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3 February 2012

The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email:fbt@treasury.gov.au

Dear Sir or Madam

Re: Consultation Paper - Living Away From Home Allowances

We understand that you are seeking input from stakeholders in relation to the Consultation Paper released in November 2011 in respect of the proposed reform of the fringe benefits tax treatment of Living Away From Home Allowances (LAFHA) (the Consultation Paper).

By way of background, we are a leading accounting firm that has a specialised Employment and Remuneration Service division with significant involvement in managing expatriate employees, overseas assignments and company obligations surrounding the above.

We believe that the proposed changes will prove to be a strong disincentive for employees to strengthen their skills through working overseas and will hinder companies seeking to recruit skilled workers to address Australia's ongoing skills shortage.

Many of the perceived abuses within the living away from home environment could be addressed without the need to remove living away from home allowances by adopting the following:

Option	Details
1	LAFHA should only be available in respect of employer instigated moves. A LAFHA should not be available where the temporary resident obtains employment after arrival in Australia. This will remove much of the rorting within the backpacker sector.
2	Introduction of a fixed time period for a LAFHA in respect of temporary resident, being the lesser of: • The temporary entry permit granted to the employee; or • 4 years
3	The employee should no longer be entitled to a LAFHA where they change their employment post arrival in Australia. The LAFHA should remain valid for the first employment, but not the second employment. This will also be useful retention tool for employers who are forced to recruit staff from overseas in light of the skills shortage in Australia.
4	The exempt accommodation component within the LAFHA should reflect actual expenditure incurred by the employee, rather than amount as loosely defined as "reasonable". The employee could sight and retain a copy of the rental/tenancy agreement and use this

	as the basis for determining the accommodation component of the LAFHA.
5	LAFHA should **not** be expressed as an acceptable percentage of gross remuneration. Such mechanisms encourage the rorting as shown in Example 5 on page 6 of the Consultative Document. Rather it should represent the additional non deductible expenditure incurred by the employee as a result of living away from their usual home.
6	Treasury and the Commissioner of Taxation have clearly identified areas where rorting occurs. Increased audit activity by the Australian Taxation Office should be directed in these areas. The proposed changes may be premature in light of the increased FBT audit i.e. the LAFHA questionnaires that were issued to employers for the FBT year ended 31 March 2010 and the data matching program being contacted with DIAC.

The balance of this submission focuses on the information contained in the Consultation Paper and the related Media Release issued by the then Assistant Treasurer on 29 November 2011 ("Media Release") and addresses the questions contained in Part 3 of the Consultation Paper.

Our key concerns are as follows:

- The proposed changes will only make personal income tax return compliance more complex and are clearly against previously stated Government policy.
- The proposed reforms do not deliver a level playing field between hiring an Australian worker and a temporary resident. A permanent resident enjoys a significant number of benefits that appear to have been excluded from any objective analysis of a "level playing field". The proposed changes will merely exacerbate the differences (refer Section 2.1 below).
- Will the existing guidelines contained in Miscellaneous Tax Office Ruling MT 2030 continue to be utilised in determining eligibility to receive a LAFHA in respect of permanent residents and temporary residents maintaining a home in Australia (see Section 2.2. below)?
- The Consultation Paper does not provide any clarity in respect of Australian national working overseas who remain residents and therefore subject to tax on worldwide income and the interaction with the proposed LAFHA changes. (See sections 2.2, 2.3 and 2.4)
- The proposed changes do not segregate between the various temporary visa categories (i.e. 417, 419, 442 and 457). (See section 2.5). The proposed changes could be better targeted in this regard.
- The lack of transitional rules severely disadvantages individuals who accepted roles in Australia on the basis that they qualified as living away from home under the existing rules. (See section 3.1) A transitional rule should be introduced in respect of existing temporary residents. The transitional period should be restricted to the lesser of:
  - Two years (2) years; or
  - The duration of the temporary entry permit issued pre 1 July 2012.
- The Consultation Paper appears to be inconsistent in the income tax deductibility of food (see section 3.3, 3.4 and 3.5)
- An objective review of the most recent substantive legislative change in the area of expatriates (i.e. the changes to section 23 AG of ITAA36) would indicate that these changes were rushed and implemented without due consideration of the interaction with other pieces of tax legislation
- The Consultation Paper takes the position that a temporary resident will not qualify as living away from home for LAFHA purposes unless they maintain a home in Australia for their own use and they are required to live away from that home (See Section 4.1).
  - Will the existing FBT concessions relating to relocation costs in respect of temporary residents not maintaining a home in Australia (other than the LAFHA or reimbursements) remain post 1 July 2012?
  - The Consultation Paper is silent in this regard.
- Clarity is required around the determination of the reasonable food amount. The Consultation Paper has indicated at Section 2.1.3 that reasonable food amounts will not need to be

substantiated. This appears to be inconsistent with the position as portrayed in Tables 1 and 4 of the Consultation Paper.

- Section 12-35 of Subdivision 12-B of the *Taxation Administration Act 1953* makes it clear that an employer must withhold PAYG from any allowance that it pays to an employee (section 4.4 below).
  - What documentation will the employer are required to maintain in order to vary the PAYG withholdings?
  - What penalties will apply if the employer incorrectly categories the employee i.e. the LAFHA is taxable and no deductions are available?
  - Will the Commissioner introduce a Legislative Instrument to effect the proposed PAYG withholding obligations?
- Will the LAFHA paid to an employee who is either a permanent resident or a temporary resident maintaining a home in Australia fall within the exclusion contained in Paragraph 72 of SGR 2009/2? If yes, will the Commissioner amend SGR 2009/2 with effect from 1 July 2012 to include LAFHA as an example of an allowance that meets the exemption outlined in Paragraph 72? (see Section 4.5 below)
- The proposed changes will significantly increase Payroll tax and WorkCover obligations (See sections 4.6 and 4.7 below).
- The tem "Community sector" is not defined within the Consultation Paper. It is difficult to provide objective commentary given the Federal Government's proposed overall the not for profit sector (see Section 7 below).

We have outlined our specific issues in detail in the attached Annexure. If you have any queries please contact Michael van Schaik on (03) 8635 1835.

Yours faithfully

Michael van Schaik
MOORE STEPHENS
MELBOURNE PTY LTD

Enclosure

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Annexure

1 Background

1.1 Pre-existing eligibility for LAFHA

We dispute the inference that tax professionals and employers have sort to erode the PAYG withholding revenue base as contained in the Consultation Paper on page 5. Rather the Commissioner of Taxation has provided a definitive pathway for the provision of LAFHA.

The fundamental factual prerequisite is that the employee will be living away from home their usual place of residence to perform employment duties with the employer. The Commissioner of Taxation (the Commissioner) has published his guidance as to when this requirement is satisfied in Miscellaneous Taxation Ruling MT 2030[1].

Over the years the professional bodies have sought clarification from the Commissioner on the scope of eligibility for LAFHA as evidenced by the numerous questions raised in the National Tax Liaison Group (NTLG) FBT Subcommittee as follows:

Date	Agenda Item
Aug-01	Distinction between living away from home and travelling (CPAA)
Feb-03	Valuation of living-away-from-home allowance (LAFHA) fringe benefits (CPAA)
May-03	Reasonable food component of a living-away-from-home-allowance (NTAA)
May-03	The meaning of travelling v living-away-from-home - the 21 day test (NTAA)
Aug-04	LAFHA - Mentions that two rulings that discuss whether a foreign national on a working holiday maker visa qualify for LAFHA fringe benefit.
Nov-04	Living away from home travel versus private travel (CPA Aust)
Nov-04	Reduction of living-away-from-home food fringe benefits (ICAA)
May-06	Living-away-from-home allowances (TA)
Feb-07	LAFHA and amount 'spent' on accommodation (NZICA)
Nov-07	How is the reasonable food component of a living away from home allowance calculated for one adult and one child? (ICAA)
May-08	LAFH benefits (Discussion of numerous issues)
Nov-08	LAFHA - same place of employment (NIA)
Nov-08	LAFHA - unit of accommodation or location (NIA)
Nov-08	LAFHA - recipients allowance period (NIA)
May-09	Employees live away from home part of each week (TIA)
Feb-10	Living away from home reimbursements and minimum salary rules for the Department of Immigration and Citizenship purposes (NIA)
May-10	Update on ATO review of LAFHA allowance (TIA)
May-11	Living-away-from-home declarations in advance (IPA)

The Commissioner has not recoiled from his stated position that MT 2030 is stated position and provides adequate guidance on the matter.

