


CR 2013/77 - Fringe benefits tax: rewards received by an employee under the LM High Flyers incentive program

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Class Ruling

Fringe benefits tax: rewards received by an employee under the LM High Flyers incentive program

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1 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 40 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA),
 - paragraph 43(a) of the FBTAA,
 - paragraph 43(c) of the FBTAA,
 - section 58P of the FBTAA, and
 - subsection 136(1) of the FBTAA.

All subsequent legislative references are to the FBTAA unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is employers appointed under an agreement with Toyota Motor Corporation Australia Limited (Toyota) to be authorised dealers who enable employees to participate in the LM High Flyers incentive program (the LM High Flyers program).
4. Within this Ruling the class of entities are referred to as Participating Employers.

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 9 to 20 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.

Date of effect

8. This Ruling applies from 1 April 2012. 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:
 - Private Ruling Application dated 18 July 2012,
 - additional information provided on 15 October 2012,
 - Class Ruling Application dated 24 October 2012,
 - National Sales 'LM High Flyers' Strategy Paper,
 - National Sales 'LM High Flyers' Extension Strategy,

- the Frequent Flyer Program Participation Agreement entered into by Toyota with the Frequent Flyer Program operator (FF operator),
- the Frequent Flyer Program (FF program) Terms and Conditions, and
- a copy of the email sent to participants titled 'LM High Flyers Take off with Frequent Flyer Points!'.

Note: Certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

10. Toyota is the Australian manufacturer and importer of Toyota and Lexus vehicles. The vehicles are sold through a dealership network that includes both independent dealerships (which are not associates of Toyota) and dealerships owned and operated by Toyota.

11. In order to increase sales of locally manufactured vehicles, Toyota has established the LM High Flyers program.

12. Under the LM High Flyers program, an eligible employee will receive a 'Toyota Token' when a specified vehicle is sold during the six month period for which the program operates. The 'Toyota Token' enables the 'eligible employee' to access an online reward game called 'Spin 2 Win'.

13. An employee will be an 'eligible employee' if:

- the employer is a Participating Employer;
- the employer has registered the employee as a participant in the LM High Flyers program,
- the employee is a member of the FF program,
- the employee registers their FF program membership number via the LM High Flyers program website,
- the employee is either a sales consultant who sells a specified vehicle during the program period or the relevant sales manager.

14. 'Spin 2 Win' is an online game of chance provided by AdInc Pty Ltd that will determine the number of frequent flyer points that the eligible employee will receive at the conclusion of the program period.

15. To facilitate the LM High Flyers program Toyota entered into an agreement with the FF operator. Under the agreement:

- Toyota at the conclusion of the program period will request the FF operator to credit a specified number of frequent flyer points to the FF program membership account of each eligible employee;

- upon receiving the request, the FF operator will credit the specified number of frequent flyer points to the specified FF program membership account;
- Toyota will pay the FF operator for the points credited to the employees' FF program membership accounts.

16. Toyota will pay all of the costs of the LM High Flyers program, including any fringe benefits tax liabilities that arise for employers of employees who receive a reward under the program. Toyota will pay the amount of the fringe benefits tax liability to the employer and provide details of the fringe benefits tax calculation to the employer.

17. An employee who is not already a member of the FF program is able to receive a free membership of the FF program via the LM High Flyers program website without paying the joining fee that would otherwise apply. This fee is currently less than \$300.

18. To access the LM High Flyers program website the employee must be registered and use a unique code that is generated when registration occurs.

19. The use of frequent flyer points is subject to the FF program terms and conditions. These terms and conditions provide a member with the right to redeem their points for a range of goods and services.

20. Members of the FF program also have a limited right to transfer points to members of their families.

Ruling

21. The provision of frequent flyer points to an employee under the LM High Flyers program will be a property benefit as defined in subsection 136(1).

22. In accordance with section 40 the property benefit that arises from the provision of the frequent flyer points to an employee will arise at the time at which the points are credited to the FF program membership account of the employee.

23. The provision of frequent flyer points to an employee of a dealership owned and operated by Toyota will be an exempt minor benefit under section 58P where the amount paid by Toyota for the frequent flyer points provided to the employee is less than \$300.

24. Where Toyota pays at least \$300 for the frequent flyer points provided to an employee of a dealership owned and operated by Toyota the taxable value of the 'external property fringe benefit' that arises from the provision of the frequent flyer points will be the amount paid by Toyota for the purchase of the points under paragraph 43(a).

25. The provision of frequent flyer points to an employee of an independent dealership will be an exempt minor benefit under section 58P where the amount the employee would have been required to pay the FF operator to purchase the number of frequent flyer points received under the LM High Flyers program is less than \$300.

26. Where the amount the employee would have been required to pay the FF operator to purchase the number of frequent flyer points received under the LM High Flyers program is at least \$300 the taxable value of the 'external property fringe benefit' that arises from the provision of the frequent flyer points will be the amount that the employee would have been required to pay the FF operator to purchase the points under paragraph 43(c).

27. A fringe benefit as defined in subsection 136(1) will not arise from the receipt of a good or a service by an employee or their associate through the redemption of frequent flyer points received under the LM High Flyers program.

28. The provision of a free membership of the FF program under the LM High Flyers program will be an exempt minor benefit under section 58P.

Commissioner of Taxation

30 October 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.*

Will a fringe benefit arise from the scheme?

29. In general terms, the definition of ‘fringe benefit’ in subsection 136(1) provides that an employer will be liable to pay fringe benefits tax when:

- (a) a benefit is provided,
- (b) to an employee or an associate of an employee,
- (c) by:
 - the employer,
 - an associate of the employer,
 - another person under an arrangement with the employer or an associate of the employer,
 - another person in circumstances that come within paragraph (ea) of the fringe benefit definition,
- (d) the benefit is provided in respect of the employment of the employee,
- (e) the benefit does not come within paragraphs (f) to (s) of the fringe benefit definition. For the purpose of this Ruling the relevant paragraph is paragraph (g) which provides that a benefit that is an exempt benefit will not be a fringe benefit.

