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Employee accommodation, food and drink expenses

TECHNICAL UPDATE

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On 17 February 2021, the ATO issued a revised [Draft Taxation Ruling TR 2021/D1](#) which outlines the income tax deductibility and FBT related issues of accommodation and travel-related food and drink expenditure (replacing draft TR 2017/D6 now withdrawn). The ATO also issued an accompanying [Draft Practical Compliance Guideline PCG 2021/D1](#) which identifies the types of arrangements that the ATO will generally not apply compliance resources to. This includes where an employee is staying away from their normal residence for work purposes for **less than 21 days at a time continuously** and **less than 90 days in total at the same location in an FBT year**.

While it appears the ATO is returning to the former three-week rule of thumb in the withdrawn Tax Ruling IT 112 for the distinction between travelling and living away from home, it has to be remembered the PCG is only a compliance guideline. Situations falling outside this compliance concession can be acceptable by considering the factors in draft TR 2021/D1.

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Deductibility of accommodation, food and drink expenses

Draft TR 2021/D1 states that whether accommodation, food and drink are deductible, depends on the facts and circumstances of each case.

Generally, an employee can only deduct accommodation, food and drink expenses under section 8-1 to the extent that:

- ▶ they incur the expense in gaining or producing their assessable income
- ▶ the expense is not of a capital, private or domestic nature
- ▶ the expense is not incurred in gaining or producing exempt income or non-assessable non-exempt income, and
- ▶ a provision of the Act does not prevent it from being deducted.

'Travelling on work' vs living expenses

The draft ruling notes that accommodation, food and drink expenses are ordinarily private or domestic in nature. However, where an employee travels and stays away from their usual home overnight in the course of performing their income-producing activities (referred to as 'travelling on work') and incurs accommodation, food and drink expenses, these expenses will generally be deductible under section 8-1.

To be deductible, the accommodation and food and drink expenses must have a sufficiently close connection to the performance of the employment duties and activities through which income is earned.

However, where the accommodation, food and drink 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 (e.g. where a person lives in one city as a matter of choice but travels to another city for work), the occasion of the outgoing will not be found in the employee's income-producing activities. Accordingly, the accommodation, food and drink expenses incurred are living expenses and will not be deductible. This is also the case where an employee is living at a location away from their usual home, even if the employee is living at that location due to their employment.

Length of time living at a work location

Generally, the longer an employee spends away from their usual home for work, the more likely the employee is living at the location. This may still be the case even if the employee stays away from their usual home for a reasonably short period of time.

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ATO's PCG compliance concession

The draft PCG 2021/D1 outlines the ATO's proposed compliance approach considered to be a concession to assist employers to work out whether an allowance or benefit provided to an employee relates to travelling on work or living at a location away from home.

'Travelling on work' or living at a location

Under the compliance concession, **the ATO will accept that an employee is 'travelling on work'** and will generally not apply compliance resources to determine whether expenses for an employee living at a location away from their usual place of residence are work travel costs when all the following circumstances are satisfied including where:

▶ **The employer:**

- provides an allowance to an employee or pays or reimburses accommodation, food and drink expenses;
- Doesn't 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.

▶ **The employee:**

- Is away from their normal residence for work purposes;
- Does not work on a fly-in fly-out or drive-in drive-out basis (these arrangements are subject to special rules under the FBT Act);
- Is away for a short-term period being **no more than 21 days at a time continuously** and **less than 90 days total in the same work location in an FBT year.**

This means the guidelines set an aggregate period of **less than 90 days** for travel to a single work location in an FBT year. Provided this requirement is met, the guidelines allow an employee to have numerous short stints of travel to that location of up to and including, **21 continuous days.**

For example: Source: Adapted from PCG 2021/D1 Example 2

Louise works in Brisbane and is employed by an engineering company. Her employer gives Louise a three-month assignment in a remote work location in Western Australia to perform duties for the company. As part of the agreement, Louise works during the three-month assignment f

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- ▶ *three weeks in Western Australia, returning to Brisbane for two weeks to perform duties in the Brisbane office*
- ▶ *another three weeks in Western Australia in the same work location, returning to Brisbane to again perform duties in the Brisbane office, this time for a week, and*
- ▶ *another three weeks in Western Australia in the same work location.*

In effect, during the three-month assignment, Louise works in the same work location in Western Australia for nine weeks and is home for three weeks in between. She is away for no more than 21 days at a time continuously and is away for a period of less than 90 days in the same work location in total. Louise does not return to work again in the same work location in Western Australia at the end of the three-month assignment.

