CR 2015/9 - Fringe benefits tax: health and fitness equipment services provided by EFM Corporate Pty Ltd

Class Ruling

Fringe benefits tax: health and fitness equipment services provided by EFM Corporate Pty Ltd

Contents Para

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:

- subsections 5B(1E) to (1L) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)
- section 38 of the FBTAA
- subsection 47(2) of the FBTAA
- section 57A of the FBTAA
- section 65J of the FBTAA
- subsections 65J(2E) to (2H) of the FBTAA, and
- subsection 136(1) of the FBTAA.

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

Class of entities

3. The class of entities to which this Ruling applies is employers who make the health and fitness equipment supplied by EFM Corporate Pty Ltd (EFM) available to their employees.

Qualifications

4. 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 7 to 23 of this Ruling.

5. 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

6. This Ruling applies from 1 April 2014 to 31 March 2021. The Ruling continues to apply after 31 March 2021 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

7. The following description of the scheme is based on information provided by the applicant.

8. EFM is a provider of health and fitness services.

9. As part of its business, EFM offers its fitness equipment and services (each being a Client Facility) to schools, hospitals and corporate entities in their capacity as employers (each being a Client).

10. Each Client Facility is located on the premises (the premises) from which that employer operates its business.

11. It was advised in the application that such premises are business premises (within the meaning of subsection 136(1)).

12. The Client Facility is permanently set up within a designated area which is generally not moved.

13. Each employer enters into a service agreement (a Service Agreement) with EFM.

14. Under each Service Agreement the following definitions apply:

- 'Fitness Equipment' means the equipment provided by EFM.
- 'Health and Fitness Club' means an area located within the employer's premises.
- 'Health and Fitness Program' means the range of equipment and services provided by EFM at the Health and Fitness Club.
- 'Hours of Operation' means the range of times that supervised fitness programs with a Trainer (as defined below) being in attendance, are provided by EFM at the Health and Fitness Club. Such services may be varied from time to time as agreed between the employer and EFM.
- 'Membership' means the membership status of Staff (as defined below) who are participating in a Health and Fitness Program with unlimited access during the hours of operation.
- 'Services' means the conduct of the Health and Fitness Program conducted at the Health and Fitness Club.
- 'Staff' means all employees on the employer's payroll.
- 'Term' means the period from the commencement date until this Service Agreement is terminated.
- 'Trainer' means a person employed or engaged by EFM who is an approved and qualified fitness instructor.
- 'Trainee' means any Staff who are participating in a health and fitness program. (All Trainees have unlimited access during the Hours of Operation).

15. Under all Service Agreements:

- EFM agrees to provide Fitness Equipment at the premises of the employer and manage the operation of the Client Facility.
- EFM will purchase all Fitness Equipment. EFM will retain ownership at its own risk of all existing and new Fitness Equipment and will be responsible for the insurance, general wear and tear maintenance, and replacement of the Fitness Equipment. EFM will ensure the Fitness Equipment is kept in a clean and tidy manner.
- EFM will be responsible for the replacement of any Fitness Equipment that goes missing during the Hours of Operation, or while a Trainer is present at the Health and Fitness Club.

- The employer will be responsible for the replacement of any Fitness Equipment that goes missing when the Client does not lock the Health and Fitness Club after use.
- Each employer engages EFM to manage that Client Facility including providing services to that employer's employees for a monthly management fee payable by the employer to EFM. The services include EFM providing instruction and supervision of the employer's employees on the correct use of the Client Facility.
- Each employer agrees to pay EFM for its services by way of a management fee (the Management Fee) which is charged based on the number of that employer's employees who use the services.
- The Management Fee is charged by EFM to provide a Client Facility. No part of it relates to the public's use of the Client Facility.
- The Management Fee is a single, ongoing, unapportioned fee which covers the provision of the Health and Fitness Program, the provision of supervision and the use of the Fitness Equipment.
- The Management Fee represents a market value fee which would be charged for those services.
- It is a condition of operating a Client Facility that at least approximately 15% of that employer's employees (calculated on a full-time equivalent basis) use that Client Facility.
- EFM is paid directly by the public for the public's use of the Client Facility. These fees are usually paid by direct debit or via credit card and the employer is not paid directly by the public for the use of the Client Facility.
- The Trainers are not personal trainers. These trainers supervise the appropriate and responsible use of the equipment so that customers do not injure themselves.
- Trainees will fill in a pre-exercise questionnaire form including relevant medical information, and then if required by EFM, undergo a medical check with their General Practitioner. The cost of any medical check will be borne by each individual Trainee.
- For the purposes of providing instruction on the correct use of the Fitness Equipment, twelve monthly group fitness assessments will be conducted by EFM for all Trainees at no cost to the employer or trainee. The assessments will include cardiovascular fitness and local muscular endurance.

