

TR 2009/D4 - Income tax, Pay As You Go Withholding and fringe benefits tax: tax consequences on the issue, holding and redemption of bonus units as part of an employee benefits trust arrangement

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Draft Taxation Ruling

Income tax, Pay As You Go Withholding and fringe benefits tax: tax consequences on the issue, holding and redemption of bonus units as part of an employee benefits trust arrangement

Contents	Para
PROPOSED LEGALLY BINDING SECTION:	
What this Ruling is about	1
Ruling	8
Date of effect	61
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	62
Appendix 2:	
<i>Your comments</i>	107
Appendix 3:	
<i>Detailed contents list</i>	109

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This publication is a draft for public comment. It represents the Commissioner’s preliminary view about the way in which a relevant taxation 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.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don’t have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

What this Ruling is about

1. This draft Ruling is about the tax consequences for employers, employees and trustees where bonus units are issued to employees as part of an employee benefits trust arrangement. In particular, it is about:

- whether and in what circumstances a payment received by an employee as a result of redemption of their bonus units constitutes a payment of salary or wages to the employee for the purposes of section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)¹ or compensation, benefits or bonuses for the purposes of section 15-2;
- whether the issue of bonus units to an employee is in respect of employment or services rendered by the employee and constitutes a payment of salary or wages to the employee for the purposes of section 6-5 or compensation, benefits or bonuses for the purposes of section 15-2;

¹ All legislative references are to the ITAA 1997 unless otherwise indicated.

- when and in what circumstances an amount must be withheld or paid to the Commissioner in accordance with section 12-35 or section 14-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) and the entity who must withhold or make the payment;
 - whether an employee participant in the arrangement obtains a tax benefit which attracts the operation of Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936); and
 - whether and in what circumstances the issue of bonus units to an employee or the transfer of value to bonus units held by an employee constitutes a provision of a fringe benefit for the purposes of subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).
2. This draft Ruling does not consider the deductibility of expenditure incurred in respect of the issue, receipt or redemption of the bonus units.

Class of entities/arrangement

3. The class of entities to which this Ruling applies are employers, employees and trustees who have participated in an employee benefits trust arrangement.
4. An employee benefits trust arrangement is an arrangement that is implemented for participation by an employer, an employee or employees of the employer, and a trustee.
5. The elements of an employee benefits trust arrangement are as follows:
- (a) a trust (the trust) is established for or by the employer and administered by the trustee for the purpose of rewarding employees of the employer;
 - (b) the employer pays contributions to the trust for the purpose of remunerating or providing incentives to the employees;
 - (c) on receipt of a contribution or shortly thereafter, the trustee of the trust makes loans to selected employees. The loan amounts are typically equal to or slightly less than the amounts the employer contributed to the trust (the difference being made up by administration fees payable to the trustee). The loans are ordinarily interest free and of a limited recourse nature. The loans can only be used by an employee to purchase ordinary units in the trust itself. The repayment of the loans is linked to and funded from the redemption of the employee's ordinary units and any bonus units that the trustee may issue to the employee;

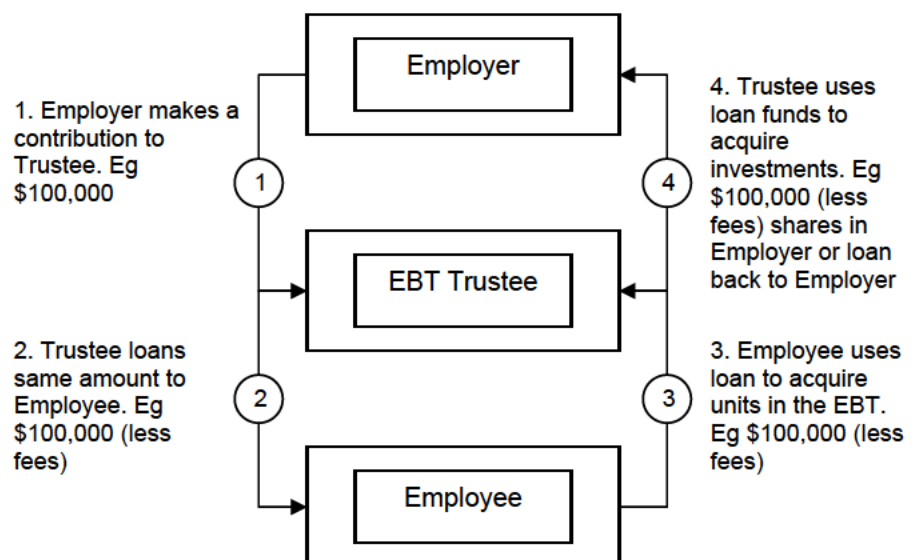
- (d) an employee uses the loan monies to purchase ordinary units in the trust. Amounts paid by an employee for the purchase of ordinary units are treated in the trust accounts as further accretions to trust capital (as the employee's share of the trust capital). An ordinary unit does not give the unit holder an interest in the assets of the trust or any right to any share in the capital of the trust. Subject to the trustee's discretion, an ordinary unit gives the unit holder an entitlement to a redemption or cancellation payment on the redemption/cancellation of the unit;
- (e) an ordinary unit typically gives the unit holder an interest in or an entitlement to a share of the income of the trust. Alternatively an ordinary unit holder may receive a share of the income of the trust at the trustee's discretion;
- (f) the trustee uses the monies paid by an employee for ordinary units to purchase assets to be held on trust for the trust beneficiaries generally. Although assets may be notionally allocated to a particular beneficiary's ordinary units, the trustee has the discretion to re-allocate those assets to any other beneficiary's ordinary units. Whilst the value of a unit is determined by reference to this allocated asset, re-allocation of such assets will affect this value;
- (g) ownership of ordinary units qualifies the employee to receive bonus units. Bonus units are issued to ordinary unit holders at the request of the employer and at the discretion of the trustee. In practice, whilst the trustee has a discretion to refuse to issue such units, the trustee will ordinarily issue bonus units at the employer's request. Although the number of bonus units issued to any particular ordinary unit holder will typically be based on the amount paid by the ordinary unit holder for their ordinary units, bonus units may be issued to all or any of the ordinary unit holders in any number, regardless of the number of ordinary units held;
- (h) the trust deed specifies that the 'issue price' in relation to a bonus unit means 'Nil';
- (i) the trust deed typically specifies that bonus units are issued in respect of a unit holder's ordinary units and that bonus units may only be cancelled when the corresponding ordinary units are also cancelled;
- (j) there is tacit or express understanding or agreement between an employee and the employer that the employee is to be rewarded by the trustee for work done for the employer through the issue and the redemption/cancellation of bonus units subject to the employee satisfying certain performance criteria;

