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WEEKLY COMMENT: FRIDAY 31 JULY 2015

1. This week and next week I am going to look at fringe benefits. I review:

   (a) Public Ruling BR Pub 14/10 *Fringe benefit tax – Provision of benefits by third parties – section CX 2(2)* released on 28 November 2014 and published in *Tax Information Bulletin* Vol. 27 No. 1 February 2015, pages 1 – 9; and

   (b) Draft Public Rulings *Fringe benefit tax – Exclusion for car parks provided on an employer's premises* and *Fringe benefit tax – Exclusion for car parks provided on the premises of a company that is part of the same group of companies as an employer*, released for comments on22 July 2015.

2. Apart from the fact that the rulings all deal with fringe benefits, they have another common aspect: in each case the discussion involves dissection of a particular phrase into its constituent parts, which are then analysed and interpreted.

Provision of benefits by third parties

3. It is noted in BR Pub 14/10 that, as a general rule, an employer will not be liable to pay FBT on a benefit provided to an employee by a third party. However, s. CX 2(2), which is an anti-avoidance provision aimed at preventing an employer from avoiding an FBT liability by arranging for a third party to provide a benefit to an employee in circumstances where FBT would have been payable had the benefit been provided by the employer directly states that:

4. A benefit that is provided to an employee through an arrangement made between their employer and another person for the benefit to be provided is treated as having been provided by the employer.

5. The particular phrase that is discussed in BR Pub 14/10 is "an arrangement made between their employer and another person for the benefit to be provided" and the words analysed and interpreted are: "arrangement", "for", "benefit" and "provided". The analysis is aimed at understanding in what circumstances s. CX 2(2) would apply when there is no direct or indirect consideration provided by the employer to the third party.

What is meant by "arrangement"

6. As defined in s. YA 1, an "arrangement" may be a legally enforceable contract, a less formal agreement or plan that may not be legally enforceable, or an informal unenforceable understanding. It included arrangements not intended to be legally binding and arrangements that are unforceable at law, for example, due to reasons of public policy, contractual incapacity or illegality.

7. It is noted that while the courts have not considered the definition of "arrangement" in the context of s. CX 2(2), there is substantial case law on the definition of "arrangement" in the context of the general anti-avoidance rule. However, there is a key distinction between the meaning of arrangements for general anti-avoidance purposes and the meaning of "arrangement" in s. CX 2(2):

   (a) For general anti-avoidance purposes an arrangement does not require that one party knew of or agreed to all the steps taken by the other party, and this was endorsed by the Privy Council in *Peterson v CIR* (2005) 22 NZTC 19,098; whereas

   (b) In s. CX 2(2), the employer's purpose or object in making the arrangement must be for a benefit to be provided to an employee, and this is similar to the meaning of "arrangement" in commerce-related legislation, where both parties agree to mutual rights and obligations in respect of the course of action to be undertaken, as opposed to when only one party makes a commitment to a proposed course of action.

What is meant by "for"

8. The arrangement must be "for" a benefit to be provided. It is noted that the cases show that "for" is to be interpreted to mean "for the purpose" or "with the object of" something. The following cases are cited:

   (a) In *Patrick Harrison & Co v AG for Manitoba* [1967] SCR 274 (CASCC) the "for" was interpreted as imposing a purpose test; and

   (b) In *G v CIR* [1961] NZLR 994 (SC) it was held that the word "for" points to intention.

9. This leads to the questions of:

   (a) Whether it is the purpose of the arrangement or the purpose of the parties that is relevant; and

   (b) If it is the purpose of the parties, which party's purpose is relevant.

10. In the phrase "an arrangement made … for the benefit to be provided" the part "for the benefit to be provided" could be read as relating to:

    (a) The arrangement, which would be consistent with the application of the general anti-avoidance rule, and would require an objective enquiry into the arrangement itself; or

    (b) The word "made", which would require looking into the purpose or object of the parties in making the arrangement, which is more consistent with the FBT rules, where the focus is on benefits that the employer has chosen to give its employees.

11. In the Commissioner's view, "for the benefit to be provided" must be read as relating to the word "made", because:

    (a) If Parliament had intended the purpose or object of the arrangement to be relevant, they would have explicitly said so; and

    (b) This interpretation distinguishes s. CX 2(2) from s. CX 2(5)(a) which concerns the FBT anti-avoidance provision in s. GB 31, where it is clear that it is the purpose or effect of the arrangement that matters.

