28 February 2020

Ms Kim Hall
Australian Taxation Office

By email: Kim.Hall@ato.gov.au

Dear Kim,

TR 2019/D7 - deductibility of employees' transport expenses

Chartered Accountants Australia New Zealand (CA ANZ) appreciates the opportunity to provide feedback on the draft Taxation Ruling *TR 2019/D7 Income tax: when are deductions allowed for employees' transport expenses?* (the Draft Ruling).

CA ANZ welcomes the more flexible approach in the Draft Ruling to determine whether a particular transport expense is incurred in gaining or producing assessable income. We agree that it is important to have regard not just to the duties in the contract of employment, but to the nature of the work as a matter of substance.

Providing the list of factors that **may** support a characterisation of transport expenses as being incurred in producing assessable income will help address some of the practical compliance concerns from employees that arose after the issue of the previous draft Taxation Ruling *TR 2017/D6 Income tax and fringe benefits tax: when are deductions allowed for employees' travel expenses?*.

Our comments on the Draft Ruling are set out in the attached.

To discuss this submission further, please contact Karen Liew at first instance on (02) 8078 5483 or by email on karen.liew@charteredaccountantsanz.com

Yours sincerely

Michael Croker
Tax Leader Australia
Chartered Accountants Australia and New Zealand

General comments

Previous ruling

According to paragraph 5 of the Draft Ruling, the subject matter of this Draft Ruling partially overlaps with that of draft Taxation Ruling *TR 2017/D6 Income tax and fringe benefits tax: when are deductions allowed for employees' travel expenses?*. Comments on the status of TR 2017/D6 on the ATO website state that:

> "TR 2019/D7 partially replaces TR 2017/D6. A further draft ruling on the deductibility of meals and accommodation will be published during 2020.
>
> Pending the provision of that additional guidance, the ATO will continue to accept that where an employee is away from home overnight for work for 21 days or less, the employee will be treated as travelling for work purposes rather than living away from home and the allowance paid by the employer will be treated as a travel allowance."

Given the ATO is aware that its views in TR 2017/D6 will be superseded by the Draft Ruling and a future draft ruling covering meals and accommodation, we recommend that the finalisation of the Draft Ruling and associated tax issues be fast traced in a coordinated fashion, with the ATO website update plus a tax agent/taxpayer education support program ready to go.

Date of effect

Paragraph 77 of the Draft Ruling states that to the extent that there is any conflict between the final Ruling and TR 2017/D6, the Commissioner would have regard to the earlier draft in deciding whether to apply compliance resources in income years to which the earlier draft applies. Given TR 2017/D6 represents the ATO's administrative view prior to 13 December 2019, we recommend that the Commissioner apply no compliance resources on taxpayers relying on the views in TR 2017/D6 which have been superseded by the Draft Ruling.

Detailed Comments

Incurred in gaining or producing assessable income – factors

Paragraph 11 outlines the factors the Commissioner considers may support a characterisation of transport expenses as being incurred in producing assessable income. We suggest case law references be included in footnotes, where applicable, to support the factors listed.

No regular place of work

Paragraph 41 simply states that this Ruling does not deal with circumstances of an employee who has no regular place of work and the principles established in TR 95/34: *Income tax: employees carrying out itinerant work - deductions, allowances and reimbursements for transport expenses* should be considered for such cases. To be of more assistance to the reader, we recommend that the principles from TR 95/34 be summarised briefly at paragraph 41 – especially since there is a distinction made in TR 95/34 between a 'web' of workplaces (i.e. the employee has no fixed place of work) and 'itinerant work'.

As an aside, given TR 95/34 is 25 years old and includes references to repealed provisions, we recommend in the long term that TR 95/34 be refreshed and modernised to deal with the work practices that we have now.

On call and standby arrangements

Example 11 covers the situation where duties have substantively commenced at home and then completed at the regular work location for a highly trained computer consultant. We query whether the example is dependent on Christine having specialised equipment installed at home given that nowadays, a computer consultant can use a work laptop with remote access to the business' intranet and server to deal with IT issues. We suggest this example be modified to reflect the more common scenario of the computer consultant using a work laptop with remote access to work from home.

Travelling to a location other than the regular work place and apportionment

The Draft Ruling does not include any commentary or examples dealing with the apportionment of travel expenses where an employee is required to travel from home to an alternative work location which includes an extended stay at the alternative work location as a result of the employee's choice. As the apportionment of transport expenses is commonly subject to debate, especially where the transport expenses involve air travel, we recommend further commentary and an example be included in the final Ruling to provide taxpayers with more certainty.

A useful example would be one similar to Example 4 where an employee has to travel to Kakadu National Park to attend a training course. Instead of travelling straight home after the course finishes, the employee stays one more extra day to explore Kakadu National Park.

For further comments on apportionment of travel expenses, we refer to the Joint submission on TR 2019/D4 *Income tax: employees: deductions for work expenses under section 8-1of the Income Tax Assessment Act 1997* which was lodged by CA ANZ, CPA Australia and Institute of Public Accountants. We note that, in cases involving business travel where a person adds on a holiday, Courts have found that it is not always appropriate to apportion airfares on a time-based apportionment methodology.

In *Case R13, 84 ATC 168* travel which included 5 days out of 40 days at a congress was held to have had a 50% deductible purpose as opposed to the ATO view that it should have been 12.5% (5/40) deductible.

> "The Commissioner has apportioned the expenditure on the fare on a time basis, allowing only that proportion of the fare that is relevant to the days on which the Congress was conducted. In the light of the decided cases, that appears to be a totally inappropriate method; the proper method is to determine the degree of predominance to be attached to the objects or purposes in the pursuit of which the taxpayer incurred the particular expenditure which is to be the subject of apportionment."

In *Amin and Commissioner of Taxation [2017] AATA 1042* in relation to course fees to study law at university and the cost of flights and accommodation to attend a conference in Las Vegas, both of which the employer had agreed would assist him with his work, were tax deductible. Two extra nights of accommodation en route to Las Vegas were personal and not tax deductible, but that did not necessitate apportionment of the flight cost as partly personal.

The Tribunal (at 61) stated:

> "It is not appropriate, in my view, to apportion the airfares to treat part of them as deductible and part of them as not deductible. This is because the US trip was work related travel and the airfares are not able to be readily apportioned for any private purpose."

Over-time transport expenses

Generally, where an employee is travelling home after work, the transport expense is simply a necessary consequence of living in one place and working in another, i.e. it is private in nature. We also note from paragraph 22 that the cost of travel between home and the employee's regular place of work does not simply become deductible because the employee works overtime and there is no public transport available at the time they start work.

However, the cases referenced in footnote 16 to paragraph 22 both deal with the situation where the employees are employed and are required to start early, or do night shift, everyday during the work week. We question whether this principle can equally apply to the situation where an employee is employed to work 9am to 5pm every day but on occasion the employee may be required to work late to meet deadlines.

We note from commentary in TR 2019/D4, there are expenses which are typically of a private nature, that may be deductible when there is a sufficiently close and real connection to the employment activities that produce assessable income for the employee. An example given is expenditure on food and drink incurred in the course of overnight travel away from home for work purposes.

We query whether this may similarly apply in the situation where an employee, who usually works 9 – 5pm in the CBD is required to work until 3am one night to meet a project deadline. Due to no public transport being available at that time, and personal safety reasons, the employer's policy requirement is for the employee to catch a taxi home, or if they are able to plan ahead, arrange to drive to work so that they can drive home at 3am. It would be useful to include an example dealing with this scenario in the final Ruling.

Appendix A

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