TD 93/D39 - Fringe Benefits Tax: under Australia's double taxation agreements (DTAs), are overseas airline companies exempt from the payment of fringe benefits tax (FBT) on benefits provided to employees who exercise their employment in Australia?

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This document has been finalised by TD 93/67.

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

Draft Taxation Determination

Fringe Benefits Tax: under Australia's double taxation agreements (DTAs), are overseas airline companies exempt from the payment of fringe benefits tax (FBT) on benefits provided to employees who exercise their employment in Australia?

1. No. FBT does not come within the scope of Australia's DTAs. The airline profits articles of Australia's comprehensive and airline profits agreements therefore do not provide exemption for overseas airlines from the payment of FBT.

2. The Australian taxes to which DTAs apply are generally the income tax and any identical or substantially similar taxes imposed in addition to, or in the place of, the existing taxes covered by the agreement. FBT is **not** an income tax. FBT is assessed under the *Fringe Benefits Tax Assessment Act 1986* and not under the *Income Tax Assessment Act 1936*(ITAA). It is not a tax on assessable income but is a separate tax payable by employers on the value of certain fringe benefits provided to their employees. A benefit on which an employer has paid FBT is not subject to income tax.

3. The fringe benefits legislation is not a mere replacement for paragraph 26(e) of the ITAA. The different intent, role and purpose of FBT is such that it cannot be regarded as substantially similar to taxes levied under the ITAA.

4. Australia's DTAs do not override the FBT legislation. Subsection 4(2) of the *Income Tax (International Agreements) Act 1953*(the Agreements Act) states that the provisions of that Act have effect "notwithstanding anything inconsistent with those provisions contained within the Assessment Act or an Act imposing Australian tax". Australian tax is defined in subsection 3(1) of the Agreements Act as "income tax or income tax and social services contribution imposed as such by an Act". As FBT is not imposed under an Act relating to income tax, the provisions of the DTAs do not override the FBT legislation.

Commissioner of Taxation
18/2/93

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