- (k) the issue of bonus units typically coincides with the time when an employee can redeem their ordinary units. Employees usually have to satisfy a minimum ordinary unit holding period and/or employment related performance criteria before their ordinary units can be redeemed. When the holding period and/or performance criteria in relation to ordinary units are satisfied, an employee will receive bonus units from the trustee and will ask the trustee to redeem both their ordinary and bonus units;
- (l) employer contributions to the trust are initially held in a separate employer contribution/unallocated trust capital account (however the account is designated or described). Monies transferred to an employee's bonus unit account on the issue of bonus units can only be transferred from the employer contribution/unallocated trust capital account. Monies in the employer contribution/unallocated trust capital account can only be transferred to an employee's bonus unit account on the issue of bonus units to that employee and cannot be transferred to any other trust account;
- (m) a bonus unit does not give its holder any rights to or interest in the assets or the income of the trust. The only right attaching to a bonus unit is its cancellation entitlement;
- (n) the cancellation entitlement for an employee's ordinary unit is typically the amount paid by the employee for the acquisition of the ordinary unit or a proportionate share of the value of the trust assets allocated to the employee's ordinary units. The cancellation entitlement of a bonus unit is typically a cash amount specified in the trust deed as the cancellation entitlement;
- (o) in practice, although the trustee has the discretion to allow redemption of units to the extent that the holding period and/or performance criteria are satisfied, the trustee honours requests for redemption and there is an expectation to that effect on behalf of the employees and employer. Upon redemption, the trustee agrees to pay to the employee the cancellation entitlements in respect of each of the ordinary units and the bonus units held by the employee, less the amount of the loan that the employee owes to the trustee. Therefore, upon redemption, the trustee will:
 - determine the cancellation entitlements of the ordinary and bonus units issued to the employee;

- offset the employee's outstanding loan balance against the cancellation entitlements for the employee's ordinary and bonus units; and
- pay to the employee the balance of the proceeds;

(p) the cancellation entitlement for the employee's bonus units will usually equal the employee's outstanding loan balance and will be offset against, and therefore extinguish, the loan.

6. The flow of funds is as follows:



7. This Ruling also applies to an employee benefits trust arrangement as described in paragraphs 4 to 6 of this draft Ruling which includes elements at subparagraphs 5(a), (b), (c), (d), (e), (f), (g) and (h) of this draft Ruling as well as the following elements:

- (a) the trust deed typically specifies that bonus units are issued in respect of a unit holder's ordinary units;
- (b) there is tacit or express understanding or agreement between an employee and the employer that the employee is to be rewarded by the trustee for work done for the employer through the issue of bonus units subject to the employee satisfying certain performance criteria;

- (c) employer contributions to the trust are initially held in a separate employer contribution/unallocated trust capital account (however the account is designated or described) for later transfer to an employee's bonus unit account. Monies transferred to an employee's bonus unit account can only be transferred from the employer contribution/unallocated trust capital account. Moneys in the employer contribution/unallocated trust capital account can only be transferred to an employee's bonus unit account and cannot be transferred to any other trust account. Monies may be transferred to an employee's bonus unit account on the issue of bonus units or at any time after the bonus units are issued;
- (d) a bonus unit gives its holder rights to and interests in the assets and/or the income of the trust;
- (e) the cancellation entitlement for a bonus unit may be based on the rights and interests that it gives to its holder;
- (f) in practice, although the trustee has a discretion to allow redemption of units to the extent that the holding period and/or performance criteria are satisfied, the trustee honours requests for redemption. Upon redemption, the trustee agrees to pay to the employee the cancellation entitlements in respect of the units being cancelled, less the amount of the loan that the employee owes to the trustee. Therefore, upon redemption, the trustee will:
 - determine the cancellation entitlements of the units being cancelled;
 - offset the employee's outstanding loan balance against the cancellation entitlements for the units being cancelled; and
 - pay to the employee the balance of the proceeds.

Ruling

Salary or wage income

8. An employee does not derive ordinary or statutory income from the provision of personal services until the income either has been received by them or is taken by subsections 6-5(4) or 6-10(3) to have been received by them.

9. An employee will not derive an amount of salary or wages or bonus income if that employee acquires only a right to receive the salary or wages or bonus income. As a mere right to receive salary or wages or bonus income, the receipt of bonus units is not a derivation of that income for the purposes of section 6-5.

10. The issue of a bonus unit to an employee by a trustee in an employee benefits trust arrangement as described at paragraphs 4 to 6 of this draft Ruling is the means by which an obligation to pay a sum certain to the employee is created. The sum certain has the character of a bonus. The issue of a bonus unit creates an entitlement or right to money by way of bonus.

11. A right to receive salary or wages or bonus income is not a fringe benefit as defined in subsection 136(1) of the FBTA. Paragraph (f) of the definition of 'fringe benefit' excludes from fringe benefits tax 'a payment of salary or wages'. A step in a series of steps having the effect of delivering a payment of salary or wages or bonus income to an employee does not in itself constitute a separate benefit provided to the employee with separate taxation consequences. The purpose and the effect of the bonus unit aspect is to deliver salary or wages or bonus income to an employee.

12. When the employee redeems the bonus units and receives a payment from the trustee, the payment received by the employee is considered to be a derivation of salary or wages or bonus income, and therefore of ordinary income, for the purposes of section 6-5 or 'allowances and other things provided in respect of employment or services' for the purposes of section 15-2.

13. The payment received by the employee on redemption of the bonus units has the character of salary or wages or bonus income because the payment is made to the employee as a reward for services provided by the employee to the employer.

