



# ***TR 96/27 - Fringe benefits tax: meaning of 'business premises***

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## Taxation Ruling

### Fringe benefits tax: meaning of 'business premises'

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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

## What this Ruling is about

### Class of person/arrangement

1. This Ruling considers what constitutes a 'business premises' for the purposes of the *Fringe Benefits Tax Assessment Act 1986* ('FBTAA'). The application of this concept as it relates to the exemption granted in subsection 47(2) of the FBTAA for the provision of child care benefits is also explained. In this Ruling where a statutory provision is mentioned (e.g., a subsection) it is a reference to the FBTAA.

## Ruling

### Appearances of the words 'business premises' in the FBTA

2. Various references are made throughout the FBTAA to the term 'business premises'. Subsection 7(3) considers the availability of a car for private use where the car is not at a business premises of an employer. Sections 39A and 39B refer to business premises in the context of car parking benefits. Section 41 provides an exemption for property provided and consumed on business premises. Subsection 47(2) exempts recreational and child care facilities which are located on business premises. Subsection 47(3) exempts the use of property that is ordinarily located on business premises and which is principally used directly in connection with business operations. Subsection 47(3) is affected by subsection 47(4A) which refers to 'business premises'.

## **Definition of 'business premises'**

3. Subsection 136(1) defines 'business premises' in relation to a person to mean 'premises, or a part of premises, of the person used, in whole or in part, for the purposes of business operations of the person'.
4. The definition contains a two fold test in determining 'business premises' for purposes of the FBTAA. First , it requires that, in relation to a person, the premises or part of premises are of the person. Second , the premises or part of premises must be used, in whole or in part, for the purposes of business operations of the person.

## **First test: premises of the person**

5. The first test requires an interpretation of the words 'premises, or a part of premises, of the person' found in the definition. These words, when read as a whole, support the view that the person must have either ownership or exclusive occupancy rights in respect of the premises or part of the premises. Any lesser interest, for example a licence, would not be sufficient to create this relationship.
6. It follows that where a person has ownership of the premises, while at the same time another person has exclusive occupancy rights as lessee of the premises, then, in relation to each person, the premises could be described as premises of each of those persons. In other words the premises could, in a particular period, be described as the premises of the owner and the premises of the lessee. However whilst the first test may identify two persons, each of whom could satisfy the 'of the person' test, only one of those persons would satisfy the second test.

## **Second test: premises used for 'business operations'**

7. The second test requires that a person who satisfies the first test (i.e., the relevant premises are of that person) must use those premises, in whole or in part, for the purposes of business operations of that person. It is only the person in exclusive occupation of the relevant premises who has the actual use of the relevant premises for that person's business operations. Thus it is only the exclusive occupant who could satisfy the second test.

## **Combination of first and second test in 'business premises'**

8. In order to see if the first test is satisfied in respect of particular premises one must ask who has the ownership of and who has the

exclusive occupancy rights in respect of the premises. If a person other than the owner has the exclusive occupancy rights, then the premises are premises both of the owner and of that other person. In order to see if the second test is satisfied one must then determine whether the exclusive occupancy rights are vested in the owner or another person. Whoever has the exclusive occupancy rights is the person who must use the premises for business operations of that person in order to satisfy the second test. The combination of the first and second tests produces the result that only one person can satisfy the 'business premises' test at any one time and that person is the person who has exclusive occupancy rights in respect of the premises and uses those premises for business operations of that person.

### **Meaning of 'business operations'**

9. The term 'business operations' in the definition of 'business premises', includes a wide range of activities. The activities include those that are undertaken by a person in the ordinary course of carrying on a business and those that, although not undertaken in the ordinary course of carrying on a business, are nevertheless undertaken in the course of carrying on a business. Profit making activities that fall short of being a business will also be included in 'business operations' if they have a business or commercial character.

