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1. This week I continue looking at fringe benefits and I review 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*.

Car parks provided on the premises of an employer

2. The use of a car park an employer provides to an employee is on the face of it a benefit and is subject to FBT. However, s. CX 23 excludes from FBT benefits provided to an employee on an employer's premises.
3. Previously, in expired Public Ruling BR Pub 99/6 the Commissioner established that for the purposes of the FBT "on-premises" exclusion "premises" were those land and buildings that an employer owned or leased (in a common law sense), and so had exclusive possession of. Land and buildings that were merely licensed to an employer were not considered to be an employer's "premises".
4. Since then, legislative changes have been made to the on-premises exclusion. Car parks owned or leased by employers at common law continue to qualify for the "on-premises" exclusion. Other car parks that an employer has substantially exclusive use of, in fact or effect, will also qualify for the exclusion – regardless of the legal form of the car parking arrangement. This means a benefit arising from the use of some (but not all) licensed car parks may now be excluded from FBT.

The on-premises exclusion

5. The on-premises exclusion is set out in s CX 23, which provides that a benefit (other than free, discounted, or subsidised travel, accommodation, or clothing) is not a fringe benefit if:
 - (a) It is provided to an employee by an employer and used or consumed on the premises of the employer or on the premises of a company that is part of the same group of companies as the employer; or
 - (b) It is provided to the employee by a company that is part of the same group of companies as the employer and used or consumed by the employee on either the premises of the employer or the premises of the company that provides the benefit.

Definition of "premises of a person"

6. There is there is a definition of "premises of a person" in s CX 23(2) under which "the premises of a person":
 - (a) Include premises that the person owns or leases; and
 - (b) Include premises, other than those owned or leased by the person on which an employee of the person is required to perform duties for the person; but
 - (c) Do not include premises occupied by an employee of the person for residential purposes.
7. The Commissioner's analysis in the draft ruling focuses on the first limb of the above definition: "include premises the person owns or leases" and proceeds by:
 - (a) Considering the meaning of the word "premises";
 - (b) Interpreting the meaning of the word "include";
 - (c) Considering the meaning of the terms "own" and "lease" in s. YA 1 and whether those meanings apply;
 - (d) Considering the application, meaning and effect of the s. YA 1 definitions of "estate" and "possession"; and
 - (e) Considering the first limb as a whole.

Meaning of "premises"

8. It is noted that the ordinary meaning of "premises" has a wide meaning that includes houses and buildings together with their land. This meaning includes land and buildings occupied by a business. However, case law indicates that the word should take its meaning from the context in which it is used (*Maunsell v Olins* [1975] 1 ERNZ 710):
 - (a) In some contexts "premises" may mean land, buildings on land (including the land surrounding the buildings) and any easements granted as appurtenant to the land and buildings: *Grandi v Milburn* [1966] 2 All ER 816;
 - (b) In other contexts premises might be restricted to simply mean buildings situated on the land: *McKenna v Porter Motors Ltd* [1955] NZLR 832.
9. The Commissioner considers that:
 - (a) "Premises" should be interpreted as including land, buildings, and parts of land or buildings; and
 - (b) The definition of "premises of a person" is not limited to "business" premises – i.e. it is not to be interpreted as being restricted to premises from which the employer carries out its normal business operations.

Meaning of "include"

10. The use of the word "include" could either be:
 - (a) Indicative of a non-exhaustive definition; or
 - (b) Read as equivalent to the narrower "means and includes" construction: *Dilworth v Commissioner of Stamps* (1899) NZPCC 578 (PC).

11. The Commissioner argues that if the word “include” is given a non-exhaustive meaning in the context of s CX 23(2)(a), then arguably an employer’s premises are not restricted to car parks that an employer “owns” or “leases” but might also include other car parks, such as any car parks licensed by an employer. The Commissioner disagrees with this interpretation and considers the better view, in this context, is to interpret “include” in the definition of “premises of a person” exhaustively. The Commissioner's view is that if Parliament had intended the class to be broader than premises that an employer “owns” or “leases” it could have explicitly provided for it.
12. Moreover, the Commissioner's view is an employer’s premises will include only premises that are essentially in the nature of an estate in the land. At common law, an estate in land exists when a person owns or leases land so that they have exclusive possession of the land. An estate in land does not exist when a person merely has a licence to use the land or is granted permission to enter the land for some specified purpose.
13. The Court of Appeal in *Fatac Ltd (in liq) v CIR* [2002] NZCA 269, [2002] 3 NZLR 648 (which followed the House of Lords’ decision in *Street v Mountford* [1985] 2 All ER 289) stated that: a licence is a mere permission to be on the land, with or without additional permission to perform additional specified acts there, and does not create an estate in land.
14. The Commissioner states that this follows the *expressio unius est exclusio alterius* (to express one thing is to exclude another) principle of statutory interpretation. By stating expressly that the definition of “premises of a person” includes premises of the type that employers own or lease, s. CX 23(2)(a) premises held under some other arrangement such as a licence are excluded from the definition.

