

***TD 2015/12 - Fringe benefits tax: when are the duties of the employment of an employee of an employer who is a government body exclusively performed in, or in connection with, a public hospital or a hospital carried on by a society or association that is a rebatable employer?***

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# Taxation Determination

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Fringe benefits tax: when are the duties of the employment of an employee of an employer who is a government body exclusively performed in, or in connection with, a public hospital or a hospital carried on by a society or association that is a rebatable employer?

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This publication (excluding appendices) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## Ruling

1. All references in this Determination are to the *Fringe Benefits Tax Assessment Act 1986* unless otherwise stated.
2. The duties of the employment of an employee of an employer who is a government body<sup>1</sup> are exclusively performed in, or in connection with, a public hospital or a hospital carried on by a society or association that is a rebatable employer<sup>2</sup> for the purposes of paragraph 57A(2)(b) when the duties of the employment of the employee satisfy any of the following tests:
  - the duties are performed 'in' a hospital such that the employee performs their duties at the physical location of the hospital facility where the activities of the hospital are being conducted

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<sup>1</sup> Government body is defined in subsection 136(1) and means the Commonwealth, a State, a Territory or an authority of the Commonwealth or of a State or Territory. A nominated State or Territory body is a government body under paragraph 135U(5)(c).

<sup>2</sup> A hospital carried on by a society or association that is a rebatable employer for the purpose of subparagraph 57A(2)(b)(ii) is referred to in this Determination as a 'non-profit hospital'. A 'public hospital' or a 'non-profit hospital' is referred to collectively as a 'hospital'.

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- the duties are performed 'in connection with' a hospital such that the employee performs their duties as a member of the hospital staff under the direction, management and control of the hospital board of management or chief executive officer, or
- the duties are performed 'in connection with' a hospital such that the employee is engaged in duties that enable the hospital to carry out its functions.

3. The presence of the word 'exclusively' in paragraph 57A(2)(b) requires that all of the duties of the employment of the employee must be performed for the required purposes, being 'in, or in connection with' a hospital.

4. Paragraph 57A(2)(b) will be satisfied when an employee performs some of their duties 'in' a hospital and undertakes the balance of their duties 'in connection with' a hospital.

5. The particular way in which an employee is performing their duties would be determined by examining the employee's actual duties of employment in relation to the FBT year. Where an employee's statement of duties is indicative of the employee's actual duties, reference can also be made to the statement of duties.

6. An employee may be exclusively performing duties 'in, or in connection with' more than one public hospital or non-profit hospital or with both a public hospital and a non-profit hospital.

7. When an employee has been engaged in separate job positions during a year by the same employer who is a government body, each job position must be considered separately for the purpose of determining whether the criteria in subsection 57A(2) are satisfied.

8. Therefore, when an employee has more than one job position during the year, it is possible for subsection 57A(2) to apply to the benefits provided in respect of one of the positions even if the requirements of subsection 57A(2) are not met in relation to the other position. Refer examples 6, 7 and 8.<sup>3</sup>

### ***Example 1: Cleaner performing duties 'in, or in connection with' a public hospital or a non-profit hospital***

9. *John is an employee of a nominated State Health Department.<sup>4</sup> John is employed as a cleaner at the first public hospital. John performs his duties at the first public hospital facility in the hospital service areas including general wards, public reception areas and thoroughfares. John's duties, at intermittent times, require him to perform cleaning duties at a co-located non-profit hospital and also at a second public hospital. John is a member of staff at the first public hospital.*

<sup>3</sup> Under subsection 5B(1E), benefits which are exempt under subsection 57A(2) have their exemption capped to a \$17,000 grossed-up amount for each employee of an employer who is a government body. Under subsection 5B(1E), each employer is only allowed one \$17,000 cap per employee even if the employee has multiple positions with the same employer. Note: for the FBT years starting on 1 April 2015 and 1 April 2016 only, the annual cap will be \$17,667 for each employee.

<sup>4</sup> A nominated State or Territory body is taken to be the employer of the employee under subsection 135U(1).

10. John performs all of his duties at the physical location of a public or non-profit hospital where the activities of the hospital are being conducted. John performs all of his duties 'in' a hospital.

11. John also performs all of his duties 'in connection with' a public hospital because those duties are performed as a member of the staff at a public hospital. Alternatively John performs all of his duties 'in connection with' a public hospital or non-profit hospital because John is exclusively engaged in duties that enable a hospital to carry out its functions.