The key guidance provided from MT 2030 can be summarised as follows:

- A person is regarded as living away from his or her usual place of residence if, but having to change residence in order to work temporarily for his employer at another locality, the employee would have continued to live at the former place (para. 14)
- The general presumption is that a person's "usual place of residence" is close to where he or she is permanently employed. Consequently, an employee who changes his or her place of residence because of change in location of a **permanent** job, whether be reason of a transfer with the same employer or a change of employment would not usually be living away from home on moving to a

[1] *Miscellaneous Taxation Ruling MT 2030 Fringe benefits tax : living-away-from-home allowance benefits*

new place of residence close to the new job location. This is so even though the new place of residence was temporary pending the obtaining of suitable long term accommodation (para. 19)

- The new position must be **temporary** or for a **limited period** of time. Provided the appointment is for a limited period and the employee can be expected in the normal course to return to the same city or district of their home country to live, the employee will be treated as living away from his or her usual place of residence (para. 22)
- A LAFHA may be paid to an employee who transfers to a new locality within Australia for a period of **2-3 years** on the basis that the employee returns to the permanent position at the end of that time (para. 23)

The Commissioner has also adopted this position when issuing a number of Private Binding Rulings on eligibility to receive a LAFHA.

Authorisation number of Ruling	Scheme commencement date	LAFHA approved
1011812014237	2011 to 2014 FBT years	Yes
1011779755168	2011 to 2014 FBT years	Yes
55166	2003 and 2004 income years	Yes
60366	2006 to 2009 income years	Yes
77822	2008 to 2011 FBT years	Yes
61863	2004 to 2010 FBT years	Yes
76568	2006 to 2010 FBT years	Yes
76625	2008 to 2011 FBT years	Yes
84417	2009 FBT year	Yes
84162	2006 to 2010 FBT years	Yes
84219	2006 to 2010 FBT years	Yes
44152	2005 to 2008 FBT years	Yes
60362	2006 to 2008 FBT years	Yes
83559	2004 to 2009 FBT years	Yes
64894	2006 to 2009 FBT years	Yes
65554	2005 to 2008 FBT years	Yes
51585	2005 to 2008 FBT years	Yes
68580 - Scenario 1	2007 FBT year	Yes
68580 - Scenario 2	2007 FBT year	Yes
68580 - Scenario 3	2007 FBT year	Yes
68659	2007 to 2011 FBT years	Yes
72085	2007 to 2008 FBT years	Yes
73815	2005 to 2009 FBT years	Yes
71796	2007 to 2010 FBT years	Yes
80996	2009 to 2011 FBT years	Yes
58015 - Scenario 1	2006 to 2010 FBT years	Yes
58015 - Scenario 2	2006 to 2010 FBT years	Yes
58015 - Scenario 3	2006 to 2010 FBT years	Yes
83380	2008 to 2011 FBT years	Yes
80034	2008 to 2010 FBT years	Yes

1.2 417 visa holders - Backpackers

On 24 January 2007, the Inspector-General of Taxation provided the Government with a report, Review of Tax Office's management of complex issues — Case Study on Lining Away From Home Allowances. The Inspector-General noted (at paragraph 2.31):

> *"The current administrative outcome and legal position appears to be that anyone, including backpackers, who claims to be living away from their usual place of residence can, as part of their remuneration agreement with their employer, receive tax-free remuneration to cover their accommodation and food expenses for extended periods. In simple terms, some employees*

> *including overseas visitors to Australia who find employment after they arrive, can effectively salary sacrifice for normal living expenses if their employer agrees."*

We find this criticism strange in that the Commissioner initially questioned the provision of LAFHA to 417 visa holders in Draft TD 2000/D5[2]. This draft determination was subsequently withdrawn effective from 19 October 2005.

The Commissioner of Taxation then addressed the issue of backpackers in the NTLG FBT Subcommittee Minutes of May 2008[3] where the following comments were made:

> *"In this situation, an employee who is already in Australia on a working holiday maker visa takes up a fixed term employment with an Australian employer. That is the employee had, previous to employment, moved from their usual place of residence, having travelled to Australia prior to employment. The important fact that must exist is that the employee's usual place of residence has not altered and the employee is not living at his or her usual place of residence.*
>
> *The question submitted is whether the employer can treat the employee as living away from the employee's usual place of residence in such a situation?*
>
> *Similar to the response to question 1, the Tax Office noted that MT 2030, in providing guidance as to whether an entitlement to a living-away-from-home allowance benefit can exist, states that it must be concluded that the payment is 'due to the employee being required to live away from his or her usual place of residence in order to perform the duties of his or her employment.' Further, paragraph 22 in MT 2030 (as referred to above) provides support for the view that this is the requirement that must be satisfied."*

We were surprised when the Commissioner did not finalise Draft TD 2000/D5 and his subsequent green light to the provision of LAFHA to 417 visas via his comments in the NTLG FBT Subcommittee of May 2008.

1.3 Meaning of Temporary resident

The term 'temporary resident'[4] is defined as follows:

a. you hold a temporary visa granted under the *Migration Act 1958*; and
b. you are not an Australian resident within the meaning of the *Social Security Act 1991*; and
c. your spouse is not an Australian resident within the meaning of the *Social Security Act 1991*.

However, an individual is not a 'temporary resident' if they have been an Australian resident (within the meaning of this Act), and any of paragraphs (a), (b) and (c) are not satisfied, at any time after the commencement of this definition. This definition applied with effect from 6 April 2006

Therefore the individual needs to satisfy all three tests in order to qualify as a temporary resident for Australian tax purposes.

This definition at first glance appears relatively straightforward. However, the definition requires either the employer or employee a working understanding of:

- The *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997*;
- The *Migration Act 1958*;
- The *Social Security Act 1991*.

Comment

[2] *Draft Taxation Determination TD 2000/D5 (Withdrawn) Income tax: can a foreign national who enters Australia on a working holiday maker visa qualify for living-away-from-home allowance fringe benefits?*
[3] http://www.ato.gov.au/taxprofessionals/content.aspx?menuid=43140&doc=/content/00153964.htm&page=11&H11
[4] Section 995 of ITAA 1997

As can be seen from the analysis below, the definition of temporary resident is neither simple nor straightforward.

It imposes an increased burden on both the employee and the employer as they need to fully understand its meaning in order to correctly identify the income tax or fringe benefits tax treatment of a living away from home allowance or benefit.

1.3.1 Temporary visa under the Migration Act

The term 'temporary visa'[5] has the meaning given by subsection 30 of the *Migration Act 1958*.

> *"Kinds of visas*
> 1. *A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.*
> 2. *A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:*
>   a. *during a specified period; or*
>   b. *until a specified event happens; or*
>   c. *while the holder has a specified status."*

Section 32 of the *Migration Act 1958* then makes reference special category visa as being treated as temporary visas for the purposes of the Migration Act.

> *"Special category visas*
>
> *(1) There is a class of temporary visas to be known as special category visas.*
> *(2) A criterion for a special category visa is that the Minister is satisfied the applicant is:*
> *(a) a non-citizen:*
> *(i) who is a New Zealand citizen and holds, and has presented to an officer or an authorised system, a New Zealand passport that is in force; and*
> *(ii) is neither a behaviour concern non-citizen nor a health concern non-citizen; or*
> *(b) a person declared by the regulations, to be a person for whom a visa of another class would be inappropriate; or*
> *(c) a person in a class of persons declared by the regulations, to be persons for whom a visa of another class would be inappropriate.*
> *(3) A person may comply with subparagraph (2)(a)(i) by presenting a New Zealand passport to an authorised system only if:*
> *(a) the New Zealand passport is of a kind determined under section 175A to be an eligible passport for the purposes of Division 5 of Part 2; and*
> *(b) before the person is granted a special category visa, neither the system nor an officer requires the person to present the passport to an officer."*

Therefore a New Zealand citizen who is not an Australian citizen and not the holder of an Australian permanent visa will be treated as a special category visa holder which in term means they are treated as a temporary visa holder within the meaning of the Migration Act 1958.

[5] Section 5 of the *Migration Act 1958*

1.3.2 Resident within the meaning of the Social Security Act

The term 'Australian resident'[6] has the meaning given by subsection (2) which provides as follows:

> *'An Australian resident is a person who:*
> *a. resides in Australia; and*
> *b. is one of the following:*
> *(i) an Australian citizen;*
> *(ii) the holder of a permanent visa;*
> *(iii) a special category visa holder who is a protected SCV holder.'*

As per the discussion above, the New Zealand citizen is a special category visa (SCV) holder.

