



**CLIENT
ALERT**

FBT Explanatory Memorandum

March 2009

Developments in FBT

Exemption for work-related items

The exemption from FBT for eligible work-related items contained in s 58X of the *Fringe Benefits Tax Assessment Act 1986* (the *FBTAA*) was amended by *Tax Laws Amendment (Budget Measures) Act 2008*, which received Royal Assent on 30 June 2008.

The amendments apply to eligible work-related items acquired on or after 7.30pm (AEST) on 13 May 2008 other than items acquired under a contract entered into before that time. Consequently, an exemption is only available if items are primarily for use in an employee's employment. The exemption is limited to one of each of the eligible items per employee per FBT year unless an item is a replacement item. Furthermore, the restriction on the exemption is extended to items that have a substantially identical function.

Note that prior to the amendments, the requirement that an item be used primarily in an employee's employment only applied to mobile phones, protective clothing and computer software.

The list of eligible work-related items was updated by the Act to deal with changes in technology. A comparison between the current and former list of eligible work-related items is set out below:

Current s 58X	Former s 58X
<ul style="list-style-type: none"> • a portable electronic device • an item of computer software • an item of protective clothing • a briefcase • a tool of trade 	<ul style="list-style-type: none"> • a mobile phone or car phone • an item of protective clothing • a briefcase • a calculator • a tool of trade • an item of computer software • an electronic diary, a laptop computer or a similar portable computer • a portable printer designed for use with a notebook computer, a laptop computer or a similar portable computer

Portable electronic device

In ATO ID 2008/133, the Tax Office states that the term 'portable electronic device' takes on its ordinary meaning. It also states that a 'portable electronic device' is limited to a device that is easily carried by hand and is based on electronics. It further states that for a device to qualify as a 'portable electronic device', it must possess four primary characteristics:

- easily portable and designed for use away from an office environment;
- small and light;
- operate without an external power supply; and
- designed as a complete unit.

Examples of portable electronic devices include laptop computers, GPS navigation devices and mobile phones.

Definition of 'primarily'

In ATO ID 2008/127, the Tax Office states that the term 'primarily' takes on its ordinary meaning. Whether an item is used primarily in an employee's employment depends on the intended use at the time the item was provided to the employee. The ATO ID states this conclusion is determined by reference to the available evidence when the item was provided such as the employee's job description, duty statement or employment contract.

If there are competing uses (ie business use and private use), the ATO ID states that the following factors may assist an employer in reaching a conclusion as to whether an item is primarily for use in an employee's employment:

- the reasons the item was provided to the employee;
- the type of work to be performed by the employee;
- the co-relation between the employee's duties and the use of the item; and
- the employer's policy and any conditions relating to the use of the item.

Related amendment

The Act also amended ITAA 1997 to ensure that an employee cannot claim a deduction for depreciation for a decline in value of eligible work-related items that are exempted under s 58X of the FBTA.

The amendment applies to items acquired after 7.30pm (AEST) on 13 May 2008 other than items acquired under a contract entered into or before that time. If an item was acquired before that time and date, a deduction for depreciation could only be claimed for the 2007/08 income year, but not for later income years.

Exemption for meal cards arrangement

The *Tax Laws Amendment (Budget Measures) Act 2008* also amended s 41 of the FBTA to ensure that an FBT exemption for meals provided to employees under salary sacrifice arrangements entered into after 7.30pm (AEST) on 13 May 2008 is not available.

An FBT exemption is still available for food and drink that are provided before 1 April 2009 if an employee entered into an agreement with his or her employer prior to the above mentioned time and date. Any food or drink purchased with additional credits ('top-ups') that occur after 13 May 2008, however, is subject to FBT.

Salary sacrifice arrangements include 'meal card' arrangements whereby employees forgo salary and wages to have food and drink supplied to them at their employer's premises. However, it does not apply to subsidised canteens which are available to all employees and does not form part of a salary sacrifice arrangement.

FBT and jointly held assets

The *Tax Laws Amendment (2008 Measures No 5) Act 2008*, which received Royal Assent on 9 December 2008, inserted a new provision into the otherwise deductible rule for loan fringe benefits, expense payment fringe benefits, property fringe benefits and residual fringe benefits (in ss 19(1), 24(1), 44(1) and 52(1) of the FBTAA).

This new provision ensures that if a fringe benefit provided jointly to an employee and her or his associate is deemed by s 138(3) of the FBTAA to be provided solely to the employee, then the taxable value of the benefit is only reduced by the employee's share of the benefit which is measured by reference to the employee's percentage of interest.

This is achieved by making a final adjustment to the notional deduction (ND) component in the formula

$(TV - ND)$ where TV is the taxable value. The adjustment reduces the unadjusted notional deduction by an employee's percentage of interest in the income producing asset (whether tangible or intangible) to which a benefit relates. That is, the taxable value of the benefit is only reduced by the employee's share of the benefit.

Generally, the amendments commence from 7.30pm (AEST) on 13 May 2008. However, employers can continue to reduce the taxable value of a fringe benefit provided jointly to an employee and her or his associate in relation to an income producing asset owned by both the employee and the associate if the benefit is:

- a loan benefit that was provided before 1 April 2009; or
- an expense payment benefit, a property benefit and a residual benefit provided under a salary sacrifice arrangement entered into before 7.30pm (AEST) on 13 May 2008.

The example below, which is from the Explanatory Memorandum accompanying the Tax Laws Amendment (2008 Measures No 5) Bill 2008, explains the operation of the amendments:

Neena and her husband Marek are jointly provided with a \$100,000 low interest loan by Neena's employer which they use to acquire shares. The loan fringe benefit has a taxable value of \$10,000.

