CR 2014/94 - Fringe benefits tax: employers of employees who take out a health insurance policy under a Health Link Consultants Employee Health Plan

Class Ruling

Fringe benefits tax: employers of employees who take out a health insurance policy under a Health Link Consultants Employee Health Plan

Contents Para

This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 20 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)
- section 45 of the FBTAA
- section 58P of the FBTAA, and
- subsection 136(1) of the FBTAA.

All legislative references in this Ruling are to the FBTAA unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies are employers of employees who take out a health insurance policy under a Health Link Consultants Employee Health Plan (Employee Health Plan) which has the characteristics set out in paragraphs 17 to 26 of this Ruling.

4. Within this Ruling the class of entities are referred to as 'participating employers'.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. The class of entities defined in this Ruling may rely on its contents provided the scheme is carried out in accordance with the scheme described in paragraphs 11 to 26 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

Date of effect

8. This Ruling applies from 1 April 2012. However, this Ruling will 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 this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Previous Rulings

9. Class Ruling CR 2010/66 *Fringe benefits tax: employers who participate in the Local Government Employees Health Plan* (LGE Health Plan) set out the Commissioner's opinion on the taxation consequences for the Municipal Association of Victoria, its member councils and associated bodies who have an employee that takes out a health insurance policy under the LGE Health Plan.

10. The LGE Health Plan is an Employee Health Plan that is covered by this Ruling. Therefore, CR 2010/66 is withdrawn from the date of issue of this Ruling.

Scheme

11. The following description of the scheme is based on information provided by the applicant including the Class Ruling application dated 10 August 2012.

12. Health Link Consultants (Health Link) is the trading name of the health insurance broking business carried on by ChooseWell Health Link Pty Limited (as trustee of the ChooseWell Health Link Unit Trust). Health Link's business activities include the development of health insurance plans in association with a number of health insurance providers.

13. Health Link in consultation with a health insurer has developed several Employee Health Plans to enable employees of the participating employers to obtain competitively priced health insurance.

14. An Employee Health Plan consists of a number of legal relationships. These include a legal relationship between Health Link and the health insurer and a legal relationship between the employee and the health insurer.

15. Each of the Employee Health Plans requires the establishment and maintenance of a fund called the Excess Refund Pool (ERP) by the ERP Operator. Generally, the ERP Operator will be an entity that has entered into a legal relationship with Health Link. However, Health Link may establish an Employee Health Plan for which it will be the ERP Operator.

16. There are some differences in the detail and structure of the various Employee Health Plans where the ERP Operator is another entity. For example:

- some plans are restricted to employees of the ERP Operator, whereas the ERP Operator in other plans is a representative organisation that enables employees of a number of different employers to take out a health insurance policy under the relevant plan
- some plans require the participating employers to pay a start-up deposit which is refundable once the ERP becomes self-funding
- some plans require the claim for a reimbursement from the ERP to be provided to the participating employer who forwards it to the ERP Operator, whereas in other plans the claim is made directly with the ERP Operator.

These differences will not affect the application of this Ruling to the Employee Health Plans which have the following characteristics:

17. Under the legal relationship between the health insurer and Health Link:

- the health insurer agrees to offer health insurance policies to employees of the participating employers under the terms and conditions that apply to the relevant Employee Health Plan and to pay Health Link a percentage of the total amount of health insurance premiums paid under the relevant Employee Health Plan. This amount includes any private health insurance rebates provided by the Commonwealth Government in respect of the relevant health policies
- Health Link agrees to facilitate the Employee Health Plans by:
  - entering into arrangements with suitable ERP operators for the establishment of ERPs
  - promoting the Employee Health Plans
  - financing the ERP by paying an administration allowance into the ERP, and
  - if necessary, establishing an ERP to enable the reimbursement of a hospital excess paid by an eligible employee or eligible family member who is a member of an Employee Health Plan for which Health Link is the ERP Operator.

18. Under the legal relationship between Health Link and the ERP Operator, Health Link agrees to pay an administration allowance to the ERP Operator on the basis that it will be accumulated in the ERP and applied in accordance with the Conduct Rules to reimburse the hospital excess payments paid by eligible employees and eligible family members.

19. Membership of each individual Employee Health Plan is limited to employees of the relevant participating employer(s). Depending upon the particular Employee Health Plan, this may be employees of the ERP Operator, or it may be employees of a number of different employers.

20. An employee of a participating employer who takes out a health insurance policy with the health insurer under the relevant Employee Health Plan will be an 'eligible employee'. Each member of an employee's family who is covered by the health insurance policy taken out by an employee will be an 'eligible family member'.

21. An employee who takes out a health insurance policy under an Employee Health Plan will enter into a low-premium-high-hospital excess health insurance policy with the health insurer. The premium charged for this policy will generally be less than the premium charged for a policy without a hospital excess.

22. An eligible employee or eligible family member who is hospitalised is liable to pay the hospital excess to the relevant public hospital, private hospital or registered day hospital facility. However, under the terms and conditions of the relevant Employee Health Plan, he or she is entitled to receive a reimbursement of the hospital excess from the ERP. The amount of the reimbursement will be determined by the Conduct Rules that apply to the relevant Employee Health Plan. For example, the Conduct Rules may limit the amount of the reimbursement, the number of times a reimbursement will be paid and the circumstances in which a reimbursement will be paid (for example, the Conduct Rules may set waiting periods that apply to the treatment).

