Inland Revenue
Te Tari Taake

SUBSIDISED TRANSPORT PROVIDED BY EMPLOYERS TO EMPLOYEES – VALUE FOR FRINGE BENEFIT TAX PURPOSES

PUBLIC RULING BR Pub 99/2

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

Taxation Laws

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

This Ruling applies in respect of sections CI 2(1), CI 3(6), CI 4(1), and the definition of "subsidised transport" in OB 1 of the Income Tax Act 1994.

The Arrangement to which this Ruling applies

The Arrangement is the provision of:

- Transportation to an employee by the employer of that employee, where that employer carries on a business that consists of or includes transportation of the public; or

- Transportation to an employee by a person with whom the employer of that employee has entered into an arrangement for the provision of that transportation, where that employer carries on a business that consists of or includes transportation of the public.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- Where transportation is provided by the employer to an employee, the value of the benefit for fringe benefit purposes is 25% of the highest amount charged by the employer to the public for transportation of the same class, extent, and occasion.

- Where transportation is provided to an employee by a third party with whom the employer has entered into an arrangement for that benefit to be so provided or granted to the employee, the value of the benefit for fringe benefit purposes is the greater of:

    - 25% of the highest amount charged by the third party to the public for transportation of the same class, extent, and occasion; or
    - The amount that the employer is so liable to pay or has so paid to the third party for the benefit being provided by the third party.

In the definition of "subsidised transport" in section OB 1, "class" refers to the classes of transportation available, such as first, business, or economy class; "extent" refers to transportation with the same departure and destination points; and "occasion" refers to the time of carriage.

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The period for which this Ruling applies

This Ruling will apply for the period 1 July 1999 to 30 June 2002.

This Ruling is signed by me on the 18th day of May 1999.

Martin Smith
General Manager (Adjudication & Rulings)

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COMMENTARY ON PUBLIC RULING BR Pub 99/2

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 99/2 ("the Ruling").

The subject matter covered in the Ruling was previously dealt with in Public Information Bulletin 136 (May 1985) at pages 28 and 29 under the heading "Subsidised Transport". This Ruling supersedes that earlier statement.

Background

Employers who are in the business of providing transportation to the public may provide transportation to their staff, either free or at a price lower than that paid by the public. These employers may also enter into arrangements with third parties to provide the employers' staff with either free transportation or transportation at a price lower than that paid by the public.

If the provision of this transportation falls within the definition of "subsidised transport", it is a fringe benefit. The employer will be liable to pay fringe benefit tax in accordance with the FBT rules.

This Ruling applies where an employer, who carries on a business that consists of or includes transportation of the public, provides transportation to an employee of that employer, or enters into an arrangement with another person for transportation to be provided or granted by that person to an employee of the employer.

Legislation

Section CI 1 states:

In the FBT rules, "fringe benefit", in relation to an employee and to any quarter or (where fringe benefit tax is payable on an income year basis under section ND 4) income year, means any benefit that consists of-

…

(d) Any subsidised transport:

"Subsidised transport" is defined in section OB 1:

"Subsidised transport", in the FBT rules, means the provision, in any quarter or (where fringe benefit tax is payable on an income year basis under section ND 4) income year, by an employer, being a person who carries on a business that consists of or includes the transportation, for hire or reward, of persons who are members of the general public, to an employee of the employer of carriage or entitlement to carriage in the course of the transportation (not being transportation in a motor vehicle) where the amount (if any) paid by the employee of the employer in respect of the carriage or entitlement to carriage is less than the amount that is the highest amount charged, in the quarter or (where fringe benefit tax is payable on an income year basis under section ND 4) income year in which the provision occurs, by the employer of the employee for the provision by that employer, to persons who are members of the general public, of carriage or, as the case may be, entitlement to carriage that is of the same class and extent and on or for the same occasion or occasions as the class and extent and occasion or occasions of the carriage or the entitlement to carriage first mentioned in the definition.

The main valuation provision for subsidised transport is section CI 3(6), which states:

For the purposes of the FBT rules, the value of any fringe benefit, being a benefit that consists of subsidised transport provided in any quarter or (where fringe benefit tax is payable on an income year basis under section ND 4) income year, by an employer, shall be the greater of-

(a) 25% of the amount that, in relation to the subsidised transport so provided is, within the meaning of the definition of "subsidised transport", the highest amount charged by the employer:

(b) The amount that the employer is so liable to pay or has so paid for the benefit being provided.

