**FRINGE BENEFIT TAX – EXCLUSION FOR CAR PARKS PROVIDED ON AN EMPLOYER'S PREMISES**

**PUBLIC RULING – BR Pub 15/11**

This is a public ruling made under s 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 ss CX 2 and CX 23.

## The Arrangement to which this Ruling applies

The Arrangement is the provision of a benefit by an employer (or a group company) to an employee in connection with their employment. The benefit is the provision of a car park that the employer owns or leases. This includes a parking space in a car parking facility or building that the employer has a right to use that is, in fact or effect, substantially exclusive.

For the purposes of this Ruling, the term "group company" means a company that is part of the same group of companies as the employer of the employee.

## How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- For the purposes of s CX 2, the car park provided by an employer (or a group company) to its employee is excluded from being a fringe benefit, so the employer is not liable to pay fringe benefit tax in these circumstances.
- Where s CX 23(2)(c) applies the car park will not be excluded from being a fringe benefit by s CX 23.

## The period or tax year for which this Ruling applies

This Ruling will apply indefinitely from 17 November 2015.

This Ruling is signed by me on 17 November 2015.

**Susan Price**
Director, Public Rulings

**FRINGE BENEFIT TAX – EXCLUSION FOR CAR PARKS PROVIDED ON THE PREMISES OF A COMPANY THAT IS PART OF THE SAME GROUP OF COMPANIES AS AN EMPLOYER**

**PUBLIC RULING – BR Pub 15/12**

This is a public ruling made under s 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 ss CX 2 and CX 23.

## The Arrangement to which this Ruling applies

The Arrangement is the provision of a benefit by an employer (or a group company) to an employee in connection with their employment. The benefit is the provision of a car park that a group company owns or leases. This includes a parking space in a car-parking facility or building that the group company has a right to use that is, in fact or effect, substantially exclusive.

For the purposes of this Ruling, the term "group company" means a company that is part of the same group of companies as the employer of the employee.

## How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- For the purposes of s CX 2, the car park provided by the employer (or a group company) to its employee is excluded from being a fringe benefit, so the employer is not liable to pay fringe benefit tax in these circumstances.
- Where s CX 23(2)(c) applies the car park will not be excluded from being a fringe benefit by s CX 23.

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This Ruling will apply indefinitely from 17 November 2015.

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**Susan Price**
Director, Public Rulings

**COMMENTARY ON PUBLIC RULINGS BR PUB 15/11 AND BR PUB 15/12**

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in Public Rulings BR Pub 15/11 and BR Pub 15/12 ("the Rulings").

Legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this commentary.

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## Summary

1. Certain benefits provided by employers to employees are not subject to fringe benefit tax (FBT) if they are used or consumed by an employee on the premises of the employer. This is referred to as the "on-premises" exclusion from FBT. BR Pub 15/11 and BR Pub 15/12 address how the on-premises exclusion applies to car parking owned or leased by an employer.

2. BR Pub 15/11 sets out that car parks provided by an employer to an employee will be exempt from FBT where the car park is on premises that the employer owns or leases. BR Pub 15/12 sets out the rule where the car parking is on the premises of a company that is part of the same group of companies as an employer**.** (As appropriate in this commentary "employer" should be read as including a "group company". A "group company" means a company that is part of the same group of companies as the employer of the employee.)

3. Parking provided to employees on land owned by the employer, on land leased by the employer, or in car parks leased by the employer will usually be excluded from FBT because it is a benefit provided on the premises of the employer for FBT purposes. It is not necessary for the employer to carry on business activities on or near those premises for the exclusion to apply.

4. However, the premises of an employer will not usually include a car park that an employer is merely licensed to use, *unless* the employer can show they have a **right to use** the car park that **is in fact or effect substantially exclusive**.

5. To establish whether an employer's use of a car park is substantially exclusive, account needs to be taken of what is actually occurring between the parties and the actual effect of any agreement between the parties. It does not matter if an employer's use of the car park does not amount to "legal" possession at common law, but the use must be substantially exclusive.

6. In the Commissioner's view an employer's use of a car park will be substantially exclusive when no one else (including the owner or car park operator) uses, or controls the overall use of, the car park preventing the employer from enjoying a substantially exclusive right to use the car park.

7. Deciding whether a car park is employer's premises may involve weighing a number of factors before deciding, on balance, whether the employer can be said to:

   - own,
   - lease, or
   - enjoy substantially exclusive use of that car park.

   For example, merely stating that the employer is to have exclusive use of the car park will not on its own be sufficient to establish the car park as the premises of the employer but, when considered alongside other factors, it may be persuasive.

8. In forming her view, the Commissioner considers it is significant that the term "licence" was not explicitly included in the definition of "premises of a person" in s CX 23(2)(a), in para (a) of the definition of "lease" or in the related definitions of "leasehold estate", "estate in relation to land, interest in relation to land, estate or interest in land, estate in land, interest in land, and similar terms", "interest" or "possession" in s YA 1. This indicates to the Commissioner that Parliament never intended s CX 23(2)(a) to be interpreted as enabling *all* premises that are licenced by an employer to be treated as the employer's premises.

9. BR Pub 15/11 and BR Pub 15/12 focus on the application of the on-premises exclusion and, in particular, on the scope of para (a) of s CX 23(2) (ie, the first limb of the definition of "premises of a person"). The Rulings do not consider whether FBT may apply to car parking provided by employers under any other provision of the FBT Rules.

**Practical considerations**

10. To help establish whether a car parking arrangement falls within the definition of a "lease" for the purposes of s CX 23 listed below are some common examples of the types of features the Commissioner might expect to find where an employer has a right to use a car park that is in fact or

effect substantially exclusive. Sometimes in an arrangement there might be conflicting features, and in those circumstances an assessment needs to be made of the nature of the overall arrangement, keeping in mind it is essentially a question of the degree of control granted to the employer under the arrangement. The more control an employer has, the more likely it is that the car parking spaces are the employer's premises.

11. The list below is not definitive and there may be other features that indicate the employer has a use of the car parking space that is substantially exclusive:

- the owner or car park operator acknowledges that the employer and their employees have the exclusive use of the employer's car parking spaces and no one else (including the owner or car park operator) can park cars on the parking spaces;
- the car parking spaces are allocated exclusively to the employer and cannot be re-allocated at the discretion of the owner or car park operator without a variation of the arrangement or a new arrangement being agreed;
- the employer has unrestricted access to the car park;
- the car parking spaces remain unoccupied if not being used by the employer (or someone authorised by the employer);
- the employer may permit others to use the employer's car parking spaces;
- if an unauthorised person parks in an employer's car parking space, the employer may take steps to have the unauthorised vehicle towed; and
- the employer may decide how the car parking space is used (eg, if desired, the employer may park a trailer in the car parking space).

12. The Commissioner accepts that a car parking arrangement for fixed hours (eg, during business hours) can be an employer's premises so long as the employer can demonstrate a right to use the car park that is in fact or effect substantially exclusive for those fixed hours.

13. To help establish whether a car parking arrangement falls within the definition of a "lease" for the purposes of s CX 23 listed below are some common examples of the types of features that might suggest a car parking arrangement is not a "lease". The list is not definitive:

- the employer is not allocated any particular car parking spaces within the car park;
- where the employer is allocated particular car parking spaces, the owner or car park operator retains the ability to reallocate car parking spaces at their discretion;
- the owner or car park operator may alter the car park's operating hours or restrict access to the car park at their discretion;
- the employer cannot remove unauthorised vehicles from the car park or otherwise enforce rights over the car park against third parties, including bringing any action for trespass; and

- there is no signage showing the employer's car parking spaces as being "reserved".

14. Examples illustrating the Commissioner's application of the Rulings are provided at [152] to [168] below.

## Background

15. A benefit provided by an employer to an employee in connection with their employment is a fringe benefit and subject to the FBT rules unless it is excluded (s CX 2). An employee's use of a car park provided by an employer is on the face of it a benefit and is subject to FBT. These Rulings are based on the assumption that the provision by an employer of a car park to an employee is a benefit for FBT purposes. While Parliament could have excluded all car parks from the FBT regime, it has not done so. Nonetheless car parks might still be exempt from FBT if any one of the exclusions in the FBT rules applies to the benefit. Section CX 23 excludes from FBT benefits provided to an employee on an employer's premises. Therefore if an employer can establish a car park is on its premises the benefit will not be subject to FBT.

16. FBT and car parks was the subject of an expired Public Ruling BR Pub 99/6 issued in 1999. (BR Pub 99/6 was not re-issued when it expired in 2002 but was extended to apply until 31 March 2005.) In BR Pub 99/6, the Commissioner established that for the purposes of the FBT exclusion "premises" were those land and buildings that an employer owned or leased (in a common law sense), and so had exclusive possession of. Land and buildings that were merely licensed to an employer were not considered to be the employer's "premises". The distinction relied on the established land law concept of "exclusive possession", which determines the difference between a lease and a licence – leases being an estate in land akin to ownership, and licences being simply a personal permission to enter and use the land for a particular purpose. A licence to use or occupy land does not create a legal estate or interest in the land. As a result, a licensee cannot sue in trespass or register a caveat against the title of land in the way that a lessee can.

17. With effect from 1 April 2005, changes were made to the FBT legislation as a result of the re-writing of the Income Tax Act. Further legislative changes were made to the on-premises exclusion in 2006. Work on re-issuing BR Pub 99/6 was undertaken with the release of an exposure draft for external consultation in August 2009. However, due to policy considerations the 2009 draft was never finalised. Issues concerning FBT and car parks were addressed by Policy & Strategy in the issues papers *Streamlining the Taxation of Fringe Benefits* (government discussion document, Policy Advice Division of the Inland Revenue Department, December 2003) and *Recognising Salary Trade-offs as Income* (officials' issues paper, Policy Advice Division of Inland Revenue and the Treasury, April 2012). Legislative amendments to the FBT treatment of car parks were proposed in the *Taxation (Livestock Valuation, Assets Expenditure, and Remedial Matters) Bill* 2013. These proposed amendments did not proceed.

