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WEEKLY COMMENT: FRIDAY 15 MARCH 2013

1. New proposals to treat car parks provided on employers' premises as fringe benefits were released on 11 December 2012 in *Supplementary Order Paper No. 167* ("the SOP") to the *Taxation (Livestock Valuation, Assets Expenditure, and Remedial Matters) Bill* ("the Bill"). The Bill is due to be reported from the Finance and Expenditure Committee on 29 May 2013. The new laws are proposed to come into force on 1 April 2014.

2. Car parks provided off the employer's premises are already subject to FBT. However, as noted on page 8 of the *Commentary on Supplementary Order Paper No. 167 to the Bill* ("the Commentary"):

   "Difficult interpretative issues are raised by the need to distinguish between whether a parking space is or is not on an employer's premises. The current interpretation of "premises" is based on a common law interpretation, under which a leased car park, like on owned by the employer, is exempt from FBT, whereas a licensed car park is not exempt."

3. In other words, leased car parks are currently treated as being on the employer's premises. The proposed new rules will eliminate the distinction between car parks on and off the employer's premises, and all car parks that are subject to the proposed new rules will be fringe benefits. The provision of car parks that do not come under the new rules will not be fringe benefits, regardless of whether they are leased or licensed. This is effected by new s. CX 28B in clause 13D of the SOP, which states that a benefit in the form of a car park is not a fringe benefit except as specified in new s. CX 9B in clause 12D of the SOP.

4. The provision of a car park that is covered by the new rules will be a fringe benefit regardless of whether the car park is used or not. This is because the proposed rules align the fringe benefit treatment of car parks with those applying to motor vehicles in the sense that the benefit arises from its availability for private use. The only other form of benefit that is a fringe benefit based on its availability for private use is a motor vehicle. In all other cases, the "mere availability" of goods or services that have not been provided will not be a fringe benefit. This is stated in Inland Revenue's Question We've Been Asked *QB 12/06: Fringe Benefit Tax – "Availability" Benefits* ("the QWBA"). I have also taken the opportunity to discuss the QWBA this week.

5. The car park must be available for private use. If the use of a parking space is restricted to *business or certificated vehicles* the availability of that parking space will not result in a fringe benefit. These are defined terms and are discussed in paragraph 13 below.

6. GST is payable on fringe benefits, generally. However, in the case of car parks that have been acquired as part of a zero-rated land acquisition, the consideration for the fringe benefit will be nil, and no GST should be payable.

QWBA on availability benefits

7. But first, a brief word on the QWBA. Inland Revenue was asked: if an employer makes a good or service available to an employee, will the mere availability of the good or service be a fringe benefit? The answer was:

   "No. Fringe benefits arise when a benefit is **provided** by an employer to an employee in connection with their employment. Once a benefit has been provided to an employee, it is irrelevant if it is never used, it will be a fringe benefit (subject to any exclusions in subpart CX applying). However the "mere availability" of goods or services that have not been provided will not be a fringe benefit.

   Motor vehicles are dealt with differently to other goods or services; the availability for private use of a motor vehicle will give rise to a benefit by virtue of s CX 6.

   Whether or not the availability for private use of a business tool (which by definition has been provided to an employee) is a fringe benefit depends on whether it falls within the exclusion in s CX 21." (Inland Revenue's emphasis)

8. The relevant legislation was summarised by Inland Revenue as follows:

   (a) Section CX 2 requires that a benefit must be provided by an employer to an employee in connection with their employment;

   (b) The benefit must arise as described in ss CX 6, CX 9, CX 10, or CX 12 to CX 16, or be an unclassified benefit;

   (c) Section CX 6 states that a *motor vehicle made available* to an employee for their private use will result in a fringe benefit;

   (d) The other sections deal with the actual *provision* of specified benefits, and an unclassified benefit results if an employer *provides* an employee with a benefit.

9. The requirements for there to be a benefit, and for the benefit to have been provided, are discussed in the QWBA:

   (a) In order for there to be a benefit, the Commissioner is of the view that a particular "advantage" must be sufficiently clear and definite that it can reasonably, practically and sensibly understood as a tangible benefit.

   (b) The case law shows that the meaning of "provide" depends on the facts and circumstances of each case: for something to have been "provided" to an employee for the purposes of s. CX 2, it must be supplied, furnished or made available for use by the employee.

