[Interpretation statement IS3448, issued by Adjudication & Rulings in October 2004]

TRAVEL BY MOTOR VEHICLE BETWEEN HOME AND WORK— DEDUCTIBILITY OF EXPENDITURE AND FBT IMPLICATIONS

This item contains guidelines for determining whether travel between home and work is deductible and when travel between home and work will be treated as work-related use (rather than private use or enjoyment) for FBT purposes. While this interpretation statement focuses on travel by taxpayers who provide services, the Commissioner has re-considered and confirms the statements in the booklet on *Rental Income* (IR264) relating to deductibility of travel expenditure incurred by taxpayers who rent out property.

The Commissioner's views in *Tax Information Bulletin* Vol 4, No 8 (April 1993), page 3 – "Shareholder-Employees and FBT on Company Vehicles" on how it can be established that a vehicle provided by a company to a shareholder-employee is not available for private use remain unaltered.

This item supersedes an item on how travel between home and work should be categorised when business calls are made en route - *Tax Information Bulletin* Vol 6, No. 9 (February 1995) and an item on "Travelling Expenses Between Two Places of Business – Position Explained" – *Public Information Bulletin* No 12 (July 1964).

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Introduction

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This item addresses:

- The circumstances in which expenditure on travel between home and work will be deductible;

- The interpretation of the expressions "business purposes" and "business use" in sections DH 1 to DH 4; and

- The circumstances in which travel between home and work will be treated as work-related use rather than "private use or enjoyment" for FBT purposes.

Summary

Deductibility of expenditure on home to work travel

The general rule is that travel between home and work is private travel and expenditure on such travel is not an allowable deduction as such expenditure is expenditure of a private or domestic nature. A deduction is allowable under section BD 2(1) for expenditure incurred in deriving income or necessarily incurred in the course of carrying on a business for that purpose, but expenditure that is of a private or domestic nature is not an allowable deduction: section BD 2(2)(a).

For travel between home and work to be deductible it is necessary to establish that:

- The need for the work to be performed partly at the home (and, therefore, the need for the travel) arises from the nature of the work; and

- The travel is in the course of performing work ("on work").

In cases relating to deductibility of travel expenditure between home and work (some of which relate to taxpayers who are employees), the following broad factual situations have been identified as circumstances where travel between home and work is regarded as business or work-related travel:

- Where a vehicle is essential for transport of goods or equipment necessary for the performance of employment duties at the home and elsewhere;

- Where the taxpayer carries on an "itinerant occupation" (that is, the taxpayer does not work from a fixed work place and the home is the taxpayer's base of operations);

- Where the taxpayer is required to be accessible at the home for employment duties and is required to undertake travel in response to emergency calls; and

- Where the travel is "on work" between two work places, one of which is also the taxpayer's home.

FBT – Private use or enjoyment

An employer who has provided or granted a fringe benefit to an employee is liable to pay Fringe Benefit Tax ("FBT"): section ND 1. A benefit consisting of the private use or enjoyment (or the availability for private use) of a motor vehicle owned, leased, or rented by the person who makes it available to an employee is a fringe benefit: section CI 1. FBT is calculated according to the number of days on which a benefit consisting of the "private use or enjoyment" of a motor vehicle is provided: section CI 3(1).

"Private use or enjoyment" means travel that confers a benefit of a private or domestic nature. The definition of "private use or enjoyment" specifically includes travel to or from the person's home and any other travel that confers on the person a benefit of a private or domestic nature.

The fundamental issue is whether a private benefit has been conferred. The concept of private use or enjoyment imports a concept of a distinction between private use and work-related use. The provision of a vehicle for work-related use only does not constitute a benefit of a private nature. See *CIR v Schick* (1998) 18 NZTC 13,738.

For FBT purposes (as for deductibility purposes) travel between home and work will be private use unless:

- The need for the work to be performed partly at the home (and, therefore, the need for the travel) arises from the nature of the work; and

- The travel is "on work".

The fact that work is performed at the home (whether or not under a contractual obligation) is not sufficient. Travel between home and work would be private travel if the work is performed at the home because of the personal circumstances or personal preferences of the taxpayer.

The fact that a vehicle is taken to an employee's home for security reasons does not in itself mean that travel between the home and work is work-related travel.

Note: Even if travel between home and work is work-related travel (so that the use of a motor vehicle for that purpose is not private use) and there is no actual private use of the motor vehicle, the employer must establish that the vehicle is not available for private use. (The requirements necessary to establish that a vehicle is not available for private use are discussed in more detail below.)

Purpose of travel

The record-keeping requirements necessary to establish the proportion of business use of a motor vehicle are set out in sections DH 1 to DH 4. A deduction is permitted for the proportion of the expenditure which reflects the proportion of the business use of

the vehicle to the total use of the vehicle: section DH 1(3). To be "business use" or use for "business purposes", the travel must be undertaken solely for a business reason. A journey is classified either as business use or not business use rather than the journey being apportioned on a mileage basis. Travel between home and work in the circumstances outlined above will be travel undertaken for a business reason.

For both deductibility and FBT purposes, where a journey undertaken for business purposes or work-related purposes includes a private component, the private travel would be disregarded and the entire journey would be classified as business travel in the following circumstances:

- The private benefit received is incidental to a journey that has been undertaken solely for business purposes or work-related purposes (being a private benefit that necessarily results from a journey undertaken for such purpose); or

- The private travel is de minimis (being a deviation for a private reason in the course of a journey undertaken for business purposes or in the course of performing employment duties that is a minor or insignificant part of the journey).

The circumstances in which an incidental private benefit or de minimis private travel will be disregarded (so that the entire journey is treated as business use) are discussed in more detail below.

Common principles relating to deductibility of motor vehicle expenditure and FBT

The test for determining whether travel expenditure is deductible and the definition of "private use or enjoyment" for FBT purposes are expressed in different terms. However, the tests raise essentially the same issues and require consideration of the same factors.

For both deductibility and FBT purposes:

- The fact that work is performed at the home is not sufficient. The need for the work to be performed partly at the home (and, therefore, the need for the travel) must arise from the nature of the work. Travel between home and work would be private travel if the work is performed at the home because of the personal circumstances or personal preferences of the taxpayer. For travel to be work-related travel, it is not sufficient that the employer and employee have contracted on the basis that employment duties would be performed partly at the home; and

- There is a distinction between travel undertaken to enable a person to commence work and travel on work. The exceptions to the general rule (that travel between home and work is private travel for deductibility purposes) relate to situations where the travel is on work rather than travel in order to commence work or travel from work. Travel by an employee in such situations would be travel for work-related purposes and would not constitute private use or enjoyment.

Legislation

Deductibility of travel expenditure

Section BD 2 provides:

(1) An amount is an allowable deduction of a taxpayer

(a) if it is an allowance for depreciation that the taxpayer is entitled to under Part E (Timing of Income and Deductions), or

(b) to the extent that it is an expenditure or loss

(i) incurred by the taxpayer in deriving the taxpayer's gross income, or

(ii) necessarily incurred by the taxpayer in the course of carrying on a business for the purpose of deriving the taxpayer's gross income, or

(iii) allowed as a deduction to the taxpayer under Part C (Income Further Defined), D (Deductions Further Defined), E (Timing of Income and Deductions), F (Apportionment and Recharacterised Transactions), G (Avoidance and Non-Market Transactions), H (Treatment of Net Income of Certain Entities), I (Treatment of Net Losses), L (Credits) or M (Tax Payments).

(2) An amount of expenditure or loss is not an allowable deduction of a taxpayer to the extent that it is

(a) of a private or domestic nature, or

(b) incurred in deriving exempt income under Part C (Income Further Defined), D (Deductions Further Defined) or F (Apportionment and Recharacterised Transactions), or

(c) incurred in deriving income from employment, or

(d) incurred in deriving schedular gross income subject to final withholding, or

(e) of a capital nature, unless allowed as a deduction under Part D (Deductions Further Defined) or E (Timing of Income and Deductions), or

(f) disallowed as a deduction under Part D (Deductions Further Defined), E (Timing of Income and Deductions), F (Apportionment of Recharacterised Transactions), G (Avoidance and Non-Market Transactions), H (Treatment of Net Income of Certain Entities), I (Treatment of Net Losses), L (Credits) or M (Tax Payments).

Section DH 1 provides:

(1) Except as provided in this section, no deduction is allowed in relation to expenditure incurred by a taxpayer in respect of or in relation to a motor vehicle used in deriving gross income of a taxpayer.

(2) Nothing in this section or in sections DH 2 to DH 4 shall apply to disallow any deduction or allowance by way of depreciation—

(a) In relation to a motor vehicle that is not used for any purpose other than—

(i) The deriving of gross income; or

(ii) A purpose that constitutes a fringe benefit; or

(b) To a taxpayer who is—

(i) A company; or
(ii) A person whose sole income is income from employment.

(3) Where in any income year a motor vehicle is used by a taxpayer partly for business purposes and partly for other purposes, there shall be allowed as a deduction in that income year the proportion of all expenditure incurred by the taxpayer in relation to the motor vehicle that reflects the proportion of business use of the vehicle to its total use in that income year, as that business use proportion is determined in accordance with sections DH 2 to DH 4.

The phrases "business purposes" and "business use" are defined in section OB 1 as follows:

"Business purposes", or "business use", in sections DH I to DH 4, in relation to the use of a motor vehicle and to a taxpayer, means travel undertaken by the vehicle wholly and exclusively in deriving gross income of the taxpayer.

FBT – private use or enjoyment

Section ND 1(1) provides:

Subject to section CI 5, an employer who has provided or granted a fringe benefit to an employee is liable to pay a special tax by way of an income tax to be known as fringe benefit tax.