We need to ascertain whether the New Zealand citizen is a protected SCV holder. The term has the meaning given by subsections (2A), (2B), (2C) and (2D) of the *Social Security Act 1991*.

In summary a protected special category visa holder is a special category visa holder who was present in Australia on or before 22 February 2001.

1.3.4 Spouse not a resident within the meaning of the Social Security Act

A 'spouse'[7] of an individual includes:

a. another individual (whether of the same sex or a different sex) with whom the individual is in a relationship that is registered under a State law or Territory law prescribed for the purposes of section 22B of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section; and
b. another individual who, although not legally married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple.

From the 1 July 2009 the spouse of an individual may be of the same sex or of the opposite sex. Prior to this date, the spouse of an individual could not be a person of the same sex.

Please refer to section 1.3.2 above to ascertain whether the spouse is an Australian resident within the meaning of the *Social Security Act 1991*.

[6] Section 7 of the *Social Security Act 1991*
[7] Section 995 of the *Income Tax Assessment Act 1997*

2 Question 1 - Are there any unintended consequences from the proposed reforms?

Neither the Consultation Paper nor the Media Release specifies the intended consequences of the proposed reform.

2.1 Level playing field?

The only reference to the intended consequences can be found in paragraphs 8 and 9 in the Forward to the Consultation Paper:

> *"The changes will ensure a level playing field exists between hiring an Australian worker or a temporary resident worker living at home in Australia, in the same place, doing the same job. The Government welcomes temporary resident workers, but our skilled migration program is a better way of making sure temporary resident workers go to sectors of the economy where they are needed most.*
>
> *No permanent resident receiving LAFHA for genuine reasons will lose any existing entitlement under the changes. This means that residents who are currently receiving LAFH benefits that can be substantiated, employees operating under fly-in, fly-out arrangements and community sector employees who are not currently using all of their FBT exemptions cap will not be affected by the reforms."*

It is clear that the Government wishes to create a level playing field between an Australian worker and a temporary resident.

The definition of temporary resident is discussed in detail at 1.3 above.

A permanent resident enjoys the following benefits that appear to have been excluded from any objective analysis of a level playing field:

- Access to Family Tax Benefit A and Family Tax Benefit B[8] . You must be residing in Australia permanently and be:
  - an Australian citizen, or
  - the holder of a permanent resident visa, or
  - the holder of a certain temporary visa, for example, a partner provisional visa, or
  - the holder of a special category visa - that is, someone with a New Zealand passport living in Australia.
- Access to Education Tax Refund[9]. Eligibility for Family Tax Benefit A is the prerequisite. A temporary resident will never qualify.
- Access to Childcare Rebate. Eligibility for Family Tax Benefits is the prerequisite. A temporary resident will never qualify.
- Access to Higher Education[10]. A child of a temporary resident is treated as an international student and therefore subjected to significantly higher education costs.

It is apparent that even within the world of temporary residents, a level playing field does not exist:

- Access to Housing[11]. The Foreign Investment Review Board imposes strict conditions on temporary residents buying real estate in Australia.
  - A New Zealand citizen does not need FIRB approval although they may be a temporary resident of Australia. Temporary residents for all other locations require FIRB approval and have strict disposal conditions imposed when the property is second hand.

[8] http://www.centrelink.gov.au/internet/internet.nsf/payments/ftb_b_residence.htm
[9] http://www.educationtaxrefund.gov.au/am-i-eligible.html
[10] http://studyassist.gov.au/sites/StudyAssist/HelpfulResources/Documents/2012%20-%20Info%20for%20CSS%20booklet.pdf
[11] http://www.firb.gov.au/content/Exemptions/exemptions.asp

In addition to the lack of a level playing field at a Federal level, various state governments impose additional imposts on temporary residents:

- ACT Department of Education and Training[12] imposes the following additional fees on the children of temporary residents attending state schools in the ACT:
  - One full academic year - Years K-6 A$9,320
  - One full academic year - Years 7-10 A$12,500
  - One full academic year - Years 11 and 12 A$13,900

- New South Wales Department of Education and Communities[13] imposes the following Education Fee structure for a 12 month (40 school week) period for the children of temporary residents attending state schools in NSW:
  - Years K-6 Primary School $4,500.00
  - Years 7-10 Junior High School $4,500.00
  - Years 11-12 Senior High School $5,500.00

An employer is required to make superannuation contributions for a temporary resident unless the temporary resident falls within one of exemptions contained in sections 27 or 28 of the *Superannuation Guarantee (Administration) Act 1992*.

However a temporary resident can claim their accumulated Australian superannuation after departure from Australia (called a Departing Australia Superannuation Payment (DASP)) if:

- they visited on a temporary visa (excluding visa subclasses 405 and 410), and
- the visa has expired or been cancelled.

Whilst this appears to be generous, it is not. The DASP is subject to discriminatory Australian tax treatment when the funds are withdrawn from the complying Australian superannuation fund are subject to withholding tax at the following rates:

- 0% for the tax-free component
- 35% for a taxed element of a taxable component
- 45% for an untaxed element of a taxable component.

Please note that these discriminatory rates continue to apply even where the temporary resident has reached preservation age and triggered a condition of release.

Typically a lump sum payment to an Australian worker in these circumstances is tax free.

Please note New Zealand citizens cannot access their accumulated Australian superannuation via DASP, even though they may fall within the definition of a temporary resident. Again it is apparent that even within the world of temporary residents, a level playing field does not exist.

From an Australian income tax viewpoint, an Australian worker and a temporary resident are subject to the same Australian income tax treatment in respect of their employment in come including any employee share scheme benefits assessable under Division 83A of the *Income Tax Assessment Act 1997*.

Comment

A level playing field has never previously existed between an Australian worker and a temporary resident worker living at home in Australia, in the same place, doing the same job.

Indeed even within the meaning of “temporary residents” there are clear distinctions present between New Zealand citizens and other nationalities.

[12] http://www.det.act.gov.au/school_education/international_students/international_education_faqs#3
[13] http://www.detinternational.nsw.edu.au/schools/downloads/trp_feespayment.pdf

The Federal Government attempt to dress these changes as creating a level playing field is clearly poor policy.

If you wish to address the perceived bias in the provision of a LAFHA to temporary residents, then the inequities present elsewhere need to be addressed.

2.2 Confirmation of existing LAFHA treatment

Paragraph 9 in the Forward to the Consultation Paper makes it clear that no permanent resident receiving LAFHA for genuine reasons will lose any existing entitlement under the changes.

MT 2030 has long detailed the eligibility criteria for qualifying as living away from home:

- A person is regarded as living away from his or her usual place of residence if, but having to change residence in order to work temporarily for his employer at another locality, the employee would have continued to live at the former place (para. 14)
- The general presumption is that a person's "usual place of residence" is close to where he or she is permanently employed. Consequently, an employee who changes his or her place of residence because of change in location of a **permanent** job, whether be reason of a transfer with the same employer or a change of employment would not usually be living away from home on moving to a new place of residence close to the new job location. This is so even though the new place of residence was temporary pending the obtaining of suitable long term accommodation (para. 19)
- The new position must be **temporary** or for a **limited period** of time. Provided the appointment is for a limited period and the employee can be expected in the normal course to return to the same city or district of their home country to live, the employee will be treated as living away from his or her usual place of residence (para. 22)
- A LAFHA may be paid to an employee who transfers to a new locality within Australia for a period of **2-3 years** on the basis that the employee returns to the permanent position at the end of that time (para. 23)

Comment

Will the qualification criteria as outlined in MT 2030 continue to be used to determine eligibility for LAFHA?

If yes, will these criteria be reflected in either the new legislative amendments to the Income Tax assessment Act 1997 or will the Commissioner issue new guidelines.

Under the proposed changes:

- Permanent residents will be able to claim an income tax deduction for accommodation expenses they can substantiate and for food expenses beyond a statutory amount.
- Temporary residents who maintain a home in Australia for their own use and who are required to live away from that home to perform the duties of their employment will be able to claim an income tax deduction for their actual expenses.

