PROVISION OF BENEFITS BY THIRD PARTIES—FRINGE BENEFIT TAX CONSEQUENCES—SECTION CX 2(2)

PUBLIC RULING—BR Pub 09/07

Note (not part of ruling): This Public Ruling is a reissue of Public Ruling BR Pub 04/05, "The provision of benefits by third parties: Fringe benefit tax (FBT) consequences – Section CI 2(1)", *Tax Information Bulletin* Vol 16, No 5 (June 2004). BR Pub 04/05 applied from 20 May 2004 until 19 May 2007. The Commissioner's view, as expressed in this Ruling, is not intended to differ from that in BR Pub 04/05. Differences between this Ruling and BR Pub 04/05 reflect the subsequent enactment of the Income Tax Act 2007 or editorial amendments made only to assist readers' understanding, and updates case law.

This is a public ruling made under section 91D of the Tax Administration Act 1994.

Taxation Laws

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

This Ruling applies in respect of section CX 2(2) and the definition of "arrangement" in section YA 1.

The Arrangement to which this Ruling applies

The Arrangement is the receipt of a benefit by an employee from a third party where there is an arrangement between the employer and the third party and where the benefit would amount to a "fringe benefit" if it had been provided by the employer.

The Arrangement does not include situations where the remuneration given by an employer to an employee is reduced because a benefit has been received from the third party, or otherwise takes the receipt of a benefit provided by a third party into account (including salary sacrifice situations). There cannot be any trade-off between the benefits provided and the remuneration that would otherwise have been received by the employee, or any difference between the remuneration levels of employees who receive benefits and those who do not.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

(a) For the purposes of section CX 2(2), there will be an arrangement for the provision of a benefit to employees where:

  (i) consideration passes from the employer to the third party in respect of the benefit being provided; or

  (ii) the employer requests (other than merely initiating contact), instructs, or directs, the third party to provide a benefit; or

  (iii) there is negotiation or discussion between the employer and the third party that (explicitly or implicitly) involves the threat or suggestion that the

employer would withhold business or other benefits from the third party unless a benefit is provided to the employees; or

(iv) the third party and the employer are associated parties, and there is a group policy (whether formal or informal), or any other agreement between the associated parties, that employees of the group will be entitled to receive benefits from the other companies in the group.

(b) Where it has been determined that the benefit has not been provided in circumstances within any of the categories identified above, section CX 2(2) will not apply where the benefit it provided in any of the following circumstances:

(i) there is negotiation or discussion between the employer and the third party that results in no more than:

(A) the employer granting the third party access to the premises or work environment to discuss the benefit with employees; and/or

(B) agreement between the parties as to the level of benefit that is to be offered by the third party to employees; and/or

(C) the employer agreeing to advertise or make known the availability of the benefit; or

(ii) the employer has done no more than initiate contact or discussions with the third party; or

(iii) there is no significant contact between the employer and the third party.

The period for which this Ruling applies

This Ruling will apply for a period beginning on the first day of the 2008/09 income year and ending on the last day of the 2013/14 income year.

This Ruling is signed by me on the 31st day of July 2009.

Susan Price
Director, Public Rulings

COMMENTARY ON PUBLIC RULING BR Pub 09/07

Introduction

1. This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 09/07 ("the Ruling").

2. The Ruling is a reissue of Public Ruling BR Pub 04/05, "The provision of benefits by third parties: Fringe benefit tax (FBT) consequences – section CI 2(1)", *Tax Information Bulletin* vol 16, no 5 (June 2004), which applied from 20 May 2004 to 19 May 2007.

3. BR Pub 04/05 concerned the application of section CI 2(1) of the Income Tax Act 1994 to the Arrangement. The Income Tax Act 1994 has since been repealed. The relevant provision is now section CX 2(2) of the Income Tax Act 2007.

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

Background

5. This Ruling arises from several private ruling applications that the Rulings Unit has considered. It considers the scope of section CX 2(2) and what will be an "arrangement" that falls within the scope of this provision.

Legislation

6. Section CX 2(2) provides:

> A benefit that is provided to an employee through an arrangement made between their employer and another person for the benefit to be provided is treated as having been provided by the employer.

7. "Arrangement" is defined in section YA 1 to mean, unless the context otherwise requires:

> an agreement, contract, plan, or understanding, whether enforceable or unenforceable, including all steps and transactions by which it is carried into effect

Application of the Legislation

8. Under the Act, an employer may be liable to pay fringe benefit tax (FBT) on fringe benefits that it provides to an employee. As a rule, an employer will not be liable to pay FBT on a benefit provided to an employee by a third party. However, under section CX 2(2) an employer may be liable to pay FBT on a benefit provided to an employee by a third party if that benefit is provided through an "arrangement" made between the employer and the third party. If section CX 2(2) applies, the benefit provided by the third party is treated as if it were provided by the employer to the employee directly. This enables the other provisions of subpart CX to be applied to determine whether FBT is payable on the benefit.

9. Understood in this way, section CX 2(2) is an anti-avoidance provision. Its purpose is to prevent employers avoiding liability for FBT by arranging for a third party to

provide a benefit to an employee in circumstances where FBT would have been payable had that benefit been provided by the employer directly.

10. It is important to note that liability for FBT does not necessarily arise if section CX 2(2) applies. For liability for FBT to arise, the benefit provided through the arrangement must amount to a "fringe benefit" within the meaning of section CX 2(1). It is possible that an arrangement may satisfy the requirements of section CX 2(2), but no FBT will be payable, as a result of the other provisions of subpart CX or because of the operation of the valuation rules in subpart RD. For instance, the benefit provided to the employee will not be a "fringe benefit" if section CX 23 or section CX 33 applies. Section CX 23 exempts from FBT certain benefits provided on the premises of the employer or of a company that is part of the same group of companies as the employer. Section CX 33 provides that in certain circumstances a discount on goods provided by a third party will not amount to a "fringe benefit".

11. This Ruling considers only what will be an "arrangement" that comes within the scope of section CX 2(2). It does not consider whether FBT will be payable on a benefit that is provided through an arrangement to which section CX 2(2) applies.

12. It is clear that section CX 2(2) applies where any form of consideration passes from the employer to the third party to compensate for, or is otherwise in relation to, the benefit provided by the third party to the employee. The wording of section CX 2(2) is broad and seems to apply in a variety of cases wider than this obvious one. The issue is: where there is no direct or indirect consideration (in any form) provided by the employer to the third party, in what circumstances will the provision apply?

Conclusion on the scope of section CX 2(2)

13. The conclusions reached in this commentary on the requirements of section CX 2(2) are summarised in the following paragraphs.

14. For section CX 2(2) to apply, a "benefit" must be "provided" to an employee through an "arrangement" made between the employee's employer and another person "for" the benefit to be "provided" to the employee.