The definition of "fringe benefit" in section CI 1 includes:

…any benefit that consists of—

(a) The private use or enjoyment, in relation to the employee, at any time during the quarter or (where fringe benefit tax is payable on an income year basis under section ND 14) income year, of a motor vehicle owned, leased, or rented by the person who makes the motor vehicle available to the employee:

(b) The availability for the private use or enjoyment of the employee, at any time during the quarter or (where fringe benefit tax is payable on an income year basis under section ND 14) income year, of a motor vehicle that is so owned, leased, or rented:

being, as the case may be, private use or enjoyment, availability for private use or enjoyment, a loan, subsidised transport, a contribution to a fund referred to in paragraph (e), a specified insurance premium or a contribution to an insurance fund of a friendly society, a contribution to a superannuation scheme, a service referred to in paragraph (ga), or a benefit that is used, enjoyed, or received, whether directly or indirectly, in relation to, in the course of, or by virtue of the employment of the employee (whether that employment will occur, is occurring, or has occurred) and which is provided or granted by the employer of the employee;

The definitions of "benefit" and "private use or enjoyment" in section OB 1 read as follows:

"Benefit", in the definitions of "private use or enjoyment", "specified insurance premium", and "work related vehicle", and in the FBT rules, includes the availability, for the private use or enjoyment of any person, of a motor vehicle that is owned, leased, or rented by another person:

"Private use or enjoyment", in the definitions of "benefit" and "work related vehicle" and in the FBT rules, in relation to a motor vehicle and to any person, includes travel by the person in the motor vehicle in the course of proceeding to or from the person's home; and also includes any other travel by

the person in the motor vehicle where that travel confers on the person a benefit of a private or domestic nature:

Provided that—

(a) Where the motor vehicle is required to be used by the employee for the purpose of making an emergency call in the course of the employee's employment, the day on which the employee departs from home to make that emergency call shall not be counted as a day on which the motor vehicle is available for the private use or enjoyment of the employee:

(b) Where an employee is required by the employer of the employee to use a motor vehicle in the course of the employment of the employee and the nature of the employment of the employee regularly requires the employee to be absent from home in the course of the employee's employment, the whole of each day in which that motor vehicle is used by the employee, while so absent from home, in the course of the performing of the activities of which that employment consists, where the period of absence is not less than 24 hours continuously, shall not, for the purposes of section CI 3, be counted as a day in which the motor vehicle was available for the private use or enjoyment of the employee,—

and, for the purposes of this proviso, the expression "day" means the continuous period of 24 hours ending at midnight:

Analysis

Income Tax

General rule

A deduction is allowable under section BD 2(1) for expenditure incurred in deriving income or necessarily incurred in the course of carrying on a business for that purpose, but expenditure that is of a private or domestic nature is not an allowable deduction: section BD 2(2)(a).

Expenditure on travel between home and work is generally considered to be expenditure on private travel: see *Ricketts v Colquhoun* [1925] AC 1. The historical background to the general rule is explained by Lord Denning in *Newsom v Robertson* [1952] 2 All ER 728. Lord Denning noted that when income tax was introduced most people lived and worked in the same place. Therefore, it was considered that the need for travel between a taxpayer's home and work was dictated by the taxpayer's choice to live at a location different from the taxpayer's place of work. Lord Denning acknowledged that in the twentieth century generally taxpayers had limited choice as to whether to live "over their work". In *FCT v Collings* 76 ATC 4254 Rath J noted that the view that home and work is private travel because such travel relates to a taxpayer's choice of living in a location different from the taxpayer's place of work was based on history rather than reason. However, changes in the way people live and work have not resulted in the general rule established in case law being overruled. In *Lunney v FCT* 11 ATD 404 Dixon CJ commented:

Both in Australia and in England the view has always prevailed that expenses of travelling from home to work or business and back again are not deductible. An explanation of how this rule came about in England is given by Denning LJ in *Newsom v Robertson*.
….

The relevant provisions of the English Income Tax Acts are not in the same terms as those of the Australian law, but the whole course of English authority involves a like conclusion. To escape from

the course of reasoning on which they proceed requires the taking of refined and rather insubstantial distinctions. I confess for myself, however, that if the matter were to be worked out all over again on bare reason, I should have misgivings about the conclusion. But this is just what I think the Court ought not to do. It is a question of how an undisputed principle applies. Its application was settled by old authority long accepted and always acted upon. If the whole subject is to be ripped up now it is for the legislature and not the Court to do it. (p. 405)

Exceptions to the general rule

The exceptions to the general rule were summarised by Northrop J in *FCT v Genys* 87 ATC 4875 as follows:

However, the general proposition laid down in *Lunney*, notwithstanding that it remains good law, is not exhaustive. In *Garrett v FCT* 82 ATC 4060, the Supreme Court of New South Wales constituted by Lusher J held that it had no application to the following situations:

(a) where the taxpayer keeps necessary equipment or instruments at his home which he needs for the purpose of performing his work, and by reason of its bulk, such equipment needs to be transported by vehicle from the home to his place or places of work *and* where the equipment is used at home;

(b) where the taxpayer incurs expenses for travel between two places of business or work; and

(c) where the employment can be construed as having commenced at the time of leaving home.

A fourth situation, not enunciated in *Garrett*, is where the taxpayer travels between home and shifting places of work, i.e. an itinerant occupation. (para 28)

There is some overlap between the categories referred to in *Genys*. In *Garrett v FCT* 82 ATC 4060 Lusher J said:

… where the nature of the employment or income earning activity can be construed as having commenced at the time of leaving the home, the expenditure on travel is a proper deduction. This can be illustrated by the commercial traveller whose engagement provides that his duties commence when he leaves his home with his samples which are kept there as part of his employment. Similarly, where equipment is transported from the home to the place of work by the taxpayer but the taxpayer's activities by which he earned income under a contract could be regarded as having been embarked upon either before or when he left his home so that the home in that sense became his base of operation from which he carried on his income earning activities the expenses become deductible. Expressed in other terms the contractual activities and requirements, by reason of their nature, in this sense are construed as being moved back anteriorly from the place of substantial performance to the earlier point or to the point of commencement of the journey. (p. 4062)

Principles relating to deductibility of travel expenditure

The general rule (that travel between home and work is private travel) will apply unless :

- The need for the work to be performed partly at the home (and, therefore, the need for the travel) arises from the nature of the work; and

- The travel is "on work".

Work performed at the home for business reasons

For expenditure on travel between home and work to be deductible, the need for the travel must arise from the nature of the income earning activity carried on by the taxpayer and not from the personal circumstances or personal preferences of the taxpayer. Although the minority in the House of Lords in *Taylor v Provan* [1975] AC 194 disagreed on the proper inference to be drawn from the facts in that case, there was no disagreement that this was the correct principle to be applied.

Lord Reid (who was in the majority) said:

Ricketts decided that if the place where a man resides is his personal choice he cannot claim with regard to expenses made necessary by that personal choice. **If the holder of an office or employment has to do part of his work at home the place where he resides is generally still his personal choice. If he could do his home work equally well wherever he lived then I do not see how the mere fact that his home is also a place of work could justify a departure from the *Ricketts* ratio.**

I do not find it easy to discover the ratio decidendi of *Pook's* case. But that does not diminish the authority of the decision. I am sure that the majority did not intend to decide that in all cases where the employee's contract requires him to work at home he is entitled to deduct travelling expenses between his home and his other place of work. Plainly that would open the door widely for evasion of the rule. There must be something more.

I think that the distinguishing fact in *Pook's* case was that there was a part time employment and that it was impossible for the employer to fill the post otherwise than by appointing a man with commitments which he would not give up. It was therefore necessary that whoever was appointed should incur travelling expenses. (p. 208) [emphasis added]

(*Pook's* case (*Owen v Pook* [1970] AC 244) is discussed in detail below.) Lord Simon (who was in the minority) said:

Applying the rule in *Ricketts v Colquhoun* [1926] AC 1 i.e. that the obligation to incur the expenses of travelling in question must arise out of the nature of the office or employment itself, and not out of the circumstances of the particular person appointed to the office or employed under the contract of employment - two different classes of travelling expenses readily come to mind. The first is where the office or employment is of itself inherently an itinerant one…. The second class of case is where the taxpayer has two places of work and is required by the nature of his office or employment to travel from one to the other. (p. 221)

Lord Wilberforce (who was also in the minority) said:

To do any job, it is necessary to get there; but it is settled law that expenses of travelling to work cannot be deducted against the emoluments of the employment. It is only if the job requires a man to travel that his expenses of that travel can be deducted, i.e. if he is travelling on his work, as distinct from travelling to his work. The most obvious category of jobs of this kind is that of itinerant jobs, such as a commercial traveller. It is as a variant upon this that the concept of two places of work has been introduced: if a man has to travel from one place of work to another place of work, he may deduct the travelling expenses of this travel, because he is travelling on his work, but not those of travelling from either place of work to his home or vice versa**. But for this doctrine to apply, he must be required by the nature of the job itself to do the work of the job in two places; the mere fact that he may choose to do part of it in a place separate from that where the job is objectively located is not enough**. The case of *Owen v. Pook* [1970] A.C. 244 brought out this distinction. The basis of the decision of the majority in that case (the minority holding the opposite) was that the nature of the office, or employment, of part-time anaesthetist and obstetrician required the doctor to work partly at his surgery and partly at the hospital. (p. 215) [emphasis added]

Taylor v Provan does not relate to travel by vehicle, but the principle stated in that case (that the need for the travel must arise from the nature of the employment duties

and not from the taxpayer's personal circumstances or personal preferences) is applicable generally. In *Burton v FCT* 79 ATC 4,318, where the taxpayer was a magistrate who was sometimes required to write judgments at his home at night, the court did not accept that expenditure on travel from and to his home was deductible as the work was performed at the home from personal preference:

> Necessity from the personal circumstances or the personal preferences of the taxpayer is not enough.
>
> A facet of the performance of the appellant's duties upon which counsel for the appellant placed some reliance was the practice of the appellant to write urgent reserved decisions at his home at night and the need to use his car to carry work associated written materials and books from his Beaufort Street chambers to his home to perform this task. There can be no doubt on the evidence that the appellant from time to time did write reserved decisions at his home but it is also clear that his chambers were available for his use at all times for this purpose. It was a matter of his personal preference that he performed this work at his home. (p. 4,323)

Travel "on work"

A distinction has been drawn in case law between travel undertaken to enable a taxpayer to commence work and travel "on work" (travel in the course of performing work). In *Case F72* (1984) 6 NZTC 59,924 Judge Bathgate commented:

> Each case however must be related to its own facts, and usually involves consideration of when a taxpayer's work commences. Expenses incurred in the course of gaining or producing assessable income are deductible. The real question in the present context becomes whether the trip from one place to another (home to work) is travel "to one's work" and "from one's work" or is "on one's work." A dwellinghouse may be a place of work so that a trip from there to a place of work may be on one's work. This is all a question of fact. (p 59,928)

In *FCT v Payne* (2001) ATC 4027 the majority in the High Court noted that the test of deductibility did not permit a deduction for all expenses having some causal connection with the deriving of income and that what must be shown is a closer and more immediate connection. In *Lunney v FCT* 11 ATD 404 in the joint judgment of Williams J, Kitto J and Taylor J, it was said:

> It is, of course, beyond question that unless an employee attends at his place of employment he will not derive assessable income and, in one sense, he makes the journey to his place of employment in order that he may earn his income. But to say that expenditure on fares is a prerequisite to the earning of a taxpayer's income is not to say that such expenditure is incurred in or in the course of gaining or producing his income. (p. 413)

Each of the exceptions referred to in *Genys* relate to situations where travel can be regarded in some sense as travel in the course of performing work rather than travel in order to commence work or travel from work.

