



The Institute of  
Chartered Accountants  
in Australia



02 November 2007

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By email: [tony.coles@treasury.gov.au](mailto:tony.coles@treasury.gov.au)

Dear Tony,

### Re: Fringe Benefits Tax and Cost of Compliance issues

Further to the discussion between the Department of Treasury and the Institute of Chartered Accountants in Australia (the Institute) last year, and at your suggestion, the professional bodies seek to re-submit the outstanding issues raised in our joint submission dated 4 August 2004 (the 2004 submission). A copy of that submission is attached to this letter for your reference.

### Outstanding issues

A number of issues in the 2004 submission have already been addressed as part of the review undertaken by the Taskforce on Reducing Regulatory Burden on Business (the Taskforce) and in a number of legislative amendments announced by the Government. We would appreciate a response to the outstanding issues, which are listed below:

- 1. Travel costs for employees working in one city and living in another:** These should be exempt from FBT altogether as they are not remuneration related but a business cost of getting the right employees in the right place.
- 2. Optional 50/50 split for recreational expenditure:** employers should have the option to adopt the 50/50 split method in respect of all recreation expenditure, as is the case for meal entertainment and entertainment leasing facility benefits.

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3. **Reportable Fringe Benefits and Recreation:** All recreation expenditure should be excluded from the Reportable Fringe Benefits reporting requirements, as is currently the case for meal entertainment expenditure and entertainment facility leasing expenses.
4. **Interaction of GST and FBT and financial supplies:** the provisions of Division 71 of the GST Act should be reviewed and overhauled.
5. **Capping thresholds:** this area requires re-visiting with the view of re-writing these provisions.

The following issues have only been addressed in part by the Government (eg. in its final response to the report prepared by the Taskforce):

6. **Reportable Fringe Benefits confined to Remuneration Benefits only:** only benefits that are part of a remuneration package or award should be reported on payment summaries.
7. **Road tolls:** the accounting for road toll fringe benefits is cumbersome and costly. It is suggested that amendments to subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* be made to include 'bridge and road tolls' within the definition of a 'car expense'.
8. **Minor and infrequent rule:**  
Whilst we welcome the recent legislative amendments increasing the minor fringe benefits exemption threshold to less than \$300 from 1 April 2007, it is our view that the Government should also consider indexing this threshold each year.
9. **Election to group:** companies should be able to have the option to elect to group their FBT obligations and thus only lodge one FBT return.

With respect to this issue, we understand that the Government is considering whether such an option could be provided in some circumstances through non-legislative means. It would be appreciated if an update on the progress of this issue could be provided.

More detailed discussion on these issues is contained in the 2004 submission.

### **Additional issues**

We have also identified two additional issues for the Government's consideration. These are discussed below.

#### **1. Classification of multi-function device capabilities under section 58X**

Section 58X of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) aims to exempt from FBT the provision of a number of work related items, notably electronic devices such as a mobile phone, electronic diary, personal digital assistant and a laptop computer.

Due to the rapid convergence of technologies, it is difficult to identify the primary function of certain multi-function devices. This matter has been raised at the NTLG-FBT subcommittee meetings on a number of occasions and the ATO has been helpful in suggesting some ways to determine the application of the section 58X exemption to multi-function devices. However, this issue continues to cause confusion for taxpayers resulting in additional compliance in an increasingly complex marketplace of products.

We would appreciate if Treasury could consider amending the FBTAA in such a manner as to clarify the treatment of products where the various capability functionalities fall within different categories of the section 58X exemption, i.e. where it has mobile phone capability (paragraph 58X(2)(a) and subsection 58X(3)) and is also an electronic diary or personal digital assistant (paragraph 58X(2)(g)). In this instance subsection 58X(3) would require a "primarily for business use" substantiation in relation to the mobile phone capability but not in relation to the functionality as a personal digital assistant.

Furthermore, the current legislation does not deal at all with devices that contain functionality that fall both within section 58X (say mobile phone, personal digital assistant) and outside of the section (say GPS functionality).

For further detail as to the issue, we refer you to Appendix 1 for extracts from the minutes of the NTLG-FBT subcommittee meetings held on 18 May 2006 and 8 February 2007.