12. In that case, the question becomes one of whether it is the employer's purpose or the purpose of the third party who provides the benefit that is relevant. In the Commissioner's view, the scheme of the FBT rules supports the employer's purpose being determinative. By contrast,

the scheme of the FBT rules does not support s. CX 2(2) applying where the third party, but not the employer, makes the arrangement with the purpose of providing a benefit to an employee.

13. When looking at the employer's purpose, the courts have held that the test depends on the statutory context (for example, in *CIR v Haenga* (1985) NZTC 5,198 (CA)). Section CX 2(2) does not contain the word "purpose" or object". Therefore, in the Commissioner's view, it is the employer's subjective purpose that should be looked into – i.e. the reason the employer made the arrangement. However, the employer's reasons should be tested in light of the surrounding circumstances (*CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 (CA)).

14. When looking at the reason the employer made the arrangement, the question is whether the provision of the benefit should be the sole or dominant reason, or whether it is sufficient if it is an additional or ancillary reason. In this regard, the Commissioner's view is that the "more than merely incidental" test is the appropriate test. In other words, the employer's purpose of providing a benefit should be significant, but it need not be the most important or dominant reason.

15. It is noted that the fact that an employee may have to independently contract with the third party in order for the benefit to bew provided does not prevent the same benefit from being regarded as provided through an employer-third party arrangement to which s. CX 2(2) applies.

What is meant by "benefit"

16. It is noted that based on *Case M9* (1990) 12 NZTC 2,069, a "benefit" is something provided by an employer that can be "reasonably, practically and sensibly understood as a benefit to the employee". Whether a fringe benefit is provided does not depend on whether employees consider that they have received an advantage or benefit. This conclusion is consistent with the analysis on the meaning of "benefit" in QB 12/06 "Fringe benefit tax – 'Availability' benefits" published in *Tax Information Bulletin* Vol. 24, No. 4, May 2012, page 32.

17. The Commissioner notes that:

    (a) Fringe benefits provide an economic advantage to an employee because they reduce an employee's need to meet private expenditure from their income.

    (b) Under the rewritten definition of "fringe benefit", all that is required is that the employer has provided a benefit to an employee – it is not necessary for the benefit to be "used, enjoyed or received" by the employee, as was the case in the original definition.

    (c) It is not necessary for the benefit to be a benefit that the public is unable to receive – a fringe benefit can include something the employee or the public could receive on their own account.

What is meant by "provided"

18. The Commissioner notes that in *Norris v Syndi Manufacturing Co Ltd* [1952] 1 All ER 935 (CA) it was stated that "the primary meaning of the word "provide" is to "furnish" or "supply". Therefore, for something to have been provided to an employee it must be supplied, furnished, or made available to that employee.

19. Ten examples are provided to assist in explaining the application of s. CX 2(2):

(a) Example 1: The requirements of s. CX 2(2) are satisfied in the case of the provision of low interest loans to employees in circumstances where the employer pays for the interest subsidy.

(b) Example 2: The provisions of s. CX 2(2) are not satisfied where employees are allowed to join a credit card company's loyalty scheme but the employer provides no consideration to the credit card company.

(c) Example 3: The provisions of s. CX 2(2) are not satisfied where an employer merely allows a retailer to advertise on the employer's premises and is allowed to email interested staff.

(d) Example 4: The requirements of s. CX 2(2) are satisfied where an employer approached its bank and requests the bank to offer low interest mortgages to its employees.

(e) Example 5: The requirements of s. CX 2(2) are satisfied where another company in the same group as the employer provides discounted goods to the employer's employees.

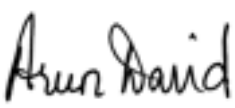
(f) Example 6: The requirements of s. CX 2(2) are satisfied where an employer that is a travel agent enters into a scheme with an airline to provide a certain number of free domestic flights to its employees who excel in promoting and selling the airline's flights.

(g) Example 7: The requirements of s. CX 2(2) are not satisfied where an employer approaches a chain of retail stores and suggests that a discount be offered to its employees, but provides no consideration for the discount.

(h) Example 8: The requirements of s. CX 2(2) are not satisfied where an employee pays for work-related expenditure on her personal credit card and obtains points in the credit card company's rewards scheme.

(i) Example 9: The requirements of s. CX 2(2) are also not satisfied where, following on from example 8, the employee receives a corporate credit card and joins the credit card company's rewards scheme, but the employer is not involved in encouraging the employee to join the scheme.

(j) Example 10: The requirements of s. CX 2(2) are satisfied where an employer approaches a motor vehicle dealer and requests that a bulk discount offered to it is extended to its employees.



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