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Senator Andrew Bragg
Chair
Senate Select Committee on Financial Technology and Regulatory Technology
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EY submission to Select Committee on Financial Technology and Regulatory Technology – FBT on retraining redundant employees

Dear Senator Bragg

I refer to an EY submission dated 30 December 2019 by Meredith Angwin, EY Partner, to the above Committee, and I request that in addition to that submission, the Committee also consider this further EY submission, related to one specific tax issue.

We believe that the specific tax issue in this submission affords the committee with an opportunity to make a very quick impact on the regulatory environment for the betterment of employees displaced by both technological changes as well as other circumstances.

Recommendation to Committee

In summary, we recommend that the Committee request the Australian Taxation Office (ATO) to review and rethink its current position that retraining provided or paid by employers for terminating employees are subject to Fringe Benefits Tax (FBT). For example, an employer, as a result of technology advancements, might make an employee redundant but wishes to invest in that employee's future employment or business prospects by retraining activities as well as outplacement advice. The ATO view is that outplacement assistance services are FBT exempt, but any actual attempt to retrain or up-skill the employee would subject to FBT under the law.

The FBT cost makes these activities economically prohibitive as it effectively doubles the cost for employers wanting to arrange such retraining programs. We say the ATO view is an incongruous tax policy position at a time of economic disruption and such a program should be free of FBT.

Failing an ATO rethink of its current position, the FBT law should be amended to exempt from FBT, costs and activities undertaken by employers to attempt to re-skill and retrain terminating employees.

An example of this prohibitive cost is as follows based on these assumptions:

- External retraining cost per employee including GST - \$1,500
- Number of terminating employees – 30

The cost of the employer for retraining terminating employees with and without FBT is compared below:

Amounts in \$	With FBT	Without FBT
Retraining cost before tax (\$1,500 x 30)	45,000	45,000
FBT payable (Type 1 gross-up, for employer paying GST)	43,996	-
Total cost before tax	88,996	45,000
Corporate tax rate	30%	30%
Total cost after tax	62,297	31,500



Analysis

As evidenced from the attached private taxation ruling, the ATO currently regards as subject to FBT a reimbursement to a leaving employee by the employer for the cost of any vocational training program that seeks to re-skill or retrain the employee for possible future employment or business readiness.

This would apply for example if an employer, as a result of technology advancements sought to make an employee redundant but wished to invest in that employee's future employment or business prospects by incurring costs to provide outplacement assistance services as well as retraining activities.

The ATO ruling is that whilst the outplacement assistance services (such as external career information sessions, assistance with CV writing etc) are FBT exempt, any actual attempt to retrain or up skill the employee would subject to FBT.

This is an incongruous tax policy position and no rational policy justification for it can be found.

As a result, we believe the ATO should be asked to rethink its position on this with a view to hopefully accepting that outplacement training can also benefit from the current FBT exemption provision for work-related counselling.

Alternatively, if the ATO is not accommodating then a legislative solution will be needed to ensure that well-meaning employers who genuinely wish to assist terminating employees with new job transitioning, are not treated economically prohibitively by the tax system in providing such assistance.

The Select Committee has been tasked with, amongst other things, looking at the possibility of

- removing barriers to the uptake of new technologies in the financial sector, and
- improving current RegTech practices and the opportunities to reduce costs
- enhancements to the effectiveness of current initiatives in promoting a positive environment to FinTech and RegTech start-ups, and
- related matters.

We believe that having a prohibitive FBT cost that makes it extremely costly for employers to help terminating employees transition to new job opportunities is a negative factor on all the above-mentioned Committee objectives.

We also believe that this is something that can be improved quickly and decisively by either ATO or legislative action.

Australians will better accept disruptive technology advancements if employers are encouraged to assist in retraining terminating employees. The tax system should encourage such retraining and certainly not discourage it. Currently it massively discourages such economy wide positive behaviour by doubling the cost to employers. This must cease immediately, and we make recommendations herein in hope that this will be the case.

Yours sincerely,

Ernst & Young

Attachment: ATO private ruling on FBT released in October 2014 (Authorisation: 1012702982847)



Attachment: ATO PBR 1012702982847

(Highlighting added by EY)

Fringe benefits tax

Disclaimer

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Ruling

Question 1

Will a reimbursement to an employee by an employer under its program in relation to outplacement services be an exempt benefit under subparagraph 58M(1)(a)(iv) of the *Fringe Benefits Tax Assessment Act 1986*?

