MT 2021 - Fringe benefits tax : response to questions by major rural organisation

TAXATION RULING NO. MT 2021

FRINGE BENEFITS TAX : RESPONSE TO QUESTIONS BY MAJOR RURAL ORGANISATION

F.O.I. EMBARGO: May be released

REF H.O. REF: L85/10-3 DATE OF EFFECT: Immediate

B.O. REF: DATE ORIG. MEMO ISSUED: 25 Aug 1986

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1210072	FRINGE BENEFITS TAX	FRINGE BENEFITS TAX ASSESSMENT ACT

OTHER RULINGS ON TOPIC: MT 2016, MT 2019

PREAMBLE A large organisation representing participants in primary industry raised a substantial number of questions concerning the practical application of the fringe benefits tax.

2. As the issues raised, and the responses, will be of interest to employers generally and to taxation advisers, the questions have been summarised and the responses set out in the form of a Ruling. References in the Ruling to sections are, unless otherwise indicated, references to sections of the Fringe Benefits Tax Assessment Act 1986.

RULING 3. The various questions dealt with and the answers given are set out in the attachment.

COMMISSIONER OF TAXATION
25 August 1986

APPENDIX

ATTACHMENT

1. ADMINISTRATION OF THE FRINGE BENEFITS TAX ASSESSMENT ACT

QUESTION 1

Where the taxable value of a benefit is based on its market value, can an employer confirm his or her valuation of the benefit so as to avoid the risk of penalties?

ANSWER

The Commissioner will issue Taxation Rulings setting out guidelines for determining the taxable value of the major kinds of benefits (e.g., employer-provided housing and parking facilities) in respect of which valuation questions may arise. Should cases remain where the valuation of a particular kind of benefit is not covered by a Taxation Ruling and the employer is unsure of the correct basis of valuation, it is open to the

employer to seek the Commissioner's opinion on whether the basis of valuation proposed by the employer is in accordance with the law.

QUESTION 2

Does anything in the Act prevent employers from back-dating to 1 July 1986 any rearrangement of employment conditions that are made after procedures for valuation of housing benefits are clarified?

ANSWER

The FBT housing valuation rules apply to circumstances as they actually exist at given times after 30 June 1986; that application would not be affected by attempts to back-date arrangments.

QUESTIONS 3 and 4

A future employee is defined in section 136 to mean a person who will become a current employee. What does the word "will" mean?

"Former employee" is defined in section 136 to mean a person who has been a current employee. How far back does former employment go?

ANSWERS

These issues are dealt with in Taxation Ruling No. MT 2016, particularly paragraphs 8-11 inclusive.

QUESTION 5

What is the meaning of the words "entitled to receive" in the definition of employee?

ANSWER

The expression "entitled to receive" in the definition of "employee" simply ensures that the definition extends to any person who has a legal right to receive salary or wages but who may not, at the relevant time, have received them.

QUESTION 6

Does section 137 expand the meaning of employee to include any person who receives a benefit from another person?

ANSWER

No. As explained in paragraph 4 of Taxation Ruling No. MT 2019, section 137 is a safeguard to ensure that persons who would be employees within the meaning of the PAYE provisions of the income tax law but for the fact that they receive their total remuneration for services rendered by way of non-cash benefits rather than cash payments are treated as employees for FBT

purposes.

QUESTION 7

Is a loan made from a superannuation fund to a beneficiary in necessitous circumstances subject to FBT by reason that the person is only a member of the fund by virtue of being an employee of the company contributing to the fund?

ANSWER

No. By virtue of paragraph (k) of the definition of "fringe benefit" in section 136, payments from superannuation funds are not treated as fringe benefits for the purposes of the FBT legislation.

QUESTION 8

(a) What are pastoral duties in relation to the exemption provided by section 57 in respect of the employment of ministers of religion and certain other employees of religious institutions?

(b) Is the provision of a house to a minister of religion, which is frequently used to interview parishioners, regarded as being provided principally in respect of pastoral duties or provided principally in respect of other duties?

ANSWER

(a) 'Pastoral duties' is not a technical legal term. Its meaning in the FBT legislation is as ordinarily understood.

(b) The provision of a house to a minister of religion whose duties are principally pastoral duties is an exempt fringe benefit regardless of the extent to which those duties include interviews with parishioners.

QUESTION 9

Does section 57 discriminate against single ministers by the requirement that, to be exempt, a benefit must be provided to the employee and a spouse or child?

ANSWER

Section 57 does not apply in the way suggested by the question. The exemption extends to benefits provided to a minister or to a spouse or a child of the minister.

QUESTION 10

Under what circumstances are benefits provided to a director of a private company who does not receive salary or wages subject to

FBT?

ANSWER

Taxation Ruling No. MT 2019 contains guidelines and illustrative examples to enable private companies to determine whether such benefits are taxable fringe benefits.

QUESTION 11

Will Australian Double Tax Treaties be changed to enable foreign companies carrying on business in Australia, or the overseas parents of Australian subsidiary employers, to claim fringe benefits tax as a creditable Australian income tax?

ANSWER

There are a number of international implications that arise from the different means by which various countries tax fringe benefits, including the question of relief from double taxation. This is a matter that the OECD currently has under study. The question of whether or not, or the circumstances in which, other countries might treat the Australian fringe benefits tax as a creditable Australian tax is one for those countries to decide. For its part, Australia has this issue under consideration in the context of its approach to the renegotiation of tax treaties that might be sought once all of the Government's tax reform measures are in place.

It must be noted, however, that the treatment by another country of the Australian fringe benefits tax as a creditable foreign tax will only benefit a taxpayer who, after allowance of credit for Australian income tax, has an excess of home country tax that is sufficient to also absorb the credit for the fringe benefits tax. In many cases, this will not be the situation, and affected taxpayers will obtain greater relief from being able to deduct the fringe benefits tax for purposes of computing the amount of Australian income subject to home country tax.

Another consideration is that the proposal would provide no relief in instances where, whether by treaty or otherwise, countries concerned free their residents from double taxation on income from activities in another country by exempting that income from home country tax.

