care facility.

19. In discussing the child care exemption available under subsection 47(2), we are concerned that some arrangements may seek to give the impression that the care of children is taking place on 'business premises' of an employer, when what is truly happening is no more and no less than the care of children on the business premises of a child care provider. These arrangements are no different in substance from where a member of the public approaches a community or commercial child care centre and enrolls one or more of their children. In these circumstances, the child care provider's premises are no more business premises of the employer than the

member of the public. It follows that the premises are not 'business premises' of the employer.

20. On the other hand, in discussing 'business premises' in the context of the child care exemption provided for in subsection 47(2), an employer does not need to derive income from the care of children. What is important for an employer seeking to establish that premises are its 'business premises' is that the employer's child care activities amount to its 'business operations' on its premises. If the particular premises are at a location separate from those that constitute the other parts of the employer's business premises, the question needs to be considered separately in relation to the particular premises.

Previous Rulings

21. Taxation Ruling TR 96/27, which expressed our previous view on the meaning of 'business premises', was withdrawn on 17 February 1999.

Date of effect

22. Subject to the exceptions noted below, this Ruling applies to years of income commencing both before and after its date of issue.

23. The exceptions are:

- the view in this Ruling as to how the law operates in relation to subsection 47(2) differs from a limited number of favourable advance opinions provided by this Office. So long as there was a full and accurate disclosure of all relevant information before the advance opinion was made, this Ruling does not disturb any arrangement entered into prior to 27 March 1996 by an employer named in an advance opinion in respect of those employees whose children were placed in the named child care facility prior to that date; and
- where this Ruling conflicts with a favourable private binding ruling made in relation to subsection 47(2), and the taxpayer has entered into a child care arrangement, the private binding ruling continues to apply for the period that it is valid. However, this Ruling applies to any material variation to existing arrangements or to any new arrangements commencing after the binding ruling expires.

24. This Ruling does not apply to employers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Explanations

Premises of the person

25. The question of whether ‘premises, or a part of premises’ are premises ‘of the person’ is to be determined having regard to the nature of the person’s interest in the premises, evidenced by the person’s rights and obligations in relation to the premises.

26. The term ‘premises’ is not defined in the FBTAA and, therefore, it must be given its ordinary meaning. ‘The word “premises” has a long history of use as a wide and general word referring to land or land and buildings’ (per Burchett J in *FC of T v Reynolds Australia Alumina Ltd & Ors* (1987) 19 ATR 598, at 617; 87 ATC 5018, at 5033; (1987) 77 ALR 543, at 559; (1987) 18 FCR 29, at 49).

27. As defined in subsection 136(1), the term ‘business premises’ can be either the whole or part of any premises.

28. The definition of ‘business premises’ in subsection 136(1) also specifically excludes the following:

- (a) premises, or a part of premises, used as a place of residence of an employee of the person or an employee of an associate of the person; or
- (b) a corporate box; or
- (c) boats or planes used primarily for the purpose of providing entertainment unless the boat or plane is used in the person’s business of providing entertainment; or
- (d) other premises used primarily for the purpose of providing entertainment unless the premises are used in the person’s business of providing entertainment.

29. On the other hand, subsection 47(4A) provides that a building site, construction site or similar place where a person carries on business operations shall be taken to be ‘business premises’ of the person for the purposes of the exemption under subsection 47(3). Subsection 136(2) also provides that a ship, vessel, floating structure, aircraft or train be included in the definition of ‘business premises’ found in subsection 136(1).

30. The definition of ‘business premises’, when first inserted in the FBTAA, only excluded ‘premises, or a part of premises, used as a place of residence of an employee of the person or an employee of an associate of the person’. The need to exclude premises used for residential purposes from the definition of ‘business premises’ would support the view that, without that exclusion, such premises would have been included in the definition. It also supports the view that the words ‘business premises’ have a fairly broad application.

31. The word ‘**of**’ as used in relation to the words ‘the person’ in the definition of ‘business premises’ in subsection 136(1), is the key to the interpretation of the words ‘premises, or a part of premises, of the person’.