23. The entitlement to claim the reimbursement of a hospital excess ceases when an eligible employee ceases to be employed by a participating employer. However, the employee and family members can continue to hold membership with the health insurer under an alternative health insurance plan offered by the health insurer.

24. In the event the ERP is underfunded, the ERP Operator may scale back the amount reimbursed. If the long term viability of the ERP is in question, the ERP Operator may dissolve the ERP and the balance of the ERP will be dealt with as required under the Conduct Rules.

25. The health insurer is independent of the ERP Operator, the participating employers and Health Link. It is acting at arm's length in connection with the provision of health insurance under the Employee Health Plans.

26. Neither the health insurer, nor Health Link are an associate of the employer.

Ruling

27. The provision of the right to have certain medical expenses paid by the health insurer to an eligible employee or eligible family member will be a benefit as defined in subsection 136(1). However, this benefit will not be a fringe benefit as defined in subsection 136(1) as it is not provided in respect of the employment of an employee.

28. The provision of the right to receive a reimbursement of a hospital excess paid by an eligible employee or eligible family member will be a residual benefit as defined in section 45.

29. The residual benefit that arises from the provision of the right to receive a reimbursement of a hospital excess incurred by an eligible employee or eligible family member will be an exempt benefit under section 58P where the administration allowance that is paid by Health Link to the ERP Operator in a year of tax, in respect of the employee is less than the amount specified in paragraph 58P(1)(e).

30. A residual fringe benefit will arise where the administration allowance paid by Health Link to the ERP Operator in a year of tax, in respect of the employee is equal to, or exceeds the amount specified in paragraph 58P(1)(e).

31. The payment by the health insurer of a medical expense incurred by an eligible employee or eligible family member is a benefit as defined in paragraph 20(a). However, this benefit will not be a fringe benefit as defined in subsection 136(1) as it is not provided in respect of the employment of the employee.

32. The reimbursement of a hospital excess paid by an eligible employee or eligible family member is a benefit as defined in paragraph 20(b). However, this benefit will not be a fringe benefit as defined in subsection 136(1) as it is not provided in respect of the employment of the employee.

Commissioner of Taxation
26 November 2014

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Does the scheme involve the provision of a benefit to an employee?

33. Subsection 136(1) contains an inclusive definition of 'benefit' which states:

> ***benefit*** includes any right (including a right in relation to, and an interest in, real or personal property), privilege, service or facility and, without limiting the generality of the foregoing, includes a right, benefit, privilege, service or facility that is, or is to be, provided under:
>
> (a) an arrangement for or in relation to:
>
> (i) the performance of work (including work of a professional nature), whether with or without the provision of property;
>
> (ii) the provision of, or of the use of facilities for, entertainment, recreation or instruction; or
>
> (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
>
> (b) a contract of insurance; or
>
> (c) an arrangement for or in relation to the lending of money.

34. An employee of a participating employer who takes out a health insurance policy with the health insurer under an Employee Health Plan will receive:

- a right to have the health insurer pay certain medical expenses incurred by an employee or eligible family member, and
- a right to receive a reimbursement from the ERP Operator of a hospital excess incurred by an employee or eligible family member who is hospitalised.

As these rights are provided under a contract of insurance, they are a benefit under paragraph (b) of the fringe benefit definition in subsection 136(1).

35. In addition to the general definition of benefit contained within subsection 136(1), Subdivision A of Divisions 2 to 11 of Part III (inclusive) deem that a benefit will arise in certain specified circumstances. Section 20 which is in Subdivision A of Division 5 states:

> Where a person (in this section referred to as the 'provider''):
>
> (a) makes a payment in discharge, in whole or in part, of an obligation of another person (in this section referred to as the 'recipient'') to pay an amount to a third person in respect of expenditure incurred by the recipient; or

(b) reimburses another person (in this section also referred to as the 'recipient''), in whole or in part, in respect of an amount of expenditure incurred by the recipient;

the making of the payment referred to in paragraph (a), or the reimbursement referred to in paragraph (b), shall be taken to constitute the provision of a benefit by the provider to the recipient.

36. In applying this section, a payment by the health insurer of a medical expense incurred by an eligible employee or eligible family member will be a benefit under paragraph 20(a) and a reimbursement by the ERP Operator of a hospital excess will be a benefit under paragraph 20(b).

37. Therefore, an eligible employee or eligible family member may receive four benefits under an Employee Health Plan. They are:

- the right to have certain medical expenses paid by the health insurer
- the right to receive a reimbursement of a hospital excess from the ERP Operator
- the payment by the health insurer of a medical expense incurred by an eligible employee or eligible family member, and
- a reimbursement from the ERP Operator of a hospital excess paid by an eligible employee or eligible family member.

Will the benefit that arises from the provision of the right to have certain medical expenses paid by the health insurer be a fringe benefit?