- Trainees will only have access to the Fitness Equipment during the Hours of Operation and while there is a Trainer in attendance.
- The employer will assist with administration, general support, communication and distribution of material associated with the Health and Fitness Program from time to time, as is reasonable and mutually agreed between the employer and EFM.
- The employer is responsible for the provision of the Health and Fitness Club as well as change rooms, toilet and shower facilities. The employer will also be responsible for the cleaning and maintenance of the Health and Fitness Club.
- The employer grants EFM access to the Health and Fitness Club for the purpose of providing a Health and Fitness Program, only during the Hours of Operation and subject to the terms and conditions specified in the Agreement. This is does not create any proprietary interest or estate in the Health and Fitness Club for EFM.

16. In relation to agreements specifically only to schools, the following additional clauses could also be present:

- EFM agrees to provide instruction on the correct use of the Fitness Equipment for up to 10 Students on each weekday between 7.30am to 8.30am and 3.30pm – 4.30pm, at no cost to the students or the College.
- EFM agrees to allow students access to the fitness equipment at times outside the Hours of Operation for the purpose of the Students physical education curriculum when supervised by a staff member who is qualified in terms of exercise prescription. The College and Staff member will be responsible for the students actions, and for maintaining the Fitness Equipment in a clean and tidy manner. EFM will not be held liable for any claims, insurance or injury costs associate with the Students that occurs outside the Hours of Operation, and the costs associated with such claims.

17. Employers often look to recoup the cost of the Management Fees by deducting it from its employees' salaries and wages. For the purposes of this ruling, such deductions occur under an effective salary sacrifice arrangement as described in TR 2001/10 *Income tax: fringe benefits tax and superannuation guarantee: salary sacrifice arrangements*.

18. There is no legal relationship between EFM and each employer's employees.

19. EFM does not have any relationship with the employers other than the arm's length commercial arrangement under the Service Agreement.

20. Each employer procuring EFM to provide instruction and supervision on the correct use of the Client Facility to the employer's employees and the provision of access to the Client Facility. Such Benefits apply only to that employer's employees and not to former employees, future employees or any relative of an employee.

21. Some employers are exempt entities (Exempt Entity) within the meaning of section 50-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).

22. Other employers are subject to the exemption under section 57A.

23. Other employers are rebatable employers under section 65J (Rebatable Employer).

Ruling

24. The exemption under subsection 47(2) applies to corporate employers, being employers who are not entitled to the exemption under section 57A or the rebate under section 65J.

25. The exemption under subsection 47(2) applies to other employers that are not providing tax-exempt body entertainment benefits under section 38.

26. Where the employer is entitled to the exemption under section 57A and the benefit provided is tax-exempt body entertainment under section 38, the expenditure comprising of the payment of the Management Fee is wholly or partly attributable to entertainment facility leasing expenses, and is excluded from the aggregate non-exempt amount under subsections 5B(1E) to (1L).

27. Where the benefit is a tax-exempt body entertainment fringe benefit under section 38 and the employer is eligible for the FBT rebate under section 65J, the expenditure, is wholly or partly attributable to entertainment facility leasing expenses and is excluded from the aggregate non-rebatable amount under subsections 65J(2E) and (2F).

Commissioner of Taxation
4 February 2015

Appendix 1 – Explanation

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.

28. The payment by the employer of the Management Fees, under a salary sacrifice arrangement, in return for the employees' use of the gym equipment and participation in the Health and Fitness Program will give rise to a 'benefit' as defined in subsection 136(1).

Corporate employers

29. For corporate employers, being employers who are not eligible for the section 57A exemption, employers who are not eligible for the section 65J rebate or non-profit employers, the benefit will be a fringe benefit where it meets the definition of 'fringe benefit' as defined in subsection 136(1).

30. The definition of fringe benefit in subsection 136(1) excludes at paragraph (g) a benefit that is an exempt benefit in relation to the year of tax.

31. For the purposes of this Ruling, the relevant exemption is the exemption provided under subsection 47(2) for a residual benefit that consists of the use of a recreational facility located on business premises of the employer.

Recreational facility – residual benefit exemption

32. Subsection 47(2) provides an exemption in respect of the provision of various types of residual benefits. Subsection 47(2) states (as relevant here):

> Where:
>
> (a) a **residual benefit** provided to a current employee in respect of his or her employment consists of:
>
> (i) the provision, or use, of a **recreational facility**; or
>
> (ii) ... and
>
> (b) the recreational facility...is located **on business premises** of:
>
> (i) the employer; or
>
> (ii) if the employer is a company, of the employer or of a company that is related to the employer;
>
> the benefit is an exempt benefit.
>
> [emphasis added]

33. Therefore, the provision of a benefit is exempt under subsection 47(2) where all of the following conditions are met:

- there has been the provision or use of a recreational facility that has supplied to a current employee.
- the provision or use of the recreational facility constitutes a residual benefit.
- that residual benefit is provided in respect of the current employee's employment.
- the recreational facility is located on the business premises of the employer.

Has there been the provision or use of a recreational facility that is supplied to a current employee?

34. The term 'recreational facility' is defined in subsection 136(1) to mean a facility for recreation (but does not include a facility for accommodation or a facility for drinking or dining).

