



## Tax Insights

# ATO's view on tax treatment of travel expenditure

### Snapshot

On 17 February 2021, the Australian Taxation Office (ATO) published three new products relating to the tax treatment of travel expenditure:

1. *Taxation Ruling (TR) 2021/1* Income tax: when are deductions allowed for employees' transport expenses?
2. *Draft Taxation Ruling TR 2021/D1* Income tax and fringe benefits tax: employees: accommodation and food and drink expenses, travel allowances, and living-away-from-home allowances;
3. *Draft Practical Compliance Guideline (PCG) 2021/D1* – Determining if allowances or benefits provided to an employee relate to travelling on work or living at a location – ATO compliance approach.

These newly published products replace previous ATO draft guidance *TR 2017/D6* which has been withdrawn.

The subject matter of *TR 2021/1* is substantially unchanged from that previously published in *TR 2019/D7*, which is now finalised. Overall, the issues of deductibility in relation to travel expenses has not advanced a great deal since the John Holland case was handed down in June 2015 despite an extensive and extended consultation between the ATO and many interested taxpayers and professional representative bodies.

The newly published *TR 2021/D1* and *draft PCG 2021/D1* introduce the ATO's new approach following the feedback provided on *TR 2017/D6*.

Of note, *PCG 2021/D1* reintroduces the 21 day rule in relation to business travel. However, it overlays this rule with a requirement that travel to the same work location must be for an overall aggregate period of fewer than 90 days in an FBT year, for the travel to continue to be treated as travel on work.

It should be noted that *TR 2021/D1* and *PCG 2021/D1* are in draft, requiring comments to be submitted by 19 March 2021, and may be subject to change in the future.

The ATO notes that *TR 2020/1*, *TR 2021/D1* and *PCG 2021/D1* are intended to be read in conjunction with each other.

### **TR 2021/1 Income tax: when are deductions allowed for employees' transport expenses?**

*TR 2021/1* sets out when an employee can deduct transport expenses. Note: It expressly states that it does not deal with itinerant workers. *TR 95/34* continues to be the relevant ATO view in respect of deductions / reimbursement of travel expenses for itinerant workers.

The ruling also applies for the purposes of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) in determining whether such expenses paid by the employer would have been 'otherwise deductible' if incurred by the employee and as a result not subject to fringe benefits tax (FBT).

The ruling confirms and discusses the long-standing principles that:

- Transport expenses incurred for ordinary travel between home and a regular place of work are not deductible; and
- Transport expenses incurred by an employee travelling between work locations are generally deductible.

The ruling also explains a number of special cases or exceptions to these general rules.

The ruling sets out the following factors as supporting the characterisation of transport expenses as being incurred in gaining or producing assessable income and income tax deductible:

- The travel fits within the duties of employment, that is, the obligation to incur transport expenses arises out of the employment itself and not the employee's personal circumstances;
- The travel is relevant to the practical demands of carrying out the employee's work duties or role, that is, the transport expenses are a necessary consequence of the employee's income-producing activity.

The ruling also sets out additional factors that may be relevant:

- The employer asks for the travel to be undertaken;
- The travel occurs on work time;
- The travel occurs when the employee is under the direction and control of the employer.

The Ruling applies both before and after its date of issue.

### **TR 2021/D1 Income Tax and Fringe Benefits Tax: employees: accommodation and food and drink expenses, travel allowances, and living-away-from-home allowances**

TR 2021/D1 sets out the Commissioner's preliminary view on the deductibility and FBT treatment of accommodation and food and drink expenses, including the criteria for determining whether an allowance is a travel allowance or a living-away-from-home allowance (LAFHA) benefit.

The subject matter of TR 2021/D1 is intended to replace the Commissioner's preliminary views that were expressed in TR 2017/D6 related to the distinction between a travel allowance and a living-away-from-home allowance (subject to FBT). TR 2017/D6 is now withdrawn.

The draft ruling notes that while accommodation and food and drink expenses are ordinarily private or domestic in nature, accommodation and food and drink expenses will generally be deductible where the employee is "travelling on work".

The draft ruling explains that an employee will not be travelling on work and the accommodation and food and drink expenses incurred will be classified as "living expenses", where any of the following factors apply:

- The expenses are incurred because the employee's personal circumstances are such that they live far away from where they gain or produce their assessable income;
- The employee incurs the expenses because they are living at a location;
- The employee incurs the expenses as a result of relocating from their usual residence.

A key element of the draft ruling is determining where an employee is "living at a location".

To assist in determining whether an employee is “living at a location” away from their usual residence the draft ruling sets out the following factors:

- There is a change in the employee’s regular place of work;
- The length of the overall period the employee will be away from their usual residence is a relatively long one;
- The nature of the accommodation is such that it becomes their usual residence; and
- Whether the employee is, or can be, accompanied by family or visited by family and friends.

All these factors should be considered and no single factor is necessarily decisive.

**PCG 2021/D1 Determining if allowances or benefits provided to an employee relate to travelling on work or living at a location – ATO compliance approach**

PCG 2021/D1 outlines the ATO’s compliance approach to determining if employees in certain circumstances are travelling on work or living away from their normal residence.

