



## Technical Update: The ATO expands the Range of Car Parking Fringe Benefits

13 July 2021

On 16 June 2021, the ATO released **Taxation Ruling TR 2021/2** (final ruling), which sets out the Commissioner's view on when the provision of car parking is a car parking benefit for the purposes of the Fringe Benefits Tax Assessment Act 1986. The ruling finalises and expands on changes proposed by the draft ruling, TR 2019/D5 (draft ruling), issued by the ATO in November 2019. The changes will result in many more employers being subject to fringe benefits tax (FBT) on the provision of car parking to employees from 1 April 2022.

The ATO has expanded on its view in the draft ruling that certain shopping centre paid car parks (and other car parks with similar arrangements) that were previously excluded as commercial parking stations in TR 96/26, may now be captured as "commercial car parking facilities". The final ruling includes virtually all such car parks that charge a fee for all day parking above the car parking threshold even if it has a primary purpose other than providing all-day parking (e.g. hourly parking at a hospital, shopping centre, hotel, university or airport, or long-term parking). This applies even if its fee structure discourages all-day parking through higher fees. This replaces the ATO's previous longstanding view in ruling TR 96/26 (withdrawn in November 2019).

The ATO view changed because of two Full Federal Court decisions in *Virgin Blue Airlines Pty Ltd v FCT* [2010] FCAFC 137 and *FCT v Qantas Airways Ltd* [2014] FCAFC 168.

### When is a Car parking benefit provided?

A car parking benefit is provided to an employee if: the employee's car is parked at one or more work car parks for a combined period of over 4 hours between 7am and 7pm at or near the primary place of employment and a commercial parking station is located within a 1 km radius of the work car park, where the lowest fee charged for all-day parking exceeds the car parking threshold. The car-parking threshold for the FBT year ending 31 March 2022 is \$9.25 per day.

### What is a 'commercial car parking facility'?

The main difference between the draft ruling and the finalised ruling is a clarification on when a parking station is a "commercial car parking facility". The ruling includes objective characteristics to be considered and examples.

The FBT definition of a 'commercial parking station' is a '**commercial car parking facility**' that is:

- permanent (but is not on-street parking); and
- at least one car space is available (**in the ordinary course of business**) to the public for all-day parking on payment of a fee.

The final ruling provides a two-stage test to assist employers to objectively evaluate a particular car parking facility and reasonably conclude whether it is or is not a commercial car parking facility. This means the employer does not have to consider the internal operations or subjective motives of the facility operator to determine whether all day parking is provided "in the ordinary course of business" of the facility operator. The test is described as follows:

- Firstly, if an employer observes a particular car parking facility is run by a car parking operator, that facility is to be considered to be a commercial car parking facility. This can include a parking facility within a shopping centre or hospital complex where the owner or lessor of the complex outsources management of the parking facility to a car park operator.
- Secondly, if the parking facility is not run by a car parking operator, the final ruling outlines three hallmark characteristics of commercial car parking facilities against which an employer can objectively evaluate a particular car parking facility as follows:

- has clear signage visible from the street advertising that paid parking is available
- has mechanisms to control who can enter and/or exit the parking facility, or park at the facility. This may include boom gates, or 'pay and display' ticketing machines
- charges more than a nominal fee (usually a significantly lower rate than the local market rate) for paid parking. This includes charging a user for parking which is not all-day parking (such as parking at an hourly rate).

If a parking facility displays two or more of these characteristics, it is a commercial car parking facility.

The following examples illustrate what would be construed as a commercial parking facility by the Tax Office and what would not be.

**Example 1:** *An inner-suburban shopping centre provides dedicated car spaces in a multi-level concrete structure attached to the shopping complex. The car park is operated by the landlord of the shopping centre. There is licence plate recognition functionality at each entrance and boom gates at each exit to the parking facility. A car can be parked for free for the first two hours, after which parking costs \$5 per hour. There is signage visible from the street and at each entrance advertising that car parking is available. This parking facility is a commercial car parking facility. While the parking facility is not managed by a car parking operator, it satisfies all three hallmark characteristics in the ruling.*

**Example 2:** *A hotel has a number of car spaces on its basement levels (a parking facility). There is clear directional signage visible from the street indicating the location of the hotel's parking facility. Entry and exit to the facility is controlled by boom gates. All of the car spaces are clearly marked. None of the car spaces are available for paid parking but are exclusively available to hotel guests during their stay at the hotel (being a feature of their nightly hotel room charge). While the hotel's parking facility displays some of the hallmarks of a commercial car parking facility, it is not a commercial car parking facility because paid parking is not available at the facility. Therefore, it is not a commercial parking station.*

### Meaning of 'primary place of employment'

Although the draft TR 2019/D5 set out the ATO's view of the meaning of 'primary place of employment', this was not included in the final ruling in light of the recent Federal Court decision in *Virgin Australia Airlines Pty Ltd & Anor v FCT 2021*. In that case, the Federal Court had to consider whether Virgin flight and cabin crew had a 'primary place of employment' (and where was that place) for the purposes of determining whether Virgin had provided car parking fringe benefits to its employees. The ATO has stated that TR 2021/2 will be amended to include further guidance on this concept in due course.

### Date of Effect

TR 2021/2 applies before and after 16 June 2021 (its date of issue), to the extent that the ruling does not conflict with the views in TR 96/26 (now withdrawn) or the terms of settlement of a dispute agreed to before 16 June 2021. However, in respect of the change in the ATO's view from TR 96/26, concerning car parks that have a primary purpose other than providing all-day parking (i.e. those charging penalty rates) were not commercial parking stations, the final Ruling will apply from 1 April 2022 in respect of car parking benefits provided on or after 1 April 2022.

### BDO Comment

The new interpretation of the meaning of "commercial car parking facility" will result in many more employers being subject to FBT on car parking fringe benefits in relation to the parking they provide to their employees. Although this will not have an effect until 1 April 2022, employers who were not previously subject to FBT on car parking fringe benefits should get ready and obtain advice on the best method to use to calculate the taxable value of these fringe benefits. Contact one of the BDO's employment specialists or your regular BDO representative to discuss the options.

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