The Institute of Chartered Accountants in Australia

1 June 2012

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

By email: FBT@treasury.gov.au

Dear Mr Leggett

Exposure draft: Reform of the living-away–from-home allowance and benefit rules

The Institute of Chartered Accountants in Australia (the Institute) welcomes the opportunity to comment on the exposure draft legislation (ED) and the accompanying explanatory materials (EM) of the reform of the living-away-from-home allowance (LAFHA) and benefits. These were released on 15 May 2012 by the Assistant Treasurer, the Hon David Bradbury MP.

On 15 February 2012, the Institute prepared a detailed submission on the November 2011 consultation paper, and we note many of our comments still apply to the current ED. However, in this submission, which is set out in the attachment, we have further concerns that the proposed changes, as currently drafted, will have unintended and adverse consequences for many employers and employees.

Given the importance of this reform, it is also disappointing that more time was not provided (submission due within two weeks from the release of the ED) to enable a thorough review and greater consideration of the taxation treatment of the LAFHA and benefits.

If you have any questions regarding this submission, or would like to discuss any aspect in further detail, please do not hesitate to contact Norman Kang on 02 9290 5718 at first instance.

Yours sincerely

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Comments

1. 12-month period

1.1 12-month period unfairly restrictive

The 12-month period is unfairly restrictive. Given the expense of assignments it is customary for assignments to be for more than 12 months duration. If it is enacted in its current form, the legislation may encourage skilled workers to leave the projects after 12 months or it may discourage them from working and living away from home in the first place, thus making it more costly and difficult for employers to complete projects. The Institute suggests a (minimum) 3-year threshold is much more appropriate.

1.2 Guidance on what constitutes the first 12 months

The proposed section 25-115(1)(e)(i) refers to the 'first 12 months that you live away from that residence.' Guidance is needed on what constitutes the first 12 months. For example, will this be a 365-day rule or a calendar year rule? How are travel days between Australian home and host location treated, and what happens if someone goes home for a weekend?

Also, paragraph 2.3 of the EM states that subject to transitional rules, the amendments will apply from 1 July 2012, however the Institute is unclear as to when the 12-month period will begin for arrangements commencing between 9 May and 30 June 2012, or where existing living away from home arrangements are varied or renewed after 1 July 2012. Does the 12-month period begin at the date of starting to live away from home or does it start from 1 July 2012? The Institute believes it should start from 1 July 2012.

1.3 Pause in 12-month period

In the proposed section 25-115(5), the Institute considers that a pause in the 12-month period should also apply to annual and long service leave at locations other than the usual place of residence, sick leave involving another location (e.g. in case of hospitalisation) and other reasonable circumstances that are more aligned to arrangements that would otherwise occur at the usual place of residence.

1.4 Subsequent periods of living away from home

The proposed section 25-115(5) permits the commencement of a new 12-month period where, at some later time, the employee is required by their employer to live at another location for the purposes of their employment and it would be unreasonable to commute to the new location from a location at which the employee had previously lived away from home.

Presumably the provision, as drafted, is designed to allow deductions for genuine situations of subsequent living away from home and to prevent arrangements whereby employees could circumvent the 12-month rule and obtain extended deductions for the same location. We would question the policy reason, for distinguishing between a person who at a later time is required to again live away from home but at a location that they have not previously been to as compared to an employee who returns home after living away from home and is then genuinely required to again live away from home at the same location.

We accept that there is a need for an anti-avoidance provision to prevent employees artificially structuring their living away from home arrangement to get around the 12-month rule, however we submit that where an employee genuinely is subsequently required to live away from home at a location that they previously had worked at they should not be prevented from obtaining a tax deduction for those costs. For example, an employee living and working in Melbourne is sent by their employer to work in Sydney for 12 months, after which they return home. Having been home in Melbourne for some time the employer again sends the employee to Sydney for a further 6-month period on an unrelated assignment, e.g. for a new project. We submit that in such cases, given a reasonable period of time (for the sake of clarity, the Institute suggests six months) between the periods of living away from home or a clearly identifiable different project, the employee should be entitled to a tax deduction for the costs associated with living away from home for the second 6-month period.

2. Requirement for dwelling in Australia in which the employee has an ownership interest

The Institute believes the requirement for the dwelling to continue to be available is extremely impractical. Rental is prevalent for legitimate reasons of security and maintenance. Under this approach, even having a house sitter, which has no economic benefit, would result in failure of the test. This is extremely punitive and a disincentive for anyone to mobilise, either domestic or outbound Australians. It is also contrary to the government's broader policy to increase or free-up available housing stock in Australia, rather than having it sit idle and unproductive.