18. As a result of BR Pub 99/6 expiring, and legislative changes being made to the on-premises exclusion, it was identified that aspects of the Commissioner's position on the application of the FBT on-premises exclusion to car parks needed clarification.

## Application of the Legislation

19. The main issue addressed by these Rulings is the application of the FBT on-premises exclusion in s CX 23, and in particular the scope of the first limb of the definition of "premises of a person" in s CX 23(2)(a), to car parking provided by an employer to an employee. This issue is addressed by considering:

- the scheme and purpose of the FBT rules,
- the scheme of the on-premises exclusion in s CX 23, and
- the wording and interpretation of the first limb of the definition of "premises of a person" in s CX 23(2)(a) and any related definitions in s YA 1.

### Scheme and purpose of the fringe benefit tax rules

20. The purpose of the FBT rules is to tax non-monetary benefits provided by employers to employees. The regime was introduced to ensure this form of remuneration did not escape the tax net. Car parking can be a benefit when provided to employees.

21. When FBT was introduced, Parliament decided it should apply only to fringe benefits for which the tax was practical to administer. Parliament agreed that the administrative and taxpayer-compliance cost of valuing benefits provided to an employee on an employer's premises were excessive. For this reason, benefits an employee uses or consumes (subject to some limited exceptions) on an employer's premises are expressly excluded from FBT. This includes the benefit of car parking provided to employees on an employer's premises.

### On-premises exclusion

22. In essence, the on-premises exclusion in s CX 23 provides that a benefit (other than free, discounted, or subsidised travel, accommodation, or clothing) is not a fringe benefit, if it is provided to an employee by an employer and used or consumed on the premises of the employer:

> **CX 23 Benefits provided on premises**
>
> *When not fringe benefit*
>
> (1) A benefit, other than free, discounted, or subsidised travel, accommodation, or clothing, is not a fringe benefit if the benefit is—
>
> (a) provided to the employee by the employer of the employee and used or consumed by the employee on the premises of—
>
> (i) the employer:
>
> (ii) a company that is part of the same group of companies as the employer:
>
> (b) provided to the employee by a company that is part of the same group of companies as the employer of the employee and used or consumed by the employee on the premises of—
>
> (i) the employer:
>
> (ii) the company that provides the benefit.

23. Section CX 23(1)(a)(ii) extends the on-premises exclusion to also include a benefit an employer provides to an employee that is used or consumed by the employee on the premises of a group company. Section CX 23(1)(b) further extends the exclusion to include a benefit a group

company provides to an employee, either on the premises of the employer or on the group company's premises.

24. To establish whether a benefit is used or consumed on the premises of the employer (or on the premises of a group company) there is a definition of "premises of a person" in s CX 23(2):

> *Premises of person*
>
> (2) In this section, the premises of a person—
>
> (a) include premises that the person owns or leases:
>
> (b) include premises, other than those referred to in paragraph (a), on which an employee of the person is required to perform duties for the person:
>
> (c) do not include premises occupied by an employee of the person for residential purposes.

## Definition of "premises of a person"

25. The definition of "premises of a person" was added to the FBT rules as part of the rewrite of the Income Tax Act in 2004. Initially, a definition for "employer's premises" was added but it was later changed to "premises of a person" when the rules for group companies were added in 2006.

26. Before 1 April 2005, the on–premises exclusion operated without a definition of "premises". The Commissioner's stance was that car parks provided on land or in car parks that an employer owned or leased at common law would be covered by the on-premises exclusion. Car parks that were licensed to an employer were not the employer's premises and fell outside the on-premises exclusion.

27. With the addition of the definition of "premises of a person" the Commissioner now seeks in these Rulings to clarify the scope of s CX 23(2)(a) as it applies to car parking:

> **Premises of person**
>
> (2) In this section, the premises of a person—
>
> (a) **include premises** that the person **owns** or **leases**:
>
> [Emphasis added]

28. For the purposes of these Rulings "person" is read as employer but it could also be a group company.

## Commissioner's approach to this analysis

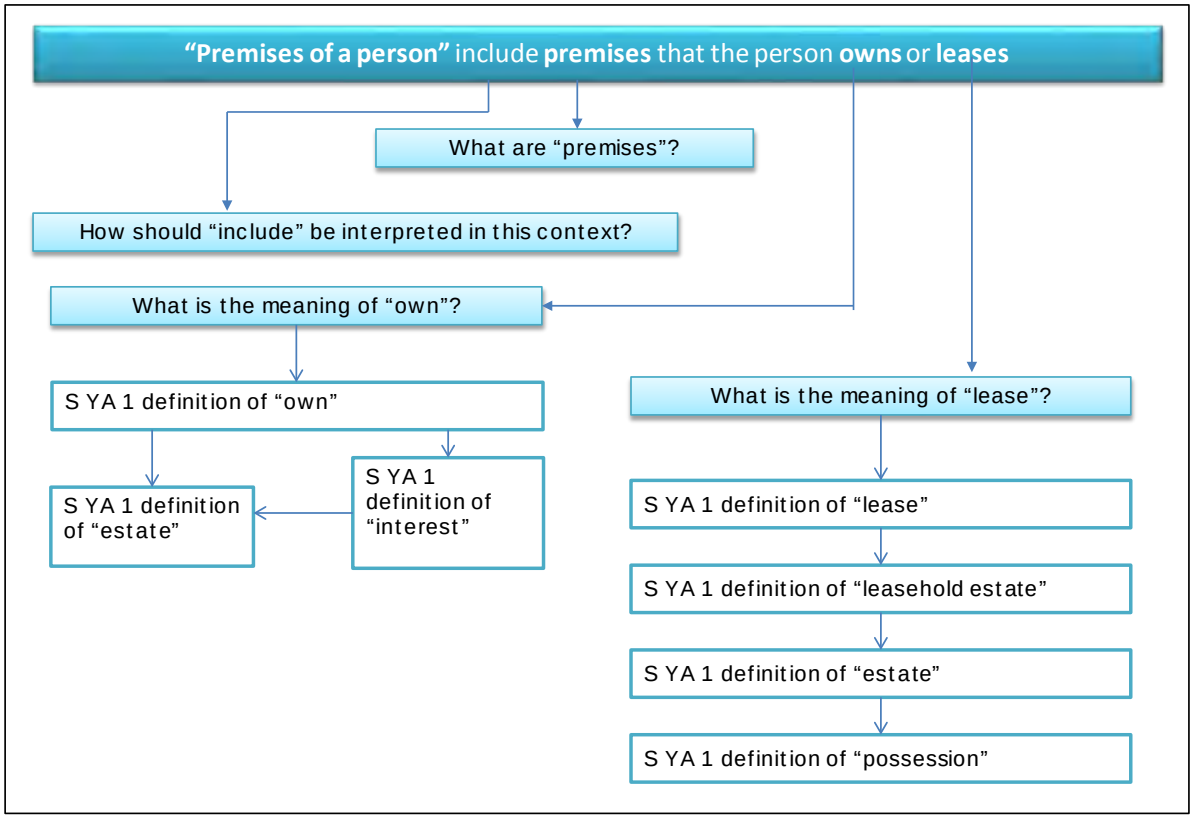
29. The key interpretative issues to be resolved to clarify when car parks provided by employers to employees are exempt from FBT are the meanings to be given to the words "include", "premises", "owns" and "leases" as these words are used in the definition of "premises of a person" in s CX 23(2)(a). This analysis will determine the Commissioner's view on the scope of s CX 23(2)(a) and the situations she considers will be excluded from FBT under the section. The analysis is fairly complex because of the potential layers of definitions that may apply.

30. The Commissioner's approach to the analysis of these issues is to:

- consider the meaning of the word "premises" as it is used in the definition;
- interpret the meaning to be given to the word "'include" in the context of the definition – to decide whether the first limb of the definition is limited to car parks that the employer owns or leases;

- address the application of the relevant s YA 1 definitions to the words "owns" and "leases";
- consider the meaning of the s YA 1 definitions of the terms "own" and "lease";
- consider the application, meaning and effect of the related s YA 1 definitions of "estate" and "possession"; and
- consider the first limb of the definition as a whole and its application to the on-premises exclusion in s CX 23.

31. This approach is summarised as follows:




32. Examples at [152] to [168] illustrate the Commissioner's interpretation.

***Meaning of "premises"***

33. To understand the definition of "premises of a person" it is necessary to consider the meaning of the word "premises" as it is used in the definition.

34. The term "premises" is not defined. The Concise Oxford Dictionary (12th ed, Oxford University Press, 2011) defines "premises" as:

> A house or building, together with its land and outbuildings, occupied by a business or considered in an official context.

35. The ordinary meaning of "premises" has a wide meaning that includes houses and buildings together with their land. This meaning includes land and buildings occupied by a business.

36. Case law indicates that the word "premises" is difficult to interpret because it is capable of many shades of meaning: *Northern Hotel IUOW v Bay of Islands College Board of Trustees* [1991] 1 ERNZ 710. Case law also suggests "premises" should take its meaning from the context in which it is used: *Maunsell v Olins* [1975] 1 All ER 16. In some contexts "premises" may mean land, buildings on land (including the land surrounding the buildings) and any easements granted as appurtenant to the land and buildings: *Grandi v Milburn* [1966] 2 All ER 816; *Whitley v Stumbles* [1930] AC 544. In other contexts premises might be restricted to simply mean buildings situated on the land: *McKenna v Porter Motors Ltd* [1955] NZLR 832.

37. In *Gardiner v Sevenoaks Rural District Council* [1950] 2 All ER 84, Lord Goddard said (at 85):

> "Premises" is, no doubt, a word which is capable of many meanings. How it originally became applied to property is, I think, generally known. It was from the habit of conveyancers when they were drawing deeds of conveyance referring to property and speaking of "parcels". They set out the parcels in the early part of the deed, and later they would refer to "the said premises", meaning strictly that which had gone before, and gradually by common acceptance "premises" became applied, as it generally is now, to houses, land, shops, or whatever it may be, so that **the word has come to mean generally real property of one sort or another**. There is no doubt that from time to time the word "premises" has been given different meanings, either extended or more restricted. [Emphasis added]

38. His Lordship said that the word "premises" generally means real property of one sort or another, although at different times it has been given different meanings, either extended or restricted.

