THE TAX INSTITUTE

1 April 2021

Kim Hall
Technical Leadership and Advice, Individuals and Intermediaries
Australian Taxation Office
Albury NSW 2640

By email: Kim.Hall@ato.gov.au

Cc: Ben Murphy
Public Advice and Guidance
Australian Taxation Office
PAGSEO@ato.gov.au

Dear Kim,

Draft Taxation Ruling — Income tax and fringe benefits tax: employees: accommodation and food and drink expenses, travel allowances, and living-away-from-home allowances

Draft Practical Compliance Guideline — Determining if allowances or benefits provided to an employee relate to travelling on work or living at a location

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to the draft Taxation Ruling TR 2021/D1, *Income tax and fringe benefits tax: employees: accommodation and food and drink expenses, travel allowances, and living-away-from-home allowances* (**Draft Ruling**) and the draft Practical Compliance Guideline PCG 2021/D1, *Determining if allowances or benefits provided to an employee relate to travelling on work or living at a location* (**Draft Guideline**). We appreciate the additional time granted to allow us to lodge this submission.

This submission has been developed in close consultation with our Fringe Benefits Tax (**FBT**) and Employment Taxes Technical Committee in order to obtain a breadth of views on issues that impact our broader membership.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix A** for more about The Tax Institute.

EXECUTIVE SUMMARY

The Tax Institute considers that, generally, the Draft Ruling and Draft Guideline contains reasonable advice and guidance that is helpful to the broader tax community.

By considering the issues identified, the Draft Ruling and Draft Guideline will be better positioned to provide more appropriate guidance and practical insight to taxpayers. This, in turn, would lead to more consistent outcomes by taxpayers correctly applying the rules under section 8-1 of the *Income Tax Assessment Act 1997* (**ITAA 1997**) when they are travelling on work, and the various other applicable provisions that arise in the context of FBT implications, the consideration of travel allowances (as defined in subsection 900-30(3) of the ITAA 1997) and a living-away-from-home allowance (**LAFHA**) benefit (section 30 of the *Fringe Benefits Tax Assessment Act 1986*) and other ATO guidance material.

Our comments and recommendations seek to improve the final versions of the Draft Ruling and Draft Guideline. These are summarised below:

- Improve Example 7 of the Draft Ruling to better reflect practical circumstances and to provide further clarity by way of an additional example;
- Improve Example 5 of the Draft Ruling to remove any potentially inconsistent interpretation of outcomes;
- Insert a further example that addresses the impact of changing circumstances when determining a distinction between a LAFHA benefit and travel allowance when travelling on work;
- Insert additional examples to provide meaningful guidance and consideration of the deductibility (or otherwise deductibility) of accommodation and food or drink expenses in fly-in-fly-out or drive-in-drive-out situations, specifically detailing the ATO's view regarding whether an employee could undertake deductible travel (in line with *John Holland*[1]) but be regarded as living-away-from-home for the duration of a project; and
- Remove the potentially misleading reference at Paragraph 133 in the Draft Ruling that employers could rely on the compliance approach in the Draft Guideline (we understand that the Draft Guideline does not apply to fly-in fly-out and drive-in drive-out arrangements).

DETAILED COMMENTS

Travelling on extended work

A significant practical difficulty faced by employers is the determination of the length of time that will be accepted by the ATO as being a 'relatively short period of time' and following this, whether business travel has a 'sufficiently close connection' to the performance of employment duties and activities through which the employee earns income (refer to paragraphs 15 and 18 of the Draft Ruling).

[1] *John Holland Group Pty Ltd v Commissioner of Taxation* [2015] FCAFC 82

The Tax Institute is of the view that certain examples in the draft Ruling could be improved to better reflect the relevant factors as indicated in paragraph 41 of the Draft Ruling,[2] as well as the ATO's current and historical practices in relation to Private Binding Rulings issued on the relevant topic.[3] We understand that there have been no relevant changes in case law which warrants diversion by the ATO from its previously accepted practice.

Example 7 - extended secondment to Australia

The conclusion provided in Example 7 seems to be inconsistent with well-accepted principles. In the Federal Court's decision in *Roads and Traffic*,[4] it was held that employees who were in the same camp for up to 125 days and who were required by their employer as an incident of their employment to live close to their work site, were on business travel for relatively short periods of time and were not considered to be living-away-from-home. Therefore, we consider that the correct conclusion for the employees in Example 7 is that they have not changed their regular place of work and they have not been away for a sufficient period of time for the relevant costs to become living expenses.

For the employees in Example 7, there is no element of choice about where to live (this is similar to the *Roads and Traffic* case). Additional facts that would be relevant to this choice assessment may include whether, in accordance with the agreed employment terms, the employees are in short term apartment accommodation arranged by the employer and will be required to move to other accommodation as based on various work locations at the discretion of the employer.

Furthermore, we consider that the reliance on living in apartment-style accommodation is over emphasised and does not accurately depict practical realities. Individuals on the relevant types of employer required work arrangements are generally placed in serviced apartments, which is inconsistent with other parts of the Draft Ruling, refer to Example 10, where apartment (or unit) style accommodation is accepted as being short term style accommodation.[5]

Based on the above, we would support the inclusion of an additional example which is similar to Example 7 but with meaningful factual differences to provide further practical insight.

