Inland Revenue
Te Tari Taake

CAR PARKS PROVIDED BY EMPLOYERS – FRINGE BENEFIT TAX EXEMPTION

PUBLIC RULING – BR Pub 99/6

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

Taxation Law

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

This Ruling applies in respect of section CI 1(h) and section CI 1(q).

The Arrangement to which this Ruling applies

The Arrangement is the making available by an employer to an employee of a car park that is on land or in a building owned or leased by the employer, and there is an exclusive right to occupy the property, and a legal estate or interest in that property. This includes space in a public car park where the space is subject to a lease between the employer and the proprietor of the car park.

How the Taxation Law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- The car park provided by an employer to an employee is excluded from the definition of "fringe benefit" in section CI 1(h) by section CI 1(q), and the employer is not liable to fringe benefit tax in these circumstances.

The period for which this Ruling applies

This Ruling will apply for the period from 1 November 1999 to 31 March 2002.

This Ruling is signed by me on the 12th day of August 1999.

Martin Smith
General Manager (Adjudication & Rulings)

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COMMENTARY ON PUBLIC RULING BR Pub 99/6

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusion reached in Public Ruling BR Pub 99/6 ("the Ruling").

Background

A question exists as to whether the provision of a car park by an employer to an employee gives rise to a fringe benefit tax (FBT) liability. The Ruling confirms that an employer-provided car park is not subject to FBT if the car park is provided on land or in a building that the employer owns or leases, and there is an exclusive right to occupy the property and a legal estate or interest in that property. (The term "exclusive right" in the Ruling is to be understood as referring not only to a single tenant/lessee situation, but also to the right of several lessees under the same lease agreement to exclude persons other than themselves.) Included is a space in a public car park where that space is subject to such a lease between the employer and the proprietor of the car park. This is because the car park is considered to be part of the employer's premises. Further information on FBT may be found in Inland Revenue's *Fringe benefit tax guide*, IR 409. The statement on page 33 of that guide on staff car parks should be read in the light of the Ruling and this commentary.

Legislation

Section CI 1(h) defines a fringe benefit to include:

Any benefit of any other kind whatever, received or enjoyed by the employee in the quarter or (where fringe benefit tax is payable on an income year basis under section ND 4) income year, -

being, as the case may be, …, or a benefit that is used, enjoyed, or received, whether directly or indirectly, in relation to, in the course of, or by virtue of the employment of the employee (whether that employment will occur, is occurring, or has occurred) and which is provided or granted by the employer of the employee; …

Section CI 1(q) excludes from the definition of "fringe benefit" under section CI 1(h):

Any benefit (not being a benefit which consists of the use or enjoyment of free, discounted, or subsidised travel, accommodation, or clothing) that is provided by the employer of the employee on the premises of the employer, not being premises that are occupied by the employee of the employer for residential purposes (or that, at any time when the employee is required to perform duties for the employer on premises, not being residential premises of the employee, other than those of the employer, or by any other person on those other premises), where the benefit is enjoyed by the employee on those premises (or, as the case may be, on those other premises).

Application of the Legislation

Under section CI 1(h), a benefit of "any other kind whatever" received by an employee directly or indirectly in relation to or by virtue of the employee's employment, is subject to the FBT regime.

The granting of a car park by an employer to an employee is a benefit under section CI 1(h) and is prima facie liable for FBT. While Parliament could have excluded all car parks from the FBT regime, it has not done so. However, section CI 1(q) excludes (with

certain exceptions) from the definition of "fringe benefit" a benefit that is provided "by the employer of the employee on the premises of the employer" (the "on premises exemption"). Accordingly, it is the phrase "the premises of the employer" that must be considered, and the extent of the exclusion ascertained by reference to those words. As the following discussion reveals, not all car parks are exempt, and a line has to be drawn somewhere between those that are and those that are not.

There is no definition of the phrase "premises of the employer" in the Act, and a question arises as to whether those words are restricted to the place in which the employer carries on business, i.e. "business premises", or whether they are unrestricted in meaning and include all premises.

