



THE TAX INSTITUTE

30 July 2018

Ms Linda Ward
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By email: linda.ward@treasury.gov.au

Dear Ms Ward,

Car Parking Fringe Benefits – recommended legislative amendments

The Tax Institute considers that the taxation of car fringe benefits needs to be reviewed in light of the outcome in *FCT v Qantas Airways Ltd* [2014] FCAFC 168 (**Qantas**). We consider that the issues we have noted cannot be resolved by administrative means. In this regard, we make the following recommendations:

- a) **Option A** – amend the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**) so that car parking fringe benefits are taxable where they are included in a “salary packaging arrangement” as defined in the FBTAA with the taxable value being an amount equal to the statutory amount (see below);
- b) **Option B** – amend the FBTAA so that car parking fringe benefits are taxable where the car parking space is provided within a particular zone, namely a central business district;
- c) **Option C** – redefine ‘commercial parking station’ in the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**) excluding special purpose parking stations, as well as parking available through various modern day applications that make car parking facilities available in residential and office buildings that do not operate as commercial car parks;
- d) **Option D** - issue a Legislative Instrument to exclude special purpose parking stations or to include specified zones in which if a parking space is provided, it will be subject to FBT.

In all cases, we suggest the taxable value of the fringe benefit be tied to a specific statutory amount, for example \$9 or thereabouts.

The Tax Institute's preferred option is Option A. However, adoption of any of the recommended options will go a long way to clarifying how to determine what kinds of parking stations can be used to attribute a 'value' to a car parking fringe benefit provided by an employer.

Discussion

1. Car Parking Fringe Benefits

Division 10A Car Parking Fringe Benefits was introduced¹ into Part III of the FBTA in 1992 following an announcement in the 1992-1993 Federal Budget to apply Fringe Benefits Tax to car parking facilities as a specific category of fringe benefits.

One of the factors in section 39A in determining whether a car parking fringe benefit has been provided (subpart (1)(a)(ii)) is to determine whether there is a 'commercial parking station' within a one kilometre radius of the business premise. The 'commercial parking station' method is also one of the methods used to determine the taxable value of the fringe benefit provided by the employer (section 39C). Therefore, what is a 'commercial parking station' is a key consideration.

2. Meaning of the term 'commercial parking station'

Subsection 136(1) of the FBTA defines a commercial parking station as:

"commercial parking station", in relation to a particular day, means a permanent commercial car parking facility where any or all of the car parking spaces are available in the ordinary course of business to members of the public for all-day parking on that day on payment of a fee, but does not include a parking facility on a public street, road, lane, thoroughfare or footpath paid for by inserting money in a meter or by obtaining a voucher.

The Australian Taxation Office's (ATO) ruling on car parking fringe benefits, Taxation Ruling TR 96/26, simply restates the definition of 'commercial parking station' set out in section 136 at paragraph 77. At paragraph 81, it goes on to list a number of parking arrangements the ATO would not consider to constitute commercial parking stations (refer to the Appendix where paragraph 81 has been extracted).

The *Acts Interpretation Act 1901* (Cth) (AIA) provides at section 15AA that in interpreting legislation, 'the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.' Section 15AB of the AIA allows for the use of extrinsic materials, such as explanatory memoranda, second reading speeches and matters raised in the records and debates of Parliament to assist in interpreting legislation. For the purpose of interpreting the meaning of the word 'commercial' for the purpose of section 39A, we turn to these materials.