30. These five requirements are discussed below at paragraphs 31 to 129 of this Ruling.

(a) Does the scheme involve the provision of a benefit?

31. Subsection 136(1) contains an inclusive definition of ‘benefit’ which states:

benefit includes any right (including a right in relation to, and an interest in, real or personal property), privilege, service or facility and, without limiting the generality of the foregoing, includes a right, benefit, privilege, service or facility that is, or is to be, provided under:

- (a) an arrangement for or in relation to:
 - (i) the performance of work (including work of a professional nature), whether with or without the provision of property,
 - (ii) the provision of, or of the use of facilities for, entertainment, recreation or instruction, or
 - (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction,

- (b) a contract of insurance, or
- (c) an arrangement for or in relation to the lending of money.

32. Toyota at the conclusion of the LM High Flyers program period will purchase frequent flyer points from the FF operator and arrange for the FF operator to credit the points to the FF program membership accounts of the eligible employees. An employee who is not a member of the FF program at the time he or she registers for the LM High Flyers program will receive a FF program membership without paying the joining fee that would otherwise apply.

33. As a member of the FF program, the employee has an enforceable right to obtain a range of goods or services through the redemption of the frequent flyer points credited to his or her FF membership account under the LM High Flyers program. Therefore, in purchasing the frequent flyer points and arranging for the points to be transferred to the employee's FF program membership account, Toyota is providing the employee with rights to receive certain goods or services. These rights are a 'benefit' as defined in subsection 136(1).

34. An employee who exercises the rights provided by Toyota will receive further benefit(s) in the form of good(s) or service(s) received through the exercise of the rights. Alternatively, if the employee transfers the points to the FF program membership account of an associate, the good(s) or service(s) received through the exercise of the rights will be received by the associate.

35. Therefore, there are three types of benefits that may be provided under the LM High Flyers program. They are:

- (i) frequent flyer points;
- (ii) good(s) or service(s) obtained by redeeming the frequent flyer points;
- (iii) membership of the FF program.

(b) Are the benefits provided to an employee or an associate of an employee?

36. Each of the benefits will be provided to either an employee or an associate of an employee as:

- (i) the frequent flyer points will be provided to an employee,
- (ii) the good(s) or service(s) obtained by redeeming the points will be provided to either an employee or an associate of an employee,
- (iii) the membership of the FF program will be provided to an employee who was not a member of the program.

(c) Will the benefits be provided by one of the four prescribed providers?

37. For a benefit to be a fringe benefit the benefit must be provided by one of the providers listed in subparagraph 29(c) of this Ruling.

38. 'Provider' is defined in subsection 136(1) to mean 'the person who provides the benefit'.

39. Under the scheme Toyota will purchase frequent flyer points and arrange for the points to be credited to the FF program membership account of the employee. By purchasing the frequent flyer points and arranging for them to be allocated to the FF program membership account of the employee, Toyota is the 'provider' of the frequent flyer points.

40. Similarly, the goods or services obtained through the redemption of the frequent flyer points will be purchased by the FF operator and provided to the employee or associate under an arrangement between the FF operator and the supplier of the goods or services. Therefore, the FF operator is the 'provider' of the goods or services obtained through the redemption of frequent flyer points.

41. The FF operator will also be the provider of the membership of the FF program as it is the person that provides the membership to the employee.

42. Where the frequent flyer points are provided to an employee of a dealership that is owned and operated by Toyota the frequent flyer points will be provided by the employer or an associate of the employer. For all of the other benefits it is necessary to consider whether either paragraph (e) or paragraph (ea) of the fringe benefit definition in subsection 136(1) apply as they will not be provided by the employer or an associate of the employer.

43. Paragraph (e) of the fringe benefit definition applies to a benefit provided under an arrangement between the employer (or an associate of the employer) and the provider of the benefit. This requirement will be met where the FF operator provides a benefit to an employee of a dealership that is owned and operated by Toyota. However, this requirement will not be met where the FF operator provides a benefit to an employee of an independent dealership.

44. Paragraph (ea) of the fringe benefit definition applies if the employer (or an associate) participates in or facilitates the provision or receipt of a benefit, or participates in, facilitates or promotes a scheme or plan involving the provision of a benefit if the employer (or associate) knows, or ought reasonably to know that they are doing so. This requirement will be met where Toyota or the FF operator provides a benefit to an employee of an independent dealership as the employer in registering its employees for the LM High Flyers program is knowingly participating in the provision of the benefit.

45. Therefore, each of the benefits will be provided by one of the four prescribed providers as:

- the frequent flyer points provided to an employee of a dealership owned and operated by Toyota will be provided by the employer or an associate of the employer,
- the good(s) or service(s) and FF program membership provided to an employee of a dealership owned and operated by Toyota will be provided under an arrangement that comes within paragraph (e) of the fringe benefit definition,
- the frequent flyer points, good(s) or services(s) and FF program membership provided to an employee of an independent dealership will be provided under an arrangement that comes within paragraph (ea) of the fringe benefit definition.

(d) Will the benefits be provided in respect of the employment of the employee?

46. The term 'in respect of', in relation to the employment of an employee, is defined in subsection 136(1) to include 'by reason of, by virtue of, or for or in relation directly or indirectly to, that employment'.

