

CR 2013/10 - Fringe benefits tax: employers who are clients of Andrews Airport Parking and who enter into the Corporate Bailment Agreement

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 This document has changed over time. This is a consolidated version of the ruling which was published on *7 August 2013*



Class Ruling

Fringe benefits tax: employers who are clients of Andrews Airport Parking and who enter into the Corporate Bailment Agreement

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

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

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

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

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

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant 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(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)
- Section 7(2) of the FBTAA
- Section 7(3) of the FBTAA
- Subsection 162(1) of the FBTAA

All legislative references are to the FBTAA unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are those employers who are clients of any of the following entities:

- Shanahan Freight Services Pty Ltd trading as Andrew's Airport Parking Melbourne, a subsidiary member of the Shanahan Freight Holdings Pty Ltd tax consolidated group;
- Shanahan Freight Services (QLD) Pty Ltd trading as Andrew's Airport Parking Brisbane, a subsidiary member of the Shanahan Freight Holdings Pty Ltd tax consolidated group;
- Shanahan Freight Services (Adelaide) Pty Ltd trading as Andrew's Airport Parking Adelaide, a subsidiary member of the Shanahan Freight Holdings Pty Ltd tax consolidated group;
- Gateway Airport Parking Pty Ltd trading as Gateway Airport Parking;
- Vicgarden Parking Pty Ltd trading as Busy Beaver Airport Parking;
- A subsidiary member of the Shanahan Freight Holdings Pty Ltd tax consolidated group trading as Andrew's Airport Parking;

collectively known as Andrews Airport Parking (AAP entities) and who enter in the Corporate Bailment Agreement (CBA) form the class of entities to which this Ruling applies.

The Ruling refers to a person belonging to the class of entities as 'the employer'.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 27 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and

- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 April 2012. The Ruling continues to apply after 31 March 2013 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

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

- Class Ruling Application dated 19 October 2012;
- Corporate Bailment Agreement; and
- Schedule attached to the Corporate Bailment Agreement.

10. The AAP entities operate commercial car parking stations which are available to the general public for both short and long term parking when visiting the relevant airport.

11. The AAP entities are proposing to extend their car parking services to clients who are employers by introducing an arrangement whereby the AAP entities take possession, but not ownership, of an employer's car parked in their commercial car parking station for a period of time while the driver is away travelling.

12. This arrangement will be achieved through the relevant parties entering into an arrangement referred to as Corporate Bailment Agreement ('CBA'), with the AAP entity as bailee and the employer as bailor.

13. The employer owns, leases or possesses the cars described in the Schedule attached to the CBA.

14. The cars may comprise any one or more of the employer's vehicles notified or described on a list supplied by the employer to the relevant AAP entity or otherwise described on any parking ticket issued by the AAP entity.

15. The employer agrees from time to time to deliver any one or more cars to an AAP location for airport parking purposes.

16. The bailment of a car commences when the car and its keys are delivered and surrendered by any employee, their associate or nominated representative on behalf of the employer to an AAP entity.

17. The bailment terminates when AAP hands back the car (including any keys) to the surrendering employee, their associate or nominated representative who first delivered the car and keys, at the conclusion of any parking period or when a nominated representative of the employer provides written notice to the AAP entity.

18. When a car is surrendered to the relevant AAP entity, the AAP entity will provide a standard AAP ticket which must be retained by the employee or their associate and produced when reclaiming the car.

19. AAP may not release the keys and car unless the ticket is produced or adequate identification is provided.

20. The CBA prohibits the use of the car by an employee or their associate for private use for the duration of the bailment period and this prohibition is enforced under the terms of the CBA to which the employer is a party for the purpose of subsection 7(4).

21. The car will be parked at all times on the business premises of the AAP entity.

22. Whilst cars are parked at the AAP entities' car parking facilities, the AAP entity will have the exclusive use, control and possession of the car for the entire duration of the car parking period (without acquiring any proprietary interest in the car) and will not be subject to any instructions or directions by the employer except those requiring observance of the conditions of the CBA.

