


CR 2009/3 - Fringe benefits tax: employers who are clients of Sydney Airport Corporation Limited and who enter into the Sydney Airport Commercial Car Parking Agreement

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Class Ruling

Fringe benefits tax: employers who are clients of Sydney Airport Corporation Limited and who enter into the Sydney Airport Commercial Car Parking Agreement

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❶ This publication provides you with the following level of protection:

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

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

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

What this Ruling is about

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

Relevant provision(s)

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

- section 7 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986); and
- subsection 162(1) of the FBTAA 1986.

All legislative references are to the FBTAA 1986 unless otherwise indicated.

Class of entities

3. Those employers who are clients of Sydney Airport Corporation Limited (SACL) and who enter into the Sydney Airport Commercial Car Parking Agreement (SACCPA) form the class of entities to which this Ruling applies.
4. This Ruling refers to a person belonging to the class of entities as 'the employer'.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
6. 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.
7. 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.
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Date of effect

9. This Ruling applies from 1 April 2008. 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

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

- Class Ruling Application (revised), dated 2 September 2008;
- email dated 15 October 2008 concerning amendment to bailment agreement clause;
- SACL car park general terms and conditions; and
- SACL terms and conditions for E-PARK.

11. SACL is the private operator of Sydney Airport.

12. SACL offers car parking facilities to the general public for both short-term and long-term car parking when visiting Sydney Airport.

13. SACL is proposing to extend its car parking services to clients who are employers by introducing an arrangement whereby SACL would take possession, but not ownership, of an employer's car parked in its car parking facilities for a period of time while the driver is away travelling. This arrangement is referred to as the SACCPA.

14. The employer owns or leases a car and provides the car to the employee or associate of the employee as a car fringe benefit. The employee or associate is the driver who parks the car at a SACL parking facility.

15. The SACCPA will be entered into by both SACL and the employer and will be entered into in advance of any car parking booking made by the employer.

16. The SACCPA will include fees in relation to the provision of parking in the various SACL parking facilities and fees for any value added services such as maintenance and cleaning of the car.

17. The SACCPA is a bailment agreement with SACL as bailee and the employer as bailor.

18. The employer agrees that the car and the car keys be surrendered at the SACL parking facility. The surrender will be made by the employee or associate on behalf of the employer. When the surrender is made the period the car is held by SACL under the bailment (bailment period) commences.

19. Prior to an employee or associate surrendering a car, SACL will provide a booking receipt and a map directing the employee or associate to the location where the employee or associate will surrender the car to SACL. The booking receipt will include a statement confirming that the employee or associate is surrendering the car on behalf of, and with the authority of, the employer. The employer signs each booking receipt confirming the order before the car is surrendered.

20. The bailment period can be ended at any time by the employee or associate who surrenders the car. If the employee surrenders the car only the employee can end the bailment period and repossess the car and car keys. If the associate surrenders the car only the associate can end the bailment period and repossess the car and car keys.

21. The bailment period can also be ended by a nominated representative of the employer other than the employee or associate. The employer must give written notice to SACL of the name of the nominated representative prior to ending the bailment period.

22. During the bailment period the employee or associate is expressly prohibited from using the car for any purpose including for private purposes. During the bailment period SACL takes physical possession of the car and car keys and is required under the SACCPA to deny any form of use of the car to the employee or associate.

23. During the bailment period the car is only used as part of the parking operation, such as positioning the car in the parking facility, in returning the car to the employee or associate or nominated representative, or for repairs and servicing as required.

24. Once the bailment period has ended the employee or associate or nominated representative repossesses the car and the car keys.

25. The employer is not an associate of SACL.

26. The employer will not have an agreement with SACL in relation to the use or availability of the employer's car other than as provided for under the SACCPA.

27. All cars parked under the terms of the SACCPA will be parked on the business premises of SACL.

28. When cars are parked under the SACCPA none of the cars will be parked on the business premises of the employer or an associate of the employer.