47. The similarity of this definition with the former section 26(e) of the *Income Tax Assessment Act 1936* (ITAA 1936) was noted by Lindgren J in the Federal Court decision of *Starrim Pty Ltd v. Federal Commissioner of Taxation* [2000] FCA 952; 44 ATR 487; 2000 ATC 4460 (*Starrim*). Lindgren J in discussing the meaning of 'in respect of' stated at ATC 4469:

... The concluding words of that definition ('for or in relation directly or indirectly to, that employment') are more general. But the same words occurred in the expression 'in respect of, or in relation directly or indirectly to any employment' in s 26(e) of the ITAA36 that was considered by the High Court in *Smith v. FC of T*. I think that they should be understood conformably with the expressions 'by reason of' and 'by virtue of' in the definition in subs 136(1) of the Act.

48. The High Court decision of *Smith v. FCT* (1987) [1987] HCA 48; 164 CLR 513; 19 ATR 274; 87 ATC 4883 (*Smith*) referred to by Lindgren J has been referred to in a number of other cases including:

- *J & G Knowles & Associates Pty Ltd v. FCT* [2000] FCA 196; 2000 ATC 4151; 44 ATR 22 (*Knowles*) in the context of the meaning of 'in respect of' in subsection 136(1),
- *Payne v. FC of T* 66 FCR 299; 96 ATC 4407; (1996) 32 ATR 516 (*Payne*) in the context of the former section 26(e) of the ITAA 1936,

- *McArdle v. Federal Commissioner of Taxation* 88 ATC 4222; (1988) 19 ATR 985; (1989) 19 ALR 637 (*McArdle*) in the context of the former section 26(e) of the ITAA 1936.

49. The Full Federal Court in *Knowles* found it instructive to consider *Smith* before stating at ATC 4158:

... what must be established is whether there is a *sufficient* or *material*, rather than a, causal connection or relationship between the benefit and the employment.

...

27. Here the question whether there is a sufficient or material connection or relationship between a benefit and employment is assisted by having regard to the purpose or object of imposing FBT on employers. That purpose was stated by the then Treasurer, Mr Keating, in the Second Reading Speech (2 May 1986, Hansard, House of Representatives) at 3020 to be to “ensure that all forms of remuneration paid to employees bear a fair measure of tax...”

28. While the width of the definition of “fringe benefit” was designed to capture benefits that, in truth, were other than remuneration, the stated purpose suggests that asking whether the benefit is a product or incident of the employment will be helpful. If it is not then the benefit is likely to be extraneous to the employment and will not bear FBT, notwithstanding that the employment might have been a causal factor in the provision of the benefit.

...

29. To put the matter another way, although the process of characterising the benefit provided in a particular case can involve questions of fact and degree, it is not sufficient for the purposes of the FBTAA merely to enquire whether there is some causal connection between the benefit and the employment: ...

50. Foster J in *Payne* in considering whether the value of airline tickets provided to Mrs Payne’s parents under a frequent flyer program formed part of the assessable income of Mrs Payne under the former section 26(e) of the ITAA 1936 distinguished the situation being considered from that which existed in *Smith*. Foster J at ATC 4424 stated:

In *Smith*, the payment was made by the employer. It was made pursuant to a scheme instituted by the employer. It was a scheme from which the employer derived benefit, namely enhancement of its employees’ skills in the performance of their work. The payment was intended to be an encouragement to employees to undertake the extra training involved in the scheme. It was accepted as such by the employees who undertook the training.

In the present case, these features are totally lacking. The benefit was received under a scheme instituted by Qantas for its benefit. The employer had no part in the scheme as such. The employer did not arrange for the employee to participate in the scheme. It did not pay for the employee's participation in the scheme. It did not even, so far as the facts show, encourage its employees to participate in the scheme. It did nothing to provide the benefit alleged to be taxable in the employee's hand.

51. Fisher J in *McArdle* in considering whether a payment received for the surrender of various rights held under stock option agreements formed part of the assessable income under the former 26(e) of the ITAA 1936 discussed the decision in *Smith* before stating at ATC 4236:

In my opinion the passages cited indicate clearly that it is necessary to go beyond the historical or temporal connection which had existed or presently existed between an employer and an employee. It is necessary to consider whether the taxpayer received the payment in any capacity other than that of employee, whether there was any consideration other than services rendered or to be rendered, and whether it could be said that the payment was in consequence only of the employee's service or of some other consideration.

52. Fisher J then referred to the decisions in *Constable v. Federal Commissioner of Taxation* [1952] HCA 64; (1952) 86 CLR 402 and *Federal Commissioner of Taxation v. Dixon* (1952) 86 CLR 540 before stating at ATC 4237:

In my opinion the test of assessability of benefits under sec. 26(e) as stated by the majority of the High Court in *Smith's case* is that the benefit must be the *consequence* of the employment relationship. In the present matter the crucial fact was that by the month of November 1981 the taxpayer had significant rights in contract as an option holder to acquire shares. These rights to call for shares were capable of being exercised subsequent to the termination of his employment or after his death. It was these contractual rights, and his entitlement as an option holder, which enabled him to deal with Delhi International in relation to the surrender arrangements. The mere existence of an employer-employee relationship in November 1981 was nothing to the point if he had not been the holder of options.

53. The application of the decision in *Payne* in the context of a consumer loyalty program was considered in Taxation Ruling TR 1999/6 *Income tax and fringe benefits tax: flight rewards received under frequent flyer and other similar consumer loyalty programs* and Practice Statement Law Administration PS LA 2004/4 (GA) *Income tax and fringe benefits tax - rewards received under consumer loyalty programs*.

54. TR 1999/6 sets out the tax implications of a flight reward received from a consumer loyalty program. For TR 1999/6 to apply to the LM High Flyers program the program must be a consumer loyalty program as defined in TR 1999/6.