39. Applying this approach to the word "premises" as it is used in the definition of "premises of a person" in the on–premises exclusion, the Commissioner considers that "premises" should be interpreted as including land, buildings, and parts of land or buildings. This is consistent with both the ordinary meaning and the common law meaning of "premises". The Commissioner considers it is also consistent with the scheme and purpose of the FBT rules. In the explanatory commentary to the FBT legislation published when the rules were first introduced in 1985 (see *Public Information Bulletin* No 136, Part 1 (May 1985) at 22) it was stated:

> The term "premises" refers to land, buildings or [appurtenances] thereto.

40. Further, in the Commissioner's view, the definition of "premises of a person" is not limited to "business" premises. Unlike in other jurisdictions (such as Australia) the definition does not use the word "business" premises and does not include a business-type test. The Commissioner considers her view to be consistent with the stated intention of the FBT rules for car parks when the rules were introduced (also set out in the commentary mentioned above at 22):

> The term "premises" refers to premises owned by, or rented or leased by, the employer for use in the carrying on of a business. In the case of car parks, parking provided on land owned by the employer, land leased by the employer, or in respect of car parks over which the employer has a long term lease will be eligible for the exemption. It is not necessary that the employer also carry on normal business activities on or near those premises.

41. For these reasons, the Commissioner considers that the better view is that the term "premises" was intended by Parliament to be a physical concept

that refers to land, buildings, and parts of land or buildings owned or leased by the employer for use in the carrying on of a business and is not to be interpreted as being restricted to premises from which the employer carries out its normal business operations.

***Meaning of "include"***

42. The word "include" is used within the definition of "premises of a person". Its use raises the question as to whether Parliament intended for the "premises of a person" to be something broader than simply land and buildings that the employer or group company owns or leases. Depending on the meaning given to the word "include" in the first limb of the definition of "premises of a person", an employer's premises may arguably extend beyond premises that an employer "owns" or "leases" (as those terms are defined in s YA 1).

43. The use of the word "include" raises a number of interpretative questions. In some statutory contexts the word "include" is indicative of a non-exhaustive definition; in other contexts it may be read as equivalent to the narrower "means and includes" construction: *Dilworth v Commissioner of Stamps* (1899) NZPCC 578 (PC).

44. When "include" is used to enlarge the meaning of a defined word (ie, where it is non-exhaustive), as it generally is, it may not extend the meaning to something that was not intended in the scheme of the Act: *Harley v CIR* [1971] NZLR 482 (CA).

45. Other case law indicates that the scope of the word "include" depends on the genus or class of items already defined in the definition: *Whitsbury Farm and Stud Ltd v Hemens (Valuation Officer)* [1988] AC 601 (HL).

46. If the word "include" is given a non-exhaustive meaning in the context of s CX 23(2)(a), then arguably an employer's premises are not restricted to car parks that an employer "owns" or "leases" but might also include other car parks, such as any car parks licensed by an employer. The Commissioner disagrees with this interpretation (although, as discussed below, the Commissioner accepts that some licenced car parks may satisfy the extended statutory definition of "lease" and therefore qualify as employer premises in that way.)

47. While it is not free from doubt, the Commissioner considers the better view, in this context, is to interpret "include" in the definition of "premises of a person" exhaustively. In the Commissioner's view such an interpretation is supported by:

- the intended purpose of the FBT rules;
- the construction of the definition of "premises of a person" in s CX 23(2);
- the nature of the "class" of items in s CX 23(2)(a); and
- the implication that if Parliament had intended the class to be broader than premises that an employer "owns" or "leases" (eg, to include all licences) it could have explicitly provided for it. [This is discussed in more detail below.]

48. As noted above the Commissioner considers that the original commentary to the FBT legislation indicates that the purpose of the on-premises

exclusion was that it applied to land an employer owns or leases or to car parks an employer leases.

49. This interpretation is arguably further supported by the construction of the definition in s CX 23(2). Paragraphs (a) and (b) of s CX 23(2) distinguish between premises an employer owns and leases and premises of an employer, other than those it owns or leases, on which an employee is required to perform duties for the employer.

50. Further, in the Commissioner's view the class of items in the first limb of the definition of "premises of a person" (ie, "owned" or "leased" premises) indicates an intention that an employer's premises will include only premises that are essentially in the nature of an estate in the land. At common law, an estate in land exists when a person owns or leases land so that they have exclusive possession of the land. An estate in land does not exist when a person merely has a licence to use the land or is granted permission to enter the land for some specified purpose.

51. The Court of Appeal in *Fatac Ltd (in liq) v CIR* [2002] 3 NZLR 648 (which followed the House of Lords' decision in *Street v Mountford* [1985] 2 All ER 289) considered whether a licence creates an estate in land. In his judgment, Fisher J said (at 658):

> A licence is a mere permission to be on the land, with or without additional permission to perform additional specified acts there. The former creates an estate in the land; the latter does not.

52. This shows that a licence does not create an estate in land, in the same way that owning or leasing land does. Therefore, premises that are licenced arguably are not in the same class of items specified in the first limb of the definition of "premises of a person" (ie, "owned" or "leased" premises).

53. By Parliament not explicitly adding premises that are licensed to the first limb of the definition of "premises of a person", it can be inferred they are to be excluded. This conclusion is supported by the application of the *expressio unius est exclusio alterius* (to express one thing is to exclude another) principle of statutory interpretation. Section CX 23(2)(a) expressly states the definition of "premises of a person" includes premises of the type that employers own or lease. This implies premises held under some other arrangement such as a licence are excluded from the definition.

54. When the definition of "premises of a person" was added to the on-premises exclusion in 2004 the intention was for the definition to reflect the existing position with respect to the scope of the exclusion by preserving the accepted boundary between leases and licences.

55. Finally, since FBT was introduced in 1985 there has been much discussion about and opportunities for amendments to the FBT legislation, yet Parliament has refrained from making any express exclusion from FBT for car parks that are licensed to employers or from excluding all car parks from the on-premises exclusion.

56. The Commissioner considers all these factors support the view that "include" in s CX 23(2)(a), in the context of the definition of "premises of a person", the exclusion and the FBT rules, should be read as equivalent to the narrower "means and includes" construction. This means s CX 23(2)(a) is to be read as being limited to premises an employer "owns" or "leases".

### *Application of s YA 1 definitions to "premises of a person"*

57. Having established that the definition of "premises of a person" is to be read as being limited to premises that an employer owns or leases, it is now appropriate to consider the s YA 1 definitions of "own" and "lease".

58. "Own" means to have an "estate" or "interest" in land. An "interest" in land is defined under the definition of "estate". A "lease" is any "estate" in land, other than a freehold estate. The definition of "lease" expressly includes licences in some circumstances; but not for the purposes of the FBT rules. The second limb of the definition of "estate" extends the general meaning of "estate" to include a right to the possession of the land. "Possession" is in turn defined as including a use of the land that is, in fact or effect, substantially exclusive.

59. The relevant parts of the s YA 1 definitions are as follows:

> **own,—**
>
> (a) for land, means to have an estate or interest in the land, alone or jointly or in common with any other person:
>
> **interest,—**
>
> (d) in relation to land, **interest in land**, **estate or interest in land**, and similar terms are defined under the definition of **estate**
>
> **lease—**
>
> (a) means a disposition that creates a leasehold estate
>
> **leasehold estate** includes any estate, however created, other than a freehold estate.
>
> **estate** in relation to land**, interest** in relation to land**, estate or interest in land, estate in land, interest in land,** and similar terms**– –**
>
> (a) mean an estate or interest in the land, whether legal or equitable, and whether vested or contingent, in possession, reversion, or remainder; and
>
> (b) include a right, whether direct or through a trustee or otherwise, to—
>
> (i) the possession of the land (for example: a licence to occupy, as that term is defined in section 121A(1) of the Land Transfer Act 1952):
>
> ...
>
> **possession** includes a use that is in fact or effect substantially exclusive.

60. On the face of it, Parliament may not have intended the s YA 1 definitions of "own" and "lease" (and the other related definitions in s YA 1 like "estate" and "possession") to apply in the context of the definition of "premises of a person". Instead Parliament might have intended for the definitions in s YA 1 to be disregarded in the context of the definition of "premises of a person" and for the common law meanings to apply in their place. Applying the s YA 1 definitions to s CX 23(2)(a) arguably broadens the scope of the on-premises exclusion.

61. However, on balance, the Commissioner does not accept this argument.

62. When *Rewriting the Income Tax Act 1994* (exposure draft, Inland Revenue, 2001) was released for consultation "employer's premises" were defined in s CX 27(2)(a) as "includes premises to which the employer has a right of possession". The term "possession" in s YA 1 was included in the list of defined terms for that section. Although the definition of "employer's premises" was subsequently changed and, in time, became the definition of "premises of a person", the link to the definitions in s YA 1 (including indirectly the link to the definition of "possession") were retained.

63. The courts impose a high threshold before a definition can be disregarded for the purposes of interpreting a defined word in an Act. There need to be strong indications to the contrary in the context: *Police v Thompson* [1966] NZLR 813.

64. The Commissioner does not think that after initially including the term "possession" in the first draft of the rewritten Act, it can be argued that it was intended that the s YA 1 definitions be disregarded in the context of s CX 23.

65. However, as noted above, the Commissioner does think it is significant that the word "licence" was not added to the new definition of "premises of a person" in s CX 23(2)(a) or to the existing definition of "lease" or "estate" in s YA 1 for these purposes. This indicates to the Commissioner that Parliament never went so far as to necessarily intend licences in general to be included within the on-premises exclusion.

