


***Commissioner of Taxation v Virgin Australia
Regional Airlines Pty Ltd -***

Decision impact statement

Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd

Court citation(s):	[2021] FCAFC 209
Venue:	Federal Court of Australia
Venue reference no:	NSD 561 of 2021 NSD 562 of 2021
Judge member name(s):	Logan, Thawley and Downes JJ
Judgment date:	22 November 2021
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

Impacted advice

 The ATO has reviewed the impact of this decision on related advice and guidance products.

Relevant advice and guidance

- Taxation Ruling TR 2021/2 *Fringe benefits tax: car parking benefits*
- Chapter 16 of *Fringe benefits tax – a guide for employers*

Précis

This Decision impact statement outlines the ATO's response to this case which concerns the interpretation of 'primary place of employment' in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) when read with the extended meaning of 'business premises' in subsection 136(2).

Brief summary of facts

In the fringe benefits tax (FBT) years ended 30 March 2013 to 31 March 2016 inclusive (the relevant years), Virgin Australia Regional Airlines Pty Ltd and Virgin Australia Airlines Pty Ltd (collectively Virgin) provided its Flight Crew and Cabin Crew (collectively Flight and Cabin Crew) employees with car parking facilities located near airport terminals in Sydney, Brisbane and Perth.

A number of conditions in section 39A of the FBTAA must be satisfied before a car parking fringe benefit is provided. In this case, the following conditions were relevant:

- (1) If the following conditions are satisfied in relation to a daylight period, or a combination of daylight periods, on a particular day:
 - ...
 - (e) on that day, the employee has a primary place of employment;
 - (f) during the period or periods, the car is parked at, or in the vicinity of, that primary place of employment;
 - ...

Subsection 136(1) of the FBTAA defines 'business premises' and 'primary place of employment' as follows:

business premises, in relation to a person, means premises, or a part of premises, of the person used, in whole or in part, for the purposes of business operations of the person, but does not include: [various exceptions which were not relevant to this matter]

...

primary place of employment, in relation to an employee in relation to a day, means business premises, or associated premises, of the employer of the employee, or of an associate of the employer, where:

- (a) if the employee performed duties of his or her employment on that day - on that day; or
- (b) in any other case - on the most recent day before that day on which the employee performed duties of his or her employment;

those premises are or were:

- (c) the sole or primary place of employment of the employee; or
- (d) otherwise the sole or primary place from which or at which the employee performs duties of his or her employment.

Subsection 136(2) of the FBTAA states:

In the definition of **business premises** in subsection (1), **premises** includes a ship, vessel, floating structure, aircraft or train.

Virgin was assessed for FBT for the relevant years on the basis that the Flight and Cabin Crew employees' 'primary place of employment' was each employee's 'Home Base' airport terminal in Sydney, Brisbane or Perth. Virgin subsequently objected to these FBT assessments.

The Commissioner disallowed Virgin's objections made under Part IVC of the *Taxation Administration Act 1953* (TAA 1953). Virgin appealed against those objection decisions to the Federal Court under section 14ZZ of the TAA 1953.

At first instance in *Virgin Australia Airlines Pty Ltd v Commissioner of Taxation* [2021] FCA 523, Griffiths J allowed Virgin's appeals. His Honour found the effect of subsection 136(2) of the FBTAA meant an aircraft could be a 'primary place of employment' for the purposes of the FBTAA. Based on his Honour's quantitative and qualitative analysis of the duties performed by Flight and Cabin Crew at their different places of employment during the course of a particular day, he concluded as follows:

- the 'primary place of employment' for employees who worked on a single aircraft on a day was that aircraft, and
- employees who worked on multiple aircraft had no primary place of employment.

The Commissioner appealed to the Full Court of the Federal Court. The Full Court (Logan, Thawley and Downes JJ) allowed the Commissioner's appeals.

Issues decided by the Court

The Full Court of Australia referred to the primary judge's outline of issues as follows¹:

- First issue: On each relevant working day, did Virgin's Flight and Cabin Crew have a 'primary place of employment'?
- Second issue: If the answer to the first issue is 'yes', where was that 'primary place of employment'?
- Third issue: If the answer to the first issue is 'yes', on each working day was the employee's car 'parked at, or in the vicinity of [the employee's] primary place of employment'?

