KPMG Centre
18 Viaduct Harbour Avenue
P.O. Box 1584
Auckland
New Zealand

Telephone +64 (9) 367 5800
Fax +64 (9) 367 5875
Internet www.kpmg.com/nz

Team Manager, Technical Services
Office of the Chief Tax Counsel
National Office
Inland Revenue Department
P O Box 2198
Wellington

Our ref 150903KPMGSubPUB0020

3 September 2015

Dear Sir or Madam

KPMG Submission on PUB00201: FBT - Exclusion for car parks provided on an employer's premises

KPMG is pleased to make a submission on the above draft public ruling. Our general and specific comments are set out below.

General comments

We welcome the Commissioner's consideration of the application of the FBT on-premises exemption in section CX 23 of the Income Tax Act 2007. However, we have concerns with the narrow reading of "premises of a person" in section CX 23(2).

A broader interpretation of "premises"

We understand that the Commissioner has considered whether "premises" has a broad or narrow meaning. The Commissioner has concluded that a narrow meaning applies.

We continue to disagree with the Commissioner's view, in paragraphs 43 and 44 of her analysis, that the word *includes*, in the "premises" definition, should be read exhaustively to mean only premises that are owned or leased (as defined in the Income Tax Act). The effect is to generally exclude car parks licenced by an employer.

We disagree with this view for the reasons set out below.

Role of commentary in interpreting the law

It is not at all clear to us from the 1985 FBT Public Information Bulletin commentary that car park licence arrangements were intended to be specifically excluded from the on-premises exemption. That commentary simply outlines the types of structures that could be considered premises of an employer (e.g. land, buildings and appurtenances) and types of legal arrangements that may qualify as use of those premises (e.g. ownership, rental or lease of the land or buildings).

In previous discussions, we noted that it was unlikely that any person would determine whether a particular site was premises of a business based on the legal status of the business with respect to the site. The Public Information Bulletin does not prevent a wider interpretation.

We understand that the Commissioner's position with respect to Public (and Tax) Information Bulletin commentary on legislation is that they do not state the law. We refer to recent discussions on the impact of the change to GST input tax rules on whether something is subsequently done in the course or furtherance of a taxable activity. The policy was that this should not change the outcome. The response was that Inland Revenue was bound by what the law says.

In this situation, given the Commissioner's position with respect to policy intention, it seems that the FBT commentary, even if it does state what the Commissioner contends, should be treated as weak evidence for her position. As an aside, given the apparent inconsistent uses of legislation commentary as support for positions taken, the Commissioner should publish in detail her approach to the use of such commentary in interpreting the legislation enacted.

Legislative construction of section CX 23(2)

We consider the construction of section CX 23(2)(a) and (b) – which includes premises an employer owns and leases and other premises on which an employee is required to perform their duties – does not support the Commissioner's position. Both subsection (2)(a) and (b) can be read non-exhaustively.

In fact, the existence of subsection (2)(c), which excludes premises occupied for residential purposes from the FBT on-premises exemption, is key. It suggests to us that Parliament explicitly contemplated and legislated for a situation which should not be covered. The fact there is no similar legislative carve-out for a licence of premises suggests Parliament did not intend for this to be excluded. (If it had, it would have specifically legislated to do so, similar to residential premises.)

Only estates in land

The Commissioner's view that section CX 23(2)(a) indicates an intention for only estates in land to be premises is circular. For this view to be supported, an exhaustive view of *includes* in subsection (2)(a) must first be taken. Further, as we discuss below, this narrow view is at odds with the seemingly more expansive view of "possession".

The exclusion principle

The *expressio unius est exclusio alterius* (to express one thing is to exclude another) principle of statutory interpretation is also quoted in support of licences being excluded from the definition of premises. However, we refer to the broader construction of section CX 23(2), which includes an explicit carve-out for residential premises occupied by an employee in subparagraph (c).

We consider the *expressio unius est exclusio alterius* principle does not apply where the legislative scheme already includes specific exclusions. In other words, the express exclusion of residential premises, using the same principle, can be taken to mean that Parliament did not

intend to exclude licensed premises. These multiple double negatives suggest that the principle does not apply to section CX 23.

Parliament's intention

The comment in paragraph 52 that *Parliament has refrained from making any express exclusion from FBT for car parks that are licensed to employers or from excluding all car parks from the on-premises exclusion* should not be taken as support for licences being excluded.