### **Child care facility**

10. Subsection 47(2) provides, *inter alia*, that where a residual benefit provided to a current employee in respect of his or her employment consists of the care of children of the employee in a child care facility and the child care facility is located on 'business premises' of the employer (or a related company if the employer is a company) the benefit is an exempt benefit. The exemption is, therefore, only available to an employer in respect of children of current employees provided the child care facility is located on the 'business premises' of the employer (or a related company if the employer is a company). The employer must be the person who has the exclusive occupancy rights in respect of premises on which the child care facility is located or, if the employer is in a group of related companies and the child care facility is not on 'business premises' of the employer, then the child care facility must be located on 'business premises' of a related company.

## Explanations

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### First test in the definition of 'business premises'

#### Premises of the person

11. The question of whether 'premises, or a part of premises' are premises 'of the person' is to be determined having regard to the nature of the person's interest in the premises, evidenced by the person's rights and obligations in relation to the premises.

12. The term 'premises' is not defined in the FBTAA and, hence, it must be given its ordinary meaning. 'The word "premises" has a long history of use as a wide and general word referring to land or land and buildings' (per Burchett J in *FC of T v. Reynolds Australia Alumina Ltd & Ors* (1982) 19 ATR 598 at 613; 87 ATC 5018 at 5030; (1987) 77 ALR 543 at 559).

13. Land or land and buildings would only constitute 'premises' of a person if either owned or leased by the relevant person. A mere incorporeal right over land or in respect of land and building is not sufficient (per Kitto J in *Moreton Central Sugar Mill Company Limited v. FC of T* (1967) 116 CLR 151; (1967) 41 ALJR 55 and applied by the Full Federal Court in *FC of T v. Reynolds Australia Alumina Ltd & Ors*).

14. As defined in subsection 136(1), the term 'business premises' can be either the whole or part of any premises.

15. The definition of 'business premises' in subsection 136(1) also specifically excludes the following:

- (a) premises, or a part of premises, used as a place of residence of an employee of the person or an employee of an associate of the person; or
- (b) a corporate box; or
- (c) boats or planes used primarily for the purpose of providing entertainment unless the boat or plane is used in the person's business of providing entertainment; or
- (d) other premises used primarily for the purpose of providing entertainment unless the premises are used in the person's business of providing entertainment.

16. On the other hand, subsection 47(4A) provides that a building site, construction site or similar place where a person carries on business operations shall be taken to be 'business premises' of the person for the purposes of the exemption under subsection 47(3). Subsection 136(2) also provides that a ship, vessel, floating structure,

aircraft or train be included in the definition of 'business premises' found in subsection 136(1).

17. The definition of 'business premises', when first inserted in the FBTAA, only excluded 'premises, or a part of premises, used as a place of residence of an employee of the person or an employee of an associate of the person'. The need to exclude premises used for residential purposes from the definition of 'business premises' would support the view that without that exclusion such premises would have been included in the definition. It also supports the view that the words 'business premises' have a fairly broad application.

18. The word '**of**' as used in relation to the words 'the person' in the definition of 'business premises' in subsection 136(1), is the key to the interpretation that the words 'premises, or a part of premises, of the person' when taken together mean 'the owner or exclusive occupier'. The word '**of**', when used in relation to a person, is defined in the *Shorter Oxford English Dictionary* as follows:

'In the sense *belonging or pertaining to*: expressing possession and its converse: "the owner of the house", "the house of the owner".'

19. We recognise that the word '**of**' when used in relation to a person, embraces a connection or association falling short of absolute ownership (see Gummow J in *Re Simersall; Blackwell v. Bray* (1992) 108 ALR 375 at 381-382; (1992) 35 FCR 584 at 590-591). In the context of the definition of 'business premises' in subsection 136(1) and generally in the scheme of the fringe benefits legislation, the words 'of the person' would include beneficial ownership and exclusive occupancy rights. As observed in the Privy Council by Lord Denning in *Council of the City of Newcastle v. Royal Newcastle Hospital* (1959) 100 CLR 1 at 4; (1959) 32 ALJR 467 at 468, it is also important to note that:

'...legal possession is not the same as occupation. Occupation is matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering: see *Pollock and Wright on Possession in the Common Law* (1888) pp.12, 13. There must be something actually done on the land, not necessarily on the whole, but on part in respect of the whole.'