## **2. Travel expenses for employees of multinational organisations with employment contracts in both Australia and overseas**

Similar issues to those identified under item 1 of the outstanding issues above also arise for multinational organisations that have employment positions which require employees to perform a portion of their services in Australia for the Australian subsidiary and a portion of their services overseas for the foreign parent company. The relevant employees are employed under dual contract arrangements, whereby they have an employment contract with both the Australian and foreign entities for their respective services.

Due to the dual nature of their roles, the employees are required to travel regularly between Australia and the overseas country, typically spending 3-4 weeks at a time in each location. Costs associated with the travel are generally paid for or reimbursed by the Australian entity.

Typically, the employees have a main residence in the overseas location, where their families continue to reside. Whilst they are performing services in Australia, the employees reside in rented accommodation. Also, the employees are tax residents of their home country under the tiebreaker clause of the relevant double tax agreement. Therefore, their foreign employment income is exempt from income tax in Australia pursuant to the dependant services article of that treaty.

The issue that arises is the appropriate FBT treatment of costs (generally airfares reimbursed by the employer) relating to the regular travel between the two employment locations. We would appreciate if Treasury could consider amending the FBTAA to remove the FBT impact on these business costs.

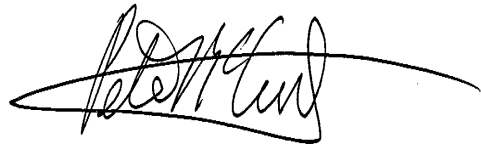
For full details on this issue, we refer you to Appendix 2, which extracts the discussion from the minutes of the NTLG FBT subcommittee meeting held on 8 February 2007.

The professional bodies look forward to the Government's response to these issues. Should you have any questions on this matter, please do not hesitate to contact Ali Noroozi (on 02 9290 5623) or Norman Kang (on 02 9290 5718) of the Institute, the co-ordinating professional body.

Yours sincerely



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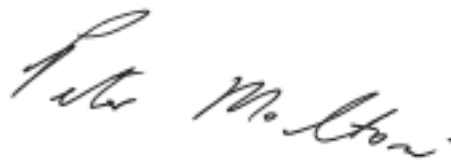
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## **Appendix 1 – extracts from the minutes of the NTLG-FBT subcommittee meetings held on 18 May 2006 and 8 February 2007**

### **NTLG-FBT subcommittee meeting on 18 May 2006**

#### **8. Exemption for personal digital assistants (Tax Office)**

This item was provided by the Tax Office for discussion at the meeting.  
What are personal digital assistants (PDA's)?

If a device has both a phone and a PDA capability, is it a phone or a PDA?

#### **Meeting discussion:**

There was a general discussion by members about, in effect, the rapid pace of converging technologies that are, in one form or another covered by the separate provisions in section 58X of the FBTA, including the specific exemption in relation to a PDA.

The convergence of technologies is moving at such a pace that, today, it is difficult to in fact determine what is a 'PDA' and what is a 'mobile phone'; with it being suggested that a basic PDA will not exist too far into the future.

It was also noted by members that a difficulty arises in that there are different tests that apply to different items, for example:

- for an item of software to be exempt it must be 'for use in the employee's employment';
- for a mobile phone to be exempt it must be 'primarily for use in the employee's employment';
- for a notebook computer to be exempt, there can only be benefits provided in any one year in respect of a single laptop;
- there is no 'business use' test applicable to the exemption in relation to laptops, portable printers or PDAs.

This inconsistency in approach to the exemptions provided creates compliance difficulties for employers in administering section 58X.

The CTA, in agreeing with the concerns raised by members, referred to its major submission to the Regulation Taskforce, in which it had identified compliance and other problems associated with the FBT regime. The submission identified that section 58X is inconsistent with its approach to certain work related items, most notably mobile phones ('primarily' test) and laptops (no 'primarily' test). The requirement that the function of a work related item be its 'primary function' (subsection 58X(2)) is very difficult to meet in light of convergent technologies and the demands of the modern workplace.

The CTA had suggested in its submission that a 'primary function' test in subsection 58X(2) should be replaced with a requirement that the item have a primary function of any combination of the items listed.

