

Via email: Kim.Hall@ato.gov.au

Attention: Kim Hall

Australian Taxation Office
GPO Box 9900
Brisbane QLD 4001

11 August 2017

DRAFT TAXATION RULING TR 2017/D6

Dear Kim,

BDO welcomes the opportunity to provide feedback in response to Draft Taxation Ruling TR 2017/D6 ('TR 2017/D6') - *Income tax and fringe benefits tax: when are deductions allowed for employees' travel expenses* that was released by the Australian Taxation Office (ATO) on 28 June 2017 and sets out general principles for determining whether an employee can deduct travel expenses under section 8-1 of the Income Tax Assessment Act 1997 (ITAA 1997).

Whilst TR 2017/D6 includes 18 new and interesting examples, BDO considers that some require further clarification and that there needs to be more examples to reflect the modern working environment.

We also understand that once finalised, TR 2017/D6 will replace Miscellaneous Taxation Ruling MT 2030 - *Fringe benefits tax: living-away-from-home allowance benefits*. We also note that MT 2030 was withdrawn on 12 July 2017, therefore we consider that it is imperative that TR 2017/D6 address the issues in this submission and be finalised as soon as possible so as to provide certainty to taxpayers.

This BDO submission:

- recommends a 6 month or 183-day rule before travel for business becomes a living away from home arrangement, consistent with industry standards and tax jurisdictions overseas.
- seeks clarification on certain examples in TR 2017/D6 including more definitive guidance on certain topics including timing and location;
- requests more examples that address issues that have not been covered in TR 2017/D6 that reflect contemporary working arrangements and flexible definitions of work location;
- highlights some grammatical errors for rectification in TR 2017/D6; and

These and other issues are expanded upon in the attached appendix.

Should you wish to discuss any of our comments, please feel free to contact me on +61 2 9240 9736, or via email: Lance.Cunningham@bdo.com.au.

Kind regards,



Lance Cunningham
BDO National Tax Director

Proposed 183-day rule before business travel becomes a living away from home

In TR 2017/D6 there are a number of examples that deal with the question of whether employees accommodation costs are deductible work related travel or non-deductible living away from home accommodation but it is not easy to discern a logical reasoning for the distinctions made in these examples. There is an indication that accommodation for two months away from home as being deductible (example 15) but four months away from home as not being deductible (example 16). There is also an example of secondments to Australia for between 90 days to 120 days (three to four months), where the employees stay on their home country's payroll but have travel and accommodation costs paid for by an Australian employer. In this circumstance the employees are also broadly treated as living away from home in which case travel costs are deductible but accommodation and meal costs are not (example 17).

Based on the examples in the draft ruling, it appears the ATO is tentatively suggesting, all other things being equal or similar, a time limit for deductible accommodation as compared to non-deductible living away from home is somewhere between two to three months. This 'three-month rule' for living away from home is suggestive at best and BDO recommends that the final ruling needs a more conclusive time period to determine deductibility as well as more examples with different fact scenarios and time periods.

We suggest that the rule for determining when a person is living away from home should be based on the usual time frame that it would take for a person to set up the usual type of arrangements for living a reasonably settled lifestyle e.g. obtaining a regular lease of an apartment etc. We suggest that 90 days is typically not a long enough time in which an employee can successfully apply for a lease on a property or take other steps to establish a settled lifestyle in a location. Generally, a regular residential lease would be a minimum of 6 months. BDO therefore recommends a 6 month or 183-day rule before travel for business becomes a living away from home arrangement. To safeguard against abuse of the proposed rule we also suggest the inclusion of qualitative factors including remaining in the location, not bringing across family members etc. that can be used to evidence an intention not to take steps to become an Australian resident.

A 6 month or 183-day rule would be consistent with global mobility industry standards of short term secondment arrangements.

In addition, some other countries have set out or legislated for when travel and subsistence expenses are deductible, for example:

- The United Kingdom's HMRC applies a 24-month rule to "temporary workplaces" to clarify a worker's right to claim travel and subsistence expenses. Broadly, where an employee attends a workplace for a limited period of time to do a particular task or project then the workplace will be a temporary workplace, even where the employee's attendance is regular. This is on the basis that they are attending for the purpose of performing a task of limited duration.
- Similarly, the United States' IRS may treat certain "away-from-home" business expenses such as travel, meals, and lodging as deductible, if with respect to a temporary assignment of less than one year

183 days (6 months) is of course one of the main factors in the employment income article (typically article 15) of most double taxation agreements. The OECD puts forward the idea that working in a host country for no more than 183 days may not give rise to a tax liability on the worker's earnings,

together with other important factors. Nearly all countries with double taxation agreements would seem to agree that up to 183 days is the timeline below which the presence is temporary.