The exemption provided in the Act is not for car parks generally, but for car parks provided on the employer's premises. This exclusion was provided for fringe benefits because of the complications of administration and valuation that accompany "on premises" benefits. Factors that would have to be addressed would be whether the tax should be based on the nominal capacity of the parking area or the actual utilisation of the benefit provided, the value to be given sealed and unsealed parks, etc. So it was never intended that car parks provided off the premises by way of a licence from a car park proprietor would be exempt from FBT. The benefit in such a case would be simply the cost of the park, but the valuation of a car park provided on the employer's premises would be more difficult.

While it could be said that some leased car parks (those provided by an independent car park proprietor) would be easily valued, in many cases parks on land leased by an employer would present the same problems as parks on land the employer owns. Accordingly one would expect the on premises exemption to cover leased parks as well.

"Premises" is defined in *The New Shorter Oxford English Dictionary*, (1993 Edition) as, "a house or building with its grounds etc. … ."

The word "of" has many meanings, and the same dictionary defines "of" in the sense of possession as:

22 Belonging to (a person or thing) as something that he, she, or it has or possesses, or as a quality or attribute; having a specified relationship to (a person).

The term "premises" has been discussed in a number of cases. In *Lethbridge v Lethbridge* (1861) 30 LJ Ch 388 it was said at page 393:

There is no doubt, … that the word admits of a limited as well as an enlarged sense, and that the context and surrounding circumstances must determine whether it was used in an enlarged or limited sense.

Over a century later in the case of *Maunsell v Olins* [1975] AC 373; [1975] 1 All ER 16, Viscount Dilhorne expressed the same idea in this way at pages 383 and 19 respectively:

"Premises" is an ordinary word of the English language which takes colour and content from the context in which it is used. … It has, in my opinion, no recognised and established primary meaning.

The word was discussed by Edwards J in *In re Alloway* [1916] NZLR 433 at page 443 in relation to the Chattels Transfer Act 1908 where he said:

The word "premises" is here used in contradistinction to the word "lands", and it seems to me to be plain that it is used in its popular sense, of which many illustrations are to be found in *Stroud's Judicial Dictionary*. In that sense the word means any place occupied or exclusively used by any person for any purpose. The words "the 'premises' of a man engaged in business" signify the place in which he carries on his business. Such premises may be wholly buildings, as in the case of many shopkeepers; or wholly land, as in the case of a timber-yard; or partly buildings and partly land, as in the case of a timber-yard used in conjunction with a large joinery business; … .

In *Re Simersall; Blackwell v Bray* (1992) 35 FCR 586 at p 591, it was said:

The term "of" in [the relevant statute] is apt to embrace a connection or association falling short of absolute ownership.

Considering the definition of the word "of" first, this indicates that the key in this usage of the word is possession or ownership, and therefore in respect of premises the word "of" indicates that to qualify as "the premises of the employer" there must be a right of ownership or possession. This may be satisfied if the premises are owned and also if they are rented or leased by the employer, since in the case of a lease the lessee obtains exclusive possession. A mere licence (that is, where the employer has permission from some third party to allow it or its employees to enter and occupy land for the purpose of car parking) would not meet this test of ownership or a possessory interest, as a licensee would have no such legal rights, but merely a right to use the premises. It may be difficult to decide in some cases whether there is a lease or a licence, and the nomenclature used by the parties is not decisive. The two factors that need to be considered are whether the legal right of exclusive possession has been given, and the intention of the parties to be inferred from the circumstances and their conduct; *Butterworths Land Law in New Zealand* by Hinde, McMorland and Sim, (Butterworths 1997) at pages 431 - 435.

The creation and nature of a licence is explained in *Halsbury's Laws of England*, Fourth Edition Reissue (Butterworths, London 1994) Vol. 27(1) at paragraphs 9 and 10 in the following way:

A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them, or where exceptional circumstances exist which negative the presumption of the grant of a tenancy. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the owner's possession and control, the agreement operates as a licence, even though the agreement may employ words appropriate to a lease. … A mere licence does not create any estate or interest in the property to which it relates; it only makes an act lawful which otherwise would be unlawful.

So the word "of" in the phrase "the premises of the employer" in section CI 1(q) introduces the requirement that the employer must either own or lease the premises. That is, the employer must have an estate or interest in the property and not merely a right to use it. If he or she does not own the premises in question, there would have to be a lease agreement for that employer to claim the benefit of the exemption provided by section CI 1(q). The phrase "the premises of the employer" in paragraph (q) is not the same as the phrase "grounds over which the employer has some rights".