12. For the reasons set out above, John performs all of his duties 'in, or in connection with' a hospital. Paragraph 57A(2)(b) is satisfied.

***Example 2: Clinical nurse performing duties 'in, or in connection with' a public hospital***

13. *Clare is a Clinical Nurse who is an employee of a State Government. Clare's duties include the provision of clinical nursing and individual case management to patients of a public hospital. Clare's duties are performed at the public hospital facility in the clinical service area and also at the homes of patients who are part of the hospital's home management program. Clare is a member of staff at the public hospital.*

14. Clare performs some of her duties at the physical location of a hospital where the activities of the hospital are being conducted. Clare also performs all of her duties (including at the patient's home) 'in connection with' a public hospital because those duties are performed as a member of the staff of a public hospital or alternatively because Clare is exclusively engaged in duties that enable a hospital to carry out its functions.

15. Clare performs all of her duties 'in, or in connection with' a public hospital. Paragraph 57A(2)(b) is satisfied.

***Example 3: Construction project manager not performing duties 'in' a public hospital***

16. *Dean is employed by a nominated State Department of Public Works (DPW) and his duties are performed in the role of project manager for the construction of a new hospital building. The construction site for the new building is located within the physical boundary of the Newland Public Hospital. Once completed, the new hospital building will be used to provide additional public hospital services and will be part of the Newland Public Hospital.*

17. *Dean's role includes working in an office performing engineering and related tasks for the construction of the new building. This office is part of a self-contained building within the physical boundary of the Newland Public Hospital. The building and immediate surrounds are fitted out with offices, office equipment, employee amenities and dedicated employee parking. The use of this building is exclusively for DPW employees who are engaged on the construction project, including Dean. Dean also performs his duties at the construction site location.*

18. When Dean performs duties at the office location (and also at the construction site) he is within the physical boundary of the Newland Public Hospital facility. However, Dean does not work at a place where the activities of the public hospital are being conducted.

19. Dean does not perform his duties 'in' a public hospital. Nor does Dean perform his duties 'in connection with' a public hospital. Paragraph 57A(2)(b) is not satisfied.

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**Example 4: Support officer performing duties 'in connection with' a public hospital**

20. *Edith is an employee of a nominated State Health Department. The unit that Edith works for exclusively provides administrative support to a number of metropolitan public hospitals including for procurement of hospital goods and services and payment of suppliers. Edith performs her duties at the Department premises which is outside the physical location of a public hospital.*

21. Edith is engaged in duties that enable a hospital to carry out its functions. Edith performs all of her duties 'in connection with' a public hospital. Paragraph 57A(2)(b) is satisfied.

**Example 5: Shared services manager not performing duties 'in connection with' a public hospital**

22. *Ahmed is the manager of a team in the Shared Services group. The Shared Services group is part of a nominated State Administrative Services Department which is Ahmed's employer. Ahmed and his team provide information technology services to all areas of the Department of Health including areas concerned with delivery of public hospital services as well as areas which are not hospital related such as the government relations area.*

23. Ahmed is not exclusively engaged in duties that enable a hospital to carry out its functions. Ahmed does not perform all of his duties 'in connection with' a hospital. Paragraph 57A(2)(b) is not satisfied.

**Example 6: Employee has two concurrent jobs**

24. *Christopher is an employee of a nominated State Health Department who has a 5 day working week. Christopher works for three days a week for the Health Department in a management position 'in, or in connection with' a public hospital. On the other two days Christopher works for the Health Department in a separate position which is not hospital related. The two positions have separate job contracts and pay entitlements.*

25. Entitlement to the subsection 57A(2) exemption is considered in relation to each separate job position. When Christopher works in the management position 'in, or in connection with' a public hospital, paragraph 57A(2)(b) is satisfied. Benefits provided in relation to that position will be exempt under subsection 57A(2).