20. A 'person' for purposes of the FBTAA is defined widely in subsection 136(1) to include:

- (a) a body politic;
- (b) a body corporate;
- (c) a partnership;

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- (d) any other unincorporated association or body of persons;  
and
- (e) a person in the capacity of trustee.

21. The above definition of 'person' includes entities that may not have status at law for certain purposes. For example, an unincorporated association or body of persons cannot sue or be sued and cannot buy or own property because it is not a separate legal entity (see *Rigby v. Connol* 14 Ch D 482 at 487 per Jessel MR; *Carlton Cricket & Football Social Club v. Joseph* [1970] VR 487 and also *Amos v. Brunton* (1897) 14 WN (NSW) 69; (1897) 18 LR (NSW) (Eq) 184). In such cases, the property is usually held by a trustee or trustees on behalf of the members for the time being of the unincorporated association or body. In these cases, whilst the property is held by the trustee/trustees, the beneficial interest is that of the members for the time being of the unincorporated association or body. In such cases the property can properly be described as premises of the statutory 'person' (in this case the unincorporated association or body which is comprised of its members ).

22. Where a trustee is the person for purposes of the provisions of the FBTAA and is also the employer, the legal ownership by the trustee will be sufficient to bring the trustee within the definition.

23. In the case of a partnership, section 165 provides that the Act applies to a partnership as if the partnership were a person. The ownership or exclusive occupancy rights in any property held by the partners of the partnership would be regarded as being held by a person by virtue of this section.

24. In most cases, there would be little difficulty in determining whether premises are premises of a person. Clearly, premises owned by a person are premises 'of the person'. Similarly, premises held by a person under a normal commercial lease or some other instrument, which gives that person exclusive occupancy rights over the premises would be premises of that person.

25. A joint tenant or tenant in common does not have the full ownership rights in the freehold or leasehold estate of the relevant premises. He or she only has a partial interest in such estate while the other joint tenants or tenants in common hold similar interests. In other words, a joint tenant or tenant in common shares ownership of the relevant estate in the premises with the other joint tenants or tenants in common. Joint tenants or tenants in common, for example, cannot point to any part of the relevant premises as being his or her own to the exclusion of the other tenants. If a joint tenant or tenant in common could do so, there would be separate ownership and not a joint tenancy or tenancy in common. For these reasons it is not

accepted that the premises are 'of the person' in the required sense when the person is a joint tenant or tenant in common.

26. A strong inference can be drawn from the words 'premises, or part of premises, of the person used, in whole or in part, for the purposes of business operations of the person' in the definition of 'business premises' in subsection 136(1). Those words infer that a single employer (person) is being referred to and the perception that the singular word includes the plural is displaced. This inference is strengthened when reference is had to the definition in subsection 136(1) of a 'person' which includes a 'partnership' and an 'unincorporated association or body of persons' all of which are, at law, not a person but a group of persons. The clear inference is that if these groups of persons were not included in the definition neither the group nor its individual members would be a 'person' for the purposes of the FBTAA.

27. There would be little difficulty in determining whether premises are premises of a person where the person obtains some lesser interest in the relevant premises and the lesser interest, for example, merely requires the person to pay costs to the extent of services provided to the person at the premises and gives the person some loose right only to terminate the management arrangements with the consent of the other persons using the premises acting through a committee. In such a case the premises are not premises of the person. For example, a mere licence does not create any estate or interest in the property to which it relates, it only makes an act lawful which without it would be unlawful (see *Banks v. Transport Regulations Board (Victoria)* (1968) 119 CLR 222; *The Minister of State for the Army v. Dalziel* (1944) 68 CLR 261 and *Radaich v. Smith and Another* (1959) 101 CLR 209).