***Meaning of "owns" and "leases"***

66. Accepting that the relevant s YA 1 definitions are intended to be applied in the context of s CX 23, the starting point is the meaning of the defined terms "own" and "lease":

> **own —**
>
> (a) for land, means to have an estate or interest in the land, alone or jointly or in common with any other person:
>
> (b) for the ownership of depreciable property, is defined in sections EE 2 to EE 5 (which relate to depreciation)
>
> **lease —**
>
> (a) means a disposition that creates a leasehold estate:
>
> (b) in sections DZ 9 (Premium paid on land leased before 1 April 1993) and EZ 8 (Premium paid on land leased before 1 April 1993),—
>
> (i) means a disposition by which a leasehold estate is created; and
>
> (ii) includes a licence:
>
> (c) for the purposes of subpart EE (Depreciation), includes a licence to occupy:
>
> …
>
> (d) (iii) includes a licence to use intangible property; and
>
> …
>
> (f) in the financial arrangements rules, means—
>
> (i) a lease as described in paragraph (d):
>
> (ii) an arrangement that would be a lease as described in paragraph (d) if the arrangement did not relate to real property, livestock, or bloodstock

67. "Own" is defined for land as "to have an estate or interest in the land".

68. The definition of "lease" in s YA 1 has six limbs, three of which (paras (b), (c), and (d)) directly, and one (para (f)) indirectly, include a reference to some form of licence. However, para (a), which sets out the general meaning of "lease" for the purposes of the Act (including for the purposes of the FBT rules), does not refer to licences. The general meaning of "lease" in para (a) is "a disposition that creates a leasehold estate". A "leasehold estate" is defined to include "any estate … other than a freehold estate".

***Definition of "estate"***

69. In s YA 1, the definition of "estate" in relation to land includes definitions of interest in relation to land, estate or interest in land, estate in land, interest in land, and similar terms. Those terms are each defined to mean an estate or interest in the land … and include a right to the possession of the land:

> **estate** in relation to land, **interest** in relation to land, **estate or interest in land, estate in land, interest in land**, and similar terms– –
>
> (a) mean an estate or interest in the land, whether legal or equitable, and whether vested or contingent, in possession, reversion, or remainder; and
>
> (b) include a right, whether direct or through a trustee or otherwise, to—
>
> (i) the possession of the land (for example: a licence to occupy, as that term is defined in section 121A(1) of the Land Transfer Act 1952):
>
> (ii) the receipt of the rents or profits from the land:
>
> (iii) the proceeds of the disposal of the land; and
>
> (c) do not include a mortgage

70. For ease of reference, the above definition is referred to in this analysis as the definition of "estate".

71. At common law an estate includes freehold estates (such as a fee simple, stratum estates and life interests) that give rise to a bundle of rights to the person who owns that estate and also leasehold estates. A *profit-à-prendre* is an example of an interest in land because it creates property rights that can be enforced *in rem* even though it does not grant exclusive possession. However, at common law, an arrangement that is a licence is never an estate or interest in land.

72. The definition of "estate" is a "means and includes" type definition. Where the words "means" and "includes" are used together within a provision the standard approach is for the "included" matters to extend the meaning of the generally defined term. Paragraph (a) of the definition provides that the term means an "estate or interest in the land, whether legal or equitable, and whether vested or contingent, in possession, reversion, or remainder". It appears the purpose of para (a) is to establish a meaning of "estate" by recognising the many different types of estates or interests in land at common law.

73. Paragraph (b) of the definition then extends that meaning by listing three other rights in respect of land. In the Commissioner's view, the three rights listed in para (b) are separate rights, any one of which may qualify as an estate.

74. The Commissioner considers that Parliament intended these three rights in para (b) to broaden the definition of "estate". The rights listed in para (b) usually arise from the ownership or control of land, but that ownership or control may not necessarily be "legally" recognised as ownership or akin to ownership. (For example, para (b)(i) of the definition of "estate" includes the example of a licence to occupy as that term is defined in section 121A(1) of the Land Transfer Act 1952. This refers to rights arising from a shareholding in a flat or office owning company. While a shareholding in a flat or office owning company may not be an estate in land at common law, it is still recognised as creating a registrable interest for land transfer purposes.)

75. The definition of "estate" (and the definitions of "lease", "leasehold estate" and "possession") originated in response to the avoidance of land tax and were enacted into New Zealand tax legislation in 1912 before being rewritten in 1916. It appears they were intended to extend the common law to include situations where a person artificially divested themselves of the legal ownership of land while still retaining one or more of the key features of ownership, such as possession, the right to receive rents and profits or the right to sale proceeds. The definition could also be applied to long term purchase agreements where a purchaser obtained one or more of the benefits of ownership but to avoid being "named" as the owner delayed obtaining legal title. The rules were designed to apply equally to freehold and leasehold estates.

76. The definition of "estate" was included in s 2 of the Land and Income Tax Act 1916, the general definition section. The definition applied for the purposes of the whole Act, not only for the land tax provisions of the 1916 Act. Since 1916 the definition of "estate" has continued to be used in New Zealand tax legislation without substantive amendment.

77. The Commissioner considers para (b) of the definition of "estate" in s YA 1 should be read as extending the definition of "estate" beyond its meaning in para (a).

***Definition of "possession"***

78. Accepting that para (b) of the definition of "estate" extends the general definition of "estate" in para (a), it is next necessary to consider the effect that the definition of "possession" may have on the meaning of the words in para (b)(i) of the definition of "estate".

79. Paragraph (b)(i) of the definition of "estate" includes a right to the possession of the land:

> (b) includes a right, whether direct or through a trustee or otherwise, to -
>
> (i) the possession of the land (*for example*: a licence to occupy, as that term is defined in section 121A(1) of the Land Transfer Act 1952):

80. "Possession" is defined in s YA 1 as including a use that is in fact or effect substantially exclusive:

> **possession** includes a use that is in fact or effect substantially exclusive

81. Therefore reading-in the definition of "possession", it follows that the general definition of "estate" is broadened to include a right to a use of the land that is in fact or effect substantially exclusive. Taking this to the next level, for the purposes of the definition of "lease" as it applies for FBT purposes, this means an agreement will be a lease if it is a disposition that creates a use of the land that is in fact or effect substantially exclusive. Therefore, if an employer has an agreement with a third party that creates a use of the land that is in fact or effect substantially exclusive, then that land will be the premises of the employer for the purposes of the on-premises exclusion.

82. Determining the meaning of the words in the definition of "possession" is therefore important to understanding the scope of the definition of "premises of a person" in s CX 23(2)(a). Section 5(1) of the Interpretation Act 1999 provides:

> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

83. The requirements of s 5(1) of the Interpretation Act 1999 were explained by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36; [2007] 3 NZLR 767 at [22] and [24]:

> 22. It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment[10] must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment. [11]
>
> …
>
> 24. Where … the meaning is not clear on the face of the legislation, the court will regard context and purpose as essential guides to meaning.
>
> [Footnotes:
>
> [10] "Enactment" means "the whole or a portion of an Act or regulations": see s 29 of the Interpretation Act 1999;
>
> [11] See generally *Auckland City Council v Glucina* [1997] 2 NZLR 1 at p 4 (CA) per Blanchard J for the Court, and Burrows, *Statute Law in New Zealand* (3rd ed, 2003), p 146 and following.]

84. Therefore, when ascertaining the meaning of the definition of "possession" it is necessary to consider not only its plain meaning but also its purpose.

*Meaning of "a use" of the land*

85. The plain meaning of the words "a use" is arguably quite broad when the words are considered in isolation, distinct from the whole of the definition. The Concise Oxford Dictionary (12th ed, Oxford University Press, 2011) defines "use" (when used as a noun) as:

> The action of using something or the state of being used for a purpose
>
> The ability or power to exercise or manipulate one's mind or body
>
> A purpose for or way in which something can be used

86. This suggests the words "a use" refers to a use of land for some purpose created by or allowed pursuant to some legal right. For example, "a use of the land" might include a right to use the land for a particular purpose, such as with an easement. It might also include a right to use the land by occupying it or deriving income from it (although this latter type of "use" is covered by para (b)(ii) of the definition of "estate"). Importantly it may also include a personal permission "to use" land in a certain way.

87. The decision in *Merrill v Wilson* [1900] 1 QB 35 (CA) considered whether ship-owners had "actual use" of a portion of a quay within the meaning of the Factory and Workshop Act, 1895 (UK), so were "undertakers" in respect of a factory and liable to pay compensation to the dependants of a workman who died. The Court of Appeal held (at 43) that the use of the quay by the ship-owners was something less than legal occupation, but was an "actual use":

> I think that full effect is given to the words of the Act by holding them to apply to the exclusive use of part of the quay by the shipowners as regards the purposes of unloading and loading, which practically involves the exclusion of most other persons, though not necessarily of all. At the time when the accident happened to the deceased man, the respondents appear to have had **substantially the full enjoyment of a definable portion of the quay, namely, that beside which the ship lay, for the essential purpose for which the quay was intended, to the exclusion of any use of it by others for that purpose**. [Emphasis added]

88. This case is interesting because it brings together some of the different elements from the definition of "possession". However, it also demonstrates that in the context of land the term "a use" is a right to enjoy land for a particular purpose. This is consistent with the dictionary definitions of "a use" as being a way in which something can be used.

*Meaning of "in fact or effect"*

89. The Act does not define "in fact or effect". When the definition of "possession" was added to the income tax legislation in 1916, there were many large landowners. Land tax was payable annually on land owned on 31 March each year. To reduce their liability for land tax, some large landowners would enter into dummy sales - they "sold" portions of their land while still effectively retaining the benefits of ownership. In other situations, purchasers would enter into long-term lease agreements with compulsory acquisition clauses designed to delay the transfer of legal title to the purchaser. The definitions of "estate" and "possession" were drafted to ensure these "dummy sales" were not an effective means of avoiding land tax by broadening the definitions of "own" and "lease" to include land over which the landowners or purchasers had de facto control.