38. In general terms, the definition of 'fringe benefit' in subsection 136(1) provides that a benefit will be a fringe benefit if the following conditions are met:

(a) the benefit is provided to an employee or an associate of an employee

(b) the benefit is provided by

- the employer
- an associate of the employer
- another person under an arrangement with the employer or an associate of the employer
- another person in circumstances that come within paragraph (ea) of the fringe benefit definition,

(c) the benefit is provided in respect of the employment of the employee, and

(d) the benefit does not come within paragraphs (f) to (s) of the fringe benefit definition. For the purpose of this Ruling the relevant paragraph is paragraph (g) which provides that a benefit that is an exempt benefit will not be a fringe benefit.

Will the right to have the health insurer pay certain medical expenses be provided to an employee or an associate of an employee?

39. The right will be provided to an employee or an associate of an employee as an eligible employee is an employee and an eligible family member is an associate of an employee.

Will the right to have the health insurer pay certain medical expenses be provided by one of the four prescribed providers?

40. For a benefit to be a fringe benefit, the benefit must be provided by one of the providers listed in subparagraph 38(b) of this Ruling.

41. 'Provider' is defined in subsection 136(1) to mean 'the person who provides the benefit'. This is the health insurer as the right is provided under the terms and conditions of the health insurance contract entered into between the employee and the health insurer.

42. The health insurer is not the employer. Nor is it an associate of the employer. Therefore, for the provision of the right to be a fringe benefit it must either be provided under an arrangement that comes within paragraph (e) of the fringe benefit definition, or in circumstances that come within paragraph (ea) of the fringe benefit definition.

43. Paragraph (e) of the fringe benefit definition applies where the benefit is provided under an arrangement between the person that provides the benefit (an arranger) and the employer or an associate of the employer. This paragraph will not apply as the right is provided under an arrangement between the employee and the health insurer (the arranger).

44. Paragraph (ea) of the fringe benefit definition applies if the employer (or an associate):

- participates in, or facilitates the provision or receipt of a benefit, or
- participates in, facilitates or promotes a scheme or plan involving the provision of a benefit,

and knows, or ought reasonably to know that they are doing so.

45. These requirements are met in relation to the right to have the health insurer pay certain medical expenses as a participating employer knowingly participates in the scheme by becoming a participating employer and facilitating the promotion of the Employee Health Plan to their employees. These activities are sufficient for the scheme to come within paragraph (ea) of the fringe benefit definition.

46. Further, some participating employers have an additional participation in the scheme as a result of:

- entering into an arrangement with Health Link to become an ERP Operator, or
- paying a refundable start-up deposit, or
- processing the claims for reimbursement from the ERP Operator.

47. Therefore, the right to have the health insurer pay certain medical expenses will be provided by one of the four prescribed providers.

Will the right to have the health insurer pay certain medical expenses be provided in respect of the employment of the employee?

48. The term 'in respect of' is defined in subsection 136(1) to include 'by reason of, by virtue of, or for or in relation directly or indirectly to, that employment'.

49. The meaning of this term was considered by the Full Federal Court in *J & G Knowles & Associates Pty Ltd v. FCT* [2000] AATA 846; 2000 ATC 4151; (2000) 44 ATR 22 (*Knowles*). In a joint decision the Court at ATC 4158 said:

> … what must be established is whether there is a *sufficient* or *material*, rather than *a*, causal connection or relationship between the benefit and the employment.
>
> …
>
> 28. While the width of the definition of 'fringe benefit'' was designed to capture benefits that, in truth, were other than remuneration, the stated purpose suggests that asking whether the benefit is a product or incident of the employment will be helpful. If it is not then the benefit is likely to be extraneous to the employment and will not bear FBT, notwithstanding that the employment might have been a causal factor in the provision of the benefit.

50. In applying this decision to the provision of the right to have the health insurer pay certain medical expenses, the provision of the right depends upon the employee taking out a health insurance policy with the health insurer and paying the relevant premium. This is no different to other members of the health insurer.

51. Therefore, the provision of the right to have the health insurer pay certain medical expenses will not have the necessary sufficient or material connection to the employment of the employee and will not be provided in respect of the employment of the employee.

52. As the right to have the health insurer pay certain medical expenses is not provided in respect of the employment of the employee, the benefit will not be a fringe benefit.

Will the right to receive a reimbursement of a hospital excess from the ERP Operator be a fringe benefit?

53. As set out in paragraph 37 of this Ruling, the right to receive a reimbursement of a hospital excess will be a benefit. This benefit will be a fringe benefit if the conditions set out in paragraph 38 of this Ruling are met.

Will the right to receive a reimbursement of a hospital excess from the ERP Operator be provided to an employee or an associate of an employee?

54. The right will be provided to an employee or an associate of an employee as an eligible employee is an employee and an eligible family member is an associate of an employee.

Will the right to receive a reimbursement of a hospital excess from the ERP Operator be provided by one of the four prescribed providers?

55. As discussed at paragraph 40 of this Ruling, a benefit will not be a fringe benefit unless it is provided by one of the providers listed in subparagraph 38(b) of this Ruling.

56. The right to receive a reimbursement of a hospital excess arises from the interaction of the legal relationships that exist between Health Link, the health insurer, the ERP Operator and the employee.