28. Therefore, to satisfy the first test, it is necessary that the relevant premises be premises that are either owned or leased by the relevant person.

### **Second test in the definition of 'business premises' Premises used for 'business operations'**

29. In addition to the requirement that premises be of the person as referred to above, premises would only be 'business premises' where the premises are used for the purposes of business operations of the person who has exclusive occupancy rights in respect of the premises either as owner or lessee.

30. The words 'used ... for the purposes of the business operations of the person' ought to be read together and in the context used. The words, when read that way, connote a wide operation. The word



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'purposes' is not restricted and, accordingly, allows directly and indirectly related purposes to fall within the phrase 'purpose of business operations' (see Lockhart J in *Parker Pen (Aust) Pty Ltd v. Export Development Grants Board* (1983) 46 ALR 612 at 621 where his Honour observed that 'the word "purpose" is, of course, susceptible of a variety of meanings depending on its context').

31. We turn now to the words 'business operations'. Those words are defined in subsection 136(1) only in relation to a government body or a non-profit company. In relation to government bodies and non-profit companies 'business operations' include any operation or activity carried out by that body or company.

32. In relation to other persons, the words 'business operations' are not defined and have to be given their ordinary meaning. 'Operations' is a very wide expression, for example 'mining operations' is wider than 'the working of a mining property' (see *Parker v. FC of T* (1953) 90 CLR 489 at 494; (1954) ALR 26 at 28; (1953) 10 ATD 287 at 291). Whether a particular activity or series of activities amounts to a business operation is a question of fact.

33. In the context of the definition of 'business premises' in subsection 136(1) we consider that the words 'business operations' have a broad meaning. In our view 'business operations' ought to be regarded as wider than 'carrying on a business' and would include both passive and active dealings, including isolated transactions of a person, without the need to establish that the person was carrying on a business provided they were undertaken for the purpose of profit making by way of a business operation or a commercial transaction.

34. Where a business exists the words 'business operations' would include a wide range of activities undertaken by the person carrying on the business. For example:

- (a) 'A taxpayer carrying on a business might sell its headquarters in order to move to larger premises and make a profit over historical cost. The transaction of sale may be one which arises in the ordinary course of the taxpayer's business' (Hill J in *Westfield Ltd v. FC of T* (1991) 21 ATR 1398 at 1406; 91 ATC 4234 at 4242).
- (b) 'Where a taxpayer operates from leased premises, the move from one premises to another and the leasing of the premises occupied are acts of the taxpayer in the course of its business activity just as much as the trading activities that give rise more directly to the taxpayer's assessable income' (Hill J in *FC of T v. Cooling* (1990) 21 ATR 13 at 26; 90 ATC 4472 at 4484).

35. Even where a business does not exist, the words 'business operations' would include profit making activities that have a business or commercial character. In *FC of T v. The Myer Emporium Ltd* (1987) 163 CLR 199; 87 ATC 4363; (1987) 18 ATR 693, the Full High Court, in a joint judgment, made the following observations (at CLR 210; ATC 4367; ATR 697):

'Nor does the fact that a profit or gain is made as the result of an isolated venture or a "one-off" transaction preclude it from being properly characterised as income ... . The authorities establish that a profit or gain so made will constitute income if the property generating the profit or gain was acquired in a business operation or commercial transaction for the purpose of profit-making by the means giving rise to the profit.'

36. The expressions 'business operation' and 'commercial transaction' appearing in the above quotation from the joint judgment of the Full High Court in *Myer* are wide enough to include profit making operations and transactions entered into by a person who is not carrying on a business. This was established by Mason J in *FCT v. Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 379; (1982) 12 ATR 692 at 707; 82 ATC 4031 at 4044, where he noted that:

'In some contexts "business deal" and "operation of business" may signify a transaction entered into by a person in the course of carrying on a business; in other contexts they denote a transaction which is business or commercial in character.'

