



THE TAX INSTITUTE

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Ms Kim Hall
Technical Leadership and Advice
Individual & Intermediaries / Small Business
Australian Taxation Office
GPO Box 9900
BRISBANE QLD 4001

By email: kim.hall@ato.gov.au

Dear Ms Hall,

Draft Taxation Ruling TR 2019/D7 Income Tax: when are deductions allowed for employees' transport expenses?

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to draft *Taxation Ruling TR 2019/D7 Income Tax: when are deductions allowed for employees' transport expenses?* (**Draft Ruling**).

Discussion

We raise a number of points below in relation to the Draft Ruling for the ATO's consideration.

- a) **Meal and accommodation expenses** – we query why meal and accommodation expenses are separated out. We consider that the treatment of these expenses should follow the same principles as the principles that apply for travel expenses. Inconsistencies and illogical outcomes may arise if meal and accommodation expenses are addressed in separate rulings.
- b) **Employees being paid and under employer direction and control while travelling** – we consider there is too much emphasis on the 'factors' of employees being paid and being under the direction and control of their employer while they are undertaking travel. There are other factors that should also be taken into account in determining whether the purpose of the travel is incurred in gaining or producing the employee's assessable income. Whether the employee is being paid and / or whether they are under the direction and control of their employer at the time are just two factors among others that should be considered.

It also does not adequately take into account annual salaried employees who are not paid by the hour. Also, non-salaried employees might travel, for instance, on a Sunday to get to a conference or meeting that starts on a Monday and they won't necessarily be paid for this time. This might not be paid travel time, but would, in our view, be deductible travel.

- c) **Concept of 'regular place of work', Example 3 and later examples** - The Draft Ruling introduces another new concept not previously addressed in case law, being the concept of a 'regular place of work'. While most of the commentary on this aspect is acceptable, in our view, the interpretation adopted in Example 3 is not justifiable and is inconsistent with some of the latter examples.

Raj's employer requires him to work some weekdays at a different office to his usual office. We consider this is still part of his employment duties and is not distinguishable from the commentary at paragraphs 33 onwards or Examples 4, 6 and 7. In our view, Example 3 is an example where too much emphasis is placed on not being specifically paid for travel time (particularly given Raj is likely to be on a salary and not being paid overtime anyway) and insufficient weight is given to the travel being part of his employment and being required by the employer. The direction by Raj's employer requiring Raj to travel to a second location is clearly the 'occasion for the expense', to use the words of paragraph 33. It is difficult to see how Example 3 differs in nature from Example 6, particularly as Example 6 does not have a specified fixed time period for the once per fortnight meeting. The only difference seems to be the need to fly, and as other parts of the Draft Ruling state, distance alone should not be a criterion.

It is also difficult to see how Example 3 differs in any significant way from Examples 4 and 7 or the commentary in paragraph 46. If anything, arguably, Sydney in Example 7, is more of an alternative regular place of work than is Brisbane in Example 3. In our view, both Example 3 and Example 7 are illustrative of situations where the employment requires the employment duties to be carried out in more than one location.

At paragraph 61, the Draft Ruling says that where an employee commences their employment duties (i.e. gets paid from) and whether they are under the 'direction and control' of their employer, are relevant but not determinative in considering whether the cost of the travel is deductible. However, it appears in Example 3 that these concepts have been applied as determinative. This seems contradictory. We suggest that the conclusion in Example 3 be amended accordingly.

- d) **Examples 9 and 10** – we are unsure how two different outcomes arise from these examples where they are substantially similar in nature. The difference in outcomes seems to be from the emphasis being placed on the fact that in Example 9, Brian is paid and under the direction and control of his employer from the time he arrives at Perth airport and therefore the cost of Brian's travel between Perth and Geraldton is deductible. In Example 10, Bill is not being paid nor is he under the direction and control of his employer from the time he arrives at Perth airport and therefore the cost of Bill's travel between Perth to Geraldton is not deductible.

Again, these two factors are being used as determinative, even though paragraph 61 says these two factors are relevant but not determinative. It appears these factors have been drawn from the case of *John Holland Group Pty Ltd v Commissioner of Taxation* [2015] FCAFC 82. However in that case, these factors were just some of the relevant factors, but were not expressed to be determinative factors to the case outcome.

In Example 10, the nature of the work, the remoteness of the location, the style of accommodation, the limited availability of accommodation and the lack in choice in being able to live at the work location should all be taken into account and, in our view, the travel between Perth and Geraldton airports should be otherwise deductible. Being paid for travel time is only one of the factors

considered in the *John Holland* case as to whether travel expenses are deductible or not and should not be determinative on its own. It also should be recognised in the Draft Ruling that the employees in the *John Holland* case were given the option to relocate to Geraldton but chose not to, though other employees who work 'fly-in, fly-out' may not have had that option available to relocate.

e) **Matters not addressed in the Draft Ruling** – we consider the Draft Ruling should address the following matters:

- i) Drive in, drive out travel scenarios;
- ii) Examples involving salaried employees where being paid separately for their travel time is not relevant;
- iii) Travel to multiple places of casual employment.

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,



Peter Godber
President