10. Inland Revenue goes on to discuss three scenarios where the concept of "availability" arises:

    (a) Where goods or services have been provided, it is irrelevant whether they are in fact used; the examples given are a sports season ticket and a gym membership.

    (b) Where goods or services are potentially available, a fringe benefit does not arise until the option of accessing the goods or services is taken up and the goods or services in

question are provided; the example given is the option of purchasing discounted goods; the availability of motor vehicles is a noted exception.

(c) Where business assets may be used privately, a benefit is only provided when the goods are actually used privately; the examples given are of a yacht charter company that allows employees to privately use its yachts, and a DVD store that allows employees free DVD rentals; in this case, two legislated exceptions are noted:

(i) Motor vehicles that are made available; and

(ii) Business tools, such as mobile phones or laptops ("unclassified benefits") that do not meet the two requirements, which must both be met, for the exclusion in s. CX 21 to apply: i.e. that the tool must be provided mainly for business use and the GST-inclusive cost must not not exceed $5,000.

Availability of a car park meeting specified requirements will be a fringe benefit

11. The availability of an area for parking a motor vehicle will be a fringe benefit if it is specified under s. CX 9B. The "on-premises" exclusion in s. CX 23 will no longer apply to "parking for a motor vehicle". However, as already noted, a car park that is not specified in s. CX 9B will not give rise to a fringe benefit.

12. Under s. CX 9B, a fringe benefit will arise <u>on a day</u> when an employer makes a parking space available to an employee in three circumstances:

(a) The parking space is in a specified urban area: currently specified as the central areas of Auckland and Wellington; or

(b) The parking space is provided to the employer by a commercial car park operator for a consideration that exceeds a specified threshold: currently set at $210 per month; or

(c) The employee would be entitled to a greater amount of employment income if the employee had not chosen to receive the parking space.

Fringe benefit of one parking space vs fringe benefit of a fraction of a parking space

13. A <u>fringe benefit of 1 parking space</u> arises on a day when:

(a) The employer makes available an <u>allocated parking space</u> (for the sole use of an employee) and the use of the parking space is not restricted to a *business or certificated vehicle*, meaning:

(i) A motor vehicle that has a valid disabled parking permit; or

(ii) A work-related vehicle, as defined in s. CX 38 (essentially a vehicle that is not a 'car' and that has business identification prominently displayed); or

(iii) A 'fleet car" – the term used in the Commentary – meaning a car made available during business hours for business purposes only.

(b) The employer makes available a <u>pool parking space</u> (a parking space that is not allocated for the sole use of an employee) and the number of pool parking spaces is equal to or greater than the total number of pool parking users (i.e. employees who may park in a pool parking space), and the use of the parking space is not restricted to a business or certificated vehicle.

14. A <u>fringe benefit of a fraction of a parking space</u> arises on a day when an employer makes available a pool parking space, and:

(a) The number of pool parking spaces is less than the number of pool parking users; and

(b) The employee's use of a pool parking space is not restricted to outside the hours between 6 am and 10 pm;

(c) The fraction is calculated using the formula:

$$\frac{\textbf{Parking ratio x (day users - business)}}{\textbf{Day users}}$$

(d) **Day users** are pool parking users whose employment both begins and ends between 6 am and 10 pm;

(e) **Business** is the number of day users whose use of the pool parking spaces between 6 am and 10 pm is restricted to a business or certificated vehicle (see paragraph 13 above);

(f) **Parking ratio** is the number of pool parking spaces divided by the number of day users (or 1, if the ratio exceeds 1).

15. A quite detailed example is provided on page 8 of the Commentary. It concerns a company in central Wellington with 90 employees and 50 pool parking spaces. On Monday, 70 employees are rostered to work, but 5 of them work "outside hours" – i.e. after 10 pm and before 6 am. Of the 65 "day users", 3 have their use restricted to work-related vehicles. The 20 employees who are not working on Monday are not allowed to use the pool parking spaces. The fraction is calculated as follows:

(a) "Day users" is 65: the employees who work between 6 am and 10 pm;

(b) "Business" is 62: the number of day users whose use of the pool parking spaces is not restricted;

(c) "Parking ratio" is: 50/65 – the number of parking spaces divided by the number of day users;

(d) The fraction is: [50/65 x (65 – 3)]/65 = 0.734.