**Tax Office response:**

In discussing this issue, the Tax Office acknowledged that the convergence of technologies was moving forward at a rapid pace and that there will, at times, be difficulties in determining whether a benefit in respect of an 'eligible work related item', for example where an item has both mobile phone and PDA capability, is exempt specifically under:

- paragraph 58X(2)(a) – mobile phone; or
- paragraph 58X(2)(g) – PDA.

Further, paragraph 58X(3) – primarily for use in employee's employment, must be considered if the item is considered to be a mobile phone.

The explanatory memorandum (EM) to Tax Laws Amendment (2005 Measures No 1) Bill 2005 stated the following at paragraph 1.13;

Section 58X of the FBTA 1986 provides an exemption from FBT for certain work-related items provided by an employer to an employee. An amendment is made to extend the FBT exemption available for electronic diaries or similar items to include 'a personal digital assistant'. A personal digital assistant is a hand held wireless device designed for use as a personal organiser which may or may not have other computing capabilities.

Today, the marketing surrounding electronic devices which includes PDAs, mobile phones and a combination of both is somewhat blurred. On one hand there is what a reasonable person would accept is clearly a mobile phone. There is also what could be referred to as a basic PDA, which is also easily identifiable.

Reference was made to ATO Interpretative Decision ATO ID 2004/14 as providing an indication of what a basic PDA is. It is noted that the ATOID was issued in January 2004 in an attempt to administer section 58X as to whether PDAs could be treated as an electronic diary or similar item or a notebook, laptop or similar portable computer. The ATOID stated that it was considered the best way of determining the classification of any particular item is to identify its primary function.

ATO Interpretative Decision ATO ID 2003/894 provides an indication of what a 'mobile phone' is, noting that this was issued in October 2003. This ATOID also stated that it was considered the best way of determining the classification of any particular item is to identify its primary function.

However, today numerous terms are used by both the manufacturers and retailers of electronic devices, and not necessarily with consistency, where mobile phone, PDA and other information technologies combine. Terms used include 'smartphones', 'PDA/phones', 'multimedia computers' and 'mobile offices'. It may not be readily apparent, given the marketing and advances in technology, as to what is the primary function of a combined device.

It was acknowledged that in most instances these combined devices are designed for, and are used for work purposes and include functions of a PDA, mobile phone and in particular 'push e-mail' capabilities. It was also accepted that employees can enter into a salary sacrifice arrangement to obtain a 'PDA' without any requirement that it is to be used for business purposes.

In view of the intent set out in the EM in relation to the exemption relating to PDAs, as noted above, given the reference to a PDA being 'a hand held wireless device designed for use as a personal organiser which may or may not have other computing abilities', it was acknowledged that a combined/converged device may be capable of being treated as a PDA or a mobile phone. This will ultimately depend on a number of factors which an employer may take into account. For example, in the following situations:

- where an employer provides a device to an employee which has both PDA and phone capabilities, or reimburses the cost of such a device, on the basis that it is primarily for use in the employee's employment, an employer could rely on the exemption provided in relation to a mobile phone.
- where it is not possible for an employer to determine which is the primary function of the device, but it is not provided primarily for use in the employee's employment, an employer could rely on the PDA exemption.

#### **NTLG-FBT subcommittee meeting on 8 February 2007**

#### **6. Classification of multi-function device capabilities under section 58X of the FBTA (ICAA)**

##### **Background**

We refer to agenda item 8 of the NTLG FBT Sub-committee meeting on 18 May 2006 which dealt with the classification of a device with both phone and PDA capabilities under section 58X of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

In its response the Tax Office noted that ATO Interpretative Decision ATO ID 2004/14 and ATO Interpretative Decision ATO ID 2003/894 state that 'the best way of determining the classification of any particular item is to identify its primary function'. However, the Tax Office acknowledges that due to the rapid convergence of technologies, it is difficult to identify the primary function of certain multi-function devices.

The Tax Office has, in this regard, advised that:

- where the device has both phone and PDA capabilities and it is primarily for use in the employee's employment, it could be classified as a mobile phone and exempted under subparagraph 58X(2)(a);
- where it is not possible to determine the primary function of the device and it is not provided primarily for use in the employee's employment, the device could be exempted as a PDA under subparagraph 58Z(2)(g).