Pay As You Go withholding

14. As the payment made to the employee on the redemption of the bonus units under the arrangement described at paragraphs 4 to 6 of this draft Ruling is considered to be a payment of salary or wages for the purposes of section 6-5 of the ITAA 1997, or compensation, benefits or bonuses for the purposes of section 15-2 of the ITAA 1997, an amount must be withheld in accordance with section 12-35 of Schedule 1 to the TAA.

15. In accordance with paragraph 66 of Taxation Ruling TR 2005/16, the trustee of the trust is the entity who must withhold. Where a payment is a payment of salary, wages, commission, bonus or allowance, then the entity that made the payment will be required to withhold under section 12-35 of Schedule 1 to the TAA.

Part IVA

16. The Commissioner's view is that payments received by an employee on the redemption of bonus units received by the employee under the arrangement described at paragraphs 4 to 6 of this draft Ruling constitute salary or wages income of the employee for the purposes of section 6-5 of the ITAA 1997, or compensation, benefits or bonuses of the employee for the purposes of section 15-2 of the ITAA 1997. To that extent the arrangements would not give rise to tax benefits within the meaning of section 177C of the ITAA 1936, and Part IVA of the ITAA 1936 would not apply.

17. However, if neither of section 6-5 of the ITAA 1997 nor section 15-2 of the ITAA 1997 applies to the receipt of a payment on the redemption of bonus units, the Commissioner may consider the application of Part IVA of the ITAA 1936. The application of Part IVA of the ITAA 1936 depends on a careful weighing of all the relevant circumstances of each case and the relative weight that should be attached to each of those circumstances. Therefore, in the absence of all relevant information, it is not possible to state definitively whether a particular scheme will attract Part IVA of the ITAA 1936. However, it is the Commissioner's view that, in the absence of other relevant facts, Part IVA of the ITAA 1936 is likely to apply to employee benefits trust arrangements as described at paragraph 4 to 6 of this draft Ruling.

Fringe benefits tax

18. This paragraph and paragraphs 19 to 23 of this draft Ruling are to be read subject to paragraph 11 of this draft Ruling. Where, in a particular case, the circumstances are such that the exception in paragraph (f) of the definition of fringe benefit is inapplicable because the bonus unit is not a right to receive salary or wages, the issue by the trustee of the bonus unit to an employee is the provision of a fringe benefit to the employee for the purposes of the FBTAA. Alternatively, in such a case the transfer from the employer contribution/unallocated capital trust capital account on issue of the bonus unit is the provision of a fringe benefit to the employee for the purposes of the FBTAA. Also alternatively, the transfer from the employer contribution/unallocated trust capital account after the issue of a bonus unit is the provision of a fringe benefit to the employee for the purposes of the FBTAA.

19. Additionally, where there are any further transfers from the employer contribution/unallocated trust capital account to the employee's bonus unit account in relation to bonus units that were previously issued for value and/or were subject to previous transfers from the employer contribution/unallocated trust capital account to the employee's bonus unit account, there is a provision of a fringe benefit to the employee at the time of transfer.

20. The issue of a bonus unit to an employee by a trustee or the transfer from the employer contribution/unallocated trust capital account to the employee's bonus unit account under an employee benefits trust arrangement as described at paragraph 7 of this draft Ruling is a benefit provided:

- to the employee;
- by the trustee as an 'arranger' under an 'arrangement' between the employer and the arranger;
- in respect of the employment of the employee.

21. The benefits referred to in paragraphs 18 to 20 of this draft Ruling are ordinary income of the employee at the time when they are provided but would not be assessable income of the employee pursuant to section 23L of the ITAA 1936.

22. The benefit constituting the issue of a bonus unit is a property benefit for the purposes of section 40 of the FBTAA. The property benefit is an external property fringe benefit with a taxable value determined under section 43 of the FBTAA.

23. The benefit constituting the transfer from the employer contribution/unallocated trust capital account to the employee's bonus unit account is either a property benefit in accordance with section 40 of the FBTAA or a residual benefit in accordance with section 45 of the FBTAA.

24. A bonus unit received by an employee or a transfer from the employer contribution/unallocated trust capital account to the employee's bonus unit account under the arrangement described at paragraph 7 of this draft Ruling is a 'non-cash benefit' for the purposes of subsection 995-1(1) of the ITAA 1997 and is not salary or wages of the employee as defined in the FBTAA. Accordingly, a bonus unit received by an employee or a transfer from the employer contribution/unallocated trust capital account to the employee's bonus unit account will be a fringe benefit provided to the employee for the purposes of the FBTAA.

Examples

Example 1 – assessable income of the employee

25. On 30 April 2009 an employer contributes \$300,000 to an employee benefits trust.

26. On 30 April 2009 the trustee of the employee benefits trust selects three employees of the employer – employee A, employee B, and employee C – as employee participants. The trustee loans \$100,000 to each selected employee. Each selected employee pays \$100,000 to the trustee and receives 100,000 \$1 ordinary units.

27. Shares in the employer have a value of \$20 per share on 30 April 2009. The trustee uses the \$300,000 received from the employees to purchase 15,000 shares in the employer. The trustee allocates 5,000 employer shares to the ordinary units of each of employee A, employee B, and employee C.

28. On 1 May 2010 the trustee, on the request of the employer, issues 1,000 bonus units to employee A. Each bonus unit has a nil issue price and a cancellation entitlement of \$100.

29. On 1 May 2010 employee A asks the trustee to redeem his ordinary units and his bonus units. The trustee exercises its discretion to redeem the units.

30. Shares in the employer have a value of \$21 per share on 1 May 2010. The cancellation entitlement for employee A's ordinary units is the value of the trust assets allocated to those units and is \$105,000. The cancellation entitlement for the bonus units is \$100,000. The aggregate cancellation entitlement is \$205,000. The trustee pays \$105,000 to employee A and applies \$100,000 in repayment of employee A's loan.

31. The cancellation of the ordinary units is a CGT event and the gain of \$5,000 on their cancellation is a discount capital gain for employee A for the purposes of Division 115. The cancellation entitlement of \$100,000 on the bonus units is salary or wages or bonus income and assessable income of employee A.