37. In general terms a transaction or operation may be said to have the character of a business operation or commercial transaction if the transaction or operation would constitute the carrying on of a business except that it does not occur as part of repetitious or recurring transactions or operations.

38. The broad approach adopted above to 'business operations' is also supported by the wide scope given by the legislature in subsection 136(1) in relation to 'business operations' of government bodies and non-profit companies.

39. On this broader view, an activity would constitute a business operation where:

- (a) it is an activity which is undertaken in the course of carrying on a business, being either:
  - (i) an activity undertaken in the ordinary course of carrying on a business (such as one that comprises the day to day operations of the taxpayer); or
  - (ii) an activity which is not undertaken in the ordinary course of carrying on a business, but is still

undertaken in the course of carrying on a business (such as an activity which has a reasonable incident to, or is in connection with, or facilitates the carrying on of a business operation); or

- (b) it is an activity which, although not itself a business, has a business or commercial character and is undertaken for the purpose of profit making by way of a business operation or a commercial transaction (cf. *Whitfords Beach* and *Myer Emporium*).

40. Important to this Ruling is the question of whether the operations of facilities, such as child care facilities, are operations that would fall within the term 'business operations'. As indicated in the preceding paragraph, 'business operations' arise only in the context of a business or a profit making undertaking. In this context, the provision of benefits to employees in the form of child care would be an important factor in recruiting, retaining and otherwise rewarding employees. Activities undertaken in connection with the provision of those benefits to employees would be 'business operations' of the employer who carried on the business or carried out the profit making undertaking. Thus, if that employer used his/her premises for operating a child care facility on the premises, the operations would be regarded as 'business operations'. The consequences of this view is that the provision of facilities such as child care, recreational, car parking or health care for employees would be an activity falling within 'business operations'.

41. In relation to a child care facility, this broad interpretation of 'business operations' will enable an employer who operates the child care facility on his/her premises to claim the tax exemption in subsection 47(2) in a broader range of circumstances. The exemption will apply, not just where the premises are used for a child care facility and other business operations, but also where the premises are used exclusively for operations of a child care facility.

### **Child care facilities**

42. Subsection 47(2) exempts a residual benefit in respect of a child care facility. A 'child care facility' is defined in subsection 136(1) to mean a facility at which a person receives or is ready to receive two or more children under the age of six years, not being associates of that person, for the purpose of minding, caring for or educating them for a day or part of a day without provision of residential care. A 'child' is also defined in subsection 136(1) and, as defined, would include an adopted child, a step-child or an ex-nuptial child of the employee.

43. The exemption in subsection 47(2) is available to an employer where:

- (a) a residual benefit is provided to a current employee in respect of his or her employment;
- (b) the residual benefit consists of the care of children of the employee in a child care facility; and
- (c) the child care facility is located on business premises of the employer (or a related company if the employer is a company).

The words in (a) and (b) above would enable the exemption to be available in a broad range of circumstances. However, the range of circumstances is diminished by the words in (c) which require the child care facility to be located on 'business premises' of the employer (or on 'business premises' of a related company if the employer is a company).

44. Where the employer claims that the child care facility is located on 'business premises' of the employer it will be necessary, having regard to the interpretation of 'business premises' in this Ruling, for the employer to have exclusive occupancy rights in respect of the premises and to use those premises for the purposes of business operations of the employer. It is only by having such rights and such use in respect of the premises that the employer could satisfy both the 'of the person' test and the 'used ... for the purposes of business operations' test in the definition of 'business premises'.

45. Where the employer claims that the child care facility is located on 'business premises' of a related company, it will be necessary for the related company to have exclusive occupancy rights in respect of the premises and to use those premises for business operations of the related company. It is only by having such rights and such use in respect of the premises that the related company would satisfy the two tests in the definition of 'business premises'.