The Institute also requests clarification as to what indicators will demonstrate a right to occupy in accordance with the definition in section 118-130 of the *Income Tax Assessment Act 1997* (ITAA 1997). In the Institute's view, formalised arrangements such as boarding in shared accommodation or with family should be allowed to qualify. This is of critical significance to fly-in-fly-out arrangements where it is prevalent for single employees to have accommodation of this nature on 'off' cycles.

3. Income tax deduction for employee

3.1 Compliance burden

It would simplify administration if the requirement that accommodation be reasonable were removed and it were accepted that actual, substantiated expenditure is sufficient, or alternatively that an employee's declaration that the accommodation is reasonable will be sufficient.

Similarly, substantiating food and drink is incredibly onerous as it can involve keeping receipts for all the food and drink they purchase from supermarkets, canteens, cafes, hotels, roadside vans, takeaway shops etc. Such employees where they do not keep all their receipts, file them, add the receipts and summarise them will pay more tax and receive less net pay. The Institute questions whether there will be any discretion as to how to simplify this where food and drink expenses exceed the reasonable levels. In remote locations, given limited supply and high transport costs, actual food and drink costs could well exceed reasonable threshold. This is very relevant to unionised workforce and those covered by industrial agreements containing entitlements to LAFHAs at specified amounts.

An issue has been raised as to a discrepancy between the ED and the EM. The ED contains a table that states, for a child aged under 12, the ordinary weekly food and drink expenses is $44, whereas the EM at paragraph 2.40 states it is $55. Treasury has confirmed that the correct amount should be $55 so the ED will need to be amended. In addition, the statutory food and drink amounts in the table should refer to the 2012-2013 income year rather than the 2011-2012 income year.

3.2 Expenditure incurred by 'you'

The Institute also notes that there seems to be a practical/technical problem with the proposed section 25-115. That is, it refers to 'You can deduct an amount for an … expense you incur' and makes it clear that the 'you' is the employee. While this works well where the employee shops for him/herself, will the proposed section apply where the partner/ spouse of the employee is the one who actually goes out and buy the food? That is it will be the partner/spouse who incurs the expense and not the employee.

We submit that an amendment is required to allow expenditure incurred by the partner/spouse of an employee to be deductible in either their tax return or the return of the employee where the requirements of the proposed section 25-115 are otherwise met.

3.3 Employer requires you to live away from home

One of the conditions specified in the proposed section 25-115(1) is that 'you incur an expense because **your employer** requires you to live away from your usual place of residence' (emphasis added). This requirement differs from what was previously required in order to be living away from home. Under the existing provisions it was merely a requirement that the person is living away from home for the purposes of their employment, and there was no testing of what the employer required. If this is intended to be a

change in requirement then the EM should clearly state this distinction and provide examples to highlight the matter. If this change is not required then the draft provision should be amended.

The proposed wording also raises a question as to whether an employee could be considered to be living away from home if they seek a job with a new employer and in order to take up that new job they are required to live away from home. In this situation it is arguable as to whether the employer required the employee to live away from home. If the existing wording is to be retained, and such scenarios are intended to satisfy the requirement of living away from home, the EM should contain examples to confirm this intention.

3.4 Nature of deductions

Paragraph 2.45 of the EM provides examples of what documentation could be used to substantiate accommodation costs and lists 'mortgage documents'. Under the existing FBT concessions, the living-away-from-home concessions only applied where the employee's accommodation costs related to a lease or licence of accommodation. This paragraph implies that deductions will be available where the employee purchases a home at their new work location. Assuming that the employee is genuinely living away from home, what costs would be deductible to the employee where they purchase a home rather than rent one? It would be appropriate for the EM to include an example of this situation.

3.5 Connection between food costs and accommodation

If the residence that a person is living away from does not continue to be available for the person's use and enjoyment (whilst they are living away from that residence), the draft provisions deny the person a tax deduction for both accommodation costs and food costs while living away from home.

While there may be some policy basis for denying a tax deduction for the accommodation costs associated with living away from home i.e. where the employee is not maintaining a home at their usual place of residence or is otherwise renting that property, we question the policy basis for denying a tax deduction for the food costs associated with living away from home. As a general proposition a person temporarily living away from home will incur additional food costs as compared to the costs that would be incurred at their usual place of residence. It is submitted that the ability to claim a tax deduction for additional food costs should not be linked to whether or not the usual place of residence continues to be available for that person's use and enjoyment. The deduction for additional food costs should merely be linked back to whether or not the person is truly living away from home.

4. Transitional Rules

4.1 Temporary residents

Treasury has clarified that the transitional relief until 1 July 2014 is only applicable to permanent residents where those benefits are provided under an employment arrangement that was in place before 7.30pm on 8 May 2012.