It is clear from the above that a temporary resident can claim a LAFHA provided they maintain a home in Australia and live away from that Australian home in order to perform the duties of that employment. Indeed the Consultation Paper at section 2.1.5 outlines the concept of maintaining a home as follows:

> *"A temporary resident will be considered to be maintaining a home in Australia for their own use when that home is available for their personal use and enjoyment at all times, even though they are living away from it for their work.*
>
> *To qualify as maintaining a home for their own use in Australia, the temporary resident employee may either own or rent a unit of accommodation. The unit of accommodation must*

> *be available for their use at any time and cannot be rented out or sub-let while they are living away from home."*

Clearly it is the intention that the temporary resident be exposed to double accommodation costs.

How will this operate within the context of a permanent employee? If you to paragraphs 26 to 30 inclusive of MT 2030 it makes the following observations:

> *"26. The question has been asked whether, before an allowance paid to an employee may qualify as a living-away-from-home allowance, the employee must actually have incurred additional expenses on accommodation and food and drink, etc.*
>
> *27. It is in the nature of an allowance that it will not ordinarily be a precise measure of actual expenses of the recipient. Rather, as mentioned in paragraph 2, a living-away-from-home allowance is an allowance in the nature of compensation for additional expenses incurred, or additional expenses incurred and other disadvantages suffered, by an employee through having to live away from his or her usual place of residence.*
>
> *28. That is, an employer will pay an allowance - perhaps on the basis of a survey of accommodation and living costs at the employee's temporary work location - in order to compensate the employee for accommodation and additional living expenses that the employee might be expected to incur. The allowance may also contain a component to compensate for general disadvantages such as the employee having to put up with isolation, harsh climatic conditions, changed lifestyle etc. Where there are a number of employees, e.g., accommodation at or near a construction site, identical amounts are often paid to employees on the same wage scale without regard being paid to any individual employee's actual outlays.*
>
> *29. Another question that has been raised is the extent to which it is necessary, before an employer may treat an allowance as a living-away-from-home allowance, to establish whether the employee does in fact have a residence at a place other than the locality at which the employee is temporarily residing.*
>
> *30. The Act does not express a requirement, for a person to qualify as having a "usual place of residence", that it be established that he or she actually have such a residence. If the employee is one of a class of employees, (e.g., diplomats posted overseas, foreign experts employed in Australia, construction workers at a remote construction site, etc.) who could reasonably be expected by the employer to satisfy the tests set out in paragraphs 11-25 of living away from the usual place of residence, and the allowance is paid to compensate for additional costs (as explained in paragraph 28) that the employees could be expected to incur through having to live away from home, the allowance will constitute a living-away-from-home allowance in terms of section 30."*

Comment

It is clear from MT 2030 that currently the employee does not need to incur double accommodation costs.

Given the stated position within the Consultation Paper that no permanent resident receiving LAFHA for genuine reasons will lose any existing entitlement under the changes, what will be the position going forward?

As per Paragraph 30 of MT 2030 which represents the current interpretation of LAFHA - the Act does not express a requirement, for a person to qualify as having a "usual place of residence", that it be established that he or she actually have such a residence.

Is therefore safe to assume that a permanent resident will not need to incur double accommodation costs in order to claim the accommodation cost incurred in the host location as a tax deduction?

2.3 Temporary residents who maintain a home in the overseas location

A number of factual situations spring to mind in which the Consultation Paper is silent. These situations are as follows:

1. The employee comes to Australia whilst the remainder of the family remains in the home location. This often typical where the children are in the critical school years or members of the family fail a medical requirement within a visa (i.e. presence of tuberculosis); or
2. The employee retains a property in the home location and is unable to either rent out the property or terminate the lease in the home location and rents a property in Australia thereby incurring additional accommodation costs

Comment

Clearly in these circumstances, the temporary resident is incurring double accommodation cost, but will not qualify as living away from home.

Is this the policy intention?

2.4 Permanent resident and temporary resident seconded overseas

A temporary resident is subject to Australian income tax on their worldwide employment income whilst they remain Australian tax residents with a Foreign Income Tax Offset (FITO) available in respect of any foreign taxes paid. Where a temporary resident is sent say on a three month assignment overseas, it is typical that their employer will provide them with a living away from home allowance.

A permanent resident undertaking a similar overseas assignment is taxed in exactly the same way in Australia.

Comment

Working on the basis that a permanent resident will be no worse off, will the permanent resident (subject to the substantiation requirements) be entitled to a deduction?

However a temporary resident will not be entitled to a deduction unless they continue to maintain a home in Australia.

A level playing field is not present in these circumstances.

2.5 Interaction with other Temporary Visa categories

Consideration needs to be given with the possible interaction with temporary entry permit classes other the 417 and 457 visas and an exemption from the proposed changes in respect of these visa categories.

The Prime Minister recently received considerable front page coverage in “The Australian” on the Australian higher education sector experiencing difficulties in attracting foreign students to Australia. Implicit within this concern is that Australian Universities must remain at the cutting edge of research and development in order to maintain their preeminent position, thus being able to attract the best and brightest.

In addition, a large number of Universities have established or are looking at establishing campuses offshore. A key part of the establishment process is maintaining suitable academic standards which will often equate the University sector to bringing staff to Australia for training and development. Universities may utilise a number of temporary visa categories including:

Type	Length	Overview
411 [14]	This visa allows skilled people to come to Australia for a temporary stay to broaden their work experience and skills. This visa has reciprocal arrangements to allow Australian residents similar opportunities overseas.	With this visa the individual can: • stay and work in the nominated position Australia for the period of the exchange agreement with a maximum stay of two years • bring any eligible secondary applicants with you to Australia (secondary applicants can work and study) • leave and enter Australia as many times as you want while your visa is valid.
416 [15]	This visa requires approved special program sponsors in Australia to invite a person from overseas to participate in an approved Special Program in Australia.	The individual may work or study if these are part of the approved program in which they are participating.
419 [16]	This visa is for professional academics to visit Australia on a temporary basis, to observe or participate in an Australian research project at an Australian tertiary or research institution.	The employee must not receive remuneration other than a contribution towards living and travel expenses. You must be sponsored and nominated by an Australian tertiary or research institution for this visa.
442 [17]	This visa allows people to complete workplace-based training in Australia on a temporary basis. The training must provide people with additional or enhanced skills in the nominated occupations, tertiary studies or fields of expertise.	This visa is for people from outside Australia who want to improve their occupational skills through training with an Australian organisation or government agency. People may be nominated for this visa if the proposed occupational training is one of the following: • training or practical experience in the workplace required for the person to obtain registration for employment in their occupation in Australia or in their home country • a structured workplace training program to enhance the person's existing skills in an eligible occupation • structured workplace training to enhance the person's skills and promote capacity building overseas.

Comment

Currently under the 419 visa conditions, the academic is not permitted to receive a salary, wage or scholarship (other than the allowance towards living expenses in Australia and travel costs) from the sponsoring institution. The allowance is currently paid as a LAFHA and is exempt from FBT and not subject to income tax

How will the allowance be treated going forward – if it is assessable income, the academic is in breach of their 419 visa conditions.

Please note that as a 419 visa does not have work rights, the Australian Taxation Office will not issue a Tax file Number. The visa holder is therefore subject to withholding tax rate of 46.5% and cannot lodge an income tax return to recover part or all of the tax withholding.

[14] http://www.immi.gov.au/skilled/specialist-entry/411/
[15] http://www.immi.gov.au/skilled/specialist-entry/416/how-the-visa-works.htm#e
[16] http://www.immi.gov.au/skilled/specialist-entry/419/
[17] http://www.immi.gov.au/students/sponsored/otv/

3 Question 2 – What practical aspects of the proposed reform need further consideration?

3.1 Lack of transitional period

The Consultation Paper makes it clear that the proposed rules will apply from 1 July 2012.

No transition period is present in the document.

The lack of transitional rules severely disadvantages individuals who accepted roles in Australia on the basis that they qualified as living away from home under the existing rules. In a number of instances these individuals had obtained a Private Binding Ruling from the Commissioner of Taxation that they could utilise the LAFHA exemption.

Employers in certain industries (i.e. infrastructure, education, it services) have also entered into a number of long term contracts for the provision of services based on the certainty of employment costs.

These changes will significantly increase employment costs (see below for comments on Superannuation Guarantee., Payroll Tax and WorkCover) in a number of instances and the employer will have to absorb these costs in many instances, negatively impacting on employer sustainability.

