PS LA 1999/10 (Withdrawn) - Rebatable employers and the operation of paragraph 65J(1)(b) of the Fringe Benefits Tax Assessment Act 1986 to separate legal entities formed by public universities.

This Practice statement has been withdrawn with effect from 26 March 2008 as the interpretative issue is covered in TD 2008/2.

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ATO Practice Statement Law Administration

PS LA 1999/10

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This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.

This Practice statement has been withdrawn with effect from 26 March 2008 as the interpretative issue is covered in TD 2008/2.

SUBJECT: **Rebatable employers and the operation of paragraph 65J(1)(b) of the *Fringe Benefits Tax Assessment Act 1986* to separate legal entities formed by public universities.**

PURPOSE: **To advise the revised ATO view**

STATEMENT

1. A public university is clearly a public educational institution established by a law of the Commonwealth, a State or Territory, and thus an institution of the Commonwealth, State or Territory for the purposes of the extended meaning in subsection 65J(3) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA). As such it cannot be a rebatable employer.

2. A separate entity established by a public university will not fall within the extended meaning of an 'institution of the Commonwealth' in terms of subsection 65J(3), as it is not established by a law of the Commonwealth. Although the entity is created by an institution of the Commonwealth, this of itself is insufficient to bring the entity within the ambit of subsection 65J(3). Accordingly, the company may be a rebatable employer if it is covered by subsection 65J(1).

EXPLANATION

3. Following advice from counsel regarding the operation of paragraph 65J(1)(b) of the FBTAA, a previous Minute dated 20 November 1997 is withdrawn and replaced with this Law Administration Practice Statement.

4. Part IIIA was inserted into the FBTAA to provide a rebate of tax for certain specified non-profit employers. Subsection 65J(1) lists the employers who qualify as rebatable employers, with paragraph 65J(1)(b) providing that a scientific, charitable or public educational institution (other than an institution of the Commonwealth, a State or Territory) is a rebatable employer.

5. It is clear from the Supplementary Explanatory Memorandum for Taxation Laws Amendment (Fringe Benefits Tax Measures) Bill 1992 there is an intention that government organisations be excluded from qualifying as rebatable employers. The

supplementary explanatory memorandum provides section 65J was introduced to provide for the special arrangements which the Treasurer announced before Parliament on 16 September 1992, in respect of "non-government organisations".

Is the separate entity an 'institution'?

6. The first question to ask concerning the particular separate legal entity is whether it is an 'institution'. In *Stratton v Simpson* (1970) 125 CLR 138 the High Court considered the meaning of 'a public educational institution'. Gibbs J (with whom Barwick CJ, Menzies and Walsh JJ agreed) said in respect of the meaning of the word 'institution'-

   "In its ordinary sense 'institution' means 'an establishment, organisation, or association, instituted for the promotion of some object, especially one of public utility, religious, charitable, educational etc. It means, as was said in *Mayor of Manchester v McAdam* [1896] AC 500 at 511, 'an undertaking formed to promote some defined purpose…' or 'the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle'."

7. It is likely a separate legal entity formed by a public university would satisfy this definition, as such a body has been called into existence to translate a particular purpose into a living and active principle.

8. Assuming the entity satisfies the definition of institution, it must also be either a 'scientific, charitable or public educational institution'.

Is the separate entity an 'institution of the Commonwealth', as defined in subsection 65J(3)?

9. The main issue to consider is whether the particular separate legal entity is itself 'an institution of the Commonwealth, a State or Territory' and accordingly denied rebatable employer status.

10. The extended meaning of 'institution of the Commonwealth, a State or territory' in subsection 65J(3) covers an institution <u>established by a law</u> of the Commonwealth, a State or territory.

11. In *The King v Sharkey* (1949) 79 CLR 121 at 152-153, Dixon J discussed the meaning of the words 'of the Commonwealth', and said-

    "..it describes the Federal Government or some appropriate organ thereof".

12. A public university would clearly be an organ of the Federal Government. It is established by a law of the Commonwealth and therefore falls within the extended meaning of 'institution of the Commonwealth' in subsection 65J(3). However, a separate legal entity formed by a public university is not a manifestation of the Federal Government or an organ thereof. Nor is the separate legal entity established by a law of the Commonwealth. Although the entity is created by an appropriate organ of the Federal Government, it is not itself an institution <u>of</u> the Commonwealth.

Is it permissible to lift the corporate veil?

13. In circumstances where a public university forms a separate legal entity, is it permissible to lift the corporate veil to ascertain whether the entity is in fact a separate institution to the public university?

14. In the opinion of counsel the corporate veil can only be lifted in very limited circumstances. In *Willcox v Federal Commissioner of Taxation* (1988) 79 ALR 267, the Full Federal Court provided the separate legal personality of a company can only be disregarded if-

    (i) the court can see there is, in fact or in law, a partnership between companies in a group;
    (ii) there is a mere sham or facade in which the particular company is playing a role; or
    (iii) the creation or use of the company was designed to enable a fiduciary obligation to be evaded or a fraud to be perpetuated.

15. The court held-

    "Neither the circumstance that a company is completely subject to the ownership and direction of another person, nor the circumstance that that other person exercises directional control of the activities of the company in ways which minimise the manifestations of the company's separate legal identity will justify, in my opinion, a conclusion that acts in law formally done by the company are to be regarded, for the purposes of the kind here in question in relation to the Australian Income Tax Law, as acts in the law done by that other person".

16. It is unlikely the corporate veil can be lifted unless the limited circumstances in paragraph 14 are present.

17. There is currently an appeal listed for hearing in the AAT in February 2000 concerning this issue. Whilst the main issue to be discussed before the AAT will be whether the entity is a 'scientific, charitable or public educational institution', the issue as to whether the entity can properly fall within the extended meaning of subsection 65J(3) will also be canvassed.

subject references:	rebatable employer; institution*;* public educational institution
legislative references:	FBTAA 65J(1)(b) FBTAA 65J(3)
case references:	*Stratton v Simpson* (1970) 125 CLR 138; *The King v Sharkey* (1949) 79 CLR 121; *Willcox v Federal Commissioner of Taxation* (1988) 79 ALR 267.
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