57. As set out in paragraph 41 of this Ruling, 'provider' is defined in subsection 136(1) to mean 'the person who provides the benefit'. The provider of the right to receive a reimbursement of a hospital excess is Health Link which arranges for the ERP to be established, finances the ERP through the payment of an administration allowance to the ERP Operator and determines the Conduct Rules.

58. Health Link is not the employer. Nor is it an associate of the employer. Therefore, for the provision of the right to be a fringe benefit it must either be provided under an arrangement that comes within paragraph (e) of the fringe benefit definition, or in circumstances that come within paragraph (ea) of the fringe benefit definition.

59. Paragraph (e) of the fringe benefit definition applies where the benefit is provided under an arrangement between the person that provides the benefit and the employer or an associate of the employer. This paragraph will apply where the ERP Operator is another entity if the right is provided to an employee of the ERP Operator or the ERP Operator is an associate of the employer. Paragraph (e) will also apply where the ERP is operated by Health Link if Health Link has entered into an arrangement with either the employer or an associate of the employer. However, paragraph (e) will not apply in relation to the right provided to employees of the other participating employers.

60. Paragraph (ea) of the fringe benefit definition applies if the employer (or an associate):

- participates in, or facilitates the provision or receipt of a benefit, or
- participates in, facilitates or promotes a scheme or plan involving the provision of a benefit;

and knows, or ought reasonably to know that they are doing so.

61. These requirements are met where the right to have the ERP Operator reimburse a hospital excess paid by an eligible employee or eligible family member does not come within paragraph (e) of the fringe benefit definition as a participating employer knowingly participates in a scheme by becoming a participating employer and facilitating the promotion of the Employee Health Plan to their employees. These activities are sufficient for the scheme to come within paragraph (ea) of the fringe benefit definition.

62. Further, some participating employers have an additional participation in the scheme as a result of:

- paying a refundable start-up deposit, or
- processing the claims for reimbursement from the ERP Operator.

63. Therefore, the right will be provided by one of the four prescribed providers as the provision of the right will come within either paragraph (e) or paragraph (ea) of the fringe benefit definition.

Will the right to receive a reimbursement of a hospital excess from the ERP Operator be provided in respect of the employment of the employee?

64. As discussed at paragraph 49 of this Ruling, the Full Federal Court in *Knowles* in considering the term 'in respect of' said that what must be established is whether there is a sufficient or material, rather than a causal connection or relationship between the benefit and the employment.

65. To be eligible to receive the right to a reimbursement of a hospital excess under the terms and conditions of an Employee Health Plan, an individual must have taken out a health insurance policy with the health insurer under an Employee Health Plan. This requires the individual to be an employee of a participating employer as membership of an Employee Health Plan is restricted to employees of a participating employer. The right is not provided to other members of the health insurer who take out a low-premium-high-hospital excess policy with the health insurer. This provides the necessary sufficient or material connection between the provision of the right and the employment of the employee.

66. Therefore, as there is a sufficient or material connection between the provision of the right and the employment of the employee, the right to receive a reimbursement will be provided in respect of the employee's employment.

Will the provision of the right to receive a reimbursement of a hospital excess from the ERP Operator be an exempt benefit?

67. As set out in subparagraph 38(d) of this Ruling, a benefit that is an exempt benefit will not be a fringe benefit.

68. Section 58P provides that a benefit will be an exempt benefit if:

(i) the benefit is not one of the benefits specifically excluded from section 58P;

(ii) the notional taxable value of the minor benefit in the year of tax is less than the amount specified in paragraph 58P(1)(e), currently $300; and

(iii) it would be concluded that it would be unreasonable, having regard to the five criteria in paragraph 58P(1)(f), to treat the minor benefit as a fringe benefit.

69. Guidance for considering these conditions is provided in Taxation Ruling TR 2007/12 *Fringe benefits tax: minor benefits*.

Is the provision of the right one of the benefits specifically excluded from section 58P?

70. Paragraphs 11 and 12 of TR 2007/12 summarise the benefits specifically excluded from paragraph 58P as follows:

> 11. First, there are certain benefits that are specifically excluded from section 58P. These are:
>
> - airline transport benefits;
> - expense payment benefits where, if the benefit was an expense payment fringe benefit, it would be an in-house fringe benefit;
> - property benefits where, if the benefit was a property fringe benefit, it would be an in-house fringe benefit; and
> - residual benefits where, if the benefit was a residual fringe benefit, it would be an in-house fringe benefit.
>
> 12. Secondly, where:
>
> - tax-exempt body entertainment is provided, and
> - the provider incurs non-deductible exempt entertainment expenditure that is wholly or partly in respect of the provision of entertainment to an employee or an associate of the employee,
>
> such benefits are excluded from consideration for exemption under section 58P, except in two limited circumstances.

71. In considering these dot points, the provision of the right will not be an airline transport benefit as the right does not involve the provision of transport in a passenger aircraft.

72. The definition of an expense payment benefit in section 20 requires either a payment that discharges in whole or in part an obligation of another person to pay an amount to a third person, or a reimbursement of expenditure incurred by the recipient. As provision of the right does not involve a payment to another person, or a reimbursement, the provision of the right will not be an expense payment benefit.