32. This issue was canvassed by Merkel J in *Esso Australia Ltd v. FC of T* 98 ATC 4953, at 4958; (1998) 40 ATR 76, at 80-81; 157 ALR 652, at 656-657, in relation to the exemption available for certain child care benefits:

‘The relevant requirement in s 47(2) is that the child care facility be located on “business premises *of* the employer”. Obviously the meaning to be attributed to those words will be influenced by the context of, and the purpose intended to be served by, the exemption granted in s 47(2). In other contexts it has been accepted that the word “of” is not a word of precision in defining a relationship between a person and a thing and generally, is apt to embrace a connection, association or relationship which may fall short of a proprietary relationship or one involving ownership: see *Bailey v Worsley* (1969) VR 79 at 83 per Lush J and *Re Simersall; Blackwell v Bray* (1992) 35 FCR 584 at 591 per Gummow J.’

‘The Macquarie Dictionary relevantly defines “of” as: “*Belonging or possession, connection, or association.*” ’

‘It seems to me that, under s 47(2), for the relevant business premises to be those *of* an employer, the employer must have a right to possession of the premises, at least to the extent necessary to enable the conduct thereon of the relevant recreational or child care facility. If the employer has the requisite possessory entitlement in respect of the premises it does not appear to matter whether that entitlement is one of ownership, exclusive possession or non-exclusive possession.’

33. A ‘person’ for purposes of the FBTAA is defined widely in subsection 136(1) to include:

- (a) a body politic;
- (b) a body corporate;
- (c) a partnership;

- (d) any other unincorporated association or body of persons; and
- (e) a person in the capacity of trustee.

34. The above definition of 'person' includes entities that may not have status at law for certain purposes. For example, an unincorporated association or body of persons cannot sue or be sued and cannot buy or own property because it is not a separate legal entity (see *Rigby v. Connol* (1880) 14 Ch D 482 at 487 per Jessel MR; *Carlton Cricket & Football Social Club v. Joseph* (1970) VR 487 and also *Amos v. Brunton* (1897) 14 WN 69; (1897) 18 LR (NSW) Eq 184). In such cases, the property is usually held by a trustee or trustees on behalf of the members for the time being of the unincorporated association or body. In these cases, while the property is held by the trustee/trustees, the beneficial interest is that of the members for the time being of the unincorporated association or body. In such cases the property can properly be described as premises of the statutory 'person' (in this case, the unincorporated association or body which is comprised of its members).

35. Where a trustee is the person for purposes of the provisions of the FBTA and is also the employer, the legal ownership by the trustee is sufficient to bring the trustee within the definition.

36. In the case of a partnership, section 165 provides that the FBTA applies to a partnership as if the partnership were a person. The possessory rights in any property held by the partners of the partnership would be regarded as being held by a person by virtue of this section.

Meaning of 'business operations'

37. In addition to the requirement that premises be 'of the person' as referred to above, premises would only be 'business premises' where the premises are used for the purposes of 'business operations' of the person who has the requisite possessory entitlement in respect of the premises.

38. The words 'used ... for the purposes of business operations of the person' must be read together and in the context used. The words, when read that way, have a wide operation. The word 'purposes' is not restricted and, accordingly, allows directly and indirectly related purposes to fall within the phrase 'purposes of business operations' (see Lockhart J in *Parker Pen (Aust) Pty Ltd v. Export Development Grants Board* (1983) 46 ALR 612 at 621; (1983) 67 FLR 234 at 242 where his Honour observed that 'the word "purpose" is, of course, susceptible of a variety of meanings depending on its context').

39. The term ‘business operations’ is defined in subsection 136(1) in relation to a government body or a non-profit company to include any operation or activity carried out by that body or company.

40. In relation to other persons, ‘business operations’ is not defined and has to be given its ordinary meaning. ‘Operations’ is a very wide expression, for example, ‘mining operations’ is wider than ‘the working of a mining property’ (see *Parker v. FC of T* (1953) 90 CLR 489, at 494; (1954) ALR 26, at 28; (1953) 10 ATD 287, at 291; (1953) 27 ALJ 574, at 575). Whether a particular activity or series of activities amounts to a business operation is a question of fact.

41. In the context of the definition of ‘business premises’ in subsection 136(1) we consider that the term ‘business operations’ has a broad meaning. In our view ‘business operations’ ought to be regarded as wider than ‘carrying on a business’ and would include both passive and active dealings, including isolated transactions of a person, without the need to establish that the person was carrying on a business, provided the dealings were undertaken for the purpose of profit making by way of a business operation or a commercial transaction.