46. The 'business premises' test in respect of premises at a particular point in time can only be satisfied by one person. That person is the person who has exclusive occupancy rights in respect of the premises. Where one or more persons have occupancy rights that are less than exclusive then none of those persons will satisfy the 'business premises' test.

47. To satisfy the test in subsection 47(2) it is not necessary for the employer, on whose 'business premises' the child care facility is located, to restrict the care provided in the child care facility to children of the employees of the employer. Children of employees of an unrelated employer (or children of a member of the public for that matter) could attend the child care facility without jeopardising the

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exemption available to the first mentioned employer who has the 'business premises' on which the child care facility is located. In that situation the child care benefits provided by the first mentioned employer to his/her employees would be exempt. The benefits provided by the second employer, who is unrelated to the first employer, would not be exempt.

48. The result in the previous paragraph would be similar if the employer was a company and the child care facility was located on 'business premises' of a related company, rather than on 'business premises' of the employer. The exemption in subsection 47(2) would be available to the employer even though the care provided in the child care facility was not restricted to children of the employees of the employer. Children of employees of any related company and children of any unrelated employer could attend the child care facility without causing the employer to fail the test in subsection 47(2).

49. Where the child care facility is located on 'business premises' of a company which is related to one or more other employer companies, all of those employer companies (as well as the group company on which the 'business premises' is located if it is an employer), could satisfy the text in subsection 47(2). However, if an unrelated employer arranged for children of its employees to be cared for at the child care facility then that employer could not be eligible for the exemption because it could not satisfy the 'business premises' test in subsection 47(2).

50. An essential requirement in satisfying subsection 47(2) is the need for the child care facility to be located on 'business premises' of the employer, or 'business premises' of a related company. For employers in a corporate group to obtain the exemption, there must be a company in the group that satisfies the 'business premises' test in respect of premises on which the child care facility is located. Where that occurs, all employers in the group who arrange for children of their employees to receive care at the facility would be entitled to the exemption. As stated in paragraphs 8 and 46, premises can only be 'business premises' of one person at a particular point in time. If that person is within a corporate group, all employers in the group could qualify for the exemption. If the person is not within a corporate group, that person could only qualify for exemption in respect of child care provided at a child care facility located on the 'business premises' of that person.

51. An exemption under subsection 47(8) from fringe benefits tax also applies to benefits provided by an employer to employees in the form of priority of access payments for an employee's child or children to a place at a child care facility. Note that a priority of access

contribution does not include a payment or reimbursement of any child care fees.

## **Alternative views**

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52. The first test in the definition of 'business premises' in subsection 136(1) is the 'premises, or a part of premises, of the person' test. The alternative view in relation to this test is that the test can be satisfied in circumstances where a person may not have ownership or exclusive occupancy rights in respect of premises but has a proportionate interest or share in the relevant premises. We do not agree with this view for the reasons set out in the **Explanations** part of this Ruling in respect of the first test.

53. The second test in the definition of 'business premises' in subsection 136(1) is that the relevant premises must be 'used, in whole or part, for ... business operations of the person'. The alternative view is concerned with the interpretation of 'business operations'. It is a view which would be unfavourable to taxpayers. The alternative view regards operations of facilities, such as child care and recreational facilities, as not being business operations. Those operations are for the private needs of employees. Therefore, if premises had such a facility located on it **and no other operations were conducted on the premises**, then the premises would not be used for business operations and there would be a failure of the second test in the definition of 'business premises'. However, where such a facility is located on part of the premises, and in another part of the premises business operations are conducted, then the alternative view would recognise that the premises would be partly used for business operations. The alternative view would accept, in common with this Ruling, that the use of premises in part for business operations will satisfy the second test in the definition of 'business premises'.