Neena and Marek use the loan to purchase \$100,000 of shares which they will hold jointly with a 50% interest each. Neena and Marek return 50% of the dividends derived from the shares as assessable income in their respective tax returns.

As a result of s 19(1)(i) and 19(5), the notional deduction of \$10,000 is reduced by Neena's percentage of interest in the shares (ie 50% so that the taxable value of the loan fringe benefit of \$10,000 is reduced by \$5,000). The employer has an FBT liability on \$5,000 which reflects the share of the loan fringe benefit that was provided to Marek.

Caution: Professional advisers and their clients will need to separate benefits provided before 7.30pm (AEST) on 13 May 2008 and those provided after that date to ensure the correct FBT treatment of the benefits. It is important to note that the transitional provisions which apply will, generally, cease from 1 April 2009, ie the 2009/10 FBT year.

Tax Office views

Mobile phones and laptops

At the FBT States and Territories Industry Partnership Meeting held in September 2008, the Tax Office expressed its view regarding the application of s 58X of the FBTAA, which included the application of the section on:

- benefits associated with a mobile phone; and
- laptop used for professional development (including self education).

Mobile phone

The Tax Office said that the amendments to s 58X have not changed its view on how the section applies to mobile phones. This is because both the former and current s 58X requires a mobile phone to be provided primarily for use in an employee's employment before an FBT exemption can arise.

The Tax Office also said that if a mobile phone is provided to an employee primarily for use in the employee's employment then the costs of calls and network costs would also be exempted from FBT. However, when the mobile phone no longer satisfies the 'primarily for use' test, the costs of calls and network costs will not qualify for an exemption under s 58X and is therefore subject to FBT. This requires an employer to examine the ongoing use of the mobile phone.

The Tax Office referred to the minutes of the National Tax Liaison Group (NTLG) FBT Sub-committee June 1996 meeting in which it discussed the application of the 'primarily for use' test to mobile phones. In that meeting, it accepted that a charger, additional battery and carry pouch form part of the cost base for a mobile phone and therefore may also qualify for an exemption under s 58X.

Laptop and professional development

The Tax Office was asked whether an exemption under s 58X was available where an employer provided a laptop computer which was purchased for use in an employee's work related self-education. For example, if an employer provides a laptop to an employee who requires it for a course of study or professional development, and to assist the employee to perform his or her employment duties.

The Tax Office acknowledged that a link between a course of study and the employment duties of an employee can exist. However, it said that a definite answer could not be provided because the factual situation may vary between employers. Therefore, the Tax Office advised that a preferred course of action for an employer would be to lodge a private ruling.

When is a briefcase not a briefcase?

In the NTLG FBT Sub-committee meeting held on 13 November 2008, the Tax Office clarified the definition of a 'briefcase' for the purposes of s 58X. While the Tax Office notes that the term is not defined in the FBTA, a 'briefcase' is defined in the Macquarie Dictionary and Oxford Dictionary as follows:

Macquarie Dictionary:

briefcase — a flat, rectangular case of leather or other material used for carrying documents, books, manuscripts, etc.

Oxford Dictionary:

briefcase — a flat rectangular case for carrying documents etc.

Therefore, the Tax Office's view is that an exemption under s 58X will only apply to items that fit the definition of a briefcase as above, subject to the 'primarily for use test' being satisfied. It states that the exemption does not extend to items that serve the same purpose as a briefcase, that is transporting work documents and items such as a laptop, to or from an employee's place of work. Accordingly, 'modern bags' do not qualify for an exemption.

However, the Tax Office advises that benefits relating to 'modern bags' may be subject to the otherwise deductible rule if an employee declaration is provided that states the percentage of employment related use of the item. Alternatively, it states that employers can consider benefit qualifies as a minor and infrequent benefit.

Tax Office Compliance Program

Compliance with FBT by small to medium enterprises is one of the areas that the Tax Office is focusing on for its 2008/09 Compliance Program. Small to medium enterprises are defined as businesses with an annual turnover of between \$2 million and \$250 million.

The Tax Office has stated that it plans to undertake 595 reviews and 370 audits of small to medium enterprises, which will focus on income and FBT compliance issues. It has also stated that it will contact 1,300 enterprises by letter or phone to verify specific income tax and FBT issues.

One of the specific compliance issues that the Tax Office is focusing on is the correct FBT treatment of business-owned motor vehicles, particularly in relation to the private use of vehicles and the provision of luxury vehicles to business principals. It states that data-matching activities will help to identify high-risk employers for further compliance action.

Definition of Relative

The Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008 received Royal Assent on 4 December 2008. The Act eliminated discrimination against same-sex couples and the children of same-sex relationships in a number of Acts.

The term 'relative' is defined in s 136(1) of the FBTAA which refers readers to s 995-1 of ITAA 1997. Consequent to the Act, a note was inserted after the definition of 'relative' in s 995-1. The note alerts readers that s 960-255 of ITAA 1997 may affect the definition of 'relative'.

Section 960-255 is contained in Subdiv 960-J of ITAA 1997. The subs, which was inserted by the Act, provides non-discriminatory rules for defining family relationships (including same-sex relationships).

In particular, s 960-255 may affect the meaning of 'relative', eg step-brothers and step-sisters may qualify as relatives.

Other relevant sections in the FBTAA that are affected by s 960-255 include s 58V and the paragraph (h) of the definition of 'fringe benefit' in s 136(1).

The Act also inserted a definition of 'parent' into s 136(1) which refers a reader to the definition contained in s 995-1 of ITAA 1997. The term 'parent' is defined in ITAA 1997 as 'an individual is the parent of anyone who is the individual's child'.

The amendments to the FBTAA apply from the FBT year starting on 1 April 2009, and to subsequent years.

Currency:

This issue of Client Alert takes into account all developments up to and including 13 February 2009.