Ruling

29. During the period when a car is parked by an employee of the employer or an associate of the employee in a SACL parking facility under the SACCPA (the bailment period), it is assumed for the purposes of this Ruling that subsection 7(2) is not otherwise satisfied.

30. During the bailment period subsection 7(3) is not satisfied because both the employee and the associate of the employee are not entitled to use the car for any purpose and do not have custody or control of the car.

31. During the bailment period, and because subsections 7(2) and 7(3) are not satisfied, subparagraph 7(1)(a)(ii) is not satisfied and the car is not taken to be available for the private use of the employee or an associate of the employee.

32. During the bailment period there is no availability of the car which constitutes a benefit under subsection 7(1). Consequently, there is no car benefit under subsection 136(1).

Commissioner of Taxation

28 January 2009

Appendix 1 – Explanation

❶ *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.*

33. Subsection 136(1) defines 'car benefit' as meaning a benefit referred to in subsection 7(1). Section 7, as relevant, sets out the following conditions:

7(1) Where:

- (a) at any time on a day, in respect of the employment of an employee, a car held by a person (in this subsection referred to as the **provider**):
 - (i) ...
 - (ii) is taken to be available for the private use of the employee or an associate of the employee; and
- (b) either of the following conditions is satisfied:
 - (i) the provider is the employer, or an associate of the employer, of the employee;
 - (ii) ...

that application or availability of the car shall be taken to constitute a benefit provided on that day by the provider to the employee or associate in respect of the employment of the employee.

7(2) Where, at a particular time, the following conditions are satisfied in relation to an employee of an employer:

- (a) a car is held by a person, being:
 - (i) the employer;
 - ...
- (b) the car is garaged or kept at or near a place of residence of the employee or of an associate of the employee;

the car shall be taken, for the purposes of this Act, to be available at that time for the private use of the employee or associate, as the case may be.

...

7(3) Where, at a particular time, the following conditions are satisfied in relation to an employee of an employer:

- (a) a car is held by a person, being:
 - (i) the employer;
 - ...

- (b) the car is not at business premises of:
 - (i) the employer;
 - (ii) an associate of the employer; or
 - (iii) a person (other than the employer or an associate of the employer) with whom, or in respect of whom, the employer or an associate of the employer has an arrangement relating to the use or availability of the car;
- (c) any of the following conditions is satisfied:
 - (i) the employee is entitled to apply the car to a private use;
 - (ii) the employee is not performing the duties of his or her employment and has custody or control of the car;
 - (iii) an associate of the employee is entitled to use, or has custody or control of, the car;

the car shall be taken, for the purposes of this Act, to be available at that time for the private use of the employee or associate, as the case may be.

- 7(4) For the purposes of subsection (3), where a prohibition on the application of a car, or on the application of a car for a private use, by a person is not consistently enforced, the person shall be deemed to be entitled to use the car, or to apply the car to a private use, notwithstanding the prohibition.

34. The employer owns or leases a car and provides the car to the employee or associate as a car fringe benefit. The car is held in accordance with subsection 162(1) and is provided in respect of the employment of an employee.

35. A benefit arising from the availability of a car under subsection 7(1), on a particular day, in respect of the employment of an employee, for a car held by a person, requires the car to be taken to be available for the private use of the employee or an associate of the employee under subparagraph 7(1)(a)(ii). Subsections 7(2) and 7(3) deal with circumstances under which a car shall be taken to be available for the private use of an employee or associate.

Subsection 7(2): home garaging assumption

36. Subsection 7(2) concerns a car being garaged at or near the employee's or associate's residence. Sydney Airport is in close proximity to surrounding residential areas. In order to determine the question under subparagraph 7(1)(a)(ii) this Ruling contains an assumption that subsection 7(2) is not otherwise satisfied.