15. The term "arrangement" is defined in section YA 1. Under this definition, the term "arrangement" encompasses various degrees of formality and enforceability. An "arrangement" may be a legally enforceable contract, a less formal agreement or plan that may or may not be legally enforceable, or an informal, unenforceable understanding. An implication of this is that an "arrangement" may exist even if no consideration is given by the employer to the third party so as to create a legally binding contract.

16. In the context of section CX 2(2), the term "arrangement" will include situations where the employer arranges with the third party to provide a benefit, where the employer agrees to allow the third party to approach the employees, or where the employer agrees to allow an employee to join a scheme promoted by the third party.

17. Section CX 2(2) provides that the arrangement made between the employer and another party be "for the benefit to be provided". These words mean that the

arrangement must be "made for the purpose" of providing a benefit to an employee or "with the object" of providing such a benefit. This requires consideration of the purpose or object of the employer and third party in making the arrangement.

18. Where the employer and the third party have a different purpose or object in making the arrangement, section CX 2(2) will apply only if the employer's purpose or object for making the arrangement was to provide a benefit to an employee.

19. In determining the employer's purpose or object, the relevant consideration is the subjective purpose of the employer in making the "arrangement". In order for section CX 2(2) to apply, the employer must have, at least, the more than incidental purpose or object of providing a benefit to an employee in making the arrangement.

20. That it can be argued that the benefit has been provided to the employee through an employee-third party arrangement does not mean that the same benefit cannot be regarded as having also been provided through an employer-third party arrangement that satisfies the requirements of section CX 2(2).

21. For there to be a "benefit" for the purposes of section CX 2(2), the thing provided to an employee must be a "fringe benefit" (as defined in section CX 2(1)) and the employee must take advantage of or use that thing.

22. For section CX 2(2) to apply, the benefit must have been "provided" to an employee by a third party. The word "provided" requires that the benefit must have been supplied, furnished or made available to the employee.

23. The Commissioner does not consider that all situations involving associated persons will necessarily fall within section CX 2(2). It is only in those situations where there is a group policy, or any other agreement between the associated parties, regarding the provision of benefits that the Commissioner considers that the section will apply.

24. It is concluded that these requirements will be fulfilled and section CX 2(2) will apply where:

- consideration passes from the employer to the third party in respect of the benefit being provided;
- the employer requests (other than merely initiating contact), instructs or directs the third party to provide a benefit;
- there is negotiation or discussion between the employer and the third party that (explicitly or implicitly) involves the threat or suggestion that the employer would withhold business or other benefits from the third party unless a benefit is provided to the employees; or
- the third party and the employer are associated parties, and there is a group policy (whether formal or informal), or any other agreement between the associated parties, that employees of the group will be entitled to receive benefits from the other companies in the group.

25. Where it has been determined that the benefit has not been provided in circumstances within any of the categories identified above, section CX 2(2) will not apply where the benefit is provided in any of the following circumstances:

- there is negotiation or discussion between the employer and the third party that results in no more than:
  - (i) the employer granting the third party access to the premises or work environment to discuss the benefit with employees; and/or
  - (ii) agreement between the parties as to the level of benefit that is to be offered by the third party to employees; and/or
  - (iii) the employer agreeing to advertise or make known the availability of the benefit; or
- the employer has done no more that initiate contact or discussions with the third party; or
- there is no significant contact or arrangement between the employer and the third party.

26. Under the heading "How the Taxation Laws apply to the Arrangement", the Ruling identifies, in paragraph (a), categories where the requirements of section CX 2(2) will be satisfied. In addition, the Ruling identifies, in paragraph (b), categories where the requirements of section CX 2(2) will not be satisfied. Some categories in paragraphs (a) and (b) may overlap. Accordingly, it is possible that a benefit may be provided in circumstances that come within a category in both paragraphs (a) and (b). In such cases, the requirements of section CX 2(2) are considered to have been satisfied. For this reason, the Ruling qualifies the categories in paragraph (b) with the words "[w]here it has been determined that the benefit has not been provided in circumstances within any of the categories identified above". For example, if a benefit is provided in circumstances that come within the "requests …, instructs or directs" category in paragraph (a), section CX 2(2) applies even if it can be argued that those circumstances also come within the "agreement … as to the level of benefit that is to be offered" subcategory in paragraph (b).

27. A consequence of this Ruling may be that the employer is required to put into place systems to enable them to obtain the relevant information required to fulfil their FBT obligations. In the Commissioner's opinion, where the employer is involved in the types of arrangement contemplated by the first four of the bullet points set out in paragraph 24, the employer will generally be in a sufficient relationship with the third party to obtain the information they require to fulfil their obligations. The onus is on employers who are involved in arrangements for the provision of benefits in any of these ways to ensure that they can do so (for example, by requiring this of the third party).

What is meant by the term "arrangement"?

28. The definition of "arrangement" in section YA 1 makes it clear that the term "arrangement" is very wide in its application, and that it encompasses not only legally binding contracts, but also unenforceable understandings. It is clear that what is required for an arrangement to exist is less than that required for a binding contract.

29. The Concise Oxford English Dictionary (11th ed, revised, 2006) defines the individual words contained in the section YA 1 definition as follows:

- "Agreement" – a negotiated and typically legally binding arrangement.

- "Contract" – a written or spoken agreement intended to be enforceable by law.
- "Plan" – a detailed proposal for doing or achieving something.
- "Understanding" – an informal or unspoken agreement or arrangement.

30. The above definitions show that the words used to describe an "arrangement" in section YA 1 all appear to be slightly different concepts. They indicate that the term "arrangement" is defined to encompass varying degrees of formality and enforceability. The term "arrangement" may be a legally enforceable contract, a less formal agreement or plan that may or may not be legally enforceable, or an informal, unenforceable understanding.

31. That an "arrangement" does not need to be legally enforceable is confirmed by the section YA 1 definition providing that "arrangement" means "an agreement, contract, plan or understanding, **whether enforceable or unenforceable**" (emphasis added). An implication of this is that an "arrangement" may exist even if there is no consideration given by the employer to the third party so as to create a legally binding contract.

32. The courts have not considered the definition of "arrangement" in the context of section CX 2(2), but have considered the same definition in the context of the general anti-avoidance rule in section BG 1.

33. The predecessor to the definition of "arrangement" in section YA 1 is section 99(1) of the Income Tax Act 1976. This defined the term "arrangement" for the purposes of the general anti-avoidance provision (as then enacted) as:

> any contract, agreement, plan, or understanding (whether enforceable or unenforceable) including all steps and transactions by which it is carried into effect:

34. This definition was discussed by Richardson P in *CIR v BNZ Investments Ltd* (2001) 20 NZTC 17,103 (CA). His Honour stated (at page 17,116):

> The words contract, agreement, plan and understanding appear to be in descending order of formality. A contract is more formal than an agreement, and in ordinary usage is usually written while an agreement is generally more formal than a plan, and a plan more formal or more structured that an understanding. And it is accepted in the definition of arrangement that the contract, agreement, plan or understanding need not be enforceable. Section 99 thus contemplates arrangements which are binding only in honour.