As far as the interpretation of the word "premises" is concerned, the Commissioner's view is that in the context of parking facilities and the FBT legislation, "premises" should be interpreted broadly to include land, buildings, and parts of buildings. Therefore, a car park will form part of the premises of the employer where the land or building on or in which it

is situated is owned or leased by the employer, and there is an exclusive right to occupy the property, as well as a legal estate or interest in it.

Furthermore, the fact that the employer is not carrying on business on the premises owned or leased does not prevent an employer-provided car park from being excluded from the definition of "fringe benefit" in section CI 1(h). This means that an area of land owned or leased by the employer that is available for employee parking, although it is located away from the employer's business premises, would qualify for the exemption. The land need not be adjacent to the business premises.

If the car park is in a public parking facility and the employer arranges and pays the proprietor to make available certain parks for the employer's employees, generally speaking the car parks will be benefits that are subject to FBT. This is because in these circumstances the employer will have a mere licence (that is to say, permission for it and its employees to enter the property for the purpose of parking while the property remains in the owner's possession and control), rather than a more formal agreement or lease that would entitle the employer to an interest in or exclusive possession of the parking facility or any part of it. Accordingly, it could not be said that the spaces or parks provided would be "the premises of the employer".

This conclusion is consistent with *Esso Australia Limited v FCT* 98 ATC 4,953 a decision of the Federal Court of Australia. Whilst that case considered whether certain childcare facilities were part of the narrower (and defined) term "business premises … of the employer" for Australian FBT purposes and the outcome is not relevant in this context, at page 4,958 the judge (Merkel J) said:

> It seems to me that, … for the relevant business premises to be those *of* an employer, the employer must have a right to possession of the premises, at least to the extent necessary to enable the conduct thereon of the relevant recreational or child care facility.

It is important to note that there was a lease in existence in *Esso*, and the licence situation was not discussed. Indeed at page 4,958 of the judgment, Merkel J acknowledged that (even with a lease) the more employers that shared the particular premises, the harder it would be to say that they were premises *of* a particular employer. Accordingly it is still considered that there is a distinction to be made between premises leased for the purposes of car parking, and premises upon which a person merely has a licence to enter for the purpose of parking a car. Where no specific park is made available, but that person simply parks at any spot available from day to day, the distinction would be even greater.

When an employer has a lease agreement, the question will depend on the precise terms of the agreement. If a specific car park space were held under the lease, the exemption would apply. On the other hand, if there is no lease or specific spaces are not allocated under a lease agreement, it is not considered that such car parks are "premises of the employer".

***Note*:** In some cases it may well be that the employer is simply acting on behalf of the employee in arranging and paying for the car park, e.g. the employee arranges his or her own parking but the employer pays the owner of the car park directly. In this situation if the employer simply pays the parking fees on the employee's behalf, the sums paid are monetary remuneration of the employee.

There could conceivably be situations where, although the employer both arranges and pays for the car park, the employer is clearly acting as the employee's intermediary or agent. The payments by the employer to the car park owner would then come within section EB 1 as being amounts that, although "not … actually paid to or received by" the employee, are nevertheless "dealt with in the [employee's] interest or on the [employee's] behalf". In those situations, the parking fees paid to the car park owner would be monetary remuneration of the employee, and taxable accordingly.

Comments on technical submissions received

Comments received from parties external to Inland Revenue raised objections that the Ruling would be unfair, it would impose further compliance costs on businesses, and would be contrary to Parliament's intention.

These matters have been given serious consideration. The plain meaning of the words "the premises of the employer" would have to be ignored in order to give them a wider interpretation that would extend to premises for which the employer has a licence. Whilst acknowledging that the same practical benefit is received by an employee whether the car park is leased or licensed, the better view of the law, given the words used, is that this expression could not fairly have a construction placed upon it that would include car parks subject to a licence as well as leased car parks. While unfairness and added compliance costs are factors to be taken into account, it is not considered that they outweigh the correctness of this conclusion.