In a number of other instances where new tax law has been introduced, transitional rules have been applied including:

Legislation	Transitional rule
Introduction of Capital Gains tax regime	Does not apply to assets held on or before 19 September 1985
Changes to car valuation rules	Only applies to new arrangements entered into post 20 February 2011. It does not apply to existing arrangements that continue past this date
Superannuation contributions	Transitional rules applied during the period 26 May 2006 until 30 June 2007
Superannuation contributions	Transitional rules for individuals over the age of 50 expiring on 30 June 2012

Comment

A transitional rule should be introduced in respect of existing temporary residents.

The transitional period should be restricted to the lesser of:

- Two (2) years; or
- The duration of the temporary entry permit granted pre 1 July 2012.

3.2 Employee's ability to determine whether they are living away from home?

The employee will be faced with a significantly increased compliance burden in determining whether they qualify as living from home and therefore can claim a deduction for the accommodation and food costs incurred. Under the current regime, this is the employer's responsibility.

Comment

Will the qualification criteria as outlined in MT 2030 continue to be used to determine eligibility for LAFHA?

If yes, will these criteria be reflected in either the new legislative amendments to the *Income Tax assessment Act 1997* or will the Commissioner issue new guidelines.

3.3 Clarification around Food

The Consultation Paper appears to be inconsistent in the income tax deductibility of food.

Section 2.1 of the Consultation Paper makes the following comments:

> *"Permanent residents will be able to claim an income tax deduction for accommodation expenses they can substantiate and for food expenses beyond a statutory amount. Temporary residents who maintain a home in Australia for their own use and who are required to live away from that home to perform the duties of their employment will be able to claim an income tax deduction for their actual expenses."*

Based on the above, the following situation would seem to apply in respect of food:

- Permanent residents – any food above the statutory amount.
- Temporary resident – any food expenditure. There is no reference to an amount above the statutory amount.

Table 1 within the same section and Table 4 (see copies below) do not make this distinction.

Table 1: Proposed treatment for permanent residents and for temporary residents maintaining a home in Australia which they are living away from for work

Income tax treatment	Fringe benefits tax treatment	
Allowance provided to an employee for living away from home [1]	Expense payments benefits provided to an employee living away from home for accommodation and food [2]	Accommodation and food provided directly for an employee living away from home [3]
Allowance included in assessable income of the employee. Income tax deduction provided for substantiated expenses for accommodation and for food above a statutory amount.	Exempt from FBT for actual expenses for accommodation and for food above a statutory amount. Employer reimburses the expenses incurred by employee.	Exempt from FBT for accommodation and for food above a statutory amount. Employer directly provides accommodation for and food to an employee.

Table 4: Impacts on employees

	Employee is...		
Employee receives...	a permanent resident	a temporary resident who maintains a home for their use in Australia which they are required to live away from for work	a temporary resident who does not maintain a home for their use in Australia which they are required to live away from for work
LAFHA	LAFHA is included in the employee's assessable income. Employee can claim deductions for actual LAFH expenses incurred. Employee must substantiate LAFH expenses. Employee pays tax only to the extent they cannot substantiate LAFH expenses. Employer will not withhold tax from the LAFHA where the employee is expected to incur deductible LAFH expenses.	LAFHA is included in the employee's assessable income. Employee can claim deductions for actual LAFH expenses incurred. Employee must substantiate LAFH expenses. Employee pays tax only to the extent they cannot substantiate LAFH expenses. Employer will not withhold tax from the LAFHA where the employee is expected to incur deductible LAFH expenses.	LAFHA is included in the employee's assessable income. Employee cannot claim deductions for any LAFH expenses incurred. Employee pays tax on the full amount of the allowance. Employer withholds tax from the LAFHA for the employee.

Our confusion is further compounded by comments make in Section 2.1.3 of the Consultation Paper entitled "Income Tax Treatment" which makes the following comments:

> *"Employees who are permanent residents will be able to claim an income tax deduction for the expenses incurred for accommodation and food while living away from home, provided they can substantiate those expenses.*
>
> *Temporary resident employees who maintain a home for their use in Australia, which they are required to live away from to perform their work, will also be able to claim a deduction for expenses they can substantiate.*
>
> *The existing substantiation requirements in Division 900 of the Income Tax Assessment Act 1997 (ITAA 1997) will be amended to include reference to a LAFH allowance; however, substantiation will not be required for food expenses up to an amount considered to be* ***reasonable*** *by the Commissioner. The ATO will publish administrative guidance to determine a reasonable food component. If employees choose to claim deductions for amounts in excess of the reasonable amount, the full amount must be substantiated."*

It would appear that the Commissioner will only accept food claims up to an amount that is considered reasonable.

Comment

Section 2.3 makes reference to the Commissioner accepting claims up to reasonable amount without substantiation.

Section 2.1 and Tables 1 and 4 make no such reference.

Please advise the approach to be adopted by the Commissioner.

3.4 Determination of Reasonable Food

The Commissioner has on a number of occasions been asked to determine the reasonable food component of a living away from home allowance for an Australian tax resident working overseas.

Historically the ATO has not been willing to supply data:

> *"The Tax Office acknowledged that there are no specific Tax Office guidelines to assist employers in determining the reasonable food components of LAFHAs paid to employees who are seconded overseas ('outbound expatriates').*
>
> *The Tax Office acknowledged that it may be a difficult task for some employers to determine what is a reasonable food component of a LAFHA for employees seconded overseas. The Tax Office advised that the information provided by an independent third party that specialises in providing international compensation data for employees working overseas is an objective method of determining the food component of a LAFHA. As long as the figures produced by the third parties are, in accordance with FBT law, reasonable amounts these would be acceptable. It is the employer who must be satisfied that the information provided by the third parties is based on acceptable methodologies and is representative of the population from which it is drawn. Also the amounts are reasonable, that is a 'reasonable persons' test, given the circumstances of the employee.*[18]

This position was reiterated in August 2009 as part of a discussion on the FBT compliance issues associated with the amendments to section 23AG of the *Income Tax Assessment Act 1936* post 1 July 2009, it was up to the employer in determining what was reasonable.

The Commissioner went further in response to a question raised in February 2010[19]:

> "The ATO, while acknowledging there may be some compliance difficulties for employers, advised that it was unlikely that a public ruling setting out the reasonable food component for overseas destinations will be released given other priorities."

Comment

We are concerned that the production of the reasonable food table be a priority of the Australian Taxation Office given their comments in the NTLG FBT Subcommittee of February 2010.

Comment

Clarity is required around the determination of the reasonable food amount.

The Australian Taxation Office needs to produce:

- clear tables detailing the reasonable food component on a country by country basis ; or
- a safe harbour amount which is updated on annual basis detailing the reasonable food component

These tables need to be place by 1 July 2012 so that employers can utilise the amounts in determining the LAFHA to be paid in a similar manner in which they utilise the reasonable travel amounts for business trips of less than 21 days.

[18] FBT Subcommittee minutes 20 February 2003 Agenda Item 9 valuation of LAFHA benefits

[19] FBT Subcommittee minute February 2010 Agenda item 6.2.7 reasonable food allowances

3.5 Interaction between the statutory food amount and reasonable food amount

Under the existing rules, the taxable value of a LAFHA is the amount of the allowance less any "exempt accommodation component" and "any exempt food component".

The exempt food component is also defined in section 136 of the FBTA. In broad terms it is the component of the LAFHA that is intended to compensate the employee for additional food costs. The amount of the exempt food component depends upon how the food component of the allowance is set:

- Where it is set so as to only compensate the recipient for reasonable additional food costs above the "statutory food amount" the whole amount of the food component of the allowance will qualify as the exempt food component.
- Where the food component of the allowance is set without reference to the "statutory food amount" the exempt food component of the allowance will be the reasonable food component of the allowance less the "statutory food component".
- Where the food component of the allowance is set with reference to a usual deemed food consumption amount that is less than the "statutory food component", the exempt food component of the allowance will be the reasonable food component of the allowance less the difference between the "statutory food amount" and the usual deemed food consumption amount.

The "statutory food amount" is set in the legislation. It depends upon the number and age of accompanying family members. For an adult person it is $42 per week and for a child under 12 it is $21 per week.

Currently the exempt food component of a LAFHA will depend upon how the food component of a LAFHA is set. Most employers set the food component of the LAFHA to only compensate the employee for additional non deductible food costs that they might reasonably be expected to incur **over** the statutory food amount.

