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The Manager
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The Treasury
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Dear Manager

Submission on exposure draft of the *Tax Laws Amendment (2012 Measures No. 3) Bill 2012: deducting expenses for living away from home*

Thank you for the opportunity to comment on the exposure draft of the *Tax Laws Amendment (2012 Measures No. 3) Bill 2012: deducting expenses for living away from home* (the "**Draft Bill**").

We set out below our comments on selected aspects of the Draft Bill.

1. SUMMARY

Broadly, our submissions can be summarised as follows:

- (a) the definition of "employer" should be extended to reflect the current definition in the fringe benefits tax ("**FBT**") legislation;
- (b) consideration should be given to removing the "ownership interest in a dwelling" requirement as the "available for use and enjoyment" requirement should be sufficient to achieve the legislative purpose (alternatively, the ownership interest requirement could be replaced with a requirement that the taxpayer contributes to the running costs of the relevant dwelling);
- (c) if the "ownership interest in a dwelling" requirement is retained, it should be clarified that ownership interest specifically includes a lease, licence or sub-lease in respect of a dwelling;
- (d) the concept of "place of residence" should be extended to reflect the current definition in the FBT legislation;
- (e) Example 2.5 in the Explanatory Materials (dealing with the "available for use and enjoyment" requirement) should be clarified;
- (f) the reference to the "2011-12 income year" in section 25-115(3)(b) should be changed to the "2012-13 income year" (consistent with the Explanatory Materials);
- (g) the "reasonableness" requirement should be clarified by specifying objective criteria that can provide a "safe harbour" for meeting this requirement;

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- (h) it should be clarified that a separate 12-month period may begin where a taxpayer, who has previously worked away from home at a location, is later required to live away from home at the same location as part of a separate arrangement;
- (i) the transitional provisions should be clarified so that a variation or renewal that does not relate to the original time an employee is required to work away from home is disregarded in determining whether a taxpayer falls within the transitional provisions; and
- (j) the PAYG withholding arrangements should be designed to minimise compliance requirements for employers.

2. **EXTENDING DEFINITION OF "EMPLOYER"**

The definition of "employer" in section 136 of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (the "**FBT Act**") should be extended to the Draft Bill. That is, the definition of "employer" in the Draft Bill should include "any person who pays, or is liable to pay, salary and wages" as defined in the FBT Act.

3. **REMOVING "OWNERSHIP INTEREST" REQUIREMENT**

Proposed paragraph 25-115(1)(b)(i) states:

(1) You can deduct an amount for an accommodation, food or drink expense you incur if:

...

(b) that residence:

(i) is a dwelling in Australia in which you or your spouse have an **ownership interest**; ...

(emphasis added)

In our view, the requirement to have an "ownership interest" in a dwelling is unnecessarily restrictive and should be removed. This requirement fails to recognise informal arrangements where people live in a dwelling in which neither they nor their spouse have an ownership interest, but nonetheless contribute to the cost of maintaining the home. For example, where a person lives with parents, other relatives or flatmates. Employees in this situation may still continue to incur costs in relation maintaining their usual place of residence notwithstanding the fact that neither they or their spouse has an ownership interest. Such employees would therefore fall within the policy objective of granting tax relief as they are required to incur *additional* costs as a result of being required to live away from their usual place of residence.

The requirement that the dwelling should continue to be available for use and enjoyment should be sufficient to achieve the legislative objective. Alternatively, we suggest that there could be a requirement for a taxpayer to contribute to the cost of maintaining their usual place of residence (whether or not they have an ownership interest).

4. **CLARIFYING "OWNERSHIP INTEREST" REQUIREMENT**

If the "ownership interest" requirement is retained, it should be clarified in the legislation that ownership interest in a dwelling can include a lease or licence in respect of a dwelling.

"Ownership interest" as defined in section 118-130 of the *Income Tax Assessment Act 1997* arguably includes a lease, because it covers:

- (a) "a legal or equitable interest" in land or a stratum unit;
- (b) "a right to occupy"; or

(c) in relation to a dwelling that is a flat or home unit, "a licence or right to occupy".