35. The courts have considered the meaning of "arrangement" in several other cases. They have generally held that the term "arrangement" applies in a wide variety of situations.

36. The High Court of Australia in *Bell v Federal Commissioner of Taxation* (1953) 87 CLR 548 considered the meaning of "arrangement" and stated (at page 573):

> it may be said that the word "arrangement" is the third in a series which as regards comprehensiveness is an ascending series, and that the word extends beyond contracts and agreements so as to embrace all kinds of concerted action by which persons may arrange their affairs for a particular purpose or so as to produce a particular effect.

37. The Privy Council in *Newton v Commissioner of Taxation of the Commonwealth of Australia* [1958] 2 All ER 759 held (at page 763):

> Their Lordships are of opinion that the word "arrangement" is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons – a plan arranged between them which may not be enforceable at law. But it must in this section comprehend, not only the initial plan but also all the transactions by which it is carried into effect – all the transactions, that is, which have the effect of avoiding taxation, be they conveyances, transfers or anything else.

38. In the context of section BG 1, the courts have considered whether the term "arrangement" requires consensus or meeting of minds. This issue was considered by the Court of Appeal in *BNZ Investments*. In that decision, the majority of the court held that consensus or meeting of minds was required. Thomas J dissented in holding that there was no such requirement. His Honour held that the term "arrangement" does not require that one party knew of, or agreed to, all the steps and transactions undertaken by the other party in order to discharge its obligations under the "agreement, contract, plan or understanding". Thomas J's approach was endorsed by the majority of the Privy Council in *Peterson v CIR* (2005) 22 NZTC 19,098 (at paragraph 34).

39. However, it is noted that other elements of section CX 2(2) require that the employer must be aware that a benefit would be provided to an employee by the third party. In section CX 2(2), the term "arrangement" is qualified by the words "made between their employer and another person for the benefit to be provided". As will be discussed, these words mean that section CX 2(2) applies only if the employer's purpose or object in making the arrangement is for a benefit to be provided to an employee: see paragraphs 73–79. For this requisite purpose or object to exist, the employer must have authorised the third party to provide a benefit to an employee.

40. The section BG 1 case law is consistent with the case law on the meaning of "arrangement" as used in commerce-related legislation (for example, the Commerce Act 1986). This case law makes clear the following:

    - An "arrangement" exists where each party intentionally creates in the other party an expectation that the first party will act in a certain way. In so doing, the parties agree to mutual rights and obligations in respect of the course of action to be undertaken.
    - An "arrangement" is unlikely to exist when only one party makes a commitment to the proposed course of action.

    (See *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257; *Re British Basic Slag Ltd's Agreements* [1963] 2 All ER 807; *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53.)

41. In summary, the definition of "arrangement" in section YA 1 encompasses various degrees of formality and enforceability. An "arrangement" may be a legally enforceable contract, a less formal agreement or plan that may or may not be legally enforceable, or an informal, unenforceable understanding. An implication of this is that an "arrangement" may exist even if no consideration is given by the employer to the third party so as to create a legally binding contract.

42. In the context of section CX 2(2), the term "arrangement" will include situations where the employer arranges with the third party to provide a benefit, where the employer agrees to allow the third party to approach the employees, or where the

employer agrees to allow an employee to join a scheme promoted by the third party.

43. In terms of the application to section CX 2(2), for there to be an "arrangement" that is caught under the section, it must be an arrangement "for" a benefit to be "provided" to an employee. This means that not every "arrangement" that exists between an employer and a third party will be caught by section CX 2(2). Similarly, not every instance where a benefit is provided to an employee by a person who is not their employer will be caught by the section.

What is the meaning of "for" as used in section CX 2(2)?

44. Section CX 2(2) provides that the "arrangement" made between the employer and another party be "for the benefit to be provided".

45. The word "for" can have a wide variety of meanings depending on its context. The Court of Appeal in *Wilson & Horton v CIR* (1995) 17 NZTC 12,325 stated (at page 12,330):

> Reference to any standard dictionary brings home the wide variety of senses in which the preposition "for" may be employed. The Oxford English Dictionary (2nd ed) identifies 11 separate categories of meaning and many distinct usages within particular categories. The discussion in the text extends over 9 columns in the dictionary. Again the Tasman Dictionary which as its name suggests is directed to Australian English and New Zealand English, lists 33 meanings of the word. **The particular meaning intended necessarily hinges on the context in which the word is used and how it is used in that context**. [Emphasis added.]

46. The use of the word "for" was interpreted in *Patrick Harrison & Co v AG for Manitoba* [1967] SCR 274 as imposing a purpose test. In this case, the court held that "for the extraction of minerals" meant "with the object or purpose of extracting minerals".

47. In *G v CIR* [1961] NZLR 994, McCarthy J held that the word "for" points to intention, which is similar to looking at a person's purpose. McCarthy J stated (at page 999):

> "For" points to intention … the essential test as to whether a business exists is the intention of the taxpayer as evidenced by his conduct, and that the various tests discussed in the decided cases are merely tests to ascertain the existence of that intention. I think that it conforms with this approach to construe the word "for", when considering a phrase such as "carried on for pecuniary profit" used in relation to an occupation, as importing intention.

48. These cases show that in several statutory contexts the courts have interpreted the word "for" to mean "for the purpose" or "with the object of" something. It is noted that in this context, a person's purpose is similar to their intention. However, to determine the word's meaning in the current section, it is necessary to look at the section's wording.

49. As already noted, section CX 2(2) requires that the benefit provided to the employee was through an arrangement made between the employer and another person "**for** the benefit to be provided" (emphasis added). The use of the term "for" in this context can mean that the arrangement entered into is concerned only

with the provision of these benefits. That is to say, the "arrangement" must have been made "for" the provision of a benefit to an employee.

50. In the Commissioner's opinion, based on the case law and dictionary definitions, for an "arrangement" to satisfy section CX 2(2) it must be "made for the purpose" of providing a benefit to an employee or "with the object" of providing such a benefit.

Is section CX 2(2) concerned with the purpose of the arrangement or the purpose of the parties in making the arrangement?

51. Given that the words "for the benefit to be provided" mean for the purpose or object of providing the benefit, the issue arises as to who or what must have this purpose or object. This requires interpreting the words "an arrangement made between the employer and another person for the benefit to be provided". There are two possible interpretations of these words.

52. First, the words "for the benefit to be provided" could be read as relating to the word "made". Under this interpretation, section CX 2(2) applies if the purpose or object of the parties in making the arrangement was for a benefit to be provided to an employee of the employer.

53. Second, the words "for the benefit to be provided" could be read as relating to the word "arrangement". Under this interpretation, section CX 2(2) applies if the arrangement has the purpose or object of providing a benefit to an employee of the employer. This would require an objective inquiry into the arrangement itself, and would not consider the purpose or object of the parties to the arrangement.

54. Under this second interpretation, section CX 2(2) could have a wider scope of application than under the first interpretation. It could be possible that, objectively, an arrangement has the purpose or object of providing an employee of the employer with a benefit in circumstances where, subjectively, the parties did not make the arrangement for the purpose or object of providing a benefit to an employee.

