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Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: *FBT@treasury.gov.au*

Dear Sir/Madam

FRINGE BENEFITS TAX (FBT) REFORM – LIVING AWAY FROM HOME BENEFITS

We thank you for the opportunity to make comment on Treasury's Consultation Paper entitled 'Fringe Benefits Tax (FBT) Reform - Living-away-from-home benefits' ('the Consultation Paper') and are pleased to provide the following response.

Pitcher Partners comprises five independent firms operating in Adelaide, Brisbane, Melbourne, Perth and Sydney. Collectively we would be regarded as one of the largest accounting associations outside the Big Four. Our specialisation is servicing and advising smaller public companies, large family businesses and small to medium enterprises (which we refer to as the "middle market"). In making this submission therefore, our focus is on the implications of the proposals in the Consultation Paper for the middle market.

We not only advise many employers in the middle market who provide living away from home benefits to both temporary resident and permanent resident employees but also employees in receipt of such benefits. As such, we believe we are in an excellent position to make informed comments on the real implications of the proposed reforms on the middle market.

General comments

The effective removal of the living away from home concessions will have a significant impact on the costs of employing skilled overseas workers - who will only be attracted to Australia if their employer is prepared to either pay increased remuneration or pay FBT on benefits formerly exempted or concessionally taxed.

Whilst larger businesses may be able to absorb such cost increases, most of the employers in the middle market will not be in a position to do so - this will inevitably result in higher costs for both services and goods produced by the middle market. Based on a small sample of our clients, it is estimated that the costs of hiring overseas workers could increase by at least 10% to 15% if the proposed reforms are implemented.

We are of the view that the proposed amendments relating to temporary resident employees, whereby they must maintain a home in Australia (which they are living away from for work), will mean that most such employees will be severely disadvantaged when compared to permanent resident employees. Rather than creating a level playing field between hiring an Australian worker or a temporary resident worker, the reforms would create an uneven playing field. This is so because temporary resident employees who are genuinely living away from home suffer the same disadvantages and additional costs as do permanent resident employees who are living away from home. The fact that they do not maintain a home in Australia does not alter the fact that they may maintain a home at their usual place of residence. In any event, permanent residents are not required to maintain a home anywhere but just retain an intention to return to their usual place of residence in order to satisfy the requirements for living away from home.

We believe that this approach also discriminates against industries which have a strong reliance on foreign labour. Such an approach will, we believe, have a significant adverse impact on large rural and remote infrastructure projects (otherwise considered beneficial for the community) that require labour and skills not otherwise available in Australia.

In our view, the reforms should be directed at maintaining a level playing field for all employees who are living away from home regardless of their residency status or industry sector. This could be achieved by tightening the rules around what is meant by 'living away from home' and secondly, introducing certainty as to what costs are reasonable through specific substantiation requirements. To some extent the proposed reforms will achieve this, with the obvious exception that the additional requirements imposed on temporary overseas residents are far too restrictive and discriminate heavily in favour of permanent residents who are living away from home.

Question 1: Are there any unintended consequences from the proposed reforms?

1. We agree that the provisions will remove 'rorting' by temporary resident employees who are not legitimately living away from home. However, the provisions will disadvantage temporary resident employees who are legitimately living away from home by imposing a requirement (having to maintain a home in Australia which they are living away from for work) that permanent resident employees living away from home do not have to meet.

2. If, as stated in the then Assistant Treasurer's media release on 29 November, 2011, the intention of the provisions is to compensate employees for additional costs they incur in living away from home, the provisions will not achieve this for temporary resident employees. In cases where they are legitimately living away from home, they suffer the same additional costs as permanent residents who are living away from home. If it is appropriate for concessions to be maintained for permanent residents, it is equally appropriate to maintain them for temporary residents who are legitimately living away from home.

3. The Consultation Paper does not make it clear as to whether certain concessionally taxed benefits currently available to temporary resident ('overseas') employees (e.g. relocation transport, holiday travel, children's education costs, etc) will be maintained in future. Will these concessions be contingent upon the employee satisfying the requirements to maintain a home in Australia, or will the concessions apply in cases where they are living away from home but not maintaining a home in Australia? We submit that it would not be appropriate to deny these concessions in all but limited cases (i.e. where a home is maintained in Australia) as temporary residents legitimately incur these additional costs in accepting assignments in Australia and it would place them at a significant disadvantage, or impose an additional cost burden to employers, to deny them in future.

4. Changes to the FBT treatment of living away from home benefits and the shift to treat living away from home allowances as assessable income of the employees, will have a significant impact on other employment on-costs such as superannuation guarantee, payroll tax and WorkCover. These changes may add additional cost burdens on employers and should be fully explored to ensure that they are not overburdened with increased on-costs.

