PCG 2021/D1 (Finalised) - Determining if allowances or benefits provided to an employee relate to travelling on work or living at a location - ATO compliance approach

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Draft Practical Compliance Guideline

Determining if allowances or benefits provided to an employee relate to travelling on work or living at a location – ATO compliance approach

Relying on this draft Guideline

This Practical Compliance Guideline is a draft for consultation purposes only. When the final Guideline issues, it will have the following preamble:

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.

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What this draft Guideline is about

1. This draft Guideline[1] outlines the ATO's compliance approach to determining if employees in certain circumstances are travelling on work[2] or living at a location away

[1] All further references to 'this Guideline' refer to the Guideline as it will read when finalised. Note that this Guideline will not take effect until finalised.

[2] Paragraphs 12 and 15 to 20 of Draft Taxation Ruling TR 2021/D1 *Income tax and fringe benefits tax: employees:*
- *accommodation and food and drink expenses*
- *travel allowances, and*
- *living-away-from-home allowances*

contain information about when an employee is travelling on work.

from their normal residence[3] (living at a location).[4] This Guideline should be read in conjunction with TR 2021/D1.[5]

2. In order to determine the nature of an allowance paid, employers are required to consider all relevant circumstances to determine whether the employee is travelling on work or living at a location. The nature of an allowance is not to be determined by reference solely to its name or the period for which it is paid.[6] As such, there will be circumstances in which it may be difficult for an employer to conclude whether an employee is travelling on work or living at a location.

3. This Guideline is focused on providing practical guidance to assist in determining whether:

- an allowance paid by an employer to an employee is paid for
  - travelling on work, which will be a travel allowance that is assessable to an employee and will not incur fringe benefits tax (FBT)[7], or
  - living at a location which may be a living-away-from-home allowance (LAFHA) benefit[8], and
- amounts reimbursed or paid by an employer would have been deductible to the employee had they purchased the goods or services (that is, it would be otherwise deductible[9] under the FBTAA).[10]

Background

4. Expenses for living at a location are usually not deductible.[11] However, expenses incurred on accommodation and food and drink are usually deductible, or otherwise deductible, where an employee is working away from home for short periods of time. In these situations, an employee is generally travelling on work.[12]

5. In many cases short periods of travel can be consistent with an employee travelling on work in the course of their employment and incurring deductible expenses. In applying the approach below the concept of 'reasonably short'[13] is used. In considering whether an

[3] The term 'normal residence' is used for FBT purposes – see section 30 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) and the definition in subsection 136(1) of the FBTAA. For the purposes of this Guideline, the term 'normal residence' is used interchangeably with the term 'home'.
[4] Paragraphs 37 to 70 of TR 2021/D1 contain information about when an employee is living at a location.
[5] TR 2021/D1 provides guidance on when an employee can deduct accommodation and food and drink expenses under section 8-1 of the *Income Tax Assessment Act 1997*, the FBT implications where an employee is reimbursed. for accommodation and food and drink expenses or where the employer provides or pays for these expenses, and the criteria for determining whether an allowance is a travel allowance or a LAFHA benefit.
[6] See paragraphs 109 to 118 of TR 2021/D1.
[7] See paragraphs 112 to 114 of TR 2021/D1.
[8] For the purposes of determining if Division 7 of the FBTAA applies. See paragraphs 109 to 111 and paragraphs 115 to 118 of TR 2021/D1.
[9] The 'otherwise deductible' rule allows the employer to reduce the taxable value of fringe benefits by the amount for which the employee would be able to claim a once-only deduction. To the extent that an expense is 'otherwise deductible', the taxable value of the benefit is reduced, which reduces the employer's potential liability to FBT.
[10] For the purposes of sections 24, 44 or 52 of the FBTAA for expense, property and residual fringe benefits respectively. If the expense or residual benefit relates to food, drink or accommodation (and is not otherwise deductible) the benefit may be exempt or the taxable value may be reduced if the requirements in section 21, subsection 47(5) or section 63 of the FBTAA are satisfied.
[11] See paragraphs 23 to 24 and paragraphs 37 to 70 of TR 2021/D1.
[12] See paragraph 23 of TR 2021/D1.
[13] See paragraph 49 of TR 2021/D1.

employee's presence at a work location[14] is reasonably short, consideration needs to be given to the:

- time spent working away from home, and
- pattern of visits to that location compared with visits to other locations.

6. Where an employee maintains a continuous presence at a work location, their presence will be reasonably short if all of the criteria in paragraph 10 of this Guideline are met.

Who this Guideline applies to

7. All employers who provide benefits referred to in paragraph 3 of this Guideline to their employees (who do not work on a fly-in fly-out or drive-in drive-out[15] basis) may rely on this Guideline.

8. If an employer chooses not to rely on this Guideline or does not meet the requirements in paragraph 10 of this Guideline; they will need to apply the relevant FBT provisions to determine if an FBT liability arises for the benefit provided (or if an exemption or concession applies) and ensure they substantiate (through obtaining relevant declarations or documentation) how they determined the taxable value of the benefit.