32. Regardless of whether employee A's loan is offset against the cancellation entitlement for the ordinary units or the cancellation entitlement for the bonus units, employee A's capital gain on the cancellation of the ordinary units is \$5,000 and the amount included in his assessable income on the cancellation of the bonus units is \$100,000.

33. The trustee must withhold an amount from the payment of \$100,000 to employee A under section 12-35 of Schedule 1 to the TAA.

Example 2 – Part IVA tax benefit

34. On 31 May 2009 an employer contributes \$100,000 to an employee benefits trust.

35. On 31 May 2009 the trustee of the employee benefits trust selects employee D as an employee participant. The trustee loans \$100,000 to employee D. Employee D pays \$100,000 to the trustee and receives 100,000 \$1 ordinary units.

36. Shares in the employer have a value of \$20 per share on 31 May 2009. The trustee uses the \$100,000 received from employee D to purchase 5,000 shares in the employer. The trustee allocates the 5,000 employer shares to employee D's ordinary units.

37. On 1 June 2010 the trustee, on the request of the employer, issues 100,000 bonus units to employee D. Each bonus unit has a nil issue price and a cancellation entitlement of \$1.

38. On 1 June 2010 employee D asks the trustee to redeem his ordinary units and his bonus units. The trustee exercises its discretion to redeem the units.

39. Shares in the employer have a value of \$21 per share on 1 June 2010. The cancellation entitlement for employee D's ordinary units is the value of the trust assets allocated to those units and is \$105,000. The cancellation entitlement for the bonus units is \$100,000. The aggregate cancellation entitlement is \$205,000. The trustee pays \$105,000 to employee D and applies \$100,000 in repayment of employee D's loan.

40. In his income tax return for the year ended 30 June 2010 employee D returns a discount capital gain of \$105,000 on the following basis:

- the ordinary units were acquired on 31 May 2009;
- the bonus units were issued in relation to employee D's original units for the purposes of paragraph 130-20(1)(b);
- the bonus units are taken to have been acquired on 31 May 2009 for the purposes of subsection 130-20(3);
- the number of ordinary units purchased is 100,000 and the number of bonus units received is 100,000. The total cost of the ordinary and the bonus units is \$100,000. The cost base of the ordinary units is apportioned between the ordinary units and the bonus units. The cost base of the ordinary units is taken to be \$50,000 for the purposes of subsection 130-20(3). The cost base of the bonus units is taken to be \$50,000 for the purposes of subsection 130-20(3);
- the ordinary units have been held and the bonus units are taken to have been held for at least twelve months for the purposes of section 115-25.

41. Employee D's income tax return is incorrect and the bonus units are not 'bonus equities' for the purposes of section 130-20.

42. The ordinary units have a cost base of \$100,000. The cancellation of the ordinary units is a CGT event and the gain of \$5,000 on their cancellation is a discount capital gain of employee D for the purposes of Division 115. The cancellation entitlement of \$100,000 on the bonus units is salary or wages or bonus income and assessable income of employee D.

43. To the extent that the cancellation entitlement of \$100,000 was not ordinary income and assessable income of employee D, employee D would have obtained a tax benefit for the purposes of Part IVA of the ITAA 1936. The Commissioner would make a determination under subsection 177F(1) of the ITAA 1997 to cancel the tax benefit.

Example 3 – fringe benefits tax – provision of bonus units or provision of trust property

44. On 30 June 2009 an employer contributes \$100,000 to an employee benefits trust.

45. On 30 June 2009 the trustee of the employee benefits trust selects employee E as an employee participant. The trustee loans \$100,000 to employee E. Employee E pays \$100,000 to the trustee and receives 100,000 \$1 ordinary units.

46. Shares in the employer have a value of \$20 per share on 30 June 2009. The trustee uses the \$100,000 received from employee E to purchase 5,000 shares in the employer. The trustee allocates the 5,000 employer shares to employee E's ordinary units.

47. On 1 June 2010 the trustee, on the request of the employer, issues 1,000 bonus units to employee E.

48. The bonus units issued to employee E are funded out of the employer contribution to the trust and give employee E a share of the income of the trust and a proportionate interest in the assets of the trust.

49. Employee E has received a non-cash benefit as defined in subsection 995-1(1) of the ITAA 1997. Section 12-10 of Schedule 1 to the TAA provides that there is no Pay As You Go (PAYG) withholding requirement in relation to a payment constituting a non-cash benefit. A non-cash benefit is not 'salary or wages' for the purposes of the FBTA.

50. The benefit constituting the issue of bonus units is a property benefit for the purposes of section 40 of the FBTA. The property benefit is an external property fringe benefit with a taxable value determined under section 43 of the FBTA. The taxable value of the property fringe benefit is \$100,000.

51. Alternatively employee E has received a benefit in the trust fund constituted by the monies transferred from the employer contribution/unallocated trust capital account. This benefit is a property benefit for the purposes of section 40 of the FBTA. The property benefit is an external property fringe benefit with a taxable value determined under section 43 of the FBTA. The taxable value of the property fringe benefit is \$100,000.

Example 4 – fringe benefits tax – provision of trust property

52. On 31 July 2009 an employer contributes \$100,000 to an employee benefits trust.
53. On 31 July 2009 the trustee of the employee benefits trust selects employee F as an employee participant. The trustee loans \$100,000 to employee F. Employee F pays \$100,000 to the trustee and receives 100,000 \$1 ordinary units.
54. Shares in the employer have a value of \$20 per share on 31 July 2009. The trustee uses the \$100,000 received from employee F to purchase 5,000 shares in the employer. The trustee allocates the 5,000 employer shares to employee F's ordinary units.
55. On 1 June 2010 the trustee, on the request of the employer, issues 1,000 bonus units to employee F.
56. The bonus units issued to employee F are unfunded and have no value at the time of issue.
57. On 1 August 2010 the trustee, on the request of the employer, transfers \$100,000 from the employer contribution/unallocated trust capital account to employee F's bonus unit account.
58. Employee F has received an interest in the employee benefits trust.
59. At the time of allocation there is a provision of a property benefit, being a benefit in the trust fund constituted by the money transferred from the employer contribution/unallocated trust capital account to employee F's bonus unit account
60. The property benefit is an external property fringe benefit with a taxable value determined under section 43 of the FBTAA. The taxable value of the property fringe benefit is \$100,000.