90. This legislative purpose was explained by the Supreme Court in *Yule v Commissioner of Taxes* [1918] NZLR 890. This case concerned the application of land tax to a property that was leased for seven years to a purchaser under a long term lease agreement before eventually being sold. It was held the purchaser/lessee was liable for the land tax because he was in possession, and the owner/lessor was not liable:

> To give effect to the object of preventing dummy sales possession ought to be given a wide rather than a narrow meaning which might lead to evasion. It is in this spirit doubtless that the Act itself now defines possession as including any use which is in fact or effect substantially exclusive, whether by virtue of exclusive occupation or not.

91. The phrase "in fact or effect" is disjunctive in nature and relates to the use of the land. It supports the view that the intended purpose of the definition of "possession" was to include as estates in land uses of land that only "in fact or effect" gave rise to possession (ie, possession enjoyed by the landowner or purchaser that may not have been considered "legal possession").

*Possession "in fact"*

92. The courts have made a distinction between factual and legal possession. For land law purposes, legal possession has traditionally been decisive in deciding whether an estate in land is created. For instance, in *Western Australia v Ward* [2002] 213 CLR 1 the High Court of Australia held that:

> **When the cases talk of exclusive possession, they speak of legal possession. It is the right to legal possession that constitutes a lease … It is the legal right to possession, not the physical fact of exclusive 'possession' or occupation, that is decisive.** That is why a lessee can bring an action for ejectment although driven from the premises and why at common law a lessee could bring an action for ejectment although he or she had not yet entered upon the land. [Emphasis added]

93. Similarly, in *Radaich v Smith* (1959) 101 CLR 209, Windeyer J stated (at 223):

> … **persons who are allowed to enjoy sole occupation in fact are not necessarily to be taken to have been given a right of exclusive possession in law**. If there be any decision which goes further and states positively that a person

> legally entitled to exclusive possession for a term is a licensee and not a tenant, it should be disregarded for it is self-contradictory and meaningless. [Emphasis added]

94. Windeyer J recognises that sometimes a person who is in sole occupation (and who therefore has de facto possession of land) is not necessarily going to be recognised as being the person in legal possession of the land for land law purposes.

95. Lord Templeman in *Street v Mountford* also recognised that there can be circumstances where an arrangement may still only be a licence notwithstanding that de facto exclusive possession can be established. For example, an owner can sometimes have a genuine need to continue to have access to land for some reason (eg, to provide services or to repair), and occupancy by the "tenant" can sometimes be referable to another legal relationship (such as employment or a mortgage) or where a purchaser is let into occupation before settlement. These legal relationships are the reason for the exclusive occupation rather than demonstrating the existence of a lease.

96. The approach taken in *Street v Mountford* was followed by the New Zealand Court of Appeal in *Fatac*. The decision in *Fatac* concerned Puhinui Quarries Ltd's sale of land in 1996 to a third party, Mt Wellington Nurseries Ltd, subject to what was described as a "licence". The licence was a right to operate the quarry granted by Puhinui to Atlas Consolidated Ltd in 1991. If the quarry right was a licence (rather than a lease), then there was a liability for GST as the sale could not be zero-rated as a sale of a tenanted property.

97. The Court of Appeal discussed the history of the lease/licence distinction in the United Kingdom, Australia and New Zealand. The court noted that New Zealand had over time adopted a broader approach than had the United Kingdom. The Court of Appeal took the opportunity to reject that broader approach in favour of a return to the United Kingdom's approach as set out in *Street v Mountford*. The Court of Appeal held (at [38] and [39]):

> [38] In our view first principles support the right to exclusive possession as the litmus for tenancies. Exclusive possession allows the occupier to use and enjoy the property to the exclusion of strangers. Even the reversioner is excluded except to the extent that a right of inspection and/or repair is expressly reserved by contract or statute. A tenant enjoys those fundamental, if temporary, rights of ownership that stem from exclusive possession for a defined period. Stipulated reservations stem from that premise. The reverse is true for a licensee. Lacking the right to exclusive possession, a licensee can merely enter upon and use the land to the extent that permission has been given. It is this reversal of starting point that provides the rationale for recognising an estate in the land, in the one case, and a mere personal right or permission to enter upon it, in the other: see further *Street v Mountford*, supra, at 816B-D.
>
> [39] Because the tenancy/licence distinction turns on those substantive rights granted to the occupier, it remains unaffected by the label which the parties choose to place upon their transaction. **It has sometimes been said that the distinction between tenancies and licences turns on the intention of the parties. This can be misleading unless it is appreciated that the only intention that matters is intention as to substantive rights, not intention as to legal classification**. [Emphasis added]

98. The Court of Appeal went on to discuss several refinements to the exclusive possession test that adopted the approach laid down in *Street v Mountford* (at [40]–[42]):

> [40] Analysis of the case law reveals a series of ancillary principles for the purpose of distinguishing tenancies from licences. None of these, however, undermines

exclusive possession as the fundamental test. Exclusive possession terminable by the owner at will would, at least as against the owner, be possession in name only. Accordingly a necessary incident of a meaningful right to exclusive possession is a defined term, whether fixed or periodic (see further *Street v Mountford*, supra, at 816G). The same is true of an intention to be legally bound (ibid at 819-822).

[41] Rent would seem relevant to the presence or absence of an intention to be legally bound but not a precondition for a tenancy per se. ….

[42] Limitations upon the purposes to which the occupier can put the land do not negate a tenancy: *Glenwood Lumber Co Ltd v Phillips*, supra, at 408-409 (PC). **Exclusive possession is not synonymous with an unqualified range of permitted uses**. **Equally consistent with the critical role of exclusive possession is the refusal to recognise a tenancy where the owner is prevented by statute from granting a tenancy (*Street v Mountford* at 821*),* where the landlord's right of entry to provide services is inconsistent with exclusive possession (ibid at 818, 824-825), or where the right to exclusive possession can be terminated pursuant to some legal relationship extraneous to that of landlord and tenant**. [Emphasis added]

99. The examples in [42] are situations where a court may overlook the decisive fact of a person's exclusive possession and find that the arrangement is not a lease.

100. The Court of Appeal (at [45]) then discussed how de facto possession can be used as a guide to whether a person has exclusive possession:

> [45] Equally consistent with the exclusive possession test are the many decisions concerned with interpretation of the contract or grant conferring the right to occupation. The fundamental question here is whether the parties intended that the occupier would have the right to exclusive possession. On that subject **de facto exclusive possession can be an important guide to contractual intentions.** That would seem the best explanation for the significance often attached to possession in fact - see, for example, *Isaac v Hotel de Paris Ltd* at p 245; *Street v Mountford* at p 823; and *Daalman v Oosterdijk* [1973] 1 NZLR 717. [Emphasis added]

101. This decision demonstrates that the courts recognise the concept of de facto possession. However, for the purposes of the common law distinction between leases and licences de facto possession is only an indicator and not decisive. In contrast, for the purposes of the definition of "possession" in s YA 1, de facto (substantially exclusive) possession is a decisive factor.

*Possession "in effect"*

102. The courts have also discussed situations where the effect of an agreement is decisive as to its true nature rather than the descriptions used in the form of the agreement. In *Radaich v Smith* Menzies J held (at 220):

> 2. The deed is called a "license" (sic) and the parties thereto "licensors" and "licensee", and it was argued that not only did these descriptions in a formal document show the intention of the parties but also that the substance of its provisions justified these descriptions. **When looked at as a matter of both form and substance, the deed seems to me to speak with two voices, but what I regard as decisive in favour of its creating the relationship of landlord and tenant is that it gives the "licensee" the right of exclusive possession of the premises for the term granted thereby.** [Emphasis added]

103. Furthermore, Lord Davey in *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405 held (at 408):

> In the so-called licence itself it is called indifferently a licence and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words but of substance. **If the effect** of the instrument is to give the holder an exclusive right of occupation of the land, though subject to

> certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself … [Emphasis added]

104. As noted above, in *Fatac* the New Zealand Court of Appeal stated (at [39] and [46]):

> [39] Because the tenancy/licence distinction turns on those substantive rights granted to the occupier, it remains unaffected by the label which the parties choose to place upon their transaction. It has sometimes been said that the distinction between tenancies and licences turns on the intention of the parties. This can be misleading unless it is appreciated that the only intention that matters is intention as to substantive rights, not intention as to legal classification. As Lord Templeman put it in *Street v Mountford*, supra, at p 819:
>
> > … The consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they are only creating a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.
>
> Windeyer J made the same point *in Radaich v Smith*, supra, when he said at p 222:
>
> > Whether the transaction creates a lease or a licence depends upon intention only in the sense that it depends upon the nature of the right which the parties intend the person entering upon the land shall have in relation to the land.
>
> [46] Terminology traditionally used to describe a tenant's right of occupation (eg the right "to enter upon, use, and enjoy" the land) is significant only if and to the extent that it indicates an intention that the occupier enjoy exclusive possession (*Addiscombe Garden Estates Ltd & Anor v Crabbe & Ors* [1957] 3 All ER 563 (CA) at p 567).

105. In *National Car Parks Ltd v Trinity* [2001] 2 EGLR 43 the agreement included a provision that stated the agreement did not give any proprietary interest to the occupier in the premises. Judge Rich QC considered the real issue to be the effect the agreement actually had and not what the agreement was that the parties expressed themselves as intending to make (at 44):

> This indicates the intention of the parties, and it is not to be assumed that they failed in such intention, although the need to express it raises a question, and that is, what is the effect of the agreement that they actually made, and not, what was it that they expressed themselves as intending to make?
>
> There is no issue between the parties as to the proper approach to that question. It is thus expressed in *Hill and Redman's Law of Landlord and Tenant* at para A-5632:
>
> > **In deciding whether a grant amounts to a lease, or is only a licence, regard must therefore be had to the substance rather than the form of the agreement**, for the relationship between the parties is determined by the law and not by the description which they choose to put on it. To put it another way, **it is the effect of the agreement in law which determines its category and not what the parties say their intention was –– still less the label they put on the agreement**.
> >
> > One must look at the transaction as a whole and at any indications one finds in the terms of the contract between the two parties to find whether in fact it is intended to create a relationship of landlord and tenant or that of a licensor and licensee. [Emphasis added]

106. These cases demonstrate that the courts consistently consider the rights a person actually has in the land to determine whether an estate in land exists. If the person is found to have rights to legal exclusive possession – howsoever the arrangement is described, the arrangement will be treated as, in effect, being an estate in land.