23. During the bailment period the car will only be used as part of the parking operation, such as positioning of the car or return to the driver.

24. None of the employers will be associates of the AAP entities.

25. There will not be any other agreements for the use of the car between the employer and the relevant AAP entity.

26. During the period when a car is parked by an employee of the employer or an associate of the employee in one of the AAP entities' car parks under the CBA (the bailment period), subsection 7(2) is not otherwise satisfied.

Ruling

27. 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.

28. During the bailment period, 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.

29. 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

30 January 2013

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.*

30. 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) [Car applied to, available for employee’s private use]

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) [Car garaged at employee’s residence]

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;
 - (ii) an associate of the employer; or
 - (iii) ...
- (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) [Car not at employer’s business premises]

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;

- (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;
- (b) the car is not at business premises of:
- (i) the employer;
 - (ii) an associate of the employer; or
 - (iii) 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) [Prohibition on private use not consistently enforced]

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.

31. The employer owns, leases or possesses a car and provides the car to the employee or associate as a car fringe benefit. The cars are held in accordance with subsection 162(1) and are provided to the employees or their associate in respect of the employment of the employees.

32. 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

33. Subsection 7(2) concerns a car being garaged at or near the employee's or associate's residence. Some of the AAP entities' car parking facilities are located near or within residential zones. 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

34. The 'particular time' to be considered under subsection 7(3) is the bailment period when the car is parked at the AAP entities' parking facilities under the CBA.¹

35. 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.

36. The car is parked at one of the AAP entities' parking facilities which is not the business premises of the employer or the business premises of an associate of the employer.

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

38. The car is parked at an AAP entity's parking facility which is the business premises of the AAP entity. The employer enters into an arrangement with the AAP entity. 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 the AAP entities which relates to the use or availability of a car under subparagraph 7(3)(b)(iii).

39. 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

40. The employee's entitlement to apply the car to a private purpose is expressly prohibited in the CBA. The AAP entities ensure that the car is not used by the employee for any private purpose (or any other purpose) during the bailment period.

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 the AAP entities.

41. The CBA provides an express prohibition as required under subsection 7(4). Each time a car is surrendered under a CBA 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

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

43. The FBTAA 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*.

44. 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.

45. 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 safe deposit box located on a bank's premises. Both the bank and the depositor held duplicate keys to the box.

46. 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.

47. In the present scheme, the car and car keys are surrendered by an employee to the AAP entity under the CBA. The AAP entity is then required to enforce a prohibition on any use of the car, private or otherwise, by the employee.

48. The AAP entity 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, the AAP entity can only release the car and car keys to the associate or nominated employer representative.

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

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.

50. The ATO 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.

51. 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).

52. 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 therefore not satisfied.

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

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

54. 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.

55. 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 also not satisfied.

56. Subparagraph 7(3)(c)(iii) is therefore not satisfied.

57. As subparagraphs 7(3)(c)(i),(ii) and (iii) are not satisfied paragraph 7(3)(c) and consequently subsection 7(3) are not satisfied.

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

58. 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.

59. 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.

60. 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.

61. 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

62. 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:

TR 2006/10

TD 94/16

CR 2009/3

Subject references:

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

Legislative references:

- FBTAA 1986
- FBTAA 1936 7
- FBTAA 1986 7(1)
- FBTAA 1986 7(1)(a)(ii)
- FBTAA 1986 7(2)
- FBTAA 1986 7(3)
- FBTAA 1986 7(3)(a)
- FBTAA 1986 7(3)(b)
- FBTAA 1986 7(3)(b)(i)
- FBTAA 1986 7(3)(b)(ii)

- FBTAA 1986 7(3)(b)(iii)
- FBTAA 1986 7(3)(c)
- FBTAA 1986 7(3)(c)(i)
- FBTAA 1986 7(3)(c)(ii)
- FBTAA 1986 7(3)(c)(iii)
- FBTAA 1986 7(4)
- FBTAA 1986 136(1)
- FBTAA 1986 162(1)
- ITAA 1936 264
- TAA 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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