Whilst it may be able to be said that Parliament's intention is unclear, Parliament could have provided a specific exemption for car parks. It has not done so and instead has chosen to make an exemption available for all benefits in general (except travel, accommodation, and clothing) provided on employers' premises. That being the case, the Commissioner has to apply the test laid down – "the premises of the employer" test - and not some other test. For example the exemption could have been restricted to premises owned by the employer. The test laid down in section CI 1(q) is clearly wider than that, but not specifically wide enough to exempt *all* car parks. The ordinary meaning of the words used must be interpreted, and that has led to the conclusion that licences are not covered by the exemption. Alternatively, it is arguably possible to interpret the phrase as meaning business premises, but if that is what Parliament meant, it could have said so. Inland Revenue has made a concession in this respect, its publications stating that business premises are not what is considered to be meant by the word "premises".

The *Esso* decision has been put forward as supporting the view that licensed car parks would qualify as premises of the employer. However, the *Esso* case concerned leased premises and the Court said that for the relevant business premises to be those *of* an employer there would need to be a right to possession (at least to the extent necessary to conduct the relevant child care facility). A licence simply does not confer possession, and so the approach taken in this Ruling does not conflict with the *Esso* case, which is not considered to go as far as commenting on licensed premises.

Examples

Example 1

During the year ended 31 March 2000, an employer provides some of her employees with car parks on land across the road from the property on which she carries on her business. The employer is the lessee of that land pursuant to a enforceable and written lease agreement.

The Commissioner considers that "premises of the employer" includes land leased by the employer. Therefore, the car parks provided by the employer to the employees are excluded from the definition of "fringe benefit" by section CI 1(q). No fringe benefit arises. The employer does not have to carry on her business on the leased land for the exclusion in section CI 1(q) to apply.

Example 2

During the year ended 31 March 2000, an employer arranges parking at a commercial car park for three of her employees. No particular spaces are designated for them, but the car park owner has an area reserved for pre-sold parking that is limited to the number of such parkers so that there are always three parks available for these employees.

The Commissioner considers that "the premises of the employer" does not include the car park or any part of it. It does not form part of the employer's premises as the car parks are not owned by the employer, and the car park owner has not parted with possession, but still retains control of the park. Another distinguishing feature is the lack of specifically allocated parks. The requisite ownership or possessory interest is not, therefore, present so that the car park can be called the "premises of the employer". Accordingly, the provision of places at the car park by the employer to the employees is subject to FBT under section CI 1(h). The provision of the car parks is not excluded from the definition of "fringe benefit" under section CI 1(q).

Example 3

As in *Example 2*, the employer arranges parking at the commercial car park for the employees, but the employer is allotted a particular area in the car park (spaces 8 - 10) and the car park proprietor bills the employer direct. The car park is not owned by the employer and no part of it is subject to a rental or lease agreement between the employer and the proprietor of the car park (although the employer occasionally refers to the charges made for the use of the car park as "rent").

Although the employer could say that the ability to exclude others from the designated spaces is significant, this is nevertheless a licence arrangement (regardless of the use of the word "rent") as the employer does not have an estate or possessory interest in the car park or any part of it, only a personal permission for herself and her employees to enter the land for a stipulated purpose. The occupation of space in fulfilment of that purpose is not intended to negate the owner's exclusive possession of the car park or even of the designated spaces as would be the case if there were a lease agreement. The car parks are not "premises of the employer": she merely has rights to use them. Because the owner of

the car park remains in possession and retains general control over the premises, the arrangement is simply a contractual licence, outside the FBT exemption in section CI 1(q). Consequently, the employer is liable for FBT on the taxable value of these fringe benefits.

Example 4

A company having many employees who use the facilities provided by a nearby commercial car park, decides that it would like to lease the whole of the top floor of the car park. The available area is less than that of the other floors and would suit the requirements of its staff. The owner of the commercial car park agrees to grant a lease to the company, and installs a card access gate to that floor so that only the company's employees may use the top floor. The written lease agreement provides that the car park owner will perform custodial duties and generally maintain the top floor to the standard of the other areas of the car park.

The Commissioner considers that in these circumstances "the premises of the employer" extend to and include the top floor leased from the car park proprietor, and no fringe benefit liability arises by virtue of section CI 1(q).