TD 2004/D4 - Income tax: Where the Commissioner makes or amends a fringe benefits tax assessment for a fringe benefits tax year, when does the taxpayer incur an outgoing for the purposes of section 8-1 of the Income Tax Assessment Act 1997 for the fringe benefits tax assessed?

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Draft Taxation Determination

Income tax: Where the Commissioner makes or amends a fringe benefits tax assessment for a fringe benefits tax year, when does the taxpayer incur an outgoing for the purposes of section 8-1 of the *Income Tax Assessment Act 1997* for the fringe benefits tax assessed?

Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the ***Taxation Administration Act 1953****. It is only final Taxation Determinations that represent authoritative statements by the Australian Taxation Office.*

1. A fringe benefits tax liability for a fringe benefits tax year, assessed under an assessment made by the Commissioner, is incurred for the purposes of section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) at the end of that fringe benefits tax year. This recognises that the conclusions drawn in paragraphs 5 and 20 to 28 of Taxation Ruling TR 95/24 about when fringe benefits tax is incurred for the purposes of subsection 51(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) apply regardless of how fringe benefits tax is assessed.

2. TR 95/24 concludes that the fringe benefits tax liability imposed under section 5 of the *Fringe Benefits Tax Act 1986* (FBTA) on the fringe benefits taxable amount of an employer of a year of tax arises at the end of that year of tax, and that an employer has a presently existing liability at that time for the amount of the fringe benefits tax payable, such that an outgoing for that amount has then been incurred for the purpose of subsection 51(1). These general conclusions in TR 95/24 were explained in the context of the 'self assessment' process that occurs under section 72 of the *Fringe Benefits Tax Assessment Act 198*6 (FBTAA) when an employer lodges a fringe benefits tax return (see paragraph 25 of the Ruling). We consider that the conclusions apply to a fringe benefits tax liability that is assessed by the Commissioner under either section 73 or section 74 of the FBTAA.

3. In *Layala Enterprises Pty Ltd (In Liq) v. FC of T* (1998) 86 FCR 348; 98 ATC 4858; (1998) 39 ATR 502, the Full Federal Court was required to determine the time at which an employer had incurred a loss or outgoing under subsection 51(1) for pay-roll tax assessed to the employer by the Commissioner of State Taxation under the *Pay-roll Tax*

Assessment Act 1971 (WA) ('PTAA'). Under the PTAA, the employer became liable to pay pay-roll tax when it paid or became liable to pay taxable wages in any month. However, the pay-roll tax only became due and owing when the pay-roll tax amount could be calculated at the end of each month.

4. Cooper J described the employer's liability in paying taxable wages as a contingent liability that matured into a debt which was owing when it was ascertainable at the end of each month. The debt then became due and recoverable seven days after the end of each month, which was when the tax was payable. His Honour found that a liability for the pay-roll tax was 'presently incurred' when it became due and owing (86 FCR 364; 98 ATC 4869; 39 ATR 516). The same principle applied whether the employer lodged a pay-roll tax return or the Commissioner issued a default assessment, as the PTAA and the *Pay-roll Tax Act 1971 (WA)* operated in such a way that liability for pay-roll tax did not depend on an assessment of that tax. The purpose of the return was not to create the employer's liability, but instead to enable the Commissioner 'to decide whether the pay-roll tax voluntarily paid is the proper or a sufficient amount' (86 FCR 359; 98 ATC 4865; 39 ATR 511). A default or amended assessment was issued to an employer when there was no tax remitted or less than was payable by law.

5. A default or amended fringe benefits tax assessment under section 73 or section 74 of the FBTAA is issued in similar circumstances. Where a return is not furnished, or a return is furnished that does not accurately account for the whole of the tax that should be remitted, the Commissioner makes an original assessment or amends an existing assessment. The assessment process does not create the liability. The liability is sourced, instead, from that which carries fiscal consequences under the FBTAA, i.e. the existence of a fringe benefits taxable amount at the end of the year of tax.

6. Paragraphs 29 to 42 of TR 95/24 deal with the view that the liability for fringe benefits tax is incurred as and when fringe benefits are provided by an employer to an employee. The conclusion in paragraph 41 was that, although the provision of a fringe benefit means that a liability to tax will arise in the future, that liability is no more than pending or expected at the time benefits are provided. This is similar to the view taken by Cooper J in the *Layala Enterprises* case, that a contingent liability to pay pay-roll tax arose when the employer paid taxable wages. Accordingly, we consider that the conclusion in paragraph 41 of TR 95/24 also applies to a fringe benefits tax liability that is assessed by the Commissioner under either section 73 or section 74 of the FBTAA.

Date of Effect

7. After TR 95/24 was issued, the ATO adopted the view that a fringe benefits tax liability assessed by the Commissioner under either section 73 or section 74 of the FBTAA did not become presently existing until the assessment issued, such that the taxpayer did not incur an outgoing for that liability under either subsection 51(1) or section 8-1 until that time. This view was based on a statement by Mason J in *Clyne & Anor v. DC of T* (1981) 150 CLR 1; 81 ATC 4429; (1981) 12 ATR 173 that 'the correct view in my opinion is that income tax is due when it is assessed and notice is served of that assessment' (150 CLR 16; 81 ATC 4437; 12 ATR 182). We now consider that it was incorrect to apply this view, about when income tax was 'due' for the purposes of subparagraph 218(1)(i) of the

ITAA 1936, in determining when a liability for fringe benefits tax assessed by the Commissioner was 'incurred' for the purposes of section 8-1.

8. The statement of Mason J should be understood in the context in which it was made. The issue before the Court in *Clyne* was whether the use of the word 'due' in subparagraph 218(1)(i) of the ITAA 1936 meant 'due and owing' or 'due and payable'. Ascertaining the meaning of the word 'due' in this context would determine when the Commissioner was able to require payment from debtors of a taxpayer in order to satisfy an amount 'due' by that taxpayer to the Commissioner. Mason J held that 'due' in that context meant 'due and owing', such that, once an assessment was served on a taxpayer, the Commissioner could require payment from the taxpayer's debtors before the income tax assessed became due and payable under section 204.

9. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination 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 Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Your comments

10. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date.

Due date: **7 April 2004**

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Commissioner of Taxation
3 March 2004

Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:
TR 92/20; TR 95/24

Subject references:
- fringe benefits tax
- allowable deductions
- amended fringe benefits tax assessments

- incurred

Legislative references:

- TAA 1953 Part IVAAA
- ITAA 1936 51(1)
- ITAA 1936 204
- ITAA 1936 218(1)(i)
- ITAA 1997 8-1
- FBTAA 1986 72
- FBTAA 1986 73
- FBTAA 1986 74
- FBTA 1986 5
- Pay-roll Tax Assessment Act 1971 (WA)
- Pay-roll Tax Act 1971 (WA)

Case references:

- Layala Enterprises Pty Ltd (In Liq) v. FC of T (1998) 86 FCR 348; 98 ATC 4858; (1998) 39 ATR 502
- Clyne & Anor v. DC of T (1981) 150 CLR 1; 81 ATC 4429; (1981) 12 ATR 182

ATO references
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