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Draft Taxation Determination

Fringe benefits tax: how is an employee's usual place of residence determined for the purposes of the living-away-from-home provisions of the *Fringe Benefits Tax Assessment Act 1986* ("FBTAA")?

1. Miscellaneous Taxation Ruling MT 2030 provides guidelines on the operation of the living-away-from-home provisions of the FBTAA. This Determination supplements that Ruling and provides further guidelines on "usual place of residence".
2. An employee's place of residence is not only the place where the employee dwells for a considerable amount of time but includes the place where the employee habitually sleeps even if only on a temporary basis. "Place of residence" is defined in subsection 136(1).
3. However, no one factor will determine whether a particular place of residence is an employee's **usual** place of residence. The following factors must be considered and appropriate weightings given when deciding where is an employee's usual place of residence:
 - a. an employee's usual place of residence is normally found near to the employee's fixed or permanent employment base;
 - b. the terms of the employee's employment contract or award may indicate whether the employee's move to a new place of residence is merely temporary or of a more lasting nature ie. a move to take up a promotion would indicate that the employee's usual place of residence would be where the employee carries on the new duties;
 - c. the longer the employee is required to work at a place, the more indicative it is that the move is not temporary in nature (*Case U110 87 ATC 663*, *Case U182 87 ATC 1049*, *FC of T v Applegate 79 ATC 4307*); and
 - d. while it is not necessary for an employee to own or have available a residence, the fact that the employee has:
 - i. immediate family,
 - ii. assets, or
 - iii. other social, business, or contractual tiesat or near a place of residence would strengthen a claim that the place is the employee's usual place of residence (*Case R99 84 ATC 650*, *Case U110 87 ATC 663*, *Case W13 89 ATC 196*).
4. Where, after considering the factors in paragraph 3, an employee's usual place of residence still cannot be determined, and the employee has been living at that place for a period of twelve months or more, that place will be taken to be the employee's usual place of residence. It is

emphasised that the determination made in this paragraph should only be used where a full consideration of the factors in paragraph 3 has not produced a substantive answer as to where is the employee's usual place of residence.

Examples

1. *A Japanese company has a training program which requires its newly appointed executives to become familiar with the global markets with which it deals. Attendance at this program is a standard requirement before promotion within the company. This program requires that the executive spend a period of 18 months at each of two overseas subsidiaries. At the end of the program, the executive will return to a position with the company in Japan. It would be considered that, unless there were any other significant factors to the contrary, expatriate employees of this company who were in Australia as part of this training program would be considered to be living away from their usual place of residence.*

2. *An American electrical engineer is a troubleshooter for his employer, a multinational electronics company. This employee's employment consists of sorting out major electronics problems encountered by the company's subsidiaries throughout the world. In the last 10 years this employee has lived in 5 countries other than America. His stay in each country was, on average, about 2 years. The employee has some investments in America but his wife and children travel with him. He returns to America for update training and occasionally for holidays but his stays are for no more than a month or two at a time. The employee is currently living in Australia. This employee is considered to be a "citizen of the world" and, as such, Australia would have been his usual place of residence from the day he arrived in Australia.*

3. *A British company advertises a position vacant (General Manager) in its Australian subsidiary. The successful applicant is a current senior executive of the British company. While the period of the appointment as General Manager is fixed (the executive can choose to return to the parent company at the end of the appointment), the employment contract allows for an extension of the appointment to be negotiated at a later time. It is considered that, from the time that the executive arrived in Australia to take up the appointment, Australia would be the executive's usual place of residence.*

4. *A major company in Melbourne has subsidiary businesses in every capital city. Its subsidiary business in Perth, however, has run into serious financial difficulty. The company sends one of its top executives from Melbourne to Perth on a temporary assignment to get the business back on its feet. The executive has six months to achieve this task or the business will be wound up. It is always intended that the executive return to the company in Melbourne at the end of the assignment. Notwithstanding that the executive may own no home or have no family ties in Melbourne it is considered that, unless there were any other significant factors to the contrary, Melbourne would remain that executive's usual place of residence.*

5. *Given the example stated in example 4, but on the basis that the executive was given as long as necessary to get the business back on its feet, there may be some difficulty in determining the executive's usual place of residence. Accordingly, this may be a case where paragraph 4 of this Determination should be applied. If it is necessary to apply that paragraph, the executive would be taken to have a usual place of residence in Perth only where he had resided there for a period in excess of 12 months.*

Commissioner of Taxation

4/11/93

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