


TD 2000/D5 - Income tax: can a foreign national who enters Australia on a working holiday maker visa qualify for living-away-from-home allowance fringe benefits?

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Draft Taxation Determination

Income tax: can a foreign national who enters Australia on a working holiday maker visa qualify for living-away-from-home allowance fringe benefits?

Preamble

Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office. DTDs should not be relied on; only final Taxation Determinations represent authoritative statements by the Australian Taxation Office.

1. No.
2. Allowances described as either living-away-from-home, subsistence, location or living allowances which are paid to a foreign national working in Australia on a working holiday maker (WHM) visa do not qualify as living-away-from-home allowance (LAFHA) benefits under section 30 of the *Fringe Benefit Tax Assessment Act 1986* (FBTAA). These allowances should be treated as income and are subject to PAYE taxation.
3. The prime purpose of a WHM visa is for a holiday and this is a requirement for the granting of the visa. Any work undertaken in the course of living in Australia whilst on a WHM visa is meant to be incidental to the holiday and solely to supplement funds of the visitor.
4. To qualify as a LAFHA fringe benefit an allowance must be in the nature of compensation to the employee for additional expenses incurred as a consequence of an employee being required to live away from his or her usual place of residence in order to perform the duties of that employment.
5. A foreign national who enters Australia on a WHM visa is unable, in view of the conditions of that visa, to demonstrate a causal connection between any additional expenses incurred whilst living in Australia and a requirement to live away from their usual residence overseas to undertake that employment. WHM visas are granted so that a person has an opportunity to holiday in Australia and supplement their funds through incidental work. Any additional expenses incurred by such a person as a consequence of living away from their usual place of residence overseas arise by reason of undertaking a holiday and not as a consequence of their incidental employment.
6. Foreign nationals working in Australia on temporary visas, which are not WHM visas, may still qualify for LAFHA benefits. Miscellaneous Taxation Ruling MT 2030 outlines the ATO's views on what is necessary for a person to qualify for LAFHA fringe benefits.

Example 1

7. Justine obtains her staff through a labour hire firm, Dark Sky. Beth enters Australia on a WHM and after two months of travelling around Australia she begins to seek casual employment. Beth makes contact with Dark Sky after hearing about the firm from her English girlfriend living in Australia, who obtained her current job through Dark Sky. Justine pays Dark Sky \$18 an hour for providing the services of Beth. Dark Sky pays Beth \$13 per hour made up of \$8 salary and \$5 LAFHA. The payment of a LAFHA to foreign nationals is normal practice for Dark Sky. Dark Sky is able to offer a higher after tax salary to foreign nationals and finds that the firm is consequently attracting many clients entering Australia on WHM visas.

8. Beth does not qualify for a LAFHA benefit as she has not been required to move from the UK to Australia in order to perform the duties of her employment. Rather Beth has chosen to come to Australia and undertake employment with a new employer, Dark Sky, as a way of supplementing her income whilst holidaying in Australia.

9. The LAFHA paid to Beth is income which Beth is required to return as assessable income.

Example 2

10. Jerry, a computer programmer, also obtained employment in Australia via Dark Sky. He organised his job through Dark Sky prior to coming to Australia. Jerry obtained a WHM visa and planned to change to another visa if he liked Australia. In accordance with the conditions of his WHM visa we consider that the main reason for Jerry coming to Australia is to engage in a holiday with him having also organised a prior job for the purpose of supplementing his income.

11. The payment of a 'living allowance' to Jerry does not qualify as a LAFHA fringe benefit. Jerry has an open mind on changing the status of his visa so as to extend his holiday. Jerry is not being paid an allowance in the nature of compensation for living away from his residence in order to perform the duties of that employment. Rather Jerry has chosen to have a holiday in Australia and take a job in the course of having a holiday.

12. The living allowance paid to Jerry should be included in Jerry's assessable income.

Your comments

13. We invite you to comment on this Draft Taxation Determination. We are allowing 4 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

Comments by Date:	3 May 2000
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Commissioner of Taxation5 April 2000

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

MT 2030

Subject references:

Assessable income; fringe benefits tax; Living away-from-home allowance

Legislative references:

FBTAA 30; FBTAA 31; FBTAA 136(1); Income Tax Assessment Act 1997 6-5(1)

Case references:

Atwood Oceanics Australia Pty Ltd v FC of T 89 ATC 4808; (1989) 20 ATR 742

Roads and Traffic Authority of NSW v FC of T 93 ATC 4508; (1993) 26 ATR 76

ATO references:

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