



## THE TAX INSTITUTE

THE MARK OF EXPERTISE

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14 April 2016

Mr Tim Sporne  
Director  
Tax Counsel Network  
Australian Taxation Office  
GPO BOX 9990  
SYDNEY NSW 2001

By email: [PGHTESADLRuling@ato.gov.au](mailto:PGHTESADLRuling@ato.gov.au)

Dear Mr Sporne,

### **Review of Chapter 7 of the *Fringe Benefits Tax – A Guide for Employers***

The Tax Institute welcomes the opportunity to provide comments to the Australian Taxation Office in relation to the review of Chapter 7 of the *Fringe Benefits Tax – A Guide for Employers* document (**Guide**).

Our comments relate to the specific matters on which the ATO seeks views, as listed in the ATO's Proposal dated 18 February 2016<sup>1</sup>. We also make some comments on the ATO's list of issues being considered.

### **Matters on which the ATO seeks views**

1. *Whether the existing chapter seven of the FBT – a guide for employers provides sufficient detail in relation to the issues addressed therein or on car fringe benefits generally.*

Generally, Chapter 7 provides sufficient detail. However, we recommend that further detail be included in Chapter 7 on certain issues, as outlined below.

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<sup>1</sup> <https://www.ato.gov.au/General/Consultation/What-we-are-consulting-about/Papers-for-comment/Fringe-Benefits-Tax--The-operation-of-Division-2---car-fringe-benefits-of-the-Fringe-Benefits-Tax-Assessment-Act-1986/>

- Available for private use – the comments in Section 7.1 should also cover these situations:
  - A car is parked on the street near the employee's home (but not garaged at the home), i.e. the words in section 7(2) should be quoted or paraphrased, rather than using the term "garaged" which is misleading.
  - A car is parked in an airport car park while travelling (TD 94/16).
  - A car is parked at or near the employer's premises while the employee is travelling, including the situation where a car key is left at the relevant employee's home.
  
- Statutory formula method – the comments in Section 7.4 should also cover these issues:
  - Base value of a car you lease – guidance is required on how to determine the leased car value of a normally short term rental car that is hired on a long term basis (given there is no obligation on the 'lessor' to provide cost or acquisition date information to the 'lessee').
  - Non-business accessories – it would be helpful to clarify that base value includes the cost without any part-year apportionment for year of acquisition.
  - Employee contributions – it would be helpful to clarify the comment "An employee contribution does not reduce the cost price of the car", in light of the comments about an employee providing a trade-in or cash payment as part of the sale agreement. I.e distinguish a contribution towards the acquisition cost, from a contribution towards the running costs/use of the car.
  
- Operating cost method – the comments in Section 7.5 should also cover these issues:
  - Actual operating costs – it would be helpful to clarify whether motor vehicle tax and coloured / special licence plate fees (paid as part of registration, but separate from registration fee) are an "expense in respect of registration".
  - Actual operating costs – it would be useful to clarify the meaning of "so much of any expense paid or payable in respect of the registration of, or insurance in respect of, the car as is attributable to the holding period" in para 10(3)(a)(ii), i.e. explain the requirement for apportionment on a 'days' basis, preferably including an example of the calculation.
  - "An employee contribution does not reduce the cost price of the car" – this comment should be clarified given that it appears in the "Actual operating costs" section (above the subheading "Change to depreciation rate"), but does not limit the comment to cost price for depreciation purposes.
  - The reference to including "operating costs paid by someone else" (third para under the "Actual operating costs" subheading) should be clarified to specifically refer to employee contributions. Also the "Example: Calculation using the operating cost method" could show how the employee contributions are included (i.e. "A" in the formula is \$5,000 including the employee's contribution of \$1,000).