55. 'Consumer loyalty program' for the purposes of TR 1999/6 is defined in paragraph 3 of TR 1999/6 which states:

For the purposes of this Ruling, a 'consumer loyalty program' is a marketing tool operated by a supplier of goods or services (including credit card providers), or a group of such suppliers, to encourage customers to be loyal to the supplier(s). The standard features of these programs are:

- (a) the customer is dealing with the supplier in a personal capacity, that is, in accordance with the normal arm's length commercial relationship that exists between consumers and suppliers,
- (b) membership is restricted to natural persons,
- (c) membership of the program is usually by application, which may require an application fee and/or annual fees,
- (d) points are received with each purchase of goods or services,
- (e) members and non-members pay the same amount for the goods or services purchased, and
- (f) points are redeemable for goods or services.

56. These features are not present in the LM High Flyers program which is a sales incentive program where employees receive points as a reward for making a sale. It is not a program where customers receive rewards for the purchase of goods or services. Therefore, as the LM High Flyers program is not a consumer loyalty program the principles contained in TR 1999/6 are not applicable to the consideration of whether the benefits received under the LM High Flyers program are received in respect of the employee's employment. Rather, in considering whether any of the benefits listed in paragraph 35 of this Ruling will be received in respect of the employment of the employee, it is necessary to apply the principles contained in the decisions listed above in paragraph 48 of this Ruling.

(i) Will the frequent flyer points be provided in respect of the employment of the employee?

57. At the conclusion of the LM High Flyers program Toyota will arrange for frequent flyer points to be credited to the FF program membership account of each employee who either sells a specified vehicle, or is the sales manager of an employee who sells a specified vehicle.

58. In considering whether the frequent flyer points are credited in respect of the employee's employment it is relevant to note the presence of the following characteristics:

- the employer participates in the scheme,
- the employer participates in the scheme for its own benefit, namely the prospect of increased revenue through increased sales,

- the employer arranges for the employee to participate in the scheme,
- the frequent flyer points are awarded as an incentive for employees to increase sales,
- the awarding of points is limited to employees.

59. These features provide the sufficient or material connection referred to in *Knowles* and enable the crediting of the frequent flyer points to be distinguished from the decision in *Payne*. Therefore, as there is a sufficient or material connection between the crediting of the frequent flyer points and the employment of the employee, the frequent flyer points are provided in respect of the employee's employment.

(ii) Will the good(s) or service(s) obtained by the redemption of frequent flyer points be provided in respect of the employment of the employee?

60. Unlike the initial crediting of points which occurs in accordance with the terms and conditions of the LM High Flyers program, the redemption of frequent flyer points to obtain a good or service is governed by the terms and conditions of the FF program. The operation of these terms and conditions at that time was summarised as follows by Foster J in *Payne* at ATC 4412:

I am quite satisfied that Payne, on payment of the consideration ..., acquired contractual rights against Qantas. The contract was of the type considered in *Perri v. Coolangatta Investments Pty Ltd* (1982) 149 CLR 537. The condition enabling Qantas to make changes in the Program Rules, including those relating to the availability of awards and the expiry of accrued points, and to terminate the Program at any time without notice were not, in my view, conditions precedent to the formation of a binding contract; they were conditions subsequent, upon which, in certain circumstances, Qantas could rely to avoid its obligations under the contract. Their existence did not prevent the contract coming into existence.

Under the contract which, in my view, came into existence when Payne's offer to join the Program and her payment ... were accepted and membership granted to her, Payne was entitled to accrue points in accordance with the Program. Upon the accrual of the prescribed number of points she was entitled to apply for the issue of a "reward ticket". Under the terms of the contract she was entitled to request that the ticket in fact be issued to her parents. This occurred within the rights conferred upon her by the contract. ...

61. In accordance with this extract, the good(s) or service(s) obtained by redeeming frequent flyer points credited to the employee's FF program membership account are obtained under the contractual rights acquired by the employee (or their associate) when he or she became a member of the FF program.

62. Although the good(s) or service(s) will be received by an employee or an associate using points awarded for the performance of employment duties, this does not provide the necessary sufficient or material connection referred to in *Knowles*. Rather, it only provides a causal connection which as discussed in *Knowles* is not sufficient for the benefit to be considered to be provided in respect of the employment of the employee.

63. Support for this conclusion is provided by the decision in *McArdle* where the consideration paid for the surrender or abandonment of pre-existing rights to acquire shares was held not to be given in respect of, or in relation to the employment. Similarly, the good(s) or service(s) obtained under the contractual rights acquired by the employee when he or she became a member of the FF program will not be provided in respect of the employment of the employee.

(iii) Will the FF membership be provided in respect of the employment of the employee?

64. An employee who is not a member of the FF program is able to receive a free membership via the LM High Flyers program website without paying the joining fee that would otherwise apply. Without this membership it is not possible for the employee to receive frequent flyer points for the sale of a specified vehicle.

65. In considering whether the FF program membership is granted in respect of the employee's employment it is relevant to note the presence of the following characteristics:

- the free membership is provided to an employee to enable the employee to receive a reward for selling a particular Toyota vehicle;
- the free membership is provided as part of a scheme in which the employer is a participant;
- the employer participates in the scheme for its own benefit, namely the prospect of increased revenue through increased sales;
- the employer arranges for the employee to participate in the scheme;
- the free membership is only provided to employees.

66. These features provide the sufficient or material connection referred to in *Knowles* and enable the granting of the free membership to be distinguished from the decision in *Payne*. Therefore, as there is a sufficient or material connection between the provision of the FF program membership and the employment of the employee, the FF program membership is provided in respect of the employee's employment.

(e) Will any of the benefits that are provided in respect of the employment of the employee be an exempt benefit?

67. As set out in paragraph 29 of this Ruling, a benefit that is an exempt benefit will not be a fringe benefit. The benefits that are exempt benefits are listed in the FBTA. For the purpose of this Ruling the relevant exemption to consider is the exemption contained in section 58P.

68. The conditions that must be satisfied for a benefit to be an exempt benefit under section 58P are discussed in Taxation Ruling TR 2007/12 *Fringe benefits tax: minor benefits* (TR 2007/12).