However, the definition of "ownership interest", which is currently relevant to the capital gains tax provisions, has generally not been applied in the context of a standard short-term lease where market rent is payable.

To avoid any doubt, "ownership interest" should be defined to include a lease or licence in respect of a dwelling. The definition of a lease should also include a sub-lease (consistent with the current definition in the FBT Act).

5. **EXTENDING DEFINITION OF "PLACE OF RESIDENCE"**

Proposed paragraph 25-115(1)(b)(ii) states:

(1) You can deduct an amount for an accommodation, food or drink expense you incur if:

...

(b) that residence:

...

(ii) continues to be available for **your use and enjoyment** during the period you are required to live away from it...

(emphasis added)

It should be made clear that the usual place of residence will still be available for "your use and enjoyment" even though the residence is also available for the use and enjoyment of other individuals. We suggest that the current definition of "place of residence" in section 136 of the FBT Act be extended to the Draft Bill.

6. **CLARIFYING EXAMPLE 2.5 OF THE EXPLANATORY MATERIALS**

We suggest that Example 2.5 of the Explanatory Materials be clarified.

The example outlines a scenario where a person, Janelle, owns a three bedroom house in Melbourne with a tenant renting and paying for one bedroom. Janelle is then required to work interstate for eight months to set up a shop in Perth. The example states that Janelle would still be eligible for the deduction as her usual place of residence continues to be available for her use and enjoyment at all times. However, the example further states that "*Janelle would not be able to rent out a further bedroom and still be entitled to a living away from home allowance deduction*".

From this explanation, it is not clear why renting out a further bedroom in a three bedroom house disqualifies Janelle from a living away from home allowance deduction if she has the use and enjoyment of the house, including one of the bedrooms.

Therefore, we suggest that the facts or the explanation in Example 2.5 of the Explanatory Materials be amended to make it clear what is required to satisfy the "available for use and enjoyment" requirement.

7. **REMOVING REFERENCE TO 2011-12 INCOME YEAR TO 2012-13 INCOME YEAR IN SECTION 25-115(3)(B)**

The reference to the income year of 2011-12 in proposed paragraph 25-115(3)(b) is incorrect and should instead refer to the income year of 2012-13 as noted in paragraph 2.40 of the Explanatory Materials.

8. **CLARIFYING EXPENSES FOR FOOD AND DRINK**

Proposed subsection 25-115(3) outlines the amount you can deduct for the food or drink expenses you incur. However, given that employees may need to substantiate expenses

for food and drink, there is nothing in the Draft Bill that makes it clear that expenses for food and drink can include the cost of incidental goods and services associated with purchasing food and drink. For example:

- when paying for a restaurant meal it should not be necessary to apportion between the cost of food and drink and the cost of table service; or
- if food and drink is delivered by a courier, it should not be necessary to apportion between the cost of the food and drink and the courier.

Therefore, we suggest that the Draft Bill include a definition or example which clarifies that expenses for food and drink can include the cost of incidental goods and services.

9. **CLARIFYING THE "REASONABLENESS" REQUIREMENT**

Proposed subsection 25-115(2) introduces a "reasonableness" requirement with regards to how much you can deduct. This section states:

The amount you can deduct for an accommodation expense is so much of the expense as is **reasonable**. (emphasis added)

This reasonableness requirement creates an element of uncertainty by requiring a subjective assessment of the location in which an employee is required to work and their lifestyle.

We suggest that the requirement to substantiate expenses should be sufficient and therefore the "reasonable" requirement is not necessary. Alternatively, we suggest that a safe harbour be introduced for determining when accommodation costs are reasonable. This safe harbour should be based on objective criteria. For example, if accommodation expenses represent less than 50% of an individual's salary, this could be taken to be "reasonable".