First and second issues

The Full Court considered the introductory words of subsection 39A(1) and paragraph 39A(1)(e) of the FBTA and the definition of 'primary place of employment' focus the inquiry on a day.²

The Full Court found in relation to the 'primary place of employment' definition that '[p]aragraphs (a) and (b) ... require identification of whether the employee performed duties on the day in issue.' Paragraph (a) applies if an employee performed duties on the relevant day; paragraph (b) applies if they did not.³ Paragraphs (c) and (d) of the definition provide two different tests to identify the premises which are or were the employee's 'primary place of employment'.⁴ The focus of paragraph (d) is on 'the place of performance of 'duties'. The paragraph (c) test 'is broad and is not limited or exhausted by an inquiry into the places from which or at which the employee undertakes his or her duties'.⁵ The Full Court found that the primary judge erred in treating paragraphs (c) and (d) as involving the same test of the places an employee performed duties during the course of a particular day.⁶

The Full Court accepted, as the primary judge did, that 'primary' within the 'primary place of employment' definition means 'first or highest in rank or importance; chief; principal'. However, as the statute uses the word 'primary', that word cannot 'be substituted by similar or explanatory words'.⁷

The Full Court had regard to Virgin's 'business premises' including the airport terminals and each aircraft on which the Flight and Cabin Crew worked.⁸ They also had regard to the various Enterprise Agreements which set out the conditions of employment of the Flight and Cabin Crew.⁹ As the Full Court stated at [21]:

Flight and Cabin Crew were allocated a "Home Base". Numerous rights and obligations of Virgin and the Flight and Cabin Crew were defined by reference to the Home Base including rosters, rest periods between "Tours of Duty" or "Trips", allowances, and car parking entitlements. In certain circumstances Virgin could require both Flight Crew and Cabin Crew to change their Home Base for operational reasons.

¹ *Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd* [2021] FCAFC 209 (Full Court), at [7].

² Subsection 39A(1) uses the wording 'a particular day' and the definition of 'primary place of employment' in subsection 136(1) uses the wording 'in relation to a day': see *Full Court* at [14].

³ *Full Court* at [14].

⁴ *Full Court* at [15–16].

⁵ *Full Court* at [16].

⁶ *Full Court* at [15].

⁷ *Full Court* at [17].

⁸ *Full Court* at [18–19].

⁹ *Full Court* at [20–22].

This evidence led the Full Court to find the Flight and Cabin Crew's 'Home Base' airport was the 'primary place of employment' per paragraph (c) of the definition in subsection 136(1) of the FBTAA, read with subsection 136(2) of the FBTAA.¹⁰ The Full Court stated at [23]:

It was the primary place of employment on each day of the employment of the Flight and Cabin Crew, even on days where the employee did not attend the "Home Base" at all, for example, on one or more days of a "Tour of Duty" where the employee had no occasion to attend, or perform duties at, his or her "Home Base". The "Home Base" was still the central place relevant to such matters as the employee's rosters, rest periods, allowances and car parking entitlements. The "Home Base" was the central place from where a "Tour of Duty" might typically be expected to begin and end. It is relevant to the inquiry required under paragraph (c), but not determinative, that on any particular day an employee carried out central duties on aircraft away from the "Home Base".

The Full Court found it unnecessary to reach a conclusion about paragraph (d) of the definition to the facts of this case.¹¹ However, it agreed Griffiths J's 'qualitative and quantitative' analysis¹² showed 'the *primary* place from which or at which' the duties of the Flight and Cabin Crew are performed 'on the particular day' ... is the aircraft from which or at which those duties were performed'.¹³ Where such duties were performed by a Flight or Cabin Crew employee on more than one aircraft during a particular day, the Full Court observed 'the *primary* place from which or at which' the duties are performed would typically be the aircraft from which or at which the employee performed his or her duties for the longest period of time'.¹⁴

Third issue

As '[i]t was common ground that the relevant parking facilities were provided 'in the vicinity of' the relevant 'Home Bases', the airport terminals in Sydney, Brisbane and Perth, 'the condition in paragraph 39A(1)(f) of the FBTAA was also satisfied'.¹⁵

ATO view of decision

The decision of the Full Court is consistent with the Commissioner's application of section 39A of the FBTAA and paragraph (c) of the definition of 'primary place of employment' in subsection 136(1) of the FBTAA. The Commissioner accepts the Court's view on the application of paragraph (d) of the definition of 'primary place of employment' in subsection 136(1) of the FBTAA.

Implications for impacted advice or guidance

As noted when TR 2021/2 was published, that Ruling will be amended to include further guidance on the concept of 'primary place of employment' in light of the Federal Court and Full Federal Court's decisions.

The ATO will similarly update Chapter 16 of *Fringe benefits tax – a guide for employers*.

¹⁰ Full Court at [23–24].

¹¹ Full Court at [25].

¹² Full Court at [8], referring to *Virgin Australia Airlines Pty Ltd v Commissioner of Taxation* [2021] FCA 523 at [91].

¹³ Full Court at [26] (original emphasis).

¹⁴ Full Court at [26] (original emphasis).

¹⁵ Full Court at [24].

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	3 March 2022
Due date:	1 April 2022
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

FBTAA 1986 Div 10A
FBTAA 1986 39A
FBTAA 1986 39A(1)
FBTAA 1986 39A(1)(e)
FBTAA 1986 39A(1)(f)
FBTAA 1986 136(1)
FBTAA 1986 136(2)

TAA 1953 Part IVC
TAA 1953 14ZZ

Case references

Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd [2021] FCAFC 209
Virgin Australia Airlines Pty Ltd v Commissioner of Taxation [2021] FCA 523

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