Date of effect

61. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation26 August 2009

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.*

Section 6-5

62. A bonus unit issued to an employee under the employee benefits trust arrangement described at paragraphs 4 to 6 of this draft Ruling gives the employee a right to a ‘cancellation entitlement’ on its redemption/cancellation. The cancellation entitlement is a fixed cash amount as specified in the trust deed. A bonus unit does not give the holder any other right such as an equitable interest in the trust assets or an entitlement to a share of the income of the trust.

63. A bonus unit can be described as a right of a pecuniary nature enforceable in equity against the trustee to be paid a sum certain by the trustee. It is not a right in regard to any property held by the trustee for the purpose of performing its duties under the trust. It is merely a personal right, and in circumstances where it is unconditional (as in the case of the employee benefits trust arrangement) it will be in the nature of an equitable debt owed by the trustee to the employee.

64. The fund from which the money payable to the employee is to be paid on the cancellation/redemption of the employee’s bonus units is trust capital contributed by the employer for the purposes of rewarding its employees in this way. The employer contributions thus create a fund for the reward of meritorious employees, and its administration distributes that fund to them by way of reward for their services to the employer.

65. Prior to the issue of the bonus units, employer contributions are held by the trustee as unallocated trust capital. Payments made to an employee on the redemption of the bonus units issued to the employee represent a transfer in value from the unallocated trust capital. The employer contributions are made as part of an employee remuneration scheme and are ultimately provided to employees by way of bonus units which are redeemed for cash. To the extent that the cancellation entitlement of the bonus units is linked to and sourced from the contributions made by the employer for employees, the receipt of the cash payment by the employee on and attributable to the redemption of the employee’s bonus units is a receipt of salary or wages or bonus income and is assessable income of the employee under section 6-5.

Section 15-2

66. In the alternative, the redemption payment made to the employee is assessable to the employee under section 15-2 of the ITAA 1997. Section 15-2 of the ITAA 1997 (which replaced paragraph 26(e) of the ITAA 1936) provides that the value of all allowances, gratuities, compensation, benefits, bonuses and premiums allowed, given or granted directly or indirectly in respect of employment or services rendered is included in assessable income.

67. In *Smith v. FC of T* (1987) 164 CLR 513; 87 ATC 4883; (1987) 19 ATR 274, Brennan CJ indicated that if the employment (or some aspect of employment) is the reason or one of the reasons why the payment is made, it falls within paragraph 26(e) of the ITAA 1936. If employment or some aspect of employment is a substantial reason for the payment, it cannot be said that the payment is merely personal, or that the payment is extraneous to employment.

Connection with employment

68. A payment to an employee will be employment-related income of the employee where the employee receives the payment in their capacity as an employee. In *Mutual Acceptance Company v. FC of T* (1944) 69 CLR 389, Latham CJ stated (396):

The payments (in cash or kind) which are included in 'wages' are payments made 'to any employee as such.' They therefore comprehend only payments made to an employee in connection with and by reason of his service as an employee or in respect of some incident of his service. Thus a merely personal gift by an employer to a person who happened to be an employee would not be included within 'wages,' though a bonus paid to employees because they were employees would be so included.

69. Similarly in *Murdoch & Ors v. Commissioner of Pay-roll Tax (Vic)* (1980) 143 CLR 629, Mason, Murphy and Wilson JJ stated (644-645):

The key features of the payments are their source and their destination. They came from the net profits of the business, and they were made only to persons who were employees for the time being of that business. In our opinion, therefore, they were 'wages' paid to 'employees as such', and the Commissioner was correct in assessing them to pay-roll tax. Our conclusion does not rest on the criteria applied by the trustees in making the distribution. On the other hand, although we do not regard those criteria as irrelevant, they certainly support the conclusion. But even if other criteria, as suggested in argument, were adopted, in our opinion it does not follow necessarily that the payments would not attract liability to pay-roll tax. Ordinarily they would still seem to be rightly described as remuneration paid to employees because they were employees.

70. In *J & G Knowles & Associates Pty Ltd v. FC of T* (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22 the Federal Court considered the meaning of 'in respect of employment' in the FBTAA. The Court noted that what has to be established in determining if a benefit is 'in respect of employment' is whether there is a sufficient or material, rather than a causal, connection or relationship between the benefit and the employment.

71. Where bonus units are issued to an employee under a remuneration scheme having regard to the employee's performance and are issued at the request of the employer in its capacity as an employer, the issue of the bonus units is sufficiently and materially connected to the employee's employment and a payment to the employee on their redemption can be characterised as a payment of salary or wages or bonus income. Although the holding of ordinary units is a condition precedent to the issue of the bonus units, the holding of the ordinary units is not the reason why the bonus units are issued and payments are made on their redemption. The bonus units are issued and payments are made on their redemption as a reward for and/or in recognition of services provided by the employee in respect of employment.

Salary or wages or bonus income paid by third party

72. Whether the redemption payment received by the employee is paid by the employer or the trustee does not affect the conclusion that the payment constitutes salary or wages or bonus income. The essential element is the nature of any connection between the payment and the individual's employment with the payer or any other entity.

73. If the payment is in respect of the employment of the individual, it is not relevant who actually made the payment. *FC of T v. Dixon* (1952) 86 CLR 540; 10 ATD 82 discusses whether a payment is in respect of a person's employment. Dixon CJ and Williams J stated (CLR 556; ATD 85):

Indeed, it is clear that if payments are really incidental to an employment, it is unimportant whether they come from the employer or from somebody else and are obtained as of right or merely as a recognized incident of the employment or work.