Each year the ATO has released a guide that sets out the amounts that represent a reasonable food component of a LAFHA received by expatriate employees during their term of employment in Australia. The amounts are expressed as a weekly figure and depend upon the number of accompanying family members. The rates applicable to this income year (2011/12) are set out in TD 2011/04.

FBT Year ending 31 March 2011	Food Component Per week ($)	Net Food component (less statutory amount) Per Week ($)
One adult	233	191
Two adults	373	289
Three adults	419	293
One adult and one child	301	238
Two adults and one or two children	419	314 (one child) / 293 (two children)
Two adults and three children	488	341

For example, if your reasonable food component was AUD 233 in accordance with the above table (single adult) and pursuant to an agreement the staff member paid AUD 42 themself and the employer paid AUD 191, there would be no FBT payable on the amount of AUD187 paid by the employer.

Comment

Given the stated position within the Consultation Paper that no permanent resident receiving LAFHA for genuine reasons will lose any existing entitlement under the changes, will the amendments within the Income tax legislation allow a similar methodology to be adopted?

3.6 Learning from prior tax law changes

An objective review of the most recent substantive legislative change in the area of expatriates (i.e. the changes to section 23 AG of ITAA36) would indicate that these changes were rushed and implemented without due consideration of the interaction with other pieces of tax legislation.

This resulted in a number of stop gap measures and ongoing difficulties, including:

- Introduction of a Legislative Instrument on 11 July 2009 to allow the employer to vary the amount of PAYG withholdings to reflect the foreign taxes being paid rather than waiting for the employee to lodge their personal PAYG withholding variation.
- Initial confusion as to the deductibility of fly in fly out (FIFO)arrangements in respect of Australian residents working overseas – see the Press Release of 1 April 2010 by the then Assistant Treasurer, Senator Nick Sherry[20] :

  "Current judicial and Tax Office interpretive decisions have found, having regard to the facts and circumstances of particular cases under review, that flights to and from home and domestic remote mining worksites are generally considered "otherwise deductible" for employers when determining FBT liabilities.

  I have worked with stakeholders and the Tax Office on how the law would be applied to flights to and from remote overseas mining worksites, including analysing a range of scenarios provided by key industry operators.

  Following this process I can announce that the Tax Office has indicated that there is no impediment to the "otherwise deductible" rule that applies within Australia also being applied to overseas fly-in/fly-out arrangements that are factually similar in nature other than the difference of one being domestic and one being international.
  With the end of the 2009-10 FBT year yesterday, and the start of the new FBT year today, this outcome will assist in providing greater certainty to impacted businesses and their advisors."

- The actual FIFO rules were finally legislated on 29 June 2011, nearly two years after the changes to section 23AG:
  - The rules did not bear any relationship to the initial press release in that the concession was only available in respect of employees working in remote overseas locations and the employer had to self assess their eligibility; and
  - To the extent that they qualified, the employer had to then amend prior year FBT returns to reflect the correct treatment and to claim refunds as appropriate.
- A number of issues still remain unresolved caused by the interaction between the Income Tax Assessment Act and the Fringe Benefit Tax Assessment Act:
  - These typically arise where the benefit is treated as assessable income in the foreign location, but treated as a fringe benefit in Australia. Double taxation arises in these circumstances as the employee cannot claim a FITO in their Australian tax return as the benefit is exempt income and the employer cannot claim the credit for the foreign taxes paid.
- These issues still remain present where the employer reimburses or pays directly for the food and /or accommodation costs as these will remain within the ambit of the FBT regime:
  - These issues will need to be addressed in respect of LAFH benefits provided by employers working overseas

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http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/057.htm&pageID=003&min=njsa&Year=&DocType=0

3.7 Previous Government Policy intent

In the policy document[21] entitled "Australia's Future Tax System" the following comments were made in respect of personal income tax compliance.

> *"Personal income tax compliance has become inordinately complex. This complexity hides its policy intent from citizens. For many people, the personal tax system is complex not only because of the rates scale and the lack of a coherent definition of taxable income, but also because they must deal with a large suite of complex deduction rules, numerous tax offsets and a variety of exempt forms of income.*
>
> *Seventy-two per cent of tax filers now seek advice from a tax agent, even though 86 per cent either claim no deductions at all or only claim work-related expenses, gifts and the costs of managing tax affairs."*

Comment

The proposed changes will only make personal income tax return compliance more complex and are clearly against previously stated Government policy.

[21] http://taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/Publications/Papers/Final_Report_Part_1/index.htm

4 Question 3 – Are there any interactions with other areas of the tax law that need to be addressed?

4.1 Interaction with other provisions within the Fringe Benefits Tax Assessment Act6

The Consultation Paper takes the position that a temporary resident will not qualify as living away from home for LAFHA purposes unless they maintain a home in Australia for their own use and they are required to live away from that home.

We have a concern that the term "the employee is required to live away from his or her usual place of residence" is utilised in other provisions of the *Fringe Benefits Tax Assessment Act 1986* to exempt or provide concessional FBT treatment.

These provisions include:

FBT Exemption	Section
Engagement of relocation consultant	58AA
Removals and storage of household effects as a result of relocation	58B
Exempt benefits – sale or acquisition of dwelling as a result of relocation	58C
Connection or re-connection of certain utilities as a result of relocation	58D
Leasing of household goods while living away from home	58E
Exempt benefits – relocation transport	58F
Reduction of taxable value – overseas employment holiday transport	61A
Reduction of taxable value – temporary accommodation relating to relocation	61C
Reduction of taxable value of temporary accommodation meal fringe benefits	61D
Reduction of taxable value of living-away-from-home food fringe benefits	63
Reduction of taxable value – education of children of overseas employees	65A

Comment

Will the existing FBT concessions relating to relocation costs in respect of temporary residents not maintaining a home in Australia (other than the Living Away From Home Allowance or reimbursements) remain post 1 July 2012?

The Consultation Paper is silent in this regard.

4.2 Potential for Double taxation

A number of issues still remain unresolved caused by the interaction between the *Income Tax Assessment Acts* and *the Fringe Benefit Tax Assessment Act 1986.*

These typically arise where the benefit is treated as assessable income in the foreign location, but treated as a fringe benefit in Australia. Double taxation arises in these circumstances as the employee cannot claim a FITO in their Australian tax return as the benefit is exempt income and the employer cannot claim the credit for the foreign taxes paid.

These issues still remain present where the employer reimburses or pays directly for the food and /or accommodation costs as these will remain within the ambit of the FBT regime.

These issues will need to be addressed in respect of LAFH benefits provided by employers working overseas.

4.3 Substantiation provisions

Subdivision 900-E of ITAA 97 contains the core provisions that set out rules that deal with what qualifies as "written evidence" for substantiation purposes and the ways in which it can be obtained.

Section 900-115 details the written evidence that must be obtained by the employee from the provider of the supplier of the services. The document must contain:

- the name (or business name) of the supplier;
- the amount of the expense, in the currency incurred;
- the nature of the goods or services – where this is not specified, the taxpayer receiving the goods or services may write in these missing details (these may be added at a later date but before the taxpayer's tax return is lodged). The taxpayer cannot write in other missing details, eg the amount or the supplier's name;
- the day the expense was incurred. If the document does not show this, the taxpayer may use independent evidence such as a bank statement to show when payment of the expense was made; and
- the date of the document

The document from the supplier must be in English or, if the expense was incurred outside Australia, in the language of that country.

The documents must be kept for a period of 5 years.

Compliance with these rules is relatively straightforward where the employee is living away from home in Australia.

The situation becomes more complex where the permanent resident or the temporary resident maintaining a home in Australia is working in a remote location offshore and the production of receipts that meet the requirements above is not common practice.

Comment

The Commissioner will need to produce updated guidelines in respect of offshore assignments where the use of receipts is not common practice. How will the employee be able to substantiate their claim?

Comment

Clarity is required around the determination of the reasonable food amount as the Consultation Paper has indicated at Section 2.1.3 that reasonable food amounts will not need to be substantiated .