42. Where a business exists, the term ‘business operations’ would include a wide range of activities undertaken by the person carrying on the business. Support for this view can be found in the judgment of Merkel J in *Eso Australia Ltd v. FC of T* 98 ATC 4953, at 4957; (1998) 40 ATR 76, at 80; 157 ALR 652, at 656.

43. As indicated in this Ruling, the provision of benefits to employees in the form of child care would be an important factor in recruiting, retaining and otherwise rewarding employees. Having regard to the views expressed above, activities undertaken in connection with the provision of those benefits (or indeed the provision of recreational, car parking or health care facilities) to employees would be ‘business operations’ of the employer who carried on the business or carried out the profit making undertaking. Thus, if that employer were to use its premises for operating a child care facility on the premises, that activity would be regarded as ‘business operations’.

44. A consequence of this is that premises would be ‘used ... for the purposes of business operations’ where they are used exclusively for the operations of a child care facility. This was the express view of Merkel J in *Eso Australia Ltd v. FC of T* 98 ATC 4953 at 4957; (1998) 40 ATR 76 at 80; 157 ALR 652 at 656:

‘Once it is accepted that the provision of benefits to employees in the form of child care at business premises of an employer is an important factor in recruiting, retaining and otherwise rewarding employees and, as such, is part of the business operations of the employer, it does not seem to be relevant

whether the child care facilities are located at the premises where the employer carries out other business operations, or are located at premises of the employer which have been procured solely for the purpose of the provision of a child care facility thereon. Common sense would dictate that in many instances basic requirements for child care facilities may be such that it is inappropriate for the facilities to be located upon the same premises where the other business operations of an employer are conducted.'

Combining the two requirements: factors an employer needs to consider

45. Further to paragraph 5, it is a question of fact and degree as to whether premises are 'business premises' of a person (see *Merkel J in Esso Australia Ltd v. FC of T* 98 ATC 4953, at 4958; (1998) 40 ATR 76, at 81; 157 ALR 652, at 657). Consequently, there is no absolute or conclusive test of whether particular premises are 'business premises' of a person.

46. Nonetheless, the following matters are of particular importance in determining whether each of the respective requirements of the definition is satisfied:

- (a) *the control the employer has over the premises; and*
- (b) *the consistency of an employer's actions and activities on the premises with those of normal business practices.*

47. However, no one factor is decisive, and there is often a significant overlap between the factors. For example, whether 'business operations' are being carried on depends on the 'large or general impression gained' (*Martin v. FC of T* (1953) 90 CLR 470, at 474; 5 AITR 548, at 551) from looking at all the indicators.

(a) *the control the employer has over the premises*

48. The employer must have a right of possession and control over the use of the premises during the course of its business operations. The absence of a right of possession and control may indicate the premises are not 'of the person', or the activities being carried out on the premises are not truly 'business operations' of the person.

49. In most situations where premises are owned or held under a normal commercial lease, both possession and control exist. Conversely, for example, the ad hoc hire of squash courts by an employer does not make the squash courts 'business premises' of the employer. This is because any rights the employer has are subject to

the overriding control of the operator. In a practical sense, the premises are not those of the employer.

50. It should be noted that situations do arise where a person has ownership of premises, while at the same time another person has exclusive occupancy rights as lessee of the premises, and so the premises could be described as premises of each of those persons. In other words, the premises could, in a particular period, be described as the premises of the owner and the premises of the lessee. However, while the Ruling at paragraphs 6 to 8 above may allow the identification of two persons, each of whom could satisfy the 'of the person' requirement, it does not automatically follow that each of those persons would satisfy the requirement that the premises be used for their 'business operations'.

51. On the other hand, the fact that particular premises are 'business premises' of a person does not necessarily preclude the premises from being 'business premises' of another person for the purposes of the FBTA (per Merkel J in *Esso Australia Ltd v. FC of T* 98 ATC 4953, at 4959; (1998) 40 ATR 76, at 82; 157 ALR 652, at 658. That said, there is a practical limit to how many persons could concurrently establish that given premises are their 'business premises'. But again, this is a question of fact and degree, which can only be resolved by making a common sense judgment about the facts of each case and not by adopting any absolute rule - see Merkel J in *Esso Australia Ltd v. FC of T* 98 ATC 4953 at 4958; (1998) 40 ATR 76 at 81; 157 ALR 652 at 657).