69. As set out in paragraph 8 of TR 2007/12 a benefit will be an exempt benefit under section 58P where the following two conditions are met:

- (A) the notional taxable value of the minor benefit is less than \$300, and
- (B) it would be concluded that it would be unreasonable, having regard to the specified criteria in paragraph 58P(1)(f), to treat the minor benefit as a fringe benefit.

70. These two conditions are discussed below at:

- paragraphs 71 to 112 in relation to the provision of frequent flyer points;
- paragraphs 113 to 129 in relation to the provision of a FF program membership.

Will the provision of frequent flyer points be an exempt minor benefit?

(A) Is the notional taxable value of the frequent flyer points less than \$300?

71. The term 'notional taxable value' is defined in subsection 136(1) to mean:

... the amount that, if it were assumed that:

- (a) in the case of a car benefit - the car benefit was a residual benefit, and
- (b) in all cases - the benefit was a fringe benefit in relation to the employer in relation to the year of tax,

would be the taxable value of the fringe benefit in relation to the year of tax.

72. The definition of 'property benefit' in subsection 136(1) provides that a benefit will be a property benefit if it comes within section 40 and is not a benefit by virtue of a provision of Subdivision A of Divisions 2 to 10 (inclusive) of Part III. Divisions 2 to 10 cover car benefits, debt waiver benefits, loan benefits, expense payment benefits, housing benefits, living-away-from-home allowance benefits, board benefits, meal entertainment and tax-exempt body entertainment. As the provision of the frequent flyer points does not come within any of these divisions, the provision of frequent flyer points will be a property benefit if it comes within section 40.

73. Section 40 states:

Where, at a particular time, a person (in this section referred to as the "provider") provides property to another person (in this section referred to as the "recipient"), the provision of the property shall be taken to constitute a benefit provided by the provider to the recipient at that time.

74. 'Property' is defined in subsection 136(1) to mean 'intangible property' and 'tangible property'.

75. 'Intangible property' is defined in subsection 136(1) to mean:

- (a) real property,
- (b) a chose in action, and
- (c) any other kind of property other than tangible property,

but does not include:

- (d) a right arising under a contract of insurance, or
- (e) a lease or licence in respect of real property or tangible property.

76. As discussed in paragraphs 32 and 33 of this Ruling, Toyota in purchasing the frequent flyer points and arranging for the points to be transferred to the FF program membership account of an employee is providing the employee with rights to receive goods or services. These rights come within the definition of intangible property as they are a form of property, but are not 'tangible property' which is defined to mean goods. Therefore, a property benefit will arise from the provision of the frequent flyer points.

77. Under section 40 a property benefit is taken to be provided at the time the property is provided to the employee. This will be at the time the frequent flyer points are credited to the FF program membership account of the employee.

78. The methods used to value a property benefit are contained in sections 42 and 43. Section 42 applies if the property benefit is an in-house property fringe benefit and section 43 applies if the property benefit is an external property fringe benefit.

79. The definitions of 'in-house property fringe benefit' and 'external property fringe benefit' contained in subsection 136(1) provide that intangible property is an external property fringe benefit. Therefore, the taxable value of the property fringe benefit that arises from the provision of the frequent flyer points will be determined in accordance with section 43.

80. Section 43 provides three alternate valuation methods. The appropriate method depends upon whether the provider is the employer or an associate of the employer and whether the employer incurs expenditure in relation to the provision of the property.

81. Section 43 states:

Subject to this Part, the taxable value of an external property fringe benefit in relation to an employer in relation to a year of tax is:

- (a) where the provider was the employer or an associate of the employer and the recipients property was purchased by the provider under an arm's length transaction at or about the provision time - the cost price of the recipients property to the provider,
- (b) where the provider was not the employer or an associate of the employer and the employer, or an associate of the employer, incurred expenditure to the provider under an arm's length transaction in respect of the provision of the property - the amount of that expenditure, or
- (c) in any other case - the notional value of the recipients property at the provision time,

reduced by the amount of the recipients contribution.

Valuation of points provided to employees of a dealership owned and operated by Toyota

82. Paragraph 43(a) provides the valuation method to be used where the provider is the employer or an associate of the provider and purchases the property under an arm's length transaction at or about the provision time.

83. As discussed at paragraph 39 of this Ruling, Toyota is the provider of the frequent flyer points. Therefore, the requirement for the provider to be the employer or an associate of the employer will be met where the frequent flyer points are provided to an employee of a dealership owned and operated by Toyota.

84. For paragraph 43(a) to apply to the points provided to the employees of the dealerships owned and operated by Toyota, the points have to be purchased by Toyota under an arm's length transaction at or around the time the points are provided to the employees. Both of these requirements will be met as:

- Toyota and the FF operator are not related and the FF operator in selling the points to Toyota is not influenced by Toyota; and

- the points are purchased at the time they are provided to the employees.

85. Therefore, the taxable value of the frequent flyer points provided to an employee of a dealership owned and operated by Toyota will be the amount paid by Toyota for the points. Where this amount is at least \$300 the provision of the frequent flyer points will not be an exempt benefit under section 58P and it is not necessary to consider the five criteria in paragraph 58P(1)(f).

Valuation of points provided to employees of an independent dealership

86. Paragraph 43(a) will not apply to the frequent flyer points provided to the employees of the independent dealerships as Toyota is not an associate of these employers. Further, paragraph 43(b) will not apply as the independent dealerships do not incur expenditure to Toyota. Therefore, the taxable value of the property benefits provided to these employees will be determined under paragraph 43(c).

87. The value under paragraph 43(c) will be the notional value of the points. 'Notional value' is defined in subsection 136(1) to mean:

the amount that the person could reasonably be expected to have been required to pay to obtain the property or other benefit from the provider under an arm's length transaction.

