THE TAX INSTITUTE

19 December 2019

Mr Ben Murphy
Australian Taxation Office
GPO Box 9990
MELBOURNE VIC 3001

By email: PAGSEO@ato.gov.au

Dear Mr Murphy,

Draft Taxation Ruling TR 2019/D5 Fringe Benefits Tax: car parking benefits
Draft FBT Guide for Employers Chapter 16 – Car parking fringe benefits

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office in relation to the following draft documents:

- *Draft Taxation Ruling TR 2019/D5 Fringe Benefits Tax: car parking benefits* (**Draft Ruling**); and
- *Draft FBT Guide for Employers Chapter 16 – Car parking fringe benefits* (**Draft Guide**).

Summary

The Tax Institute considers that amendments to the fringe benefits tax (**FBT**) law are required with respect to when a 'car parking fringe benefit' arises. However, until such time as the law is amended, we make comments below in relation to the Draft Ruling and Draft Guide to ensure this guidance works as effectively as possible given the current legislation.

Discussion

1. General

The Tax Institute considers that, in light of the decision in *FCT v Qantas Airways Ltd* [2014] FCAFC 168 (**Qantas case**), the issues raised in the Qantas case cannot be resolved by administrative means. We have previously made a submission to Treasury[1] requesting a legislative amendment. In light of the release of the Draft Ruling, we will resubmit our concerns with the legislation to Treasury.

[1] https://www.taxinstitute.com.au/tisubmission/car-parking-fringe-benefits-recommended-legislative-amendments

However, until such time as the law is changed, we make the following comments in relation to the Draft Ruling and Draft Guide which have been issued by the ATO for consultation as we would like to ensure this guidance works as effectively as possible.

2. Draft Ruling

a) *'Commercial' parking 'facility' (Paragraph 15)* – the first bullet point in paragraph 15 includes as a factor to determine whether a car space is provided at a commercial parking facility whether the space is in a purpose-built parking facility in an office or apartment block.

The second bullet point in paragraph 15 includes as a factor to determine whether a car space is provided at a commercial parking facility whether the car spaces are offered to the public by way of advertising or a mobile application in the parking facility.

Ordinarily, car spaces provided in an office or apartment block are made available to occupants of the building, rather than the public at large. We query whether a single parking space made available in the parking facility of an office or apartment block via advertising or a mobile application, or spaces made available in these parking facilities on an ad hoc basis, would of themselves necessarily amount to a 'commercial parking facility', particularly as these parking facilities are not built with the purpose of being made available to the public.

It would also be useful if the ATO could clarify what is meant by 'the public'. Is this the public at large? If a company reserves some parking spaces through a mobile application for exclusive use by its employees, are these spaces still considered available to 'the public'?

b) *'Run to make a profit' (Paragraph 16)* – paragraph 16 contemplates that a parking facility operated by a not-for-profit organisation may be included as a 'commercial' facility if it is run to make a profit, By definition, a not-for-profit does not operate to make a profit. In the case of a not-for-profit such as a university or a hospital, often a parking facility is provided to the organisation's staff and rationed out as there would ordinarily be limited car spaces available. There are also cases where the parking facility of the not-for-profit is operated by a commercial parking station operator.

It would be useful if the Draft Ruling included examples of where the parking facility operated by a not-for-profit qualified as a commercial parking facility and examples of where it did not qualify as a commercial parking facility. It would also be useful if an example was included where the parking facility of the not-for-profit was operated by a commercial parking station operator for profit to compare to the other examples.

c) *Ordinary course of business (Paragraphs 21 to 22)* - Paragraph 21 states that 'a commercial parking station offers parking in the *ordinary course of its business'* [emphasis added]. It goes on to say what constitutes the 'ordinary course' depends on whether the offer of all-day parking is a 'usual or regular part of business activities even if it is not the sole business activity'. It is not clear from the Draft Ruling how the concept of 'ordinary course of business' has been linked to the car parking being available for more than one purpose which is what the examples provided in the Draft Ruling suggest. A car parking facility may be available for more than one purpose, but it is the activity(ies) carried out in the 'ordinary course of its business' that should be the focus.

d) *Lowest representative fee charged (Paragraphs 23 to 28)* – the wording in these paragraphs appears to indicate that a taxpayer is **required** to follow the method set out in the Draft Ruling to determine what is the 'lowest representative fee charged'. In our view, the method set out in the Draft Ruling is onerous in nature and could create unnecessary compliance work for a taxpayer.

   As following such a method is not required by legislation, we suggest that these paragraphs be redrafted to express the method described in the Draft Ruling as a 'suggested method' only which may be adopted by the taxpayer in the event they would like to verify the 'lowest representative fee charged' which they otherwise selected.

e) *Date of effect* - we consider that the Draft Ruling should apply prospectively from the FBT Year starting 1 April 2021 on the basis that a number of employers will have already entered lease agreements for parking facilities to be provided to employees and will not have accounted for the additional FBT liability that will likely arise to them as a result of the application of the Draft Ruling. Further, the wording in paragraph 30 will create considerable uncertainty as to when it can be relied on, particularly regarding what is a penalty rate that is significantly higher than normal commercial rates.