Subsection 7(3): car not at employer's business premises

Paragraphs 7(3)(a) and 7(3)(b): car held and not at business premises

37. The 'particular time' to be considered under subsection 7(3) is the bailment period when the car is parked in the SACL parking facility at Sydney Airport under the SACCPA.¹

38. The car is an employer owned or leased car. The car is held in accordance with subsection 162(1). Paragraph 7(3)(a) is satisfied.

39. The car is parked at a SACL parking facility which is not the business premises of the employer or the business premises of an associate of the employer.

40. Subparagraphs 7(3)(b)(i) and (ii) are satisfied.

41. The car is parked at a SACL parking facility which is the business premises of SACL. The employer enters into an arrangement with SACL. Under this arrangement there is no use of the car other than what would normally be conducted by an operator of a commercial car park in storing and maintaining a car. All other forms of use are expressly prohibited. This arrangement deals with car parking rather than with the use of a car. There is no arrangement between the employer and SACL which relates to the use or availability of a car under subparagraph 7(3)(b)(iii).

42. Subparagraph 7(3)(b)(iii) is satisfied. Therefore, paragraph 7(3)(b) is satisfied.

Subparagraph 7(3)(c)(i): employee entitled to apply the car to a private use

43. The employee's entitlement to apply the car to a private purpose is expressly prohibited in the SACCPA. SACL ensures that the car is not used by the employee for any private purpose (or any other purpose) during the bailment period.

44. The SACCPA provides an express prohibition as required under subsection 7(4). Each time a car is surrendered under a SACCPA the prohibition is enforced under the terms of an agreement to which the employer is a party. Subparagraph 7(3)(c)(i) is therefore not satisfied.

Subparagraph 7(3)(c)(ii): employee not performing duties of employment and has custody or control of the car

45. In order to satisfy subparagraph 7(3)(c)(ii) the employee must have custody or control of the car.

¹ This Ruling is not concerned with addressing any fringe benefits tax consequences outside of the bailment period when the car is not under the physical control of SACL.

46. The FBTA 1986 does not define the meaning of the words 'custody or control'. In applying the ordinary meaning of 'custody' the *Macquarie Dictionary*² defines it as:

1. keeping; guardianship; care: *in the custody of her father*. 2. Law legal guardianship of a child: *the mother was given custody*.

47. The *Macquarie Dictionary*³ defines control as:

1. to exercise restraint or direction over; dominate; command. 2. to hold in check; curb ... 4. the act or power of controlling; regulation; domination or command. 5. check or restraint.

48. In *Federal Commissioner of Taxation v. Australia & New Zealand Banking Group Ltd*⁴ (the ANZ case) the Court examined the access provisions in section 264 of the *Income Tax Assessment Act 1936* when a depositor had an agreement with the bank to use a safety deposit box located on a bank's premises. Both the bank and the depositor held duplicate keys to the box.

49. In the ANZ case, it was found that the bank had physical custody, physical control and legal control over the contents of the safe deposit box. In relation to the depositors, they maintained control, but not physical control, over the contents of the box.

50. In the present scheme, the car and car keys are surrendered by an employee to SACL under the SACCPA. SACL is then required to enforce a prohibition on any use of the car, private or otherwise, by the employee.

51. SACL can only release the car and car keys to the employee or to the nominated employer representative. Alternatively if it is the associate who delivers the car and car keys, SACL can only release the car and car keys to the associate or nominated employer representative.

52. In these circumstances, the physical custody and physical control of the car are removed from the employee when SACL takes possession of the car and car keys.

53. The Tax Office position in relation to a car kept in a commercial garage for safe storage while the employee is travelling is contained in Taxation Determination TD 94/16. Example 1 in TD 94/16 is as follows:

1. An employee who is provided with a car by her employer leaves the car in a commercial storage facility (e.g. an airport parking station) while on an interstate business trip. The employee cannot leave the car on the employer's premises because there are no car parking facilities available. The commercial storage facility is not in the vicinity of the employee's residence. The car will not be taken as being available for the employee's private use if the employer removes the control and custody of the car from the employee (e.g. takes the car keys) and enforces a prohibition on the private use of the car by the employee or any associate of the employee.