The Australian Taxation Office needs to produce:

- clear tables detailing the reasonable food component on a country by country basis ; or
- a safe harbour amount which is updated on annual basis detailing the reasonable food component

4.4 PAYG withholding provisions

Section 2.1.3 of the Consultation Paper makes the following comment:

> *"An allowance paid to an employee as compensation for being required to live away from their usual place of residence will no longer be a fringe benefit. Instead, the allowance will be assessable income of the employee, consistent with other employment allowances."*

The Consultation Paper outlines the employer withholding obligations in Table 3 as follows:

Table 3: Impacts on employers

Employer provides...	... to an employee who is a permanent resident	... to an employee who is a temporary resident and who maintains a home for their use in Australia which they are required to live away from for work	... to an employee who is a temporary resident who does not maintain a home for their use in Australia which they are required to live away from for work
LAFHA	LAFHA is a taxable allowance of the employee. No FBT consequences for the employer. ATO will make a PAYG withholding variation so employers do not have to withhold tax from the LAFHA where the employee is expected to incur deductible LAFH expenses.	LAFHA is a taxable allowance of the employee. No FBT consequences for the employer. ATO will make a PAYG withholding variation so employers do not have to withhold tax from the LAFHA where the employee is expected to incur deductible LAFH expenses.	LAFHA is a taxable allowance of the employee. No FBT consequences for the employer. Employer withholds tax from the LAFHA for the employee.

Section 12-35 of Subdivision 12-B of the *Taxation Administration Act 1953* makes it clear that an employer must withhold PAYG from any allowance that it pays to an employee.

It would appear that based on the above, the employer can vary the PAYG withholding, however in order to vary the employer must be in a position to ascertain whether the employee is:

- A permanent resident;
- A temporary resident who maintains a home for their use in Australia; or
- A temporary resident who does not maintain a home in Australia.

Comment

What documentation will the employer are required to maintain in order to vary the PAYG withholdings?

What penalties will apply if the employer incorrectly categories the employee i.e. the LAFHA is taxable and no deductions are available?

Will the Commissioner introduce a Legislative Instrument to effect the proposed PAYG withholding obligations?

4.4.1 Amendments required to existing provisions within the Taxation Administration Act

Currently subsection 12-1(2) of Subdivision 12-A of Part 2-5 of the PAYG withholding provisions provides that:

> *"In working out how much to withhold under section 12-35, 12-40, 12-45, 12-47, 12-115, 12-120, 12-315 or 12-317 from a payment, disregard so much of the payment as is a living-away-from-home allowance benefit as defined by section 136 of the Fringe Benefits Tax Assessment Act 1986"*

This provision will need to be repealed effective 1 July 2012.

4.5 Superannuation Guarantee

A temporary resident is subject to Superannuation Guarantee unless they fall within one of the exemption provisions contained in sections 27 and 28 of the *Superannuation Guarantee (Administration) Act 1992* (the SGAA). The exemption is typically where the employee is covered by the provisions of a Bilateral Social Security Agreement.

For the majority of temporary residents, their ordinary times earnings (OTE) are subject to superannuation guarantee.

Currently fringe benefits as defined in the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) are excluded under subsection 11(3) of the SGAA. Therefore no SG is payable in respect of LAFHA paid as they currently fall within the meaning of a fringe benefit.

However post 1 July 2012 under the proposed changes, the living away from home allowance will be treated as an allowance and therefore falling within the meaning of OTE.

SGR 2009/2 provides an extensive overview on the meaning of OTE. The following is an extract from this ruling:

> *"Expense allowances and reimbursements*
>
> *72. Expense allowances, that is, those allowances paid to an employee with a reasonable expectation that the employee will fully expend the money in the course of providing services, are not 'salary or wages'.*
>
> *73. A reimbursement that compensates an employee for an expense they have incurred on behalf of the employer is also not 'salary or wages'."*

Comment

Will the LAFHA paid to an employee who is either a permanent resident or a temporary resident maintaining a home in Australia fall within the exclusion contained in Paragraph 72 of SGR 2009/2?

If yes, will the Commissioner amend SGR 2009/2 with effect from 1 July 2012 to include LAFHA as an example of an allowance that meets the exemption outlined in Paragraph 72?

Comment

The employer will be required to know the status of each employee in order to ascertain whether the LAFHA is subject to SG.

This will place a significant administrative burden on employers

4.6 Payroll Tax

As you are aware Payroll Tax is a State tax calculated on wages paid or payable by an employer to its employees and deemed employees and applies in all states and territories.

The following comments are predicated on the Victorian payroll tax legislation[22] but apply equally to the other states and territories as a result of the recent harmonisation process.

The term 'wages' for Victorian payroll tax purposes includes:

- wages
- remuneration
- salaries
- allowances
- commissions
- bonuses
- employer (pre-tax) superannuation contributions and includes:
    - superannuation guarantee payments,
    - salary sacrifice contributions,
    - from 1 July 2007, the value of non-monetary contributions, and
    - superannuation contributions to defined benefit funds.
- fringe benefits, within the meaning of the Fringe Benefits Tax Assessment Act - from 1 July 2007, to calculate the total taxable value of the fringe benefits for payroll tax purposes, the fringe benefit aggregate amounts must be grossed up using only the Type 2 factor. Before 1 July 2007, the fringe benefit aggregate amounts were grossed up as calculated under the FBT Act (i.e. Type 1 fringe benefits were grossed up using the Type 1 factor and Type 2 benefits were grossed using the Type 2 factor)
- from 1 July 2007, the value of shares and options granted to employees, directors, former directors and some contractors
- payments to some contractors
- payments by employment agencies arising from employment agency contracts
- remuneration paid by a company to or in relation to company directors, and
- employment termination payments and accrued leave.

Under the current rules, where properly structured a LAFHA is an exempt benefit and is therefore not subject to FBT.

Comment

An increased cost burden will be placed upon employers in respect of payroll tax.

Where the employer either pays the LAFH expenses directly or reimburses the amount, the amount remains subject the Fringe Benefits Tax Assessment Act.

The employer will face the following scenario in respect of LAFH payments or reimbursements:

1. Permanent resident – exempt from Payroll tax
2. Temporary resident maintaining a home in Australia – exempt from Payroll tax
3. Temporary resident not maintaining a home in Australia – subject to Payroll tax

The employer will also face an increased compliance burden in correctly categorising the employee into the requisite category.

Where the LAFHA is paid in the form of an allowance, the LAFHA is an allowance and is subject to Payroll Tax.

[22] Victorian Payroll Tax Act 2007

The only exemption in respect of allowances is contained in section 30 as follows:

"30 Accommodation allowances

*(1) For the purposes of this Act, **wages** do not include an accommodation allowance paid or payable to an employee in respect of a night's absence from the person's usual place of residence that does not exceed the exempt rate.*

*(2) If the accommodation allowance paid or payable to an employee in respect of a night's absence from the person's usual place of residence exceeds the exempt rate, **wages** include that allowance only to the extent that it exceeds the exempt rate.*

*(3) For the purposes of this section, the **exempt rate** for the financial year concerned is—*

(a) the total reasonable amount for daily travel allowance expenses using the lowest capital city for the lowest salary band for the financial year determined by the Commissioner of Taxation of the Commonwealth; or

(b) if no determination referred to in paragraph (a) is in force, the rate prescribed by the regulations."

It can be seen that the above exemption only relates to reasonable travel allowances, not to living away from home allowances that are expected to be fully expended.

Comment

Based upon the current Victorian Payroll tax legislation, a LAFH paid in the nature of an allowance post 1 July 2012 will be fully subject to Payroll tax as no exemption is present within the current legislation.

This treatment will apply to all employees receiving living away from home allowances that are treated as assessable income.

This is to be compared to the treatment afforded expense payments or reimbursements.

This will lead to significantly increased Payroll tax costs irrespective of the employee type. It applies to permanent residents, temporary residents maintaining a home in Australia and temporary residents not maintaining a home in Australia.

4.7 Work Cover

WorkCover (formerly known as Workers Compensation) is a state impost based upon rateable remuneration. Each state has its own WorkCover guidelines and the comments below are based upon the Victorian legislation.

Rateable remuneration[23] includes:

- Salaries and wages:
  - Salaries
  - Wages
  - Gross pay before tax
  - Allowances
  - Annual leave payments (including leave loading)
  - Long service leave
  - Paid parental leave
  - Make-up pay
  - Back pay

[23] http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/home/insurance-and-premiums/determining-your-remuneration/what-to-include-in-your-remuneration

  - Bonuses
  - Directors' fees and all remuneration to directors or members of a governing body of a company
  - Fees for work performed by a worker or deemed worker
- Contractors
- Fringe benefits
- Superannuation
- Other

WorkCover uses the Australian Taxation Office definition of items that are taxable fringe benefit.

Comment

An increased cost burden will be placed upon employers in respect of WorkCover.