3. Draft Guide

a) Section 16.1.3 Location of work car park

In Example 4b, we suggest that the distance between the carpark and the coffee shop in the airport terminal be two kilometres instead of three kilometres to be in line with the facts in *Virgin Blue Airlines Pty Ltd v FCT* 2010 FCAFC 137.

It would be useful if an example was included in the Draft Guide where an employee spends more than four hours at a client's premises such that it becomes the employee's place of work for the day and the client provides the employee with a parking spot indicating whether there are any fringe benefits tax (**FBT**) implications for the employer in respect of that parking space. We do not consider that a fringe benefit should arise in this circumstance.

b) Section 16.1.4 The definition of 'car'

The Draft Guide should also indicate that where there is a vehicle that does not meet the definition of 'car' , such as a ute with a carrying capacity of more than one tonne, there is still a fringe benefit, although a 'residual fringe benefit' rather than a 'car parking fringe benefit'.

Example 5 – pool cars indicates that a fringe benefit arises to the employee for each day the employee takes the pool car home in the evening. In our view, the FBT outcome in this example goes beyond the intention and wording of the legislation. We suggest the ATO review this outcome.

c) Section 16.1.6 Is there a commercial parking station within a one-kilometre radius of the work car park?

It would be useful if the Draft Guide explained how the one-kilometre radius was measured – whether you measure from the exit of one car park to the entry of another, in what direction, which mode of transport is

used to make the measurement, what happens if the route requires going through private property during hours when that property is closed to public access, etc.

d) Section 16.1.6.1 When does a commercial parking station qualify?

In addition to our comments above, it would be useful if a definition of 'commercial' could be included in the Draft Guide. At Section 16.1.6.2, the commentary suggests the car park needs to be run to make a profit to be considered 'commercial'. It would be useful if the Draft Guide indicated in what circumstances parking facilities operated by shopping centres and not-for-profits were regarded as 'commercial'.

e) Section 16.1.6.2 Fees for all-day parking

The Draft Guide notes that a commercial parking station must charge a fee for all-day parking that indicates the car park is run to make a profit. Therefore, this rate cannot be nil. This rate will most likely be relevant for determining whether a rate can be used as a reference rate for working out the taxable value under the average cost or commercial parking station methods. Taxation Ruling TR 96/26 (now withdrawn) indicated at paragraph 81 that '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' is not a commercial parking station.

Given this has been a contentious issue in the context of audits and rulings, it would be useful if a threshold amount was included in the Draft Ruling indicating that all-day parking fees at or below this amount would indicate that the car park is not being run to make a profit and would therefore not be a commercial parking station.

Examples

We refer to Example 8 which demonstrates the use of car park sharing mobile applications in a couple of scenarios. Where a few parking spaces are being made available by an application in a broker capacity, we consider that the availability of the spaces via the application does not necessarily make the spaces a 'commercial parking facility'.

It would also be useful if the ATO could clarify the outcome if the Fancy Co office complex was not located in the CBD where parking is at a premium. An example which did not make reference to the CBD would be useful given the Draft Ruling would have greater implications for parking facilities provided outside the CBD.

We refer to Paragraph 15 of the Draft Ruling which states that the purpose of a parking facility is to provide parking to the public. In relation to Example, a few unused parking spaces made available via a parking operator who operates the spaces on their website should still not amount to a 'commercial parking station' on the basis that parking spaces in a residential apartment complex are not built with the purpose of being made available to the public. We would ask the ATO to reconsider the view taken in this example.

In relation to Example 9, it would be useful if it was made clear in the example whether the all-day parking rates offered to the public in Car Park 1 or the discounted car parking rates offered to the members of the Performing Arts Centre 'support program' is the comparator rate to determine the value of the free spaces for FBT purposes offered to the members of the 'support program' in Car Park 2.

f) Section 16.2.1 Taxable value – summary of methods

We note that the 'Additional record-keeping requirements' in the table at 16.2.1. refer to 'an advertisement or a screenshot of the operator's website showing fees charged for the day and any conditions for the relevant fee' (against the 'Commercial parking station method' and the 'Average cost method'). The table reads as if all the types of records in the 'Additional record-keeping requirements' are required to be maintained. This should be redrafted to express these numerous records as a suggestion of how to satisfy the record-keeping requirements in the legislation or as a 'best practice'.

g) 16.2.5.3 Market Value method – things to keep in mind

The second bullet point suggests that the taxpayer has to form an independent view whether the valuation is correct or whether the valuer was qualified to make the valuation. In our view, this is not a reasonable requirement to impose on a taxpayer. We do not see why a taxpayer could not rely on the valuation provided by a qualified valuer.

h) Additional example re valuation

We suggest that an example similar to Example 7 from *Taxation Ruling TR 96/26 Car Parking Fringe benefits (now withdrawn)* (at paragraph 48) re Seaside Shire Council be included in the Draft Ruling. This example was useful in that it noted that it is appropriate for a valuer to consider the availability of free public parking spaces in determining the value for FBT purposes of the parking spaces the Council was providing to its employees.

4. Other

Draft Guide includes a number of useful examples though is non-binding in nature as it will be published on the ATO website. In our view, the Draft Ruling would benefit from the inclusion of more examples which would make it a more useful piece of binding guidance to taxpayers.

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,

Tim Neilson
President