Section CI 4(1) further states:

Subject to this section, for the purposes of the FBT rules the taxable value of any fringe benefit provided by the employer of the employee in any quarter or (where fringe benefit tax is payable on an income year basis under section ND 4) in any income year shall be the value of that fringe benefit, reduced by-

(a) The amount (if any) paid by the employee (or, where section GC 15(1) applies, by the associated person) in relation to the quarter or the income year for the receipt or enjoyment of that fringe benefit (not being an amount paid for the acquisition or improvement by the employee or associated person of an asset the receipt or enjoyment of which does not constitute the fringe benefit), except where the fringe benefit is an employment related loan:

In relation to benefits provided by third parties, section CI 2(1) states:

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

The definition of an "arrangement" is provided in section OB 1:

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

Application of the Legislation

The legislative provisions concerning the valuation of subsidised transport provided to employees are uncertain in their application. This Ruling sets out how the Commissioner will interpret these provisions.

Subsidised transport may be provided to an employee by the employee's employer or by a third party that has an arrangement with the employer to provide the employee with a benefit. These two situations are discussed separately below.

Subsidised transport provided by the employer

The valuation of subsidised transport provided by an employer to an employee of that employer is provided for in section CI 3(6). This requires the value to be the greater of:

- 25% of the highest amount charged by the employer to the public for transportation of the same class, extent, and occasion; and

- the amount that the employer is liable to pay or has so paid for the benefit being provided.

Some commentaries on the value of subsidised transport refer to the cost to the employer of providing the transportation. This has caused confusion about whether costs incurred by an employer itself in providing transportation to an employee, such as the cost of food and fuel on an airline, should be taken into account in the second limb of section CI 3(6).

It is the Commissioner's view that section CI 3(6)(b) was inserted into the valuation provision to provide for the situation where the transport is provided by a third party and the employer pays more to the third party for the transport than 25% of the highest fare. Previously, the valuation provision referred only to 25% of the highest fare. The words "liable to pay or has so paid" in section CI 3(6)(b) do not refer to the cost to the employer. Paragraph (b) of section CI 3(6) only applies when an employer actually pays a third party to provide transportation for its employees. This situation is discussed below. If an employer provides transportation itself, there will generally be no amount that the employer is liable to pay, as the employer does not charge itself for the employee's transportation. While the employer may incur costs in providing the transportation, these are not to be taken into account in determining the value of the benefit.

In summary, it is the Commissioner's view that, where the transportation is provided by an employer to an employee of that employer, the value of the benefit is 25% of the highest fare charged to the public for transportation of the same class, extent, and occasion. The meaning to be given to the "highest fare", "class", "extent", and "occasion" is discussed below.

Subsidised transport provided by a third party that has an arrangement with the employer

The valuation of subsidised transport provided by a third party that has an arrangement with the employer to provide transport to an employee of that employer is also provided for in section CI 3(6). The interpretation of this section is problematic. This is in part due to the effect of section CI 2(1). Under section CI 2(1), if an employer has entered into an arrangement with another to provide a benefit to an employee of that employer, the benefit is deemed to be provided by the employer.

Interpreting section CI 3(6) without reference to section CI 2(1), the benefit is valued as the greater of:

- 25% of the highest amount charged by the employer to the public for transportation of the same class, extent, and occasion; and

- the amount that the employer is liable to pay or has so paid for the benefit being provided.

If the employer offers the same transportation to the public that was arranged to be provided to the employee by the third party, an amount will be charged by the employer to the public for the same transportation. In this instance, the benefit will be the greater of the two options.

However, in the majority of cases, the employer will not provide the same transportation to the public as that arranged with the third party to be provided for the benefit of the employee. In this instance, there is no amount charged by the employer to the public for that transportation. The value of the benefit depends on the amount paid by the employer for the third party to provide the benefit. That is, it is only paragraph (b) of section CI 3(6) that is relevant.

However, section CI 2(1) affects this interpretation. This section deems a benefit provided to an employee by a person with whom the employer has an arrangement to be provided by the employer. Reading section CI 3(6) in conjunction with section CI 2(1) may require ascertaining the highest amount charged by the third party to the public and the amount that the third party is liable to pay or has so paid. That is, reading the word "employer" in section CI 3(6) as the third party. In other words, the highest amount charged by the employer refers to the highest amount charged by the third person, and the amount the employer is liable to pay or has so paid is a reference to the amount that the third party is liable to pay or has so paid.