Date of effect

9. When finalised, this Guideline is proposed to apply both before and after its date of issue.

Our compliance approach

10. The Commissioner will accept that an employee is travelling on work and will generally not apply compliance resources to determine if benefits referred to in paragraph 3 of this Guideline relate to expenses for living at a location when all of the following circumstances are satisfied:

The employer	**The employee**
• provides an allowance to an employee or pays or reimburses[16] accommodation and food and drink expenses for the employee • does not provide the reimbursement or payment as part of a salary-packaging arrangement and the employee is not given the option to elect to receive additional remuneration in lieu	• is away from their normal residence for work purposes[17] • does not work on a fly-in fly-out or drive-in drive-out[18] basis • is away for a short-term period being – no more than 21 days at a time continuously, and

[14] For the purposes of this Guideline, a work location is the usual or normal place of work where an employee starts and finishes their work duties with a particular employer.
[15] Section 31E of the FBTAA outlines the requirements of a fly-in fly-out or drive-in drive-out employee.
[16] The difference between an allowance and a reimbursement is explained in Taxation Ruling TR 92/15 *Income tax and fringe benefits tax: the difference between an allowance and a reimbursement*. For the purposes of this Guideline, an employer is not required to determine the distinction.
[17] For the purposes of this Guideline, an employer is not required to determine definitively if the employee is living away from their normal residence or not. This Guideline does not apply if the employee is travelling for the purposes of education or study.
[18] Section 31E of the FBTAA outlines the requirements of a fly-in fly-out or drive-in drive-out employee.

The employer	The employee
• includes the travel allowance on the employee's payment summary or income statement and withholds tax, where appropriate, and • obtains and retains the relevant documentation to substantiate the fact that all of these circumstances are met.	– an overall aggregate period of fewer than 90 days (that is, the most being 89 days) in the same work location in an FBT year, and • must return to their normal residence when their period away ends.

11. The compliance approach in this Guideline sets an aggregate period of fewer than 90 days for travel to a single work location in an FBT year. Provided that this requirement is met, the Guideline allows an employee to have numerous short stints of travel of up to, and including, 21 continuous days.

Example 1 – allowance is not a LAFHA benefit

12. *Kate lives in Perth and is employed by engineering company Employer Co. Kate spends most of her time working at Employer Co's head office in Perth.*

13. *From time to time, Kate is also required to spend between one and three weeks (no more than 21 days) working in various remote locations of Employer Co in Western Australia. Kate returns to her home in Perth for periods of more than a week before her next trip.*

14. *When this occurs, Employer Co pays Kate an allowance which she spends on accommodation and food and drink while she is away. Kate is away for a period of less than 90 days in total in the same location in Western Australia in the FBT year.*

15. *The allowance is included in Kate's assessable income and Kate may be entitled to a deduction for her accommodation and food and drink expenses.*

16. *Employer Co is able to rely on this Guideline as the requirements in paragraph 10 of this Guideline are met, that is, the Commissioner would accept that Kate is travelling on work. Employer Co is paying Kate a travel allowance and not a LAFHA, and Employer Co is not liable for FBT on the allowance paid.*

Example 2 – accommodation and food and drink expenses otherwise deductible

17. *Louise works in Brisbane and is employed by engineering company Employer Co.*

18. *Employer Co gives Louise a three-month assignment in a remote work location in Western Australia to perform duties for Employer Co. As part of the agreement, Louise works during the three-month assignment for:*

- *three weeks in Western Australia, returning to Brisbane for two weeks to perform duties in the Brisbane office*
- *another three weeks in Western Australia in the same work location, returning to Brisbane to again perform duties in the Brisbane office, this time for a week, and*
- *another three weeks in Western Australia in the same work location.*

19. *In effect, during the three-month assignment, Louise works in the same work location in Western Australia for nine weeks and is home for three weeks in between. She is away for no more than 21 days at a time continuously and is away for a period of less*

than 90 days in the same work location in total. Louise does not return to work again in the same work location in Western Australia at the end of the three-month assignment.

20. *Employer Co pays Louise's accommodation and food and drink expenses while she is in Western Australia. The accommodation and food and drink expense amounts are not provided to Louise as part of a salary packaging arrangement. Louise cannot claim the accommodation and food and drink expenses as a deduction in her tax return as they have been paid for by Employer Co.*

21. *Employer Co is able to rely on this Guideline as the requirements in paragraph 10 of this Guideline are met. The Commissioner would accept that Louise is travelling on work. Employer Co is not liable for FBT on the accommodation and food and drink expense payment benefits it provides as the otherwise deductible rule applies.*

Example 3 – Guideline does not apply, character of allowance must be determined based on facts and circumstances

22. *Employer Co referred to in Examples 1 and 2 of this Guideline undertakes a four-month project near Adelaide. Jeremy, who is based in Melbourne, is appointed project manager.*

23. *Jeremy works from Adelaide for the duration of the project, and Employer Co pays him an allowance to cover his food and accommodation expenses while he is working in Adelaide. Employer Co also pays for Jeremy to return to Melbourne for the weekend at the end of every fortnight.*

24. *Employer Co is not able to rely on this Guideline as the requirements in paragraph 10 of this Guideline are not satisfied. While each of the continuous periods Jeremy is away are less than 21 days, the overall period he is away at the one work location is more than 90 days for the FBT year. Accordingly, without more information, the Commissioner does not accept that Jeremy is travelling on work.*

25. *Employer Co will need to apply the relevant FBT provisions to determine if the allowance Jeremy receives is a LAFHA benefit.*

Commissioner of Taxation
17 February 2021

Status: **draft only – for comment**

Your comments

26. You are invited to comment on this draft Guideline, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

27. A compendium of comments is prepared when finalising this Guideline, and an edited version (with names and identifying information removed) may be published on ato.gov.au Please advise if you do not want your comments included in the edited version of the compendium.

Due date: **19 March 2021**

Contact officer details have been removed following publication of the final guideline.

Status: **draft only – for comment**

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 92/15; TR 2020/D1

Legislative references:

- ITAA 1997 8-1
- FBTAA 1986 21
- FBTAA 1986 24
- FBTAA 1986 30
- FBTAA 1986 31E
- FBTAA 1986 44
- FBTAA 1986 47(5)
- FBTAA 1986 52
- FBTAA 1986 63
- FBTAA 1986 136(1)

ATO references

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