**Example 7: Employee changes jobs during the year**

26. *Janet is an employee of a nominated State Health Department. Her current employment duties do not satisfy the requirements of paragraph 57A(2)(b). Janet is provided, as part of her remuneration package, with the use of a car for private purposes.*

27. *Janet will shortly cease duties in relation to her current position. Janet will then commence duties relating to a new position as a member of the hospital staff (Director of Nursing) at a public hospital. Janet's employer remains the State Department of Health and Janet will retain the use of the car as part of her new remuneration package.*

28. Entitlement to the subsection 57A(2) exemption is considered in relation to each separate job position. Janet's new position as Director of Nursing has duties which are exclusively performed, 'in, or in connection with' a public hospital. Paragraph 57A(2)(b) is satisfied and the exemption applies to the car benefits provided to Janet in respect of her nursing position.

**Example 8: Employee seconded to corporate role**

29. *Bill is employed by a nominated State Health Department. Bill is employed as a clinician and performs duties 'in, or in connection with' the public hospital where he works. Bill is seconded to the State Health Department corporate office for 4 weeks relieving in an executive management position while the incumbent is absent on annual leave. During Bill's secondment he is not performing his duties 'in, or in connection with' a public hospital.*

30. Entitlement to the subsection 57A(2) exemption is considered in relation to each separate job position. Paragraph 57A(2)(b) is not satisfied during Bill's secondment. Paragraph 57A(2)(b) is satisfied at other times.

**Example 9: CEO engaged in related activities**

31. *Jim is CEO of a public hospital and is employed by a nominated State Health Department. During enterprise bargaining processes the head of the State Health Department requests Jim to assist in the negotiations at different stages over two weeks, during which time Jim will also remain as CEO of the hospital and undertake his normal role. Enterprise bargaining involves negotiating new certified agreements for Health Department staff.*

32. Jim's duties when engaged in Enterprise Bargaining are an integral part of his role as CEO of the hospital. As a result, throughout the enterprise bargaining processes Jim is exclusively engaged in duties which enable the hospital to carry out its functions. Alternatively, Jim at all times is performing duties as a member of staff at a public hospital. Jim performs all of his duties 'in connection with' a public hospital. Paragraph 57A(2)(b) is satisfied.

**Example 10: State government employees occupying public hospital positions**

33. *A State government places employees in public hospital positions. Each employee performs their duties as a member of staff at a public hospital. In relation to employees placed at a particular public hospital, the duties performed include:*

- *a pathology courier driver who travels from site to site collecting samples*
- *providing services to patients in a general practitioner clinic*
- *working on a project to extend and install a specialised hospital computer system into a new hospital building during construction*
- *child and youth health services in shopfronts and schools*
- *teaching medical students in a university teaching hospital and at a university campus*
- *providing patient services at residential care wards in hospitals*
- *biomedical engineering, and*
- *information technology, procurement and financial services.*

34. All of these government employees are, at all times, performing duties as members of staff at a public hospital. As a result all duties performed by these employees are performed 'in connection with' a public hospital. Paragraph 57A(2)(b) is satisfied.

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## **Date of effect**

35. This Determination applies to years of income commencing both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

36. It is recognised that this Determination takes a slightly different approach to the criteria in subsection 57A(2) to ATO Interpretative Decision ATO ID 2003/40 (withdrawn 29 October 2014). It is not expected that this difference will have a widespread practical impact. Nevertheless, in respect of arrangements entered into before the date of this Determination, the Commissioner does not intend to take active compliance action to treat a benefit as not exempt from fringe benefits tax if it would have been treated as exempt under the approach in ATO ID 2003/40. This would include not taking active compliance action on affected salary sacrifice arrangements in place before the date of this Determination.

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**Commissioner of Taxation**

24 June 2015

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## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### Explanation

37. Subsection 57A(2) provides:

Where:

- (a) the employer of an employee is a government body; and
- (b) the duties of the employment of the employee are exclusively performed in, or in connection with:
  - (i) a public hospital; or
  - (ii) a hospital carried on by a society or association that is a rebatable employer; a benefit provided in respect of the employment of the employee is an exempt benefit.

38. Paragraph 57A(2)(a) requires that the employer of the employee is a government body.

39. Paragraph 57A(2)(b) requires that the duties of the employment of the employee are exclusively performed 'in, or in connection with' a public hospital or a non-profit hospital.

40. The words 'in, or in connection with' contain two separate phrases separated by the conjunction 'or'. This means that when considering **all** of the duties of an employee each duty must be performed **either** 'in' **or alternatively** 'in connection with' a hospital to satisfy subparagraph 57A(2)(b).

41. Paragraph 57A(2)(b) can be satisfied where an employee performs some duties 'in' a hospital and undertakes the balance of their duties 'in connection with' a hospital.