QUESTION 12

Will employers be informed of legal and procedural changes relevant to new appeal arrangements whereby the Boards of Review have been replaced by Tribunals established under the Administrative Appeals Tribunal Act?

ANSWER

Those employers who completed the Employer Request for Information Form and indicated that they will be liable for fringe benefits tax will be advised by mail of the changes in

appeal procedure. This information will also be available from Taxation Offices.

QUESTION 13

Will the Commissioner impose additional tax for late payment in circumstances where employers have not obtained sufficient knowledge to prepare FBT returns on a timely basis?

ANSWER

In considering this issue, it is to be noted that, from the time the legislation came into force on 1 July 1986, employers will have had some four months in which to prepare for the lodgment and payment of the first FBT instalment that is due on 28 October 1986. As well, some six weeks before 1 July, the Fringe Benefits Tax guide for employers was mailed to employers. The case has not been made out to justify a general offer of lodgment or payment concessions to FBT payers. Nevertheless, requests for extensions of time to pay will be considered on an individual basis and legal action would generally be deferred for one month on request subject to the accrual of penalty tax at 20% per annum.

QUESTION 14

Does section 123 of the Act, which deals with retention requirements for statutory evidentiary documents, mean that original documents must be retained by employers, or is microfilm reproduction acceptable?

ANSWER

The guidelines that have been set in Taxation Ruling No. IT 2349 concerning record-keeping requirements for income tax purposes, may also be applied to statutory evidentiary documents. Briefly, documents may be converted to microfilm or computer output microfiche provided the film/fiche will be a true and clear reproduction of the original document, and adequate facilities are provided for the preservation of the film/fiche for the statutory retention period.

QUESTION 15

What is the position where an employer is required to obtain a statutory evidentiary document from an employee, but the employee needs to keep it for his or her own taxation records?

ANSWER

Wherever the FBT law requires an employer to obtain a statutory evidentiary document from an employee, other than a declaration made by the employee, it is sufficient if, instead of the original receipt, car log book, travel diary etc., the employee gives the employer a copy of the document. Thus, if there is a need for the employee to retain a document, the original may be copied and the copy given to the employer.

QUESTION 16

Section 133 provides for release of employers in cases of (serious) hardship. Are there guidelines by which employers can assess their eligibility for consideration under the hardship provisions?

ANSWER

The question of serious hardship is one that needs to be considered having regard to the particular circumstances of each case. Given that individual circumstances can differ markedly from case to case, it is not possible to provide general guidelines which would enable an employer in advance to assess eligibility for relief under the hardship provisions.

QUESTION 17

What test can be used to determine whether a benefit provided to an associate of an employee is provided in respect of employment?

ANSWER

The test is essentially whether the employer provided the benefit to the associate because of the employment relationship between the employer and the employee. This test would not be satisfied if it can be established that the benefit was provided to the associate solely by reason of an independent relationship (e.g., a family relationship) that he or she had with the employer.

QUESTION 18

What is there to prevent the anti-avoidance provisions of the FBT law (section 67) applying to the withdrawal of a fringe benefit and compensation of the employee with additional cash income, or any other rearrangement of benefits, for the purpose of reducing the fringe benefits tax?

ANSWER

The implication behind the question that section 67 would strike down "cashing out" arrangements is incorrect. As mentioned in the explanatory memorandum to the FBT law, section 67 may only apply where there is an arrangement under which a benefit is provided to a person and the fringe benefits taxable amount in respect of that benefit is either nil or less than it would have been but for the arrangement. Those conditions would not apply either where additional cash wages were paid or one benefit was withdrawn and replaced by another.

QUESTION 19

Is an increase in knowledge or improved skills which an employee acquires either from direct on-the-job instruction or by a passive learning process subject to FBT?

ANSWER

No.

QUESTION 20

What is the fringe benefits tax position where a share farmer is provided with a house or other benefits as part of a share farming agreement?

ANSWER

As a general rule, sharefarmers are treated as carrying on the business of primary production in their own right, and not as employees of the landholder, so that housing or other benefits provided by the landholder would not be subject to FBT.

In some cases, however, a person may agree to provide labour only, under the control and direction of the landholder in the conduct of the landholder's business. In those circumstances, although the person may be described as a sharefarmer, he or she would in all practical respects be an employee. Benefits provided to such a person would be subject to FBT consistent with the treatment of such persons as employees for PAYE purposes under the income tax law.

2. HOUSING FRINGE BENEFITS

QUESTION 1

How does an employer establish whether or not a unit of accommodation is an employee's usual place of residence?

ANSWER

The employer can obtain the relevant information from the employee and, if appropriate, request the employee to make a declaration.

QUESTIONS 2, 3 and 6

In effect each of these questions address the same issue: Is any guidance available as to when a place of residence of an employee will be regarded as the employee's "usual" place of residence?
ANSWER

The meaning of "usual" place of residence will be addressed in a Taxation Ruling on living-away-from-home allowances that will issue shortly.

QUESTION 4

If residential accommodation is provided by an employer to a permanently itinerant employee who has no other place of residence, will the benefit be subject to FBT?

ANSWER

Yes.

QUESTION 5

Where an employee has a residence other than that provided by the employer but it is not a usual place of residence by reason that the employee is permanently engaged in itinerant work, is the accommodation provided exempt under sub-section 47(5)?

ANSWER

The residence owned by the employee would be the employee's usual place of residence if he or she normally returns to that residence at the conclusion of casual jobs or seasons. If, however, the residence owned by the employee is not his or her usual place of residence, e.g., if permanently let to tenants, the exemption would not apply.

QUESTION 7

How can the market value of accommodation provided to itinerant rural workers be ascertained?

ANSWER

A Taxation Ruling setting out guidelines for determining the market rental value of accommodation including farm accommodation will issue shortly. In the meantime, the leaflet "The Fringe Benefits Tax and Farmers" provides some guidance.

QUESTION 8

How can an employer establish whether or not the provision of a benefit to a person who is an employee was related to that person's employment?