¹ *Taxation Laws Amendment (Car Parking) Act 1992* (Cth) (1992 Act)

The broadest statement of the Parliament's intent in introducing this measure can be found in the speech which the then Treasurer, the Hon. John Dawkins MP, made at the time of introducing this Budget measure. He stated that the alterations to the relevant provisions of the FBTA were to be applied to 'valuable car parking facilities - mainly in central business districts (**CBD**) – that are provided by employers to their employees'.² While these cannot be relied on for the purpose of interpretation, it is worth noting that news reports from the time stated that the focus of the measure was on targeting parking in 'mainly city centres'.³

In the Explanatory Memorandum to the 1992 Act introducing the present Division 10A requirements for car parking fringe benefits, the intention is that the word 'commercial', in the phrase 'commercial parking station', is to be interpreted according to its ordinary dictionary meaning.⁴ The Macquarie Dictionary defines the word 'commercial' as an adjective that suggests something that is 'of, or of the nature of, commerce', 'engaged in commerce' or 'capable of returning a profit'. On the basis that the ordinary dictionary definition of the term 'commercial' is preferred, it could be argued that a parking station will be commercial when it is simply 'capable of returning a profit'.⁵

While the term 'commercial parking station' is defined in the FBTA, the FBTA does not define the term 'commercial' either generally or for the purpose of section 39A and Parliament provides inconsistent statements as to its intent. On one hand, the Explanatory Memorandum states the definition of 'commercial' takes its ordinary dictionary meaning, which is 'of, or of the nature of, commerce', 'engaged in commerce' or 'capable of returning a profit', that is simply able to return a profit.

The Explanatory Memorandum then qualifies this with the following statements⁶:

*A car park which was not run with a view to making a profit (usually reflected in significantly lower car parking rates charged compared with the normal market value for that facility) would **not** be commercial [Emphasis added].*

*Some car parking facilities have a primary purpose to provide short-term shopper parking. To discourage all-day parking, the operators of these facilities charge penalty rates for all-day parking. These rates are significantly greater than the rates that would be charged by a similar facility which encourages all-day parking. **For the purposes of these provisions, short-term shopper parking facilities using penalty rates for all-day parking will not be treated as a "commercial parking station"**. [Emphasis added]"*

On its face, one may consider that charging penalty rates for all-day parking would in fact be a profit-making activity and therefore consistent with the dictionary definition of 'commercial', however the Explanatory Memorandum says otherwise.

² 1992-93 Federal Budget Speech, Hansard, The Hon. John Dawkins, M.P., Fremantle, Treasurer, House of Representatives, Tuesday, 18 August, 1992, 7:30 p.m., at p. 60.

³ Peter Hatcher, *Labor's \$13BN Repair Job*, The Sydney Morning Herald, 18 August 1992.

⁴ Refer to the Explanatory Memorandum to the *Taxation Laws Amendment (Car Parking) Bill 1992* (Cth) (1992 Bill) at p6.

⁵ For example, in the edited versions of ATO Private Rulings 35195, 39284 and 70459.

⁶ At p7

In the Second Reading Speech when the 1992 Bill was introduced into the House of Representatives, the then Minister Assisting the Treasurer, the Hon. Peter Baldwin MP, stated that:

*To minimise concerns about any unintended impact of these measures, the Government has ensured that the Bill provides that the provision of certain parking facilities can be exempted by Regulation. **Such exemptions may include parking facilities provided by employers that are of a minimal value or parking facilities which would not normally be considered to be 'commercial parking stations' for the purpose of these measures.** The Government will consider the circumstances under which it would be appropriate for it to recommend to the Governor – General to make such Regulations.*
[Emphasis added]

To date, the only regulations that have been made with respect to car parking fringe benefits is Regulation 4 of the *Fringe Benefits Tax Assessment Regulations* 1992 (Cth) which exempts the provision of car parking facilities for disabled persons. None have been created in relation to commercial parking stations.

Taken together, these factors suggest that Parliament's intention in including the term 'commercial parking station' in sections 39A and 136 of the FBTA was to restrict the imposition of car parking fringe benefits to apply to only those employers who provide parking to their employees within a one kilometre radius of a parking station that provides valuable parking, does not charge penalty or non-market rates, is operated with a primary purpose of providing all day parking and does not operate solely outside the normal range of all-day paid parking facilities, such as those found in the central business districts of major Australian cities.

The parking arrangements listed in paragraph 81 of TR 96/26 attempt to capture factors contained in the Explanatory Memorandum, for example the first and second bullet points (refer to the Appendix where paragraph 81 has been extracted).