Facility

35. The term 'facility' is not defined in the FBTAA and it therefore takes its ordinary meaning.

36. ATO ID 2009/141 *Fringe Benefits Tax Entertainment facility leasing expenses: hire of a marquee* provides the following information in relation to the definition of 'facility'.

> The word 'facility' is defined in the *Macquarie Dictionary* (Multimedia version 5.0.0) to mean:
>
> facility
>
> *noun* (plural facilities)
>
> 1. something that makes possible the easier performance of any action; advantage*: transport facilities; to afford someone every facility for doing something.*
>
> 8. a building or complex of buildings, designed for a specific purpose, as for the holding of sporting contests.
>
> The word 'facility' is also defined in the *Butterworths Encyclopaedic Australian Legal Dictionary*, (Online Edition), LexisNexis Australia:
>
> **Facility**
>
> A building or appliance, designed for a specific purpose, which has the effect of making possible the easier performance of an action
>
> The word facility, as described in each dictionary definition above, and as used in the income tax and fringe benefits tax definitions above is of wide meaning.

37. ATO ID 2009/141 also states that:

> Whilst the term 'facility' is not defined in the FBTAA, it is used in conjunction with other definitions such as:
>
> - 'child care facility' in subsection 136(1) of the FBTAA means 'a facility.. for the purpose of minding, caring for or educating..'
> - 'in-house health care facility' in subsection 136(1) of the FBTAA means '…a clinic, surgery, first-aid station or similar facility.. on premises of the employer..'
>
> Similarly, the term 'facility' is used in the *Income Tax Assessment Act 1997* (ITAA 1997) including instances where a facility is used for recreation purposes.
>
> - A 'facility' used for recreation on the employer's property and operated for employees is described in section 32-30 Item 1.5 of the ITAA 1997. A facility used for recreation in section 32-30 would include a drink vending machine.
> - A 'leisure facility' as defined in subsection 26-50(2) of the ITAA 1997 is 'land, a building, or part of a building or other structure, that is used (or held for use) for holidays or recreation. Examples of buildings or other structures which fall within the definition of 'leisure facility' would be ski-lodges, fishing shacks, holiday cottages, swimming pools and amenity buildings used in connection with tennis, bowling, golfing or swimming.

38. As indicated in paragraph 37 of this Ruling, section 32-30 of the ITAA 1997 identifies that a facility includes a drink vending machine.

39. Under the Service Agreement, the employee participates in the Health and Fitness Program at a gym which is set up in a designated area and has access to use gym equipment which is supervised by a trainer. Similar to a drink vending machine being an appliance that is designed for a specific purpose that makes obtaining a drink easier and therefore a 'facility', the gym is something designed for a specific purpose that makes enabling a person to improve fitness easier and is therefore also a 'facility'.

Recreation

40. The term 'recreation' is also defined in subsection 136(1) as follows:

> ***Recreation*** includes:
>
> (a) amusement;
>
> (b) sport or similar leisure-time pursuits; and
>
> (c) recreation or amusement provided on, or by means of, a vehicle, ship, vessel or aircraft.

41. As the definition of the term 'recreation' in subsection 136(1) is 'inclusive' the ordinary meaning of the term is also relevant. In that respect the Macquarie Dictionary 2014 Online Edition states in relation to the term 'recreation':

> **recreation**
>
> 1. refreshment by means of some pastime, agreeable exercise, or the like.
>
> 2. a pastime, diversion, exercise, or other resource affording relaxation and enjoyment.

42. It is considered that the activities available at the Client Facility meet the wider definition of 'recreation' and therefore meets the definition of a 'recreational facility' that is available for use by current employees.

43. On that basis, this requirement is met as there has been the provision or use of a recreational facility that is supplied to a current employee.

Does the provision or use of the recreational facility constitute a residual benefit?

44. Section 45 provides that a benefit will be a residual benefit if it is not a benefit by virtue of a provision of Subdivision A of Divisions 2 to 11 (inclusive).

45. Under each Service Agreement, the employer is liable to pay EFM a Management Fee based on the number of employees participating in the Health and Fitness Program. Also under each Service Agreement, the employee does not incur a liability for use of the Client Facility or participation in the Health and Fitness Program.

46. The benefit provided by corporate employers, therefore, does not fall within any of the provisions of Subdivision A of Division 2 to 11 and as such is a residual benefit per section 45.

Is the residual benefit provided in respect of a current employee's employment?

47. The expression 'in respect of' is defined as follows in subsection 136(1) in relation to the employment of an employee.

> ***in respect of****,* in relation to the employment of an employee, includes by reason of, by virtue of, or for in relation directly or indirectly to, that employment.

48. It is a condition of operating the Client Facility that approximately 15% of that employer's employees (calculated on a full-time equivalent basis) use the Client Facility.

49. The Management Fee is calculated based on the number of current employees that use the Client Facility.

50. Therefore, the residual benefit is provided in respect of the current employee's employment and this condition is met.

Is the recreational facility located on the business premises of the employer?