BDO suggests that a minimum of 183 days/6 months is used as the time factor in determining whether expenditure is deductible, together with other qualitative factors such as location of family, assets, employer, usual workplace etc.

Special Demands travel and definition of ‘remote location’

BDO supports the introduction of the new concept of ‘special demands travel’ illustrated in examples 4, 5, 14, 15 and 16 which considers the remoteness of the work location of an employee or the requirement to move continuously between changing work locations. We understand that this is in response to *John Holland Group Pty Ltd & Anor v. FCT [2015] FCAFC 82; (2015) 321 ALR 530* (‘*John Holland case*’), which found employees engaged on a large project on a Fly in Fly Out (FIFO) basis would have been able to claim a personal tax deduction for the flight costs to travel between the project location and the home location airport had they incurred those costs directly.

We note however that in TR 2017/D6 ‘special demands travel’ includes travel to locations that are remote but that there is no definition of what constitutes ‘remote’ in TR 2017/D6 beyond the reference in example 4. The ATO has a description of ‘remote area’ on its [website](#) as ‘a location that is not in - or adjacent to - an eligible urban area’ along with a list of remote locations, which is relevant for the definition of “remote area housing benefit” in section 58ZC of the Fringe Benefits Assessment Act 1986 (“FBTAA”). However, we recommend the ATO does not incorporate this legislative definition of ‘remote’ for the purposes of ‘special demands travel’ in TR 2017/D6. This is because it would go against the findings in the *John Holland case*, which did not involve travel to a ‘remote area’ as defined in section 58ZC of the FBTAA (Geraldton WA is not included as a ‘remote area’ for section 58ZC).

BDO recommends that TR 2017/D6 should make it clear that the concept of ‘remoteness of work locations’ in the ruling is referring to the work location being at a reasonable distance from another relevant location and not the same concept as ‘remote area’ as for section 58ZC. Section 58ZC is dealing with identifying areas that are remote from any reasonable sized urban areas; whereas the concept of remote work location in TR 2017/D6 is dealing with a location that is not near another location, either another workplace or place of residence that may or may not be in a remote area as per section 58ZC.

‘Special demands travel’ and ‘Co-existing work locations and definition of ‘direction and control’

There are a number of examples in TR 2017/D6 that rely on the employee being or not being subject to the ‘direction and control’ of the employer during the travel (see examples 2, 3, 4, 10, 14 and 15). However, there is very little description in TR 2017/D6 of what it means for an employee to be under the direction and control of the employer while travelling, apart from very brief comments in paragraphs 30 and 31.

BDO therefore seeks guidance from the ATO on how the definition of ‘direction and control’ applies to wage-earning employees and salary earners while traveling and how it would or would not be seen as being a contrived employment arrangement.

Guidance required on what constitutes a reasonable commute - comparison between examples 2 and 14

We recommend that TR 2017/D6 include guidance on what constitutes a reasonable commute and how far from home an employee needs to be to be considered to be travelling. According to the scenario in Example 2 ‘The travel time between his home on the Gold Coast and Brisbane is one hour and it does not require Raj to stay away from home overnight and it is concluded that the travel cost is not deductible. Conversely, according to the scenario in Example 14, ‘the cost of Aisha’s travel between Melbourne and Ballarat is deductible’. The approximate travel time for the 77.8km journey from Melbourne to Ballarat (according to Google Maps) is 1 hour and 32 minutes. Apart from the extra half hour travel time, the other relevant differences in example 14 is that the is that Aisha is under the employer’s directions and control while travelling and Aisha will stay in a motel in Ballarat during the weeknights while she is working in Ballarat.

How relevant is being or not being under the direction and control of the employer while travelling in these two examples? If in example 2 nothing else changes except that Raj was under the direction and control of the employer while travelling, would that be sufficient for the travel to be deductible? If it is not enough to change the outcome in example 2, we suggest that the more relevant issue for example 14 is the one and half hour travel time, which may take it outside what may be considered to be the time for a regular commute to and from work, this is supported by the fact that Aisha stays overnight in Ballarat, which we assume is because the one and half hour commute would be seen as too long.

The treatment of time attributed to travelling in the examples in TR 2017/D6 is inconsistent, therefore BDO recommends that the ATO clarify the timing in examples 2 and 14 in TR 2017/D6 and provide definitive guidance on whether the length of time that constitutes a reasonable daily commute is a factor to be considered in determining deductibility of the travel costs.

Living in one state and working in another

TR 2017/D6 provides some good examples of travel to remote work location including regular travel between states and also covers the cost of the apartment and meals whilst in a second state to be deductible. However, TR 2017/D6 does not have examples of an employee who lives in one state and works in another state using employer provided accommodation in the work location, commuting weekly between the two. On first sight, this appears it could be travel to and from work, however, would it be deductible travel if the employee were under the direction and control of the employer during the travel and it was a requirement of the employee to travel for their work, or were paid while undertaking the travel to the ‘remote work location’ in the other state? There does not seem to be much difference between this situation and the John Holland case situation and on that basis it appears that it should be seen as travel during the course of undertaking work activities and therefore deductible.