55. The other words in section CX 2(2) do not appear to suggest that one interpretation is preferable to the other. It is consequently considered that the meaning of the words "an agreement made between their employer and another person for the benefit to be provided" is ambiguous. Therefore, it is necessary to consider whether the scheme of the FBT regime, and of the Act as a whole, favours one interpretation over the other.

56. Interpreting section CX 2(2) as requiring consideration of the purpose or object of the parties could be seen as consistent with the FBT regime. The FBT regime applies where there is a "fringe benefit", which is defined in section CX 2(1)(a) as being a benefit that "is provided by an employer to an employee in connection with their employment". This indicates that the focus of the FBT regime is on benefits that the employer has chosen to give its employees. Understood in this way, the purpose of section CX 2(2) appears to be to prevent employers from deliberately avoiding liability for FBT by arranging for the third party to provide the benefit instead.

57. An argument favouring interpreting section CX 2(2) as requiring consideration of the purpose or object of the arrangement is that this interpretation is consistent

with section BG 1. Under section BG 1, it is only the objective purpose or effect of the "arrangement", and not the intention of the parties to the arrangement, that is relevant to whether there is a "tax avoidance arrangement": *Newton v FC of T* (1958) 11 ATD 442; *Glenharrow Holdings Ltd v CIR* [2008] NZSC 116*; Ben Nevis Forestry Ventures v CIR, Accent Management v CIR* [2008] NZSC 115. Arguably, it is appropriate that section CX 2(2) is interpreted consistently with section BG 1, given they both have an anti-avoidance purpose and share the same definition of "arrangement".

58. However, it might be argued that interpreting section CX 2(2) as requiring consideration of the purpose or object of the parties is not inconsistent with section BG 1. Unlike section CX 2(2), the wording in section BG 1 is unambiguous in requiring consideration of the purpose or effect of the arrangement. Section YA 1 provides that "tax avoidance arrangement":

> Means an arrangement, whether entered into by the person affected by the arrangement or by another person, that directly or indirectly—
>
> (a) has tax avoidance as its purpose or effect; or
>
> (b) has tax avoidance as 1 of its purposes or effects, whether or not any other purpose or effect is referable to ordinary business or family dealings, if the tax avoidance purpose or effect is not merely incidental.

59. Moreover, interpreting section CX 2(2) as requiring consideration of the purpose or object of the arrangement arguably creates the potential for overlap with section GB 31. Section GB 31 provides an anti-avoidance rule that applies when "a purpose or effect of the arrangement [entered into by two or more persons] is to defeat the intent and application of any of the FBT rules". Section CX 2(5)(a) provides that a benefit may be treated as having been provided by an employer to an employee under section GB 31.

60. Section GB 31(1) makes clear that it is concerned with the purpose or effect of the arrangement and not with the purpose or object of the parties to the arrangement. This arguably suggests that if section CX 2(2) were interpreted as requiring consideration of the purpose or object of the arrangement, then section CX 2(2) might cover only situations that would fall within section GB 31. By contrast, interpreting section CX 2(2) as requiring consideration of the purpose or object of the parties might reduce the potential for overlap, because sections CX 2(2) and GB 31 would have different focuses and apply in different circumstances. If the drafters had intended the purpose or object of the arrangement to be relevant under section CX 2(2), it would be reasonable to expect that the drafters would have adopted language similar to that used in sections BG 1 and GB 31.

61. This suggests that the scheme of the FBT regime favours interpreting section CX 2(2) as requiring consideration of the purpose or object of the parties. The legislative history to section CX 2(2) will now be examined to assess whether this conclusion is correct.

62. The background to section CX 2(2) and its predecessors in the Income Tax Acts 1994 and 2004 does not provide useful guidance on this issue. However, the background to section 336N(2) of the Income Tax Act 1976, which is the earliest predecessor to section CX 2(2), does assist in understanding Parliament's purpose in enacting that provision and the FBT regime generally. Section 336N(2) provided:

> For the purposes of this Part of this Act, where a benefit is provided for or granted to an employee by a person with whom the employer of the employee has entered into an arrangement for that benefit to be so provided or granted, that benefit shall be deemed to be a benefit provided for or granted to the employee by the employer of the employee.

Section 336N of the Income Tax Act 1976 was enacted by the Income Tax Amendment Act (No 2) 1985, which also enacted the FBT regime.

63. The FBT regime was enacted in light of the recommendations in *Report of the Task Force on Tax Reform* (Wellington, Government Printer, 1982). The task force was chaired by P M McCaw. Before the enactment of the FBT regime, fringe benefits were generally not taxed. The task force noted that generally fringe benefits did not amount to assessable income under the tax legislation at that time. It considered that the non-taxable status of fringe benefits was unsatisfactory, because it increased the inequity in the tax system and narrowed the tax base (at paragraph 6.185). The task force did not discuss the situation where an employer arranges for a third party to provide an employee with a benefit.

64. Also relevant is the speech of the then Minister of Finance, the Hon R O Douglas, in the third reading debate of the Income Tax Amendment Bill (No 2). The Minister stated that the purpose of the fringe benefit tax was to "close … off loopholes that are a major source of unfairness in income distribution", and that (NZPD vol 462 1985, at page 3,920):

> In the Government's view it is fair to tax the employers, the basic reason being that it is the employers which have been using fringe benefit payments to lower the cost structures of their business. I gave the example in the Committee of an employer who might want to put together a package of $100,000. He could pay $40,000 in terms of salary, then put together a fringe benefit package of about $20,000 in various forms, which was the equivalent of tax paid income of $60,000. In other words, for $60,000 in terms of cost structure to the business the employer was able to put together a salary package equivalent of $100,000. In those circumstances the Government believes it is fair and equitable to tax the employer.

65. The Minister of Finance's speech indicates that the mischief Parliament sought to remedy by enacting the FBT regime was the ability of employers to decrease the costs of employment by substituting assessable income with non-assessable fringe benefits. While the Minister did not specifically discuss the clause of the Bill that became section 336N(2) of the Income Tax Act 1976, his comments suggest that section 336N(2) was intended to cover the specific situation of an employer that knowingly seeks to avoid liability for FBT by arranging for a benefit to be provided to an employee by a third party.

66. In summary, the words "an arrangement made between their employer and another person for the benefit to be provided" are ambiguous. These words can be interpreted as requiring consideration of the purpose or object of **the arrangement** or the purpose or object of **the parties** in making that arrangement. It is considered that the scheme of the FBT regime and the legislative history suggest that the better view is that section CX 2(2) requires determining the purpose or object of the parties in making the arrangement.

Whose "purpose" is relevant under section CX 2(2)?