---

2 Paragraph 41 of the Draft Ruling lists the following factors which support the characterisation of an employee as living at a location away from their usual residence:

- A change in the employee's regular place of work;
- The length of the overall period the employee will be away from their usual residence is a relatively long one;
- The nature of the accommodation is such that it becomes their usual residence; and
- Whether the employee is (or can be) accompanied by family or visited by family and friends.

3 For example, PBR Authorisation Number(s) 1051491907817, 1051240582975, 1051240352197 and 1051360768999.

4 *Roads and Traffic, Authority of New South Wales v Commissioner of Taxation* [1993] FCA 445

5 In Example 10, the employee has the choice about where to live whilst travelling on work, distinct from being required by his employer.

Example 5 - living at a location away from usual residence

We suggest that Example 5 in the Draft Ruling be amended so that it is consistent with the above view, as well as being consistent with Example 3 (personal circumstances - travel between two regular workplaces). This could be achieved by changing the period that Yumi is assigned to the Townsville office to a proposed period of 5 months.

Extension of work project

A further example that addresses the impact of changing circumstances when looking at the difference between LAFHA and travel allowance would give practical insight to taxpayers that commonly face this scenario.

Certain job types require employees to travel to project sites for temporary periods of time, often until their part of the project is complete. For example, this is a typical arrangement in the construction industry and with utility companies. Often, the initial intended length of the project, and factors such as the style of accommodation, etc., are commensurate with a 'travelling on work' scenario. However, it is not uncommon for projects to be delayed and for assignments to be extended. In these situations, the extension of the time period is commonly the only relevant factor that changes. As mentioned, this is a current problem that employers are presented with. Employers face various uncertainties such as, whether to continue to treat an allowance as a travel allowance, or whether to start treating it as a LAFHA from a certain point in time. In particular for employers with large numbers of the relevant employees, they require a practical way to interpret the rules across their workforce.

An additional example of a 'travelling on work' scenario that is initially intended to be for example, 80 days, (with appropriate other supporting factors to support this), that is then extended by a further 50 days due to an unexpected need to extend the project, would be very helpful. In our view, if the time extension is the only factor that changes, we would consider the employee to continue to be travelling on work. That is, it would not be logical or fair for the employee to all of a sudden be considered as living-away-from-home or to retrospectively treat them as living-away-from-home from the beginning. Possibly, the original time period and the extended time period could be viewed as two separate trips, or a better approach could be to re-assess the travel type on a prospective basis as and when the facts change. In this case, the future time period has changed, but that period and the other factors together still indicate business travel.

Fly-in-fly-out and drive-in-drive-out arrangements

We are of the view that the draft Ruling does not provide any meaningful guidance on the deductibility (or otherwise deductibility) of accommodation and food or drink expenses in fly-in-fly-out or drive-in drive-out situations, other than a sole LAFHA example (refer to Example 12).

Given the Full Federal Court's unanimous decision in *John Holland,* which we understand was the key instigator behind the ATO's review of existing travel and living-away-from-home guidance overall, we consider it necessary for more guidance and support for employers to clarify the impact of *John Holland*, including a range of examples that clarify when expenses are deductible versus personal living expenses. The provision of further examples would help clarify the ATO's position on fly-in fly-out or drive-in drive-out situations, particularly with respect to instances of travel allowances and deductibility, turning on alternate facts such as length of contract, absence of employee choice (on a range of matters such as accommodation type/location, absence of alternate food options, etc.) and clarifying to what extent such facts are relevant and appropriate weighting.

The ATO concludes in Example 12 that the employee is living away from home, without commenting on the travel circumstances. Is it the ATO's view that this decision is independent of, and can exist concurrently with, a deductible travel scenario like in *John Holland* (such that the employee is undertaking deductible travel to a destination, but accommodation, food and drink expenses incurred there are non-deductible personal living expenses)? Alternatively, is the view that transport expenses in an Example 12 type scenario are also non-deductible? We suggest that both outcomes are inconsistent with principles outlined in the *John Holland* case. However, if the ATO believes this to be the appropriate outcome, this requires clarification and clear practical examples to illustrate the view that the outcomes for transport and food/accommodation expenses are different.

This issue of appropriate weighting is a genuine practical challenge for taxpayers. Based on feedback from our FBT & Employment Taxes Technical Committee, it is also a source of inconsistency when seeking guidance from the ATO, as ATO staff can tend to focus on the existence of absence of specific isolated facts, rather than the overall nature of the arrangement in a direction and control context. This contributes to inconsistency with key precedents such as *John Holland*. Such guidance within the draft Ruling is equally as important for facilitating consistency in the ATO's handling of Private Rulings and similar guidance, as it is for employers in a self-assessment context.

We also note that the reference at paragraph 133 in the Draft Ruling that employers could rely on the compliance approach in the Draft Guideline is potentially misleading and could be misconstrued. The Draft Guideline excludes fly-in fly-out and drive-in drive-out arrangements, as extracted below:

> *"7. All employers who provide benefits referred to in paragraph 3 of this Guideline to their employees (who do not work on a fly-in fly-out or drive-in drive-out basis) may rely on this Guideline."*

* * * * * *

If you would like to discuss any of the above, please contact Michelle Ma, Associate Tax Counsel, on (02) 8223 0084.

Yours faithfully,

Peter Godber

President

APPENDIX A

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.