88. Guidance for determining this amount is provided by Taxation Determination TD 93/231 *Fringe benefits tax: what is an acceptable method for determining the 'notional value' of a property fringe benefit for the purposes of sections 42 and 43 of the Fringe Benefits Tax Assessment Act 1986?*

89. Paragraphs two to five of TD 93/231 state:

2. To ascertain the 'notional value' of a property fringe benefit the employer must determine the amount the employee would have to pay for a comparable (on the basis of age, type and condition) benefit under an arm's length transaction.
3. This Office will accept a number of ways of obtaining the notional value including:
 - the price of comparable goods advertised in local newspapers and/or relevant magazines or similar publications,
 - the price paid for comparable goods at a public auction,
 - the price of comparable goods at a second-hand store, or
 - the market value of the goods determined by a qualified valuer.
4. The lowest value obtained using any of these methods will be acceptable.

5. Valuation methods which are not acceptable to this Office include the lease residual value, the tax written down value or the 'best offer' made by an employee.

90. In *Walstern v. Federal Commissioner of Taxation* [2003] FCA 1428; (2003) 138 FCR 1; 2003 ATC 5076; (2003) 54 ATR 423 Hill J in discussing notional value stated at ATC 5092:

As already noted, the valuation formula depends upon the 'notional value' in relation to the provision whether of property or of a benefit to each of the Medichs. From the definition it follows that the question to be asked is what is the amount that each of the Medichs could reasonably be expected to have been required to pay to obtain the benefit from the provider under an arm's length transaction. The provider in the present case is Walstern. Hence the question in relation to Mr Ronald Medich, is how much he could reasonably be expected to have been required (i.e., by Walstern) to pay to Walstern to obtain the interest obtained by him in the fund, assuming the transaction between Walstern and him to be at arm's length.

91. Therefore, the notional value of the benefit that arises from the provision of the points will be the amount that an employee could reasonably be expected to have been required to pay the FF operator for the points. This will be different to the negotiated amount paid by Toyota under the terms of the contract with the FF operator. It also will differ from the value of goods and services received by a FF program member in exchange for the frequent flyer points.

92. Under the terms and conditions of the FF program a FF program member who does not have sufficient points to purchase a particular good or service is able to purchase additional points from the FF operator. The amount that a FF program member is required to pay for these points is set out in a table listed on the FF operator's website.

93. In applying the guidance provided by TD 93/231, the amount shown in the table on the FF operator's website will be accepted as being the amount that the employee could reasonably have been expected to pay to purchase the points that were provided to the employee under the LM High Flyers program. Where this amount is at least \$300, the provision of the frequent flyer points will not be an exempt benefit under section 58P and it is not necessary to consider the five criteria in paragraph 58P(1)(f).

(B) *Having regard to the five criteria in paragraph 58P(1)(f) is it unreasonable to treat the provision of the frequent flyer points as a fringe benefit?*

94. The second condition set out in paragraph 8 of TR 2007/12 is for it to be unreasonable having regard to the criteria in paragraph 58P(1)(f) to treat the minor benefit as a fringe benefit. This condition only needs to be considered if the notional value is less than \$300.

95. The five criteria in paragraph 58P(1)(f) are:
- (i) the infrequency and irregularity with which associated benefits, being benefits that are identical or similar to:
 - (A) the minor benefit, or
 - (B) benefits provided in connection with the provision of the minor benefit,have been or can reasonably be expected to be provided;
 - (ii) the amount that is, or might reasonably be expected to be, the sum of the notional taxable values of the minor benefit and any associated benefits, being benefits that are identical or similar to the minor benefit, in relation to the current year of tax or any other year of tax,
 - (iii) the amount that is, or might reasonably be expected to be, the sum of the notional taxable values of any other associated benefits in relation to the current year of tax or any other year of tax,
 - (iv) the practical difficulty for the employer in determining the notional taxable values in relation to the current year of tax of:
 - (A) if the minor benefit is not a car benefit - the minor benefit, and
 - (B) if there are any associated benefits that are not car benefits - those associated benefits, and
 - (v) the circumstances surrounding the provision of the minor benefit and any associated benefits including, but without limiting the generality of the foregoing:
 - (A) whether the benefit concerned was provided to assist the employee to deal with an unexpected event, and
 - (B) whether the benefit concerned was provided otherwise than wholly or principally by way of a reward for services rendered, or to be rendered, by the employee.

96. These five criteria are discussed in paragraphs 193 to 244 of TR 2007/12.

97. Several of the criteria refer to associated benefits. For the purposes of the minor benefits exemption, the term 'associated benefits' is defined in subsection 58P(2) to mean a benefit that is any of the following:

- identical or similar to the minor benefit;
- provided in connection with the provision of the minor benefit; or
- identical or similar to a benefit provided in connection with the provision of the minor benefit.

In addition:

- the associated benefit and the minor benefit must relate to the same employment of a particular employee; and
- a benefit that is an exempt benefit under another provision of the FBTAA will not be an associated benefit.

98. The circumstances in which a benefit will be provided in connection with the provision of the minor benefit are discussed in paragraphs 190 to 192 of TR 2007/12. These paragraphs state:

190. A benefit that is provided 'in connection with' the minor benefit is one that is provided in conjunction with the minor benefit. For example if accommodation, board and electricity benefits are provided in conjunction with the payment of minor telephone expenses, these benefits are provided in connection with the telephone expense payment benefit.

191. The term 'in connection with' is potentially wide but it is to be interpreted in the context of the statute in which it is contained: see Davies J in *Hatfield v. Health Insurance Commission* (1987) 15 FCR 487 at 491; 77 ALR 103 at 106-107. Wilcox J also stated in *Our Town FM Pty Ltd v. Australian Broadcasting Tribunal (No. 1) (Our Town FM case)* 16 FCR 465 at 479; 77 ALR 577 at 591-592 in the context of paragraph 5(1)(b) of the *Administrative Decisions (Judicial Review) Act 1977* that:

The words 'in connection with' have a wide connotation, requiring merely a relation between one thing and another. They do not necessarily require a causal relationship between the two things: see *Commissioner for Superannuation v. Miller* (1958) 8 FCR 153 at 154, 160, 163.

