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Ben Murphy
Public Advice and Guidance
Australian Taxation Office

By email: PAGSEO@ato.gov.au

Dear Ben

Car parking fringe benefits – Draft Taxation Ruling TR 2019/D5 and FBT Guide for Employers – draft Chapter 16

As the representatives of over 200,000 current and future professional accountants in Australia, the two major Australian accounting bodies, Chartered Accountants Australia and New Zealand and CPA Australia, we make this submission on the draft ATO guidance for car parking fringe benefits. The Corporate Tax Association (the CTA) also supports the following observations.

The publication of *Draft Taxation Ruling TR 2019/D5 Fringe benefits tax: car parking benefits* (**the Draft Ruling**) and draft Chapter 16 of *Fringe benefits tax – a guide for employers* (**the Draft Guide**) not only crystallises the implications of the decision in *FCT v Qantas Airways Ltd* [2014] FCAFC 168 (**Qantas**) for taxpayers but also further broadens the interpretation of commercial parking station to include spaces leased by non-profit organisations and single spaces leased in the ordinary course of business.

While we acknowledge that the ATO is bound by the Court's view in Qantas and cannot administer fringe benefits tax (**FBT**) law to the contrary, the Draft Ruling raises concerns regarding the divergence of the law from the policy intent, the impacts on previously unaffected taxpayers and the compliance approach that will be taken by the ATO.

The taxable value of car parking benefits has been around $250 million per annum since 2011-12 with 6315 employers reporting gross taxable car parking benefits in 2017-18. The employee contribution as a percentage of gross taxable value has grown from 5.7 per cent in 2011-12 to 10.7 per cent in 2017-18[1]. This suggests that employees are increasingly incurring the cost of car parking benefits, arguably the intended outcome of Division 10A of the *Fringe Benefits Tax Assessment Act 1986* (**FBTAA**). However, the figures do not provide an indication of the number of newly-liable employers that will arise from the proposed ATO guidance.

The CTA recently conducted a member survey on the impact of the Draft Ruling, which indicated that of those members affected, 60 per cent will pay the increased FBT cost, with 20 per cent seeking some form of employee contribution, and 20 per cent ceasing to provide car parking facilities to employees. The average increase in FBT cost of those affected was $1.6 million per annum, particularly impacting employers located at Macquarie Park and North Ryde in Sydney.

In particular:

- employers operating in suburban and regional areas may now be captured by a law that was originally intended to address the provision of high-value parking in central business districts

[1] ATO, *Table 1: Fringe benefits tax: selected items, by FBT return years 2009-10 to 2017-*18, Taxation Statistics, 2018

- the extension of the definition of commercial parking facility to the leasing of limited excess spaces may be inappropriate
- clarity is required on the characteristics of a car parking station that is run to make a profit and a method by which it can be established whether a profit is being made
- it is unreasonable to expect an employer within the one-kilometre radius to be able to ascertain whether non-standard car parking facilities (e.g. single spaces leased via an app) are run to make a profit
- a pricing methodology to disentangle non-market rents such as monopoly rents or penalty rates from the base market price to obtain the lowest representative fee should be considered
- streamlined practical approaches such as safe harbours and guidelines should be provided
- the administrative burden arising from the proposed interpretation poses a challenge for the ATO and businesses to monitor the entry and exit of commercial parking stations across Australia and to ensure compliance with FBT obligations.

We recommend that the ATO liaise with Treasury to explore reform options to address the issues created by the Qantas decision. We suggest that the Draft Ruling is withdrawn as opportunities to correct or improve the law are explored. At the very least, we recommend that the start date of any Ruling should be deferred to 1 April 2021.

We also note the lack of targeted consultation with our respective bodies prior to the release of this Draft Ruling and that the Draft Ruling was not tabled at the ATO's Fringe Benefits Tax Working Group for comment by members. It is our view that this has resulted in an interpretation that goes well beyond the view established in Qantas and imposes an unreasonable compliance burden for negligible revenue.

Detailed comments are included in the attachment.