- Deemed interest – it would be useful to clarify that this is calculated using depreciated value at beginning of the year, rather than just stating depreciated value without an indication of whether this is to be determined at the beginning or end of the year.
  - Deemed interest – it would be helpful to include the actual statutory interest rates in the Guide for the current year and the prior 2 years<sup>2</sup>, rather than only referring to annual TDs and the annual FBT return form instructions.
  - Deemed depreciation and interest – it would be helpful to have an explanation of how these are to be calculated on non-business accessories added after purchase of car (i.e. separate calculations to those of the car itself).
  - Leased cars – for long term rental cars, it would be helpful to clarify the treatment of tolls and airport/location surcharges that are added to the rental charges, but are not actually running costs.
  - Log book being kept for a part-year holding period (eg. car first held in April/May/June) – the current guidance seems to be misleading in suggesting that a log book of at least 12 weeks must be kept, but that is not the requirement in s162H. Clarification of the requirements for part-year holding periods would be of assistance.
- Employee contributions (both methods):
    - The Guide states that one must “look at the terms of any agreements and contracts in place to determine whether this is an employee contribution or not” – it would be more helpful if the ATO explains what it would look for in a review.
    - Journal entries – it would be helpful if the ATO provided examples of when a journal entry might be (or might not be) an employee contribution.
- Exempt car benefits – the comments in Section 7.6 could be updated for the following:
    - It would be useful to provide a link to the ATO's list of exempt vehicles and to keep that list up to date<sup>3</sup>. The same applies for Section 20.2 (which is largely a repeat of Section 7.6).
    - The current layout of the first part of Section 7.6 is misleading as it can be interpreted from the wording that taxis, panel vans and utilities are not subject to the private travel limitations.
    - It would also be useful to include guidance from MT 2024 in plain English re dual cab vehicles' eligibility for exemption where private use is limited to certain work-related travel.

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<sup>2</sup> Or every year to date if the ATO thought this was appropriate.

<sup>3</sup> We note the latest information available on the ATO website for exempt vehicles is for 2012:  
[https://www.ato.gov.au/general/fringe-benefits-tax-\(fbt\)/in-detail/exemptions-and-concessions/fbt---exempt-motor-vehicles/](https://www.ato.gov.au/general/fringe-benefits-tax-(fbt)/in-detail/exemptions-and-concessions/fbt---exempt-motor-vehicles/)

- Novated leases – the comments in Section 7.7 could be expanded for the following matters:
  - The comments could also cover partial novations.
  - “Transfer of lease to new employer” – currently these comments only cover the transfer of base value (statutory formula method) to the new employer. It would be useful if the comments also covered the situation where operating cost method has been used by the former employer and/or will be used by the new employer.
  - In addition to the reference to IT28 for lease residual, it would be helpful to also refer to TD93/142 and ATOID 2002/1004.
  - It would be helpful to explain the difference between Employee Contribution Method novated leases and other novated leases.

The ATO should also clarify the timing of when a car is “first held” under the following scenario:

- i) A car is owned by an employer and provided to the individual for private use;
- ii) The company sells the car to the employee at a market value; and
- iii) The employee proceeds to enter into a novated lease arrangement with the company in respect of the car.

- As a general comment, it would assist users of the Guide (particularly when practitioners are advising clients and referring to parts of the Guide) if all subheadings in the Chapter were to be numbered. For example, it would be helpful if one could refer to, say, Section 7.5.4 of the Guide rather than having to refer to the “Cost price” subheading on the 3<sup>rd</sup> page of Section 7.5 Operating Cost Method.

2. *Whether there is a need to provide a coherent principles based explanation to assist taxpayers in understanding the application of Division 2 – car fringe benefits of the FBTAA, to enable taxpayers to determine whether they have a car fringe benefit, and if so how to determine the value of the car fringe benefit – to complement chapter seven of the FBT – a guide for employers?*

This could be covered in a very short introduction to Chapter 7, prior to “What is a car fringe benefit”. However we caution against repetition of what is already covered in the Chapter.