Expenditure on travel which enables a taxpayer to commence income earning activities is not deductible but expenditure incurred on travel in the course of deriving income (travel "on work") is deductible: refer *FCT v Payne* 2001 ATC 4027. Travel costs are not deductible merely because the taxpayer cannot begin to perform work duties unless the travel is undertaken. For the costs of travel to be deductible, the journey between home and work must be undertaken "to complete some aspect of employment already under way when the journey commences" (see *FCT v Collings* 76 ATC 4254, 4262.

Therefore, generally travel from a taxpayer's home to the taxpayer's place of work (or to make the first business call of the day) and travel between the last business call of the day and the home would be private use, being travel to enable the taxpayer to commence work or after work has finished. Travel between the place where the first business call is made and the taxpayer's work base, or to make subsequent business calls, would be business use, being travel in the course of performing work.

Under the general rule it is irrelevant whether the travel is between the home and a regular workplace or between the home and a workplace that is not the taxpayer's regular workplace. In *Kirkwood v Evans* [2002] EWHC 30 Patten J commented that:

> …the costs of travelling directly from home directly to a temporary workplace would probably have fallen foul of the decision in *Ricketts v Colquhoun (Inspector of Taxes)* [1926] AC 1, that the choice of location of one's home was a matter of personal choice and not a necessity of the office or employment. That objection is no longer available to the Revenue provided that the employee or office holder needs to attend the temporary workplace, in order to perform his duties and the workplace is truly a temporary one. [para 15]

These comments indicate that in the absence of specific legislation, the general rule would apply to travel between the home and any temporary workplace (that is, such travel would be private travel although the travel is not to the taxpayer's regular workplace). (Under the UK Act, a deduction is not allowable for expenses of "ordinary commuting" or private travel: section 198(1) Income and Corporation Taxes Act 1988. Travel to a "temporary workplace" is not ordinary commuting.)

Circumstances where travel between home and work is not private travel

In cases relating to deductibility of travel expenditure between home and work (some of which relate to taxpayers who are employees) the following broad factual situations have been identified as circumstances where travel between home and work is "on work" rather than travel to enable the taxpayer to commence work:

- Where a vehicle is essential for transport of goods or equipment necessary for the performance of income earning activities at the home and elsewhere;

- Where the taxpayer carries on an "itinerant occupation" (that is, the taxpayer does not work from a fixed work place and the home is the taxpayer's base of operations);

- Where the taxpayer is required to be accessible at the home for employment duties and is required to undertake travel in response to emergency calls; and

- Where the travel is for work purposes between two related work places, one of which is also the taxpayer's home.

1. *Vehicle essential for transport of goods or equipment*

Where a vehicle is used for the transport of goods or equipment necessary for the performance of income earning activities performed both at the home and at the taxpayer's normal work place or work places, the use of the vehicle would be

attributable to the transport of the goods rather than the transport of the taxpayer. For this exception to the general rule to apply:

- It is necessary (because of the nature of the income earning activity) to transport the goods or equipment to the taxpayer's home to enable the taxpayer to carry out the income earning activity at the home and to transport the goods or equipment to the taxpayer's usual work place or work places; and

- A vehicle is required to transport such goods or equipment (because of their bulk or because the value, sensitivity or other special characteristics of the items transported make it impractical to transport such items without the use of a car). "Bulky" in this context means cumbersome. Whether an item or set of equipment is bulky will generally depend on the weight of the equipment and the relative ease of transporting or carrying it.

An example is *FCT v Vogt* 75 ATC 4073, where the taxpayer was a professional musician who performed at a number of venues and who was required to provide his own instruments and equipment. The taxpayer kept his instruments and equipment at his home and practised there. The taxpayer required a vehicle to transport his instruments (trumpet, flugelhorn, acoustic bass, electric bass, and amplifiers) to performance venues because of their bulk. Waddell J held that the expenditure was deductible. He took into account the following matters:

Firstly, the expenditure was incurred as part of the operations by which the taxpayer earnt his income. Secondly, it was essential to the carrying on of those operations: there was no other practicable way of getting his instruments to the places where he was to perform. Thirdly, in a practical sense, the expenditure should be attributed to the carriage of the taxpayer's instruments rather than to his travel to the places of performance. The mode of his travel was simply a consequence of the means which he employed to get his instruments to the place of performance, that is by carrying them in the motor vehicle which he drove. (p. 4078)

The term "bulky" was used in the *Vogt* case. In *Crestani v FCT* 98 ATC 2219 the AAT discussed the meaning of that word. The AAT said:

7. ….I do not think that the term "bulky" should be construed to refer only to an article which is of large size, such as the musical instruments which were the subject of the decision in *FC of T v Vogt* 75 ATC 4073 . The term is, in my view, more aptly to be construed as similar to "cumbersome" in the sense that it is not easily portable

In *Gaydon v FCT* 98 ATC 2328 the AAT said:

22. The question whether an item or set of equipment is bulky will generally depend on the weight of the equipment and the relative ease of transporting or carrying it.

In *Scott v FCT (No 3)* 2002 ATC 2,243 the AAT considered that this exception to the general rule was not limited to items that require special transport arrangements because of their physical characteristics. The AAT considered that the value, sensitivity or other special characteristics of the items transported may also make it necessary to transport such items by car. The AAT said:

15. I think the exception is broader than that. A taxpayer may think it is necessary to make special arrangements to transport essential items to his workplace for reasons other than their size or

> weight. An item that is essential to a business might have other features or attributes that make special transport arrangements appropriate. The simplest example is valuable items, like jewellery or cash. But it is easy to imagine items that are awkward to transport. Items that have a noxious smell, or which are offensive or which might scandalise or embarrass other people might require special arrangements for their transport. The taxpayer may be uncomfortable transporting the items in the usual way, and could therefore justify making a claim for the cost of transporting those items through alternative means. He or she is free to "hitch a free ride to work" on those items: *U107* at 652.

The *Scott* case concerned a dentist who was required to transport confidential patient files and wax denture moulds between his home and a secondary surgery which did not have much equipment. Because of the size and shape of the moulds, it was not possible to carry the items in a briefcase or a box that could be sealed. The AAT accepted that transport costs were deductible on the basis that special arrangements were necessary to transport the items because of their sensitivity and value:

> 16. Dr Scott carried cash (although not in large amounts) and patient files including, on some occasions, x-rays. The files were confidential. The wax moulds were also grotesque. He said a patient would be disturbed if she knew that her dentures were being ogled by the dentist's fellow passengers on a bus.
>
> 17. While it is easy to imagine better examples of items that might be regarded as awkward to transport in the sense that I have described, I am satisfied Dr Scott should be able to claim the cost of making the special arrangements for transporting the goods in his own vehicle. He was carrying items that were sensitive and valuable. He (and his fellow travellers were he to use public transport, and his patients) might feel distinctly uncomfortable were the contents of the box to spill or be observed by others. Since the evidence suggests the contents of the box might be visible to others because it often could not be sealed, special arrangements for its transport were justified. It follows that the cost of those arrangements should be an allowable deduction.

2. *Itinerant occupations*

An occupation would be regarded as an itinerant one if the following conditions are satisfied:

- The taxpayer's home is the taxpayer's base of operations. (In *Taylor v Provan* [1975] AC 194 Lord Wilberforce regarded a situation where a taxpayer had two fixed work places, one of which was the home, as a variation of a situation where a taxpayer carries on an "itinerant occupation"); and

- The nature of the taxpayer's income earning activity is such that travel is essential to the carrying out of the activity; and

- The taxpayer is required to undertake work at a number of work places during the course of a day or the sequence of work places and the periods of time spent by the taxpayer at each work place vary and are unpredictable so that it is impractical for the taxpayer to carry out the income earning activity without the use of a car; and

- The taxpayer can be regarded as travelling in the performance of the taxpayer's work from the time of leaving home.

These criteria are drawn from the following cases on deductibility of travel expenditure: *Horton v Young* [1971] 3 All ER 412; *Gaydon v DFC of T* 98 ATC 2328; *FCT v Wiener* 78 ATC 4006; *FCT v Genys* 87 ATC 4875.

In *Wiener*, the taxpayer was a teacher who taught at five different schools from Monday to Thursday. On Friday she taught at one school and did the administrative work associated with the teaching programme. The court considered that the taxpayer's employment was an itinerant one. The nature of the job made travel in the performance of the duties essential and it was an implied term of her employment that she provide her own means of transport. A motor vehicle was necessary to enable the taxpayer to comply with her teaching timetable. The taxpayer could be said to be travelling in the performance of her duties from when she left home to when she returned home.

In *Genys*, the court did not accept that the fact that the taxpayer (a nurse who was employed at various hospitals through an employment agency) did not have permanent employment at one hospital was sufficient for her occupation to be an "itinerant" one. The court considered that the taxpayer's duties did not commence until she arrived at the hospital. She merely drove from home to work and back again. The court considered that if the taxpayer in *Wiener* had been employed at one school on each day of the week, each school would have been regarded as a fixed place of work: see p. 4883.

3. *Travel in response to emergency calls*

That an employee travels to and from work in response to a telephone call is not sufficient to make the travel work-related travel. For example, it was considered that the work duties of an airline pilot who was on call did not begin until the pilot arrived at the airport and travel between the pilot's home and work was private travel: *Nolder v Walters* 15 TC 380. Also, travel by the taxpayer in *Genys* was private travel as the taxpayer was not obliged to accept the work offered and her duties did not commence until her arrival at the hospital.

If an employee elects to carry out some work duties at home and is consequently required to travel to the employee's usual work place in response to a call, travel between the employee's home and work would still be private travel. The requirement for the employee to perform work duties at the home and to be accessible at the home for emergency calls must be a consequence of the nature of the employee's duties. Examples of such a situation are: *Owen v Pook* [1970] AC 244 and *FCT v Collings* 76 ATC 4254.

In *Owen v Pook*, a doctor (who was in practice as a GP and who was also employed part-time by a hospital for emergency cases) was required to be accessible by telephone at home. On receipt of a phone call from the hospital the taxpayer gave instructions to the hospital staff before leaving for the hospital or advised treatment by telephone. The majority in the House of Lords considered that the taxpayer carried out his duties in two places, namely, at the hospital and at his home and that the taxpayer had commenced his employment duties at the home before travel commenced. Lord Guest said:

In *Ricketts v. Colquhoun* there was only one place of employment, Portsmouth. It was not suggested that any duties were performed in London. In the present case there is a finding of fact that Dr. Owen's duties commenced at the moment he was first contacted by the hospital authorities. This is further emphasised by the finding that his responsibility for a patient began as soon as he received a telephone call and that he sometimes advised treatment by telephone ... There were thus two places where his duty is performed, the hospital and his telephone in his consulting room. If he was performing his duties at both places, then it is difficult to see why, on the journey between the two places, he was not equally performing his duties ... It follows that he had to get from his consulting room to the hospital by car to treat the emergency. The travelling expenses were, in my view, necessarily incurred in performance of the duties of his office. [pp. 256 - 257]

In *Collings*, the taxpayer was employed as a computer consultant who had been sent to the US for special training in relation to a major conversion in computer facilities of her employer. Her normal hours of work were from 8.30 am to 5.30 pm, but she was also required to be on call for the remainder of the 24 hours of the day and on weekends. It was normal for her to receive calls and to give telephone advice to workers at the office at any time of the day or night. The taxpayer was provided with a computer which was connected to the office computer, in order to assist in diagnosing and correcting computer faults from home. If the problem could not be dealt with at home, the taxpayer was required to go into the office.