52. In some arrangements an employer, as one of many employers, merely pays a fee to a service provider for the child care services that have been provided at particular premises, with only limited rights to terminate the arrangement. In these situations, questions arise as to whether the employer has a sufficient right to possession of the premises to satisfy the requirement that the premises be premises *of* the employer.

53. There are also questions as to whether the premises or any part of the premises are being used for the business operations of the employer. It may be that the activities actually taking place *on the premises* would more properly be described as business operations of the service provider. Consequently, the facts may give rise to the inference that the premises are not the 'business premises' of the employer.

54. The control question requires a consideration of both the form and the substance of the arrangement: objectively, which, if any, of the respective employers, has a sufficient interest in the premises to carry on its business operations.

(b) the consistency of an employer's actions and activities on the premises with those of normal business practices

55. An employer will have difficulty in showing premises are its 'business premises' if its conduct in relation to the premises departs from normal business practices. Premises are clearly not 'business premises' of an employer if the employer's actions and activities are merely carried out as a part of some artificial or contrived legal form.

56. For example, in relation to the child care exemption, an employer may, either by itself or jointly with one or more other employers, engage an independent child care operator under a management agreement to care for employees' children. Naturally, an employer who is a party to such an arrangement would be concerned to know whether the premises upon which the care of employees' children is taking place are its 'business premises'.

57. In this regard, we would ordinarily expect an employer, either by itself or jointly with one or more other employers, to incorporate the following minimum requirements into its arrangements, viz., that:

- the management agreement with the child care operator operate on an ordinary and arm's length basis;
- the management agreement be able to be terminated on normal commercial grounds;
- where the management agreement is terminated, there be no impediment to another child care operator being engaged to manage and operate the facility on the particular premises;
- the document granting the employer or employers tenure or occupancy rights operate on normal commercial grounds;
- the termination of the management agreement not require termination of the employer's or employers' tenure or occupancy rights, nor should the rights under the tenure or occupancy rights agreement (for example, amount of rental, conditions of occupancy) be affected in any way;
- the management agreement and tenure or occupancy rights agreement operate independently of each other;
- the calculation of rentals under the tenure or occupancy rights agreement, management fees and child care fees be commercially based and independent of each other;
- the risks held by the various parties be consistent with the relevant premises being those of the employer or

employers (for example, risks in respect of flow of funds, insurance, etc);

- the tenure and occupancy rights as they affect the child care facility come from the employer or employers, rather than the operator; and
- the composite rights of control over the service provider, e.g., the right of termination, be on a normal commercial basis. For example, clauses in management agreements that have the effect that an operator may only be removed in the most extraordinary or extreme circumstances give rise to the inference that the activity is not ‘business operations’ of the employer or employers.

58. In short, for arrangements similar to the one described in paragraph 56, we would ordinarily consider that failure to observe the minimum requirements described in paragraph 57 means it is unlikely an employer would be able to demonstrate it has the requisite possessory entitlement and degree of control. Consequently, an employer in this situation would have difficulty establishing that the care of children was being carried on *on its premises* (i.e., premises of the employer) *and* that any of the relevant activities taking place on the premises (i.e., the care of children of their employees) amount to one of its ‘business operations’.

59. In these circumstances, the premises being used for the care of the children of the employer’s employees would not be ‘business premises’ of the employer.

60. Similar issues may need to be reviewed in relation to other business operations, for example, the provision of recreational facilities, that are carried on by employers.

Child care facilities

61. Subsection 47(2) exempts a residual benefit in respect of a child care facility. A ‘child care facility’ is defined in subsection 136(1) to mean a facility at which a person receives or is ready to receive two or more children under the age of six years, not being associates of that person, for the purpose of minding, caring for or educating them for a day or part of a day without provision of residential care. A ‘child’ is also defined in subsection 136(1) and, as defined, would include an adopted child, a step-child or an ex-nuptial child of the employee.

