TR 97/D15 - Income tax and fringe benefits tax: benefits received under frequent flyer and other similar consumer loyalty programs

This document has been finalised by TR 1999/6.

Draft Taxation Ruling

Income tax and fringe benefits tax: benefits received under frequent flyer and other similar consumer loyalty programs

other Rulings on this topic

TR 97/11

Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office.

DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings which represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.

What this Ruling is about

1. The purpose of this Ruling is to set out the tax implications of benefits received from consumer loyalty programs following the Federal Court's decision in *Payne v. FC of T* 96 ATC 4407; (1996) 32 ATR 516 (*Payne*). This decision indicated that the Commissioner's interpretation of the law on the assessability of benefits received under consumer loyalty programs required a review.

2. For the purposes of this Ruling, a 'consumer loyalty program' is a marketing tool operated by a supplier of goods or services, or a group of such suppliers, to encourage customers to be loyal to the supplier(s). The standard features of these programs are:

   (a) the customer is dealing with the supplier in a personal capacity, that is in accordance with the normal arm's length commercial relationship that exists between consumers and suppliers;

   (b) membership is restricted to natural persons;

   (c) membership of the program is usually by application which may require an application fee;

   (d) points are received with each purchase of goods or services;

   (e) members and non-members both pay the same amount for the goods or services purchased; and

   (f) points are redeemable for goods or services.

3. The taxation implications considered by this Ruling are:

(a) whether there is a liability for fringe benefits tax ('FBT') under Division 5 or Division 12 of the *Fringe Benefits Tax Assessment Act 1986* ('FBTAA') for employers in respect of benefits received or joining fees paid;

(b) whether a benefit to a recipient is assessable under section 21A or paragraph 26(e) of the *Income Tax Assessment Act 1936* ('the 1936 Act') or section 6-5 of the *Income Tax Assessment Act 1997* ('the Act'); and

(c) the deductibility of joining fees under section 8-1 of the Act.

Class of person/arrangement

4. This Ruling applies to:

(a) an employer who pays for an employee's membership to a consumer loyalty program;

(b) an employer who permits an employee to use benefits derived from employer-paid expenditure for private purposes;

(c) an employee who receives benefits from employer-paid expenditure; and

(d) an individual who is a member of consumer loyalty programs.

5. In this Ruling, 'employer' extends to associates of an employer, and 'employee' extends to relatives and associates of an employee.

Ruling

Benefits received under the consumer loyalty program

Employer

6. FBT does not apply to benefits received where the consumer loyalty program either:

(a) does not allow employers to be members, and thereby be in a position to be in receipt of benefits that can be passed onto employees; or

(b) does not allow employers to be a party to the contract between the member and the provider, and thereby fall within the definition of 'arrangement' as defined in subsection 136(1) of the FBTAA.

Employees and other individuals

7. The benefits that arise are not assessable as the benefits arise as a result of a personal (that is, non-employment/non-business) contractual relationship.

Joining fees

Employer

8. Joining fees paid by an employer are deductible where they are paid in connection with the employer's business. Section 58P (minor benefit exemption) of the FBTAA applies to exempt current joining fees from FBT where they are a one-off fee and fall below the $100 threshold.

9. Membership of the consumer loyalty program may result from aircraft lounge membership. This benefit is exempt from FBT under section 58Y of the FBTAA.

Employees and other individuals

10. Joining fees paid by an individual are not an allowable deduction as the expense does not relate to the earning of assessable income and is private.

Date of effect

11. This Ruling applies to years commencing both before and after its date of issue. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Previous Rulings

12. The four previous Taxation Rulings on this topic, TR 93/2, TR 94/15, TD 95/61 and TD 96/15, will be withdrawn when this Ruling issues in final form.

Explanations

13. In *Payne*, Mrs Payne joined the consumer loyalty program without her employer's knowledge. Mrs Payne was unable to cash in the benefit or transfer it to anyone else, but she was able to have the reward (airline tickets) made out in the name of family members. The points that Mrs Payne accrued from employer-paid travel (and some privately-paid travel) were used to acquire airline tickets in the name of her parents for travel from England to visit her. The Commissioner assessed Mrs Payne on the value of the airline tickets that accrued from employer-paid travel. The Federal Court held that Mrs Payne received the benefit as a result of the personal contract she had with the airline and was not assessable in respect of the benefit.

Benefits

14. The Commissioner accepts that benefits accrued from membership of consumer loyalty programs are distinct and separate from any benefit resulting from the payment by the employer of membership fees.

Employers

15. Current consumer loyalty programs operating in Australia do not allow for an employer to be:

- a member of a program;
- party to a contract formed between the employee and the program provider; or
- able to access the points accrued by an employee.

These restrictions result in benefits received by employees from employer-paid expenditure not being subject to FBT.