The taxpayer did not claim that her normal daily journeys between home and work were business journeys. The issue in the case was whether expenditure relating to the "special journeys" in response to calls for assistance was deductible. However, the following passage from the judgment indicates that if the court had been required to determine whether expenditure on the normal daily journeys was deductible, the court would have considered that such expenditure was private expenditure:

It seems to me that the proposition that expenses of travel between the taxpayer's residence and his place of work are not allowable deductions under sec. 51 has its basis in a specific viewpoint that such expenses are of a private nature, and not in any compulsion of the words "incurred in gaining or producing the assessable income" or in any of the criteria formulated for applying those words in particular cases. That such expenses are essentially of a private nature has derived from a view that a man's choice of a home in a location different from work is a decision relating to his private living. The historical origins of this view, and the anomalies inherent in it, are explained by Denning LJ (as he then was) in *Newsom v Robertson* [1953] 1 Ch 7 at p. 17). The relevant passages are quoted in the joint judgment in *Lunney's* case (100 CLR at p. 499-500) and are referred to by Dixon CJ (at p. 485).

Thus the question in the present case resolves itself into whether a principle, that appears to be grounded in history rather than reason, should be extended to a case such as the present when a business element is present in the journey from home to work, if not from work to home. **I am not concerned with those normal daily journeys that have their sole relation to a person's choice of his place of residence; I am concerned with journeys which begin as a result of performance of duties of the employment at the taxpayer's home**. (p. 4262) [emphasis added]

Rath J considered that expenditure on travel undertaken by the taxpayer between home and work in order to resolve a problem or malfunction of the employer's computer was deductible as the expenditure was incurred in the course of performing employment duties commenced at the home ('on work"). Expenditure on the special journeys was, therefore, deductible. Rath J commented:

There were two separate and distinguishable facets of her employment. On the one aspect she commuted regularly to her work; on the other she had a different set of functions, namely to be ready at call at all other times, night or day or on weekends to work at problems of malfunctioning of the

computer, with the aid of such information as she could obtain on the telephone, and with or without the aid of her portable terminal. Lord *Reid* said (in *Taylor v. Provan*) that it was necessary, in *Owen v. Pook,* that whoever was appointed should incur travelling expenses. Similarly it would, in a practical sense, be necessary for any person on duty 24 hours a day seven days a week to incur travelling expenses. Adapting the words of Lord *Morris* (p. 211), the journeys to and from home were made necessary by the very nature of the employment and of the taxpayer's duties. The taxpayer here, as much as in *Taylor v. Provan,* had a "very special" employment (cp. p. 212). She was not really in a position similar to those "thousands of employees" that Lord *Donovan* referred to (in *Owen v. Pook,* p. 261) who have to be on stand-by duty at their homes and are required to obey a summons to cope with some emergency. It may or may not be that those "thousands of employees" cannot deduct the expenses of emergency travel; but the case of the present taxpayer is clearly different, for she was engaged upon a special assignment, and was continuously on duty, wherever she was. **The taxpayer is not in this case choosing to do part of the work of her job in two separate places (cp. Lord *Wilberforce* in *Taylor v. Provan,* at p. 215). Unless she were to spend all her time in the office with the computer, she must have more than one place of work. Hers is not the freedom of choice of a barrister who does some of his work at home (*Newsom v. Robertson* (1953) 1 Ch. 7). Her double work-location is not only not merely colourable, but the two places of work are a necessary obligation arising from the nature of her special duties (cp. Lord *Simon,* p. 222)**. The taxpayer's employer had gone to the expense of having the taxpayer specially trained in the United States so as to be capable of effecting and supervising the computer conversion. The employer had to have her, as a person so uniquely qualified, available at all times for the conversion. It seems to me that the circumstances of this case are closer to those of *Taylor v. Provan* than to those of *Owen v. Pook,* and are thus more strongly in favour of the taxpayer (cp. Lord *Salmon,* p. 227). None the less the analogy with *Owen v. Pook* is close. When called at her home, the taxpayer immediately had the responsibility of correcting the malfunction in the computer. She might there and then diagnose the trouble, and provide the remedy; or she might decide that she would have to make the journey to the office, and if she took this course she was during the journey on duty in regard to the particular problem that had arisen. The circumstances of her case contrast sharply with the case of the airline pilot on call (*Nolder v. Walters* 15 T.C. 380). In that case the expenses of the pilot's telephone were also disallowed, and here again there is a contrast between the pilot's use of the telephone and the use that the taxpayer in the present case makes of the telephone. *Rowlatt* J. said (p. 388):

> "He has to be at the office, wherever he has to start from, and I think the telephone is in the same position. It is a mere question of communicating with him with a view to him coming to the office to do his duties, which begin when he gets there; and, of course, when I say the office I mean in this case the aerodrome; the place of employment. That is all it is, and it seems to me that both those heads are clearly outside the rule." [emphasis added] (p 4268)

In each case it is necessary to consider whether the taxpayer's work commenced at the home. Travel by the taxpayer in *Collings* in response to emergency calls was travel to complete work commenced at the home but the taxpayer's normal daily travel was travel to put the taxpayer in the position of being able to commence work and was private travel.

The mere fact that a taxpayer is required to be accessible at the home to receive business calls is not sufficient. The taxpayer in *Nolder v Walters* was required to travel to the airport in order to commence work there but did not travel between home and work in the course of performing work. In *Pitcher v DFC of T* 98 ATC 2190 (which concerned a radiographer who was required to be on-call after hours but was not paid to be on-call) the AAT said:

> As the Applicant accepted, she received the calls and in response to them travelled to the hospital to perform her duties there. Unlike the taxpayers in *Collings* and *Owen v Pook*, her home could not be described as a place at which work was performed; it was by contrast merely the place at which she received the calls. (para 14)

A second journey to the workplace after an evening meal or travel undertaken at the weekend is not business travel merely because the travel is undertaken outside normal business hours. In *Case M99* 80 ATC 691 the taxpayer was a public servant whose duties involved the carrying out of independent research. The taxpayer's ordinary hours of work were a minimum of 36¾ hours a week to be worked between 8 am and 6 pm, Monday to Friday. However, the taxpayer often returned to work in the evenings and worked on weekends in order to do something that had to be done at that particular time for the success of his research. The AAT held that the weekend and evening journeys had the same character as the usual morning and afternoon journeys. The AAT said:

> 10. There is no doubt that that principle applies where a person chooses to travel to his home for his midday meal, and then to travel back to the place of work. By analogy that principle applies also where, say a barrister finds it is essential for him to return at night to his city chambers for a conference after he has had his evening meal at his suburban residence. Thus the application of *Lunney and Hayley* is not excluded where the journey is merely any daily journey from home to work and return; nor is it excluded where the second such journey is, in the opinion of the claimant, a compulsory one for the proper conduct of work.

The taxpayer in *Case M99* was not travelling in the course of performing work but was merely travelling to work and from work. The travel to the home in the evening was for a private purpose (to have dinner) and the travel back to work was no different from the normal daily journey.

4. *Travel between two work places (one of which is the taxpayer's home)*

It is not sufficient to establish that the home is a work place. For expenditure to be deductible, the need for the work to be performed at the home and, therefore, the need for the travel must arise from the nature of the work and not from the personal choice or personal circumstances of the taxpayer: see *Ricketts v Colquhoun* [1926] AC 1; *Taylor v Provan*; *Burton v FCT* 79 ATC 4,318; *Miners v Atkinson* [1995] STC 58; *Kirkwood v Evans* [2002] STC 231 (discussed in more detail below).

There is also a distinction between travel to enable the taxpayer to commence work and travel in the course of performing work. Travel to enable the taxpayer to commence work is not deductible. Travel between home and work would be travel "on work" rather than travel to enable the taxpayer to commence work in the following circumstances:

- If the taxpayer had commenced work at the time of leaving the home or before the taxpayer leaves the home to travel to work; or

- Where travel to the home is undertaken in the course of performing work in order to complete the work at the home.

Travel between a work place at the home and another work place would be work-related travel only where the two work places relate to the same income earning activity. In *FCT v Payne* 2001 ATC 4027 the taxpayer was employed as an airline pilot and also operated a deer farming business at a property where he lived with his family. By a majority, the High Court of Australia held that expenditure incurred in travelling between the farm and the airport was not deductible. Travel between a

workplace relating to one income earning activity and a workplace relating to a different income earning activity was no different from travelling from home to work in order to enable a taxpayer to commence work:

> 14. When, as here, the travel is between two places of unrelated income derivation, the expense cannot be said to be incurred "in the course of" deriving income from either activity. As the majority of the Full Court [99 ATC 4391 at 4399] recognised in this case:
>
> > "…The expenditure was incurred before [the taxpayer] began to perform his duties as a pilot, or after he had fulfilled those duties. Similarly, in relation to the deer farming business." [99 ATC 4391 at 4399]
>
> The expenditure was, as the majority of the Full Court rightly said, "not incurred in the course of his employment as a pilot, nor in the course of his deer-farming business". The taxpayer's travel occurred in the intervals between the two income-producing activities. The travel did not occur while the taxpayer was engaged in either activity. To adopt and adapt the language used in *Ronpibon*, neither the taxpayer's employment as a pilot nor the conduct of his business farming deer occasioned the outgoings for travel expenses. These outgoings were occasioned by the need to be in a position where the taxpayer could set about the tasks by which assessable income would be derived. In this respect they were no different from expenses incurred in travelling from home to work. (pp. 4030-4031)

The Commissioner now considers that the item "Travelling Expenses Between Two Places of Business" in *Public Information Bulletin* No 12 (July 1964) does not correctly state the position. The item, which is based on *A v Commissioner of Inland Revenue* 6 AITR 47, is not consistent with the view of the Court of Appeal in *CIR v Banks* (1978) 3 NZTC 61,236 that for expenditure to be deductible it must be incurred in the course of deriving income. The consequence of that approach is that a distinction is drawn between travel to put a taxpayer in the position of being able to commence work and travel "on work" (travel in the course of deriving income). *FCT v Payne* is an example of a case where the court drew that distinction, with the result that a deduction was not allowed for travel between workplaces relating to different income-earning activities. See also the comments of Judge Bathgate in *Case F72* (1984) 6 NZTC 59,924 referred to above, where the judge considered that to determine whether travel expenditure was deductible generally consideration was required of when work commenced.