The Guideline is focused on providing practical guidance to assist in determining whether an allowance paid by an employer to an employee is paid for:

- Travelling on work, which will be a travel allowance subject to PAYG withholding, or
- Living at a location, which may be a LAFHA benefit and subject to FBT.

The Guideline also assists in determining whether amounts reimbursed or paid by an employer would have been deductible to the employee had they purchased the goods or services themselves.

The Guideline states that the Commissioner will generally accept an employee is travelling on work when the following circumstances are satisfied:

The employer	The employee
<ul style="list-style-type: none"> <li>• Provides an allowance to an employee or pays or reimburses accommodation and food and drink expenses for the employee</li> <li>• Does not provide the reimbursement or payment as part of a salary-packaging arrangement and the employee is not given the option to elect to receive additional remuneration in lieu</li> <li>• Includes the travel allowance on the employee’s payment summary or income statement and withholds tax, where appropriate, and</li> <li>• Obtains and retains the relevant documentation to substantiate the fact that all these circumstances are met.</li> </ul>	<ul style="list-style-type: none"> <li>• Is away from their normal residence for work purposes</li> <li>• Does not work on a fly-in fly-out or drive-in drive-out basis</li> <li>• Is away for a short-term period being               <ul style="list-style-type: none"> <li>○ no more than 21 days at a time continuously, and</li> <li>○ an overall aggregate period of fewer than 90 days (that is, the most being 89 days) in the same work location in an FBT year, and</li> </ul> </li> <li>• Must return to their normal residence when their period away ends.</li> </ul>

Where these requirements are met, the Commissioner will accept that an employee is travelling for work, and will generally not apply compliance resources to determine if the allowance or reimbursements relate to expenses for living at a location.

Whilst this Guideline sets out the Commissioner's practical approach to categorising certain allowances and reimbursements, employers have a choice as to whether to adopt the Guideline. If an employer chooses not to rely on the Guideline, they will need to apply the relevant FBT provisions to determine if an FBT liability arises for the benefit provided (or if an exemption or concession applies) and they will need to substantiate how they determined the taxable value of the benefit.

The guideline applies to all employers, but not where benefits are provided to employees who work on a fly-in fly-out or drive-in drive-out basis.

When finalised, the Guideline is proposed to apply both before and after its date of issue.

### **Deloitte's Observations**

- Depending on the situation, the income tax deductibility (and in turn any FBT consequences) of travel expenses, can be quite complex to administer. For many years, the only guidance that taxpayers had was a 1986 Miscellaneous Tax Ruling, MT 2030. In 2017 the ATO released TR 2017/D6 in draft, and it has taken a further 3.5 years to determine that TR 2017/D6 should be scrapped and a new package of rulings be issued.
- TR 2017/D6 (now withdrawn) dealt with the taxation treatment of travel expenses and did not necessarily distinguish between transport expenses and accommodation, food and drink expenses. The Commissioner has now changed his approach and has determined that transport expenses must be dealt with separately and at times differently from how accommodation, food and drink is to be treated. For example, it is recognised that there are situations where the transport expenses associated with certain travel are deductible whereas the costs of accommodation, food and drink associated with the same trip, may not be deductible.
- TR 2017/D6 introduced concepts such as "Special Demands Travel" and "Co-existing Work Locations travel". The new ruling and the new draft ruling instead revert back to general principles of deductibility, supplemented by the safe harbour rules contained in the PCG.
- The return to a 21 day count threshold in PCG 2021/D1 provides some structure and certainty as requested by stakeholders through the consultation process. Employers may use these new safe harbour rules to develop revised and concise travel policies, design record keeping systems to support updated travel policies, eliminate administrative complexities and reduce the risk of error, interest and penalties in the event of an ATO audit.
- The safe harbour rules are not mandatory, however employers who determine not to apply these parameters will be required to maintain sufficient documentation and records to support their positions that certain allowances and reimbursements are in respect of travelling on work.
- The threshold referring to travel on work being for a short term period of no more than 21 days at a time continuously and for no more than 89 days in the aggregate for one location in an FBT year, may be reasonable in some circumstances but may not be

practical in other circumstances (where clearly travel on work is being undertaken) such as:

- Genuine business travel greater than 21 days in length (as is consistent with various rulings and court cases); or
  - Frequent business trips to the same location (e.g. 2-3 days in duration) that total more than 89 days in a FBT year.
- PCG 2021/D1 sets out and discusses the Commissioner's compliance approach to allowances paid by employers and reimbursements made by employers. However, it does not provide guidance on the Commissioner's compliance approach to expenses incurred by an individual in their capacity as an employee to which they seek to claim an income tax deduction in their personal tax return.
  - Businesses/industries who should pay particular attention to the ATO's views include:
    - Construction industry;
    - Project engineering;
    - Facility refurbishment/planned maintenance shutdowns/upgrade projects;
    - IT/software developers;
    - Mining & resources;
    - Businesses with senior executives who may regularly travel to other places of business away from that closest to their residence.
  - Clearly, during 2020 and continuing into 2021, there has been a significant reduction of all types of travel across Australia and abroad and a change in the way we work. There is a great deal of uncertainty as to whether business travel will ever be at the same levels as it was prior to the Global Pandemic especially due to the acceleration of remote work technology and capabilities. This may result in the need to continually reflect and update our approach to the treatment of business travel and our application of general principles.

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