62. The exemption in subsection 47(2) is available to an employer where:

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- (a) a residual benefit is provided to a current employee in respect of his or her employment;
- (b) the residual benefit consists of the care of children of the employee in a child care facility; and
- (c) the child care facility is located on business premises of the employer (or a related company if the employer is a company).

The words in (a) and (b) above would enable the exemption to be available in a broad range of circumstances. However, the range of circumstances is diminished by the words in (c) which require the child care facility to be located on 'business premises' of the employer (or on 'business premises' of a related company if the employer is a company).

63. As explained, for premises to be 'business premises' of the employer, the employer must have a right to possession of the premises at least to the extent of being able to use those premises for the purposes of its 'business operations'. It is only by having such rights and such use in respect of the premises that the employer could satisfy the respective requirements of 'premises of the person' and 'used ... for the purposes of business operations' in the definition of 'business premises'.

64. Where the employer claims the child care facility is located on 'business premises' of a related company, it is necessary for the related company to have the requisite possessory rights in respect of the premises and to use those premises for business operations of the related company. It is only by having such rights and such use in respect of the premises that the related company would satisfy the requirements of the definition of 'business premises'.

65. To satisfy the test in subsection 47(2) it is not necessary for the employer, on whose 'business premises' the child care facility is located, to restrict the care provided in the child care facility to children of the employees of the employer. Children of employees of an unrelated employer (or children of a member of the public, for that matter) could attend the child care facility without jeopardising the exemption available to the first mentioned employer who has the 'business premises' on which the child care facility is located. In that situation, the child care benefits provided by the first mentioned employer to its employees would be exempt. The benefits provided by the second employer would only be exempt if the second employer satisfied in its own right the respective requirements of 'premises of the person' and 'used ... for the purposes of business operations' in the definition of 'business premises'.

66. The result in the previous paragraph would be similar if the employer was a company and the child care facility was located on

‘business premises’ of a related company, rather than on ‘business premises’ of the employer. The exemption in subsection 47(2) would be available to the employer, even though the care provided in the child care facility was not restricted to children of the employees of the employer. Children of employees of any related company and children of any unrelated employer could attend the child care facility without causing the first employer to fail the test in subsection 47(2).

67. Where the child care facility is located on ‘business premises’ of a company related to one or more other employer companies, all of those employer companies (as well as the group company on which the ‘business premises’ are located, if it is an employer) could satisfy subsection 47(2). However, if an unrelated employer arranged for children of its employees to be cared for at the child care facility then that employer would only be eligible if the employer satisfied in its own right the respective requirements of ‘premises of the person’ and ‘used ... for the purposes of business operations’ in the definition of ‘business premises’.

68. An essential requirement in satisfying subsection 47(2) is the need for the child care facility to be located on ‘business premises’ of the employer, or ‘business premises’ of a related company. For employers in a corporate group to obtain the exemption, there must be a company in the group that satisfies the ‘business premises’ test in respect of premises on which the child care facility is located. Where that occurs, all employers in the group who arrange for children of their employees to receive care at the facility would be entitled to the exemption.

Private Rulings

69. We invite any suitably authorised person who is uncertain as to whether certain premises are ‘business premises’ of a particular employer to apply for binding advice from us about the matter, by applying for a private ruling under Part IVAA of the *Taxation Administration Act 1953* (‘TAA’).

70. An application should contain ‘sufficient information’ to enable the Commissioner to give the ruling. ‘Sufficient information’ in relation to a private ruling, where the matter(s) in issue include the issue of whether particular premises are ‘business premises’ of an employer, includes information that canvasses all of the relevant issues, in particular, the factors set out at paragraph 12 of this Ruling. Complete copies of all documents in relation to the arrangement should also be provided.

Examples

Example 1

71. ABC Pty Ltd is a company that has one principal place of business where it carries out certain manufacturing activities. There is no space on the premises for employees to park their cars during working hours. The company purchases premises situated two blocks away from its principal place of business and converts those premises into a car park for use only by its employees. The company has exclusive occupancy rights in respect of the premises. As part of their remuneration package, employees pay no fees for the use of the facility.

