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Manager, Technical Standards
Office of the Chief Tax Counsel
National Office
Inland Revenue Department
PO Box 2198
Wellington

Dear Rob and Michael

Employer-provided travel from home to a distant workplace – income tax (PAYE) and fringe benefit tax ED0217

Thank you for the opportunity to comment on this draft operational statement.

Overall, we welcome the approach the Commissioner proposes in the draft operational statement. The statement will be a useful resource for employers to determine the correct/accepted tax treatment of employer-provided travel.

We note that the Commissioner's proposed approach is pragmatic, applies current caselaw, and follows the legislative rules for the tax treatment of employer-provided accommodation. Despite our support of the draft operational statement we are mindful that the Commissioner may change her approach in the future (albeit not necessarily in the immediate future). If this were to happen uncertainty and confusion may follow. Therefore, we recommend that the issue be referred to Policy and Strategy to consider a law change specific to employer-provided travel. In the interim, the draft operational statement could be finalised and followed.

As previously recommended, we consider that the scope of the draft operational statement should be extended to include the income tax implications of employer-provided travel from home to a workplace in the same local area within the same town or city. This situation often arises in today's flexible work environment.

For the reasons set out in more detail below we recommend that the:

- draft operational statement be expanded to show how the Commissioner's approach would apply to a shareholder-employee;
- explanation of a "distant workplace" be expanded;

- draft operational statement confirm the Commissioner’s approach if a different tax position on employer-provided travel from home to a distant workplace was identified in the course of an investigation relating to periods before the publication of the final operational statement. This would help reassure taxpayers;
- discussion on motor vehicles and fringe benefit tax should be clarified; and
- discussion regarding home as a workplace in the draft operational statement is reconciled with the Commissioner’s statements in Interpretation Statement IS3448, Travel by Motor Vehicle Between Home and Work – Deductibility of Expenditure and FBT Implications; and Interpretation Statement IS 17/07, Fringe Benefit Tax – Motor Vehicles.

Shareholder-employees

It would be helpful if the draft operational statement illustrated how the Commissioner’s approach would apply to a shareholder-employee. Additional discussion and an example considering whether a shareholder-employee has multiple workplaces and/or whether a shareholder-employee’s home can also be a workplace, would be useful.

Distant workplace

A “distant workplace” is briefly defined on page 1 of the draft operational statement and readers are referred to a 2009 Tax Information Bulletin (TIB) item in a footnote. In our view, it would be useful if the key message in the TIB item is expressed in one sentence in the main body of the draft operational statement.

We also note that the TIB item is reproduced on the Inland Revenue website:

<https://www.classic.ird.govt.nz/technical-tax/general-articles/leg-2009-guidance-reasonable-distance.html>.

This resource could also be referenced in the draft operational statement.

Application

Page 3 of the draft operational statement confirms that taxpayers do not need to revisit tax positions taken before publication of the final operational statement. This implies that the Commissioner will not be directing resources to specifically focus on this issue. We support this decision; however, in our view, it would be helpful if the draft operational statement also confirmed the Commissioner’s approach should this issue be identified in the course of an investigation relating to periods before the publication of the final operational statement.

Motor vehicles and fringe benefit tax

In our view, the discussion in paragraphs 21 – 25 of the draft operational statement could be clarified.

We note that Interpretation Statement IS 17/07, Fringe Benefit Tax – Motor Vehicles, includes discussion on the FBT implications of an employer making available to an employee a motor vehicle for private use –

the subject of the above paragraphs. This interpretation statement is not referred to in the draft operational statement. We recommend that it is. We also recommend that the statements in IS 17/07 are reconciled with the statements in the draft operational statement to ensure clarity and consistency. See further our comments later in our submission regarding Example 4.

Paragraph 24 of the draft operational statement says that “the Commissioner considers that the approach in this Statement can be used in determining whether using an employer-provided motor vehicle (for example, a rental car) to travel from home to a distant workplace is work-related travel.” It would be helpful to illustrate this with an example.

Paragraph 25 of the draft operational statement reminds employers that even if travel between home and work is work-related travel, they must establish that the vehicle is not available for any private use. We recommend that this paragraph also provide guidance on how this can be achieved. For example, the paragraph could mention the type of records that should be kept; cross references could be made to paragraphs 272, 273, 276 and 277 of IS 17/07, or other Inland Revenue guides.

Home as a workplace

Paragraphs 39 – 51 of the draft operational statement sets out the Commissioner’s proposed approach in determining whether a person’s home is a workplace for the purposes of the multiple workplace approach. Taking into account the Commissioner’s acknowledgement of possible implications to employer/employee contracting arrangements and compliance costs, we broadly support the principles outlined in these paragraphs.