Answer

Yes.

Question 2

Will a reimbursement to an employee by an employer under its program in relation to retraining activities be an exempt benefit under subparagraph 58M(1)(a)(iv) of the *Fringe Benefits Tax Assessment Act 1986*?

Answer

No.

This ruling applies for the following period:

1 January 2013 to 31 December 2015

The scheme commences on:

1 January 2013

Relevant facts and circumstances

The employer announced the closure of a branch.

As a result of the closure the employees who worked in the branch will be retrenched.

All employees of the employer affected by redundancy as a result of the restructure may be entitled to a payment under the employer's program.

The payment is to be by way of reimbursement for the actual costs of eligible courses or training for a specific period.

The purpose of the program is to encourage eligible employees to develop and prepare for their future employment prospects.

The employer will reimburse employees for successful completion or attendance of vocationally based courses or training. Courses relating to hobbies or interests are not eligible.

The formal approval process for reimbursement incorporates assessing the training or course requested and reviewing all documentation before an application is approved.

The following 2 conditions must be met for the reimbursement to be approved:

- the course must be offered by a registered training organisation or run by an established provider or institution and must provide accreditation, and
- it can be reasonably assumed that the course or activity will assist the employee in gaining future employment.

The applicant advises that the reimbursement is not a reward for services rendered or to be rendered by the employer. It is solely provided to the employees to prepare them for future employment due to their role being made redundant.

The applicant provided a set of guidelines in relation to the program.

The guidelines include the following elements:

- the purpose of the program is to encourage employees to prepare for their future employment prospects;
- eligible employees will be reimbursed expenses in accordance with the following guidelines:
- expenditure does not need to be relevant to the employee
- there is no prescriptive list of what is appropriate expenditure, however the intent of the payment is that it is not to apply to hobbies or interests that the employee has which are not vocationally based
- examples of 'vocational based activities' include:
 - attending external career information sessions or similar
 - up-skilling
 - **retraining**
 - developing a new skill
 - certificates of competency for gaining outside employment
 - external accreditation
- reimbursement will only be made when the course or a portion of the course or training has been successfully completed or attended
- reimbursement will be made for:
 - course/training fees
 - other student fees
 - compulsory text books

Relevant legislative provisions

Fringe Benefits Tax assessment Act 1986 Section 58M

Fringe Benefits Tax assessment Act 1986 Subsection 136(1)

Reasons for decision

Will a reimbursement to an employee by the employer under its program be an exempt benefit?

Under the arrangement the employer will reimburse an employee undertaking approved 'vocational based activities' expenses incurred in respect of course/training fees, other student fees and compulsory text books.

In general terms, the definition of a 'fringe benefit' in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) provides that a fringe benefit will arise from the reimbursement if the following conditions are satisfied:

- (a) the reimbursement is a benefit;
- (b) the benefit is provided to an employee or an associate of an employee;
- (c) the benefit is provided by the employer, an associate or a third party under an arrangement;

- (d) the benefit is provided in respect of the employment of the employee; and
- (e) the benefit does not come within any of paragraphs (f) to (s) of the definition of a 'fringe benefit' in subsection [136\(1\)](#) of the FBTA.

These conditions are considered in relation to the employer's circumstances below.

(a) Is the reimbursement a benefit?

Paragraph [20\(b\)](#) of the FBTA provides that a reimbursement is a benefit. Paragraph 20(b) states:

Where a person (in this section referred to as the *provider*):

- (a) ...; or
- (b) reimburses another person (in this section also referred to as the *recipient*), in whole or in part, in respect of an amount of expenditure incurred by the recipient;

the making of ... the reimbursement referred to in paragraph (b), shall be taken to constitute the provision of a benefit by the provider to the recipient.

Therefore, a reimbursement to an employee by the employer under its vocational training program is a benefit.

(b) Is the benefit provided to an employee or an associate of an employee?

The benefit that is the subject of this Ruling is a reimbursement to an employee by the employer under its vocational training program.

As such, the benefit will be provided to an employee.