BDO recommends the ATO confirm what its view of the deductibility of these type of travel costs would be in the final ruling.

Examples on flexible working and working from home arrangements required

Whilst TR 2017/D6 includes numerous new and interesting examples, there could be more examples to reflect the modern working environment in Australia. BDO requests therefore that the finalised ruling contain more examples to address flexible working and working from home arrangements. The finalised ruling will also be the definite guidance on deductibility of travel expenses in the future and should reflect the future of modern working Australia.

Definition of work location required

‘Work location’ as outlined in paragraph 6 is currently defined as “any place an employee attends for work” but when read in conjunction with footnote 7, which states “an employee may attend a place for different purposes at different times (sometimes for work, sometimes for private purposes)”, indicates that a place is only a work location on occasions the employee attends there for work.

Employees are also increasingly working from locations other than ‘the office’. Increasing number of employees are also predominantly able to conduct the majority if not all of their business using portable electronic devices. This means that less physical equipment is required to establish a place of work which could for some employees theoretically be anywhere they have access to their portable electronic devices and perform work on them. We therefore request further clarity on the definition of ‘work location’ in TR 2017/D6 and guidance on how travel between such locations should be treated.

The inclusion of additional examples will also require consideration be given to the flow on effects of employees working from home and appropriate taxation treatment of the use of motor vehicles and equipment which has been addressed in our next submission point.

Incorporation of concepts of private use of cars and home to work travel and use of equipment from MT 2027

TR 2017/D6 applies to car expenses however there is only sporadic reference to motor vehicles in the examples. *Miscellaneous Taxation Ruling MT 2027 - Fringe benefits tax: private use of cars: home to work travel* sets out the circumstances in which the use of a car will be a taxable fringe benefit. MT 2027 is not one of the rulings that were withdrawn with the introduction of TR 2017/D6 but also is not listed in paragraph 8 of TR 2017/D6 as one of the rulings that has issues that are not covered in TR 2017/D6.

MT 2027 deals with determining the business use of a car by an employee or associate for the purposes of the operation cost method for car fringe benefits. We understand that the reason why MT 2017 has not been withdrawn and incorporated into TR 2017/D6 is because the business use of a car for the operating cost method does not directly rely on the otherwise deductible rule and therefore requires its own ruling. However, the concepts used in determining the business use of the car and the otherwise deductible rule use similar if not the same concepts. We suggest that the ATO could consider incorporating examples into TR 2017/D6 that deal with some of the situations in MT 2027, particularly where the use of a car may be attributed to the necessary carriage of equipment to and from work and, as such, accepted as business travel. BDO recommends that there be a reference to MT 2027 in TR 2017/D6 and that the concepts in MT 2027 be incorporated in TR 2017/D6.

More examples on who is living away from home

BDO understand that once finalised TR 2017/D6 will replace *Miscellaneous Taxation Ruling MT 2030 - Fringe benefits tax: living-away-from-home allowance benefits*. We also note that MT 2030 was withdrawn on 12 July 2017, therefore it is critical that we understand the ATO’s view on this. This is important when an employer pays for accommodation and food costs for an employee - as whether those costs are deductible or not will hinge on whether the employee is considered to be living away from home or travelling on business. Whilst we recognise that there are a number of factors that determine the outcome, some further examples in the finalised version of TR 2017/D6 with similar facts but different time periods would be useful.

Grammatical errors that need rectification

Footnote 34 on Page 10 and Example 2

Footnote 34 on Page 10 of TR 2017/D6 refers to Example 2 and indicates that Example 2 mentions 'accommodation expenses incurred by an employee by choice and are preliminary to the work, rather than being incurred in performing their duties' however Example 2 does not refer to accommodation expenses. The only reference to accommodation mentioned in Example 2 was that 'The travel between the Gold Coast and Brisbane does not require Raj to stay away from home overnight'. BDO requests footnote 34 be clarified in relation to how it applies to Example 2 or delete the reference to example 2 in Footnote 34.

Example 14

In Example 14 - short-term travel to a temporary, alternative work location (3 weeks), paragraph 214 states that 'Aisha will commence training at 10.30am on Mondays and 9.00am on the other weekdays. Aisha will stay at a motel in Ballarat on the Tuesday, Wednesday and Thursday nights over the three-week period of the training and receive an allowance from her employer to cover her costs'. There is no reference to whether she will be staying on Monday nights. BDO requests that example 14 be amended to include a reference to Aisha staying in the motel on Monday nights.