51. Business premises is defined in subsection 136(1) to mean '…premises, or a part of premises, of the person used, in whole or part, for the purposes of business operations of the person, but does not include:

(a) premises, or a part of premises, used as a place of residence of an employee of the person or an employee of an associate of the person; or

(b) a corporate box; or

(c) boats or planes used primarily for the purpose of providing entertainment unless the boat or plane is used in the person's business of providing entertainment; or

(d) other premises used primarily for the purposes of providing entertainment unless the premises are used in the person's business of providing entertainment.

52. Taxation Ruling TR 2000/4 *Fringe benefits tax: meaning of 'business premises'* provides the following explanation of what needs to be considered in relation to whether premises are business premises:

> 11. Given that each case turns on its own facts, there is no absolute or conclusive test of whether particular premises are 'business premises' of a person. However, in order to determine whether premises are 'business premises' i.e., they satisfy the respective requirements of 'premises of the person (*the employer*)' and 'used… for the purposes of business operations of the person (*the employer*)', an objective analysis of all the circumstances is necessary.
>
> 12. In making this analysis, an employer should carefully weigh all relevant matters, including the following factors that are especially relevant to determining whether each of the two requirements has been met:
>
> (a) *the control the employer has over the premises; and*
>
> (b) *the consistency of an employer's actions and activities on the premises with those normal business practices.*
>
> Importantly, each factor should be considered in relation to each of the two requirements. Further, the factors must be considered in combination and as whole, together with all relevant matters.
>
> 13. Having regard to the above, where a person is carrying on 'business operations' on premises, the premises are their 'business premises' where in form and substance the person bears the rights and risks of possession of the premises associated with the conduct of the 'business operations'.

53. The Applicant has advised that under the scheme, each Client Facility is located on the premises from which that employer operates its business and that such premises are business premises within the meaning of subsection 136(1) and, as a result, this requirement is met. As all the requirements of subsection 47(2) are met, the exemption applies in respect of corporate employers.

Other employers

54. Section 57A states that a benefit provided in respect of employment of an employee by an employer that is a registered public benevolent institution, a registered health promotion charity, public and non-profit hospitals or public ambulance services is an exempt benefit.

55. The benefit is provided because the employee works for the relevant employer. It is therefore provided in respect of the employment of the employee.

56. Therefore, where the employer is one of the entity types listed at paragraph 54 of this Ruling, the benefit will be an exempt benefit under section 57A.

57. Although the benefit is an exempt benefit, it may still be included in the calculation of the employer's aggregate non-exempt amount. In general terms, a public benevolent institution or health promotion charity will not be liable to pay fringe benefits tax unless a particular employee receives benefits with a value in excess of the amount specified in Step 2 of the Method statement in subsection 5B(1E).

58. The method for calculating the employer's aggregate non-exempt amount is set out in subsections 5B(1E) to (1L).

59. The exemptions that are available to all employers, such as the exemption under section 47(2), are not included in the employer's aggregate non-exempt amount.

60. The method for calculating the employer's aggregate non-exempt amount is set out in subsections 5B(1E) to (1L).

61. In general terms, these provisions provide that the value of a benefit will be included in the calculation of the aggregate non-exempt amount unless:

- the benefit is a benefit that constitutes the provision of meal entertainment; or
- the benefit is a car parking benefit; or
- the taxable value of the benefit is wholly or partly attributable to entertainment facility leasing expenses.

62. Similarly, section 65J provides that certain employers (rebatable employers) are entitled to a rebate equal to a percentage of the gross FBT payable, subject to a capping threshold.

63. The calculation of the employer's FBT rebate under subsection 65J(2A) involves calculating the employer's aggregate non-rebatable amount following the method statement in subsection 65J(2B).

64. In working out an employer's aggregate non-rebatable amount, the employee's type 1 and type 2 individual base non-rebatable amounts must be worked out under subsections 65J(2E) and (2F) respectively.

65. In calculating the employee's type 1 and type 2 individual base non-rebatable amounts, certain benefits are disregarded under subsection 65J(2H).

66. The benefits that are disregarded under subsection 65J(2H) include benefits whose taxable value is wholly or partly attributable to entertainment facility leasing expenses.

67. The exemptions that are available to all employers, such as the exemption under section 47(2), are not included in the employer's aggregate non-rebatable amount.

68. For the purposes of this Ruling, then, the relevant exceptions are:

(1) where the exemption provided under subsection 47(2) for a residual benefit that consists of the use of a recreational facility located on business premises of the employer, or

(2) the exception that applies to benefits that are wholly or partly attributable to entertainment facility leasing expenses.

69. If either of these exceptions apply to the benefit arising from the payment of the Management Fee for the employee's access to the Health and Fitness Club, or use of the equipment or participation in the Health and Fitness Program, the benefit will not be included in the calculation of the aggregate non-exempt nor non-rebatable amount.

(1) Does an exemption arise under subsection 47(2) for the provision of a recreational facility?

70. As per paragraph 33 of this Ruling, there are 4 requirements that must be met for the exemption under subsection 47(2) to apply:

(a) there has been the provision or use of a recreational facility that has supplied to a current employee.

(b) the provision or use of the recreational facility constitutes a residual benefit.