However, when taking into account the variety of statements made at the time section 39A was introduced - that the 1992-93 Federal Budget speech made reference to 'valuable car parking facilities', that the Explanatory Memorandum refers to the ordinary definition of 'commercial' but excludes from this parking stations with lower rates because they would not be run for a profit, nor would parking stations that charge short-term shopper parking facilities that charge penalty rates for all-day parking – it remains unclear what is a 'commercial parking station' that can be referred to in determining whether an employer is providing a valuable car parking fringe benefit.

3. The Qantas decision

The Administrative Appeals Tribunal held that the car parking spaces provided on Qantas' own premises at airports around the country to its employees were car parking fringe benefits and therefore subject to fringe benefits tax. The Federal Court upheld the Tribunal's decision and overturned the Tribunal's decision in relation to car parking spaces provided at Canberra Airport. The Court held the provision of these parking

spaces at Canberra Airport to Qantas employees was also a car parking fringe benefit irrespective of the fact that the parking station operator imposed a limitation on the use of the parking spaces (the limitation being the spaces could only be used by airline passengers or 'meeters and greeters' of airline passengers).

The Court's view of the requirement in section 39A(1)(a)(ii) is that "the role of the commercial parking station requirement is as a criterion which indicates whether a car space given to an employee is sufficiently valuable to warrant submitting the car space to the process of assessment" (paragraph 22). This is more fully explained earlier in the judgement at paragraph 12:

*The statute does not operate on the basis that the commercial parking station has to be something which the employee might or could use. This is made clear by s 148(1)(c) of the Assessment Act, which provides that a benefit to the employee within the meaning of the Assessment Act will have been provided, whether or not the benefit is surplus to the needs or wants of that employee. The condition that there be a commercial car parking station within a one kilometre radius of the employer's business premises to constitute a car parking fringe benefit is not a proxy for the value of the benefit to the employee of receiving an actual parking space at the employer's business premises, **but a proxy for determining the taxable value of a benefit provided by the employer to an employee on which tax on the employer is imposed. This is confirmed in the reference in the definition [in section 136] to any of the car parking spaces being available in the ordinary course of business to members of the public for all-day parking on that day on payment of a fee.** [Emphasis added]*

At paragraph 20, the Court noted:

*The relevance of the presence of commercial parking stations within a kilometre of the place of work is not to test whether employees might otherwise be able to find parking in it. **Its relevance is to indicate that the car spaces which have in fact been provided [by the employer] have a value which ought to be assessed under the Assessment Act.** [Emphasis added]*

This view is rounded out further in paragraph 22 by the statement "In considering the criterion in the definition of 'commercial parking station' that car spaces be available in the ordinary course of business to members of the public, it is that metric which should be kept in mind." That is, that a parking station will be a 'commercial parking station' if it is available for use by the public.

The Qantas case makes clear that an employer must look to relevant 'commercial parking stations' (within a one kilometre radius) that are available for use by the public to then determine whether the car parking spaces it provides to its employees have a value that should be assessed under the FBTA.

The question that then arises is: has the definition of 'commercial parking station' as interpreted by the Federal Court, delivered an inconsistent outcome with the original intention of Parliament? The analysis above indicates this is the case. This becomes further distorted when applied to modern day parking offerings.

4. Modern day parking offerings

The emergence of on-line mediums creating availability of parking spaces in residential and office buildings that are not of themselves operated as a commercial car park has also extended the potential quantity of commercial car parking facilities now available to the public.

More and more special purpose car parking facilities are also breaching the car parking threshold, specifically noticeable in outer suburban (non-CBD), low value areas. Examples are hospital parking facilities, school and university parking facilities, shopping centre car parking facilities, hotel parking facilities, conference venue/function centre parking facilities and airport car parking facilities (including park and shuttle services).

A common attribute in relation to these facilities is that there is an abundance of free or very low value parking in the area, with the special purpose car park distinctly over-priced in comparison. Nevertheless, the impact of the existence of the special purpose car park is to bring surrounding employers (within one kilometre of them) into the FBT net because these special purpose car parks are available to the public and are therefore capable of meeting the section 136 definition of a 'commercial parking station'.