It is noted that an 'employee' is defined at subsection [136\(1\)](#) of the FBTA to mean a current, future or former employee. Therefore, the benefit will be provided to an employee whether or not the employee's employment has been terminated.

(c) Is the benefit provided by the employer, an associate or a third party under an arrangement?

The benefit that is the subject of this Ruling is a reimbursement to an employee by the employer under its vocational training program.

As such, the benefit will be provided by the employer.

It is noted that an 'employer' is defined at subsection [136\(1\)](#) of the FBTA to mean a current, future or former employer. Therefore, the benefit will be provided by an employer whether or not the employee's employment has been terminated.

(d) Will the benefit be provided in respect of the employment of the employee?

The term 'in respect of' is defined in subsection [136\(1\)](#) of the FBTA to include 'by reason of, by virtue of, or for or in relation directly or indirectly to, that employment'.

In Chapter 1 of the ATO publication, *Fringe benefits tax: a guide for employers* (NAT 1054), it is stated:

... a fringe benefit in respect of employment ... effectively means a benefit is provided to somebody **because they are an employee** ...

As a guide to whether a benefit is provided in respect of employment ask yourself whether you would have provided the benefit if the person had not been an employee.

As only eligible employees are entitled to receive the benefit provided by the employer, the benefit is provided in respect of the employment of the employee.

(e) Will the benefit come within any of paragraphs (f) to (s) of the definition of a 'fringe benefit' in subsection [136\(1\)](#) of the FBTA?

Paragraphs (f) to (s) of the definition of a 'fringe benefit' in subsection [136\(1\)](#) of the FBTA list certain benefits and payments that are not included in the definition of a fringe benefit.

For the purpose of this Ruling the relevant paragraph is paragraph (g) which provides that a fringe benefit does not include a benefit that is an exempt benefit.

One such exempt benefit is found at section [58M](#) of the FBTA. Paragraph [58M\(1\)\(a\)](#) of the FBTA sets out the circumstances in which an expense payment benefit will be an exempt benefit under section 58M. For the purposes of this Ruling the relevant subparagraph is subparagraph [58M\(1\)\(a\)\(iv\)](#) which states:

Where any of the following benefits is provided in respect of the employment of an employee:

(a) An expense payment benefit where the **recipients expenditure** is in respect of

...

(iv) work-related counselling of the employee or of an associate of the employee ...

the benefit is an exempt benefit.

[emphasis added]

Therefore, a reimbursement to an employee by the employer under its program will be an exempt benefit under subparagraph [58M\(1\)\(a\)\(iv\)](#) of the FBTA if the employee's expenditure¹ is 'in respect of ... work-related counselling of the employee'.

'Work-related counselling' is defined in subsection [136\(1\)](#) of the FBTA as follows:

work-related counselling:

(a) in relation to an employee of an employer, means counselling attended by the employee; and

(b) in relation to an associate of an employee of an employer, means counselling attended by the associate where the associate is accompanied by the employee;

where all of the following conditions are satisfied:

(c) the attendance of:

(i) if paragraph (a) applies - the employee; and

(ii) if paragraph (b) applies - both the employee and the associate;

at the counselling gives effect to an objective, purpose, plan or policy devised, adopted or required to be followed, by the employer to:

(i) improve or maintain the quality of the performance of employees' duties; or

(ii) prepare employees for retirement;

(d) the counselling relates to any of the following matters:

(i) safety;

(ii) health;

(iii) fitness;

(iv) stress management;

(v) personal relationships;

(vi) retirement problems;

(vii) drug or alcohol abuse;

(viii) rehabilitation or prevention of work-related trauma or of other disease or injury;

- (ix) first aid;
- (x) any similar matter;
- (e) there is no benefit that:
 - (i) is provided in respect of the employment of the employee;
 - (ii) consists of the provision of, or relates to, the counselling; and
 - (iii) is provided wholly or principally as a reward for services rendered or to be rendered by the employee.

The vocational training guidelines do not provide a prescriptive list of appropriate expenditure. However, the intent of the program is that it is vocationally based.

Examples of 'vocational' based activities' include:

- attending external career information sessions or similar
- up-skilling
- retraining
- developing a new skill
- certificates of competency for gaining outside employment
- external accreditation

The employee's expenditure in this case will be in respect of 'vocational based activities'.