3. *What is the preferred channel through which to deliver this content – having regard to the different levels of protection afforded by the various types of guidance? For example, do you believe that the extra level of protection provided by a public ruling is necessary?*

We consider that an updated Chapter 7 of the Guide would be the preferred channel for this content. We do not consider it necessary for the ATO to replace the guidance by what would have to be a very lengthy public ruling. Existing public rulings on specific matters are helpful to supplement the guidance in Chapter 7.

4. *What additional circumstances should the new guidance cover in order to complement chapter seven of the FBT – a guide for employers and be relevant?*

Please see our comments in response to Question 1 regarding items that we suggest require further detail in the existing Chapter 7.

In addition, we recommend that further clarity be provided in Section 4.2 (chapter 4) – Log book records and odometer records as follows:

- Where there is reference to log books being “usually maintained for a continuous 12-week period”, there needs to be coverage of the situations where less than 12 weeks is permissible under the FBT law.
- “This continuous period may overlap two tax years” – this does not seem to be permitted by the legislation (see s162H which permits a shorter log book period for years of acquisition or disposal, but otherwise requires the 12 week period to start and end in the holding period). The ATO may wish to consider providing an administrative concession to allow taxpayers to take the approach of allowing the continuous period to overlap two years. Also, if this concessional approach is to be permitted, clarity is needed regarding which of the two years covered by the log book is the log book year – the first or second? Or are both years log book years, so that the four years after the second year can continue to use the same log book percentage?

Chapter 18 – Residual Benefits should include guidance on valuing a residual benefit which is the provision of short-term car hire as a short-term replacement of a car benefit that is valued using the operating cost method. In particular, it would be useful to have reference to the ATO’s view that the log book records relating to the usual car may be relied on to determine the business use of the short-term hire car. This matter was addressed in the ATO’s FBT Sub-committee meeting of 20 May 2004 (see item 12 of the minutes).

**Issues being considered by the ATO**

- the meaning of the ‘earliest holding time’ for the purposes of paragraph 9(2)(b) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)

The Tax Institute makes no comment on this issue.

- the meaning of the term ‘applied to own use’ in the context of ‘cost price’ in subsection 9(2) of the FBTAA

The Tax Institute makes no comment on this issue.

- the meaning of the term ‘private use of the car’ for the purposes of subsection 8(2)(b) of the FBTAA

We suggest that Chapter 7 would be improved by clarification and cross-referencing of each of the following similar terms, including highlighting the differences in meaning and usage:

- “private use of the car” in subsection 8(2)(b), currently used in Section 7.6 of Chapter 7 and Section 20.2 of Chapter 20 (Exempt Benefits)
  - “available at that time for the private use” in subsections 7(2) and 7(3), currently used in Section 7.1 of Chapter 7
  - “private use” as referred to in respect of log books, currently in Section 7.5 of Chapter 7
- the application of the car fringe benefit carve outs in subsection 7(2A) and section 8 of the FBTAA.

In relation to section 8, it would be useful to have an annually updated list of vehicles which the ATO considers to be potentially exempt (and whether under 47(6) or 8(2)). The list of exempt motor vehicles has not been updated since 2012, which means that every employer and/or tax practitioner needs to do the same time-consuming task of researching the specifications of every new vehicle each year, possibly resulting in inconsistent and/or incorrect conclusions.

We understand that the car industry has been asked by the ATO to provide the relevant information, but as this has not been forthcoming to date, we suggest that this task could be done once, by the ATO, and provided for the use of all employers. It is very difficult (and sometimes impossible) for employers to obtain the information required by the ATO to determine load carrying capacity and designated seating capacity, in order to correctly categorise such vehicles. The ATO performing once, the research that many employers would otherwise need to do, would be a big cost of compliance saving for employers, as well as encouraging compliance and consistency.

The Tax Institute’s FBT & Employment Taxes Committee would be pleased to discuss any of the above matters with the ATO.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0059 in the first instance.

Yours sincerely



**Arthur Athanasiou**  
President