On the same reasoning that an employer does not charge itself for providing transportation to its employees, the third party does not charge itself for providing transportation to employees of the employer. Accordingly, the value of the benefit depends on the amount charged by the third party to the public for transportation of the same class, extent, and occasion. Therefore, only paragraph (a) of section CI 3(6) is relevant here.

Alternatively, section CI 2(1) may not require reading the word "employer" in section CI 3(6) as the third party. If this approach is taken, section CI 3(6) would be interpreted in the same manner as above where no account was taken of section CI 2(1). That is, it is only paragraph (b) of section CI 3(6) that is relevant here.

The above interpretations, with and without reference to section CI 2(1), with the exception of the limited instance where the employer provides the same transportation service to the public as that provided to the employee by the third party, deny the requirement that the benefit be valued at the greater of two options of any meaning. However, combining the results from the two interpretations would give this requirement meaning in all circumstances. For example, the value of the benefit is the greater of:

- 25% of the highest amount charged by the third party to the public for transportation of the same class, extent, and occasion; and

- the amount that the employer is liable to pay or has so paid for the benefit being provided by the third party.

It is acknowledged that this approach, which interprets the word "employer" in a different manner under each limb of section CI 3(6), is inconsistent with a strict literal interpretation of the section. However, it is the Commissioner's view that, as the wording used in the legislation is less than ideal, this is the better approach where a benefit is provided by a third party.

In summary, it is the Commissioner's view that if transportation is provided to an employee by a third party with whom the employer has entered into an arrangement for that benefit to be provided or granted to the employee, the value of the benefit is the greater of:

- 25% of the highest fare charged by the third party with whom the employer has an arrangement to the public for transportation of the same class, extent, and occasion; and

- the price the employer paid or is liable to pay to the third party with whom the employer has an arrangement for the benefit being provided.

If the employer is not required to pay the third party with whom the employer has an arrangement, i.e. there is no price paid or payable by the employer for the benefit, the benefit is valued at 25% of the highest fare charged to the public for transportation of the same class, extent, and occasion. That is, only paragraph (a) of section CI 3(6) has relevance in this situation.

Other issues

Carriage and entitlement to carriage

A benefit arises on the provision to an employee of carriage or an entitlement to carriage. "Carriage" refers to the actual carriage on the particular transport, whereas "entitlement to carriage" refers to a specific right to carriage in the future. For example, a bus pass and an airline ticket are both entitlements to carriage. They both provide the employee with a future right to carriage.

If the employee is not entitled to claim a specific right to carriage, e.g. because certain conditions must be met before the entitlement to carriage arises, there is no entitlement to carriage unless those requirements are fulfilled. For example, if an employee is provided with a standby ticket which is subject to the limitation that carriage will only be provided if special loading requirements are met, no entitlement to carriage arises until these requirements have been fulfilled and the employee is *entitled* to the future right to carriage. The employee may then choose whether or not to use the entitlement to carriage. No benefit to the employee will arise if the special conditions that the ticket is subject to are not fulfilled as no entitlement to carriage or carriage will have arisen.

Special conditions that employees may be subject to can be distinguished from intrinsic limitations that everyone is subject to, such as there being available seats on a bus when utilising a bus pass, for example. An employee with a bus pass has an entitlement to carriage, even though he or she may not gain carriage on the first bus that comes along because it happens to be full. In other words, the availability of seats is not a special condition that must be fulfilled before the entitlement to carriage arises, but a limitation inherent in bus travel that everyone is subject to. This situation can be contrasted with a standby fare, where carriage is subject to certain conditions being fulfilled before the entitlement to carriage arises at all. That is, where an employee is told that he or she will receive an entitlement to carriage or carriage *provided* certain conditions are first met.

A further issue that arises in relation to entitlement to carriage is the suggestion that entitlement to carriage refers to carriage with restrictions attached. The example was given of standby type restrictions. The Commissioner does not agree with this interpretation. As discussed in the preceding paragraphs, no entitlement to carriage will arise where the employee does not become entitled to the carriage. Special conditions or restrictions attached to a ticket are taken into account in the legislation by the use of a 25% basis for calculating the value of the benefit. This percentage reflects that employees may be subject to special standby type conditions, and therefore the value of the benefit should not be based on the full fare paid by the public.