*Conclusions on "in fact or effect"*

107. In the Commissioner's view the words "in fact" in the definition of "possession" extend the concept of possession for the purposes of the Act to include situations where the user is actually occupying or using the land without the requisite legal exclusive right to possession of the land. This is broader than the common law concept of "possession".

108. The Commissioner considers the reference to "in effect" in the definition of "possession" emphasises the need to have regard to the substance of the arrangement in law between the parties. These words do not extend but reflect the common law in this regard. The words "in effect" may also cover the situation where a lessee may not in fact be exercising their right to possession, despite being legally entitled to do so.

109. In summary, the words "in fact or effect" in the definition of "possession" mean that in limited circumstances a person who is, in fact, in occupation or has use of the land may be considered to be in "possession" of the land even though they may not satisfy the requirements for legal possession of the land. Also, a person who is not in occupation or is not actually using the land may still be considered to be in possession of the land, if they in effect have a right to use the land. These words give effect to the purpose of the definition as it was explained by the court in *Yule*.

*Meaning of "substantially exclusive"*

110. As explained above (at [92]), the common law approach to possession turns on the substantive rights granted to the occupier. Anything less than *exclusive* possession is insufficient for an estate or interest in land at common law. (It is recognised that sometimes a lessor will reserve certain rights or impose restrictions on a lessee but it is generally accepted that this need not disturb a lessee's exclusive possession.)

111. In contrast, the definition of "possession" in s YA 1 provides that a use that is "substantially exclusive" is sufficient for tax purposes. The Act does not define when a use will be "substantially exclusive". The courts have not tested this phrase.

112. The ordinary meaning of "substantially" in the Concise Oxford Dictionary (12th ed, Oxford University Press, 2011) is:

> 1 To a great or significant extent
>
> 2 For the most part; essentially

113. Black's Law Dictionary (6th ed, West Publishing, 1990) defines the term "substantially" as:

> without material qualification; in the main; in substance; materially.

114. In case law, the meaning given to the term "substantially" depends on the context in which it is used and the facts. For example in *R v Lloyd* [1965] 1 QB 175 and *Troon Place Investments Ltd v CIR* (1995) 17 NZTC 12,175 "substantially" refers to something less than totally or wholly but more than trivial or minimal (see also *Jolly v Palmer* [1985] 1 NZLR 658). The meaning falls somewhere in between. It is a word of degree with the cases suggesting it is closer to the "totally or wholly" end of the spectrum than to the "trivial or minimal" end. The courts have found that "substantially" may refer to a significant part of something (*Lloyd*). In this context the Commissioner considers "significant" means a relatively large amount so as to be important or noteworthy. The meaning of

"substantially" has also been equated with the words significant, real and considerable when used as a negative test (*Plato v Ashton* (CA 25/84, 1 October 1984)).

115. When "substantially" is used to qualify an unambiguous term (such as "full-time"), "substantially" has been interpreted by equating it to phrases such as "to all intents and purposes", and "in the main". In *Troon Place Investments* Tompkins J considered that in the context of s 190 of the Income Tax Act 1976, which limited a deduction for excessive remuneration paid to a director of a company who was employed substantially full-time in the business of a company, "substantially" meant "to all intents and purposes, in the main" and that to be employed substantially full time, a person need not be employed full time.

116. Tompkins J commented (at 12,180) on the meaning of the phrase "employed substantially full time":

> The phrase is one of degree. A person does not have to be employed full time - it is sufficient if the employment is "substantially" full time. In my view, in the phrase and in the context of the section, the word is used in the sense given to it by the *New Shorter Oxford Dictionary* as meaning "to all intents and purposes, in the main". If the person is to all intents and purposes employed full time or is in the main employed full time, then such a person would be employed substantially full time.

117. In the Commissioner's view the decision in *Troon Place Investments* is helpful. This is because the word "substantially" is being considered in the context of the Income Tax Act and modifies an otherwise "definite" word (that is, the words "full-time" and "exclusive" are similarly definite in their scope).

118. *Simpson v ACC* (Decision 206-2009, AI 250-04), is an Accident Compensation Corporation decision that attempted to identify the cause of a person's ill health. Although the decision is not factually relevant to the matters being addressed in the Rulings, Judge Barber's discussion does offer a contextual example of the words "substantially" and "exclusive" being used together. In the case, age-related degeneration was not found to be the exclusive cause of the appellant's symptoms; nor was degeneration found to be substantially the cause of the symptoms. This was because the appellant could point to an earlier injury that had a significant causal connection with the symptoms.

119. Applying Judge Barber's thinking to the words in the definition of "possession", a use of land by a person may not be "substantially exclusive" if there is another person with a competing right to also use the land.

120. Based on the dictionary meanings and the limited case law, on balance, the Commissioner considers the better view is that, in the context of the definition of "possession" in s YA 1, the words "substantially exclusive" are referring to a use of the land by a person that is, to all intents and purposes, or in the main, exclusive. In other words, no other person has (or retains) a competing right to use the same land such that it could be said that the first person is prevented from having a use of the land that is substantially exclusive.

*Similarities with English cases on occupiers*

121. Various United Kingdom cases included reference to the term "substantially exclusive" in the context of the occupation of land. Although not directly relevant to the definition of "possession", these cases offer

some insights into the expression "substantially exclusive" as it is used in the context of land.

122. The Court of Appeal in *Hutt Valley Electric-Power Board v Lower Hutt City Corp* [1949] NZLR 611 discussed the rights that power companies are granted over land in respect of poles and power lines. The Court of Appeal (at 616) referred to the English decision of *Newcastle-under-Lyme Corp v Wolstanton, Ltd* [1946] 2 All ER 447:

> In the case of a right-of-way, there is merely the right of passage, but here is a *de jure* occupation—physical occupation of a piece of land—and no inference is permitted in respect of the poles or power lines, the right being statutory. **The plaintiff Board is a licensee with substantially exclusive rights to part of the soil; and occupation is a question of fact** …. [Emphasis added]

123. The decision in *Newcastle-under-Lyme* concerned whether a gas company had an exclusive right of occupation of the land through which its pipes or cables passed that would enable it to sue for nuisance. It was held that the company did. In reaching its decision, the court considered (at 454) the status of gas companies (and the like) as occupiers of the land for rating purposes:

> It is to be observed that in all the rating cases the question before the court was whether the subject sought to be rated was an "occupier of lands" within the meaning of the Poor Relief Act, 1601. As regards the word "lands" the effect of the cases has been to give a wide interpretation to it; and **as regards the word "occupier" the effect has been to establish that the question is one of fact—whether (to state the matter briefly and without attempting a definition) the subject sought to be rated was in de facto possession to the substantial exclusion of any enjoyment of the land by others and in circumstances importing some degree of permanence**. **It has been clearly laid down that the question is not a matter of title and does not depend upon title**.
>
> In the words of Lord Russell of Killowen ([1936] 2 All ER 322, at p 329), in the *Westminster City* case:
>
> > '… it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement.'
>
> I cite also the language of Wightman J (1 E & E 716, at p 720) in the *West Middlesex Waterworks* case, which was quoted with approval by Lord Davey ([1895] AC 117, at p 132) in the *Halkyn Drainage* case:
>
> > '… the first question is whether the company are rateable for their mains, which are laid under the surface of the highway, without any freehold or leasehold interest in the soil thereof being vested in the company. We think they are. These mains are fixed capital vested in land. The company is in possession of the mains buried in the soil, and so is *de facto* in possession of that space in the soil which the mains fill, for a purpose beneficial to itself. The decisions are uniform in holding gas companies to be rateable in respect of their mains, although the occupation of such mains may be *de facto* merely, and without any legal or equitable estate in the land where the mains lie, by force of some statute.' [Emphasis added]

124. This decision makes it clear that to be an occupier for rating purposes it was not necessary for the occupier to have a legal estate in the land. Instead it was sufficient to be in de facto possession to the substantial exclusion of any enjoyment of the land by others. In the Commissioner's view this is essentially the same test as is provided for in the definition of "possession".

125. The court in *Newcastle-under-Lyme* followed the approach to rating occupiers of land as it was explained by Lord Russell of Killowen in the House of Lords decision of *Westminster City v Southern Railway Co* [1936] 2 All ER 322. That case concerned premises at Victoria Station in London. The question was whether the premises (including shops, stalls, a bank, kiosks, and the like) were "so let out as to be capable of separate assessment" for rates purposes. It was held that the occupiers of the

premises had sufficient de facto and exclusive occupation of the premises to be assessed for rates as occupiers.

126. Lord Russell of Killowen commented that sometimes more than one person may have claims to the use or occupancy of premises (eg, a landlord and a tenant). He said (at 326):

> The question in every such case must be one of fact, - namely, whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises.

127. He gave the example of a lodger in a lodging house not being treated as an occupier for rating purposes. While Lord Russell acknowledged that this was a pragmatic result, he noted sound legal reasons also existed for the decision (at 327):

> But it can I think be justified and explained when we remember that the landlord, who is the person held to be rateable, is occupying the whole premises for the purpose of his business of letting lodgings, that for the purpose of that business he has a continual right of access to the lodgers' rooms, and that he, in fact, retains the control of ingress and egress to and from the lodging house, notwithstanding that the power of ingress and egress at all hours, is essential to the lodger. The general principle applicable to the cases where persons occupy parts of a larger hereditament seems to be that if the owner of the hereditament (being also in occupation by himself or his servants) **retains to himself general control over the occupied parts**, the owner will be treated as being in rateable occupation; if he retains to himself no control, the occupiers of the various parts will be treated as in rateable occupation of those parts. [Emphasis added]

128. Lord Russell then noted that this principle had been applied in cases other than lodgers. He referred to cases involving ships using wharves to load and unload cargo. He noted that each case depends on its facts and an examination of the degree of control the landlord or owner can exercise to interfere with the occupier's enjoyment of the premises.