If you have any queries about this submission, please contact:

- Elinor Kasapidis (CPA Australia) on 03 9606 9666 or elinor.kasapidis@cpaaustralia.com.au
- Michael Croker (Chartered Accountants ANZ) on 02 9290 5609 or michael.croker@charteredaccountantsanz.com, and
- Paul Suppree (CTA) on 03 9600 3865 or psuppree@corptax.com.au.

Yours sincerely

Simon Grant FCA
Group Executive – Advocacy, Professional Standing
Executive General Manager, and International Development
Chartered Accountants Australia and New Zealand

Dr Gary Pflugrath CPA
Policy and Advocacy
CPA Australia

Paul Suppree
Assistant Director
Corporate Tax Association

CHARTERED ACCOUNTANTS™
AUSTRALIA + NEW ZEALAND

Chartered Accountants Australia and New Zealand
33 Erskine Street, Sydney, NSW 2000
P: +61 2 9290 1344
W: charteredaccountantsanz.com
ABN 50 084 642 571

CPA Australia
Level 20, 28 Freshwater Place, Southbank Victoria 3006
P: 1300 73 73 73
W: cpaaustralia.com.au
ABN 64 008 392 452

Cc: Mr Lucas Rutherford, Treasurer's Office
Ms Lucy Connor, Assistant Treasurer's Office
Ms Marisa Purvis-Smith, Division Head: Individuals and Indirect Tax Division, Department of Treasury

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Chartered Accountants
Australia and New Zealand
33 Erskine Street, Sydney, NSW 2000
P: +61 2 9290 1344
W: charteredaccountantsanz.com
ABN 50 084 642 571

CPA AUSTRALIA

CPA Australia
Level 20, 28 Freshwater Place,
Southbank Victoria 3006
P: 1300 73 73 73
W: cpaaustralia.com.au
ABN 64 008 392 452

Broadened scope of Division 10A

The updated ATO interpretation of a commercial parking station now clearly includes:

- car parks with fee structures that discourage all-day parking
- car parks made available for all-day parking via sharing mobile apps in the ordinary course of business
- car parks in residential apartment complexes made available for all-day parking through a commercial arrangement
- car parks operated by non-profit organisations where at least one space is made available to the public for all-day parking
- car parks that impose restrictions, but are available provided any member of the public accepts those restrictions
- a single car space being made available in the ordinary course of business, to members of the public, for all-day parking.

This means that the number of employers who are captured by Division 10A of the FBTAA is likely to increase due to the expanded definition of a commercial parking station. Any employer whose work car park is within a one-kilometre radius of an airport, shopping centre, hospital, university, hotel, conference centre or any other car space that is being offered for all-day parking may now be liable for fringe benefits tax on car parking benefits. Employers operating in suburban and regional areas may now be captured by a law that was originally intended to address the provision of high-value parking in central business districts[2].

Extension of interpretation of commercial parking facility to app-based car parking and single space leases

The introduction of app-based offerings into the car parking market also brings challenges. It is not unreasonable to expect that businesses may advertise excess car spaces above the FBT threshold in industrial zones or suburban office complexes, thereby creating FBT obligations for surrounding businesses. Where the market is yet to determine an equilibrium, the price may not reflect the true economic value of the car space but is required to be used to determine the lowest representative fee. The market value method is likely to provide a more realistic price but is a costly impost on businesses that were previously unaffected. We challenge the ATO's assertion in at 16.2.5.3 of the Draft Guide that an employer cannot rely on the valuation provided by the qualified valuer but rather must consider whether the valuation was correct according to a reasonable person.

While the ATO's consideration of the impact of new technology-enabled business models in the context of this issue is appreciated, we question whether the extension of the definition of commercial parking facility to the leasing of limited excess spaces (e.g. residential apartment complexes, on-site parking spaces at suburban industrial complexes) is appropriate. We anticipate that such an interpretation will impose FBT obligations on a far broader range of employers than intended by the legislation including businesses in lower-density employment hubs.

