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BDO submission on draft taxation ruling TR 2019/D5: Fringe benefits tax: car parking benefits and Rewrite of Chapter 16 of the Employers Guide

We refer to the ATO's invitation to consult on draft taxation ruling TR 2019/D5: Fringe benefits tax: car parking benefits, which was released on 13 September 2019 and the accompanying draft update to chapter 16 of fringe benefits tax guide for employers.

BDO believe that the main issue with the ATO's revised approach is that it will be difficult, if not impossible, for an employer to know whether particular car parks are 'run to make a profit'. We therefore request that the ATO provide guidance on how employers can identify whether a particular car park is run to make a profit including a potential safe harbour. Our other observations on the ruling and recommendations are contained in Appendix 1.

BDO appreciate that the fundamental reason for proposed update to chapter 16 is the release of the ruling. However, we note that, the guide gives little guidance on how an employer can determine whether a particular car parking station is run to make a profit. In fact, some of the examples in the new Chapter 16 make a statement that a particular car parking station is a commercial car parking station without any reference to how it was determined that the car parking station is run to make a profit in accordance with paragraph 16 of TR 2019/D5. Please refer to Appendix 2 for detailed observations on the Chapter 16 rewrite.

Should you have any questions, or wish to discuss any of the comments made in our submission, please do not hesitate to contact me on 02 9240 9736 or lance.cunningham@bdo.com.au.

Yours sincerely



Lance Cunningham
BDO National Tax Director

APPENDIX 1 TR 2019/D5

1. Impact on the small business car parking exemption in Section 58GA of the FBT Act

Where a small business employer has business premises at a shopping centre, and the shopping centre is considered a commercial parking station, then its employees would be considered parking at a commercial parking station. Accordingly, the small business would no longer be eligible to the small business car parking exemption in Section 58GA. BDO believe this is an unintended consequence and would like to see a carve out in this case. If a carve out is not possible it should be made clear in the ruling or Employer's Guide that this is the consequence of the ATO's changed approach in the ruling.

2. Staff only car parks at shopping centres (where the shopping centre is considered a commercial parking station)

It would be good to understand the ATO view of the impact of the staff only car park facility that is associated with a 'commercial parking station', and whether this facility would qualify as a separate commercial parking station in its own right under the FBT law.

If the staff car park doesn't qualify as a commercial parking station in its own right (due to restriction that only staff can park there), is it still caught up in the wider net of the public car parking facilities of the shopping centre and therefore still part of a commercial parking station?

If the staff car park doesn't qualify as a commercial parking station (and is not caught in the wider net of the public car parking facilities as a commercial parking station), then:

- i. The Section 58GA car parking exemption would still apply to the small business employers of those employees who park there (noting comments at point 1 above) (since staff not considered parking at a commercial parking station).
- ii. Since the shopping centre public car park is a commercial parking station, and is within 1 km radius and charges greater than the car parking threshold, then the shopping centre parking rates (not the staff rates) would be used to determine the lowest all day parking rate.

If the staff carpark does qualify as part of the commercial parking station then what is the impact on the lowest daily car parking rate? For example if staff are charged \$3 a day to park:

- iii. Does it mean that the \$3 rate can then be used by other employers to value car parking fringe benefits arising from car parking at any of the shopping centre car park facilities?
- iv. Does it mean that the \$3 rate is then the lowest car parking rate of the entire shopping centre car park, which is lower than the car parking threshold of \$8.95 and accordingly no car parking fringe benefit is triggered? This would not be the case if the ATO agrees that the staff car park is separate from the public parking facility i.e. the small business parking exemption could still apply to the employers of staff who park in the staff car park but the other employers would not be able to use the \$3 day as the lowest daily car parking rate. The ATO should clarify its position in this regard.

3. Enhanced compliance burden

The proposed changes will create a significant administrative and compliance burden on taxpayers. Many shopping centres charge very high fees for parking (even outside of main cities) but it would be almost impossible for employers that are not associated with the shopping centre to know whether the car park is charging the higher prices to make a profit from the car park or it is just as a deterrent for commuters, tourists and other longer term parkers. As an alternative, the employers will have to engage valuers to get a true cost of the car park provided at employer car park. This places an

unreasonable compliance burden on taxpayers who provide parking to employees at their premises often in circumstances where there is ample free street parking.