73. The definition of 'property benefit' in subsection 136(1) provides that a benefit will be a property benefit if it comes within section 40 and is not a benefit by virtue of a provision of Subdivision A of Divisions 2 to 10 of Part III.

74. A benefit will come within section 40 if the provider provides property to another person. 'Property' is defined in subsection 136(1) to mean:

(a) intangible property; and

(b) tangible property.

75. 'Tangible property' is defined in subsection 136(1) to mean:

Goods and includes:

(a) animals, including fish; and

(b) gas and electricity.

76. As the right is not a good, it will not be tangible property.

77. 'Intangible property' is defined in subsection 136(1) to mean:

(a) real property;

(b) a chose in action; and

(c) any other kind of property other than tangible property;

but does not include:

(d) a right arising under a contract of insurance; or

(e) a lease or licence in respect of real property or tangible property.

78. As the right arises from a contract of insurance it will be excluded from being intangible property by paragraph (d) of the intangible property definition. Therefore, the provision of the right will not be a property benefit as it does not involve the provision of either intangible property or tangible property.

79. Further, the exclusion in respect of tax-exempt body benefits is also not applicable as Health Link in providing the right to receive a reimbursement does not incur non-deductible exempt entertainment expenditure. Therefore, the provision of the right will not be a tax-exempt body entertainment benefit.

80. The definition of 'residual benefit' provides that a benefit that is not a benefit by virtue of a provision of Subdivision A of Divisions 2 to 11 of Part III will be a residual benefit. As discussed above, the provision of the right to receive a reimbursement will not come within Division 5 (expense payment benefits). Nor will it come within

Division 11 (property benefits). It also does not come within Divisions 2 to 4, or Divisions 6 to 10. Therefore, the benefit will be a residual benefit.

81. The definition of 'in-house residual fringe benefit' in subsection 136(1) contains different requirements depending upon whether the provider of the benefit is the employer or an associate of the employer.

82. As discussed at paragraph 57 of this Ruling, Health Link is the provider of the right to receive a reimbursement of the hospital excess. As Health Link is neither the employer, nor an associate of the employer, the relevant paragraph of the 'in-house residual fringe benefit' definition is paragraph (b).

83. Paragraph (b) of the definition of 'in-house residual benefit' states:

> (b) where all of the following conditions are satisfied:
>
> (i) the provider is not the employer or an associate of the employer;
>
> (ii) the provider purchased the benefit from the employer or an associate of the employer (which employer or associate is in this definition called the seller);
>
> (iii) at or about the comparison time, both the provider and the seller carried on a business that consisted of or included the provision of identical or similar property principally to outsiders;
>
> but does not include a benefit provided under a contract of investment insurance.

84. Subparagraph (b)(ii) requires the provider to purchase the benefit from the employer or an associate of the employer. As Health Link does not purchase the right from the employer or an associate of the employer, the provision of the right will not be an 'in-house residual fringe benefit'. Rather, it will be an external residual benefit.

85. Therefore, as the provision of the right is an external residual benefit it is not specifically excluded from section 58P.

Is the notional taxable value of the provision of the right less than the amount specified in paragraph 58P(1)(e), currently $300?

86. Paragraph 58P(1)(e) requires the notional taxable value of the benefit in relation to the year of tax to be less than $300.

87. Notional taxable value is defined in subsection 136(1) to be the amount which would have been the taxable value of the benefit if it was a fringe benefit.

88. The methods used to calculate the taxable value of an external residual fringe benefit are contained in sections 50 and 51. The relevant section depends upon whether the benefit is a period or

non-period benefit. In general terms, a non-period benefit is one which is provided for less than one day.

89. Both section 50 and 51 provide three methods that can be used to calculate the taxable value of an external residual fringe benefit. The relevant method depends upon whether the employer (or an associate of the employer) is the provider or incurs expenditure to the provider under an arm's length transaction in respect of the provision of the benefit.

90. As discussed above at paragraph 57 of this Ruling, Health Link is the provider of the right. As Health Link is neither the employer, nor an associate of the employer and neither the employer, nor an associate of the employer incurred expenditure to Health Link in respect of the provision of the benefit, the relevant valuation method is the method contained in paragraphs 50(c) and 51(c).

91. In general terms, the taxable value of a residual fringe benefit under paragraphs 50(c) and 51(c) is the notional value of the benefit reduced by the recipients contribution.

92. Notional value is defined in subsection 136(1) to mean:

> the amount that the person could reasonably be expected to have been required to pay to obtain the property or other benefit from the provider under an arm's length transaction.

93. In *Walstern v. Federal Commissioner of Taxation* (2003) 138 FCR 1; 2003 ATC 5076; (2003) 54 ATR 423, at FCR 96; ATC 5092; ATR 442, Hill J examined the application of this provision:

> As already noted, the valuation formula depends upon the 'notional value' in relation to the provision whether of property or of a benefit to each of the Medichs. From the definition it follows that the question to be asked is what is the amount that each of the Medichs could reasonably be expected to have been required to pay to obtain the benefit from the provider under an arm's length transaction. The provider in the present case is Walstern. Hence the question in relation to Mr Ronald Medich, is how much he could reasonably be expected to have been required (i.e., by Walstern) to pay to Walstern to obtain the interest obtained by him in the fund, assuming the transaction between Walstern and him to be at arm's length.