(c) that residual benefit is provided in respect of the current employee's employment.

(d) the recreational facility is located on the business premises of the employer.

(a) Has there been the provision or use of a recreational facility that is supplied to a current employee?

71. As explained at paragraphs 35 to 43 of this Ruling, this requirement is met.

(b) Does the provision or use of the recreational facility constitute a residual benefit?

72. Section 45 provides that a benefit will be a residual benefit if it is not a benefit by virtue of the provision of Subdivision A of Divisions 2 to 11 (inclusive). For the purpose of this Ruling, the relevant Division is Division 10 which applies to tax-exempt body entertainment benefits. However if the benefit is a tax-exempt body entertainment benefit, it will not be a residual benefit.

Is the benefit a tax-exempt body entertainment benefit?

73. Section 38 sets out the circumstances in which a tax-exempt body entertainment benefit will arise. Section 38 states:

> Where, at a particular time, a person (in this section referred to as the ***provider***) incurs non-deductible exempt entertainment expenditure that is wholly or partly in respect of the provision, in respect of the employment of an employee, of entertainment to a person (in this section referred to as the ***recipient***) being the employee or an associate of the employee, the incurring of the expenditure shall be taken to constitute a benefit provided by the provider to the recipient at that time in respect of that employment.

74. Section 38 contains the following 3 requirements:

(i) a person (the provider) incurs non-deductible exempt entertainment expenditure

(ii) that expenditure is wholly or partly in respect of the provision of entertainment to an employee or an associate of the employee, and

(iii) the provision of entertainment is in respect of the employment of the employee to whom, or to whose associate, the entertainment is provided.

75. Therefore, for a tax-exempt body entertainment benefit to arise from the use of the gym facility by an employee, the employer must incur expenditure. Further, the expenditure must be in respect of the provision of entertainment with the benefit arising at the time the expenditure is incurred.

76. Entertainment for the purposes of the FBTAA is defined as 'entertainment by way of food, drink or recreation' and recreation in turn is defined to include 'amusement, sport or similar leisure-time pursuits.' It is agreed that for FBTAA purposes the provision of the use of a gym facility is the provision of entertainment.

77. Expenditure incurred in payment of Management Fees for the employees' use of a gym, under an effective salary sacrifice arrangement, is expenditure in respect of the provision of entertainment to an employee.

78. In order to satisfy the requirements of section 38, it is necessary to consider whether such expenditure is 'non-deductible exempt entertainment expenditure.' If the expenditure is considered to be non-deductible entertainment expenditure, it will be a tax-exempt body entertainment benefit and the exemption in subsection 47(2) will not apply to the benefit.

(i) Has the provider incurred non-deductible exempt entertainment expenditure?

79. Subsection 136(1) defines non-deductible exempt entertainment expenditure as follows:

> ***non-deductible exempt entertainment expenditure*** means non-deductible entertainment expenditure to the extent to which it is not incurred in producing assessable income.

80. As the employer is a non-profit entity, any expenditure incurred will not be incurred in producing assessable income. Therefore, the issue to be determined is whether the relevant Management Fees are non-deductible entertainment expenditure.

What is non-deductible entertainment expenditure?

81. The term 'non-deductible entertainment expenditure' is defined in subsection 136(1) of as follows (as applicable here):

> ***non-deductible entertainment expenditure*** means [an]...outgoing to the extent to which:
>
> (a) section 32-5 of the *Income Tax Assessment Act 1997* applies to it, or would apply if it were incurred in producing assessable income; and
>
> (b) apart from that section, it would be deductible under section 8-1 of that Act, or would be if it were incurred in producing assessable income;
>
> (on the assumption that section 32-20 of the *Income Tax Assessment Act 1997* had not been enacted).

82. Section 32-5 of the ITAA 1997 prevents an income tax deduction being claimed for a loss or outgoing incurred in providing entertainment under section 8-1 of the ITAA 1997 unless the expenditure comes within one of the exceptions contained in sections 32-20 to 32-50 of the ITAA 1997.

83. Therefore, a fundamental requirement that must be satisfied for the expenditure to be a tax-exempt body entertainment benefit is for the expenditure to come within section 8-1 of the ITAA 1997.

Is that expenditure deductible under section 8-1 of the ITAA 1997?

84. Section 8-1 of the ITAA 1997 states:

> **8-1 General deductions**
>
> (1) You can ***deduct*** from your assessable income any loss or outgoing to the extent that:
>
> (a) it is incurred in gaining or producing your assessable income; or
>
> (b) it is necessarily incurred in carrying on a *business for the purpose of gaining or producing your assessable income.
>
> Note: Division 35 prevents losses from non-commercial business activities that may contribute to a tax loss being offset against other assessable income.
>
> (2) However, you cannot deduct a loss or outgoing under this section to the extent that:
>
> (a) it is a loss or outgoing of capital, or of a capital nature; or
>
> (b) it is a loss or outgoing of a private or domestic nature; or
>
> (c) it is incurred in relation to gaining or producing your *exempt income or your *non-assessable non-exempt income; or
>
> (d) a provision of this Act prevents you from deducting it.
>
> For a summary list of provisions about deductions, see section 12-5.