Section YA 1 definitions of "own" and "lease"

15. The Commissioner considers that the better view is that the relevant definitions in s. YA 1 apply for the purposes of s. CX 23(2)(a). The important parts of the definitions for the purposes of this discussion are:
 - (a) "Own" means to have an estate or interest in the land; and
 - (b) "Lease" means a disposition that creates a leasehold estate.
16. Notably, in the Commissioner's view, the definition of "lease" has six limbs, three of which include a reference to some form of licence, but the general part of the definition, which is the part that applies for FBT purposes, does not refer to licences.

Section YA 1 definitions of "estate" and "possession"

17. The main part of the discussion in the draft ruling is focused on the circumstances in which something other than an estate in land at common law might constitute "premises" in any case. The meanings of "estate" and "possession" in s. YA 1 are a central part of this discussion.
18. The relevant parts of the s. YA 1 definition of "estate" are as follows":
 - (a) Estate means an estate in land ... and
 - (b) Estate includes a right, whether direct or through a trustee or otherwise, to the possession of the land ..."
19. The Commissioner notes that the definition of “estate” is a “means and includes” type definition. Where the words “means” and “includes” are used together within a provision the

standard approach is for the "included" matters to extend the meaning of the generally defined term. While at common law, an arrangement that is a licence is never an estate or interest in land, the extension to include a right to possession results in the inclusion of a separate right that may not always be an estate at common law.

20. The extension of the definition of an "estate" to include a right to possession makes the s. YA 1 definition of "possession" also relevant. In s. YA 1:

"Possession includes a use that is in fact or effect substantially exclusive"

21. Applying this meaning to the definition of a "lease" for FBT purposes, the Commissioner's view is that this means an agreement will be a lease if it is a disposition that creates a use of the land that is in fact or effect substantially exclusive. Therefore, if an employer has an agreement with a third party that creates a use of the land that is in fact or effect substantially exclusive, then that land will be the premises of the employer for the purposes of the on-premises exclusion.

22. In this context, the Commissioner's view is that "a use" can be something less than legal occupation, providing it is an actual use. In *Merrill v Wilson* [1900] 1 QB 35 (CA) the Court of Appeal considered whether ship-owners had "actual use" of a portion of a quay and decided that the ship owners "had substantially the full enjoyment of a definable portion of the quay, namely, that beside which the ship lay, for the essential purpose for which the quay was intended, to the exclusion of any use of it by others for that purpose".

23. The words "in fact or effect" were initially introduced into New Zealand's tax legislation to prevent landowners from entering into dummy sales to avoid land tax while still effectively retaining the benefits of ownership.

24. The discussion in the draft ruling concerning the meaning of "possession in fact" first focuses on the legal meaning. It is noted that legal possession has traditionally been decisive: in *Western Australia v Ward* [2002] HCA 28, [2002] 213 CLR 1 the High Court of Australia held that "when the cases speak of exclusive possession, they speak of legal possession". The New Zealand Court of Appeal stated in *Fatac* that:

(a) The right to exclusive possession as the litmus for tenancies – a licensee merely has a personal right or permission to enter upon land, and lacks the right to exclusive possession;

(b) The lease/licence distinction is unaffected by the label which the parties choose to place upon their transaction – the distinction does not turn on the intention of the parties – the only intention that matters is intention as to substantive rights;

(c) A necessary incident of a meaningful right to exclusive possession is a fixed or periodic term of the tenancy;

(d) Limitations upon the purposes to which the occupier can put the land do not negate a tenancy: *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405 (PC);

(e) De facto exclusive possession can be an important guide to contractual intentions.

25. As noted in *Fatac*, at common law, de facto possession is indicative, but not conclusive, of there being a lease rather than a licence. However, as recognised in *Street v Mountford*, there can be circumstances where an arrangement may still only be a licence notwithstanding that de facto exclusive possession can be established - for example, an owner can sometimes have a genuine need to continue to have access to land for some reason.

