

## **PRODUCT RULING - BR Prd 10/02**

This is a product ruling made under section 91F of the Tax Administration Act 1994.

### **Name of the Persons who applied for the Ruling**

This Ruling has been applied for by Restaurant Brands Limited.

### **Taxation Law**

All legislative references are to the 2007 Income Tax Act unless otherwise stated.

This Ruling applies in respect of:

- Sections BD 2, DA 1 and DA 2(4) and the definition of “income from employment” in section YA 1 of the Income Tax Act 2007.
- The definition of “taxable activity” in section 6, and the definition of “employment under any contract of service” in section 6(3)(b) of the Goods and Services Tax Act 1985.

### **The Arrangement to which this Ruling applies**

The Arrangement is a recurring arrangement in terms of section 91E(1) of the Tax Administration Act 1994 involving the engagement of delivery drivers by Restaurant Brands Limited (“RBL”) pursuant to the Delivery Driver Contract, completion of Certification S5, and in accordance with information in the Delivery Driver Handbook, and the standard practice information provided to Inland Revenue in the ruling application (dated 8 December 2009) and by email on 22 January 2010 (collectively referred to as “the relevant documents”), to deliver RBL products to RBL customers. Further details of the Arrangement are set out in the paragraphs below.

### ***Relationship between RBL and its delivery drivers***

1. RBL prepares and sells a range of “fast food” products via its Pizza Hut business. RBL sells its products through a chain of restaurants and provides a delivery service to its customers at some of these restaurants. RBL engages the services of delivery drivers to deliver its products to its customers from its Pizza Hut stores.
2. The relationship between the Delivery Drivers (owner drivers) and Pizza Hut are governed by the following documents:

- The “Delivery Driver Contract” which includes the following:
    - An outline of delivery driver payments (clause 7);
    - A form to compile the details of the driver, bank account, vehicle and motor insurance (schedule B); and
    - The driver uniform policy (schedule C);
  - The “Delivery Driver Handbook” which incorporates the following:
    - The guideline on “Delivery Driver Payments”;
    - A form to compile the details of the driver, bank account, vehicle and motor insurance (schedule B):
    - The “Contract Delivery Drivers Notice of Taxation Requirements”;
    - The guideline on “Making a Delivery”;
    - The “CHAMPS ” guidelines on dealing with a customer;
  - The “Certification S5” which drivers are required to complete to demonstrate their skills and knowledge in the following areas:
    - Driver’s role in CHAMPS;
    - Service Standards;
    - Driver Safety and Security.
  - The “Standard Practice Information” provided to Inland Revenue in the rulings applications.
3. Changes to the terms of the Delivery Driver contract and the Deliver Driver Handbook are communicated to Area Managers and Store Managers by RBL Head Office by email. This is in turn communicated to the Delivery Drivers verbally with reference to the email received from RBL Head Office. No physical amendment is made to the Delivery Driver Contract entered into with each respective driver. Refer to paragraph (a) of the “Conditions Stipulated by the Commissioner” (page 9 of this ruling).
4. In some cases, in-store employees make home deliveries for Pizza Hut stores from time to time, while also carrying out employment duties in-store. These employees are contracted with RBL under employment contracts and are paid a taxable allowance for making the deliveries but are not remunerated separately for the delivery services performed.

*Terms of the Delivery Driver Contract*

5. Under the terms of the Delivery Driver Contract the delivery driver agrees to:
- (a) use only the motor vehicles detailed in the Driver/Vehicle details as provided in Schedule B to the contract in the performance of the contract (clause 3.1(d));
  - (b) ensure the performance of the delivery services in a safe, proper and courteous manner in accordance with the guidelines provided in the Delivery Driver Handbook as varied from time to time (clause 3.1) (attention is drawn to any delivery driver guidelines issued by RBL from time to time);
  - (c) be responsible for all costs and expenses of the driver's business including the costs and expenses of operating and maintaining all delivery vehicles (clause 4.1(b));
  - (d) immediately refer any discrepancies on delivery with regards to collection of monies and delivery records to RBL (clause 5.1(a));
  - (e) at the end of each delivery period provide to RBL's authorised representative:
    - a complete account and record in the format specified by RBL (clause 5.1(b)(i)); and
    - all monies collected by the delivery driver from customers of RBL during the course of that delivery period (clause 5.1(b)(ii));
  - (f) be responsible to account for any cheques, credit card slips or monies received on behalf of RBL as soon as possible and make good any shortfall (clause 5.1(c));
  - (g) be liable for, and indemnify RBL against, any liability, loss, claim or proceedings arising out of or relating to the use of the Contractor's vehicles in the provision of delivery services (clause 8.1);
  - (h) maintain throughout the continuance of the agreement, at their own expense ACC contributions, where the delivery drivers engage employees to perform services under the contract, make the appropriate ACC employer contribution as required on behalf of those employees (if any) (clause 8.1(a));
  - (i) a minimum of Third Party Property Damage Liability Insurance in respect of the vehicle (clause 8.1(b));
  - (j) wear any uniforms provided by RBL and ensure their proper care and maintenance. A \$30 deposit is retained out of the first payment, to be returned to the delivery driver on return of the uniform in good conditions (fair wear and tear excepted) (clause 9.1);