72. The provision of the car parking facility, as the provision of a facility to remunerate employees, in the interest of efficiency of the business, would be regarded as 'business operations' of the company. Although the car parking facility is not situated on the principal business premises of the company, it would be regarded as situated on other 'business premises' of the company. A car parking fringe benefit may arise if the other conditions set out in subsection 39A(1) are satisfied.

Example 2

73. D Mining Ltd, with its administrative office in a capital city, conducts mining operations some 1,000 kilometres away from the city in a remote area. Mining staff are located in a company town about 30 kilometres from the actual mining operations. To encourage more women to work at the mine, D Mining Ltd constructs a child care centre on its premises in the town, which is used exclusively to provide child care facilities for employees requiring the facility.

74. The child care facility would be regarded as being located on the 'business premises' of D Mining Ltd and the exemption under subsection 47(2) would be available.

Example 3

75. A, B, and C, in partnership, are carrying on the business of manufacturing tools. The partnership leases premises to operate a commercial child care service for any children, including their employees' children, although the employees receive the benefit free of charge. They renovate the premises to turn them into a child care centre. The partnership oversees the centre's management and hires a professional child carer to manage the day to day operations of the facility. The partnership has the power to hire and fire the child carer, and has a management team to review regularly the centre's

operations, set policy and review the centre's budget. The partnership also has the full responsibility for the operations of the centre.

76. A partnership is a person for purposes of the FBTAA. The partnership in the above situation is conducting the centre as part of the partnership's 'business operations'. The partnership, as a person, has, under the lease, exclusive occupancy rights in relation to use of the premises. The child care facility would, therefore, be treated as being located on the partnership's 'business premises'. The exemption under subsection 47(2) would be available to the partnership in respect of the child care benefits for children of employees of the partnership.

Example 4

77. Keepaus Kleen Holdings Pty Ltd wholly owns two operating companies named Keepaus Kleen (Commercial Detergents) Pty Ltd and Keepaus Kleen (Domestic Detergents) Pty Ltd. Each subsidiary has a separate operating plant. Keepaus Kleen (Commercial Detergents) Pty Ltd leases premises situated about two kilometres from both operating plants and converts the leased premises into a child care centre. (The lease gives the company exclusive occupancy rights in respect of the premises.) It engages a professional company to manage and provide all the necessary facilities. Children of employees of Keepaus Kleen Holdings Pty Ltd and its subsidiary companies are offered places at the child care centre free of charge. If there are any vacant places not utilised by employees of the companies, they are offered for a fee to any parent requiring the facility.

78. Under these arrangements, the premises would be considered as 'business premises' of Keepaus Kleen (Commercial Detergents) Pty Ltd. That company and related corporate employers (the holding company and Keepaus Kleen (Domestic Detergents) Pty Ltd) would be entitled to the exemption under subsection 47(2) in respect of child care benefits provided by each employer to its employees. In the circumstances, no exemption would be available in respect of the caring of a child who is not a child of an employee in the Keepaus Kleen group.

Example 5

79. Good Accounting Pty Ltd and Better Taxation Services Pty Ltd are two leading accountancy and tax advising firms in a capital city. They are not related and compete for the work in that capital city. However, the firms have joined their resources to provide child care facilities for the employees. They have set up a child care centre in premises situated at Good's premises. Under the arrangements,

Better merely enters into an agreement to a 'joint venture' child care centre with only the responsibility to pay fees depending on the number of child places taken by its employees. Good has the lease of the premises and also arranges for the management of the centre.

80. Under these arrangements, the relevant premises would be properly considered as the 'business premises' of Good but not Better. This would be so even if the majority of the children in care were children of Better's employees. The exemption under subsection 47(2) would only apply to Good.

Example 6

81. Three unrelated corporate employers, X Co, Y Co and Z Co, lease premises from an arm's length lessor under a three year lease, with options for three further terms each of three years. The premises are leased jointly and severally, and the employers enjoy exclusive possession of the premises. Together, the three employers establish a child care centre on the premises for the benefit of employees of the three companies. In addition, the employers jointly enter into a separate arm's length agreement with an independent children's services provider to furnish and supervise the child care services to be provided at the premises. Each of the employers is liable for one third of the costs of providing the facility. Employees of each of the respective companies are entitled to enrol their children at the child care centre.