ANSWER

In most cases, it will be quite clear whether a benefit was provided to a person because of an employment relationship or because of some other relationship (e.g., a family relationship) between the person and the employer. Taxation Rulings Nos MT 2016 and MT 2019 set out guidelines for determining whether or not benefits provided to family members or shareholder/employees of private family companies are in respect of employment. Further Rulings will issue if cases of practical difficulties arise in other areas.

QUESTION 9

If a child leaves the family farm and works in other jobs and then returns to work on the farm is the accommodation then provided in respect of employment?

ANSWER

As stated in Taxation Ruling No. MT 2016, where accommodation and

meals are provided in the family home to children of a primary producer who work on the farm, it would be concluded that the benefits were given as a normal incidence of family relationships and were not to any extent provided in respect of the children's employment. The fact that a child may have left the farm for a period would not affect this conclusion.

QUESTION 10

If a child is not a shareholder or officer of the private company that owns a family farm, but the child lives in a separate dwelling on the farm and works on the farm, is the company then liable for FBT?

ANSWER

The provision of separate accommodation is a normal element of the remuneration that would be expected to be provided to an arm's length employee. If the company claims income tax deductions relating to the accommodation on the basis that the accommodation was provided as remuneration for employment, the benefit will be subject to FBT. On the other hand, if it is clear that the child would be provided with the accommodation irrespective of his or her employment on the farm because of the family relationship and income tax deductions are not claimed in respect of the accommodation, the benefit will not be subject to FBT.

QUESTION 11

How can advice from valuers and agents be regarded as an accurate guide to market rental value for farm cottages when in many areas there is no rental market for farm cottages, because there is no demand from outsiders for rental of the cottage?

ANSWER

In determining the market rental value of a farm cottage, valuers would take into account all factors that could be expected to bear on its rental value. These factors would include the rental paid for a house of similar size and standard in the nearest township, the distance of the farm property from the town and the availability of services. By taking these factors into account, valuers are able to offer expert opinions on the amount of rent that a farm cottage could be expected to be let for, notwithstanding that accommodation comparable in all respects to the cottage being valued is not actually rented.

QUESTION 12

Does the "recipients rent" include the value of maintenance work done by an employee outside of working hours in return for a reduction of rent?

ANSWER

No. The recipients rent does not include consideration such as

services rendered that is not "paid" to the employer.

QUESTION 13

If an employer who makes an election under sub-section 29(2) ceases to be an employer and in subsequent years again becomes an employer, can a new election be made?

ANSWER

No. In this unlikely situation, the original election automatically applies in all subsequent years.

QUESTION 14

Does any section of the Act permit an employer to change an election made under sub-section 29(2)?

ANSWER

No.

QUESTION 15

From the Act it is not clear how widely an election under section 29 will apply. What extent of common ownership will deem entities to be the same employer? What changes in ownership will constitute the entity to be a different employer such that a prior election no longer applies?

ANSWER

Each employer who is liable to pay FBT on remote area housing fringe benefits can make an election under section 29. Broadly, the employer of an employee is the legal entity that pays the salary or wages of the employee. There are no provisions which deem companies under common ownership to be the same employer. Nor are there any provisions which deem a company whose ownership has changed to thereby be a different employer.

QUESTION 16

How can the "market value" of accommodation provided to rural employees be determined if onerous conditions applied to the occupation of the accommodation are disregarded?

ANSWER

The law requires a determination of what the rental value of the accommodation would be if prospective tenants were entitled to occupy the unit of accommodation on terms which did not include any onerous conditions related to the employee's employment. That is, the law makes it clear that the normal market rental value of the accommodation is not to be reduced by reason of onerous employment-related conditions attached to the employee's occupancy such as a condition requiring the employee to be "on-call".

QUESTION 17

Where accommodation is provided only while the employee is employed by the employer and there is no security of employment or occupancy, should this inherent restriction be taken into account in determining market value?

ANSWER

No. This restriction is an onerous condition related to the employee's employment and sub-section 27(2) requires that such conditions be disregarded in determining the market rental value of the accommodation.

QUESTION 18

Accommodation provided to employees is commonly not covered by Tenancy or Landlord and Tenant Acts which offer legal protection to tenants. How can this factor be evaluated when establishing the value of the housing right when there is no market that is outside these Acts?

ANSWER

The fact that the employee's occupancy is not governed by landlord and tenants legislation is not considered to be a factor that is relevant in determining the market rental value of the housing right. Market rental value refers to the rent that an arm's length tenant could be expected to pay for the right to occupy the unit of accommodation.

QUESTION 19

Does any provision of the Act allow for a new base year to be established in circumstances where the value of housing in a particular area is falling, such as where a mine has closed down, but there is still housing provided to persons who are maintaining the mine on a care and maintenance basis, or in rural centres that are depopulating?

ANSWER

No. Nor is a new base year required to be established in reverse situations to those described.

QUESTION 20

Does anything in the Act prevent the establishment of a zero value for a housing right?

ANSWER

No, but it would rarely be the case that a zero value would apply.

QUESTION 21

How will FBT apply to accommodation provided to an expatriate professional employee who is assigned to work in Australia for 3 years and who maintains a dwelling in his or her ordinary country of residence?

ANSWER

As the expatriate is living away from his or her usual place of residence, the provision of accommodation would be exempt from FBT by virtue of sub-section 47(5) provided the employee gives the employer the appropriate declaration.

QUESTION 22

How will FBT apply where a visiting professional is paid by his or her overseas employer but is under the effective control of a local host who provides non-cash fringe benefits to the visitor?

ANSWER

As the visitor continues to receive his or her salary from the overseas employer, that employer will be liable for FBT on taxable fringe benefits provided to the visitor by the local host.

QUESTION 23

Where a company claims deductions for mortgage interest that relates to both farming land and the homestead, will the claiming of those deductions mean that the occupancy of the homestead is a fringe benefit in respect of employment?