- (k) provide and wear any additional uniform items as may be requested by RBL (e.g. black trousers) (clause 9.1);
  - (l) provide a float of \$20 for the purpose of making change during each delivery period (clause 9.2);
  - (m) return upon request, clean and in good condition uniforms and delivery pouches. Failure to do so will entitle RBL to deduct the replacement cost from any monies owing to the delivery driver (clause 9.3); and
  - (n) produce to RBL's authorised representative documents that are necessary in the opinion of RBL to establish that the delivery driver has complied and continues to comply with their obligations under the contract (clause 10).
6. The delivery driver is not liable to take out any insurance or be responsible for loss or damage to the products delivered (as long as the loss or damage does not result from the delivery driver's wilful default, negligence or breach of the Contract) (clause 8.3).
7. The delivery driver may not assign their rights under the contract without the prior written consent of RBL (clause 1.3).
8. In terms of RBL's obligations under the Delivery Driver Contract:
- (a) The engagement of the delivery driver does not commit RBL to a guarantee of any minimum remuneration (clause 1.2);
  - (b) RBL also reserves the right to engage the services of other contractors (clause 1.4);
  - (c) RBL agrees to pay the delivery driver:
    - for services on a per delivery basis an all inclusive payment of \$5 per delivery including GST (clause 7); (effective from 20 May 2008 an all inclusive payment of \$5.10 per delivery for new drivers, \$5.20 per delivery for drivers who have completed 6 months of service and \$5.30 per delivery for drivers who have completed 12 months or more of service, all including GST (if any));
    - within 14 days of submission of an invoice for services (clause 6.1);
  - (d) RBL is not responsible for any vehicle damage sustained as a result of the delivery driver's negligence or omission (clause 8);
  - (e) Products carried by the delivery driver shall be at the risk of RBL (clause 8.3);
  - (f) The uniforms and delivery pouches remain the property of RBL (clause 9.3).

9. Under clause 1.2 either party may terminate the Delivery Driver Contract upon notice to the other party at the conclusion of any delivery.
10. The legal relationship between the delivery driver and RBL is described as that of “principal and independent contractor and not that of employer and employee” (clause 2.1).

#### *Delivery Driver Payments*

11. Clause 7 of the guideline on “Delivery Driver Payments” states that the delivery drivers will be reimbursed at the current delivery payment rate per delivery, at a maximum of two deliveries per round trip.
12. In the case of a mistake and redelivery is required, the delivery driver will receive another delivery payment if the mistake was through no fault of their own.
13. The following are examples of delivery driver payments/reimbursements that are available.

The delivery drivers receive payments/ reimbursements for:

- redeliveries that have resulted through overdue order complaints, only if the initial order was logged out from the restaurant (i.e. order has left the restaurant) after 20 minute timeframe has lapsed;
- redelivery due to wrongly supplied delivery details (e.g. wrong address/ phone number supplied by RBL to the delivery driver);
- delivery of hoax orders or orders cancelled after the product has left the restaurant (the product must be returned to the restaurant);
- redelivery due to miscellaneous circumstances outside the delivery driver’s control;
- cost of phone calls made to customers or back to the restaurant from a payphone.

14. The delivery drivers do not receive payments/ reimbursements for:
  - three or more home deliveries per delivery round, RBL policy is a maximum of two,
  - complaints indicating driver’s mishandling of the order (e.g. pizza has been dropped by the delivery driver),
  - redelivery due to the delivery driver not finding the address where the original delivery details are correct (where possible delivery drivers are required to call from a pay phone to clarify the delivery details),
  - cost of cell phone calls to the customer or back to the restaurant,

- redelivery due to missing items off the order (e.g. missing garlic bread). [It is the delivery driver's responsibility to check that they have the entire order before leaving the restaurant],
- transporting stock between stores, stock transfers are the shift manager's responsibility, and not the delivery driver's responsibility.

15. Delivery drivers are not guaranteed any minimum per hour delivery payment.

#### *Uniform Requirements*

16. Schedule C to the Delivery Driver Contract sets out the uniform requirements for delivery drivers to adhere to health regulations and Pizza Huts professional standards. Key points of the requirements are listed below:

- Pizza Hut hat – to be kept clean and worn with visor at front;
- Pizza Hut Shirt – to be clean, free from wrinkles, tucked in and with a minimum of 1 button done up;
- Name tag – to be visible to customers at all times;
- Pizza Hut black trousers – to be clean and properly fitted;
- A wedding band and a watch is the only allowable jewellery; and
- A clean undershirt may be worn under the uniform. To be black or navy and contain no visible print.