5. With the shift from taxing living away from home allowances as fringe benefits and treating them as assessable income in the hands of employees, this will introduce significant compliance risks as employee's will be required to assess their own circumstances. In our experience, employees and their advisors are far less likely to accurately assess their own circumstances, when compared to employers as they are driven by self-interests to achieve the most tax effective results. This could lead to excessive claims for deductions, particularly by permanent residents who are not legitimately living away from home.

6. In relation to PAYG withholding, will employees have to individually apply to the Commissioner for a variation (in circumstances where they believe they will have deductions to claim against living away from home allowances) or will some form of general variation be issued?

7. The shift from taxing living away from home allowances as fringe benefits and treating them as assessable income in the hands of employees, will also mean that many on-hired workers of employment agencies who do not meet the definition of an employee for FBT purposes, could in future access living away from home concessions (in our experience many agencies incorrectly treat on-hired workers as eligible for the current concessions). Is it intended that such persons should be able to access these concessions in future or should they remain outside the class of worker for whom the concessions are intended?

8. Many employers have pre-existing and long term binding agreements with overseas employees working in Australia (or on behalf of such employees) to provide certain benefits which are currently treated as exempt or concessionally taxed for FBT purposes. These could include benefits such as accommodation, holiday travel or payment of childrens' school fees. In many cases, these agreements will go well beyond 1 July 2012 meaning that employers could be liable for FBT on benefits which were originally costed as exempt or concessionally taxed at the time of the agreement. Without appropriate transitional arrangements, such employers will be exposed to what could amount to very significant additional costs (in terms of additional remuneration or FBT payable).

9. The removal of concessions for temporary resident employees could mean that employers will be unable to attract skilled workers from overseas where there are currently skill shortages in Australia unless they significantly increase payments to them.

Question 2. What practical aspects of the proposed reforms need further consideration?

1. How will employers deal with binding agreements and contracts currently in place with both employees and third parties (e.g. leases) which will continue to have effect post 1 July 2012? Many of the allowances and benefits contained in these are costed based on the present provisions and exemptions but may incur FBT under the proposed provisions.

2. How will employees substantiate that they are legitimately living away from home? Currently, a declaration is required from the employee and held by the employer. Will a similar declaration be required? Will this be sufficient or will other independent substantiation be required?

3. Currently, there are differences of opinion as to what is meant by the term 'reasonable', particularly in relation to accommodation costs. Is reasonable equal to actual costs incurred by the provider (or employee) or is reasonable a more subjective measure having regard to such factors as the employee's status, standard of accommodation at the usual place of residence and size of the family unit? In our view, clarity should be introduced by defining reasonable to always be no greater than what is actually incurred by the provider or employee.

Question 3. Are there any interactions with other areas of the tax law that need to be addressed?

As stated under Question 1, the reforms will have an impact on employment related on-costs and obligations such as PAYG Withholding, superannuation guarantee, WorkCover and payroll tax. Any reform should be actively considered in conjunction with the relevant authorities administering these on-costs to ensure that the bases on which they are calculated are not unduly distorted by the proposed measures.

Question 4. As the statutory food amount is intended to reflect the ordinary costs incurred by an Australian in 2011, what should the statutory food amount be updated to?

In our view, it would be appropriate to review the statutory food amounts to reflect current values. We are not in a position to advise as to what that amount should be but suggest that an appropriate benchmark measure be found (such as in a similar vein to the 'basket of goods' used to measure CPI movements).

Question 5. Should the statutory food amount be indexed annually to ensure it remains up to date?

We agree that it is appropriate for the statutory food amount to be indexed annually to reflect movements in values. This could be done in much the same way as is currently the case for certain FBT rates and thresholds (e.g. housing indexation factors, reasonable food components) which are indexed annually.

Question 6. What transitional arrangements would be appropriate for the community sector?

We submit that the issue of transitional arrangements is relevant to not only the community sector but all employers who have employees living away from home. Accordingly, we submit that due consideration must be given to transitional arrangements for all employers to ensure they are not unreasonably disadvantaged by the reforms.

As you would understand, in many cases employers and employees agree to arrangements for the employee to live away from home where certain allowances or benefits are agreed to be provided. These arrangements are almost always based on the current FBT treatment whereby the benefits or allowances paid or provided are exempt or concessionally taxed. Typically, these agreements can run for a number of years (possibly up to four years in the case of temporary resident employees who are working under a 457 visa). As previously argued, these employees are often legitimately living away from home and not rorting the system.

To remove the FBT exemptions and concessions part way through an agreement is akin to a new taxing provision being introduced retrospectively. This is not, we submit, good tax policy and should be avoided where possible. Accordingly, we submit that transitional arrangements should be introduced to effectively grandfather current arrangements and therefore ensure that employers and employees bound by existing agreements are not disadvantaged.

Contacts for Further Information

Should you have any queries in relation to the points raised in our submission, please do not hesitate to contact me on 03 8610 5204 or Gary Matthews on 03 8610 5381.

Yours faithfully

M D NORTHEAST
Executive Director