ANSWER

By claiming deductions in respect of that part of the interest that relates to the homestead, the company is, in effect, treating the homestead as a business asset that is being occupied by the farmer in respect of his or her employment by the company.

3. CAR FRINGE BENEFITS

QUESTION 1

Why is there unequal tax treatment of employee owned and employer owned vehicles: part business, part private trips in an employer's vehicle are treated as business trips for FBT, but reimbursements to employees to operate their own cars are proportionally taxed?

ANSWER

The question confuses the relative positions of employers and employees. Where an employee is reimbursed by an employer on a cents per kilometre basis for operating his or her own car, the appropriate result is that the employer obtains a deduction for the reimbursement, while the employee is required to include the reimbursement in assessable income but may claim deductions for car expenses on the basis of substantiated business kilometres.

The same basic principle applies where the employer's car is used by the employee: the employer is entitled to income tax deductions for expenses of operating the car, but FBT is calculated by reference to the extent that the car is available for the employee's private use or is actually used privately by the employee.

QUESTION 2

Under section 8, there is no FBT in respect of certain commercial vehicles provided their private use by employees is limited to work-related travel. Is a log book required to establish that fact?

ANSWER

There is no legislative requirement to keep a log book in those circumstances.

QUESTION 3

What happens if such a commercial vehicle is actually used privately by an employee?

ANSWER

Fringe benefits tax would apply in respect of that private use and any other private use by the employee, including private use such as travel to and from work that otherwise would have been treated as work-related private use not subject to FBT.

QUESTIONS 4 & 5

What is the position for FBT where a farmer's car is garaged in a machinery shed on the farm and an employee of the farmer has a residence on the farm?

Does the distance that the car is parked from the employee's house make any difference?

ANSWER

The FBT law specifies that an employer's car that is garaged or kept at or near an employee's residence is taken as being available for the employee's private use. Where the employer and employee live in very close proximity, or in the same residence, the question is whether the car is garaged there for the use of the employee or to be at the employer's disposal. If the car was usually driven by the employee rather than the employer, and the employee was free to use it after working hours, it would be treated as available for the employee's private use. If, as may be more likely on the facts as stated, the car was one used by the employer it would not be treated as available to the employee.

QUESTION 6

If a farmer's vehicle is driven off a farm under the control of

an employee who is entitled to but does not use the vehicle for private use is FBT payable?

ANSWER

Under the FBT law, a car is taken to be available for private use when it is not on the employer's business premises and is being driven by an employee who is entitled to use it privately. Where these circumstances apply but the employee does not actually use the car privately, the operating cost method based on log book records would be used to ensure that business journeys by the employee did not attract tax.

QUESTION 7

How is an entitlement to privately use a car where it is not on the employer's business premises measured if the operating cost method based on log book records is chosen?

ANSWER

Availability for private use is not itself a measurable factor, except insofar as the statutory formula method values a benefit by reference to the number of days in a year of tax when a car is available for an employee's private use. If the log book method is chosen, the taxable value is calculated by reference to the proportion of recorded business kilometres to total kilometres.

QUESTION 8

Would 2-way radios, car telephones, air conditioners and radio cassette players with a facility for dictating be classified as accessories required to meet the special needs of the business operations the car is used for, so as to be excluded from the base value of the car?

ANSWER

An accessory would qualify for exclusion under this test if it was installed primarily because it was to be used in connection with the particular business operations of the employer. On that basis, 2-way radios and car telephones used in a business could be expected to qualify, but air conditioners and radio cassette players - with or without dictating facilities - would not.

QUESTION 9

Are bull-bars, tow-bars and windscreen protecting screens on rural vehicles regarded as business accessories or non-business accessories?

ANSWER

Items of those kinds fitted to cars used in rural industries would usually qualify as business accessories on the basis explained in the answer to question 8.

QUESTION 10

Are car parking expenses an expense payment fringe benefit or a motor vehicle fringe benefit if the employer owns the vehicle?

ANSWER

Car parking expenses in relation to private use of a vehicle will be a residual fringe benefit if the expenditure is incurred by the employer, or an expense payment fringe benefit if the expenditure is incurred by the employee but borne by the employer. An example of the latter would be where the employee incurs and pays the car parking fee but is reimbursed by the employer.

QUESTION 11

What is the position in relation to car parking expenses if the employee regularly makes his own vehicle available for business use as a requirement of his duties?

ANSWER

The taxable value of the fringe benefit would be reduced to the extent to which any expenditure incurred in acquiring the benefit would have been deductible to the employee under the income tax law i.e., if the employee had paid the parking expenses. The extent to which such expenses would have been deductible to the employee depends on whether business use is made of the car on days when car parking benefits are provided. If the car is used during the course of the day by the employee in his or her employment (and not just for travel to and from work), parking fees for that day would be treated as deductible. If the car is required to be used on business every day (e.g., by a salesman or representative) the taxable value of the fringe benefit of parking expenses would be nil.

QUESTION 12

What kind of fringe benefits are car parking facilities provided on employers' premises without charge and how should they be valued?

ANSWER

Car parking facilities are dealt with as residual fringe benefits. If the employer has leased the car parking space for a particular amount that would indicate the value. If not, the taxable value would be the amount the employee could reasonably be expected to pay to obtain the parking facility under an arm's length transaction. The benchmark in this case would usually be the rate charged for comparable car parking in commercial car parks. If no comparable commercial parking is provided nearby, the amount the employee might be expected to pay needs to be assessed according to the circumstances. If alternative free parking was readily available off the employer's premises, it is unlikely that there would be a taxable value. A detailed Ruling

on car parking fringe benefits will be issed in the near future.

QUESTION 13

Can the statutory formula be used to establish the value of availability for business use of an employee's car made available to an employer?

ANSWER

No.

QUESTION 14

What is the position where, at a particular time, more than one person holds a car? Is the fringe benefits tax law inoperative because the car is not held by a particular person?

ANSWER

It is possible for more than one person to "hold" a car at a given time. For example, a car may be owned by one company and leased to another company. A car benefit arises where the holder, or any one of the holders if there is more than one, is an employer (or associate) and an employee (or associate) uses the car for a private purpose or is entitled to do so.