Where the employer either pays the LAFH expenses directly or reimburses the amount, the amount remains subject the *Fringe Benefits Tax Assessment Act 1986*.

The employer will face the following scenario in respect of LAFH payments or reimbursements:

1. Permanent resident – exempt from WorkCover
2. Temporary resident maintaining a home in Australia – exempt from WorkCover
3. Temporary resident not maintaining a home in Australia – subject to WorkCover

The employer will also face an increased compliance burden in correctly categorising the employee into the requisite category.

Where the LAFHA is paid in the form of an allowance, the LAFHA is an allowance and is subject to WorkCover unless it falls within the following exemption:

- Where an accommodation allowance extends beyond 30 continuous days, a worker must also be maintaining a personal domestic dwelling for their own use in order for the allowance to retain the exemption.
  - For 2010/11 the exempt rate is $227.35 per night
  - For 2011/12 the exempt rate is $238.10 per night
- Any amount paid per night over the exempt rate is considered to be rateable remuneration and should be included in your determination of salaries and wages.

Comment

Based upon the current Victorian WorkCover regime, a LAFH paid in the nature of an allowance post 1 July 2012 will be fully subject to WorkCover once it exceeds 30 days. The employee must maintain a home for their own use. Please see our comments at 2.2 above about permanent residents not needing to maintain a home in order to qualify for LAFHA.

This is to be compared to the treatment afforded expense payments or reimbursements.

This will lead to significantly increased WorkCover costs irrespective of the employee type. It applies to permanent residents, temporary residents maintaining a home in Australia and temporary residents not maintaining a home in Australia.

The employer will also incur additional administrative costs as they will need to monitor the time spent away from home (is it more than 30 days) and then ascertain whether the employer maintained a home.

5 Question 4. - As the statutory food amount is intended to reflect the ordinary costs incurred by an Australian in 2011, what should the statutory food amount be updated to?

No comment, other than the measure should be objective and referenced to an index that is updated annually by an independent third party (i.e. Bureau of Statistics) or the Australian Taxation Office.

The amount will need to be released by no later than the beginning of each tax year so that it can be incorporated into the determination of the food component of LAFHA.

The same methodology in determining the statutory food amount should be utilised in determining the reasonable food amount.

6 Question 5 - Should the statutory food amount be indexed annually to ensure it remains up to date?

No comment, other than the measure should be objective and referenced to an index that is updated annually by an independent third party (i.e. Bureau of Statistics) or the Australian Taxation Office.

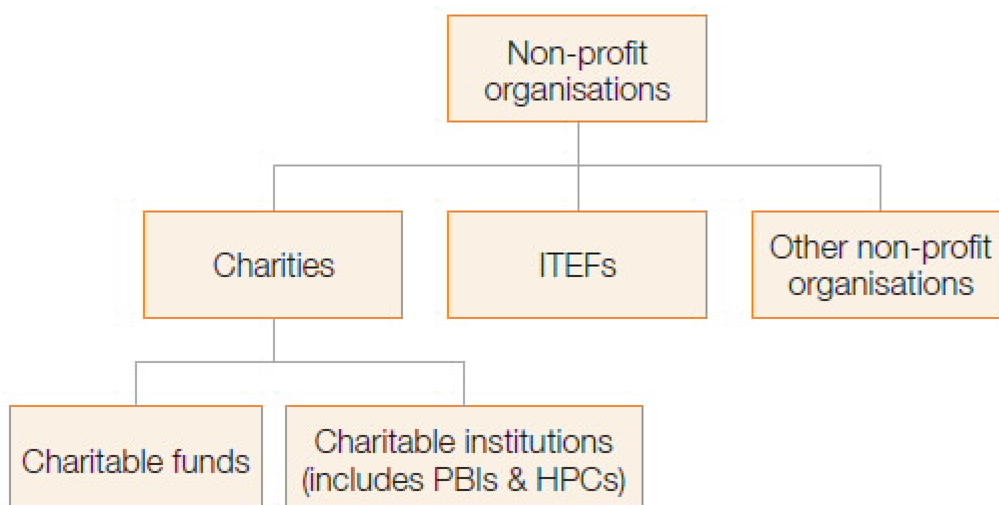
The amount will need to be released by no later than the beginning of each tax year so that it can be incorporated into the determination of the food component of LAFHA.

The same methodology in determining the statutory food amount should be utilised in determining the reasonable food amount.

7 Question 6 - What transitional arrangements would be appropriate for the community sector?

The term "Community sector" does not appear to have been defined within the Consultation Paper.

We have therefore assumed that Treasury is referring to the Non profit sector as illustrated in the following diagram as contained on the ATO website[24].



Our comments will be predicated on the basis of the above.

Comment In many ways it is difficult to provide a objective comment as we currently face uncertainty due to the review currently being undertaken by Treasury within the non profit sector. Comments may be more appropriate once the proposed draft legislation has been finalised and we are faced with a clearer starting point.

The current FBT treatment within the non profit sector is complex as detailed in the table below. These changes will only add uncertainty in a sector that often relies on voluntaries and does not have access to professional advice.

The proposed changes may impact in respect of delivery of Aus Aid. A number of non profit sector employers deliver Aus Aid projects on behalf of the Australian Federal Government.

A temporary resident is subject to Australian income tax on their worldwide employment income whilst they remain Australian tax residents with a Foreign Income Tax Offset available in respect of any foreign taxes paid. Where a temporary resident is sent say on a three month assignment overseas, it is typical that their employer will provide them with a living away from home allowance.

A permanent resident undertaking a similar overseas assignment is taxed in exactly the same way in Australia.

24 http://www.ato.gov.au/nonprofit/content.aspx?doc=/content/00100254.htm&pc=001/004/031/008/001&mnu=45420&mfp=001/004&st=&cy=

Comment

It is clear from Paragraph 30 of MT 2030 that the employee does need to incur double accommodation costs in order to be eligible for a LAFHA.

Therefore working on the basis that a permanent resident will be no worse off, will the employee (subject to the substantiation requirements) be entitled to a deduction?

However, it would seem that a temporary resident will not be entitled to a deduction unless they continue to maintain a home in Australia.

A level playing field is not present in these circumstances.

Secondly it will make the recruitment of staff from overseas with the vital sector experience more difficult.

The non profit sector is not known as a generous employer and it implicitly relies on the FBT concessional treatment in order to attract and retain staff.

Type of organisation	FBT concessions	Endorsement required? Yes/No
Charitable funds	**No FBT concessions available**	No
Charitable institutions	**FBT rebate (subject to a capping threshold of $30,000)** Qualifying employers are entitled to have their liability reduced by a rebate equal to **48%** of the gross FBT payable (subject to a $30,000 capping). If the total grossed-up taxable value of benefits is more than $30,000, a rebate can't be claimed for the FBT liability on the excess amount (or on the aggregate non-rebatable amount).	Yes
Public benevolent institution (PBI) (other than public hospitals) Health promotion charity (HPC)	**FBT exemption (subject to a capping threshold of $30,000)** As a PBI or health promotion charity, benefits you provide to your employees are exempt from FBT where the total grossed-up value of certain fringe benefits for each employee during the FBT year is **$30,000** or less. If your employees receive grossed-up benefits above this threshold, you are liable for FBT on the excess (or the aggregate non-exempt amount).	Yes
Hospitals (public and non-profit) Public ambulance service	**FBT exemption (subject to a capping threshold of $17,000)** Benefits provided by public and non-profit hospitals and public ambulance services are exempt from FBT, if the total grossed-up taxable value of certain fringe benefits provided to each employee is **$17,000** or less. If your employees receive grossed-up benefits above this threshold, you are liable for FBT on the excess (or the aggregate non-exempt amount).	No
Certain non-government and non-profit organisations - also referred to as 'rebatable employers' eg public education institutions and employer associations	**FBT rebate (subject to a capping threshold of $30,000)** Qualifying employers are entitled to have their liability reduced by a rebate equal to 48% of the gross FBT payable (subject to a $30,000 capping). If the total grossed-up taxable value of benefits is more than $30,000, a rebate can't be claimed for the FBT liability on the excess amount (or on the aggregate non-rebatable amount).	For those that are charities - Yes For those that are **not** charities - No
Religious institutions	**FBT rebate (subject to a capping threshold of $30,000)**	For those that are charities - Yes For those that are **not** charities -No
Non-profit company	**No FBT concessions available**	No