67. The discussion so far has proceeded on the basis that the parties' (that is, the employer's and the third party's) purpose or object in making the arrangement is

relevant. Where both the employer and the third party share the same purpose, then determining whether section CX 2(2) applies will be straightforward. However, in some situations it might be possible to argue that the employer and third party each have a different purpose for making the arrangement. For example, where the third party agrees to provide the benefit because the employer has stated that it will withhold business from the third party unless it does so, it might be argued that the third party has not made the arrangement for the purpose or object of providing a benefit to an employee. Instead it might be argued that the third party made the arrangement for the purpose or object of preserving its business with the employer. In such situations, the issue arises as to whose purpose should be considered determinative when deciding whether section CX 2(2) applies.

68. It is considered that the scheme of the FBT regime supports the employer's purpose being determinative in both these situations.

69. Liability for FBT is imposed on benefits provided by employers to their employees. The FBT regime is not, as a rule, concerned with benefits provided to employees by persons who are not their employers. An exception to this rule is in section CX 2(2). Section CX 2(2) has an anti-avoidance purpose. It seeks to prevent employers from avoiding liability for FBT by arranging for third parties to provide benefits to their employees.

70. The scheme of the FBT regime supports section CX 2(2) applying where the employer, but not the third party, makes the arrangement with the purpose of providing a benefit to an employer. In such cases, liability for FBT is avoided in circumstances where it would have arisen if the benefit had instead been provided by the employer directly. Moreover, the third party is not seeking to avoid liability for FBT, because it has no prospective liability. At most, the third party might be a knowing participant in the employer's arrangement. More likely, perhaps, the third parties would be pursuing their own commercial non-tax objectives and may be ignorant of, or indifferent to, the employer's purpose.

71. By contrast, the scheme of the FBT regime does not support section CX 2(2) applying where the third party, but not the employer, makes the arrangement with the purpose of providing a benefit to an employee. If section CX 2(2) were to apply in such cases because of the third party's purpose, then FBT would be imposed despite the employer not having the purpose of providing a benefit to its employee. The imposition of FBT in these circumstances seems unfair and illogical.

72. In summary, it is considered that section CX 2(2) applies where the purpose of the employer for making the arrangement is for a benefit to be provided to an employee of the employer.

Should the test to determine the employer's purpose in making the arrangement with the third party be objective or subjective?

73. The above conclusions combine to show that for an "arrangement" to be caught under section CX 2(2), the purpose of the employer must have been to provide the employee with a benefit. This part of the commentary considers whether the test to determine whether the employer's purpose in making the arrangement is for the purpose of providing a benefit should be a subjective or an objective one.

74. A subjective approach requires consideration of the intention of the parties in entering into the arrangement. In the current context, a subjective test would look at what the particular employer had in mind when the arrangement with the third party was entered into. An objective approach, however, might consider what a reasonable person in the position of the employer ought to have had in mind.

75. Additionally, case law, particularly in the area of GST, indicates that the correct test for determining purpose is a mixed test, considering both subjective and objective factors in reaching a conclusion as to the taxpayer's purpose. In several cases the courts have held that the test for purpose is dependent on the statutory context in which it is found (see, for example, *CIR v Haenga* (1985) 7 NZTC 5,198).

76. It is, therefore, necessary to look closely at the wording of the section. Section CX 2(2) does not contain the word "purpose". It requires that the "arrangement" be "made between" the employer and the third party "for the benefit to be provided".

77. In the Commissioner's view, section CX 2(2) requires consideration of the reason that the employer "made" the "arrangement" with the third party. This means the test to determine the employer's purpose in making the arrangement should be subjective, looking at the particular reasons the employer had in mind. However, objective factors may be taken into account to aid in this interpretation.

78. This approach could be seen as being supported by McCarthy J in *G v CIR* where he held that the word "for" points to intention, clearly indicating a subjective approach. McCarthy J stated (at page 999):

> "For" points to intention. …the essential test as to whether a business exists is the intention of the taxpayer as evidenced by his conduct, and that the various tests discussed in the decided cases are merely tests to ascertain the existence of that intention. I think that it conforms with this approach to construe the word "for", when considering a phrase such as "carried on for pecuniary profit" used in relation to an occupation, as importing intention.

79. Therefore, the test to determine the employer's purpose is a subjective one that looks at the intention of the employer, but objective factors should be considered to ensure the employer's stated purpose is honestly held. That is, for section CX 2(2) to apply, the reason the employer made the arrangement must have been to provide a benefit to its employee.

What test should be used to determine the employer's purpose?

80. This part of the commentary considers the appropriate test to be used in determining the purpose of the employer making the "arrangement" with a third party.

81. A spectrum of tests could be used to determine the purpose of the employer in making the arrangement with the third party.

82. At one end of the spectrum is a sole purpose test. This test requires that the provision of a benefit to an employee is the sole or only purpose of the employer in making the arrangement. In the Commissioner's opinion, this would be an unduly restrictive test for section CX 2(2), because it would not apply in any situation where there was another purpose, no matter how secondary or minor.

83. At the other end of the spectrum, is the test that the section will apply if any one of the purposes of the employer in making the arrangement is that the employee be provided with a benefit. In the Commissioner's opinion, this is also not an appropriate test in the context of section CX 2(2), because the section would catch all benefits that were provided to employees if the employer had some form of arrangement with the third party and the fact the employees were receiving a benefit had crossed the employer's mind when they entered into the arrangement with the third party. If the provision of the benefit is not a part of the arrangement between the parties, but is truly incidental to the purpose of the employer, then the section should not apply.

84. Between these two extremes are the dominant purpose test and the more than incidental purpose test.

85. A dominant purpose test would require that the main reason why the employer made the arrangement with the third party is for the benefit to be provided to the employee. This test would allow the employer to have other purposes in making the arrangement, but that, in order for the section to apply, the main purpose of the employer in making the "arrangement" needs to be the provision of a benefit. This test would also mean that if the employer had more than one purpose in making the "arrangement" and the provision of a benefit to employees was not the most important purpose, then section CX 2(2) would not apply.

86. Several cases have determined that the word "purpose" used on its own in statutory language without any apparent qualifier means the dominant purpose of the taxpayer, for example, in relation to the third limb of section CB 4 (and predecessor provisions) and in relation to section 108 of the Land and Income Tax Act 1954 (the former section BG 1).

87. In the Commissioner's opinion, there is no reason to conclude that section CX 2(2) requires a dominant purpose test. There is no indication on the words of section CX 2(2) that a dominant purpose test is necessary. This can be contrasted with section CD 4, where the section clearly refers to "**the** purpose" (emphasis added). Therefore, it is the Commissioner's opinion that it would not be appropriate to apply a dominant purpose test in determining whether section CX 2(2) applies.

88. A more than incidental purpose test would be similar to the test in section BG 1, where, as long as the purpose of providing a benefit is more than incidental to any other purpose of the employer in making the "arrangement", the section will apply. In the context of section CX 2(2), this means that if the provision of the benefit is incidental to other purposes of the "arrangement", such as the provision of credit cards to employees or obtaining a good package deal for the employer, then the section would not apply. The use of this test could be seen as being supported by the fact section CX 2(2) is an anti-avoidance provision and that it is appropriate to have a similar test as in other avoidance contexts. Alternatively, it could be argued that a more than incidental test is not appropriate, because the language of section BG 1 explicitly provides for the test of more than merely incidental in the legislation itself, whereas section CX 2(2) does not.