QUESTION 15

If a delivery vehicle is garaged at a place of business which also acts as an employee's home (premises above employer's grocer's shop), does this constitute availability for private use?

ANSWER

Yes, but see the answer to questions 4 and 5. If the car is a commercial vehicle (utility, panel van or other load carrying vehicle) there will be no fringe benefits tax liability if private use by the employee is limited to work-related travel.

QUESTION 16

Will there be a list of vehicles that fall within the meaning of "car" in a similar fashion to the list which was issued for investment allowance purposes?

ANSWER

The investment allowance list referred to was of vehicles that qualified for the allowance under the minimum 1 tonne or 9 passenger carrying tests. Those tests are identical under fringe benefits tax, but have the effect of attracting tax rather than reducing it. A vehicle that would have qualified for investment allowance will not be a "car" as defined for fringe benefits tax purposes. It may not be practicable to issue a list of "eligible" fringe benefits tax cars, all the more so because employers' vehicles that are not "cars" may nevertheless give

rise to a taxable fringe benefit (under the residual benefits rules) if they are used privately by employees. The load carrying capacity of a vehicle is the gross vehicle weight less the basic kerb weight (as for the investment allowance). These specifications are available from motor retailers or manufacturers.

QUESTION 17

Will a four-wheeled motor cycle, which is often utilised on farms, be treated as a car? If not, how should employers value any benefit arising from the availability or use of such a vehicle for private purposes?

ANSWER

A 4-wheeled motor cycle is a 'motor cycle or similar vehicle', to which the car fringe benefits valuation rules do not apply.

Should such a motor cycle be provided for the private use of an employee there would, nonetheless, be a residual fringe benefit. The taxable value would be the amount the employee could reasonably be expected to pay to obtain the use of the cycle under an arm's length transaction. That would ordinarily be the cost of hiring or leasing a similar vehicle for the period of use, reduced to the extent (if any) to which such cost would have been deductible to the employee under the income tax law if paid for by the employee.

QUESTION 18

What are the fringe benefits tax effects in relation to an employer's car that is garaged at an employee's home while the employee is overseas on the employer's business? Would there be a different result if the car was left at the employer's premises?

ANSWER

As mentioned in the reply to question 4 in this section, an employer's car that is garaged or kept at or near an employee's residence is taken as being available for the employee's private use. That would include any period when the employee was away from home. (In such a period the car would not be being used for business purposes and could be available for use by the employee's associates.) If, however, the car was left at the employer's premises, it would not be treated as being available for the employee's private use.

QUESTION 19

In the situation outlined in question 18, would the car be treated as available for the private use of the employee's secretary if the keys were left with her, or should the keys be locked in the company's safe?

ANSWER

The holding of keys for security by another employee would not affect liability to fringe benefits tax.

QUESTION 20

What constitutes a prohibition against private use of a car and what is required for it to be consistently enforced?

ANSWER

There would need to be a situation where an express prohibition had been made by the employer in clear and unequivocal terms. Employees would also need to be made aware that the prohibition was genuine and would be reinforced, if necessary, by disciplinary measures for its breach. Consistent enforcement could comprise regular checks of odometer readings against business kilometres claimed to have been travelled by employees. In short, it would not be sufficient for an employer to issue the instruction either on the general understanding that it would be honoured in the breach, or without establishing a system of review to detect and deter breaches.

QUESTION 21

How should the "leased car value" be determined where the lessor purchased the car well before the date when the employer began leasing it?

ANSWER

The "leased car value" is the amount the employer would reasonably have expected to buy the car for under an arm's length transaction at the time the lease was entered, i.e., its value on the open market.

QUESTION 22

What is the cost price of a car where the employer acquires the car at a price which reflects a trade-in by some other person?

ANSWER

The "cost price" is the amount of expenditure incurred by the employer in acquiring the car. If another person (e.g., the employee who is to have the private use of the car) supplies a trade-in vehicle, the cost price to the employer would be the purchase price minus the trade-in allowed.

QUESTION 23

In relation to the operating cost method of valuing car benefits, if relevant information regarding a journey is not properly recorded in a log book the journey is deemed to be a non-business journey. Does the law make provision for not applying fringe benefits tax where inadequate log book entries are not the fault of the employer?

ANSWER

No. It is the employer's responsibility, if claiming under this method, to see that the requirements are met.

QUESTION 24

If separate taxable entities are created within a business, can a car be sold by one entity to another to permit the valuation method to be changed?

ANSWER

There is nothing in the fringe benefits tax law to prevent the transfer of ownership of vehicles between associated entities, but once an employer has adopted the statutory formula basis it will continue to apply as long as the employer or an associate of the employer owns the car.

If an election to adopt the operating cost method has been made, however, an associate who subsequently becomes the owner of the car would be entitled to adopt the statutory formula basis. The base value of the car would not change in that case.

QUESTION 25

Will an employer be penalised if full car log book entries are not made, e.g., because the employee is unable or unwilling to make them?

ANSWER

There is no penalty as such for not properly filling out a log book but, to the extent that journeys by employees are not recorded in log books, they must be treated as private journeys. That could result in a greater fringe benefits tax liability then would otherwise be the case where the operating cost method is used. (See also the following answer indicating that only one log entry is required if all the day's travel is for business purposes.)

QUESTION 26

Will car log book entries which are delayed for some weeks after the end of the journey, be accepted as satisfying the statutory requirement that each entry must be made as soon as reasonably practical after the end of the journey?

ANSWER

No. It should rarely be the case that it is not practical to make a log book entry on the same day as the trip. Note that if the car is used only for business purposes during a day, only one log book entry need be made for that day's journeys.

QUESTION 27

The Act is silent on the evidence which is required in order to establish the opening and closing kilometres on the odometer for the purposes of the statutory formula.

What evidence will be required in order to establish this factor?