The employee's expenditure on 'vocational based activities' will be 'in respect of ... work-related counselling of the employee' as required by subparagraph [58M\(1\)\(a\)\(iv\)](#) of the FBTAA where the following requirements are met:

- the 'vocational based activities' are 'counselling attended by the employee';
- the attendance of the employee at the counselling gives effect to 'an objective, purpose, plan or policy devised, adopted or required to be followed', by the employer to either improve or maintain the quality of the performance of employees' duties or prepare employees for retirement;
- the 'vocational based activities' fall within the meaning of counselling as defined in paragraph (d) of the definition of 'work-related counselling' in subsection [136\(1\)](#) of the FBTAA; and
- the reimbursement is not provided wholly or principally as a reward for services rendered or to be rendered by the employee.

These requirements are considered below.

Are the 'vocational based activities' considered to be 'counselling attended by the employee'?

The meaning of the term counselling in the context of the work-related counselling definition is discussed in paragraphs 112 to 117 of Class Ruling CR 2011/41 *Fringe benefits tax: health services provided by BUPA Wellness Pty Ltd* (CR 2011/41). Paragraphs 112 to 117 of CR 2011/41 state:

What is counselling?

112. In understanding the meaning of this term it is helpful to refer to the ordinary dictionary meanings.

113. The *Macquarie Dictionary*⁶ defines the word 'counsel' as 'advice; opinion or instruction given in directing the judgment or conduct of another'. The *Australian Concise Oxford Dictionary*⁷ defines 'counselling' as the act or process of giving counsel' and relevantly the noun 'counsel' as 'advice, esp. formally given', and the verb as ' **1** ... advise (a person) **2a** give advice to (a person) on social or personal problems, esp. professionally' and ' **b** assist or guide (a person) in resolving personal difficulties'.

114. The wording of the definitions in paragraphs 112 and 113 indicates 'counselling' involves a suitably qualified person providing advice or guidance to someone else in relation to their established area of expertise.

115. The Explanatory Memorandum to Taxation Laws Amendment (Fringe Benefits and Substantiation) Bill 1987 indicates the advice or information can be given either on an individual basis, or in a group situation such as a seminar. This is reflected in the definition of 'counselling' in subsection 136(1) which states that 'counselling' includes the giving of advice or information in a seminar'.

116. The advice or information can be in relation to a wide range of matters. For example, the Explanatory Memorandum to Taxation Laws Amendment (Fringe Benefits and Substantiation) Bill 1987 indicates it can be related to matters such as safe work practices, stress management, fitness, drug or alcohol abuse or retirement problems. This list of examples is extended by Taxation Determination [TD 93/153](#) to include outplacement services such as assistance in writing a resume and job application, guidance on seeking new employment or training for employment interviews and selection tests.

117. Although the advice or information provided can be in relation to a wide range of areas a benefit will not be considered to be 'counselling' unless the provision of advice is the principal purpose for the benefit being provided to the employee. For example, although 'counselling' can include training or advice about how to undertake various physical activities, a physical activity session with limited instruction undertaken by an employee for the purpose of keeping fit will not constitute 'counselling'.

It is accepted that the 'vocational based activities' meet the requirements of paragraph (a) of the work-related counselling definition.

Does the attendance of the employee at the counselling give effect to 'an objective, purpose, plan or policy devised, adopted or required to be followed' by the employer to either improve or maintain the quality of the performance of employees' duties or prepare them for retirement?

The employer developed a vocational training program designed to support and provide assistance to all employees made redundant by the branch closure to encourage them to develop and better prepare themselves for their employment prospects once they are made redundant.

This program incorporates the reimbursement by the employer of an employee's expenditure on certain 'vocational based activities'.

It is accepted that the attendance of an employee at such 'vocational based activities' gives effect to an objective, purpose, plan or policy devised, adopted or required to be followed by the employer to maintain the quality of the performance of the employees' duties.

Do the 'vocational based activities' fall within the meaning of counselling as defined in paragraph (d) of the definition of 'work-related counselling' in subsection 136(1) of the FBTAA?