The benefit to the employee arises on the provision of the carriage or entitlement to carriage. It is irrelevant if the entitlement to carriage is not subsequently used by the employee. A benefit does not arise when a carriage is taken pursuant to an entitlement to carriage. For example, say an employee has been provided with a bus pass that entitles her to "free" carriage. A member of the public who has purchased a similar pass will also be provided with carriage without having to pay any more. No benefit arises to the employee in this situation. As neither the employee nor the member of the public is charged for the actual carriage, the employee does not receive the carriage for an amount less that the amount charged to the public. The legislation does not tax the one benefit as a "carriage" and then subsequently as an "entitlement to carriage".

A transportation benefit will not come within the "subsidised transport" definition if the same transportation is not sold to the public. This is because the employee would not be getting transportation at a lesser amount than is charged to the public. If the service is not sold to the public, there can be no charge to the public. However, such a benefit could come within section CI 1(h) as "any benefit of any other kind".

Highest fare charged

The definition of "subsidised transport" in section OB 1 refers to the provision of carriage or entitlement to carriage where:

… the amount (if any) paid by the employee …is less than the amount that is the highest amount charged … by the employer … to … the general public, of carriage or … entitlement to carriage that is of the same class and extent and on or for the same occasion or occasions as the class and extent and occasion or occasions of the carriage or the entitlement to carriage …

In determining the value of the subsidised transport, section CI 3(6) then refers in paragraph (a) to:

… 25% of the amount that, in relation to the subsidised transport so provided is, within the meaning of the definition of "subsidised transport", the highest amount charged by the employer …

Accordingly, section CI 3(6) requires that the value of the benefit be determined according to the highest amount charged to the public for carriage or entitlement to carriage that is of the same class, extent, and occasion. It is the Commissioner's view that "class" refers to the classes of travel available, such as first, business, or economy class, as that term is used in the travel industry. The Commissioner does not accept that standby is a class of travel. To include standby fares as a class is to confuse "class" with fares. The special conditions attached to a standby fare have been compensated for by valuing the benefit at only 25% of the amount charged to the public. It was stated in the second reading of the Income Tax Amendment Bill (No 2) (NZPD Vol 461, 1985: 3722) that "The exemption effectively recognises that the true benefit enjoyed by the employee is somewhat less than the full value of the fare". Further, "extent" refers to travel with the same departure and destination points, and "occasion" refers to the time of carriage.

It is arguable that the relevant fare is the highest fare charged during the *quarter* for travel of the same class and extent. However, this interpretation denies the word "occasion" in the definition of "subsidised transport" of any meaning. Both "quarter" and "occasion" need to be given meaning. It is arguable that the inclusion of the reference to "quarter" means the highest fare charged in the quarter as it was the intention of the legislation that the fare be the highest fare charged in the quarter. However, such an intent is not made clear in the legislation and this interpretation deprives "occasion or occasions" of any meaning.

It is submitted that the words "in the quarter" are a reference to the fact that FBT is charged on a quarterly basis. This view is supported by the fact that the words "in the quarter" are followed by "or (where fringe benefit tax is payable on an income year basis under section ND 4) income year". This appears to be a reference to the time that FBT is determined. The words "quarter or income year" are repeated throughout the legislation. Apart from the legislative intent, there is no evidence that "quarter or income year" have any greater meaning in this part than they do in any other part.

There are differing views on what "occasion" means. The ordinary meaning of "occasion" is the time of occurrence of a particular event or happening. In this situation the particular event or happening is the carriage. Therefore, it would be consistent with this meaning to use the highest fare charged on the actual transportation as that is the time that the carriage occurs.

It would not be consistent with the ordinary meaning of "occasion" to define it as the *day* that the actual travel takes place or as the *time* or *season* that the employee is allowed to travel. The better meaning to be given to "occasion or occasions" is the actual time of carriage. This is consistent with the ordinary meaning of "occasion".

In relation to an entitlement to carriage, the relevant occasion is the period of time for which the entitlement to carriage is valid. For example, if the provision is of a bus pass that entitles the employee to carriage on a bus for a period of a month, the relevant value of the benefit is the highest fare charged to the public for that bus pass in that month period. If the entitlement to carriage is a ticket for carriage in the future, such as an airline ticket, the relevant value is the highest fare charged to the public for that particular transportation.