42. Similarly, the terms 'public hospital' and 'non-profit hospital' are separated by the conjunction 'or' in subparagraphs 57A(2)(b)(i) and (ii). This means that an employee may be exclusively performing duties 'in, or in connection with' a public hospital (or public hospitals), a non-profit hospital (or non-profit hospitals) or both a public hospital and a non-profit hospital. The latter case may occur, for example, where there are working relationships between public hospitals and non-profit hospitals.

### Duties of the employment exclusively performed 'in' a hospital

43. Paragraph 57A(2)(b) refers to the duties of the employment of an employee being exclusively performed 'in' a hospital.

44. When used as a preposition, the word 'in' can take different meanings. In this context the *Macquarie Dictionary*<sup>5</sup> defines the word 'in' as including:

1. inclusion within space or limits, a whole, material or immaterial surroundings, etc.; *in the city, in the army, dressed in white; in politics.*

45. Therefore, the word 'in' can indicate inclusion within a physical space or geographical location. It can also suggest belonging to or being part of an organisation or group (such as 'in the army').

<sup>5</sup> *The Macquarie Dictionary*, 2009, rev 5<sup>th</sup> Edn, The Macquarie Library Pty Ltd, NSW.

46. If the latter view is adopted as the preferred meaning, a question arises as to the scope of the word 'in' when used in paragraph 57A(2)(b). A government employee may be employed within (as a member of) the hospital staff. A different government employee may work in a departmental role with hospital related duties (but not in a hospital staff role). For the reasons given in further detail below, the preferred view of the 'in connection with' test is that the words 'in connection with' are sufficiently broad to include both of these employee circumstances. Given that the 'in connection with' test already covers an employee who is a member of the hospital staff then there would be little point in having the 'in' test cover the same employee for the same reason. To give meaning to the 'in' test, which is expressed as an alternative to the 'in connection with' test, it must be capable of covering different or additional circumstances.

47. Accordingly, the preferred view is that the word 'in' is a geographic test relating to duties performed at the physical location of the hospital. This means, in the context of paragraph 57A(2)(b), that the exemption will be satisfied when the duties of the employee are performed at the physical location of the hospital facility where the activities of the hospital are being conducted.

48. Locations at a hospital facility such as a surgical theatre, a patient ward or a hospital administration office are recognisable as being places where the activities of a hospital are being conducted so that duties performed in such locations would be performed 'in' the hospital. However, for locations at a hospital facility such as a pathology collection room, general practitioner room or a vacant radiology room being refitted with new equipment, there may be uncertainty about whether these are places where the activities of the hospital are being conducted.

49. It would be acceptable when determining this matter to refer to a hospital's constituent documents or other informative material such as annual reports, local hospital network reports or hospital board minutes to identify a location at a hospital facility where activities of the hospital are being conducted.

50. For example, reference to these documents may show that a particular public hospital is required to provide or facilitate general practitioner services as a means of providing better targeted access to acute care emergency services. An employee who was performing duties in those general practitioner rooms within this public hospital facility would be performing duties 'in' the public hospital.

51. A location such as a dedicated building, a separate floor or a room in a building at a hospital facility that is used by, for example, civil engineers and project managers during the construction of buildings and access roads for a new hospital is not a place at a hospital facility where activities of the hospital are being conducted.

### **Duties of the employment exclusively performed 'in connection with' a hospital**

52. Paragraph 57A(2)(b) refers to the duties of the employment of the employee being exclusively performed 'in connection with' a hospital.

53. In *Collector of Customs v. Cliffs Robe River Iron Associates*<sup>6</sup> per Bowen CJ, Morling and Neaves JJ at paragraph 16:

The meaning of the word 'connection' is both wide and imprecise. One of its common meanings is 'relation between things one of which is bound up with, or involved, in another'.

<sup>6</sup> [1985] FCA 96; (1985) 7 FCR 271.

54. In *Health and Research Employees Association of Australia v. University of Sydney*<sup>7</sup> (*Health and Research Employees*) her honour Gaudron J examined whether an employee who was employed by the Howard Florey Institute of Experimental Physiology and Medicine was a person employed 'in or in connection with' the University of Melbourne. At CAR 250 her honour said:

A more appropriate consideration is whether the employment which is claimed to be in connection with universities and/or colleges of advanced education is so bound up or involved with their activities as to be necessarily supportive of or dependent upon such activities. The Institute, as observed earlier, has a separate legal identity: the evidence does not disclose either that the activities of the Institute necessarily depend upon the activities of the University of Melbourne or alternatively that the University's activities in any way depend upon the Institute.