Notwithstanding the above, we consider that there is risk of confusion and an apparent inconsistency of tax treatment between the Commissioner’s proposed approach and the approach adopted for FBT purposes as published in Interpretation Statement IS3448, Travel by Motor Vehicle Between Home and Work – Deductibility of Expenditure and FBT Implications; and Interpretation Statement IS 17/07. In these statements the Commissioner takes a stricter approach when determining whether home is a workplace. We therefore recommend that the discussion in the draft operational statement clarifies and reconciles the proposed approach in the draft operational statement and the current FBT interpretation statements.

The discussion in paragraphs 45 – 49 of the draft operational statement indicates that there will be certain records that employers and employees will need to keep to support the position that an employee’s home is a workplace. It would be helpful if the draft operational statement included examples of what the Commissioner would require in this regard.

In practice it would not be unusual for an employee to exchange/swap their contracted work-at-home day in a particular week due to work flow or work activity. For example, an employee who works from home on a Tuesday may work at the distant office on that day instead because they are required to attend a meeting with a person visiting from overseas (i.e. the overseas visitor is in town only on that Tuesday). The employee works from home on Thursday in that week instead. From the draft operational statement,

the travel from home to the distant work place on that Tuesday would be non-taxable. However, from the examples it would appear that the travel from home to a distant workplace on that Thursday would not qualify for the Commissioner's concessionary treatment. It would be helpful if the draft operational statement confirmed the position in this circumstance. This could be achieved by extending the facts or explanation in example 6.

Examples

We suggest the following examples be clarified:

Example 2: Ongoing travel from home to a distant workplace

The example should confirm that the employer-provided travel is taxable from the outset, i.e. from day 1. See further below.

We recommend that example 2 be extended, or a new example be added, to consider a scenario that would often arise in commercial practice. The scenario is:

- there is an arrangement that the employer provides travel to the employee from home to a distant workplace for a period of less than two years;
- as things progress it becomes apparent that there is a commercial need to extend the period of employer-provided travel;
- the extension results in the two-year threshold being exceeded.

For certainty and completeness, we believe the draft operational statement should set out the Commissioner's view on the tax treatment of the employer-provided travel in the above situation – both in the initial two-year period and in the period after the two-year threshold has been exceeded. The draft operational statement should also confirm whether the Commissioner would require a retrospective adjustment for the first two years.

Example 4: Travel between multiple workplaces

The last statement in example 4 should be reconciled with the statements made in paragraphs 20 and 23 of the draft operational statement. The former implies that the travel, provided limited to this example situation, would be considered to be "work-to-work" and therefore not private. However, it is not clear from the statements in paragraphs 20 and 23 that the same conclusion would be drawn in the context of FBT. In our view, it would be sensible and simple if the same treatment applied.

Example 4 should clarify whether there is an office in Nelson or whether Charlotte's home is a workplace per her employment contract. Given the placement of the example in the draft operational statement (i.e. in the discussion regarding multiple workplaces), the inference is that there is an office in Nelson from which Charlotte performs her employment duties.

We note that the structure of the draft operational statement focuses readers on one particular aspect at a time and the examples are placed under each accordingly. Readers are therefore encouraged to read the whole item and not just the examples in isolation. Notwithstanding this, we think that there is a risk

that the reference in example 4 to Charlotte travelling to a distant workplace from home may confuse readers. It would be helpful if the facts in example 4 confirmed that home was not a workplace (the issue of whether home is a workplace is discussed in the remaining paragraphs (paragraphs 39 – 51) of the draft operational statement).

Example 8: Whether home is a workplace when person required to work at specified places on different days

The statement in the final paragraph in example 8 should be reviewed and clarified. We find the last statement confusing and its conclusion appears to be inconsistent with the statements made in the second paragraph about determining whether home is a workplace. In our view, if Monday, Tuesday and Wednesday are Phil's contracted work from home days then travel on those days to a distant workplace would be travel between two workplaces and therefore non-taxable. This could be contrasted with travel on the Thursday to the distant workplace, which would be taxable based on the fact pattern in the example.

There is an editorial error in paragraph 37: "the" at the beginning of the last sentence in that paragraph should read "The".

We are happy to discuss our submission. Please contact Lindsay Ng should you wish to do so.

Yours sincerely



John Cuthbertson
NZ Tax and Financial Services Leader



Lindsay Ng
Senior Tax Advocate