Whilst we appreciate that the above is not a definitive statement of law, it has nonetheless been very helpful in providing guidance to taxpayers in an increasingly complex marketplace of products. We now seek further guidance in this regard as technology has, once again, led to the sale of new products that are difficult to categorise using the guidance above.

### **Issue**

There are an increasing number of products within the Australian market that have dominant functions in addition to having both phone and PDA capabilities. That is, products where it is not possible to identify a single primary function from amongst a range that includes mobile phone and PDA but also includes other functions not covered by section 58X (such as GPS or audio functions).

Examples of such devices include:

- The Mio A701 GPS PDA phone
- The Dopod P800W PocketPC phone with GPS

These products are becoming more and more common.

The current guidance from the Tax Office, as set out above, appears to only extend to devices with dual phone and PDA capabilities and does not cover other products. This submission requests Tax Office direction on how devices that do not have an identifiable primary function, and which include functions not covered by section 58X (such as those mentioned above) be classified for FBT purposes.

### **Submission**

We have set out below two alternative approaches to this issue that we believe to be fair and reasonable from both the Tax Office and taxpayer's perspectives. Should the Tax Office not accept either alternative, we kindly request guidance on the treatment of converging technologies under section 58X to avoid confusion as to whether new devices with more than phone and PDA capabilities fall within the categories of exempted items under subsection 58X(2).

#### **Alternative 1**

We submit that the Tax Office's abovementioned position in relation to the treatment of phone and PDA devices under section 58X remains the best approach to the determination of the nature of the device for FBT purposes. In this regard, we suggest the following modifications to the guidelines in order to ensure they are applicable to current and future technology in this area:

- where the device has multiple and equally marketed capabilities, and less than 50% of the capabilities fall within the items listed in subsection 58X(2), the device should not be considered a 'work-related item' for section 58X purposes, and will therefore not be exempt from FBT. For example, where a device has phone, PDA, GPS, MP3 and camera capabilities and all these functions are given equal prominence in advertising material, the device will not be exempted under section 58X since only 40% of the capabilities fall within subsection 58X(2);
- where the device has multiple and equally marketed capabilities, and 50% or more of the capabilities fall within the items listed in subsection 58X(2), the device could be considered a 'work-related item' for section 58X purposes. Whether it is treated as a mobile phone or a PDA could be determined with reference to the guidance previously provided in the 18 May 2006 meeting, as outlined above.

## **Alternative 2**

Alternatively, the Tax Office could take the position that multi-purpose devices with functions that are not listed under subsection 58X(2), and which give equal prominence to these functions such that a 'primary' function cannot be determined, should be classified according to the dominant function of the device for the user.

For example, in the case of a device which has the equally dominant functions of a phone, PDA and GPS, and the employee uses the device predominately as a phone, then the device should be classified as a mobile phone and treated as such for FBT purposes. However if they were to use the device primarily as a GPS system, it would not fall within section 58X(2) and therefore be subject to FBT.

Under this alternative it would be necessary for the employee to sign a declaration stating their intended primary use as evidence supporting the FBT position taken.

## **Meeting discussion**

As has occurred at previous meetings where this topic has been raised, there was a lengthy discussion about the scope of the exemption provided for converged devices as well as the methodologies and guidance provided to date by the Tax Office in regard to same.

Members agreed that the advice provided to date through this forum was of assistance however the major change to converged devices was the inclusion of GPS abilities, which were not a common feature of a converged device until recently.

It was also acknowledged that the advancements in this area would continue unabated and that the work environment would also continue to evolve. Any further administrative assistance that the Tax Office could provide through this forum would be welcome.

## **Tax Office response**

The Tax Office acknowledged the complexities of correctly identifying a particular device for the purposes of the application of the provisions contained in section 58X.

Broadly, it was also agreed that there is a blurring of lines between what may be referred to as 'consumer' and 'business' products in the area of 'mobile phones and PDAs' which can also create difficulties in determining the primary function of an device, as highlighted in the ICAA submission.

The Tax Office indicated that ATO ID 2003/894; mobile phones, ATO ID 2004/14; PDAs – handheld and palm sized organisers and the minutes of this forum of 18 May 2006 ([agenda item 8](#)), are a useful starting point for employers where there are difficulties in determining what a particular item is.