ANSWER

The statutory formula requires a determination of the total kilometres travelled by a car during the tax year. An employer can establish this figure by having the opening and closing odometer readings taken, recorded and the record signed by the person making the entries when the readings are made. If an employer overlooked the need to make an odometer reading as at 1 July 1986 it will be permissible to make a reasonable estimate of what the reading was and record the actual reading at the end of the transitional year of tax. The estimate for the missed 1 July 1986 figure could, for example, be based on service history records.

QUESTION 28

The Act specifies the recording of odometer readings to substantiate the number of business and private kilometres travelled in a car. How should an employer seek to substantiate distance if an odometer is not functioning?

ANSWER

Pending the repair of the odometer, reasonable estimates of distances travelled will be accepted where these are properly recorded in the log book. It would be expected that the necessary repair would be effected promptly.

QUESTION 29

A hire-car does not fall within the definition of a taxi. Where a hire car is taken home by an employee of a hire car company can an employer substantiate use of hire cars so as to satisfactorily avoid the risk of FBT liability in respect of the availability of the car for private use?

ANSWER

The employer can elect to value the car fringe benefit using the operating cost method in which case business use of the car must be substantiated by log books.

QUESTION 30

Where a director of a private investment company is provided with a motor vehicle will FBT be payable if the company does not claim an income tax deduction in respect of the expenses of running the vehicle? Will there be a choice as to whether income tax deductions are not claimed or FBT paid?

ANSWER

This question is dealt with in Taxation Ruling No. MT 2019. As explained in that Ruling, FBT is payable where the car is provided in respect of the employment of the director. If the car is being provided in an employment context, i.e., its provision is effectively part of the director's remuneration, the application of the law necessarily follows.

QUESTION 31

Section 10(1) provides for an election by an employer in respect of the taxable value of car fringe benefits. There appears to be no indication of how or when such an election may be made. Can an employer make such an election at any time?

ANSWER

These matters are dealt with in sub-sections 10(4), (5) and (6). The election must be made in writing and lodged with the Commissioner by the time of lodgment of the employer's FBT return for the first tax year in which taxable car fringe benefits arise in respect of the car.

4. DEBT WAIVER FRINGE BENEFITS

QUESTION 1

The Act appears to make no distinction between the writing off of a bad debt and a debt waiver. Does the writing off of a bad debt constitute a release from payment and thus a debt waiver benefit?

ANSWER

The writing off of a bad debt by an employer does not of itself constitute waiver. However, if the debt is written off in circumstances where the employer absolves the employee from his or her obligation to pay the debt, the amount that the employee is no longer obliged to pay will be a debt waiver benefit. The waiver will not, however, be a fringe benefit if the debt is bad (e.g., it cannot be recovered because the employee has no assets) and is waived for reasons unrelated to the employment relationship.

QUESTION 2

If a distinction does exist between a bad debt and a waiver, what evidence will be required to demonstrate beyond doubt that a debt is bad, and that FBT is not payable?

ANSWER

The fact that a debt is waived because it is bad rather than by reason of the employment relationship could be established, for example, by showing that reasonable efforts were made to recover the debt and that the waiver was in line with the policy of the company in relation to the waiver of debts owing by non-employees.

QUESTION 3

Does a loan fringe benefit arise during the period of time in which efforts are made to recover an outstanding debt before it is declared "bad" and written off? Does a loan cease to be a loan when it becomes a doubtful debt?

ANSWER

If the loan was granted to the employee in respect of his or her employment, a loan fringe benefit will subsist while the employee remains under an obligation to repay the loan.

QUESTION 4

Circumstances may arise in which a settlement of debt is negotiated to avoid legal costs with the result that less than the total outstanding debt is repaid. Does anything in the Act exclude the unpaid portion from being deemed a waiver of debt that is subject to FBT?

ANSWER

If it can be established that the reasons for releasing part of the debt are entirely unrelated to the employee's employment, a debt waiver fringe benefit will not arise.

5. LOAN FRINGE BENEFITS

QUESTION 1

In certain circumstances an employee may make a low interest loan to an employer in respect of employment. Does anything in the Act prevent this arrangement from being deemed to be consideration paid by the employee which reduces the net value of fringe benefits provided by the employer?

ANSWER

There is no provision in the Act which allows the provision of a low interest loan by an employee to an employer to reduce the taxable value of fringe benefits provided by the employer to the employee.

QUESTION 2

Where a principal of a private company takes a low interest loan from the company to be used separately to produce assessable income for the individual, does FBT apply to the company?

ANSWER

Taxation Ruling No. MT 2019 contains guidelines as to whether a loan made to a shareholder/employee of a private company is in respect of his or her employment and thus a fringe benefit.

If a low interest loan is made to a shareholder/employee in

respect of his or her employment, the taxable value of the loan fringe benefit can generally be reduced to the extent to which interest payable on the loan is, or would be, allowable as an income tax deduction to the employee.

For example, if such a loan were used to produce assessable income for the individual by way of financing the purchase of interest-bearing investments, the loan would not produce a taxable value because interest paid on the loan would be wholly deductible for income tax purposes.

QUESTION 3

Is the benchmark interest rate which is to be adopted the lowest benchmark interest rate in a particular period, or is it the lowest benchmark immediately prior to the preceding year of tax, on the basis that there may be different benchmark interest rates for different principal borrowings in respect of housing loans made by the Commonwealth Savings Bank?

ANSWER

For loans, other than fixed interest loans made before 1 July 1986, the benchmark interest rate is the lowest rate charged by the Commonwealth Savings Bank for housing loans immediately prior to the commencement of the year of tax, subject to a ceiling of 13.5% per annum in the case of a housing loan made before 3 April 1986.

QUESTION 4

Where there is uncertainty as to whether a loan from a private company to a shareholder will be treated as a deemed dividend for income tax purposes and thus not subject to FBT, can the company seek a deferral of FBT until after the assessment of the shareholder's income tax without incurring a penalty?

ANSWER

This question is not one to be answered without reference to particular facts but as a general rule it is most unlikely that deferral of FBT would be allowed without attracting additional tax for late payment.