Her employer pays Louise's accommodation, food and drink expenses while she is in Western Australia. The accommodation and food and drink expense amounts are not provided to Louise as part of a salary packaging arrangement.

Her employer is able to rely on this Guideline as the requirements in paragraph 10 of this Guideline are met. The Commissioner would accept that Louise is travelling on work. Louise's employer is not liable for FBT on the accommodation, food and drink expense payment benefits it provides as the otherwise deductible rule applies.

Following PCG concession or draft ruling?

It should be noted, the ATO's draft PCG is not a ruling and although it should be read in conjunction with the draft TR 2021/D1, it is not part of and does not have the status of the draft ruling. However, if the requirements of the PCG are met the ATO will generally not look into the arrangement and the employer can rely on the guidance to protect them from penalties.

Draft TR 2021/D1 states that there is no requirement to follow the guidance in PCG 2021/D1. However, it is suggested that employers in the first instance consider whether they and their employees satisfy the relevant requirements in PCG 2021/D1. If the employer does not satisfy the relevant requirements in the PCG, then they should consider whether their arrangement is covered by draft TR 2021/D1 instead. Then all the factors outlined in draft TR 2021/D1 must be considered and applied to the facts of the employer's and an employee's circumstances to determine whether the employee is travelling on work or living at a location.

The factors outlined in Draft TR 2021/D1 that would support an employee as living at a location away from their usual residence are:

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- ▶ where 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;
- ▶ whether the employee is, or can be, accompanied by family or visited by family and friends.

Alternatively, an employer may wish to request a private ruling.

Differences between withdrawn TR 2017/D6 and 2021/D1

The current draft TR 2021/D1 replaces draft TR 2017/D6 (withdrawn from 17 Feb 2021) which previously dealt with accommodation and travel-related food and drink issues. The revised draft ruling is proposed to have a retrospective effect but penalties may be remitted if the taxpayer previously relied on the withdrawn TR 2017/D6.

TR 2021/D1 uses a different format, terminology and some of the concepts compared to withdrawn TR 2017/D6 and although there are some similarities in the examples there are many important differences some of which are outlined below.

The fact position in example 9 of withdrawn TR 2017/D6 are not covered by any of the examples in TR 2021/D1 or in the draft PCG. Example 9 deals with an employee that is sent on a six-week training course that requires him to stay away from his usual place of residence for the whole six weeks. It concludes that the employee is travelling for work. This situation would not fit within the requirements of the draft PCG concession. Therefore this scenario would need to be reconsidered based on the factors covered in the draft ruling 2021/D1.

There is also a difference in treatment between Example 11 in withdrawn TR 2017/D6 compared to Example 3 in TR 2021/D1. In Example 11 in withdrawn TR 2017/D6 an employee lives in Sydney but her employer requires her to work in the Melbourne office 2-3 days per week and in the Sydney office 2-3 days per week. It concludes that the employee is travelling for work when staying in Melbourne.

Example 3 in TR 2021/D1 has similar facts but it differs in that the employee's role is based in Melbourne but the employer allows the employee to work out of the Sydney office up to two days a week at the employee's discretion. The conclusion in this example is that, as the employee's duties do not require her to work in the Sydney office, the employee is not travelling for work when staying in Melbourne.

As example 11 in withdrawn TR 2017/D6 does not meet the requirements of the PCG and now come to the same conclusion would need to be considered carefully based on

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 described in TR 2021/D1.

Tax Ruling 2021/1 – Employee transport expenses

In addition to the above, the ATO released [Taxation Ruling TR 2021/1](#) on the deductibility of employee transport expenses on 17 February 2021 (the same day the above draft ruling and PCG were issued). The TR 2021/1 sets out the principles for determining when transport expenses satisfy the basic requirements of section 8-1 ITAA 1997, i.e. whether it is incurred in gaining or producing assessable income and whether it is non-private, non-domestic expenditure. The ruling has a retrospective effect.

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