Record keeping requirements – Sections DH 1 to DH 4 of the Income Tax Act 1994

Motor vehicle expenses are not deductible except as provided in section DH 1. Sections DH 1 to DH 4 (which concern the record-keeping requirements necessary to establish the proportion of business use of a motor vehicle that is used partly for business purposes and partly for other purposes) do not apply to companies or to taxpayers whose sole income is income from employment, nor do they apply in relation to a motor vehicle that is used only for the deriving of income or for a purpose that constitutes a fringe benefit: section DH 1(2)(a).

Section DH 1(3) requires apportionment of expenditure in relation to a motor vehicle that is used partly for business purposes and partly for other purposes. A deduction is permitted for the proportion of the expenditure which reflects the proportion of business use of the vehicle relative to the total use of the vehicle: section DH 1(3). The business use proportion of a vehicle, for the purpose of section DH 1(3), is determined in accordance with sections DH 2 to DH 4. Under sections DH 2 and DH 3, the business use proportion may be established from:

- Complete and accurate records of the reasons for and distance of journeys undertaken by a motor vehicle for business purposes and such other details as the Commissioner may require; or

- A logbook including these details which is maintained for a test period: section DH 2(2).

Where a taxpayer has not maintained actual records for any period or the logbook test period provision does not apply, the business use proportion of the vehicle for that period would be limited to the lesser of the proportion of actual business use and 25 percent of the total use of the vehicle during that period: section DH 4.

"Business use" or use for "business purposes"

"Business use" or use for "business purposes" is travel undertaken wholly and exclusively in gaining or producing the taxpayer's gross income: see definition of "business purposes" or "business use" in section OB 1. To be "business use" or use for "business purposes" the travel must be undertaken *solely* for a business reason. In circumstances where (in line with the principles outlined above) travel between home and work is business travel, such travel would be "business use" or use for "business purposes".

In each case, the question is: what was the objective to be served by the travel. See *Bentleys Stokes and Lowless v Beeson* (1952) 33 TC 491; *Mackinlay v Arthur Young McClelland Moores & Co* [1990] 2 AC 239. To be travel undertaken "wholly and exclusively in deriving gross income", the advantage gained or sought to be gained from the travel must be the deriving of gross income and no other purpose. A journey is classified either as business use or not business use rather than the journey being apportioned on a mileage basis. This follows from the "wholly and exclusively" test. A journey undertaken for a business purpose which includes a material deviation for a private reason is not "travel undertaken …wholly and exclusively in deriving gross income of the taxpayer". Section DH 2, which requires taxpayers to maintain details of the reasons for and distance of journeys undertaken by a vehicle for business purposes, also contemplates that a particular journey will be either business use or not business use.

Travel undertaken *solely* for a business reason which necessarily also results in an incidental private benefit being received by the taxpayer would still be "business use" and the costs of the travel would be deductible: see *Bentleys Stokes and Lowless v Beeson* (1952) 33 TC 491; *Mallalieu v Drummond* 57 TC 330. A private benefit received by a taxpayer would be disregarded where travel has been undertaken solely to achieve a business objective but the travel also has an effect of providing a private benefit to the taxpayer. Such an incidental private benefit would arise where the transport of the taxpayer is a necessary consequence of travel undertaken for business purposes. For example, if it is essential for a taxpayer to use a vehicle to transport business goods or equipment (because of their bulk, weight or other special characteristics) between home and work in the course of carrying out income earning activities, the journey would be "business use", notwithstanding that the taxpayer is also transported. An incidental private benefit could also arise where a taxpayer is

able, in the course of a journey undertaken for business purposes, to also go to a private destination without travelling any additional distance to do so. For example, if a taxpayer, who is travelling to a business destination, must pass a dairy in order to reach the business destination and stops at the dairy for personal shopping, the private benefit received would be incidental to the business use of the vehicle for the purpose of sections DH 1 to DH 4 and the costs of the journey would still be deductible.

Conversely, the performance of incidental tasks such as picking up mail or newspapers or making a business call on the way to work (when travel between home and work is not business travel) would not make the trip business travel. In *Sargent v Barnes* [1978] STC 321 the taxpayer was a dentist who had a laboratory one mile from his home and 11 miles from his surgery. The laboratory was maintained for the purpose of the repair, alteration and making of dentures. Each morning on his way to the surgery the taxpayer spent about ten minutes at the laboratory to collect completed work. Each evening after closing his surgery the taxpayer called at the laboratory to deliver dentures and other articles to the technician working there. Oliver J considered that the journey was essentially a private journey (travel between home and work) and the intermediate stop did not alter the character of the travel and, therefore, expenditure on such travel was not incurred wholly and exclusively for business purposes:

In seeking to assess, on the facts as found by the commissioners, the taxpayer's purpose in incurring the expenditure here in question, counsel for the taxpayer points to the fact that he paused in his progress to the surgery to discuss matters with the technician and that he sometimes spent up to an hour with him in the evening, even carrying out work on dentures himself. But the interruption of a journey, whether for five minutes or for a longer period, does not alter the quality of the journey, although it may add to its utility. At highest, as it seems to me, it merely furnishes an additional purpose

Of course, it is right to say that if I notionally interrupt the taxpayer's journey at an intermediate point between the laboratory and the surgery and ask myself the question 'Why is he on this particular road at this particular time?' I may come up with the answer that he is taking that particular route because it passes the laboratory. But, as counsel for the Crown points out, that is not the right question**. What the court is concerned with is not simply why he took a particular route (although that may be of the highest relevance in considering the deductibility of any additional expense caused by a deviation) but why the taxpayer incurred the expense of the petrol, oil, and wear and tear and depreciation in relation to this particular journey."** (p. 328) [emphasis added]

In each case the question is: what is the real purpose of the journey? If travel between home and work is private travel but the taxpayer plans a journey so as to incorporate a deviation through a place of work where the taxpayer has no business to do, the deviation would not alter the nature of the journey. In *Sargent v Barnes* Oliver J made the following comments in relation to the taxpayer's argument that once it was established that the laboratory was a place of business, a deduction was allowable:

Now the assumption here is that the expense of travel between two places of business is always and inevitably allowable, and counsel for the taxpayer bases himself on this passage in the judging of Lord Denning MR in *Horton v Young* [1971] 3 All ER 412 at 415, [1972] Ch 157 at 168, 47 Tax Cas 60 at 71:

> "If the commissioners were right it would lead to some absurd results. Suppose that Mr Horton had a job at a site 200 yards away from his home, and another one at Reigate, 45 miles away. All he would have to do would be to go for five minutes to the site near home and then he would get his travelling expenses to and from Reigate. I can well see that he could so arrange his affairs that every morning he would have to call at a site near home. Instead of

> going to that absurdity, it is better to hold that his expenses to and from his home are all deductible.'

I question, however, whether, in that passage, Lord Denning MR intended to suggest that by deliberately planning your journey to your place of work so as to incorporate a deviation through another place of work where you actually have no business to do you alter the quality of the journey. (p. 327)

Example 1

A taxpayer has two places of work. One work place (A) is situated in a town which is 20 km from the taxpayer's home. The other work place (B) is located 2km from the taxpayer's home. Normally, on 4 days of the week the taxpayer works from A and on the other day the taxpayer works from B. Sometimes the taxpayer travels between A and B during the day. The taxpayer travels from A to the taxpayer's home but chooses to deviate through B, although there is no business reason for the taxpayer to do so.

The travel between home and work would generally be private travel as the taxpayer cannot alter the character of the journey by deliberately planning the journey to the taxpayer's place of work so as to incorporate a deviation through another place of work where the taxpayer has no business to do: see *Sargent v Barnes*.

A journey undertaken for business purposes which involves a deviation of no significant distance for a private reason would be classified as business travel. The broad principle to be applied is that to be business use, any additional distance travelled for a private reason in the course of a journey undertaken for business purposes must be insignificant in comparison with the total journey. Both the additional distance travelled for a private reason and the proportion of the total journey which the private use represents need to be taken into account. Where a significant proportion of the journey involves travel undertaken for private purposes, the journey would not be business travel (even if the private component involves only a short distance). As a guideline, the Commissioner considers that private travel that represents the lesser of approximately 2 km or approximately 5 percent of the journey would be minor or insignificant.

Example 2

A taxpayer is a self-employed plumber whose home is his base of operations. He goes to the gym on his way home at the end of the day. The stop at the gym involves the taxpayer travelling an alternative route from the last job of the day to the home work base which adds 1 km to the journey. The total journey is 17 km. The travel to the gym (5.8% of the journey) would be minor or insignificant private use.

Example 3

A taxpayer is employed as a midwife. The taxpayer does not work from a fixed base and her duties require her to visit all of her clients at regular intervals during their pregnancy and to be present at the birth of their babies.

On a particular day the journey from the taxpayer's last call of the day to her home would have been a distance of 3 km. However, instead of going direct to her home, the taxpayer travelled to a rest home to visit her father. The visit to the rest home added an additional distance of 2 km to the journey. The travel to the rest home (40% of the journey) is not minor or insignificant and the journey would not be minor or insignificant private use.

If there was a material deviation for a private reason (an additional distance travelled representing a significant proportion of the journey) the journey would not be business use for the purpose of section DH 1(3). However, in some cases travel involving an intermediate stop between two points could be two journeys rather than a single journey. Whether this is so depends on what the real purpose of the journey is and whether the intermediate stop is incidental to the entire journey: see *Sargent v Barnes*. For example, if a taxpayer travels to the taxpayer's office in order to carry out substantive business activities there and then travels to another place for business purposes, there would be two journeys and (assuming that travel between the taxpayer's home and work is private travel) the first journey would be private.

Example 4

A taxpayer travels from home to the taxpayer's office to pick up some papers required for a meeting at a client's office and then travels to a client's office. The journey would be a single journey for one purpose, the stop at the taxpayer's office being incidental to the journey.

Example 5

A taxpayer travels from home to the taxpayer's office where the taxpayer has appointments with clients. Later in the day, the taxpayer travels to a supplier's premises for a meeting. The journey to the taxpayer's office and the journey to the supplier's premises are separate journeys.

To summarise, to be "business use" or use for "business purposes" the travel must be undertaken *solely* for a business reason. A journey is classified either as business use or not business use rather than the journey being apportioned on a mileage basis**.** Where a journey undertaken for business purposes includes a private component, the private travel would be disregarded and the entire journey would be classified as business travel in the following circumstances:

- The private benefit received is incidental to a journey that has been undertaken solely for business purposes (being a private benefit that necessarily results from a journey undertaken for such purpose). For example, if a taxpayer is required to transport heavy or bulky business equipment between home and work in order to perform income earning activities at the home and another work place and a vehicle is essential for that purpose, the transport of the taxpayer would be incidental to the transport of the business equipment. If a taxpayer made a stop at a dairy on the way to a business destination and did not follow a particular route to enable the taxpayer to make the stop, the private benefit would also be incidental. However, if a taxpayer made a deviation on a business journey in order to pick up children from school, then the journey would be undertaken for both a private and

a business reason and would not, therefore, be business use (being travel that is undertaken wholly and exclusively in deriving gross income of the taxpayer); or

- The private travel is de minimis (being a deviation for a private reason in the course of a journey undertaken for business purposes or in the course of performing employment duties that is a minor or insignificant part of the journey). (If the private travel is more than a minor or insignificant part of the journey, the journey would not be business use. However, in some cases travel involving an intermediate stop between two points could be two journeys rather than a single journey.)