6. EXPENSE PAYMENT FRINGE BENEFITS

QUESTIONS 1 and 2

Where an employer contributes a proportion of a telephone account, how can the business proportion of the expense be verified when the cost of individual calls cannot be verified by a subscriber without incurring substantial additional cost and inconvenience by making trunk calls? Is the employer required to verify business calls?

ANSWER

To establish the business proportion of the expense, the employee is required to give the employer a declaration in a form approved by the Commissioner specifying what percentage of the expense would be deductible for income tax purposes. The percentage specified by the employee can be based on a reasonable estimate of the business component of the account. If the employee's estimate appears excessive to the employer having regard to the nature of the employee's duties, the employer should seek an explanation from the employee.

7. LIVING-AWAY-FROM-HOME ALLOWANCE FRINGE BENEFITS

QUESTION 1

Section 51A of the Income Tax Assessment Act treats allowances as living-away-from-home allowances only to the extent that they reflect the additional cost of living away from home. Any allowance for "additional disadvantages" appears to be within the meaning of salary and wages and therefore not assessable as a fringe benefit. Is this in conflict with section 31 which deems such amounts to be taxable as a fringe benefit?

ANSWER

There is no conflict between the Income Tax Assessment Act and the Fringe Benefits Tax Assessment Act.

Section 51A of the Income Tax Assessment Act has been repealed. A living-away-from-home allowance (LAFHA) within the meaning of section 30 of the Fringe Benefits Tax Assessment Act is exempt from income tax in the hands of the employee and is not within the meaning of salary and wages as now defined in the PAYE provisions of the income tax law.

An allowance paid to an employee living away from home for the dual purpose of compensating for additional costs and other disadvantages will be treated as a LAFHA under section 30 but an allowance paid for the sole purpose of compensating for other disadvantages will not be treated as a LAFHA and will therefore be assessable to the employee.

QUESTION 2

The Act offers no means of defining how a cash payment in the nature of salary or wages is to be identified separately from a cash payment in the nature of a living-away-from-home allowance. How is an employer, and an employee for his tax purposes, to determine this difference?

ANSWER

Section 30 specifies the circumstances in which an allowance paid by an employer to an employee will be treated as a living-away-from-home allowance. These are where the allowance paid is in the nature of compensation for additional expenses incurred, or additional expenses incurred and other disadvantages suffered, because the employee is required to live away from home

to perform his or her duties of employment. Additional expenses here do not include expenses that would be deductible for income tax purposes.

A Taxation Ruling on the subject of living-away-from-home allowances will issue shortly and will contain guidance for determining whether an allowance meets the tests specified in section 30. If it does, the allowance will be within the scope of the FBT. If not, the employer will be required to show the allowance on the employee's group certificate.

QUESTION 3

It appears that the FBT liability for a living-away-from-home allowance is contingent on the extent to which the allowance is regarded as assessable income of the employee. Is this only known with certainty after the employee's income is assessed, which would be after the date for lodgment of the employer's FBT return?

ANSWER

No. See the answer to question 2. The nature of the allowance will be known to the employer at the time the allowance is paid.

8. BOARD FRINGE BENEFITS

QUESTION 1

Where a farmer's children are employed on the farm and provided with accommodation, free of charge, are meals which are also provided to be regarded as a board fringe benefit if there is no payment within the family for board. Does the status of such meals alter if other children in the family, not working on the farm pay board when living at home?

ANSWER

The value of meals provided in the family home where the children work on the family farm was considered in Taxation Ruling No. MT 2016.

The Ruling states that where such benefits are given in an ordinary family setting and would have been a normal incidence of family relationships, it would be accepted that they were not provided in respect of employment and thus not subject to FBT.

Where children in the family not working on the farm pay board when living at home but children who work on the farm are not required to pay board, the farmer may be claiming income tax deductions in respect of the expenditure incurred in providing the board to the working members. Where such deductions are allowable on the basis that the board represents remuneration of employees, the board meals will be subject to FBT.

QUESTIONS 2 and 3

Paragraph (d) of the definition of "board meal" appears to exclude meals which are prepared in a facility used wholly for preparation of meals for employees. Does this mean that meals provided to station hands, etc., in a separate cookhouse or other employee messing facility are not board meals?

ANSWER

No. Paragraph (d) of the definition of 'board meal' does not exclude meals which are prepared in a facility used wholly for the preparation of meals for a group of employees. It only excludes meals prepared in a facility that is principally used to prepare meals for a particular employee (and his or her family).

9. PROPERTY FRINGE BENEFITS

QUESTION 1

If an employee is able to use his position with a company to achieve a "corporate rate" discount or other discount, on private purchases of goods or services, without any payment being made by the company, does this attract FBT?

ANSWER

No. The taxable value of the benefit is nil as the amount paid by the employee equals the arm's length cost price of the goods or services to the employer.

QUESTION 2

In some instances employers on remote cattle stations provide rations to large numbers of distant relatives of aboriginal stockmen. Are all these rations to be regarded as a fringe benefit or only those provided to immediate family, or only those provided to the stockman?

ANSWER

Rations provided by reason of the stockman's employment to the stockman and his relatives will be fringe benefits. Rations provided by reason of the stockman's employment to persons who are not relatives as defined in section 6 of the Income Tax Assessment Act will be fringe benefits if they are provided under an arrangement between the stockman and the employer to provide such rations to those persons.

QUESTION 3

The usual product of a farm is live animals rather than meat (which a farmer is prohibited from selling). Is meat provided to farm employees an "in-house" or "external" benefit?

ANSWER

Where an employer provides meat to his employees and the employer is a farmer whose usual product of the farm is live animals, the

meat is an in-house benefit as the meat is considered to be a similar product to the live animals sold by the farmer.

QUESTION 4

Meat, milk and eggs produced on a farm and provided to employees in such a manner that they would be regarded as external property benefits cannot be valued according to the Act as an arm's length transaction cannot exist between the farmers and a member of the public. Is there any other section of the Act which determines a value in this case? If not, is a zero value appropriate?