55. The phrase 'in connection with' in the context of paragraph 57A(2)(b) has a similar meaning to that referred to in *Health and Research Employees*. The employee's duties need to be so involved with the hospital activities that the employee supports the operation of the hospital and conversely that the employee is dependent on the hospital to undertake their duties. Essentially the employee is engaged in duties that allow the hospital to carry out its functions. Under this test, it is not necessary that the duties of employment be performed at the physical location of the hospital.

56. This means in the context of paragraph 57A(2)(b), that the exemption will be satisfied when the duties of the employee are duties that allow the hospital to carry out its functions.

#### ***Employee performing duties as a member of staff at a hospital***

57. An employee would exclusively perform duties 'in connection with' a hospital if their duties were performed as a member of staff at a hospital. Such an employee would be occupying a job position in the hospital hierarchy that reports to the hospital board of management or chief executive officer. The employee would perform their duties as a member of staff under the direction, management and control of the hospital board of management or chief executive officer. The employee would always be performing duties that allow a hospital to carry out its functions and their duties would always be performed 'in connection with' a hospital.

58. This position is consistent with the Explanatory Memorandum to the Taxation Laws Amendment (Fringe Benefits and Substantiation) Bill 1987 – explanation of the main features and in relation to public hospital employees (clause 32):

The Bill ensures that benefits provided to employees who work in a public hospital but are technically employed by a Commonwealth, State or Territory Health authority will also be exempt from fringe benefits tax.

59. That is, the relevant exemption provisions in the *Fringe Benefits Tax Assessment Act 1986* provide symmetry in relation to the treatment of benefits provided to employees who are employed directly by a hospital, to which subsections 57A(3) and (4) can apply, and employees who are legally government employees but are part of the workforce of the hospital, to which subsection 57A(2) applies.

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<sup>7</sup> (1977) 183 CAR 249.

## ***Statements of duties***

60. Whether the duties of employment are being performed in a particular way would be determined by examining the employee's actual duties of employment in relation to the FBT year. Where an employee's statement of duties is indicative of the employee's actual duties, reference can also be made to the statement of duties.

61. A statement of duties which describes the employee's position as being attached to a particular hospital and hospital reporting structure would indicate that the employee is performing their duties as a member of the hospital staff. However, where departmental statements of duties are generic and do not rule in or rule out hospital related duties then reference should be made to the employee's actual duties.

## **Separate job positions**

62. The criteria in paragraph 57A(2)(b) must be tested in respect of the employee's particular position. When an employee of an employer that is a government body changes job positions during the year or is concurrently engaged in separate positions during a period, those positions should be considered separately for the purposes of subsection 57A(2).

63. In the circumstances where there are separate job positions, it is possible for subsection 57A(2) to apply to the benefits provided in respect of one of the positions even if the requirements of subsection 57A(2) are not met in relation to the other position.

## References

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*Previous draft:*

TD 2014/D17

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- fringe benefits tax
- exempt benefits
- public hospitals
- hospitals carried on by non-profit organisations
- hospitals
- government entities

*Legislative references:*

- FBTA 1986 5B(1E)
- FBTA 1986 57A(2)
- FBTA 1986 57A(2)(a)
- FBTA 1986 57A(2)(b)
- FBTA 1986 57A(2)(b)(ii)

- FBTA 1986 57A(3)
- FBTA 1986 57A(4)
- FBTA 1986 135U(1)
- FBTA 1986 135U(5)(c)
- FBTA 1986 136(1)

*Case references:*

- Collector of Custom v. Cliffs Robe River Iron Associates [1985] FCA 96; (1985) 7 FCR 271
- Health and Research Employees Association of Australia v. University of Sydney (1977) 183 CAR 249

*Other references:*

- ATOID 2003/40 (withdrawn)
- Explanatory Memorandum to the Taxation Laws Amendment (Fringe Benefits and Substantiation) Bill 1986
- The Macquarie Dictionary, 2009, rev 5<sup>th</sup> Edn, The Macquarie Library Pty Ltd, NSW

## ATO references

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