[2] Data from the Australian Bureau of Infrastructure, Transport and Regional Economics shows strong relationships between job density and private transport, and the use of cars to travel to suburban employment clusters but weaker relationships between parking costs, private transport and car density. The author observes that the weak relationship between parking prices and private modes of transport may be due to the provision of parking by the employer. Loader, C., *Update on Australian transport trends*, Charting Transport, 28 December 2018

There may also be unintended consequences where an arm's length provider of a car space prices their all-day parking below the FBT car parking threshold, thereby eliminating the obligation. For example, a business in a central business district holds leases over two car parking spaces in their office basement and regularly offers one to the public for all-day parking via a mobile app with an average price of $8.50 which generates a small margin over the notional lease costs (i.e. makes a profit) but is less than the FBT threshold. All employers within a one-kilometre radius would then be exempt.

We suggest that the ATO refine its interpretation to limit the definition of commercial parking stations to where the purpose of the car parking spaces is to be made available to the public. This will not only ease the administrative and compliance burdens on the ATO and businesses, but also ensure that the basis of the lowest representative fee is reflective of a purposeful commercial market for car parking spaces rather than incorporate opportunistic offerings to the public which are based on excess parking capacity.

Determining whether car parking stations are run to make a profit

Paragraph 16 of the Draft Ruling states:

> *A facility is 'commercial' if it is run to make a profit which may include a facility operated by a not-for-profit organisation. 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 Draft Guide does not expand on what the ATO considers to be the characteristics of a car parking station that is run to make a profit, nor does it suggest a method by which it can be established whether a profit is being made. In some instances, there will be no intention to run the car park at a profit or the provision of car parking may be unprofitable when direct and indirect costs are calculated. The provision of car parking facilities may often be so incidental to the primary business operations, especially in the case of non-profit organisations (e.g. hospitals and universities) or where businesses/residents lease excess car parks, that separate accounts are not kept.

Examples include:

- revenues from shopping centre car parks do not cover costs such as repairs and maintenance, service attendants, ticket booths and boom gates, and apportioned lease expenses; that is, the car park is operated at a loss and is subsidised by the rents paid by tenants of the shopping centre
- a hospital pays a service provider to operate its car park but the operations run at a loss once full costs are determined and there is no intention by the hospital to make a profit from the car park
- a university provides extensive car parking across its campus however the fee structure is designed to only cover costs
- a resident in an apartment building who operates a home business leases their unused car park at a rate that is less than an apportioned rental expense amount based on square footage
- a business wholly owns land and buildings in an industrial park and offers two car parks for rent at a rate intended to cover car park outgoings
- a suburban conference centre charges a nominal fee to conference attendees for car parking which is also extended to the public when there are available spaces and the fee is based only on covering direct costs.

In such instances, while there is a price in the market for such car parking spaces, the car parking station is not run to make a profit and therefore does not satisfy the definition of a

commercial parking facility as articulated in the ruling. This therefore precludes the use of such a price as a proxy for taxable value (Qantas, [12]).

However, from a compliance perspective, it is unreasonable to expect an employer within the one-kilometre radius to be able to ascertain whether such car parking stations are run to make a profit, or whether the above situations apply instead. It is similarly unreasonable to expect the relevant car parking facility to make such details available to surrounding employers for the purposes of determining whether an FBT obligation arises.

The ATO guidance should address such examples and provide clarity for employers in the vicinity of such car parking stations.

Valuing the benefit when prices reflect a combination of monopoly and locational rents
The commercial parking station is used as a proxy for determining the taxable value of the benefit. However, embedded in the prices of certain commercial car parks are monopoly rents or penalty rates which are not necessarily 'representative' of a free market premium. The ATO should consider whether there is scope to develop a pricing methodology to disentangle such non-market rents from the base market price. This will prevent FBT being imposed at a rate that is not an appropriate proxy for economic value, but rather includes penalty and other pricing distortions.

Further details in guidance
The Draft Ruling increases uncertainty in determining whether a commercial parking station is available. Given the compliance burden imposed by the approach taken in the Draft Ruling, the Guide should consider including practical approaches such as safe harbours and guidelines that assist in determining whether a car park is a commercial parking station and run to make a profit in the ordinary course of business. This will provide clarity to taxpayers who, each year, will need to check for a commercial parking station and, if identified, determine the benefit provided.