85. Therefore, a tax-exempt body entertainment benefit will not arise in relation to expenditure that is a loss or outgoing of capital, or of a capital nature.

86. In the case of expenditure on the Management Fees, it would be deductible as a business expense. It is therefore necessary to consider the exceptions contained in sections 32-50 of the ITAA 1997.

Do the exceptions contained in sections 32-20 to 32-50 of the ITAA 1997 apply?

87. Section 32-20 of the ITAA 1997 is the main exception to the operation of section 32-5 of the ITAA 1997. Section 32-20 of the ITAA 1997 states that '[s]section 32-5 does not stop you deducting a loss or outgoing to the extent that you incur it in respect of providing *entertainment by way of *providing a *fringe benefit.'

88. However, the definition of 'non-deductible entertainment expenditure', in subsection 136(1), proceeds on the assumption that section 32-20 of the ITAA 1997 had not been enlivened. Consequently, section 32-20 of the ITAA 1997 has no further application.

89. It is also considered that sections 32-35, 32-45 and 32-50 of the ITAA 1997 would not apply in relation to this scheme meaning that only sections 32-30 and 32-40 of the ITAA 1997 could be applicable.

90. The following two exceptions are relevant in these circumstances:

- Item 1.5 of the table in section 32-30 of the ITAA 1997, and
- Item 3.1 of the table in section 32-40 of the ITAA 1997.

Does item 1.5 of the table in section 32-30 of the ITAA 1997 apply?

91. Item 1.5 of the table in section 32-30 of the ITAA 1997 states:

Item	**Section 32-5 does not stop you deducting a loss or outgoing for ...**	**But the exception does not apply if ...**
1.5	providing a facility for *recreation on property you occupy, if the facility is mainly operated for your employees to use.	the facility is for: (a) accommodation; or (b) dining or drinking (unless it is a food or drink vending machine).

92. 'Item 1.5', of the table in section 32-30 of the ITAA 1997, concerns an employer occupied facility for recreation that is mainly operated for the use of the employer's employees (and the facility is not used for accommodation or for dining or drinking, unless from a vending machine).

93. The Service Agreement provides that 15% of Full Time Equivalent Employees must be Members. However, the 'facts, degree or impression of how the facility is used' must also be taken into account.

94. Each Client will need to determine whether this requirement is met.

(A) Instances where this requirement is met

95. This would include circumstances where a gym is only established on the Client's premises for the Client's employees to use. In such instances, 'Item 1.5' of the table in section 32-30 of the ITAA 1997 would apply to make the entertainment expenses deductible as there would be little chance of non-employees being able to use the facility.

96. Where this requirement is met, the provision of the Client Facility will not be a tax-exempt body entertainment benefit, but rather is a residual benefit as explained at paragraph 72 of this Ruling. Should that be the case, the other requirements of subsection 47(2) must also be considered.

97. As the provision of the Client Facility is in respect of the employee's employment as explained at paragraphs 47 to 50 of this Ruling, and the recreational facility is also located on the business premises as explained at paragraphs 51 to 53 of this Ruling, the exemption under subsection 47(2) will apply.

(B) Instances where this requirement is not met

98. There may be circumstances, however, where this requirement is not met. For example:

- A hospital may have a gym facility on its premises as part of their patients' rehabilitation program.
- A school may ordinarily have a gym on its premises so that students of the school can use the facilities as part of their physical education curriculum.

99. In both of these instances, any use of the gym by employees would be incidental to its use by patients of the hospital or students of the school. Therefore, 'Item 1.5' of the table in section 32-30 of the ITAA 1997 does not apply in this case to make the entertainment expenses deductible and section 32-40 of the ITAA 1997 will need to be considered where section 32-30 of the ITAA 1997 does not apply.

Does item 3.1 of the table in section 32-40 of the ITAA 1997 apply?

100. Item 3.1 of the table in section 32-40 of the ITAA 1997 states:

Item	Section 32-5 does not stop you deducting a loss or outgoing for ...	But the exception does not apply if ...
3.1	providing *entertainment for payment in the ordinary course of a *business that you carry on.	

101. The intention of item 3.1 of the table in section 32-40 of the ITAA 1997 is to allow an entity that carries on a business of providing entertainment to claim a deduction for losses or outgoings incurred in providing that entertainment. Therefore, an outgoing only falls within 'Item 3.1' where it is in respect of providing entertainment for payment in the ordinary course of business carried on by the entity making the outgoing.

102. It is accepted that the employer may well incur various expenditures in operating the Client Facilities and where such operating expenditures would also be entertainment expenditures under section 32-5 of the ITAA 1997 then the exception afforded by 'Item 3.1' may be satisfied. This would be on the basis that such operating expenses would be part of the ordinary course of business of the Client in providing entertainment for payment.

103. In this case though, the employer does not provide entertainment for payment. Under the Service Agreement, the employer does not receive any payment for providing entertainment.