74. In *Kelly v. FC of T* (1985) 85 ATC 4283; (1985) 16 ATR 478 the Supreme Court of Western Australia concluded that a payment from a third party that was not the employer of the employee was assessable income of the employee under the former section 25 of the ITAA 1936 or the former paragraph 26(e) of the ITAA 1936. The Court concluded (ATC 4288-4289; ATR 484) that:

the payment to and receipt by the appellant of the sum of \$20,000 was directly related to his employment

and was:

caught if not by section 25 then by section 26(e) of the Act. The 'cause' of the payment on the facts of this case is the employment of the appellant

75. Where a payment is a reward for services provided by the employee, as an employee, to the employer the payment would be incidental to the employment regardless of whether the payment is made by the employer or another entity. If the payment is a payment of salary, wages, commission, bonus or allowance then the entity that made the payment will be required to withhold under section 12-35 of Schedule 1 to the TAA.²

Remuneration rights not fringe benefits

76. Where an employee is granted a right or rights to remuneration (pre-existing remuneration rights) that are an intrinsic part of a contract for services that ultimately results in the receipt by the employee of remuneration that is subject to tax under the relevant tax laws as 'salary or wages', those pre-existing remuneration rights come within the definition of a 'benefit' for the purposes of the FBTA.

77. However, paragraph (f) of the definition of 'fringe benefit' in subsection 136(1) of the FBTA excludes the payment of 'salary or wages', itself a defined term, from that definition of fringe benefit. The presently relevant part of the meaning of salary or wages will ultimately be found in section 12-35 of Schedule 1 to the TAA, viz, 'salary, wages, commission, bonuses or allowances an entity pays to an individual as employee (whether of that or another entity)'. 'Entity' includes the trustee of a trust estate: see subsection 3AA(2) of the TAA and subsection 960-100(2) of the ITAA 1997. Broadly speaking, the scheme of the fringe benefits tax is to tax remuneration of employees derived from employment in the hands of the employer if that remuneration is not salary or wages as so defined, but to leave remuneration in the form of salary or wages to be assessed to income tax in the hands of the employee. A cash bonus paid to an employee by a person other than the employer will be 'salary or wages' and hence not a fringe benefit. It is subject to income tax.

² Refer to Taxation Ruling TR 2005/16 for guidance about when and by whom amounts must be withheld from payments to employees.

78. The Commissioner does not consider the term ‘*payment of salary or wages*’ to be confined to the actual discharge of any liability on the part of the employer or another person to pay salary or wages to an employee. If entitlements to receive salary or wages constituted fringe benefits, Parliament’s purpose in excluding salary or wages from fringe benefits tax would be stultified and systemic double taxation might result. Consequently it is evident from the context and object of the FBTAA that the creation of an obligation to pay (and the corresponding entitlement to be paid) a sum of money that, when discharged, amounts to the payment of salary or wages to an individual as employee, is also incapable of being a fringe benefit. Thus debts on account of salary and wages are not fringe benefits as defined.

79. Where an employee is granted a right in the form of a bonus unit under an employee benefits trust arrangement as described at paragraphs 4 to 6 of this draft Ruling, the grant of that right will not be a ‘fringe benefit’ for the purposes of the FBTAA.

Part IVA

80. On the assumption that an ordinary unit has been held for at least twelve months it has been contended that the redemption/cancellation of an ordinary unit and a bonus unit delivers a discount capital gain to an employee for the purposes of Division 115. This contention is based on the following propositions:

- an ordinary unit in the employee benefits trust is an ‘original equity’ for the purposes of section 130-20;
- a bonus unit in the employee benefits trust is a ‘bonus equity’ for the purposes of section 130-20;
- a bonus unit issued to an employee is not issued in relation to the employee’s employment;
- a bonus unit issued to an employee is issued in relation to the employee’s ordinary unit for the purposes of paragraph 130-20(1)(b);
- item 1 in the table in subsection 130-20(3) applies such that:
 - the bonus unit is taken to have been acquired by the employee at the time when the employee acquired the ordinary unit; and
 - the first element of the cost base of the ordinary unit is apportioned to the ordinary unit and the bonus unit;
- the redemption/cancellation of an ordinary unit and bonus unit is a CGT event C2 pursuant to section 104-25; and
- the redemption/cancellation of the bonus unit does not result in the derivation by the employee of assessable income in the form of salary or wages.

81. The Commissioner's view is that the proceeds payable to an employee on the redemption/cancellation of bonus units under the employee benefits trust arrangement described at paragraphs 4 to 6 of this draft Ruling are salary or wages or bonus income of the employee. If the proceeds payable to an employee on redemption/cancellation are assessable income of the employee from salary or wages, the operation of Division 130 is immaterial. Division 130 would not result in the inclusion of a greater amount of assessable income, and to the extent that it might result in a smaller amount, the anti-overlap rule in CGT prevents double taxation. However the following observations may be made.

82. A 'bonus unit' is a right of a pecuniary nature enforceable in equity against the trustee to be paid a sum certain of money by the trustee. It is not a right in regard to any property held by the trustee for the purpose of performing the trusts; it is merely a personal right; and where it is unconditional it will be in the nature of an equitable debt owed by the trustee to the employee. Employees who are awarded bonus units redeem them, either immediately or in due course, for money. As noted in paragraph 71 of this Ruling, the entitlement represented by the bonus unit will be fruit of the employee's employment, resulting from the exercise of a discretionary power of appointment by the trustee in respect of trust capital contributed by the employer for distribution to employees by way of bonus to reward and encourage them in their employment.

83. As the so-called units amount to no more than a right to receive a specified sum of money out of trust capital provided by the employer in the exercise of a discretion under the trust, it may be doubted that they are units, or the trust a unit trust, of the kind contemplated by Subdivision 130-A. But whether or not the trusts in question are relevantly 'unit trusts' for the purposes of Subdivision 130-A and whether or not 'units' of this character in the trust are relevantly 'units' for the purposes of the Subdivision (neither matter concluded by the label attached to the trust or right), a so-called 'bonus unit' is not a unit issued to the employee 'in relation to the original equities' for the purposes of paragraph 130-20(1)(b). Thus the Subdivision does not apply to it. Subdivision 130-A is a rule which, broadly speaking, provides for the spreading of the cost base of original shares in company or units in a unit trust where the interest represented by the original equities is 're-expressed' in a different number of identical equities through a bonus issue. It also creates a cost base in the bonus equities to the extent that they, or rather their value, is deemed to be a dividend or is included in the assessable income. The Subdivision is thus concerned with shares or units that are bonus equities issued 'in relation to' original equities in the sense that they flow from them, either because the issue reframes the original interest or effects (or is taken to effect) a distribution in respect of it. In the present case, the bonus units are issued in relation to the employee's employment rather than the original units. They flow from the contract of employment, not proprietary rights enjoyed by the employee as the unit holder.