94. Therefore, the notional value of the benefit that arises from the provision of the right to receive a reimbursement of a hospital excess from the ERP Operator will be the amount that an employee could reasonably be expected to have been required to pay to obtain that right.

95. Guidance for determining this amount is provided by Taxation Determination TD 93/231 *Fringe benefits tax: what is an acceptable method for determining the 'notional value' of a property fringe benefit for the purposes of sections 42 and 43 of the Fringe Benefits Tax Assessment Act 1986?* Although this Taxation Determination refers to the property fringe benefit provisions, the principles provided are also relevant to the determination of the notional value of a residual benefit.

96. Paragraphs two to five of TD 93/231 state:

> 2. To ascertain the 'notional value' of a property fringe benefit the employer must determine the amount the employee would have to pay for a comparable (on the basis of age, type and condition) benefit under an arm's length transaction.
>
> 3. This Office will accept a number of ways of obtaining the notional value including:
>
> - the price of comparable goods advertised in local newspapers and/or relevant magazines or similar publications;
> - the price paid for comparable goods at a public auction;
> - the price of comparable goods at a second-hand store; or
> - the market value of the goods determined by a qualified valuer.
>
> 4. The lowest value obtained using any of these methods will be acceptable.
>
> 5. Valuation methods which are not acceptable to this Office include the lease residual value, the tax written down value or the 'best offer' made by an employee.

97. In applying these guidelines, the premium that an employee could be expected to pay for the right to receive a reimbursement of the hospital excess will be determined by the demographics of the membership of the particular health plan and the likelihood of a claim being made. These characteristics will be different for the members of an Employee Health Plan as compared to the members of other health plans offered by the health insurer as membership of the Employee Health Plans is restricted to current employees and their family members. Given this difference it is not possible to identify a comparable premium charged by the health insurer for an alternative health plan.

98. Rather, a more practicable valuation method for determining the amount an employee could reasonably be expected to pay for the right is the amount of the administration allowance paid by Health Link to the ERP Operator for the employee. This is the amount of funding that Health Link, the health insurer and the ERP Operator have agreed is required by the ERP Operator to administer the ERP and be in a position to be able to reimburse an employee's hospital excess when an entitlement arises.

99. Therefore, in applying the valuation method set out in paragraph 94 of this Ruling the notional taxable value of the right to receive a reimbursement of the hospital excess will be the amount of the administration allowance for that employee that is paid to the ERP Operator by Health Link. Where this amount is at least $300, the provision of the right will not be an exempt benefit under section 58P.

100. However, where the administration allowance that is paid for an employee is less than $300, it is necessary to consider the five criteria in paragraph 58P(1)(f).

Is it unreasonable to treat the minor benefit as a fringe benefit?

101. The five criteria in paragraph 58P(1)(f) that need to be considered where the Administrative Allowance that is paid for an employee is less than $300 are as follows:

- the infrequency and irregularity with which associated benefits, being identical or similar benefits, are provided
- the sum of the notional taxable values of the benefit and any associated benefits which are identical or similar to the minor benefit in relation to the current year of tax or any other year of tax
- the sum of the notional taxable values of any other associated benefits in relation to the current year of tax or any other year of tax
- the practical difficulty in determining the notional taxable values of the benefit and any associated benefits, and
- the circumstances surrounding the provision of the benefit and any associated benefits.

102. These five criteria are discussed in paragraphs 193 to 244 of TR 2007/12.

103. Several of the criteria refer to associated benefits. For the purposes of section 58P, the term 'associated benefits' is defined in subsection 58P(2) to mean a benefit that is any of the following:

- identical or similar to the minor benefit
- provided in connection with the provision of the minor benefit, or
- identical or similar to a benefit provided in connection with the provision of the minor benefit.

In addition:

- the associated benefit and the minor benefit must relate to the same employment of a particular employee, and
- a benefit that is an exempt benefit under another provision of the FBTAA will not be an associated benefit.

104. In considering the provision of the rights there are no associated benefits as:

- the provision of the right to receive a reimbursement of the hospital excess is a single benefit which exists inside and outside the year of tax
- as discussed above at paragraphs 48 to 52 of this Ruling, the right to have certain medical expenses paid by the health insurer is not provided in respect of the employee's employment
- as discussed below at paragraphs 123 to 127 of this Ruling, any medical expenses paid by the health insurer under the terms of the health insurance policy will not be paid in respect of the employee's employment, and
- as discussed below at paragraphs 137 to 140 of this Ruling, any reimbursements of the hospital excess will not be made in respect of the employee's employment.

The infrequency and irregularity with which associated identical or similar benefits are provided

105. As discussed above at paragraph 104 of this Ruling there are no associated benefits.

The sum of the notional taxable values of the benefit and associated benefits which are identical or similar

106. As there are no associated benefits and these criteria will only be considered where the notional taxable value of the provision of the rights is less than $300, the value of this criterion will be less than $300.