Firstly, it not clear why a specific legislative inclusion for car parks that are licenced is necessary given the construction of section CX 23(2) presently does not, in our view, support exclusion. Secondly, from a tax policy perspective, a distinction between car park lease and licence arrangements, for the purposes of the FBT on-premises exemption, is unjustified. They are economically similar and should result in the same tax outcome. Thirdly, Government and Parliament's time and legislative resources are limited so that not all desired legislative clarifications will receive due attention.

Analysis of "possession"

The subsequent analysis is convoluted as a result. The Commissioner's view is that licences are not included as "premises of a person" because that has a narrow meaning due to an exhaustive rather than clarifying use of *includes*. The analysis goes on, however, to more pragmatically conclude that premises of an employer will include a car park where the employer has a substantially exclusive right to use that car park, regardless of the legal form of the arrangement.

This is based on the Commissioner's acceptance that "possession in fact or effect", includes circumstances where a person is *…in fact, in occupation or has use of the land… even though they may not satisfy the requirements for legal possession of the land.* In that context, the Commissioner's view appears to be that a licence which gives the car park user a right to use that is in fact, or effect, substantially exclusive will qualify for the FBT on-premises exemption.

This pragmatic view of what constitutes "possession" (and therefore an "estate in land"), in our view, is at odds with and undermines the Commissioner's arguments for an exhaustive reading of *includes* in section CX 23(2)(a).

Meaning of "includes" in other contexts

We also have concerns as to what a narrow definition of "includes", in this draft ruling, will mean for the Commissioner's statutory interpretation of this term in other contexts. It is by no means obvious when its use has an exhaustive versus extending or clarifying meaning. This raises serious questions about the practical application of our tax laws. It is important that the Commissioner's general view on the use of the term is published for consultation.

Specific comments

While we believe that the Commissioner's analysis in support of generally excluding licences of car parks from the on-premises exemption needs reconsideration, we support the view that car parks that an employer has substantially exclusive use of, in fact or effect, will qualify for the exemption. This is an improvement to the BR Pub 99/6 position, which was too restrictive.

Our specific comments below are on the practical tests for determining substantially exclusive use, identified by the Commissioner, and the examples in the draft analysis.

We have attempted to marry the Commissioner's practical considerations, in paragraphs 150 and 151, with the terms and conditions we have sighted in car park lease and licence arrangements.

In particular, we have concerns about the following:

- The draft analysis considers that an employer having unrestricted access to the car park and deciding how the car park space is used (e.g. if desired, the employer may park a trailer in the car parking space) are features that suggest the employer has substantially exclusive use of a car park.
- Similarly, the Commissioner considers that a car park operator or owner having the ability to alter the car park's operating hours or restricting access to the car park at their discretion might suggest a car park arrangement is not a lease.

In practice, the factors will not be clear cut.

- Most operators will regulate the opening and closing hours of a car park building (e.g. the building may be closed during weekends and/or during specified hours, such as between midnight and 5am). Similarly, while some car park buildings will provide employers with access control, such as key cards, others will not. (As an example, refer Auckland Council's website for the different access and operating hours for car park buildings operated by Auckland Transport.)
- Agreements will also typically specify the hours where an employer will have exclusive use of a car parking space (e.g. 7am to 6pm on weekdays with weekends and public holidays excluded is common). Outside of these hours of exclusivity, the car park operator may make the parking space available for members of the public.
- Agreements may have provisions preventing a lessee or licensee using the car park space for purposes other than parking a motor vehicle. This is generally to prevent obstruction of others' car parking spaces, common and non-parking areas, and entry and exit paths. In our view, this does not mean the licensee has less than full use of the car park for the purpose for which it is designed.
- It will also be common for agreements to allow the car park operator to move vehicles parked within the car park building. Generally this will be in case of hazard or obstruction.

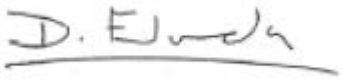
The tests for determining substantially exclusive use needs to reflect these commercial factors. The existence of these features should not result in the FBT on-premises exemption ceasing to apply.

We further recommend that the examples be expanded to incorporate these real world features. The examples, as currently drafted, are too vanilla in nature to provide any meaningful guidance to employers and there is a risk that Inland Revenue's operational teams will apply a "black and white" interpretational approach when applying the ruling in the field.

Further information

Please do not hesitate to contact us, Rebecca Armour on (09) 367 5926 or Darshana Elwela on (09) 367 5940, if you would like to discuss this submission in greater detail.

Yours sincerely



Rebecca Armour
Partner

Darshana Elwela
National Tax Director