54. The alternative view of the second test would have the effect that premises used **exclusively** as a location for facilities, such as child care or recreational facilities, would not be premises that satisfy the 'business operations' requirement. This is because operations of such facilities are not business operations. Therefore, the second test in the definition of 'business premises' would not be satisfied. In the absence of 'business premises', employers could not qualify for the tax exemption provided in subsection 47(2). We do not agree with this alternative view of the words 'business operations' for the reasons set out in paragraphs 40 and 41 of this Ruling.

## **Examples**

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### **Example 1**

55. ABC Pty Ltd is a company that has one principal place of business where it carries out certain manufacturing activities. There is no space on the premises for employees to park their cars during working hours. The company purchases premises situated two blocks away from its principal place of business and converts those premises into a car park for use only by its employees. The company has exclusive occupancy rights in respect of the premises. As part of their remuneration package, employees pay no fees for the use of the facility.

56. The car parking facility, although not situated on the principal business premises of the company, would be regarded as situated on another business premises of the company - as the provision of a facility to remunerate employees - and in the interest of efficiency of the business, would be regarded as a business operation of the company.

### **Example 2**

57. D Mining Ltd, with its administrative office in a capital city, conducts mining operations some 1,000 kilometres away from the city and in a remote area. Mining staff are located in a company town about 30 kilometres from the actual mining operations. To encourage more women to work at the mine, D Mining Ltd constructs a child care centre on its premises in the town which is used exclusively to provide child care facilities for employees requiring the facility.

58. The child care facility would be regarded as being located on the 'business premises' of D Mining Ltd and the exemption under subsection 47(2) would be available.

### **Example 3**

59. Keepaus Kleen Holdings Pty Ltd wholly owns two operating companies named Keepaus Kleen (Commercial Detergents) Pty Ltd and Keepaus Kleen (Domestic Detergents) Pty Ltd. Each subsidiary has a separate operating plant. Keepaus Kleen (Commercial Detergents) Pty Ltd leases premises situated about two kilometres from both operating plants and converts the leased premises into a child care centre. It engages a professional company to manage and provide all the necessary facilities. Children of employees of Keepaus Kleen Holdings Pty Ltd and its subsidiary companies are offered places at the child care centre free of charge. If there are any vacant

places not utilised by employees of the companies, they are offered for a fee to any parent requiring the facility. Keepaus Kleen (Domestic Detergent) Pty Ltd considered entering into the lease jointly or as tenant in common with Keepaus Kleen (Commercial Detergents) Pty Ltd but decided not to do so.

60. Under these arrangements the premises would be considered as 'business premises' of Keepaus Kleen (Commercial Detergents) Pty Ltd. That company and related corporate employers (the holding company and Keepaus Kleen (Domestic Detergents) Pty Ltd) would be entitled to the exemption under subsection 47(2) in respect of child care benefits provided by each employer to its employees. No exemption would be available in respect of the caring of a child who is not a child of an employee in the Keepaus Kleen group.

61. If Keepaus Kleen (Domestic Detergents) Pty Ltd had entered jointly or as tenant in common into the lease with Keepaus Kleen (Commercial Detergents) Pty Ltd, then neither subsidiary would satisfy the 'business premises' test in respect of the leased premises and the exemption in subsection 47(2) would not be available to any of the three companies.

#### **Example 4**

62. A, B, and C in partnership are carrying on the business of manufacturing tools. The partnership leases premises to operate a commercial child care service for any children including their employees' children, although the employees receive the benefit free of charge. They renovate the premises to turn them into a child care centre. The partnership oversees the centre's management and hires a professional child carer to manage the day to day operations of the facility. The partnership has the power to hire and fire the child carer, and has a management team to review regularly the centre's operations, set policy and review the centre's budget. The partnership also has the full responsibility for the operations of the centre.

63. A partnership is a person for purposes of the FBTAA. The partnership in the above situation is conducting the centre as part of the partnership's business operations. The partnership, as a person, has under the lease exclusive occupancy rights in relation to use of the premises. The child care facility would, therefore, be treated as being located on the partnership's 'business premises'. The exemption under subsection 47(2) would be available to the partnership in respect of the child care benefits for children of employees of the partnership.