The sum of the notional taxable values of any other associated benefits

107. As there are no associated benefits the value of this criterion will be nil.

The practical difficulties in determining the notional taxable values of the benefit and any associated benefits

108. Although each participating employer would need to obtain details of the amount of the administration allowance paid in respect of a particular employee's health insurance policy in a year of tax, this is unlikely to present considerable difficulties to the employer, given the arrangements that exist between the participating employers and the ERP Operator. Further, in some of the Employee Health Plans the employer is the ERP Operator. For these plans the employer will not have any difficulty in determining the notional taxable value of the benefit.

The circumstances surrounding the provision of the benefit and any associated benefits

109. The fifth criterion requires consideration of the circumstances surrounding the provision of the benefit. Without limiting the generality of the circumstances to be considered surrounding the provision of the benefit, it is necessary to consider specifically whether the benefit was provided as a result of an unexpected event and whether or not it could be regarded to be provided wholly or principally as a reward for services rendered, or to be rendered by the employee.

110. In considering this criterion in relation to the provision of the rights, although the rights are provided to assist the employee to cover the cost of medical treatment which by its nature is generally unexpected or unplanned, the provision of the rights for an amount that is less than the employee would otherwise be expected to pay is not the result of an unexpected event.

111. In consideration of the circumstances surrounding the arrangements and the provision of the right it can be concluded that the right is not provided principally as a reward for services rendered, or to be rendered by the employee as the availability of the right is not dependent upon the duties performed by the employee and the provision of the right does not alter the amount of salary received by an employee who receives the right.

Conclusion

112. In considering these criteria it is necessary to look at the nature of the benefit provided and give due weight to each of the criteria. On balance having regard to all of the criteria, it is considered that where the notional taxable value of the provision of the right to receive a reimbursement of the hospital excess is less than $300, the factors that indicate it is unreasonable for the provision of the right to be treated as a fringe benefit outweigh those that indicate it is not unreasonable.

113. Therefore, where the notional taxable value of the provision of the right is less than $300, the provision of the right will be an exempt benefit under section 58P.

Will the payment by the health insurer of a medical expense incurred by an eligible employee or eligible family member be a fringe benefit?

114. As set out in paragraph 36 of this Ruling, the payment of a medical expense incurred by an eligible employee or eligible family member will be a benefit under paragraph 20(a). This benefit will be a fringe benefit if the conditions set out in paragraph 38 of this Ruling are met.

Will the benefit be provided to an employee or an associate of an employee?

115. The expenses that will be paid will be incurred by an employee or an associate of an employee as an eligible employee is an employee and an eligible family member is an associate of an employee.

Will the benefit be provided by one of the four prescribed providers?

116. As discussed at paragraph 40 of this Ruling, a benefit will not be a fringe benefit unless it is provided by one of the providers listed in subparagraph 38(b) of this Ruling.

117. Under section 20 the provider of the benefit that arises from the payment of a medical expense will be the person who makes the payment. This is the health insurer. As the health insurer is neither the employer, nor an associate of the employer it is necessary to consider whether the payment is made under an arrangement that comes within paragraphs (e) or (ea) of the fringe benefit definition.

118. Paragraph (e) of the fringe benefit definition applies where the benefit is provided under an arrangement between the person that provides the benefit (an arranger) and the employer or an associate of the employer. This paragraph will not apply as the payment is made under an arrangement between the employee and the health insurer.

119. Paragraph (ea) of the fringe benefit definition applies if the employer (or an associate):

- participates in, or facilitates the provision or receipt of a benefit, or
- participates in, facilitates or promotes a scheme or plan involving the provision of a benefit,

and knows, or ought reasonably to know that they are doing so.

120. These requirements will be met in relation to the payments made for an employee or an associate as a participating employer knowingly participates in the scheme by becoming a participating employer and facilitating the promotion of the Employee Health Plan to their employees. These activities are sufficient for the scheme to come within paragraph (ea) of the fringe benefit definition.

121. Further, some participating employers have an additional participation in the scheme as a result of:

- entering into an arrangement with Health Link to become an ERP Operator, or
- paying a refundable start-up deposit, or
- processing the claims for reimbursement from the ERP Operator.

122. Therefore, the benefit will be provided by one of the four prescribed providers in accordance with paragraph (ea) of the fringe benefit definition.

Will the benefit be provided in respect of the employment of the employee?

123. As discussed at paragraph 49 of this Ruling, the Full Federal Court in *Knowles* in considering the term 'in respect of' said that what must be established is whether there is a sufficient or material, rather than a causal connection or relationship between the benefit and the employment.

124. In applying this decision to the payment of the medical expenses of an eligible employee or eligible family member, the payment of the medical expenses depends upon the terms of the health insurance policy the employee has with the health insurer. If the policy does not cover a particular medical treatment, the health insurer will not pay for the cost of the treatment, even if the person incurring the expenses is an employee (or an associate of an employee).

125. This connection between the payment and the terms of the health insurance policy indicates the payment is made as a result of the rights granted when the person became a member of the Employee Health Plan. It is not made as a result of the person being an employee.

126. Therefore, the payment will not have the necessary sufficient or material connection to the employment of the employee and will not be provided in respect of the employment of the employee.

127. As the payment is not provided in respect of the employment of the employee, the benefit will not be a fringe benefit and it is not necessary to consider whether the payment will be an exempt benefit.

Will the reimbursement of a hospital excess be a fringe benefit?