5. Administrative solutions not viable

For some time, the ATO has been grappling with trying to amend TR 96/26 to clarify what is meant by 'commercial parking station' in light of modern day car parking offerings and the Qantas case. The Tax Institute considers that the ATO does not have the ability to address the issues raised within its current means to a satisfactory level both for taxpayers and itself. Therefore, we consider that an administrative solution is not a viable outcome in this case. Rather, legislative reform is required.

6. Options for reform

Given the current lack of clarity around what is a 'commercial parking station' for the purpose of the FBTA and the apparent inconsistency with the original intent of Parliament, The Tax Institute considers that this issue needs to be addressed and poses the following options to Treasury to consider:

- a) **Option A** – amend section 39A of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**) so that car parking fringe benefits are only taxable where they are included in a "salary packaging arrangement" as defined in the FBTA with the taxable value being an amount equal to a statutorily defined amount (see below) – this is our preferred option as it clearly defines which car parking fringe benefits should be subject to FBT and does not rely on other factors (such as location or zoning) to determine whether a fringe benefit has been provided and is not reliant on the definition of 'commercial parking station';

- b) **Option B** – amend the FBTAA so that car parking fringe benefits are taxable where the car parking space is provided within a particular zone, namely a high value central business district – this option requires a legislative amendment to affirm that only car parking spaces provided within particular areas (ie ‘zones’) will be subject to FBT;
- c) **Option C** – redefine ‘commercial parking station’ in the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**) excluding special purpose parking stations, as well as parking available through various modern day applications that make car parking facilities available in residential and office buildings that do not operate as commercial car parks – this option would clarify what is a commercial parking station and would ensure that special purpose parking stations such as short-term shopper parking stations and parking stations at places like hospitals are not included in making this determination. However, the definition of a car parking fringe benefit will still rely on this definition;
- d) **Option D** - issue a Legislative Instrument to exclude special purpose parking stations or to include specified zones in which if a parking space is provided, it will be subject to FBT - this option has the same effect as Option C, does not require a legislative amendment and therefore would be easier to execute.

In all cases, we suggest the taxable value of the fringe benefit be tied to a specific statutory amount, for example \$9 or thereabouts. This will eliminate having to select one of the numerous valuation methods contained in Subdivisions B, C and D, thus markedly simplifying the application of the law to car parking fringe benefits.

As noted above, Option A is our preferred option.

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

Yours faithfully,



Tracey Rens
President

APPENDIX

Paragraph 81 TR 96/26

81. We do not regard the following parking arrangements as constituting commercial parking stations:

- *car parking facilities, with a primary purpose other than providing all-day parking, that usually charge penalty rates significantly higher than the rates chargeable for all-day parking at commercial all-day parking facilities (such as parking provided for short term shoppers or hotel guests);*
- *a car park that is not run with a view to making a profit or which charges a nominal fee (usually a significantly lower rate than the current market value), e.g., an all-day parking fee of less than \$2.00 is likely to be a nominal fee;*
- *car parking that is established for a short period to cater for a special function;*
- *car parking spaces leased to a tenant by a property developer as part of an overall lease agreement for business premises;*
- *parking facilities provided by a sporting venue to persons associated with the venue where:*
 - *(a) parking facilities are usually available only after 5 pm to coincide with night events; or*
 - *(b) parking is available only for a specific event, and the event is a daytime event; or*
 - *(c) parking is available to all members of the public only during sporting events; and*
- *provided that, when there is no such event, the parking facilities are not usually available to members of the public;*
- *parking provided by a business for its own employees and those of a nearby business, but to no other person, if there is no commercial car park within 1 km;*
- *in an area without a commercial parking station and where street parking is not permitted, arrangements made by a business for its employees to park during business hours in yards and driveways of surrounding houses;*
- *a kerb side parking meter, from the FBT year commencing 1 April 1994, even where it is possible to purchase all-day parking at the meter in a single transaction.*