² The Macquarie Dictionary, [Multimedia], version 5.0.0, 1/10/01.

³ The Macquarie Dictionary, [Multimedia], version 5.0.0, 1/10/01.

⁴ (1979) 143 CLR 499; [1979] HCA 67; 79 ATC 4039; (1979) 9 ATR 483.

54. In Example 1 given in TD 94/16 the car is kept in a commercial car park and the custody and control of the car are removed from the employee by means of the car being put in storage and by the employer taking the car keys. This example shows that both 'custody' and 'control' can be removed by physical means for the purposes of subsection 7(3).

55. In the present matter, and during the bailment period, the physical custody and physical control of the car are removed from the employee. In terms of subparagraph 7(3)(c)(ii) the employee does not have custody or control over the car. Subparagraph 7(3)(c)(ii) is not satisfied.

Subparagraph 7(3)(c)(iii): associate of employee entitled to use the car, or has custody or control of the car

56. Subparagraph 7(3)(c)(iii) has two conditions, either of which must be satisfied.

57. The first condition requires that an associate be entitled to use the car (for any purpose). As is the case for the employee, the entitlement to use the car is removed from the associate. The first condition to subparagraph 7(3)(c)(iii) is not satisfied.

58. The second condition requires that the associate has custody or control of the car. As is the case for the employee, custody and control of the car are removed from the associate. The second condition to subparagraph 7(3)(c)(iii) is not satisfied.

59. Subparagraph 7(3)(c)(iii) is not satisfied.

60. Subparagraphs 7(3)(c)(i),(ii) and (iii) are not satisfied. Consequently, paragraph 7(3)(c) and subsection 7(3) are not satisfied.

Conclusion: subsection 7(1) benefit and subsection 136(1) car benefit

61. It is assumed for the purposes of this Ruling that subsection 7(2), which is in relation to the car being garaged at or near an employee's or associate's home, is not otherwise satisfied.

62. Subsection 7(3) is not satisfied because both the employee and the associate are not entitled to use the car for any purpose and do not have custody or control of the car.

63. Subsections 7(2) and 7(3) are not satisfied, subparagraph 7(1)(a)(ii) is not satisfied and the car is not taken to be available for the private use of the employee or an associate.

64. During the bailment period there is no availability of the car which constitutes a benefit under subsection 7(1). Consequently, there is no car benefit under subsection 136(1).

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 94/16; TR 2006/10

Subject references:

- car benefits
- car fringe benefits
- fringe benefit
- fringe benefits tax

Legislative references:

- FBTA 1986
- FBTA 1986 7
- FBTA 1986 7(1)
- FBTA 1986 7(1)(a)(ii)
- FBTA 1986 7(2)
- FBTA 1986 7(3)
- FBTA 1986 7(3)(a)
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- FBTA 1986 7(3)(b)(i)
- FBTA 1986 7(3)(b)(ii)
- FBTA 1986 7(3)(b)(iii)

- FBTA 1986 7(3)(c)
- FBTA 1986 7(3)(c)(i)
- FBTA 1986 7(3)(c)(ii)
- FBTA 1986 7(3)(c)(iii)
- FBTA 1986 7(4)
- FBTA 1986 136(1)
- FBTA 1986 162(1)
- ITA 1936 264
- TA 1953
- Copyright Act 1968

Case references:

- Federal Commissioner of Taxation v. Australia & New Zealand Banking Group Ltd (1979) 143 CLR 499; [1979] HCA 67; 79 ATC 4039; (1979) 9 ATR 483

Other references:

- The Macquarie Dictionary, [Multimedia], version 5.0.0, 1/10/01

ATO references

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