FBT – private use or enjoyment

Distinction between private use and work-related use

FBT is chargeable where a fringe benefit consisting of the private use or enjoyment (or availability for private use or enjoyment) of a motor vehicle is provided by an employer to an employee.

In *CIR v Schick* (1998) 18 NZTC 13,738, Gallen J considered that the term "private use or enjoyment" imported the concept of a distinction between work-related use and private use. The fundamental issue is whether a private benefit has been conferred. A fringe benefit will not be conferred unless a private benefit is provided. Gallen J considered that the provision of a motor vehicle to an employee only for work-related travel would not constitute a private benefit and would not be "private use or enjoyment".

The definition of "private use or enjoyment" specifically includes "travel in the course of proceeding to or from … the home". However, in *Schick* the court considered that this part of the definition did not apply where the vehicle was used for travel between the home as a work base (rather than as a home) and another work place. Therefore, the fact that the vehicles were used for travel starting from or ending at the home did not necessarily bring the travel within the definition.

No fringe benefit unless private benefit provided

In *Schick* Gallen J approved the reasoning in *Case Q25* (1993) 15 NZTC 5,124 that the definition of "private use or enjoyment" applied to travel that conferred a benefit of a private or domestic nature:

> The comments are interesting firstly because they put an emphasis on the purpose for which the vehicles were used as distinct from whether they merely travelled to or from home and secondly because he regarded the concept of benefit of a private or domestic nature, which qualifies the second part of the definition of private use or enjoyment, as applying also to the first part where it does not appear. I think in context there is justification for that particular view. The term "fringe benefit" itself in definition refers to benefit not only in the title, but in the first part of the definition. **The concept of private use or enjoyment where it appears in sub-para (a) and in the definition of that term itself, imports the concept of a distinction between a work related use and a private use.**
>
> **It follows then that I agree with the Judge that the word "travel" where used in the definition of private use or enjoyment, is to be regarded as qualified by that qualification which appears in the**

second part of the definition and means travel which confers a benefit of a private or domestic nature. (p.13,743) [emphasis added]

The taxpayers in *Schick* carried on business as transport operators and earthmoving contractors and had provided vehicles to their foremen who used the vehicles to transport themselves and fuel and grease and other equipment necessary for the operation of earthmoving equipment to remote worksites where the equipment was operated. The mechanic employed by the taxpayers used the van provided to him to service both the transport vehicles and the earthmoving equipment. The employees usually travelled direct from home to the worksites and were paid from the time that they left home to the time that they returned home. Also, the foremen were paid an extra half hour a day to do clerical work and were required to keep their daily records at home. At times the foremen kept oil or grease and a few tools at their homes. The foremen were given plastic cards that allowed them to purchase fuel, oil and grease and were expected to ensure that they had sufficient stocks of oil and grease to ensure the smooth running of the earthmoving equipment. The foremen had discretion to discuss the progress of work with customers.

Gallen J considered that a private benefit had not been provided to the employees in *Schick*. He accepted that the employees were working from the time they left home. They were paid from the time they left home, they were required to keep daily records at home and to be available there for consultation with clients. The employees and the vehicles were required to be available at the home for emergency call-outs. The provision of the vehicles was for the benefit of the employer in getting the employee to remote worksites in the quickest and most efficient way possible.

No private benefit provided where vehicle provided for work-related travel between work and home as a work place

Gallen J considered that where the employee's home is also a work place and where the vehicle was used for transport to and from work, a private benefit would not be provided:

…The concept of "home" where it appears in the definition of "private use or enjoyment", does not apply where the home concerned is not used exclusively as a home, but also as a work place. This is in accord with the view that the definition of "private use or enjoyment" is confined to a situation where there is a genuine benefit to the employee concerned which would occur where the vehicle was used for transportation to and from work. Where however transportation was from work to work, there is no room for the operation of the definition. (p. 13,643)

Gallen J considered that it was open to the TRA to conclude on the facts that the home was also a work place (Gallen J noted that different considerations would arise if the question being considered was whether deductions are allowable in respect of the home). The Commissioner had argued that whether a home was a work place depended on the extent to which it was so used and that one or more of the following factors were satisfied:

- Whether there are sound business reasons for operating from home;
- Whether significant business activity actually occurs at home;

- Whether there is significant storage of business goods or equipment at home;

- Whether significant space is set aside and used for business-related activities conducted at home;

- Whether the activities conducted at the home are closely integrated with the taxpayer's business.

These factors were drawn from the facts of cases on "private use or enjoyment" decided before *Schick*: see *Case R37* (1994) 16 NZTC 6,208; *Case Q25* (1993) 15 NZTC 5,124; *Case S26* (1994) 17 NZTC 7,182 (discussed in more detail below). Applying these factors, the court in *Schick* concluded that the employees' homes were work places for FBT purposes. The court considered that three of the above factors had some application, and that these three factors taken together were sufficient for the home to be considered to be a work place. The court made the following comments in relation to these factors:

- There were sound business reasons for working from home. The employees were required by their employers to keep their daily records at home. They were required to be available for consultation with clients and were required to be available for emergency purposes.

- The activities carried on at the home were an integral part of the taxpayers' business activities in that the employees effectively operated and managed the taxpayers' business from their homes to the actual work sites.

- The storage of the vehicles at the employees' homes would go some way towards establishing that there was significant storage of business goods and equipment at the homes. The court noted, however, that this factor should not be given too much weight given the issues in the case. In the context of the employers' business (which involved work carried out at remote work sites and which required the employees to be available at the home for consultation with clients or for emergencies), the vehicles were taken to the home and kept there to be available for work-related travel.

Relevance of Schick factors

In *Schick*, the employees' homes were considered to be work places, although the taxpayer could not establish that a significant proportion of the homes were set aside for business purposes or that significant business activity occurred at the homes and the only storage of business goods or equipment was the vehicles themselves. Whether the factors of significant storage of business goods or equipment at the home or significant space at the home being set aside for business purposes are relevant and are to be given weight depends on the nature of the employment duties and whether the goods and equipment stored at the home are necessary for the performance of employment duties and the space requirements of the particular activity. The significant storage of business goods and equipment at the home and the setting aside of significant space at the home for business use will not in themselves make the home also a place of work or business. On the other hand, technological changes mean that significant space or significant storage of tangible goods may no longer be

necessary for the carrying on of business activities at a home. Technology has also made it more feasible for employees to perform their employment duties outside the conventional factory or office environment. For these reasons, the Commissioner considers that the presence or absence of these three indicators will not necessarily determine whether travel between home and work is private travel or work-related travel.

A home still retains the characteristics of a home although business goods may be kept there and some employment duties may be performed there.

The approach in cases on deductibility of travel expenditure is that for expenditure on travel between home and work to be deductible it is necessary to establish:

- The need for the work to be performed partly at the home (and, therefore, the need for the travel) arises from the nature of the work ; and

- The travel is "on work".

The Commissioner considers that the same approach is to be applied in determining whether travel between home and work is private travel for FBT purposes.

The first requirement is consistent with the two other indicators referred to in *Schick* (whether there are sound business reasons for operating from the employee's home and whether the activities conducted at the home are closely integrated with the employer's business), The Commissioner considers that for both FBT and deductibility purposes, in order to distinguish between business use and private use, it is necessary to consider the nature of the income earning activity and the relationship of the travel to that activity. Travel between home and work would be private travel if the work is performed at the home because of the personal circumstances or personal preferences of the taxpayer. For travel to be work-related travel, it is not sufficient that the employer and employee contracted on the basis that employment duties would be performed partly at the home.

However, it is not sufficient that employees carry out employment duties at home for business reasons. The *Schick* case establishes that the fundamental issue is whether a private benefit has been conferred. Under the FBT regime there is a presumption that the provision of a vehicle for travel between home and work confers a private benefit. The definition of "private use or enjoyment" specifically includes "travel … in the course of proceeding to or from the person's home". Generally travel between home and work is private travel as it enables employees to live away from their work and relates to a private decision (the employee's choice of location of residence). In *Lunney v FCT* in their joint judgment Williams J, Kitto J and Taylor J referred to *Newsom v Robertson* (which concerned a barrister who worked at his chambers or in court during the day and frequently took papers home to work for several hours after dinner) and commented:

It should be mentioned that in this case the additional fact appeared that the taxpayer consistently performed some of his professional duties at his home and the case was put as one in which the facts disclosed that the expenditure was incurred, not merely in travelling between his home and place of business, but, rather, in travelling between one place of business and another. Yet the taxpayer's claim to a deduction was rejected both, in the first instance and in the Court of Appeal. None of the members

of the latter Court were prepared to assent to the proposition that the taxpayer's journeys were for the "purpose" of his profession; in the language of Romer LJ:

> "The object of the journeys between his home and place of work, both morning and evening, is not to enable the man to do his work but to live away from it."

The fact that few taxpayers are free to choose whether they will live at their place of work or away from it may appear to invest this statement with a degree of artificiality. But, even in these modern times, they still have, within limits, the right to choose where their homes shall be so that a taxpayer's daily journeys between his home and place of work are rendered necessary as much by his choice of a locality for his residence as by his choice of employment or occupation. And indeed the purpose of such journey [sic] is, at least, as much to enable him to reside at his home as to attend his place of work or business. (p. 413) [emphasis added]

Example 7

An employee is the manager of a foreign exchange dealing room of a bank whose head office is in Hong Kong. Many of the bank's clients are in different time zones from New Zealand. The manager often works at the home in the evenings or on Saturday mornings (when the US markets are still open) as the manager is required to be available to provide market information or report to the bank's head office or to carry out currency dealing. The manager is sometimes required to travel back to the bank's premises or to a video conference facility for conference calls or video conferences.

Although FBT was introduced much more recently than income tax, the same philosophy underlies the classification of travel between home and work as private travel (that is, travel between home and work is required because of the taxpayer's choice of location of residence). The normal daily travel by an employee does not cease to be private travel merely because employment duties are performed at the home. A second journey to participate in a video conference is no different from travel by an employee who chooses to travel home for lunch and then to travel back to work: see *Case M99* 80 ATC 691. Travel by an employee in such circumstances is undertaken to enable the employee to live away from the employee's workplace and remains travel to commence work. An employee who performs work duties at the home after normal working hours cannot be regarded as being continuously engaged in employment duties while travelling between home and work. The employee may be travelling to do work at the home but is not travelling on work. Unlike the taxpayer in *Collings*, the employee would not be travelling to complete an aspect of the employee's employment already underway when the journey began.