As previously advised, in many cases, the primary function is clear.

It has been suggested however that it is becoming more difficult to determine a primary function where a converged device now includes GPS capabilities, as an example.

The ICAA, in also acknowledging that the current administrative guidance provided to date by the Tax Office is of assistance, has suggested that a 'weighting' be given to the capabilities of a particular device based on those capabilities listed in section 58X.

In the first alternative, where a device has multiple and equally marketed capabilities and less than 50% of the capabilities fall within the items listed in subsection 58X(2), it should not be an exempt item. Where the device has 50% or more of the listed capabilities, it could be considered 'a work related item' for section 58X purposes. Whether it should be treated as a mobile phone or a PDA could be determined in accordance with the current guidelines.

The Tax Office view was that the broad intent of section 58X is to, as appropriate, exempt certain 'work related items'. The first alternative put forward may hinder the application of the exemption where the intent of the employer is to provide a 'work related item', particularly where the employee will be using the phone capability of the device or the device has been selected by the employer because it has basic business capabilities. Although the way in which these devices are marketed can be helpful, it should not be the only criteria which an employer can consider.

The Tax Office indicated that it was not comfortable with endorsing the first alternative. In relation to the second alternative, where a device has multiple functions that are equally prominent, and the guidance previously available does not assist in reaching a conclusion as to the status of the device, an employer could consider the primary intended use of the device. As put forward by the ICAA, where a device has numerous functions, no one being of prominence, an employer's understanding of the intended use of the device could be of assistance in determining whether a device is a mobile phone, a PDA or a device that is not an exempt item.

Where an employer provides a converged device, where there is no prominent function, with the intention that the employee is being provided with a mobile phone primarily for use in the employee's employment, and notwithstanding that the device has other functionality such as MP3 and/or GPS, that device could be treated as a mobile phone and exempt under section 58X.

On the other hand, where a converged device, where there is no prominent function, is provided to an employee and that converged device has GPS and MP3 functionality, and this will be the features that the employee will use, as an example, as the employer has not provided the device primarily for use in the employee's employment the item would not appear to satisfy the requirements of subsection 58X(2) relating to a mobile phone. Nor would it appear that the device is in fact a PDA.

The Tax Office also noted the fact that the exemption contained in section 58X is a cost of compliance reduction measure. Whether an employer obtains a declaration as to the intended use of a device or not, as this is not a requirement under the FBTAA, this would simply be a choice that an employer could make in such situations.

In concluding the discussion on this item the Tax Office restated that the intent of the section 58X exemption relates to 'work related items'. The convergence of technologies and the advancements in capabilities will continue into the future.

In essence where a converged device, where there is no prominent function, has phone capability, and all such devices do and noting that they are generally known as 'smart phones', an employer can rely on the mobile phone exemption contained in subsection 58X(2) in those instances where the device has been provided by the employer 'primarily for use in the employee's employment'; subsection 58X(3) notwithstanding other capabilities that the device has.

## **Appendix 2 – extracts from the minutes of the NTLG-FBT subcommittee meeting held on 8 February 2007**

### **7. Travel expenses for employees with employment contracts in both Australia and overseas (ICAA)**

A multinational organisation has a number of employment positions which require employees to perform a portion of their services in Australia for the Australian subsidiary and a portion of their services overseas for the foreign parent company. The relevant employees are employed under a split-contract arrangement, whereby they have an employment contract with both the Australian and foreign entities for their respective services.

Due to the dual nature of their roles, the employees are required to travel regularly between Australia and the overseas country, typically spending 3-4 weeks at a time in each location. Costs associated with the travel are generally paid for or reimbursed by the Australian entity.

Typically, the employees have two places of residence. A residence in the overseas location, where their families continue to reside. Whilst they are performing services in Australia, the employees reside in rented accommodation. Also, the employees are tax residents of their home country under to the tie breaker clause of the relevant double tax agreement. Therefore, their foreign employment income is exempt from income tax in Australia pursuant to the dependant services article of that treaty.