Employees and other individuals

16. For a benefit to be assessable under section 6-5 of the Act, the amount must be received or receivable as money, in the form of money's worth, or in a form which can be employed in the acquisition of some other right or commodity (the convertibility test: see *FC of T v. Cooke and Sherden* 80 ATC 4140 at 4148-4150; (1980) 10 ATR 696 at 703-705). That is, the benefit must be able to be turned into a pecuniary gain.

17. Section 21A and paragraph 26(e) of the 1936 Act are not constrained by the convertibility test (see *Cooke and Sherden* at ATC

4147; ATR 703). Therefore, the income of a person who works for a benefit may be assessable even though the benefit cannot be turned into a pecuniary gain.

18. In determining if there is a benefit being derived in the context of paragraph 26(e) of the 1936 Act (i.e., employment or services), the following three criteria identified by the High Court in *Constable v. FC of T* (1952) 86 CLR 402 at 415 must be present:

(a) *there must be a benefit*.

This was not addressed in *Payne* as it was held the case could 'be disposed of on other grounds' (at ATC 4416; ATR 526). In *Mommersteeg et al v. The Queen* 96 DTC 1011, the Canadian court held that the points resulted in a benefit.

(b) *the benefit must be 'allowed, given or granted'*.

This relates to the issue of timing. In *Payne*, it was held that, at the time of redemption of the points, no benefit was received; there was merely 'the paying out of a contractual entitlement' (at ATC 4415; ATR 525). Cases including *Constable* (supra); *Abbott v. Philbin (HM Inspector of Taxes)* (1960) 39 TC 82; *Donaldson v. FC of T* 74 ATC 4192; (1974) 4 ATR 530; and *FC of T v. McArdle* 88 ATC 4051; (1988) 19 ATR 1901 indicate that the issue of timing is critical.

(c) *the benefit has to be allowed, granted or given in respect of 'employment or services rendered'*.

In *Payne*, the Federal Court considered this at length and decided that if there was a benefit given, it was given as a result of the personal contract between the taxpayer and the consumer loyalty program provider notwithstanding that the benefit arose as a 'consequence' of the employment.

19. In determining if a benefit was derived under section 21A of the 1936 Act (i.e., a non-cash business benefit), the following three criteria must be present:

(a) *there has to be a benefit which has the characteristics of income*.

In *Payne*, it was held that this characteristic was absent.

(b) *the taxpayer must be in business*.

Paragraph 13 of Taxation Ruling TR 97/11 lists eight indicators that will assist in addressing this criterion. Notwithstanding that that Ruling refers to the business of

primary production, the indicators apply to business generally.

(c) *there must be a business relationship between the taxpayer and the consumer loyalty program provider beyond that existing between other consumers and the consumer loyalty program provider*.

Based on the standard features of consumer loyalty programs, it would have to be concluded that benefits arise from a personal contractual relationship.

20. Taxpayers, who become entitled to benefits under consumer loyalty programs which exhibit the standard features in paragraph 2, are not in receipt of an assessable benefit and do not have to pay tax on that benefit.

Cross references of provisions

21. Sections 6-5 and 8-1 of the Act, to which this Ruling refers, express the same ideas as subsections 25(1) and 51(1), respectively, of the 1936 Act.

Your comments

22. If you wish to comment on this Draft Ruling, please send your comments by: 10 October 1997

to:

Contact Officer: Michael Majoor

Telephone: (02) 9354 3158

Facsimile: (02) 9354 3988

Address: Mr Michael Majoor
INB Tax Technical Network
Australian Taxation Office
PO Box 9990
PARRAMATTA NSW 2123.

Commissioner of Taxation

27 August 1997

ISSN 1039 - 0731

ATO references
NO 97/1717-0
BO 97/5833-0

Not previously released to the public in draft form

Price $0.70

FOI index detail
reference number

subject references
- expense payment fringe benefits
- frequent flyer benefits
- fringe benefits
- income
- non cash benefits

legislative references
- FBTAA Div 5
- FBTAA Div 12
- FBTAA 58P
- FBTAA 58Y
- FBTAA 136(1)

- ITAA36 21A
- ITAA36 25(1)
- ITAA36 26(e)
- ITAA36 51(1)

- ITAA97 6-5
- ITAA97 8-1

case references
- Abbott v. Philbin (HM Inspector of Taxes (1960) 39 TC 82
- Constable v. FC of T (1952) 86 CLR 402
- FC of T v. Cooke and Sherden 80 ATC 4140; (1980) 10 ATR 696
- Donaldson v. FC of T 74 ATC 4192; (1974) 4 ATR 530
- FC of T v. McArdle 88 ATC 4051; (1988) 19 ATR 1901
- Mommersteeg et al v. The Queen 96 DTC 1011
- Payne v. FC of T 96 ATC 4407; (1996) 32 ATR 516