89. Overall, it is the Commissioner's opinion that the more than incidental test is the appropriate test to be adopted in interpreting section CX 2(2). This approach means that if the purpose of providing a benefit to the employees is no more than

incidental to some other purpose of the employer making the arrangement, the arrangement would not be caught within the section. A more than incidental test means that the purpose of the employer must be significant in order for the benefit to be caught within the section, but does not need to be the most important (or dominant) reason or purpose of the employer in making the "arrangement".

90. In the Commissioner's opinion, if an employer has more than one purpose when they made the "arrangement" with the third party, it is appropriate to exclude incidental purposes from section CX 2(2), but there is no reason why an employer with a significant, but not dominant, purpose of providing a benefit to employees should not be caught by the section.

91. Therefore, to establish whether section CX 2(2) applies, it is necessary to look at what the arrangement between the employer and the third party is for, and whether the provision of the benefit to employees is incidental to another purpose of the employer, or whether it is a separate, significant purpose in its own right. If the provision of a benefit is no more than incidental to some other purpose of the employer in making the arrangement with the third party, then section CX 2(2) will not apply.

92. The relevant consideration is whether the purpose of the employer of providing a benefit to employees is incidental to another purpose of the employer, not whether the benefit received is incidental to the arrangement with the third party. It is the purpose of the employer that is relevant, not the purpose of the arrangement.

93. If the employer does not have a purpose of providing a benefit to employees (or the purpose is not more than incidental), section CX 2(2) will not apply to any benefit that may be provided by a third party.

Which "arrangement" must be the one "for" the benefit?

94. In some cases where a benefit is provided to an employee by a third party, it might be possible to argue that there are two arrangements "for" that benefit to be provided: one arrangement between the employer and the third party and another between the employee and the third party. In such cases, the issue may arise as to whether the presence of an arrangement between the employee and third party for the provision of a benefit means that same benefit cannot have been provided under an arrangement between the employer and third party.

95. For instance, an employer makes an arrangement with a local gym under which the gym agrees to provide free membership to the employer's employees. To obtain this free membership, employees must undertake the gym's membership process (including agreeing to its standard terms and conditions of use). In this situation it might be argued that section CX 2(2) cannot apply, because the gym membership should be considered to have been provided through an arrangement between the gym and the employee, and therefore, not through the arrangement between the employer and the third party.

96. In the Commissioner's view, there appears to be no reason to conclude that merely because there is an **employee**-third party arrangement for a benefit to be provided that it is not also possible for that same benefit to be considered to have been provided through an **employer**-third party arrangement to which section CX 2(2)

applies. Section CX 2(2) does not expressly or implicitly exclude itself from applying only because the benefit concerned can also be considered to have been provided through an employee-third party arrangement. Accordingly, section CX 2(2) may apply even if the benefit can also be considered to have been provided through an employee-third party arrangement.

What is required for there to be a benefit to the employees?

97. Under section CX 2(1), the definition of what amounts to a fringe benefit is broad and intended to include all non-cash payments made by an employer to an employee in respect of their employment. However, it is not clear, given that section CX 2(2) is an anti-avoidance provision, whether what the employee receives from the third party needs to be a benefit that the employee would not usually be able to receive or if something else is needed. The issue arises of whether a benefit under section CX 2(2) must be something that the public is unable to receive.

98. In *Case M9* (1990) 12 NZTC 2,069, District Court Judge Bathgate held that the provision of the motor vehicle was subject to FBT and stated (at page 2,073):

> A benefit is often regarded as being given voluntarily, rather than compulsorily. A benefit may however be given under compulsion in some circumstances – Yates v Starkey [1951] 1 All ER 732 … "Fringe benefits" are defined in s 336N(1) [of the Income Tax Act 1976] as the benefits "received or enjoyed", in the sense that it is from the employee's view they are to be considered a benefit, which is the object and purpose of such.

99. In *Case M59* (1990) 12 NZTC 2,339, District Court Judge Bathgate stated (at page 2,343):

> Only the receipt or enjoyment occurred after FBT was imposed, but that was not sufficient, as that is only a part of a fringe benefit, and not the whole fringe benefit. By 31 March 1985 the objector had provided a benefit, although it was not enjoyed by B and C until after that date. That enjoyment however was not for the purposes of the Act a fringe benefit. Although the objectors would be taxable in that period after 1 April 1985, they were not subject to the tax because when the benefit was provided by them it was not chargeable to FBT.

100. This means two separate elements must exist for there to be a "benefit" for FBT purposes: provision to the employee and enjoyment by that employee. Accordingly, for a benefit to exist under section CX 2(2), there must be both the provision of something by a third party who has entered into an arrangement with the employer to provide that benefit, and enjoyment by the employee.

101. Accordingly, on the basis of the above cases, all that is necessary for there to be a benefit to an employee under section CX 2(2) is for the employee to receive, or be provided, something by a third party, and to enjoy, or take advantage of, that thing. There is no requirement that a fringe benefit is something the employee could not receive on their own account, or that the public cannot receive it provided the requirements of the definition in section CX 2(1) are met and the benefit is provided in respect of the employment of the employee.

102. This interpretation is supported by the scheme of the FBT rules. Section CX 2(1) defines the term "fringe benefit" broadly. It is not necessary for the purposes of the FBT rules for the benefit to be something that the employee could not otherwise be able to receive or that the public is unable to receive. All that is required is that something needs to be provided to the employee that falls within the definition of

"fringe benefit" in section CX 2(1). In the Commissioner's opinion, this applies equally to section CX 2(2). If something is provided to the employee by a third party that would have been a fringe benefit had it been provided by the employer, it will be subject to FBT by virtue of section CX 2(2).

103. Therefore, for there to be a benefit under section CX 2(2) all that is required is that a "fringe benefit" (as defined in section CX 2(1)) is provided to the employee by a third party (in addition to regular salary or wages) pursuant to an arrangement between the employer and the third party for the provision of that thing, and the employee must take advantage of or use that thing. This conclusion is consistent with "The meaning of 'benefit' for FBT purposes", Tax Information Bulletin vol 18, no 2 (March 2006), which states that "[i]n terms of the scheme of the FBT regime, a 'benefit' means what is received by the employee, without regard to any contribution made by the employee."

Meaning of "provision"

104. Section CX 2(2) requires that a benefit be "provided to an employee through an arrangement". For a benefit to be caught under section CX 2(2) it must have been provided to the employee by the third party. It is not sufficient that there is an "arrangement" between the parties that is merely for access to premises, the "arrangement" must be "for" the provision of a benefit for section CX 2(2) to apply.

105. The *Oxford English Dictionary* (11th ed, revised, 2006) defines the term "provide" as "make available for use; supply".