The ATO should provide a streamlined approach for determining the representative fees and what it will accept. The way in which apps or websites such as Parkopedia and ParkHound can be utilised should be clarified. The Draft Ruling should be clear that such an approach is a suggested method only.

The way they may be able to ascertain whether a car park is being made available in the ordinary course of business and run for a profit should also be clarified especially in the context of single-spaces, app-based and non-profit car space facilities.

The Draft Guide should expand on the ATO's view of sub-let car parks, especially with owners who operate no other business. This includes an owner of a car park in a residential apartment building who regularly offers it for all-day parking via an app, or a sole trader running a home business out of an apartment and makes the car space available.

Clarity is also required as to whether the following may constitute commercial parking stations:

- memberships such as that given in example 9 of the Draft Guide but where car park access is embedded in the membership price, or
- subscription or time share-based models such as car parking clubs where car spaces are pooled and can be accessed for an annual fee.

Communication and compliance challenges
In the event the Ruling is finalised in its current form, the ATO faces a significant communication challenge in ensuring that all previously unaffected businesses are made aware of their

potential FBT obligations. The ongoing encroachment of app-based car parking into traditional commercial parking facilities also poses a challenge for the ATO to monitor the entry and exit of commercial parking stations as defined in this Draft Ruling in the Australian market and to ensure tax agents and businesses are kept up to date on market changes.

We suggest that a practical approach is taken in the interpretation and administration of Division 10A following the Qantas decision to ensure that the Court's findings are not unnecessarily or unfairly extended to businesses that were never intended by the then-Government to be captured under the provisions.

Reform through regulations

We recommend that the ATO liaise with Treasury to explore reform options to address the issues created by the Qantas decision. We suggest that the Draft Ruling is withdrawn or its finalisation deferred as opportunities to correct or improve the law are explored.

The Court's decision overrides the qualification related to short-term shopper parking facilities included in the Explanatory Memorandum[3]. At a minimum, we would seek for this qualification to be included in the operative provisions by legislative amendment[4].

Consideration should also be given to removing secondary leasing (e.g. a business sub-letting its spare office car parking spaces) and clarification of whether the sub-letting of residential car parking spaces constitutes an ordinary course of business.

There may be reason to use an alternative means by which to adjust the FBT car parking threshold given that car park prices are a function of land costs, location premiums and the price of alternatives such as public transport. The use of the All Groups Consumer Price Index prescribed by section 39A means that the threshold has not stayed in line with increases in market prices. This is the equivalent of bracket creep for FBT. A review should be undertaken to ascertain the most appropriate threshold that ensures the policy intent is achieved, taxpayers are not unduly affected and the ATO is able to assure compliance with the FBTAA.

We also suggest further consideration of the options put forward by The Tax Institute in its submission[5] to Treasury, in particular the proposal to redefine 'commercial parking station' in the FBTAA to exclude special purpose parking stations (as well as parking available through various modern-day applications that make car parking facilities available in residential and office buildings that do not operate as commercial car parks) and the provision of powers to the Minister to issue a Legislative Instrument to exclude special purpose parking stations or to include specified zones in which if a parking space is provided, it will be subject to FBT.

Finally, we note the Board of Taxation has completed its FBT compliance cost review and the Board's report has been submitted to the Government. Any relevant recommendations from the Board's report should also be considered.

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[3] *Some car parking facilities have a primary purpose to provide short-term shopper parking. To discourage all-day parking, the operators of these facilities charge penalty rates for all-day parking. These rates are significantly greater than the rates that would be charged by a similar facility which encouraged all-day parking. For the purposes of these provisions, short-term shopper parking facilities using penalty rates for all-day parking will not be treated as a "commercial parking station".*, Explanatory Memorandum to the *Taxation Laws Amendment (Car Parking) Bill 1992*

[4] The need for the operative provisions in legislation to contain such qualifications, rather than their inclusion in explanatory materials, was highlighted by the Administrative Appeals Tribunal in QANTAS AIRWAYS LIMITED v FC of T, [2014] AATA 316, [34]

[5] The Tax Institute, *Car Parking Fringe Benefits - recommended legislative amendments*, submission to Treasury, 30 July 2018