192. In determining whether a benefit provided to an employee qualifies for the minor benefits exemption in section 58P, the criteria set out in paragraph 58P(1)(f) requires a consideration of any other associated benefits that have been provided before concluding whether it would be unreasonable to treat the minor benefit as a fringe benefit. Interpreting the words 'in connection with' broadly is consistent with the purpose of section 58P where it is necessary to consider all other benefits that have been provided in conjunction with the minor benefit to determine whether the exemption under section 58P applies.

99. The Maquarie Dictionary [MultiMedia], version 5.0.0, 1/10/01 defines 'conjunction' to mean:

1. the act of conjoining; combination.
2. the state of being conjoined; union; association.
3. a combination of events or circumstances.

100. In applying this definition, the provision of a free membership of the FF program to an employee under the LM High Flyers program will be an associated benefit as there is an association between the provision of the membership and the provision of the points.

101. However, any goods or services received from the redemption of frequent flyer points will not be an associated benefit as the provision of those goods or services does not relate to the employment of the employee.

102. Each of the five criteria are considered below in relation to the provision of frequent flyer points.

(i) The infrequency and irregularity with which associated identical or similar benefits are provided

103. The first criterion to be considered is the infrequency and irregularity with which associated benefits that are identical or similar to the minor benefit, or benefits that are given in connection with the minor benefit, are provided, or can reasonably be expected to be provided.

104. As discussed at paragraphs 100 and 101 of this Ruling, the only associated benefit is the provision of free membership of the FF program. As the membership is neither identical nor similar to the frequent flyer points, no associated identical or similar benefits will be provided.

(ii) The sum of the notional taxable values of the minor benefit and associated benefits which are identical or similar

105. The second criterion to be considered is the amount that is, or might reasonably be expected to be, the sum of the notional taxable values of the minor benefit and any associated benefits, being benefits that are identical or similar to the minor benefit, in relation to the current year or any other year of tax.

106. As discussed at paragraph 104 of this Ruling, no identical or similar associated benefits will be provided. Therefore, this amount will be the notional taxable value of the frequent flyer points. This value will vary depending upon the number of vehicles sold by the employee during the six month period. However, given this criterion will only be considered where the notional taxable value of the points is less than \$300, the value of this criterion will be less than \$300.

(iii) The sum of the notional taxable values of any other associated benefits

107. This amount will depend upon whether the employee was an existing member of the FF program. If the employee was an existing member, this criterion will have a nil value. However, as discussed at paragraph 117 of this Ruling, if the employee receives free membership of the FF program under the LM High Flyers program the value of this criterion will be the amount the employee would have been required to pay to become a member of the FF program. Currently, this is not a significant amount.

(iv) The practical difficulty in determining the notional taxable values of the minor benefit and any associated benefits

108. Toyota will provide the employer with details of the taxable value of the benefits provided to each employee. Given this information will be provided to the employer, the employer will have little practical difficulty in determining the notional taxable values of the minor benefit and associated benefits.

(v) Circumstances surrounding the provision of the minor benefit and any associated benefits

109. The fifth criterion requires consideration of the circumstances surrounding the provision of the minor benefit. Without limiting the generality of the circumstances to be considered surrounding the provision of the benefit, it is necessary to consider specifically whether the benefit was provided as a result of an unexpected event and whether or not it could be regarded to be provided wholly or principally as a reward for services rendered, or to be rendered by the employee.

110. In considering this criterion in relation to the provision of the frequent flyer points the points are not provided to assist the employee to deal with an unexpected event; but are provided wholly as a reward for services rendered.

Conclusion

111. In considering the five criteria listed in paragraph 58P(1)(f):

- no identical or similar associated benefits are provided;
- the sum of the notional taxable values of the minor benefit and associated benefits that are identical or similar will be less than \$300;
- the sum of the notional taxable values of any other associated benefits will be the amount that the employee would have been required to pay to become a member of the FF program. Currently, this is not a significant amount;
- there should be no practical difficulty in determining the taxable values of the minor benefit and any associated benefits;
- the points are not provided as a result of an unexpected event;
- the points are provided wholly as a reward for services rendered.

112. In considering these criteria it is necessary to look at the nature of the benefit provided and give due weight to each of the criteria. On balance having regard to all of the criteria, it is considered that where the notional taxable value of the provision of the points is less than \$300 the factors that indicate it is unreasonable for the provision of the frequent flyer points to be treated as a fringe benefit outweigh those that indicate it is not unreasonable. Accordingly, where the notional taxable value of the provision of the frequent flyer points is less than \$300, the provision of the points will be an exempt benefit under section 58P.

Will the provision of a FF program membership be an exempt minor benefit?

(A) Is the notional taxable value of a FF program membership less than \$300?

113. In determining the notional taxable value of a benefit it is necessary to initially determine the type of benefit that is being provided.

114. Foster J in *Payne* at ATC 4412 determined that the applicant on payment of the fee to become a member of the Qantas Frequent Flyer program acquired contractual rights against Qantas. These rights enabled the applicant to accrue points and redeem those points for goods or services.

115. In applying *Payne*, a similar conclusion can be reached in relation to an employee who receives a membership of the FF program under the LM High Flyers program. That is, an employee who receives a membership of the FF program will receive rights that come within the definition of intangible property. The rights will be an external property benefit.

116. In determining the taxable value of the property benefit, paragraph 43(a) will not apply as the provider of the benefit (the FF program operator) is not the employer or an associate of the employer. Nor will paragraph 43(b) apply as neither the employer, nor an associate of the employer incurs expenditure to the FF program operator for the provision of the FF program membership.