106. Several cases have discussed the meaning of the word "provide". These cases show that the meaning of "provide" depends on the facts and circumstances of each case. For example, in *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414, Pearson J stated (at page 422):

> I do not think that there is any hard and fast meaning of the word "provided"; it must depend on the circumstances of the case as to what is "provided" and how what is "provided" is going to be used.

107. In *Norris v Syndi Manufacturing Co Ltd* [1952] 1 All ER 935, an employee had removed the safety guard from a machine in order to carry out tests. His employer was aware that the employee took the guard off to test the machine, and had told him to replace it "after testing and before operation". The employee inadvertently injured himself while working without the guard one day. The Court of Appeal found that the guard had been "provided" by the employer, and that the duty to provide the guard did not require that the employer should have to order the workers to use it. Romer LJ stated (at page 940):

> The primary meaning of the word "provide" is to "furnish" or "supply", and accordingly, on the plain, ordinary interpretation of s. 119 (1), a workman's statutory obligation is to use safety devices which are furnished or supplied for his use by his employers.

108. The meaning of "provide" has been considered by the Employment Court of New Zealand in *Tranz Rail Ltd (T/A Interisland Line) v New Zealand Seafarers' Union* [1996] 1 ERNZ 216. In that case, the issue was whether a statutory requirement that the employer provide food and water to the seafarers meant the employer had to provide them with free food and water or merely ensure facilities were available

for the employees to have access to food and water. Colgan J stated (at page 227):

> The applicant's principal argument is that the plain words of the statute allow an employer of seafarers either to agree to provide food and water without cost to an employee or to do otherwise whether by negotiation as part of a collective employment contract or by the imposition of charges for such provisions. Ms Dyhrberg submitted that to achieve an interpretation as sought by the respondents, the Court would be required to add to the statutory words a phrase such as "without cost to such employees" or the like. Ms Dyhrberg submitted that the word "provide" means make available but no more. Counsel conceded that this interpretation would mean that an employer of seafarers would be entitled to charge an employee for water consumed, although stressed that such an outcome would be unlikely in any event.
>
> Ms Dyhrberg submitted that to "provide" is to provide the opportunity of having the appropriate supplies of food and water. I find however that in this context the natural and ordinary meaning of the word "provide" in relation to food and water on ships is to supply without cost to the recipient seafarer.

109. The Australian Administrative Appeals Tribunal in *Pierce v FCT* 98 ATC 2240, considered whether a car had been provided to an employee. The tribunal stated (at page 2,247):

> There is no reason why "provides" should not be given its ordinary English meaning, namely "to furnish or supply" (Macquarie Dictionary).

110. For something to have been "provided" to an employee by a third party in the context of section CX 2(2), it must be supplied, furnished, or made available to that employee.

Salary sacrifice situations

111. This Ruling does not consider or rule on the taxation implications of salary sacrifice situations. In the context of the Ruling, this includes situations where the remuneration given by an employer to an employee is reduced because of a benefit being received by the employee from the third party (or because of the possibility of a benefit being received), or where the remuneration of the employee otherwise takes the receipt of a benefit provided by a third party into account.

112. It is considered that different considerations may apply to the tax treatment of such situations, for example, the benefit may have been provided by the employer in such a situation, or there may be other relevant aspects of the arrangement, and this Ruling has not considered the taxation implications of salary sacrifice situations.

Period of Ruling

113. This Ruling commences on the first day of the 2008/09 income year. The previous Ruling expired on 19 May 2007. Given the terms of section 91C of the Tax Administration Act 1994, it is not possible to issue a ruling in respect of the Income Tax Act 2004 for the period beginning 20 May 2007 to the end of the 2007/08 income year. However, the Commissioner's view is that the same principles and conclusions as set out in this Ruling apply to an arrangement of the type covered by the Ruling for this period.

Examples

114. The following examples are included to assist in explaining the application of the law. They consider whether the requirements of section CX 2(2) are satisfied. The examples do not consider whether FBT will be payable on a benefit provided through an arrangement to which section CX 2(2) applies. It might be possible that section CX 2(2) applies but FBT will not be payable, as a result of the other provisions in subpart CX or because of the operation of the valuation rules contained in subpart RD.

115. These examples all assume that there has been no sacrifice of salary by the employee receiving the benefit.

Example 1

116. ABC Bank wishes to offer the employees of XYZ Ltd a low interest loan facility. ABC approaches XYZ, which agrees to ABC's offer and agrees to pay ABC the difference between the interest rate offered to employees and the current market interest rate.

117. On the facts of this example, the requirements of section CX 2(2) are clearly satisfied. An "arrangement" exists between ABC and XYZ, and the purpose of the employer is to allow the provision of a benefit to XYZ's employees. This is evidenced by the fact consideration has been passed between the employer and the third party in respect of the benefit being provided.

Example 2

118. A credit card company approaches the manager of BCE, and asks whether BCE would allow it to approach BCE's employees to offer them credit cards (for the employees' personal use). The credit card company proposes that all staff members who choose to receive cards would be allowed to join the credit card company's loyalty scheme (which has no joining fee, but is available only to selected cardholders). BCE agrees to this request, but suggests that the credit card company might wish to provide a slightly discounted interest rate to the employees, so that the offer does not waste the employees' time. The credit card company agrees to this change. BCE provides no consideration to the credit card company. The credit card company is keen to secure BCE employees as customers and is happy to agree to offer the employees the additional benefits.

119. In this example, there is an "arrangement" between the employer and the third party. The employer and third party have agreed to the third party undertaking a particular course of action. However, section CX 2(2) will not apply in this situation. The agreement does not include the provision of a benefit, but merely allows the credit card company access to BCE's employees to offer them a benefit. The main purpose of the employer in entering into the arrangement is to allow the credit card company to offer a benefit to their employees that will be of potential interest to the employees. The provision of a benefit, if it is a purpose of the employer, will be incidental to this. Therefore, any benefit received by the employee from the credit card company will not amount to a "fringe benefit" under section CX 2(2).

Example 3

120. A local retailer approaches MNO Ltd, and asks permission to display advertising brochures on MNO's premises and for MNO to place an advertisement on the company's intranet. After a cursory inspection of the brochures and advertisement, MNO agrees. MNO also agrees to allow the retailer to email interested staff with updated specials (staff are given the opportunity not to receive the email updates). The brochures and subsequent email messages invite the employees to join a loyalty programme, which gives them the possibility of receiving rewards.

121. In this example, there will be an "arrangement" between the employer and the third party, as they have agreed on a future course of action. However, the arrangement will not be "for" the provision of a benefit. The employer has agreed only to allow the third party access to its employees, and this is their main purpose in entering into the arrangement. Any purpose the employer may have of benefiting their employees is incidental to this purpose. The "arrangement" is "for" access to the employer's premises or to allow the third party to communicate with the employees directly or by electronic means, not to provide a benefit to employees. Hence, any reward received by an employee under the loyalty programme will not amount to a "fringe benefit" under section CX 2(2).