84. If the proceeds payable to an employee on the redemption/cancellation of bonus units are not salary or wages or bonus income of the employee, and if a bonus unit is a 'bonus equity' for the purposes of section 130-20 of the ITAA 1997 such that the arrangement delivers a discount capital gain to the employee on the redemption/cancellation of an employee's ordinary and bonus units, the Commissioner's view is that it is likely that the employee will have obtained a tax benefit for the purposes of Part IVA of the ITAA 1936. The limited benefits attributable to the holding of a bonus unit – a bonus unit does not give its holder any rights to either the income of the trust or any share in any capital growth of the trust – do not suggest that a bonus unit is held for any commercial purposes. There are no discernable financial advantages that arise to an employee through the holding of a bonus unit. The financial benefits are limited to the receipt and the cancellation of a bonus unit.

85. Under the arrangement as described a bonus unit is cancelled very soon after it is issued. The steps involving the bonus units may be properly regarded as a part of a more comprehensive arrangement designed to deliver remuneration to an employee in the form of a discount capital gain.

86. Any definitive conclusion about the application of Part IVA of the ITAA 1936 to a particular case will necessarily depend on the particular facts. However the Commissioner's view is that certain provisions of the employee benefits trust deed suggest that the arrangement attempts to convert what would otherwise be salary or wage or bonus income of an employee into a discount capital gain with significant tax savings. Those provisions appear to be explicable only as an attempt to enable the tax savings.

Fringe benefits tax

In respect of employment

87. For a benefit provided to an employee to be a fringe benefit, the benefit must be provided to the employee in respect of the employment of the employee. In this regard the discussion at paragraphs 68 to 71 of this draft Ruling in relation to the arrangement described at paragraphs 4 to 6 of this draft Ruling is equally relevant to the arrangement described at paragraph 7 of this draft Ruling. In particular, benefits provided to an employee in relation to the issue or the holding of a bonus unit are provided in relation to the employment of the employee.

Trustee an ‘arranger’

88. The trustee is ‘an arranger’ for the purposes of paragraph (e) of the definition of ‘fringe benefit’ in subsection 136(1) of the FBTAA. At the time of the issue of the bonus units, or alternatively at the time of the transfer from the contribution/unallocated trust capital account to the employee’s bonus unit account, there is a benefit provided to an employee by the trustee under an arrangement between the employer and the trustee in respect of the employment of the employee.

Not salary or wages

89. In the arrangement described at paragraph 7 of this draft Ruling, the issue of a bonus unit or the transfer from the employer contribution/unallocated trust capital account to the employee’s bonus unit account is not considered to be a step in the calculation and delivery of an employment related cash bonus to the employee.

90. The definition of ‘fringe benefit’ for the purposes of subsection 136(1) of the FBTAA excludes a payment of salary or wages or a payment that would be salary or wages if salary or wages included exempt income for the purposes of the ITAA 1936. Salary or wages is a defined term in the FBTAA. Salary or wages means a payment from which an amount must be withheld (even if the amount is not withheld) under a provision in Schedule 1 to the TAA listed in the table, to the extent that the payment is assessable income. The table lists sections 12-35, 12-40, 12-45, 12-115 and 12-120 as provisions that require withholding from an amount defined as salary or wages for the purposes of the FBTAA.

91. The issue of a bonus unit to an employee or the transfer from the employer contribution/unallocated trust capital account to the employee’s bonus unit account is the provision of a non-cash benefit. A non-cash benefit is defined by the ITAA 1997 as meaning ‘property or services in any form except money.’ Section 12-10 of Schedule 1 to the TAA provides that Division 12 of Schedule 1 to the TAA ‘does not apply to a payment in so far as it consists of providing a non-cash benefit.’

92. Division 14 of Schedule 1 to the TAA provides for payments to be made to the Commissioner in respect of non-cash benefits. Specifically, section 14-5 of Schedule 1 to the TAA requires that an amount be paid to the Commissioner in respect of a non-cash benefit where, had cash been provided instead of the non-cash benefit, an amount would have been withheld and paid to the Commissioner. However, paragraph 14-5(3)(a) of Schedule 1 to the TAA provides that there is no payment requirement in relation to the provision of a fringe benefit.

93. The provision of a non-cash benefit to an employee by an employer that does not attract a withholding requirement under Division 12 of Schedule 1 to the TAA does not fall within the definition of 'salary or wages' for the purposes of excluding salary or wages from fringe benefits tax.

Property fringe benefit or residual fringe benefit

94. The rights and interests that a bonus unit gives an employee as its holder under the employee benefits trust arrangement described at paragraph 7 of this draft Ruling depend on the provisions of the trust deed and any relevant agreements or understandings between the employer, the employee and the trustee in relation to the bonus unit.

95. To the extent that a bonus unit is property as defined in subsection 136(1) of the FBTAA and has a value on issue representing a transfer from the employer contribution/unallocated trust capital account, the issue by the trustee of the bonus unit to the employee is the provision of a property benefit to the employee for the purposes of the FBTAA. Alternatively, the transfer from the employer contribution/unallocated trust capital account on the issue of the bonus unit to the employee is a provision of a residual benefit to the employee for the purposes of the FBTAA.

96. Alternatively, where a bonus unit is issued without any transfer from the employer contribution/unallocated trust capital account, and there is a later transfer from the employer contribution/unallocated trust capital account to the employee's bonus unit account, there is a provision of a property benefit or residual benefit to the employee at the time of transfer.

97. Additionally, where there are any further transfers from the employer contribution/unallocated trust capital account to the employee's bonus unit account in relation to bonus units that were previously issued for value and/or were subject to previous transfers from the employer contribution/unallocated trust capital account to the employee's bonus unit account, there is a provision of a property benefit or a residual benefit to the employee at the time of transfer.