17. Schedule C also states that drivers must practice good daily hygiene.

18. There is also a comment "REMEMBER TO DELIVERY CUSTOMERS YOU ARE PIZZA HUT!"

#### *Notice of Taxation Requirements*

19. The "Contract Delivery Drivers Notice of Taxation Requirements" is a guide contained in the Delivery Driver Handbook which states that:

- The delivery driver is not an employee of RBL;
- The delivery driver should seek independent taxation advice to understand their rights and obligations;
- PAYE will not be deducted from payments for deliveries;
- The gross values of all payments received by the delivery driver for deliveries must be included in the delivery driver's annual income tax return;

- The delivery driver must calculate and pay their earner premium at the end of the year when they file their tax return;
- The delivery driver may be liable to pay provisional tax; and
- The delivery driver must register for GST if the delivery driver has income of \$40,000 or more (please note, the Delivery Driver handbook has not been updated to reflect the current GST threshold of \$60,000, however, it has been verbally communicated to the Delivery Drivers).

*Making a delivery*

20. The guidelines on “Making a Delivery” have suggestions for the manner in which deliveries are to be made, handling customer complaints, and what to do in the event of emergencies.

*CHAMPS – guidelines on dealing with a customer*

21. The CHAMPS guidelines on dealing with a customer includes a problem solving method and actions to take when certain scenarios arise (e.g., if the order has missing items).

*Certification S5 – Serving Delivery Customers*

22. The Delivery Drivers are required to complete and pass this certification to demonstrate their skills and knowledge in the following areas:
- Drivers role in CHAMPS;
  - Service standards;
  - Driver Safety and Security.

Any questions that are incorrect are re-done by the drivers and re-marked by the trainers until the correct answer is recorded and understood by the incumbent delivery driver.

*Standard Practice Information*

23. The delivery drivers are not:
- entitled to overtime or sick pay;
  - required to belong to any union;
  - able to supervise employees of RBL;
  - able to access RBL’s administration or support services, however they do have access to staff toilets and product discounts;

- advertising for work nor do they have their own client base, however there is no restriction for them doing this.
24. Also, the delivery drivers:
- are able to decide the hours they work (provided work is expected to be available). It is standard practice that the delivery drivers make themselves available for rostered hours;
  - provide their own vehicles and associated equipment;
  - are free to work for another principal;
  - must hold an appropriate drivers' license.
25. RBL trains the delivery drivers as to the manner in which deliveries are made. The delivery drivers are instructed as to what geographical area they will work in.
26. RBL employees take orders over the phone and decide the delivery sequence of the orders. A maximum of two orders can be delivered at any one time (to ensure quality control of the product).
27. From time to time RBL may pay at its discretion the delivery drivers a minimum of two deliveries per hour during certain hours, in order to ensure minimum coverage for RBL during quiet periods.
28. Although the delivery driver may find his or her own replacement driver, in practice this does not happen and generally another delivery driver is used by RBL.

***Relationship between RBL's employees (employed under a different contract) and delivery drivers***

29. In certain cases, employees of RBL may from time to time, be required to perform delivery services. The employees are paid a (taxable allowance) per delivery. Where this is the case, the employees also do other tasks (i.e. making the pizzas, cleaning etc). In contrast, delivery drivers are contracted purely to deliver pizzas and are not asked to perform other tasks.
30. No other collateral contracts, agreements, terms or conditions, written or otherwise, have a bearing on the conclusions reached in this Ruling.



## **Conditions stipulated by the Commissioner**

This Ruling is made subject to the following conditions:

- (a) The terms of the relevant documents entered into by RBL and the delivery driver is exactly the same as those provided to the Inland Revenue in the Ruling application dated 8 December 2009 and by email dated 22 January 2010, except in relation to the following clauses of the Delivery Driver Contract where the basic uniform and hygiene requirements, number of days or dollar amounts (as appropriate) may vary from time to time:
- Clause 6, which states that RBL agrees to pay the delivery drivers within 14 days of submission of an invoice.
  - Clause 7, which states the rate per delivery as a gross amount of \$5.
  - Clause 9.1, which states that a \$30 deposit will be retained out of the delivery driver's first payment, to be returned to the delivery driver on the return of the uniform in good condition.
  - Clause 9.2, which provides that a float of \$20 be carried by the delivery driver;
  - Schedule C, which specifies the current uniform and hygiene requirements.
- (b) RBL will provide the delivery drivers with the notice of taxation requirements at the commencement of the contract and advise the delivery drivers that as independent contractors they are required to comply with their own income tax, GST and ACC obligations.
- (c) The actual relationship between RBL and the delivery driver is, and will continue to be during the period this Ruling applies, in accordance with the terms of the relevant documents in all material respects.

## **How the Taxation Laws applies to the Arrangement**

Subject in all respects to any assumption or condition stated above, the Taxation Laws applies to the Arrangement as follows:

- For the purposes of sections BD 2, DA 1 and DA 2(4) of the Act, payments made by RBL to the delivery driver are not "income from employment" as defined in section YA 1 of the Act, so the driver is not prevented from claiming deductions under these sections by reason only that the driver earns "income from employment"; and

- For the purposes of the GST Act, the provision of services by the driver to RBL will not be excluded from the definition of “taxable activity” in section 6 of the GST Act by section 6(3)(b) of that Act as they are not made under “contracts of service”.

**The period or income year for which this Ruling applies**

This Ruling will apply for the period beginning on 26 October 2009 and ending on 26 October 2013.

This Ruling is signed by me on the 19th day of March 2010.

Ross Baxter

Investigations Manager, Assurance