129. It is interesting to consider the similarities between the issues addressed by Lord Russell and those being considered in these Rulings. Lord Russell of Killowen's analysis can be read as suggesting that an occupier for rating purposes is a person who is in fact or effect enjoying the use of the relevant land to the substantial exclusion of all others, and in particular the owner. When read this way, it is similar to the definition of "possession" in s YA 1. The English cases clarify that when an owner (or landlord) occupies the land along with a "tenant", then the dominant occupier needs to be established for rating purposes. This is determined by considering whether the owner retains such a degree of control over the land that it interferes with the tenant's enjoyment of the land so the tenant is prevented from enjoying a use of the land that is substantially exclusive.

*Reading definition of "possession" as a whole*

130. Having considered the separate elements of the definition of "possession", it is now appropriate to consider the definition of "possession" in s YA 1 as a whole:

> … a use that is in fact or effect substantially exclusive

131. In the Commissioner's view a person's use of the land will be substantially exclusive when to all intents and purposes, or in the main, no other person (including the owner) has (or retains) a competing right to use the same land.

132. In the context of car parks and the FBT on-premises exclusion, in most situations "possession" will be established by determining whether, in granting a right to use the land for parking, anyone else, including the owner of the land or car park operator has (or retains) a degree of control over the land such that it prevents the employer from having, to all intents and purposes, exclusive use of the land. If someone else, including the owner or car park operator, does have or retain such a degree of control over the parking spaces then the employer will not have a substantially exclusive right to use the land and the car parks will not be the premises of the employer.

133. When establishing whether a use of land is substantially exclusive account is to be taken of what is actually occurring between the parties and to the actual effect of any agreement between the parties. It does not matter whether the employer's use does not satisfy the concept of "legal possession" at common law, but it must be substantially exclusive.

134. In the Commissioner's view this interpretation of the definition of "possession" is consistent with the purpose of the definition as explained by the Supreme Court in *Yule*.

135. The Commissioner also thinks her interpretation of the definition of "premises of a person" when read as a whole is consistent with the natural and ordinary meaning of the words "premises of the employer". The Supreme Court of Western Australia considered the phrase "premises of an employer" in *Molina v Zaknich* (2001) 125 A Crim R 401. *Molina* concerned, among other things, access by union officials to an employer's premises. Hasluck J held that the natural and ordinary meaning of the phrase "premises of an employer" refers to a site under the control of the employer. The Commissioner considers this is consistent with her interpretation of the definition.

*Absence of word "licence" from definitions*

136. In forming her view, the Commissioner considers it is significant the term "licence" is not explicitly included in s CX 23, in para (a) of the definition of "lease" (although it is expressly included in other parts of the definition of "lease"), or in the related definitions of "leasehold estate", "estate", "interest" or "possession". (It is noted that para (b)(i) of the definition of "estate" includes an example of a licence to occupy arising from a share in a flat or office owning company. The Commissioner does not consider this very specific example to be in any way suggestive that licences to occupy in general are included within the definition of "estate".)

137. It is generally acknowledged for common law purposes that a clear distinction exists between a lease and licence, and that legally the two concepts are mutually exclusive. If Parliament had intended for *all* licences to be treated as leases, then it would have explicitly provided for this as it has in other situations.

**Alternative views**

138. The Commissioner is aware of possible counter-arguments suggesting that all car parking spaces provided by an employer for employees should be treated as being the employers "premises" under s CX 23(2)(a).

139. There is an argument that the word "include" in the definition of "premises of a person" in s CX 23(2)(a) should be interpreted non-exhaustively, so that any car parks that are licenced by employers can be included as an

employer's premises. The Commissioner accepts that the word "include" normally indicates an inclusive definition. However, as noted above, the Commissioner considers the better view, in this context, is to interpret "include" in the definition of "premises of a person" exhaustively. In the Commissioner's view such an interpretation is supported by:

- the intended purpose of the FBT rules;
- the construction of the definition of "premises of a person" in s CX 23(2);
- the nature of the "class" of items in s CX 23(2)(a); and
- the implication that if Parliament had intended the class to be broader than premises that are owned or leased it could have explicitly provided for it.

140. Another counter-argument is that the definition of "lease", as extended by the definition of "possession", supports all licences being included as "leases". However, in the Commissioner's view, when the definition of "possession" is interpreted in light of its text and its purpose, an employer will only have substantially exclusive use of the car park when they have a substantial degree of control over the car park. Without such a degree of control, the Commissioner does not consider that the car park is "leased" for the purposes of the definition of "premises of a person".

**Conclusions**

141. The premises of an employer include car parks owned or leased by the employer. The premises of an employer are not restricted to business premises of the employer.

142. When determining whether premises are leased by an employer, regard must be had to the relevant definitions in s YA 1 of "lease", "estate", "leasehold estate" and "possession".

143. At common law (and for the purposes of the general definition of "estate" in para (a) of the definition), land is leased when the employer has legal possession of the land to the exclusion of all others, including the owner. Where an employer is granted something less than exclusive possession of the land (such as a licence to occupy the land) there is no lease at common law or for the purposes of the general definition of "estate".

144. Paragraph (b) of the definition of "estate" extends the general definition of "estate" to include a right to possession of the land. "Possession" is defined as a right to use the land that is in fact or effect substantially exclusive.

145. The premises of an employer will not usually include a car park that an employer is merely licensed to use, *unless* the employer's right to use the car park is in fact or effect substantially exclusive.

146. An employer will have a right to use a car park that is in fact or effect substantially exclusive when no-one else (including the owner, the car park operator, or any third party) has a competing right to use the car park premises that could be said to prevent the employer from enjoying a use that is substantially exclusive.

147. Sometimes when an owner or landlord is operating their business from the land that they have granted rights over, they will seek to retain some degree of control over the land (eg, the owner of a lodging house or a port

company over its wharves). In the context of car parking, if the owner or the car park operator retains a degree of control over the relevant car park that might be sufficient to prevent the employer from enjoying substantially exclusive use of that park.

148. In the Commissioner's view the words "in fact" in the definition of "possession" extend the common law concept of "possession" to include situations where the user is actually controlling the land without the requisite legal exclusive right to possession.

149. The Commissioner considers the reference to "in effect" in the definition of "possession" emphasises the need to have regard to the substance of the arrangement in law between the parties. These words do not extend but reflect the common law in this regard. The words "in effect" may also cover the situation where a lessee may not in fact be exercising their right to possession, despite being legally entitled to do so.

150. Therefore, when determining whether an employer has substantially exclusive use of the land it is not the legal form of the arrangements that is decisive but the substance of the arrangements demonstrated either through the fact of what is actually occurring or through the effect of the true arrangements between the parties.

151. The Commissioner accepts that the definition of "lease" for the purposes of s CX 23 is wider than the common law meaning of "lease" as it includes a car park which the employer has a right to use that is in fact or effect substantially exclusive. However, the Commissioner does not consider this to mean *every* right to use a car park will be a "lease" for tax purposes. Many car parking arrangements will continue to fall outside the definition of "lease" for the purposes of s CX 23.

## Examples

152. The following examples illustrate the way in which an employer's overall arrangement with a car park owner or operator needs to be considered to determine if the employer has a right to use a car park that is in fact or effect substantially exclusive. The conclusions in the examples are based on the facts as stated. It is important to bear in mind that every situation is different, and the different features of parking arrangements may result in different FBT outcomes. In each example it is assumed that the provision of a car park by the employer to its employee is a benefit for FBT purposes.

### Example 1 – Leased car parks on vacant land adjacent to business

153. Diane provides some of her employees with car parks on vacant land across the road from the property from which she carries on her business. Diane is the lessee of that land under an enforceable and written lease agreement with the owner of the land.

154. Because the rights granted to Diane under the agreement are enforceable against third parties, she has exclusive possession of the land, and the definition of "lease" for the purposes of establishing the "premises of a person" is satisfied. The car parks Diane provides to her employees are excluded from being a "fringe benefit" by s CX 23, and so no FBT is payable in respect of the car parks. Diane does not have to carry on her business on the leased land for the exclusion to apply.

### Example 2 – Allocated parking under a lease agreement with a group company

155. Eastern City Limited, a company in the same group as Eastern Port Limited, enters into a deed of lease with Wharf St Developments Limited, a company that provides parking in a car parking building. Under the arrangement, Eastern City is granted a lease of 12 parking spaces. The parking spaces are identified on a plan of the car park, and the plan is attached to the lease agreement. The parking spaces cannot be changed unless a new deed of lease or a variation of lease is executed.

156. Under the deed of lease Eastern City is responsible for monitoring and requesting removal of any unauthorised cars that park in its parking spaces. Eastern City is restricted to using the car parks for parking cars, but can approach Wharf St Developments to make improvements to the car parks, or arrange for other types of vehicles to use the parks, which Wharf St Developments cannot unreasonably deny.

157. The Commissioner considers that in these circumstances the car parks are the premises of Eastern City, because Eastern City in fact and effect has a right to use the car parks that is substantially exclusive.

158. Employees of Eastern Port, a company in the same group as Eastern City, use the car parks for parking while at work. The car parking benefit provided by Eastern Port to its employees will be used or consumed on the premises of Eastern City, a company in the same group as Eastern Port, so the exclusion in s CX 23 applies and no FBT is payable in respect of the car parks.

### Example 3 – Allocated parking in a commercial car park

159. Southern City Limited wants to provide parking in a commercial car park for 50 of its employees. It enters into a standard month-by-month agreement with a commercial car park operator close to Southern City's office.