Both the normal daily journey between work and home and a second journey back to work for a video conference by the manager is travel of a private nature.

Example 8

A researcher works in an open plan environment at the employer's premises. Sometimes the researcher takes more complex and difficult work home.

> Because of disruptions at the employer's premises it is more efficient for the work to be carried out at home.
>
> Travel between work and home would still be private travel where work is performed at home because of problems with facilities at work. The employee would be travelling to work rather than in the course of performing work duties. In *Warner v Prior* (2003) Sp C 353 a deduction was not allowed although it was accepted that the taxpayer performed the additional duties at her home because adequate facilities were not provided for her to carry out these duties at the schools where she taught.

Each of the FBT cases where travel between home and work has been found not to be "private use or enjoyment" falls into one or more of the exceptions referred to in *Genys*. Each of these exceptions involves situations where the travel is "on work" rather than travel in order to commence employment duties or travel from work. Travel by an employee in such situations would be travel for work-related purposes and would not constitute private use or enjoyment.

- *Vehicle essential for transport of goods or equipment*

In *Cases S26* and *Q25* one of the factors taken into account in reaching a conclusion that travel between home and work was not private use was that the vehicle was used for the transport of goods to the home for work to be performed on them. In *Case S26*, the taxpayer was a clothing manufacturing company. Finishing off work was carried out on the garments at the home of the shareholder-employees. The finishing work on garments was intricate and time-consuming and it was inconvenient to fit in such work during the day at the factory. The vehicle was used each night to transport the garments between the factory and the home, and the following day, after finishing work had been done, the garments were transported back to the factory or were delivered to customers. The company in *Case Q25* was also in the business of clothing manufacture. The home of the shareholders was fitted out for the storage of garments and up to 5,000 garments could be stored there at any time. The work performed at the home involved pressing garments, unpicking, and making good defective workmanship. The work carried out by the shareholders at the home was intended to minimise overheads. (In *Case Q25* the TRA also held that the vehicles were work-related vehicles within the meaning of section 336N(1) of the Income Tax Act 1976 (now contained in section OB 1 of the Act).) That aspect of the TRA's decision was upheld by the High Court: *CIR v Rag Doll Fashions (NZ) Ltd* (1995) 17 NZTC 12,104.)

- *Itinerant occupations*

The occupations of the employees in *Schick* can be regarded as itinerant occupations. The court considered that the employees operated the employers' business from their homes to the actual work sites where the work was performed. As previously mentioned, the employees were regarded as working from the time they left home. They were paid from the time they left home, they were required to keep daily records at home and to be available for consultation with clients. The employees and the vehicles were required to be available at the home for emergency call-outs. The

vehicles were required to transport oil and grease necessary for the smooth running of the earthmoving equipment at remote work sites.

- *Travel between work and home as a work place*

In *Case R37* (1994) 16 NZTC 6,208, it was held that travel from and to the home of the shareholder-employees was travel from and to a second business site. The company carried on the business of screen-printing. The actual printing and screening work was carried out at the company's factory. Continuous test washing of sample garments (to check the quality of adherence of ink and dyes on garments) was carried out at the home on most days, there being no washing facility at the factory. Preparation of art work and clerical work involving the confirmation of quotes given during the day and the issuing and payment of accounts was also carried out at the home (because it could not be established that the vehicle was not available for private use or enjoyment, the company was liable for FBT).

In *Case S26* the home was also considered to be a business site. The company's clothing manufacturing business had initially been conducted from the home and had later expanded to the factory. Although much of the manufacturing was carried out at the factory, finishing work continued to be done at the home. In *Case Q25* also, garments manufactured at the company's factory were taken to the home for finishing off work to be carried out on the garments. It was held that the vehicles were used for travel between the home and work for work-related purposes.

Case T39 (1997) 18 NZTC 8,261 concerned a company which carried on the business of cosmetic dentistry and employed its principal shareholder and director in that business. Vehicles owned successively by the main shareholder and director of the company were leased to the company during working hours. The shareholder carried on the taxable activity of car leasing. Two issues were considered in the case: whether a fringe benefit had been provided and whether the shareholder had acquired the vehicles for the principal purpose of making taxable supplies for GST purposes. The TRA accepted that the nature of the agreement between the shareholder and the company was that the company was entitled to use the vehicle only during the lease hours (being the company's hours of business). Because the vehicle was available to the shareholder for private use during those hours, the company was liable for FBT.

In relation to the GST issue, the TRA considered that travel between home and the surgery was business use, as the home was an ancillary place of business in relation to the dentistry business (as that business was carried on by the company, it appears that while the vehicle was used for travel between the surgery and the home, the vehicle was considered to be subject to the lease). The work performed by the shareholder involved examining the patient, taking X-rays, preparing a jaw record, and making models of teeth. The shareholder specialised in treating complicated cases. Patients were seen at the surgery and treatment plans were prepared at the home office. Written records, teeth models and an articulator (a machine which simulated the movement of the jaw) were moved between the surgery and the home. The equipment at the home office included an X-ray viewer and a Bunsen burner used to remodel with wax the models of teeth. Also, the practice laundry was done at the home and was transported from the surgery to the home for that purpose. The TRA accepted that the particular style of dental speciality required there to be available a

place of business separate from the surgery where the shareholder could consider and plan the highly specialised form of treatment which the shareholder would recommend and apply to the practice's clients.

Travel between a work place at the home and another work place would be work-related travel only where the two work places relate to the same income earning activity: *FCT v Payne* 2001 ATC 4027. Therefore, applying the approach in *Payne*:

- If an employee had full-time employment and the employee's home was a place of work in relation to that employment, travel between the home to carry out employment duties in relation to a second job would be private travel.

- If an employee was employed full-time and carried on a part-time business at the employee's home, travel between the home and work would be private travel.

Common principles relating to deductibility and to FBT

The test for determining whether travel expenditure is deductible and the definition of "private use or enjoyment" for FBT purposes are expressed in different terms. However, the tests raise essentially the same issues and require consideration of the same factors. Expenditure on travel of a private nature cannot satisfy the test of deductibility. Conversely, if travel between home and work is "private use or enjoyment" (being travel which confers a benefit of a private or domestic nature"), expenditure on such travel would not be deductible.

The test of deductibility and the FBT test applied to the same facts (and assuming that the employee had incurred expenditure on travel and a deduction was allowable for expenditure incurred in gaining income from employment) would produce the same result. In each of the FBT cases where it has been found that travel between home and work is not private use would have satisfied the test of deductibility in relation to the employee.

For both deductibility and FBT purposes:

- It is not sufficient that work is performed at the home. The need for the work to be performed partly at the home (and, therefore, the need for the travel) must arise from the nature of the work; and

- There is a distinction between travel undertaken to enable a person to commence work and travel in the course of performing work ("on work"). Travel to enable a person to commence work is private travel.

For FBT purposes (as for deductibility purposes) a journey would be treated as work-related travel where:

- The private benefit received is incidental, being a private benefit that necessarily results from a journey undertaken for work-related purposes; or

- The private travel is de minimis (being a minor or insignificant proportion of a journey undertaken solely for work-related purposes).

Employment duties performed at home because of employee's personal circumstances

There may be cases where an employee has contracted on the basis that employment duties would be performed partly at the home. Technological and social changes have made such arrangements more common.

The House of Lords in *Taylor v Provan* considered that an employment contract stipulates the nature of the employment duties and where the employment duties must be performed. However, the contract must be bona fide. Their Lordships also considered that (applying *Ricketts v Colquhoun* [1926] AC 1) the travel must be necessitated by the nature of the employment duties and not from the personal circumstances of the employee: see pp. 208, 212, 215-216, 221-222, 225, 226. Although the majority and the minority in *Taylor v Provan* did not agree on the proper inference to be drawn from the facts, there was no disagreement on the principles to be applied.

Therefore, the terms of an employment contract (provided these are bona fide) generally establish the nature of the employment duties and where these are to be performed. However, the fact that the home is a place where work is performed (whether or not under a contractual obligation) is not sufficient. The need for the travel must arise from the nature of the work and not from the personal choice or circumstances of the employee. Whether the need for travel arises from the nature of the work is determined objectively. These principles were applied in *Taylor v Provan*.

In *Taylor v Provan*, the taxpayer was a Canadian brewery magnate who was a director of several UK brewery companies with special responsibility for negotiating mergers and amalgamations. The position was created specifically for the taxpayer who was uniquely qualified for the position. The arrangement was that the taxpayer would provide his services in Canada or the Bahamas as far as possible and when necessary he would travel to the UK to visit breweries there. The taxpayer was not paid for his services but he was reimbursed for the cost of travelling between Canada or the Bahamas and the UK.

The Commissioner had assessed the taxpayer for income tax on the amounts reimbursed. The House of Lords held that the amounts were income but the majority (Lords Reid, Morris and Salmon) considered that the travel to and from the UK was not private travel and that, therefore, the expenses of such travel were deductible. It was not sufficient that the taxpayer had contracted to do most of the work outside the UK. *Taylor v Provan* is a case that involves exceptional circumstances. The distinguishing feature in the case was that the office was a unique one created to be held by a particular person with specialised skills and it was not possible for the company to get the work done by anyone else: see judgment of Lord Reid at p. 208, Lord Morris at p. 212-213, Lord Salmon at p. 227. However, the minority (Lords Wilberforce and Simon) did not accept that the taxpayer was under a contractual obligation to carry out part of his duties in Canada or the Bahamas and even if there had been such an obligation, the minority considered the terms of the taxpayer's

employment merely recognised the taxpayer's personal circumstances and were not required by the nature of the tasks involved in the office.

The above principles were applied in two cases which were decided comparatively recently: *Miners v Atkinson* [1995] STC 58 and *Kirkwood v Evans* [2002] STC 231.

In *Miners v Atkinson* the taxpayer was a computer consultant and director of his own company. The company contracted to provide the taxpayer's services to another company. The company's registered office was at the taxpayer's home, 80 miles away from the premises where the consulting services were performed. A distinction was drawn between services provided to the client and the taxpayer's duties as a director. There was no contract between the client and the taxpayer and, therefore, in all of the taxpayer's activities the taxpayer acted as a director of the company. It was accepted that the taxpayer's home was the base from which he worked, being the place where he carried out his duties as a director of the company. The taxpayer argued that once it was accepted that the home was the taxpayer's base of operations, it followed that expenses of travel between the home and the place where the consulting services were performed were necessarily incurred unless it could be shown that the taxpayer's choice of residence was unreasonable. It was held that the expenditure was not deductible as the taxpayer was working at home out of choice. It was not necessary for the work to be carried out at the taxpayer's home and the work could have been done anywhere.