128. As set out in paragraph 36 of this Ruling, the reimbursement of a hospital excess will be a benefit. This benefit will be a fringe benefit if the conditions set out in paragraph 38 of this Ruling are met.

Will the reimbursement be provided to an employee or an associate of an employee?

129. The reimbursement will be provided to an employee or an associate of an employee as it will be paid to an eligible employee or an eligible family member.

Will the reimbursement be provided by one of the four prescribed providers?

130. As discussed at paragraph 40 of this Ruling, a benefit will not be a fringe benefit unless it is provided by one of the providers listed in subparagraph 38(b) of this Ruling.

131. Under section 20, the provider of the benefit that arises from the reimbursement of the hospital excess will be the person that makes the reimbursement. This is the ERP Operator. Therefore, where the ERP Operator is the employer or an associate of the participating employer, the benefit will be provided by one of the four possible providers.

132. Where the participating employer is not the ERP Operator or an associate of the ERP Operator it is necessary to consider the application of paragraph (ea) of the fringe benefit definition.

133. Paragraph (ea) of the fringe benefit definition applies if the employer (or an associate):

- participates in, or facilitates the provision or receipt of a benefit, or
- participates in, facilitates or promotes a scheme or plan involving the provision of a benefit,

and knows, or ought reasonably to know that they are doing so.

134. These requirements will be met in relation to the participating employers that are not the ERP Operator or an associate of an ERP Operator as these employers knowingly participate in the scheme by becoming a participating employer and facilitating the promotion of the Employee Health Plan to their employees. These activities are sufficient for the scheme to come within paragraph (ea) of the fringe benefit definition.

135. Further, some participating employers have an additional participation in the scheme as a result of:

- paying a refundable start-up deposit, or
- processing the claims for reimbursement from the ERP Operator.

136. Therefore, the reimbursement will be provided by one of the four prescribed providers as the benefit will either be provided by the employer, an associate of the employer or under an arrangement that comes within paragraph (ea) of the fringe benefit definition.

Will the reimbursement be provided in respect of the employment of the employee?

137. As discussed at paragraph 49 of this Ruling, the Full Federal Court in *Knowles* in considering the term 'in respect of' said that what must be established is whether there is a sufficient or material, rather

than a causal connection or relationship between the benefit and the employment.

138. In applying this decision to the reimbursement of the hospital excess of an eligible employee or eligible family member, the payment of the reimbursement depends upon the terms of the ERP arrangement. An employee will only receive a reimbursement if the conditions set out in the ERP arrangement are met. This indicates the reimbursement is made as a result of the rights granted when the person became a member of the Employee Health Plan. It is not made as a result of the person being an employee.

139. Therefore, the reimbursement will not have the necessary sufficient or material connection to the employment of the employee and will not be provided in respect of the employment of the employee.

140. As the reimbursement is not provided in respect of the employment of the employee, the benefit will not be a fringe benefit and it is not necessary to consider whether the payment will be an exempt benefit.

Appendix 2 – Detailed contents list

141. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 2007/12;
TD 93/231; CR 2010/66

Subject references:

- exempt benefits
- fringe benefits
- fringe benefits tax
- in respect of employment
- minor benefits

Legislative references:

- FBTAA 1986
- FBTAA 1986 Pt III Div 2
- FBTAA 1986 Pt III Div 2 Subdiv A
- FBTAA 1986 Pt III Div 3
- FBTAA 1986 Pt III Div 3 Subdiv A
- FBTAA 1986 Pt III Div 4
- FBTAA 1986 Pt III Div 4 Subdiv A
- FBTAA 1986 Pt III Div 5
- FBTAA 1986 Pt III Div 5 Subdiv A
- FBTAA 1986 20
- FBTAA 1986 20(a)
- FBTAA 1986 20(b)
- FBTAA 1986 Pt III Div 6
- FBTAA 1986 Pt III Div 6 Subdiv A
- FBTAA 1986 Pt III Div 7
- FBTAA 1986 Pt III Div 7 Subdiv A
- FBTAA 1986 Pt III Div 8
- FBTAA 1986 Pt III Div 8 Subdiv A
- FBTAA 1986 Pt III Div 9
- FBTAA 1986 Pt III Div 9 Subdiv A
- FBTAA 1986 Pt III Div 9A
- FBTAA 1986 Pt III Div 9A Subdiv A
- FBTAA 1986 Pt III Div 10
- FBTAA 1986 Pt III Div 10 Subdiv A
- FBTAA 1986 Pt III Div 11
- FBTAA 1986 40
- FBTAA 1986 45
- FBTAA 1986 50
- FBTAA 1986 50(c)
- FBTAA 1986 51
- FBTAA 1986 51(c)
- FBTAA 1986 58P
- FBTAA 1986 58P(1)(e)
- FBTAA 1986 58P(1)(f)
- FBTAA 1986 58P(2)
- FBTAA 1986 136(1)
- TAA 1953

Case references:

- J & G Knowles & Associates Pty Ltd v. FCT [2000] AATA 846; 2000 ATC 4151; (2000) 44 ATR 22
- Walstern v. Federal Commissioner of Taxation (2003) 138 FCR 1; 2003 ATC 5076; (2003) 54 ATR 423

ATO references

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