104. Therefore, Item 3.1 of the table in section 32-40 of the ITAA 1997 would not apply.

105. What is also under examination in relation to this scheme is whether the employer's payments of the Management Fees, recouped via an effective salary sacrifice arrangement, are also part of the ordinary course of business of the employer in providing entertainment.

106. The phrase 'in the ordinary course of a business' is not defined in either the FBTAA or the ITAA 1997 and so must be interpreted according to its ordinary meaning and its legislative context.

107. The Client Facilities are 'business premises' of the employer and they are used for 'business operations' of the employer, as indicated at paragraph 11 of this Ruling.

108. Nonetheless, as explained in paragraph 9 of TR 2000/4 *Fringe benefits tax: meaning of 'business premises'*, activities that are considered to form part of 'business operations' do not necessarily mean that such activities are also 'undertaken in the ordinary course of carrying on a business.'

109. TR 2000/4 also states at paragraphs 42 to 44:

> 42. Where a business exists, the term 'business operations' would include a wide range of activities undertaken by the person carrying on the business. Support for this view can be found in the judgment of Merkel J in Esso Australia Ltd v. FC of T 98 ATC 4953, at 4957; (1998) 40 ATR 76, at 80; 157 ALR 652, at 656.
>
> 43. As indicated in this Ruling, the provision of benefits to employees in the form of child care would be an important factor in recruiting, retaining and otherwise rewarding employees. Having regard to the views expressed above, activities undertaken in connection with the provision of those benefits (or indeed the provision of recreational, car parking or health care facilities) to employees would be 'business operations' of the employer who carried on the business or carried out the profit making undertaking. Thus, if that employer were to use its premises for operating a child care facility on the premises, that activity would be regarded as 'business operations.'

> 44. A consequence of this is that premises would be 'used … for the purposes of business operations' where they are used exclusively for the operations of a child care facility. This was the express view of Merkel J in Esso Australia Ltd v. FC of T 98 ATC 4953 at 4957; (1998) 40 ATR 76 at 80; 157 ALR 652 at 656:
>
> > 'Once it is accepted that the provision of benefits to employees in the form of child care at business premises of an employer is an important factor in recruiting, retaining and otherwise rewarding employees and, as such, is part of the business operations of the employer, it does not seem to be relevant whether the child care facilities are located at the premises where the employer carries out other business operations, or are located at premises of the employer which have been procured solely for the purpose of the provision of a child care facility thereon. Common sense would dictate that is many instances basic requirements for child care facilities may be such that it is inappropriate for the facilities to be located upon the same premises where other business operations of an employer are conducted.'

110. Whilst it is accepted that the Health and Fitness Club is a factor in recruiting, retaining and otherwise rewarding the Client's employees, paragraph 41 of TR 2000/4 cannot be discounted where it states:

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

111. Under the Service Agreement, the employer does not receive any payment for providing entertainment. All payments are received by EFM. Therefore, the dealings were not undertaken for the purpose of profit making by the employer.

112. As such, the exception provided by 'Item 3.1', of the table in section 32-40 of the ITAA 1997, does not apply to make the entertainment expenses deductible and as none of the relevant exceptions applies in respect of the employer's employees' membership fees to the Client Facilities, it can be concluded that non-deductible entertainment expenditure is incurred.

113. Per paragraph 103 of this Ruling, the non-deductible entertainment expenditure is not incurred in producing assessable income.

114. Therefore, the expenditure is non-deductible exempt entertainment expenditure.

(ii) Is that expenditure wholly or partly in respect of provision of entertainment to an employee or an associate of the employee?

115. The expression 'in respect of' is not defined in the ITAA 1997 but that expression is defined as follows in subsection 136(1) in relation to the employment of an employee.

> ***in respect of****,* in relation to the employment of an employee, includes by reason of, by virtue of, or for in relation directly or indirectly to, that employment.

116. Staff of employers who participate in the program have unlimited access to the health and fitness equipment during the relevant hours of operation whilst they remain members.

117. It is a condition of operating a Client Facility that approximately 15% of that employer's employees (calculated on a full-time equivalent basis) use that Client Facility.

118. Therefore, payment by the Client in respect of the Management Fees are outgoings that will have sufficient connection to the provision of entertainment to these employees provided that the relevant activities at the Client Facilities do constitute 'entertainment ' for the purposes of the ITAA 1997.

119. As discussed at paragraph 77 of this Ruling, the provision of a gym facility constitutes entertainment.

120. The expenditure is therefore wholly or partly in respect of the provision of entertainment to an employee.

(iii) Is the provision of entertainment in respect of the employment of the employee to whom the entertainment is provided?

121. The definition of 'in respect of' for the purposes of the FBTAA is explained at paragraph 47 of this Ruling.

122. The meaning of the phrase 'in respect of the employment of the employee' was considered in the context of fringe benefits in the Federal Court case of J & A Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22 (Knowles). It was held in Knowles that the words 'in respect of' required a sufficient or material, rather than a causal, connection or relationship between the two activities.

123. In this case, the relevant expenditure is paid pursuant to salary sacrifice arrangements between the Client and the Client's employees. The expenditure is therefore in respect of the employment of the employee and this condition is met.