117. Therefore, the notional taxable value of a FF program membership will be the notional value under paragraph 43(c). This is the amount the employee could be expected to pay to become a member of the FF program. This is currently less than \$300.

(B) Having regard to the five criteria in paragraph 58P(1)(f) is it unreasonable to treat the provision of a FF program membership as a fringe benefit?

118. The five criteria that need to be considered in determining whether it is unreasonable to treat a benefit as a fringe benefit are listed in paragraph 95 of this Ruling in relation to the provision of the frequent flyer points. As discussed in paragraphs 100 and 101 of this Ruling, in considering these criteria, the only associated benefit to the provision of a free FF program membership will be the provision of frequent flyer points.

119. Each of the five criteria are considered below in relation to the provision of a FF program membership.

(i) The infrequency and irregularity with which associated identical or similar benefits are provided

120. As discussed at paragraph 104 of this Ruling, no identical or similar associated benefits will be provided as the only associated benefit is the provision of frequent flyer points which is neither identical nor similar to the provision of the membership.

(ii) The sum of the notional taxable values of the minor benefit and associated benefits which are identical or similar

121. As discussed at paragraph 120 of this Ruling, no identical or similar associated benefits will be provided. Therefore, this amount will be the notional taxable value of the FF membership. As discussed at paragraph 117 of this Ruling, the notional value of a FF membership is the amount the employee would have been required to pay to become a member of the FF program. Currently, this is not a significant amount.

(iii) The sum of the notional taxable values of any other associated benefits

122. The sum of the notional taxable values of any other associated benefits will either be the amount paid by Toyota for the frequent flyer points awarded to the employee (dealership owned and operated by Toyota), or the amount the employee would have been required to purchase the points from the FF operator (independent dealership). Depending upon the number of vehicles sold by the employee this may be a significant amount.

(iv) The practical difficulty in determining the notional taxable values of the minor benefit and any associated benefits

123. Given that the FF program membership is obtained through the LM High Flyers program website, Toyota should be able to provide the employer with details of the employees who have received a free membership under the program. If this information is provided to the employer, the employer should have little practical difficulty in determining the notional taxable values of the minor benefit and associated benefits.

(v) Circumstances surrounding the provision of the minor benefit and any associated benefits

124. The fifth criterion requires consideration of the circumstances surrounding the provision of the minor benefit. Without limiting the generality of the circumstances to be considered surrounding the provision of the benefit, it is necessary to consider specifically whether the benefit was provided as a result of an unexpected event and whether or not it could be regarded to be provided wholly or principally as a reward for services rendered, or to be rendered by the employee.

125. In considering this criterion in relation to the provision of a membership of the FF program, the membership is not provided to assist the employee to deal with an unexpected event. Rather, it is provided to enable the employee to receive frequent flyer points which as discussed in paragraph 110 of this Ruling, are provided wholly as a reward for services rendered.

126. Guidance for determining whether a benefit provided to an employee to enable the employee to receive a reward for services is to be treated as a reward received wholly or principally as a reward for services rendered is provided in paragraph 241 of TR 2007/12. Paragraph 241 of TR 2007/12 states:

Whether a benefit has been provided wholly or principally for services rendered or to be rendered will depend on the circumstances. As the two cases illustrate, this can be difficult to determine and that it should be noted that this is merely one criterion to be considered when determining whether a benefit is a minor benefit. The Commissioner's view is that where a SSA is in place it is clear that any benefits provided under the SSA by the employer to the employee are wholly or principally by way of a reward for services rendered because the benefits have been provided in substitution for salary and wages. On the other hand, although a Christmas party provided to employees and their families may be considered to be a reward for services rendered or to be rendered, it would not necessarily be considered to have been provided wholly or principally by way of a reward for services rendered or to be rendered by the employee. In most instances a Christmas party would not be considered to be provided to an employee as a substitute for salary, wages or bonuses.

127. In applying this guidance, it is noted that a free FF program membership is only available to the employees who receive frequent flyer points for selling a particular Toyota vehicle. This is indicative of the employment services being the principal reason for the provision of the free membership.

Conclusion

128. In considering the five criteria listed in paragraph 58P(1)(f):

- no identical or similar associated benefits are provided;
- the sum of the notional taxable values of the minor benefit and associated benefits that are identical or similar is currently not a significant amount;
- the sum of the notional taxable values of the minor benefit and other associated benefits may become significant depending upon the number of vehicles sold by the employee;
- there should be no practical difficulty in determining the taxable value of the minor benefit and any associated benefits;
- the FF program membership is not provided as a result of an unexpected event;
- the membership is provided in connection with the provision of a reward for services rendered.

129. In considering these criteria it is necessary to look at the nature of the benefit provided and give due weight to each of the criteria. It is considered, on balance having regard to all of the criteria, the factors that indicate it is unreasonable for the provision of the FF program membership to be treated as a fringe benefit outweigh those that indicate it is not unreasonable. Accordingly, the provision of a FF program membership under the LM High Flyers program will be an exempt benefit under section 58P.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

*Related Rulings/Determinations:*TR 2006/10; TR 1999/6;
TR 2007/12; TD 93/231*Subject references:*

- external property fringe benefits
- FBT property fringe benefit
- fringe benefits
- fringe benefits tax
- in respect of employment
- property fringe benefits
- exempt benefits
- minor benefits

Legislative references:

- FBTAA 1986
- FBTAA 1986 Pt III Div 2
- FBTAA 1986 Pt III Div 3
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- ITAA 1936 26(e)
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- *J & G Knowles & Associates Pty Ltd v. FCT* [2000] FCA 196; 2000 ATC 4151; 44 ATR 22
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- *Smith v. FCT* (1987) [1987] HCA 48; 164 CLR 513; 19 ATR 274; 87 ATC 4883
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