ANSWER

Where a farmer provides meat, milk or eggs produced on his farm to employees but does not sell them as part of his business, their taxable value under paragraph 43(c) of the Act is the amount that the employee could reasonably be expected to pay to acquire the produce under an arm's length transaction (less any employee contribution). This amount is what the farmer would have charged an arm's length purchaser "at the farm gate".

QUESTION 5

Section 54 provides for exemption of food or drink provided to an employee under certain circumstances. Are the limits to exemption in this section in conflict with the less qualified exemption which applies in section 41?

ANSWER

No. The sections deal with different situations. Section 54 applies only where an employee is provided with board. It exempts food and drink other than board meals where provided and consumed on the employer's premises. The exemption applies irrespective of whether the recipient of the food or drink is the employee or a family member of the employee and whether or not the benefit is provided on a working day. The effect of the exemption is that the total taxable value of all food and drink provided where there is a board arrangement will be limited to the taxable value of the board meals.

Section 41 applies where the employee is not receiving a board fringe benefit. It exempts food, drink and other property provided and consumed on the employer's premises. This exemption only applies where the recipient of the benefit is an employee and the benefit is provided on a working day.

10. RESIDUAL FRINGE BENEFFITS

QUESTION 1

How is a benefit consisting of the use of tools and equipment out of work hours or on a non-working day to be established where no reasonably equivalent arm's length transaction exists for use of such equipment and facilities?

ANSWER

The use of tools and equipment on the employer's premises on a working day (whether during or after work hours) is exempt under sub-section 47(3).

Where this exemption does not apply, the taxable value of the benefit is based on the commercial value of the right to use the tools and equipment. This value will be the amount that the employer would have charged if the equipment was hired to a person in an arm's length transaction. Where the equipment is of a kind that can be hired from a commercial hiring outlet, the taxable value of an employee's use of the equipment can be readily ascertained by reference to the commercial hiring charge for the period of use.

Should cases arise where similar equipment is not hired commercially, the employer can make a reasonable estimate of what would be a commercial hiring charge.

In the case of small tools which have a low capital cost, the use of the tools will not have a commercial value and in such cases it will be accepted that the taxable value of the benefit is nil.

QUESTION 2

Does any provision of the Act prevent the use of property located on the employer's premises on a working day (which is an exempt residual benefit) being taxed as a property benefit?

ANSWER

Yes. By virtue of paragraph (e) of the definition of "intangible property" in section 136, a property benefit does not include a lease or licence in respect of property.

QUESTION 3

What, for the purposes of sub-section 47(4), is the distinction which makes drink vending machines, tea or coffee making facilities and water dispensers not considered to be facilities for drinking? What is a facility for drinking?

ANSWER

The question is founded on a misreading of sub-section 47(4). The phrase 'not being facilities for drinking or dining' in the sub-section qualifies only the expression 'other amenities' and does not limit in any way the specific exemptions under the sub-section of drink vending machines, tea or coffee making facilities and water dispensers. That is, the other amenities exempted are those which are not facilities for drinking (e.g., a bar) or dining.

QUESTION 4

If section 54 applies and board is not provided, is food and

drink provided to be valued as a residual benefit or a property benefit?

ANSWER

See also the answer to question 5 of part 9 dealing with Property Fringe Benefits. Section 54 only applies where board is provided. Food and drink provided otherwise than under a board arrangement is a property benefit.

QUESTION 5

Where accommodation is provided and the employee does not have a usual place of residence or the employee does not furnish an approved declaration in relation to place of residence, is it correct that the Act does not indicate whether the accommodation becomes a residual benefit, a living-away-from-home benefit or a housing benefit?

ANSWER

No. By virtue of the definition of "housing right" in section 136, if the accommodation is provided to the employee as his or her usual place of residence it will constitute a housing benefit. Any other employer-provided accommodation will constitute a residual benefit. Living-away-from-home allowance benefits relate only to cash allowances.

QUESTION 6

With the exception of sub-section 47(5) all other benefits listed in section 47 as exempt residual benefits appear to be taxable as property benefits. Do any other sections of the Act exclude these benefits from the definition of property benefit?

ANSWER

Yes. By virtue of paragraph (e) of the definition of "intangible property" in section 136, "property" does not include a lease or licence in respect of real property or tangible property. Note also that a property benefit only arises where there is a disposal of property and a vesting of legal or beneficial ownership of the property in the employee.

Accordingly, where benefits are treated as exempt residual fringe benefits under section 47 they will not also be taxable as property benefits.

11. TRAVEL FRINGE BENEFITS

QUESTIONS 1 and 2

What is meant by travel undertaken "exclusively in gaining or producing salary or wages" in the definitions of extended travel benefits? If the employee is away for seven nights and does not work during the weekend, could it be said that the travel was not undertaken exclusively in gaining or producing salary or wages,

but was undertaken primarily for that purpose and for a lesser purpose of private activity?

ANSWER

The travel itself must be undertaken by the employee for the sole purpose of performing the duties of his or her employment. This test will be met if the employee would be entitled to a full income tax deduction for the cost of the fares had he or she borne the cost. This would be the case where the employee undertakes a business trip for 7 working days and does not return home during the intervening weekend.

12. BENEVOLENT INSTITUTIONS

QUESTION 1

What definition applies to public benevolent institutions?

ANSWER

The term "public benevolent institution" is not defined in the FBT legislation but carries its meaning as settled by court decisions. Broadly, such an institution is one which is organised for the relief of poverty, suffering, distress or misfortune and is not conducted for the profit of individuals.

QUESTION 2

Does care of disadvantaged persons include care in a hospital owned by a church or other benevolent institution?

ANSWER

The exemption permitted by section 58 requires, among other things, that the employee live, together with disadvantaged persons, in a house or hostel used exclusively for the provision of residential accommodation to disadvantaged persons and employees whose duties consist of caring for those persons. A hospital would not constitute such a house or hostel. However, a public hospital is a public benevolent institution attracting exemption under section 57A. Some of the hospitals referred to in the question will be exempt under section 57A.