Conclusion on whether a tax exempt body entertainment benefit is provided

124. As the requirements explained at paragraph 74 of this Ruling are met, the benefit provided is a tax-exempt body entertainment benefit where section 32-30 of the ITAA 1997 does not apply.

125. As the benefit provided is a tax-exempt body entertainment benefit, it is not a residual benefit as explained at paragraph 72 of this Ruling.

126. The exemption under subsection 47(2) therefore does not apply and it is therefore not necessary to consider the other requirements as listed at paragraph 70 of this Ruling.

(2) Is the expenditure wholly or partly attributable to entertainment facility leasing expenses?

127. As discussed at paragraphs 68 of this Ruling, the other exception that may apply is expenditure wholly or partly attributable to entertainment facility leasing expenses.

128. Entertainment facility leasing expenses are defined in subsection 136(1) as meaning, for a person:

> Expenses incurred by the person in hiring or leasing:
>
> (a) a corporate box; or
>
> (b) boats, or planes, for the purpose of the provision of entertainment; or
>
> (c) other premises, or facilities, for the purpose of the provision of entertainment;
>
> but does not include so much of any such expenses that:
>
> (d) is attributable to the provision of food or drink; or
>
> (e) is attributable to advertising and is an allowable deduction for the person under *the Income Tax Assessment Act 1936* or *the Income Tax Assessment Act 1997*.

(a) Is the expenditure incurred in hiring or leasing?

129. As provided for in ATO ID 2009/45 the word 'hiring' is not defined in the FBTAA it has its natural meaning, taken in the context in which it appears in the legislation.

130. The Macquarie Dictionary 2014 Online edition defines 'hire' as:

> verb (t) (hired, hiring)
>
> 1. to engage the services of for payment: to hire a clerk.
>
> 2. to engage the temporary use of for payment: to hire a car.
>
> 3. Also, hire out. to grant the temporary use of, or the services of, for a payment.
>
> –noun
>
> 4. the price or compensation paid, or contracted to be paid, for the temporary use of something or for personal services or labour; pay.
>
> 5. the act of hiring.

131. The LexisNexis Encyclopaedic Australian Legal Dictionary defines 'hire' as:

> To lend to another for consideration the possession and use of goods for a particular period or purpose. Title to the goods throughout the hire period remains with the owner.

132. Subsection 136(1) defines 'leased':

> Means let on hire (including letting on hire that is described in the relevant agreement as a lease) under an agreement other than a hire-purchase agreement.

133. The employer has incurred expenses in return for the use of the gym equipment within Client Facility within the wider premises of the employer which accords with the dictionary definition of 'hire'.

(b) Is the expenditure in relation to hiring or leasing other premises or facilities?

134. Under the definition of 'entertainment facility leasing expenses', the hire or lease must be of corporate box, boat plane or other premises or facilities.

135. The words premises or facilities are not defined in the FBTAA, so they have their natural meaning, taken in the context that they appear in the legislation.

136. As explained at paragraphs 35 to 39 of this Ruling, participation in the Health and Fitness program consisting of supervision of trainers and the use of the gym equipment in a designated area meets the definition of 'facility'.

137. As the Management Fee is paid to cover the employee's use of the gym equipment, the expenditure is wholly or partly attributable to entertainment facility leasing expenses.

138. Therefore, the benefit is not included in the aggregate non-exempt amount under subsections 5B(1E) to (1L).

139. The benefit is similarly not included in the aggregate non-rebatable amount under subsection 65J(2H).

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2000/4; TR 2001/10;
TR 2006/10

Subject references:

- entertainment facility leasing expenses
- exempt benefits
- FBT entertainment
- FBT public benevolent institutions
- FBT rebatable employers
- fringe benefits tax
- tax-exempt body entertainment fringe benefits

Legislative references:

- FBTAA 1986
- FBTAA 1986 5B(1E)
- FBTAA 1986 5B(1F)
- FBTAA 1986 5B(1G)
- FBTAA 1986 5B(1H)
- FBTAA 1986 5B(1J)
- FBTAA 1986 5B(1K)
- FBTAA 1986 5B(1L)
- FBTAA 1986 38
- FBTAA 1986 45
- FBTAA 1986 47(2)
- FBTAA 1986 57A
- FBTAA 1986 65J
- FBTAA 1986 65J(2A)
- FBTAA 1986 65J(2B)
- FBTAA 1986 65J(2E)
- FBTAA 1986 65J(2F)
- FBTAA 1986 65J(2H)
- FBTAA 1986 136(1)
- ITAA 1997
- ITAA 1997 8-1
- ITAA 1997 32-5
- ITAA 1997 32-20
- ITAA 1997 32-30
- ITAA 1997 32-40
- ITAA 1997 32-50
- ITAA 1997 50-5
- TAA 1953

Case references:

- J & A Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22

Other references:

- ATO ID 2009/45
- ATO ID 2009/141
- Macquarie Dictionary 2014 Online
- LexisNexis Encyclopaedic Australian Legal Dictionary

ATO references

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