The issue that arises is the appropriate FBT treatment of costs (generally airfares reimbursed by the employer) relating to the regular travel between the two employment locations. Possible alternatives are:

1. the travel constitutes 'relocation transport' and is therefore exempt from FBT?;
2. the travel constitutes an expense payment fringe benefit and the taxable value can be reduced by the otherwise deductible rule? or
3. the travel is provided by the foreign employer in respect of the employee's foreign employment and is therefore not a fringe benefit?

#### **Legislation**

Section 20 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) provides that an expense payment fringe benefit arises where an employer reimburses an employee or pays a third party to discharge an obligation in respect of expenses incurred by the employee.

Section 143A of the FBTAA provides that in order for transport to qualify as exempt 'relocation transport', the transport must be required solely because:

the employee is required to live away from home in order to perform the employment duties and the transport enables the employee to take up residence near the place of employment, or

the employee, having lived away from home, is required to return home having ceased performing those duties and the transport enables the employee to take up residence at the usual place of residence.

In the National Tax Liaison Group (NTLG) FBT sub-committee minutes from 18 November 2004, the Tax Office responded to queries regarding the distinction between travelling from an employee's usual place of residence to their usual place of employment in another location, and specifically, if this would be considered relocation transport or private travel for FBT purposes. In this regard, the Tax Office stated that travelling from an employee's usual place of residence to their usual place of employment would normally be considered private in nature as it is simply travel between the employee's home and work. In arriving at this conclusion the Tax Office stated that the travel expenses would not constitute a 'benefit in respect of relocation transport' (and therefore be exempt from FBT) as the trips were of a 'weekly recurring nature'. The Tax Office also stated that the 'intended scope of the [relocation] exemption is limited and was not intended to cover' situations where an employee's usual place of residence was not located near their usual place of employment.

Section 25-100 of the *Income Tax Assessment Act 1997* (ITAA 1997) enables taxpayers to claim a deduction for transport expenses to the extent they are incurred as a result of travelling between workplaces. Subsection 25-100(2) of the ITAA 1997 provides that *travel between workplaces* is travel directly between 2 places, to the extent that:

(a) while you were at the first place, you were:

(i) engaged in activities to gain or produce your assessable income; or

(ii) engaged in activities in the course of carrying on a \*business for the purpose of gaining or producing your assessable income; and

(b) the purpose of your travel to the second place was to:

(i) engage in activities to gain or produce your assessable income; or

(ii) engage in activities in the course of carrying on a business for the purpose of gaining or producing your assessable income;

and you engaged in those activities while you were at the second place.

Subsection 25-100(3) Travel between 2 places is not *travel between workplaces* if one of the places you are travelling between is a place at which you reside.

In *FCT v Payne* (2001 ATC 4027) a pilot claimed a deduction for the transport expenses incurred as a result of travelling between his income producing deer farm (which was also the taxpayer's home) and his place of employment at an airport. In rejecting the deduction, the court held that the travel was neither part of the taxpayer's job as an employee, nor part of his business as a farmer.

## Discussion

As the initial liability for payment of the travel costs rest with the employee (under a corporate credit card), payment or reimbursement of the expenses by the employer would amount to an expense payment benefit for the purposes of the FBTAA.

### 1. Are the travel benefits in respect of relocation transport?

Although the issue of relocation transport was discussed in the NTLG Sub-committee Minutes (18 November 2004), in our view the facts surrounding travel benefits provided to the employees in the current situation differ significantly to the facts discussed in the NTLG FBT Minutes. Specifically, the employees:

- have two places of employment and not a sole place of employment with two usual places of residence;
- are not commuting back to a second usual place of residence each weekend, but instead travel between the two locations such that they can perform employment duties in both locations, and
- the employment arrangement is for a finite period, in contrast to the facts in the minutes which imply a more permanent and infinite employment arrangement.

Notwithstanding the above, as the employee's travel between Australia and overseas is of a recurring nature and is not a permanent relocation to one location or the other, in our view the travel would not satisfy the relocation transport exemption for FBT purposes.

### 2. Can the taxable value of the expense payment benefit be reduced by the otherwise deductible rule?

As noted above, to the extent travel benefits are paid for or reimbursed by the Australian employer an expense payment fringe benefit would arise. In this regard, to the extent the travel benefits have a sufficient nexus with the employee's Australian employment, an alternative argument is that the travel costs are otherwise deductible to the employee and therefore the FBT taxable value can be reduced.