This has meant that affected businesses and employees have effectively been given only just over a month's notice before an extremely significant change to their tax burden.
There is a need for transitional rules to be available for temporary residents who are benefitting from living away from home arrangements, without the need to have a residence in Australia from which they are living away from, particularly as many are committed to long-term leasing arrangements that they cannot easily extricate themselves from.

4.2 Breaching the non-discrimination articles

The transitional rules (available for permanent residents and not temporary residents) appear to breach the non-discrimination articles in Australian treaties. From an 'in-substance' perspective, the requirement under the new rules to have an Australian home (rather than a home in any location) also appears to breach these articles.

4.3 Employee becoming a permanent resident during the relevant period

The transitional rules are unclear as to when an employee changes his/her resident status during the relevant period. If an employee becomes a permanent resident either before 1 July 2012 or after that date, what happens under the transitional rules?

5. Eligible employment arrangement

The Institute would like confirmation that changes to the terms of a LAFHA to reflect the impact of this legislation e.g. alignment with new statutory amounts and reasonable thresholds or changes to the manner in which it is delivered as a reimbursement or an allowance, will not constitute a variation to the eligible employment arrangement which would deny transitional treatment.

Similarly, confirmation is required that changes to terms of employment which have no impact on the requirement to live away from home e.g. pay rises, statutory changes such as superannuation, and changes in employer, do not result in a disqualifying variation or renewal of the eligible employment arrangement, and thus do not jeopardise the transitional treatment.

A further example arises where a project on which an employee, who is living away from home, is working is not completed within the contemplated time frame. In such instances, if the employees LAFHA period is extended (all other employment conditions remaining unchanged), but is still within the transitional time frame, this should not be treated as a change to the eligible employment arrangement.

The EM should be updated with commentary to cover these and as many other examples as possible as to what will or will not constitute a change to an eligible employment arrangement.

6. Interactions with other areas of the tax law that need to be addressed

6.1 Superannuation guarantee

As mentioned in our submission to the November 2011 Consultation Paper, it is still not clear how the superannuation guarantee concept of an allowance that is intended to be expended interacts with the income tax deductibility provisions. That is, it is not clear whether a non-deductible LAFHA paid to a temporary resident, which is intended to be expended, should still be classified as an expense allowance which would fall outside the scope of ordinary time earnings. It should be clarified whether LAFHAs provided by employers would constitute ordinary time earnings for employees, and any circumstances that affect this classification.

6.2 Otherwise deductible rule

The proposed changes state that where the employer provides the accommodation or food (rather than paying an allowance) they are to rely on the otherwise deductible rule to reduce the value of the relevant benefits. The amendments also state that the employee is entitled to a tax deduction for the accommodation and food and drink costs that relate to his/her spouse and children while they are living away from home with the employee.

However, the Institute requires clarification on the operation of the otherwise deductible rule in the *Fringe Benefits Tax Assessment Act 1986* (FBTAA). For example, in relation to property benefits (this would apply to the provision of food and drink) section 44(1) (k) of the FBTAA states the benefit is deemed to be provided only to the employee as per section 138(3) of the FBTAA, and the amount is calculated in accordance with section 44(5) of the FBTAA to determine the employee's percentage. In the Institute's opinion, if the food and drink is provided to the employee and their associates, the calculation under section 44(5) of the FBTAA can only result in a 50% reduction (although the food was used 100% in producing the employee's assessable income), because the employee only has a 50% interest in the food.

The Institute therefore considers that an amendment is needed to either subsections 44(1) (k) or 44(5) of the FBTAA to prevent this from arising.

6.3 PAYG Withholding

We note that the EM does not address the pay-as-you-go withholding (PAYGW) issues associated with a LAFHA. However, we understand that the Commissioner is considering issuing a class PAYGW variation so employers do not have to withhold where the employee is expected to incur deductible living-away-from-home expenses up to or in excess of the allowance paid.

The EM should contain some discussion of the PAYGW requirements and what evidence an employer would require in order to apply such a variation.

6.4 Other aspects

Again, as noted in our submission on the November 2011 Consultation Paper, it is unclear how the changes will affect temporary accommodation of international assignees e.g. serviced apartment costs for the first six week while they seek long term accommodation. It appears that the operation of section 61C of the FBTAA would not currently operate to make such accommodation costs exempt benefits (through the reduction of taxable value to zero). The Institute believes section 61C of the FBTAA should be expanded to cover the range of residual situations that will now arise if not eligible for concessional treatment under the proposed new rules.

The Institute also believes rental bond and leasing of household goods exemptions should extend to overseas workers if they would qualify for the proposed section 25-115 apart from the requirement to maintain a residence in Australia.