160. Under the agreement 50 parking spaces in the commercial car park are allocated to Southern City's employees for them to park in from 7am to 7pm Monday to Friday. These car parks are each marked with a sign that reads "Reserved for Southern City 7am to 7pm Mon-Fri". Southern City is issued with 50 access cards enabling the cardholders to access the car park between those hours. Under the terms of the agreement, if an unauthorised person parks in one of Southern City's car parking spaces during those hours, Southern City has the right to request the car park operator remove the vehicle. The car park operator is only able to re-allocate Southern City's car parks or alter the hours of access with Southern City's prior agreement.

161. The Commissioner considers that in these circumstances the car parks are the premises of Southern City. This is because the employer in fact has a right to use the car parks that is substantially exclusive during the agreed period. No-one else, including the car park operator, has a competing right to use the reserved car parks at those times. As a result the exclusion in s CX 23 applies and no FBT is payable in respect of Southern City's car parks. The Commissioner considers the same result would apply regardless of the number of car parks "leased" by Southern City.

**Example 4 – Allocated parking floor**

162. Coastal City Limited has many employees who use parking facilities provided by a nearby commercial car park. It decides there are enough employees that need parking that it could use the whole top floor of the car park. The proprietor of the commercial car park agrees to install a card access gate so that only Coastal City's employees can use the top floor. A car parking agreement is prepared using the proprietor's standard-form licence agreement. Signage is erected identifying the floor as being reserved for Costal City's employees' use.

163. The Commissioner considers that in these circumstances the top floor of the car parking building is the premises of Coastal City even though under the agreement Coastal City is only licensed to use the parks. This is because the employer in fact has a right to use the top floor of the building that is substantially exclusive. The car park proprietor retains only a minimal degree of control over the floor. No-one else has a competing right to use the floor. As a result the exclusion in s CX 23 applies and no FBT is payable in respect of the parking on the top floor.

**Example 5 – Unallocated parking in commercial car park**

164. Northern City Limited wants to provide parking in a commercial car park for three of its employees. It enters into a one year agreement with a commercial car park operator close to Northern City's office. The agreement is described as a lease however no particular parking spaces are designated for Northern City's employees. Instead the car park operator has set aside some parking spaces in a reserved area of the car park to be shared with other businesses. Three parking spaces will always be available for Northern City's employees in the reserved area, although not the same spaces every time.

165. The Commissioner considers that neither the car park, nor any part of it, is the premises of Northern City. Despite the agreement being called a lease, the parking spaces are not owned or leased by Northern City, because Northern City (and its employees) cannot be said to have in fact or effect a use of specific parking spaces that is substantially exclusive. Other authorised business users of the car park can also park in the reserved area, sharing the same spaces at the same time they are made available to Northern City. Northern City simply has permission to enter and use the reserved area of the car park with no substantially exclusive right to use any particular car parking space. Northern City has no right to arrange for vehicles to be removed from the car parking spaces in the reserved area.

166. The provision of car parking by Northern City to its three employees is not excluded from being a "fringe benefit" by s CX 23(2)(a). As a result FBT may be payable in respect of the car parks.

**Example 6 – Prepaid parking in a public car park**

167. Sunny Gifts, a retail store in a busy tourist town, provides parking for two of its employees in an open air public car park behind the town's main street. The car park is open to the public on an hourly fee-basis, however store owners can purchase parking permits for workers. The permits are displayed in the front windscreen of the car and entitle the holder to all-day parking every day. There are no designated spaces in the car park for parking permit holders.

168. The provision of car parking by Sunny Gifts to its two employees is not excluded from being a “fringe benefit” by s CX 23(2)(a). The Commissioner considers neither the car park, nor any part of it, to be the premises of Sunny Gifts. As a result FBT may be payable in respect of the car parks.

## References

### Expired Ruling(s)

BR Pub 99/6 Car parks provided by employers - fringe benefit tax exemption

### Subject references

Car park; fringe benefit; fringe benefit tax; possession; premises

### Legislative references

Income Tax Act 2007, ss CX 2, CX 23, YA 1

### Case references

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## Appendix – Legislation

1. Section CX 2(1) defines what is meant by a fringe benefit:

**CX 2 Meaning of fringe benefit**

*Meaning*

(1) A **fringe benefit** is a benefit that—

(a) is provided by an employer to an employee in connection with their employment; and

(b) either—

(i) arises in a way described in any of sections CX 6, CX 9, CX 10, or CX 12 to CX 16; or

(ii) is an unclassified benefit; and

(c) is not a benefit excluded from being a fringe benefit by any provision of this subpart

2. Section CX 23 provides an exclusion from fringe benefit tax for benefits provided on an employer's (or group company's) premises:

**CX 23 Benefits provided on premises**

*When not fringe benefit*

(1) A benefit, other than free, discounted, or subsidised travel, accommodation, or clothing, is not a fringe benefit if the benefit is—

(a) provided to the employee by the employer of the employee and used or consumed by the employee on the premises of—

(i) the employer:

(ii) a company that is part of the same group of companies as the employer:

(b) provided to the employee by a company that is part of the same group of companies as the employer of the employee and used or consumed by the employee on the premises of—

(i) the employer:

(ii) the company that provides the benefit.

*Premises of person*

(2) In this section, the premises of a person—

(a) include premises that the person owns or leases:

(b) include premises, other than those referred to in paragraph (a), on which an employee of the person is required to perform duties for the person:

(c) do not include premises occupied by an employee of the person for residential purposes.

3. The definitions in s YA 1 that relate to the terms “owns” or “leases” as they are used in s CX 23 are:

**YA 1 Definitions**

In this Act, unless the context requires otherwise,—

**estate** in relation to land, **interest** in relation to land, **estate or interest in land, estate in land, interest in land**, and similar terms– –

(a) mean an estate or interest in the land, whether legal or equitable, and whether vested or contingent, in possession, reversion, or remainder; and

(b) include a right, whether direct or through a trustee or otherwise, to—

(i) the possession of the land (for example: a licence to occupy, as that term is defined in section 121A(1) of the Land Transfer Act 1952):

(ii) the receipt of the rents or profits from the land:

(iii) the proceeds of the disposal of the land; and

(c) do not include a mortgage

**land—**

(a) includes any estate or interest in land.

(b) includes an option to acquire land or an estate or interest in land:

(c) does not include a mortgage:

(d) is defined in section CB 19(3) (Business exclusion from sections CB 6 to CB 11) for the purposes of that section:

(e) is defined in section IZ 1(12) (Use of specified activity net losses) for the purposes of that section:

(f) in the definitions of **permit area**, **petroleum mining asset**, **prospecting expenditure**, and **residual expenditure**,—

(i) means all land within the territorial limits of New Zealand; and

(ii) includes land below the territorial sea of New Zealand or any other waters within the territorial limits of New Zealand; and

(iii) includes the continental shelf; and

(iv) includes the seabed and subsoil below any sea that is beyond the territorial sea of New Zealand but that, by New Zealand legislation and under international law, has been or may be designated as an area in which the rights of New Zealand relating to natural resources may be exercised

**interest,—**

(a) for a person’s income,—

(i) means a payment made to the person by another person for money lent to any person, whether or not the payment is periodical and however it is described or calculated; and

(ii) does not include a redemption payment; and

(iii) does not include a repayment of money lent:

(b) for the RWT rules and the NRWT rules, includes a redemption payment:

(c) in sections DB 6 (Interest: not capital expenditure), DB 7 (Interest: most companies need no nexus with income), and DB 8 (Interest: money borrowed to acquire shares in group companies),—

(i) includes expenditure incurred under the financial arrangements rules or the old financial arrangements rules; and

(ii) does not include interest to which section DB 1(1)(e) (Taxes, other than GST, and penalties) applies:

(d) in relation to land, **interest in land**, **estate or interest in land**, and similar terms are defined under the definition of **estate**

**lease—**

(a) means a disposition that creates a leasehold estate.

(b) in sections DZ 9 (Premium paid on land leased before 1 April 1993) and EZ 8 (Premium paid on land leased before 1 April 1993),—

(i) means a disposition by which a leasehold estate is created; and

(ii) includes a licence:

(c) for the purposes of subpart EE (Depreciation), includes a licence to occupy:

(d) in sections EJ 10 (Personal property lease payments), EX 21(30) and (31) (Attributable CFC amount and net attributable CFC income or loss: calculation rules), FA 6 to FA 11 (which relate to finance leases), FZ 2 to FZ 4 (which relate to specified leases) and in the definitions of **cost price** (paragraphs (b) to (e)), **finance lease**, **guaranteed residual value**, **initial period**, **instalment**, **lessee** (paragraph (b)), **lessor** (paragraph (b)), **operating lease**, **outstanding balance**, **personal property lease asset**, **specified lease**, and **term of the lease**,—

(i) means an agreement under which a lessor transfers to a lessee for the term of the lease a personal property lease asset or the right to possess a personal property lease asset in consideration for a personal property lease payment; and

(ii) includes a sublease; and

(iii) includes a licence to use intangible property; and

(iv) includes a hire or bailment; and

(v) includes a lease that is 2 or more consecutive or successive leases treated as 1 lease because the same personal property lease asset had been leased to the same lessee or an associated person of the lessee under the consecutive or successive leases and the Commissioner, having regard to the tenor of this paragraph, regards the consecutive or successive leases as 1 lease; and

(vi) does not include a hire purchase agreement, the definition of which applies, for this purpose, as if it did not contain paragraph (f); and

(vii) does not include an assignment of a hire purchase agreement, the definition of which applies, for this purpose, as if it did not contain paragraph (f):

(e) is defined in section GC 5(5) (Leases for inadequate rent) for the purposes of that section:

(f) in the financial arrangements rules, means—

(i) a lease as described in paragraph (d):

(ii) an arrangement that would be a lease as described in paragraph (d) if the arrangement did not relate to real property, livestock, or bloodstock

**leasehold estate** includes any estate, however created, other than a freehold estate.

**own,—**

(a) for land, means to have an estate or interest in the land, alone or jointly or in common with any other person:

(b) for the ownership of depreciable property, is defined in sections EE 2 to EE 5 (which relate to depreciation

**possession** includes a use that is in fact or effect substantially exclusive