Pursuant to Australian income tax legislation, an employee is able to claim a tax deduction for expenses incurred as a result of producing assessable income. Travel costs incurred in the course of employment producing assessable income would therefore normally be deductible. The difficulty here however, is that the employees have two employments, one of which results in income that is exempt from Australian tax. Further, *FCT v Payne* (2001 ATC 4027) appears to preclude deductions for travel between two unrelated income producing activities. While the dual roles of the employees are not unrelated, it is possible that the same reasoning could apply given that they are not both income producing activities. As well, the provisions in section 25-100 of the ITAA 1997 introduced to overcome *Payne's* case are not applicable here, for the same reason. Therefore both legs of the travel cannot meet the otherwise deductible requirement.

However, in our view the overseas-Australia leg by itself could meet the deduction requirements, as it is a recurring cost incurred to enable the employee to earn their Australian assessable income. The position here can be distinguished from that referred to in the FBT NTLG sub-committee minutes referred to above as the employee is not returning from a second residence but from other employment duties, and doing so on a regular basis. Accordingly, the FBT taxable value can be reduced to nil for this leg, although the Australia-overseas leg would continue to attract FBT.

We note, however, that this outcome appears to be inconsistent with the general principal that business expenses are not typically subject to FBT and may also result in inconsistencies where return airline tickets are purchased.

### **3. Are the travel benefits a fringe benefit if provided by the foreign employer in respect of the employee's foreign employment?**

Where the travel benefits are provided by the foreign employer in respect of the employee's foreign services, then the travel benefits potentially would not satisfy the definition of 'fringe benefit' as set out in the FBTA.

For a benefit to be considered a fringe benefit for FBT purposes, the benefit must be provided to an employee (or associate of the employee) by their employer (or an associate of an employer) in respect of the employment of the employee. In order to be an 'employee' for FBT purposes, the employee must receive or be entitled to receive salary or wages. Salary and wages is then defined to mean salary, wages, bonuses, allowances, and so on which are subject to pay as you go (PAYG) withholding, but excludes exempt income. Accordingly, where an employee is in receipt of exempt salary and wages, they are not considered to be an employee for FBT purposes and benefits provided to the employee in respect of them deriving the exempt income are also not subject to FBT.

Accordingly, with respect to the employees, where they are performing duties in respect of their foreign employment and are earning exempt income for Australian tax purposes, they would not meet the definition of employee for FBT purposes. Therefore any benefits provided to them, such as the travel benefits, by the foreign employer in respect of their overseas services would not be a fringe benefit for Australian FBT purposes and would not attract FBT.

In summary, in our opinion, if the cost of Sydney-overseas leg is borne by the foreign employer, it is an exempt benefit as it relates to the overseas employment. However, the overseas-Australian leg would still be considered referable to the Australian services and therefore would not fall under this exemption.

#### **Tax Office response**

Following a general discussion of the difficulties that an employer may have in such a situation as that outlined in the submission, The Tax Office stated that this agenda item deals with a number of complex issues including double tax agreements, exempt income, dual employment, and deductibility of travel.

The Tax Office advised that it is not possible to deal with the numerous factual issues raised and noting that the agenda item was received quite late, at the forum. Such a scenario is required to be dealt with through a private binding ruling request. In relation to the factual outcome for such an individual it is appropriate to lodge a private binding ruling, with all relevant facts and agreements set out fully for proper consideration.

It was noted, that where no clear ATO view currently exists on an issue, a private binding ruling request would in turn require, at a minimum, an ATO interpretative decision to set out the ATO view.

The Tax Office further noted that, in relation to the issue of travel between Australian capital cities where an employee is required to move for a 12 or 18 month project period to work in a different capital city and returns frequently to their family residing in their usual place of residence in another, the FBT consequences have been re-raised in the Joint Submission that is currently being finalised and will shortly be forwarded to Government (refer item 3.2 of these minutes).

The Tax Office suggested, given the apparent acceptance in the ICAA submission that there are also probable FBT taxing points for the overseas travel highlighted in this submission, that the members could consider broadening the joint submission to cover this scenario also.