26. However, for New Zealand tax purposes, de facto or "substantially exclusive" possession is a decisive factor in the s. YA 1 definition. In the Commissioner's view, the words "in fact" extend the concept of possession for the purposes of the Act to include situations where the user is actually occupying or using the land without the requisite legal exclusive right to possession of the land. This is broader than the common law concept of "possession".
27. In contrast, the use of the words "possession in effect" does not extend the common law interpretation, but simply reflects it. The courts have consistently emphasised that it is the substance rather than the form of an agreement that is decisive in determining whether it is a lease or a licence. If the effect of an instrument is to give to the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purpose for which it may be used, it is a lease (rather than a licence): *Glenwood Lumber*.
28. The Commissioner interprets the words "substantially exclusive" to mean that the use by a person must, for all intents and purposes, or in the main, be exclusive. No other person should have or retain a competing right to use the land such that it could be said that the first person is prevented from having a use of the land that is substantially exclusive. This interpretation is supported by the discussion in *Troon Place Investments Ltd v CIR* (1995) 17 NZTC 12,175.
29. It is noted that a number of UK cases offer some insights into the expression "substantially exclusive" as it is used in the context of land:
- (a) In *Newcastle-under-Lyme Corp v Wolstanton Ltd* [1946] 2 All ER 447 it was held that a gas company had an exclusive right of occupation of the land through which its pipes or cables passed because the company "was in de facto possession to the substantial exclusion of any enjoyment of the land by others and in circumstances importing some degree of permanence".
- (b) In the House of Lords decision of *Westminster City v Southern Railway Co* [1936] 2 All ER 322, occupiers of premises at Victoria Station in London had exclusive occupation of the premises. Where more than one person has claims to the use or occupancy of the premises, it is a question of fact whose position in relation to occupancy is paramount. Their position was contrasted with that of a lodger in a lodging house where the landlord occupies the whole premises for the purposes of his business, despite the lodger occupying a room.

Definition of "possession" as a whole

30. The Commissioner considers that in the context of car parks and the FBT on-premises exclusion, in most situations "possession" will be established by determining whether, in granting a right to use the land for parking, anyone else, including the owner of the land or car park operator has (or retains) a degree of control over the land such that it prevents the employer from having, to all intents and purposes, exclusive use of the land.
31. This interpretation is consistent with the Supreme Court of Western Australia's decision in *Molina v Zaknich* (2001) 125 A Crim R 401, where it was held that the phrase "premises of an employer" refers to a site under the control of the employer.

Practical considerations

32. The Commissioner has helpfully listed a number of features that indicate that the employer has a use of the parking space that is substantially exclusive:
- (a) The owner or car park operator acknowledges that the employer and their employees have the exclusive use of the employer's car parking spaces and no one else (including the owner or car park operator) can park cars on the parking spaces;
 - (b) The car parking spaces are allocated exclusively to the employer and cannot be re-allocated at the discretion of the owner or car park operator without a variation of the arrangement or a new arrangement being agreed;
 - (c) The employer has unrestricted access to the car park;
 - (d) The car parking spaces remain unoccupied if not being used by the employer (or someone authorised by the employer);
 - (e) The employer may permit others to use the employer's car parking spaces;
 - (f) If an unauthorised person parks in an employer's car parking space, the employer may take steps to have the unauthorised vehicle towed; and
 - (g) The employer may decide how the car parking space is used (eg, if desired, the employer may park a trailer in the car parking space).
33. In contrast, the following are examples of features that might suggest a car parking arrangement is not a "lease":
- (a) The employer is not allocated any particular car parking spaces within the car park;
 - (b) Where the employer is allocated particular car parking spaces, the owner or car park operator retains the ability to reallocate car parking spaces at their discretion;
 - (c) The owner or car park operator may alter the car park's operating hours or restrict access to the car park at their discretion;
 - (d) The employer cannot remove unauthorised vehicles from the car park or otherwise enforce rights over the car park against third parties, including bringing any action for trespass; and
 - (e) There is no signage showing the employer's car parking spaces as being "reserved".

Examples

34. There are also six examples provided that illustrate some of the above practical considerations:
- (a) Example 1: Leased car parks on vacant land adjacent to the employer's premises are on the premises of the employer despite the vacant land not being where the employer's business is being carried on.
 - (b) Example 2: Parking spaces leased by a company in a parking building, with the spaces identified in the lease agreement, that are used by the company's employees as well as by employees of another company in the same group, are on the premises of the employer even if use of the parks is restricted to parking cars and the car park operator is responsible for monitoring unauthorised use.

- (c) Example 3: 50 parking spaces reserved for a company in a parking building which are able to be used by a company's employees through the issue of 50 access cards will be regarded as being on the premises of the employer.
- (d) Example 4: Parking spaces in the entire top floor of a parking building, to which access is restricted by an access gate, are regarded as premises of the employer despite the agreement being a "standard-form licence agreement" because no-one else has a competing right to use the floor.
- (e) Example 5: Three undesignated parking spaces of a company's employees in a commercial car park are not premises of the employer despite the agreement being called a lease because other users can use the car parks, and the company simply has the right to enter the reserved area and use the car parks.
- (f) Example 6: Parking for two employees in an open air public car park with permits required to be displayed on the windscreen are not premises of the employer.



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