**Example 5**

64. A commercial child care centre operator conducts its business on premises over which it holds a lease. It enters into an arrangement with various employers to provide child care services to their employees' children. Under this arrangement, each employer separately contracts with the operator to sub-lease an undivided share in the premises, and each employer will only ever be separately liable for rental in respect of its own share. Also, under a management agreement, each employer participates in the centre's management committee, which has overall responsibility for the management of the centre, including the power to terminate the services of the operator as manager of the centre. Each employer's share in the premises and voting rights on the committee are determined by the number of child care places it wishes to utilise.

65. In this situation, no employer has exclusive occupancy rights in respect of the premises. The premises, therefore, are not considered to be the business premises of any individual employer, and the exemption in subsection 47(2) would not apply.

**Example 6**

66. TOT is a professional provider of child care facilities and already owns six centres in various cities in Australia providing child care to children independently of any employer involvement. It now seeks to expand its operations by setting up a large centre in the heart of the CBD of a major city.

67. TOT enters into a lease for the relevant premises and enters into arrangements with various employers to allow their employees to use the centre with payments made directly by the employers of all fees.

68. Under the arrangements the following 'legal' documents are executed:

Joint Venture Agreement - features of which are akin to an association of employers with a committee of some representatives of the employers managing the 'venture'. The Committee under this agreement is required to meet only once a year and the 'venture' has no real assets or responsibilities. In any case the rights, duties, obligations and liabilities of the employers are several and not joint or joint and several.

Sub-lease - with employers having no responsibility for the care of the premises nor any indemnities.

Management Agreement - provides a clear indemnity by the provider of the facilities to employers for any claim whatsoever in respect of the premises.

69. Like **Example 5** above, under these arrangements the relevant premises are not premises of any individual employer. The exemption under subsection 47(2) would not be available to any employer on the basis that neither are the premises those of the employer nor are any 'business operations' of the employer being conducted at the relevant premises.

### **Example 7**

70. Good Accounting Pty Ltd and Better Taxation Services Pty Ltd are two leading accountancy and tax advising firms in a capital city. They are not related and compete for the work in that capital city. However, the firms have joined their resources to provide child care facilities for the employees. They have set up a child care centre in premises situated at Good's premises. Under the arrangements, Better merely enters into an agreement to a joint venture child care centre with only the responsibility to pay fees depending on the number of child places taken by its employees. Good has the lease of the premises and also arranges for the management of the centre.

71. Under these arrangements the relevant premises would be properly considered as the 'business premises' of Good but not Better. The exemption under subsection 47(2) would only apply to Good.

## **Date of effect**

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72. This 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).

73. The view contained in this Ruling as to how the law operates in relation to subsection 47(2) of the FBTAA is at variance with advance opinions that this office gave in a small number of particular cases. This Ruling will, in those circumstances, not disturb any arrangement entered into prior to 27 March 1996 by an employer named in the advice given in any of the advance opinions issued by this office in respect of those employees whose children have been placed in the named child care facility prior to that date. Before ruling accordingly there would of course be the need to examine these cases to ascertain, for instance, that a full and accurate disclosure of all relevant material and technical issues were brought to our attention before the advance opinion was given.

74. Where a taxpayer has received a private binding ruling inconsistent with the interpretation of subsection 47(2) as set out in

this Ruling, and has entered into a child care arrangement, the private binding ruling will continue to apply for the period that the private binding ruling is valid. However, this Ruling would apply to any material variation to existing arrangements or any new arrangements commenced after the binding ruling expires.

### Last Ruling

This is the last Taxation Ruling for the 1996 calendar year. The next Ruling will be Taxation Ruling TR 97/1.

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## Commissioner of Taxation

18 December 1996

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