Example 4

122. BB Ltd is a large company with several high net worth employees. BB contacts its bank and asks the bank to offer a low interest mortgage facility to BB's employees, which would also permit employees to obtain a mortgage with a smaller deposit than would usually be required. BB believes the bank will agree to this request because BB has a lot of business with the bank. Additionally, it is expected that the bank will get a great deal of business from the employees of BB, because BB has told the bank it is aware of a reasonable number of staff members who would be interested in such a facility. The bank is attracted by the level of business it might achieve with the employees, and is also keen to maintain the good relationship it has with BB, so it puts together a proposal, which it presents to BB. BB considers that the proposal is worthwhile, so asks the bank to make the facility available to employees. BB also agrees to help promote the facility by putting up posters and making brochures available in the workplace, and by sending an email message to staff informing them of the facility.

123. In this example, there is an "arrangement" between BB and the bank that is "for" the provision of a benefit to employees. The course of action agreed to by the parties involves the provision of a benefit to employees. BB has not simply entered into the arrangement with the purpose of allowing the bank access to the employees. Rather, BB has entered into the arrangement with a more than incidental purpose of providing employees with a benefit. This is evidenced by the fact BB has an expectation that the bank would comply with its request and because it is aware of staff members who would be interested in the facility. Therefore, section CX 2(2) will apply to this arrangement.

Example 5

124. STU Ltd and VWX Ltd are both companies in the same group of companies. The group has a widely understood policy that all companies in the group will provide discounted products or services to all employees of companies in the group, although this policy has never been put into writing. STU, therefore, provides interested VWX employees with discounts on its products.

125. In this example, there will be an "arrangement" for the provision of a benefit, and VWX will be liable to FBT on any benefits received by its employees from STU. There is a group policy that each company will provide the employees of the other companies in the group with benefits. Therefore, there is an understanding between the employer and the third party that each will act in a particular way, that understanding extending to the provision of a benefit, and the purpose of the policy is to allow employees to be provided with benefits by a third party. Therefore, section CX 2(2) will apply.

Example 6

126. DFG, a travel agent, employs several staff and enters into a scheme with YTR, an airline, to strengthen its relationship with YTR. The scheme involves YTR agreeing to give a certain number of free domestic flights per year to employees of DFG who excel in promoting and selling YTR flights. In return, DFG agrees to have its employees promote YTR flights and convert flights to YTR wherever possible. To determine which employees are entitled to free flights, DFG awards its staff with points for outstanding customer service. Once a staff member has accumulated the required number of points, they are entitled to a free flight from YTR. There is no cost to DFG for those flights.

127. In this example, section CX 2(2) will apply. There is an "arrangement" between the parties, as the course of action agreed to by DFG and YTR involves the provision of a benefit to employees. One of the main purposes of DFG in entering into the arrangement is to provide the staff with free flights. Although DFG has another significant purpose in entering into the arrangement, which is to strengthen its relationship, the purpose of providing a benefit to employees is not incidental to that purpose.

Example 7

128. HJK is a large nationwide employer with many staff. A senior manager of HJK approaches LMN, a nationwide chain of retail stores, and suggests that LMN might like to consider offering a discount to HJK employees. LMN agrees to consider this idea, and later decides to allow a 10% discount to all HJK staff at all of its stores. (This is achieved by providing all employees with a discount card.) HJK does not give any consideration for this, has made no suggestion that it will do business with LMN if a discount is permitted, and has not been involved in discussions about the level of the discount or any other details of the offer. LMN has decided to offer the employees the discount, because it believes LMN will obtain a substantial amount of business.

129. Section CX 2(2) will not apply in this situation. There is no "arrangement" between the parties that encompasses the provision of the benefit, as the only course of

action agreed to by the parties is that LMN will consider the idea. HJK has done no more than initiate discussions with LMN, and the decision to offer a benefit to employees was made unilaterally by LMN. Although the purpose of HJK could be argued to be the provision of a benefit, there is no "arrangement" with LMN that is "for" such provision.

Example 8

130. An employee works for a company. She obtains a personal credit card and joins its associated points reward scheme. Under that scheme, she can accumulate points as goods and services are charged on the credit card. After the employee accumulates 10,000 points, she can transfer those points, at her option, to any one of several airlines' frequent flyer schemes affiliated to the credit card company's points reward scheme. Once she accumulates a specified number of points on the airline frequent flyer scheme, she can exchange them for free or discounted travel.

131. In the course of the employee's work, she incurs several employment-related charges on the credit card as well as private expenditure. The employee accumulates points on the credit card points reward scheme for both types of expenditure. She soon reaches the specified threshold of points, and transfers them to a particular airline's frequent flyer scheme, exchanging them for a free trip to Fiji.

132. Section CX 2(2) will not apply on the facts of this example. The receipt of the points under the credit card company's points reward scheme is because of the contractual arrangement between the credit card company and the employee. No arrangement exists between the employer and the credit card company to provide the employee with entitlements under its points reward scheme or the associated airline's frequent flyer scheme. It does not matter that some of the points that give the entitlement result from employment-related expenditure.

Example 9

133. Following from example 8, in the following year the employee is promoted in the company and receives a corporate charge card on which she is specified as the cardholder. The charge card is from a different company to that which issued her personal card. This particular charge card company also allows cardholders to join its points reward scheme. The employee joins the points rewards scheme as an individual member and pays the membership fee personally. The employee's employer is not involved in encouraging the employee to join the scheme. This scheme also allows an accumulation of points as goods and services are charged on the card and a transfer of points, subject to certain conditions, to a participating airline's frequent flyer scheme.

134. Any entitlement received by the employee under the credit card company's points reward scheme will not amount to a "fringe benefit" under section CX 2(2). There is no arrangement between the employer and the credit card company to provide entitlements to the employee under the points reward scheme. The employee receives those entitlements because of her contractual relationship with the credit card company.

Example 10

135. QRS purchases motor vehicles for business purposes from a motor vehicle dealer. As a result of QRS' substantial custom, the dealer states that it will discount QRS' future purchases. It also informs QRS that the more vehicles purchased, the greater the discount. In order to increase the discount, QRS suggests to the dealer that it offer the same discount to the employees of QRS. QRS tells the dealer that many of its employees would like to purchase vehicles and it expects that they would be induced to buy vehicles from the dealer if they were offered the same discount. The dealer agrees that it will offer the employees the same discount as it provides to QRS.

136. In this example, QRS has requested that the dealer provide its employees with a discount on any vehicles they purchase. Because of QRS' substantial custom, the dealer agreed to offer the discount to the employees. There is an arrangement between the dealer and QRS that is for the provision of a benefit (i.e. the discount) to the employees. Although the dominant purpose of QRS may be to obtain a higher discount on its future vehicle purchases, a significant purpose of it entering into the arrangement is so that the same discount is offered to its employees. Therefore section CX 2(2) will apply, because QRS made the arrangement with a more than incidental purpose to provide its employees with a benefit.