(e) Therefore a fringe benefit of 0.734 of a day arises for each of the 65 day users.

16. Note the following in respect of the fringe benefit that arises on Monday in the above example:

(a) A fringe benefit arises in respect of the 3 day users whose use is restricted to work-related vehicles;

(b) A fringe benefit does not arise in respect of the 5 "non-day users"; and

(c) No fringe benefit arises in respect of the 20 employees who do not use to pool parking spaces on Monday.

Daily value of the fringe benefit

17. The daily value of a fringe benefit that arises from the availability of a parking space is set out in proposed new section RD 33B as follows:

(a) If the fringe benefit relates to the availability of a whole parking space:

(i) Rule 1: If the parking space is provided by a commercial car park operator, the daily cost to the employer (treating a month as 30 days and a year as 360 days), regardless of whether the employee sacrificed an amount of salary for the car park; or if Rule 1 does not apply,

(ii) Rule 2: The value set by the Commissioner for a parking space in central Auckland or central Wellington – currently likely to by $250 per month according to page 9 of the Commentary – converted into a daily rate, again regardless of whether the employee sacrificed an amount of salary for the car park; or if Rules 1 and 2 do not apply,

(iii) Rule 3: An amount of salary explicitly sacrificed by the employee for the car park.

(b) If the fringe benefit relates to the availability of a pool parking space, the value of the fringe benefit is calculated as the applicable fraction of a parking space multiplied by the daily value if it had been a whole parking space.

(c) If an employer chooses, daily average figures can be used to calculate the fraction, using a 'test period' that complies with the rules set out in proposed new section RD 33C.

(d) The normal fringe benefit valuation rules for services provided by employers contained in s. RD 41 will not apply, except for an employer who is a commercial car park operator, in which case, the value of the benefit is the price charged to the general public, as set out in s. RD 41(a).

18. The rules for the use of a test period are set out in new s. RD 33C as follows:

(a) The test period must be a continuous period of 2 months or more; and

(b) The test period must fairly represent the pattern of use over the whole of the chosen term; and

(c) A daily record must be kept for the whole of the test period of the parking spaces, users and other statistics required by the 'fraction' formula; and

(d) The results of the test period apply for 3 years, or a shorter term ending with an FBT period; and

(e) The employer must monitor the lesser number during the test period of the number of parking spaces or the users, and cease to use the test period after the end of an FBT return period during which the number exceeds the test period number by 10% or more.

Attribution of fringe benefits to individual employees or pooled employees

19. A car park fringe benefit must be attributed to an employee whatever the value: there is no threshold value. The usual rules in s. RD 50 for calculating the FBT liability will apply.

20. When the benefit is an unallocated car park and there are fewer spaces than employees, the employer has the option of pooling the benefits and calculating the pooled benefits under the usual rules, contained in s. RD 53, which apply to calculate pooled fringe benefits. If the pooled calculation method is chosen, for employees who are not major shareholders, the FBT rate will be 42.86%, which equates to a marginal tax rate of 30%.

GST implications

21. GST will payable on the fringe benefits, unless one of the exclusions in s. 21I(2) of the GST Act applies. In the circumstances, the supply to an employee is not likely to be zero-rated or exempt.

22. However, it is noted that s. 10(7) of the GST Act reduces the consideration for the supply to nil in circumstances where the employer was not entitled to an input tax deduction for the supply of the fringe benefit. This could occur if a car park was acquired as part of a zero-rated acquisition of land. Alternatively, the car park may have been acquired as part of a zero-rated acquisition of a going concern pre-1 April 2011.

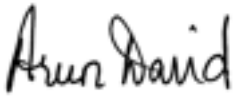
23. Therefore, the determination of whether or not GST should be paid may not be straightforward.

Inclusion in family scheme income

24. If an employee who is not a "controlling shareholder" would be entitled to a greater amount of employment income if the employee had chosen not to receive the car park, the amount of the employment income sacrificed will be included in the employee's family scheme income under proposed new s. MB 7B, from 1 April 2014.

25. An employee who is a "controlling shareholder" – i.e. who, together with associated persons holds has an ownership interest of at least 50% - already has fringe benefits included in family scheme income under s. MB 8.

26. For those of you who are interested, the proposed new legislation is described in the attached PDF on *FBT on Car Parks*.



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