The Commissioner is of the view that the legislation requires the highest fare charged for the actual transportation to be used in valuing the benefit. However, it has been submitted that in some circumstances it may be very difficult, if not impossible, to determine this figure. Accordingly, the Commissioner will accept the highest published market fare that the employer or third party, with whom the employer has entered into an arrangement for the provision of the benefit, ever charges for the service as evidence of the highest fare charged for transportation of the same class, extent, and occasion by the employer or third party. For example, this could be by reference to the Air Tariff Worldwide Fares published by the Air Tariff Publishing Company. However, it is acknowledged that at times there are fares that are published but never charged to the public. Such fares would not satisfy this criterion. The highest actual fare charged is to be used where available in preference to the highest published market fare.

Further, the Commissioner acknowledges the compliance costs involved in complying with the valuation provisions in relation to the occasion of the transportation. Accordingly, the Commissioner will allow the use of the highest publicised market fare charged, in the particular day, week, or month in which the occasion occurs, for transportation of the same class and extent as the value to be attributed to the benefit.

Arrangement

Section CI 2(1) refers to an employer that "has entered into an arrangement" with a third party concerning the provision of benefits by the third party to employees of the employer.

An "arrangement" is defined in broad terms in the Act to mean "any contract, agreement, plan, or understanding (whether enforceable or unenforceable) …". Case law indicates that an "arrangement" includes an understanding between two or more persons in relation to an agreed course of action that may not be enforceable in law. However, it must be an arrangement "for that benefit to be so provided or granted". An employer that merely allows a third party to place promotional materials offering travel in the staff-room, for example, would probably have entered into an arrangement with that third party, but it would not be an arrangement for the provision of a benefit to the employee. It is necessarily a question of fact and degree in any given situation. Any understanding between an employer and a third party to provide a benefit to employees of the employer could constitute an arrangement to which section CI 2(1) applies. If the arrangement provides for the third party to provide numerous and ongoing benefits to employees of the employer, the employer would need a system in place to ensure that it is aware of exactly what benefits are being provided to its employees.

Employee contributions

Under section CI 4(1), if an employee pays an amount for the receipt or enjoyment of subsidised transport provided by that employee's employer, the value of the benefit provided is reduced by that amount. That is, once the benefit is valued according to section CI 3(6), any amount paid by the employee for that benefit is to be deducted from that amount. This is illustrated in the examples below.

Examples

Example 1

An airline employee takes an overseas holiday on his employer's airline. He travels economy class. The highest price charged to the public for a ticket on that flight in economy class, with the same departure and destination points, is $650. The employee pays $200.

Highest fare charged to the public for the same flight	$650
25% of this highest fare	$162.50

As the employee pays more than the value of the benefit ($200 compared to $162.50), the taxable value of the benefit is nil and no FBT is payable by the employer.

Example 2

An airline employee takes a holiday overseas on an airline that has an agreement with her employer. The highest price charged to the public for travel of the same class, extent, and occasion is $650. Under the agreement the employee's airline pays $325 to the airline that carries the employee.

Highest fare charged to the public for the same flight	$650
25% of this highest fare	$162.50
Price paid or payable by the employer	$325

The price paid by the employer is greater than 25% of the highest fare charged for the flight. As the employee does not make any contribution, the taxable value of the benefit is $325.

If the employee pays the employer $200, that amount would be deducted from $325 and the taxable value of the benefit would be $125.

Comments on technical submissions received

The comments received in relation to this Ruling concerned five main areas. Specifically:

1. The valuation of a benefit provided by a third party and the relationship between sections CI 2(1) and CI 3(6).
2. Standby fares are a separate class of travel.
3. The difficulties in obtaining information as to the highest fare charged where a third party provides the transport.
4. With an entitlement to carriage, the benefit arises when the transport is taken.
5. Not all relationships between employers will constitute an "arrangement" for the provision of a benefit.

Point 1 highlights that section CI 2(1) only deems the benefit to be provided by the employer; it does not deem the highest price charged by the third party to be the highest price charged by the employer for the purposes of section CI 3(6). The Ruling acknowledges the difficulties with the legislation and attempts to provide a workable solution to the valuing of transport provided by a third party.

Point 2 has previously been raised during the consultation process. It is not accepted that standby is a "class" of travel.

Point 3 concerns compliance with the Ruling and has been discussed in the commentary.

Point 4 has been considered, but is not agreed with. To conclude otherwise would mean that an entitlement to carriage that is not subsequently utilised by the employee would not be subject to FBT. There is no requirement that the entitlement actually be used by the employee. However, this submission led us to question what constitutes an "entitlement to carriage", as discussed in the commentary.

Point 5 concerns the definition of an "arrangement", and has been further discussed in the commentary.