Paragraph (d) of the definition of 'work-related counselling' in subsection [136\(1\)](#) of the FBTAA states that the counselling must relate to any of the following matters:

- (i) safety;
- (ii) health;
- (iii) fitness;
- (iv) stress management;
- (v) personal relationships;
- (vi) retirement problems;
- (vii) drug or alcohol abuse;
- (ix) rehabilitation or prevention of work-related trauma or of other disease or injury;
- (ix) first aid;
- (x) any similar matter;

In accordance with the examples listed in the vocational training guidelines, 'vocational based activities' can be split in to 2 categories:

1. Outplacement services such as attending external career information sessions or similar.
2. **Retraining activities** such as up-skilling, developing a new skill, certificates of competency for gaining outside employment, external accreditation or similar.

For the purpose of considering paragraph (d) of the definition of 'work-related counselling' in subsection [136\(1\)](#) of the FBTA each of these categories will be considered separately.

1. Outplacement services

Taxation Determination [TD 93/153](#) provides guidance on the application of section [58M](#) of the FBTA to outplacement services provided by employers to employees before and after they are made redundant.

In relation to the outplacement services, paragraph [3](#) of TD 93/153 states:

Outplacement services are quite commonly provided by employers to employees ... to assist them to organise their skills and experience in order to obtain satisfactory new employment. Such services, as they are normally provided, are considered to fall within the meaning of counselling as defined in paragraph (d) of the definition of "work-related counselling" in subsection [136\(1\)](#).

Examples of outplacement services are provided at paragraph [5](#) of TD 93/153 including 'guidance on seeking new employment'. 'External career information sessions or similar' as shown in the examples listed in the vocational training guidelines are akin with the examples provided at paragraph [5](#) of TD 93/153.

Therefore, consistent with [TD 93/153](#), it is accepted that outplacement services such as 'external career information sessions or similar' fall within the meaning of counselling as defined in paragraph (d) of the definition of 'work-related counselling' in subsection [136\(1\)](#) of the FBTA.

2. Retraining activities

Paragraph (d) of the definition of 'work-related counselling' in subsection [136\(1\)](#) of the FBTA requires that the counselling 'relates to' certain specified matters.

The phrase 'relates to' is not defined in the FBTA. The meaning of these words has however been discussed at common law.

It is common ground in relevant case law that the term 'relates to' is extremely wide requiring the existence of an association or connection between two subject matters. That connection or association may be direct or indirect, substantial or real, depending on the context in which the words are used. However, the connection or association must be relevant and a remote relationship would generally not suffice.

It is considered that retraining activities such as 'up-skilling, developing a new skill, certificates of competency for gaining outside employment, external accreditation or similar' do not relate to any of the specific matters listed in subparagraphs (i) to (ix) of paragraph (d) because the connection or association is too remote. Such retraining activities enable the employee to acquire new skills, qualifications and accreditations to enhance their future employment prospects.

It is further considered that the retraining activities do not relate to 'any similar matter'. *The Macquarie Dictionary Online* edition defines 'similar' to mean having likeness or resemblance, especially in a general way. In this context, for an unlisted matter to be similar, that matter would have to resemble or have likeness to one of those matters listed. It is not considered in the circumstances described that the matter of redundancy resembles or has a likeness to any specific matter listed.

Accordingly, the retraining activities are not related to any matter listed in paragraph (d) of the definition of 'work-related counselling' in subsection [136\(1\)](#) of the FBTA and, therefore, do not fall within the meaning of counselling as defined in paragraph (d).

Is the reimbursement provided wholly or principally as a reward for services rendered or to be rendered by the employee?

It is accepted that the reimbursement to an employee by the employer under its vocational training program is not provided wholly or principally as a reward for services rendered or to be rendered by the employee.

Conclusion

A reimbursement to an employee by the employer under its vocational training program in relation to outplacement services is an exempt benefit under subparagraph 58M(1)(a)(iv) of the FBTA. Therefore, no fringe benefit will arise from such a payment.

A reimbursement to an employee by the employer under its vocational training program in relation to retraining activities is not an exempt benefit under subparagraph 58M(1)(a)(iv) of the FBTA. A fringe benefit will arise from such a payment.

Footnotes

¹ That is, the 'recipients expenditure' as referred to in subparagraph 58M(1)(a)(iv) of the FBTA.