82. X Co is keen to establish that the leased premises upon which the care of employees' children is taking place are its 'business premises', i.e., that it is eligible for the exemption granted for the provision of child care benefits.

83. X Co applies for a binding ruling on its eligibility for the exemption under subsection 47(2). X Co's application includes all relevant information and canvasses all of the matters in issue.

84. Upon a review of all of the facts, we accept that it is apt to describe the leased premises as X Co's 'business premises'. Consequently, X Co is eligible for the exemption under subsection 47(2) (see *Esso Australia Ltd v. FC of T* 98 ATC 4953; (1998) 40 ATR 76; 157 ALR 652).

Example 7

85. TOT is a professional provider of child care facilities and already owns six centres in various cities in Australia, providing child care to children independently of any employer involvement. It now seeks to expand its operations by setting up a large centre in the heart of the CBD of a major city.

86. TOT enters into a lease for the relevant premises and enters into arrangements with various arm's length employers to provide child care services to their employees' children. All payments are made directly by the employers.

87. Under the arrangements the following 'legal' documents are executed:

Sublease - each employer separately contracts with the operator to sublease an undivided share in the premises. Each employer is only ever separately liable for rental in respect of its own share, with employers having no responsibility for the care of the premises. TOT enters into a succession of subleases.

Management Agreement - TOT, as provider of the facilities, gives a clear indemnity to employers for any claim whatsoever in respect of the premises. Also, under the management agreement, each employer has the power to terminate the services of the operator as manager of the centre. Each employer's share in the premises and voting rights in relation to terminating the management agreement appointing TOT as the provider of child care services are determined by the number of child care places it wishes to utilise. The management agreement can only be terminated by a 75% majority decision of the employers. However, where TOT, as an employer, holds greater than 25% of the voting rights under the management agreement, TOT is deemed to have voting rights not exceeding 25%.

Neither of the 'legal' documents provides for a formal mechanism for employers to participate in a general, overall management committee for the centre.

88. On an objective view, the premises are not considered to be the business premises of any of the arm's length employers. The employers have no control over the premises and the arrangements are inconsistent with normal business practices:

the rights, duties, obligations and liabilities are several and not joint or joint and several. The risks held by the various parties are simply not consistent with the relevant premises being those of the employers;

as a practical matter, the voting arrangements preclude TOT's removal in all but the most extraordinary of circumstances; and the employers have no say in the general running of the centre. Again, these matters are simply not consistent with the care of the children being business operations of the employers on the relevant premises.

Consequently, the exemption under subsection 47(2) would not be available to any of the arm's length employers. A similarly unfavourable result would arise if the termination of the management agreement were to result in the termination of the subleases.

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Subject references:

- business operations
- business premises
- child care facility
- employee benefits
- exempt benefits
- exempt fringe benefits
- fringe benefits
- fringe benefits tax

Legislative references:

- FBTAA 7(3)
- FBTAA 39A
- FBTAA 39B
- FBTAA 41
- FBTAA 47(2)
- FBTAA 47(3)
- FBTAA 47(4)
- FBTAA 47(4A)
- FBTAA 136(1)
- FBTAA 136(2)
- FBTAA 165
- TAA IVAA

Case references:

- Amos v. Brunton (1897) 14 WN 69; (1897) 18 LR (NSW) Eq 184
- Bailey v Worsley (1969) VR 79
- Carlton Cricket & Football Social Club v. Joseph [1970] VR 487
- Esso Australia Ltd v. FC of T 98 ATC 4953; (1998) 40 ATR 76; 157 ALR 652
- FC of T v. Reynolds Australia Alumina Ltd & Ors 87 ATC 5018; (1987) 19 ATR 598; (1987) 77 ALR 543; (1987) 18 FCR 29
- Martin v. FC of T (1953) 90 CLR 470 at 474; 5 AITR 548
- Parker Pen (Aust) Pty Ltd v. Export Development Grants Board (1983) 46 ALR 612; (1983) 67 FLR 234
- Parker v. FC of T (1953) 90 CLR 489; [1954] ALR 26; (1953) 10 ATD 287; (1953) 27 ALJ 574
- Re Simersall; Blackwell v. Bray (1992) 108 ALR 375; (1992) 35 FCR 584
- Rigby v. Connol (1880) 14 Ch D 482

ATO references:

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