10. **CLARIFYING THE ABILITY TO START A SEPARATE 12-MONTH PERIOD**

Proposed subsection 25-115(5) states:

For the purposes of subparagraph (1)(e) and this subsection:

- (a) pause that 12-month period if, and while, you temporarily resume living in your usual place of residence; and
- (b) start a separate 12-month period if:
 - (i) your employer later requires you to live at another location for the purposes of your employment; and
 - (ii) you could not reasonably be expected to commute to that other location from an earlier location for which you incurred an expense that you can deduct under this section in relation to that employer; ...

However, in our view, this section is unnecessarily restrictive. For example, say an employee who usually resides in Sydney is required by their employer to work in Perth on a construction project for 12 months and returns to Sydney after those 12 months. Two years later, the employer begins a new construction project in Perth and again requests the employee to work in Perth for 12 months. This means that as a result of the new provisions in the Draft Bill, notwithstanding that the projects are unrelated, the employee is prevented from accessing any living away from home tax concessions merely because their previous unrelated assignment was in the same location.

Accordingly, we suggest that the Draft Bill be amended so that a new 12-month period may commence where an employer later requires an employee to live away from home at the same location under a separate arrangement.

11. CLARIFYING THE TRANSITIONAL PROVISIONS

The Draft Bill introduces transitional provisions in relation to existing employment arrangements. Items 30(1) and 30(2) state:

(1) During the transitional period, you can disregard paragraphs 25-115(1)(b) and (e) of the Income Tax Assessment Act 1997 if:

- (a) you are neither a temporary resident nor a foreign resident; and
- (b) during the entire period:
 - (i) starting at the Budget time; and
 - (ii) ending on 30 June 2012;

your employment was covered by an eligible employment arrangement that was not varied or renewed.

(2) During the transitional period, you can disregard paragraph 25-115(1)(e) of the Income Tax Assessment Act 1997 if:

- (a) you are a temporary resident or a foreign resident; and
- (b) during the entire period:
 - (i) starting at the Budget time; and
 - (ii) ending on 30 June 2012;

your employment was covered by an eligible employment arrangement that was not varied or renewed.

These proposed transitional provisions mean that if there is *any* variation to an eligible employment arrangements, such as the amount of an allowance or a change in the form of the benefit, this could trigger an end to the transition period for employee. Alternatively, it could affect whether the employee falls within the transitional provisions at all.

We submit that the Draft Bill be redrafted in a way so that only variations or renewals which extend the time an employee is required to live away from their usual place of residence are relevant.

12. PAYG WITHHOLDING REQUIREMENTS

The Draft Bill does not contain any specific PAYG withholding arrangements for the payment of living away from home allowances (although it contemplates the repeal of subsection 12-1(2) in Schedule 1 to the *Taxation Administration Act 1953*). The Explanatory Materials contains one reference to PAYG withholding at Example 2.6 which indicates that an employer will not need to withhold an amount from a living away from home allowance where an employee indicates they will be claiming a deduction under proposed section 25-115.

Section 15-15 of Schedule 1 to the *Taxation Administration Act 1953* enables the Commissioner of Taxation to vary the amount required to be withheld by an entity from relevant withholding payments. The Commissioner can presumably use this power to issue a Gazetted notice to introduce appropriate withholding arrangements for the class of entities providing living away from home allowances.

In addition to this, consideration should be given to including a provision in Division 12 in Schedule 1 to the *Taxation Administration Act 1953*. This provision should outline that a payer may disregard the amount of a payment, which is an allowance for compensation for expenses. This is provided the payee declares they reasonably expect this amount to be deductible under section 25-115 of the *Income Tax Assessment Act 1997*. The payer should be able to rely on this declaration when determining how much to withhold.

Given that employees will now need to determine their own tax position in relation to living away from home expenses, sufficient resources should be given to the Australian Taxation Office to enable it to produce fact sheets and other guidance materials to assist

Given that employees will now need to determine their own tax position in relation to living away from home expenses, sufficient resources should be given to the Australian Taxation Office to enable it to produce fact sheets and other guidance materials to assist employees in determining whether their living away from home allowances will be deductible.

Yours faithfully



Ashurst Australia