98. At the time of the transfer from the employer contribution/unallocated trust capital account to the employee's bonus unit account there is a provision of property, namely the benefit in the trust fund constituted by the money which is property, so that there is a property benefit as defined in the FBTAA. However it is noted that Hill J stated in *Walstern v. FC of T* 2003 ATC 5076 at 5092; (2003) 54 ATR 423 at 441 the benefit may be either a property benefit or a residual benefit.

Taxable value

99. If the benefit provided is a property benefit under section 40 of the FBTA, the benefit will be an external property fringe benefit with a taxable value determined under section 43 of the FBTA. The taxable value of the benefit will be the 'notional value of the recipients property at the provision time'.

100. If the benefit provided is a residual benefit under section 45 of the FBTA, the benefit will be an external non-period residual fringe benefit with a taxable value determined under section 50 of the FBTA. The taxable value will be the 'notional value of the benefit at the comparison time'. The 'comparison time' for present purposes is 'the time when the benefit is provided' as per the definition of 'comparison time' in subsection 136(1) of the FBTA.

101. Subsection 136(1) of the FBTA provides that 'notional value', in relation to the provision of property or another benefit to a person, means 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.'

102. The Commissioner's view is that the amount that the employee could reasonably be expected to have been required to pay to obtain the benefit from the trustee is the amount transferred from the employer contribution/unallocated trust capital account in relation to the bonus unit either when the bonus unit was issued or at any time subsequently during the period in which the bonus unit is held. To paraphrase Hill J in *Walstern*, the benefit constituting the interest under the fund as provided by the employer cost the employer the amount transferred. The employer would expect to be paid that amount by the employee before it would make the contribution resulting in the employee obtaining the relevant benefit.

103. The notional value of the property fringe benefit or residual fringe benefit provided to the employee is equal to the relevant amount transferred. On the basis of Hill J's conclusion, the notional value would be the amount transferred from the employer contribution/unallocated trust capital account to the employee's bonus unit account.

Capital gains tax consequences where a transfer from the employer contribution/unallocated trust capital account is the provision of a fringe benefit

104. Whilst the issue of a bonus unit or the transfer from the employer contribution/unallocated trust capital account to the employee's bonus unit account is considered to be in respect of the employment of the employee, the payment that an employee may receive on the employee's future redemption of the bonus unit will not be considered to be in respect of the employee's employment.

105. Where the provision of a bonus unit to an employee or the transfer from the employer contribution/unallocated trust capital account to the employee's bonus unit account is a fringe benefit, payments received by the employee on redemption of the bonus unit will not normally be considered a reward for services provided to the employer by the employee and will not be assessable income of the employee as salary or wages or bonus income.

106. To the extent that the bonus unit confers valuable rights on its holder at the time of its issue and the redemption proceeds represented a mere realisation of those valuable rights, the cancellation of the bonus unit would be a CGT event.

Appendix 2 – Your comments

107. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

108. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	9 October 2009
Contact officer:	Maria Noia
Email address:	Maria.Noia@ato.gov.au
Telephone:	(03) 9275 4093
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Appendix 3 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Class of entities/arrangement	3
Ruling	8
Salary or wage income	8
PAYG withholding	14
Part IVA	16
Fringe benefits tax	18
Examples	25
<i>Example 1 – assessable income of the employee</i>	25
<i>Example 2 – Part IVA tax benefit</i>	34
<i>Example 3 – fringe benefits tax – provision of bonus units or provision of trust property</i>	44
<i>Example 4 – fringe benefits tax – provision of trust property</i>	52
Date of effect	61
Appendix 1 – Explanation	62
Section 6-5	62
Section 15-2	66
<i>Connection with employment</i>	68
Salary or wages or bonus income paid by third party	72
Remuneration rights not fringe benefits	76
Part IVA	80
Fringe benefits tax	87
<i>In respect of employment</i>	87
<i>Trustee an ‘arranger’</i>	88
<i>Not salary or wages</i>	89
<i>Property fringe benefit or residual fringe benefit</i>	94
<i>Taxable value</i>	99
<i>Capital gains tax consequences where a transfer from the employer contribution/unallocated trust capital account is the provision of a fringe benefit</i>	104
Appendix 2 – Your comments	107
Appendix 3 – Detailed contents list	109

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

IT 2639; TR 2001/10;
TR 2005/16; TR 2006/10;
TD 2009/D5; TD 2009/D6

Subject references:

- anti avoidance
- arrangement
- bonus Units
- employee bonuses
- fringe benefits tax
- in respect of employment
- Part IVA
- salary & wages income
- salary sacrifice
- unit trust

Legislative references:

- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-5(4)
- ITAA 1997 6-10(3)
- ITAA 1997 15-2
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- ITAA 1997 Div 130
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- ITAA 1997 130-20(1)(b)
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- TAA 1953 Sch 1 Div 12
- TAA 1953 Sch 1 12-10
- TAA 1953 Sch 1 12-35

- TAA 1953 Sch 1 12-40
- TAA 1953 Sch 1 12-45
- TAA 1953 Sch 1 12-115
- TAA 1953 Sch 1 12-120
- TAA 1953 Sch 1 Div 14
- TAA 1953 Sch 1 14-5
- TAA 1953 Sch 1 14-5(3)(a)
- ITAA 1936
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- ITAA 1936 26(e)
- ITAA 1936 Pt IVA
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- FBTAA 1986 43
- FBTAA 1986 45
- FBTAA 1986 50
- FBTAA 1986 136(1)

Case references:

- FC of T v. Dixon (1952) 86 CLR 540; 10 ATD 82
- J & G Knowles & Associates Pty Ltd v. FC of T (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22
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- Murdoch & Ors v. Commissioner of Pay-roll Tax (Vic) (1980) 143 CLR 629
- Mutual Acceptance Company v. FC of T (1944) 69 CLR 389
- Smith v. FC of T (1987) 164 CLR 513; 87 ATC 4883; (1987) 19 ATR 274
- Walstern v. FC of T (2003) 138 FCR 1; 2003 ATC 5076; (2003) 54 ATR 423

ATO references

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Fringe Benefits Tax ~~ Interpretation – including meaning of ‘fringe benefit’

Fringe Benefits Tax ~~ Property fringe benefits