4. FBT reform

The Australian Government requested that the Board of Taxation launch a comprehensive review on compliance costs associated with taxpayer obligations under FBT legislation. This draft ruling does not assist the objective of reducing compliance costs and in fact creates significantly more compliance burden on taxpayers.

The ATO has general powers of administration and a solution be for the ATO to issue “safe harbour” rules that have zones at certain distances from CBD locations and the ATO sets a particular threshold rate for each zone. These zones should become cheaper for city fringe locations and not exist beyond these locations. This would also push the compliance burden for reviewing lowest daily rate to the ATO as opposed to every FBT paying entity in Australia.

BDO is of the belief that there needs to be a review of the ATO threshold rate for car parking. The rates have not kept up with general increases in car parking costs and the growing demand of car parking in any area. The annual CPI increase in this rate is not reflective of the actual annual incremental cost of car parking.

APPENDIX 2 - Employers Guide Chapter 16 rewrite

BDO have compared the old chapter 16 and the proposed chapter 16 and made the following observations on the following issues:

Is the commercial parking station run to make a profit?

Section 16.1.6.1 gives an example of a shopping centre operator that runs a car park as part of their operations to be used by shopping centre patrons and local commuters as park and ride scheme. The Guide says the shopping centre car park is a commercial parking station but it does not give any indication as to how it was determined that the carpark was run to make a profit from the car parking facility. Paragraph 16 of TR 2019/D5 says, “In determining whether a car parking facility is commercial, you will need to consider all of the surrounding circumstances and the general nature of the operation of the car parking facility. No one factor will be determinative.” The example does not provide sufficient surrounding circumstances to make such a determination.

Another example states that Inner city hospital is a commercial car park where the majority of its parking spaces are reserved for medical staff and, a small proportion of left over spaces are made available to the public for all-day parking. In this case, the guide says the hospital car park is also considered to be a commercial parking station. We query the logic in this example and it appears to go against the comments in paragraph 16 of TR 2019/D5 as mentioned above. There is no indication as to the rate charged to medical staff compared to the rate charged to the general public. It is assumed that the rate charged to the medical staff is low or nil and in this case it would be very difficult for the car parking facility to make a profit from the car parking facility if it is relying on the small number of places offered to the general public to make a profit.

Separate commercial parking stations in the one facility

Example 9 in 16.1.6.2 ‘fees for all-day parking’ is interesting as it indicates that the one parking facility can have more than one commercial parking station. It also indicates that even though a car park facility has limitations on who can park there, it is still considered a commercial parking station. It would be good to have further clarification of the application of this to car parking facilities for staff only at shopping centres, and any other separate areas that may be provided in shopping centres.

Market value method changes

Previously employers were required to keep records of the actual number of car parking fringe benefits. In 16.2.5 the ATO proposes to change this to requiring that employers keep records of the actual number of car spaces provided instead and as well obtain valuers reports from a qualified valuers which need to be received before returns are lodged. BDO believe that despite the fact the change is accompanied by the inclusion of practical guidance and tips to keep in mind when engaging a valuer which is useful, the more rigorous record keeping requirements will create a compliance burden for employers.

Spaces method - how do you calculate the total taxable value for all fringe benefits?

The spaces method in section 16.2.8 proposes to provide a total taxable value for all of the fringe benefits for employees if you elect to value using this method. You calculate a daily rate amount using the commercial parking station method, the market value method or the average cost method. The proposed new chapter provides a formula for working out the average number of employees and average number of spaces, however BDO are of the view that it could be more helpful than merely describing the new formula using words i.e. with more worked examples.

Ancillary Matters - what do these include?

Section 16.3.1 now provides more guidance on what car-parking benefits are not subject to FBT including three extra scenarios:

1. a car parking benefit that is a minor benefit will be exempt
2. the provision of parking for a motorcycle or an e-bike will be exempt
3. parking provided from cars that are not used by employees to travel between work and home

BDO are pleased that new scenarios have been added and encourages the inclusion of more scenarios.