In *Kirkwood v Evans* the taxpayer was a civil servant who chose to join a homeworking scheme provided by his employer. The scheme was available to approved employees and was not compulsory. Under the scheme the taxpayer was provided with a computer and other equipment but was required to provide his own office accommodation at his home. The taxpayer's home was his main work place but he agreed to travel to Leeds (which was 135 miles away from the taxpayer's home) once a week in order to deliver work that he had done, to collect work and to download information from a database. While in Leeds the taxpayer was available to work there for the remainder of the day. It was held that the cost of travelling between the taxpayer's home and Leeds was not deductible. The fact that the taxpayer had two places of work was not sufficient as this was not required by the nature of the taxpayer's employment. Patten J said:

[12] **I mean no disrespect to Mr Evans when I say that he was obviously not uniquely qualified for the work he did and he accepted that in argument**. The highest that he can put his case is that he was under the terms of the homeworking agreement with the CAS required to visit the office in Leeds to deliver and collect work and to update the information needed for his work. On the authorities this is not enough to make the travelling expenses ones which are necessarily incurred in the performance of those duties. Even accepting that the terms of his contract (whilst the homeworking agreement subsisted) required him to work four days in King's Lynn and one in Leeds his choice to live in King's Lynn rather than Leeds was historical and is unconnected with any term of his employment. The necessity of travelling to Leeds is dictated by his choice of the place where he lives and not by the nature and the terms of the job itself.

[13] In para 10(b) of the case stated the reasoning and decision of the General Commissioners on this point is set out in the following terms:

> '(b) Having found as a fact that the taxpayer had two places of work, one his home in King's Lynn and the other at his employer's office in Leeds, the Commissioners

> determined that the taxpayer was obliged in respect of the performance of his work duties to travel from his King's Lynn office to Leeds and therefore the expense of so doing was necessary within the meaning of Section 198 of the 1988 Act, as was the expense relating to heating and lighting his King's Lynn office.'
>
> It seems to me that the commissioners considered that the mere fact that Mr Evans had two places of work (one being his home) and was required to travel between them was sufficient to bring the expenses involved within the provisions of s 198(1). For the reasons set out in the speech of Lord Reid in *Taylor v Provan* (*Inspector of Taxes*) this is not correct as a matter of law. **Unless it could be shown either that Mr Evans was uniquely qualified to do that job or that objectively the job could only be done by working at home in King's Lynn (as opposed to anywhere else) and at the office in Leeds the expenses cannot be said to have been necessarily incurred in the performance of Mr Evans' duties.** The Crown's appeal will therefore be allowed in respect of the travel expenses which relate to the year 1997–98.
>
> ….
>
> [16] …The travel in question was between his home in King's Lynn and the CAS office in Leeds. **The fact that his home was also a 'work place' does not prevent it from being his home**. [emphasis added]:

FCT v Collings 76 ATC 4254 also confirms that *Taylor v Provan* is to be regarded as an exceptional case. The *Collings* case concerned a computer consultant whose employer had undertaken a conversion of its computer system and who had been sent to the US for training in connection with the conversion. The taxpayer was required to be on call 24 hours a day. The court in *Collings* considered that the case was analogous with *Taylor v Provan* in that the taxpayer was uniquely qualified for the position.

Although the actual result in *Taylor v Provan* was not discussed in the following cases, the authority of *Taylor v Provan* was not questioned in these cases: *R v Deimert* [1976] CTC 301; *FCT v Wiener* 78 ATC 4006; *Garrett v FCT* 82 ATC 4060; *Case D19* (1979) 4 NZTC 60,553; *Case F47* (1983) 6 NZTC 59,801. In *R v Deimert* the court noted that *Taylor v Provan* did not detract from the authority of *Ricketts v Colquhoun*, which was distinguished on the facts: see para 39. In *Wiener* (a case concerning a taxpayer with an itinerant occupation) Smith J, adopting the approach in *Taylor v Provan*, focused on the nature of the taxpayer's employment.

Fitzpatrick v IRC [1994] SLT 836 also supports the view that a contractual obligation to undertake travel between a home work place and another place of work would not mean that travel between the two places would be work-related travel. In that case the House of Lords confirmed that an expense is not deductible merely because it relates to an act which is required as a condition of employment.

Generally, if an arrangement is made for an employee to perform employment duties partly at the employee's home solely because of the employee's personal circumstances, such an arrangement would merely recognise the employee's personal circumstances and would not be required by the nature of the employment duties. In exceptional cases, where the business reason for the employer agreeing to employment duties being performed partly at the home is to obtain the services of the employee, travel between home and work may be regarded as work-related travel. This would be so where the position is a unique one for which the employee is uniquely qualified and it is not possible for the employer to fill the position otherwise.

In order to decide whether a particular case is such an exceptional case, it is necessary to consider the employee's role in the employer's business and why the arrangement was agreed to by the employer.

Example 9

An employee works at home because otherwise the employee would spend long periods travelling to work because of traffic jams. During the day the employee is required to call at the employer's premises in order to deliver documents or to pick up documents.

Travel between the home and the employer's premises is private travel, being travel that is necessary because the employee lives at a distance from the employer's premises. The performance of work duties at the home is for the employee's convenience.

Vehicle taken to home for security reasons

The Commissioner considers that the fact that a vehicle is taken to an employee's home for security reasons would not in itself make the journey work-related travel (although this factor may be taken into account in conjunction with other factors). While the employer would receive a benefit from a car being taken home by an employee for security reasons, the employee would also receive a benefit from the use of the vehicle for travel to and from the home which is more than incidental to the benefit to the employer. Such travel would not be undertaken in the course of performing employment duties. Rather the travel would be undertaken in order to travel from home to work or from work to home.

In *Schick*, it was acknowledged that the storage of the vehicle at home should not be given too much weight given that the issue being considered was whether the travel between home and work was private travel. Although in *Case Q25* the TRA appeared to give some weight to the evidence that the vehicle was taken home because it was unsafe to leave it at the factory, other factors were present in the case which led to the conclusion that travel between home and work was work-related travel.

The principle underlying the exceptions to the general rule that travel between home and work is private travel is that such travel will not be private travel where such travel is "on work" (in the course of performing work duties) rather than from work or to work. The Commissioner considers that an employee would not be travelling "on work" when travelling between work and home merely because the vehicle is stored at the employee's home. Where a vehicle is taken to the employee's home for storage, the private benefit derived by the employee (the transport of the employee) is not incidental to transport of work items.

Availability for private use or enjoyment

Even if travel between home and work is work-related travel (so that the use of a motor vehicle for that purpose is not private use) and there is no actual private use of the motor vehicle, the employer must establish that the vehicle is not available for

private use. For a vehicle to be available for private use, the owner, lessor or hirer of the vehicle must have permitted the private use of the vehicle: *CIR v Yes Accounting Services Ltd* (1999) 19 NZTC 15,296. If a vehicle is physically available for private use by an employee, the vehicle would be regarded as being available for private use unless the employer can establish that:

- The employee is prohibited from using the vehicle for private purposes. If the employer has prohibited the private use of the vehicle it could not be said that the employer has made the vehicle available for private use, although the vehicle may be physically available for private use: *CIR v Yes Accounting Services Ltd* (1999) 19 NZTC 15,296. The prohibition against private use may be a general prohibition to employees contained in a human resources manual (or other formal employment policy document) or the prohibition may be part of an individual employee's terms of employment; and

- The prohibition on the private use of the vehicle is a genuine one. In *Case R37* (1994) 16 NZTC 6,208 letters had been written on behalf of the company by shareholder-employees to themselves in their capacity as employees of the company prohibiting the private use of the vehicle. However, the TRA found that the letters were not really intended to prevent the availability of the vehicles. Whether the employees have private motor vehicles available for private use will also be relevant in determining whether the prohibition is genuinely observed: see, for example, *Case S26* (1994) 17 NZTC 7,182; and

- The employer takes steps to ensure that the prohibition is observed. The employer in *Yes Accounting Ltd* carried out regular checks in order to enforce the prohibition.

The record keeping requirements necessary to establish that a vehicle is not available for private use are set out in *Tax Information Bulletin* Vol 4, No 8 (April 1993) – "Shareholder-Employees and FBT on Company Vehicles".

Comments on technical submissions received

Comments were received from parties external to Inland Revenue that:

- for FBT purposes it is sufficient to establish that the home is a workplace and

- the *Schick* case establishes that the reasons that an arrangement is made for an employee to work at home are irrelevant.

The Commissioner does not accept that for FBT purposes it is sufficient to establish that a home is a workplace (on the basis of the five indicators outlined in *Schick*). As discussed above, the *Schick* case confirms that the fundamental issue in respect of FBT is whether a benefit of a private nature has been conferred and that a private benefit will not be provided where a vehicle is provided only for work-related travel This item addresses the circumstances in which travel by an employee between home and work will be treated as work-related travel.

The Commissioner also does not accept that the *Schick* case establishes that the reasons that an arrangement is made for an employee to work at home are irrelevant. Two of the factors referred to in *Schick* were:

- There are sound business reasons for undertaking work at home; and

- The activities carried on at the home must be an integral part of the employer's business activities.

In each of the cases where it has been held that travel between work and home was travel between work and home as a workplace for FBT purposes, there were sound business reasons for undertaking work at the home and the activities carried on at the home were an integral part of the employer's business: see *Schick*; *Case R37* (1994) 16 NZTC 6,208; *Case S26* (1994) 17 NZTC 7,182. These factors require the nature of the employment duties and the relationship of the travel to those duties to be considered.

A comment was also made that the approach adopted in this Interpretation Statement fails to recognise technological and social changes which have resulted in greater numbers of employees performing work-related duties at home. There is recent case law which confirms that in spite of technological and other changes, the rule relating to deductibility of expenditure on travel between home and work remains a strict one: see *Miners v Atkinson* [1995] STC 58; *Kirkwood v Evans* [2002] STC 23. These cases confirm that:

- The fact that the home is a place where work is performed (whether or not under a contractual obligation) is not sufficient. The need for the travel must arise from the nature of the work and not from the personal choice or circumstances of the employee.

- Whether the need for travel arises from the nature of the work is determined objectively; and.

- If the work could have been done anywhere but is done at the home from the taxpayer's personal choice or because of the taxpayer's personal circumstances travel between the home and another work place is private travel.

It was also submitted that in some circumstances where an employee takes a vehicle home for storage purposes (such as where an employee has a private vehicle, lives close to the work premises and the vehicle is not available for private use other than travel between work and home) there may be little actual private benefit to the employee from using the vehicle for travel between home and work. However, liability for FBT and the valuation of the fringe benefit arising from the private use of a motor vehicle does not depend on its actual value to the employee.