PUBLIC RULING | WHAKATAUNGA TŪMATANUI

Income tax – employer issued cryptoassets provided to an employee

Issued | Tukuna: 15 May 2023

BR Pub 23/06

This ruling considers when cryptoassets issued by an employer and paid to an employee will be a fringe benefit, how the benefit is valued and the time at which the benefit is provided.

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

START DATE | RĀ TĪMATA

This ruling will apply from 30 July 2022.

REPLACES | WHAKAKAPIA

This is a reissue of BR Pub 19/03. For more information about earlier publications of this Public Ruling see the Commentary to this Ruling.

Public Ruling BR Pub 23/06: Income tax – employer issued cryptoassets provided to an employee

This is a public ruling made under s 91D of the Tax Administration Act 1994.

Taxation laws | Ture tāke

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of ss CX 2, RD 27 and RD 40(1).

The arrangement to which this Ruling applies | Te whakaritenga i pāngia e tēnei Whakataunga

The Arrangement is the agreement to provide cryptoassets to an employee in connection with their employment in circumstances where:

- the employer is issuing cryptoassets (for example through an Initial Coin Offering, an Initial Exchange Offering, a Security Token Offering, or a Token Generating Event);
- the employee will receive the cryptoassets only if they are still employed by the employer at a specified future date (the condition); and
- the employee cannot sell or otherwise transfer the cryptoassets until the specified future date.

The Ruling applies only to salary and wage earners, not to self-employed taxpayers.

The Ruling does not apply where:

- the cryptoasset provided is a "share" for income tax purposes that is received under an "employee share scheme" as defined in s CE 7; or
- Public Ruling "BR Pub 23/04: Income Tax – salary and wages paid in cryptoassets" or Public Ruling "BR Pub 23/05: Income Tax – bonuses paid in cryptoassets" applies.

How the taxation laws apply to the Arrangement | Ko te pānga o te ture tāke ki te Whakaritenga

The taxation laws apply to the Arrangement as follows:

- A fringe benefit will be provided under s CX 2 when the condition is met and the employee becomes entitled to the cryptoassets.
- Where the employer is selling its cryptoassets to arm's length buyers at the time the cryptoassets are provided to the employee, the value of the fringe benefit is the "market value" determined under s RD 40.
- Where s RD 40 does not apply and at the time the cryptoassets are provided to the employee it can be purchased on the open market, the value of the fringe benefit is the "market value" determined under s RD 27(3).
- Where there is no "market value" under s RD 27 or s RD 40, the Commissioner will need to determine the value of the fringe benefit.

The period for which this Ruling applies | Ko te wā i pāngia e tēnei Whakataunga

This Ruling will apply from 30 July 2022 to 30 November 2027.

This Ruling is signed by me on 15 May 2023.

James McKeown

Tax Counsel, Tax Counsel Office | Roia Tāke, Te Tari Tohutohu Tāke

Commentary on Public Ruling | Takinga kōrero o ngā Whakatau Tūmatanui BR Pub 23/06

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in Public Ruling BR Pub 23/06 ("the Ruling").

Contents | Ihirangi

Summary | Whakarāpopoto

1. This Ruling is a reissue of BR Pub 19/03, which expired on 29 July 2022. There have been no changes to the original ruling. The Ruling uses the term "cryptoasset" to

cover digital assets that use cryptography and blockchain technology to regulate their generation and verify transfers.[1]

2. The Ruling considers the income tax treatment of employer-issued cryptoassets provided to employees. In particular, it covers the situation where the cryptoassets are subject to conditions that the employee must satisfy to become entitled to the cryptoassets. The commentary discusses the application of the fringe benefit tax (FBT) rules to the Arrangement. It also briefly discusses the FBT treatment of similar arrangements.

Background | Horopaki

3. The Ruling sets out the Commissioner's view on the situation where an employee receives cryptoassets issued by their employer (or an associated person). Often this will occur in the context of an Initial Coin Offering (ICO), an Initial Exchange Offering, a Security Token Offering, or Token Generating Event.

4. The Ruling considers the situation, as is common in arrangements of this type, where the cryptoassets are provided subject to a condition that must be satisfied before an employee becomes entitled to the cryptoassets. The condition considered in the Ruling is that the employee remains employed by the employer. However, the same reasoning applies for other conditions that must be satisfied for the employee to become entitled to the cryptoassets – for example, meeting certain performance targets.

Application of the legislation | Whakapānga o te whakature

5. Section CE 1 sets out when an amount derived by a person in connection with their employment will be their income. The cryptoassets covered by this Ruling will not come within any of the paragraphs of s CE 1. Consequently, it is necessary to consider how FBT applies.

6. Section CX 2(1) defines "fringe benefit" as:

> (1) A **fringe benefit** is a benefit that—
>
> (a) is provided by an employer to an employee in connection with their employment; and

[1] These are sometimes referred to by other terms including "cryptocurrencies" and "tokens".

(b) either—

(i) arises in a way described in any of sections CX 6, CX 9, CX 10, or CX 12 to CX 16; or

(ii) is an unclassified benefit; and

(c) is not a benefit excluded from being a fringe benefit by any provision of this subpart.

7. Broadly, a fringe benefit is a benefit an employer provides to an employee in connection with their employment. The following analysis considers:

- whether there is a "benefit";
- when the benefit is "provided"; and
- what the value of the benefit is.

Whether there is a benefit

8. Cryptoassets are not included in ss CX 6, CX 9, CX 10, and CX 12 to CX 16. Therefore, if it is a benefit, it is an unclassified benefit under s CX 37.

9. The Act does not define the term "benefit" for the purposes of the FBT rules. Therefore, "benefit" should be given its ordinary meaning.

10. The Concise Oxford English Dictionary (12th edition, Oxford University Press, New York, 2011) relevantly defines "benefit" as "an advantage or profit gained from something".

11. In *Case M9* (1990) 12 NZTC 2,069, the Taxation Review Authority (TRA) considered the FBT status of contributions to a superannuation fund and the provision of motor vehicles that were available for the private use and enjoyment of two employees. The TRA commented on the general meaning of "benefit" (at 2,074):

> The section itself to an extent explains what is a benefit, for the purposes of a fringe benefit; so long as something is provided by an employer to an employee that can be reasonably, practically and sensibly understood as a benefit to the employee in itself and is not expressly excluded, [that] would be sufficient for it to be a benefit for the purposes of the definition of "fringe benefit" as provided by the section.

12. It can be seen from the quotation above that "benefit" has a wide meaning and includes anything that can be "reasonably, practically and sensibly understood as a benefit to the employee". Cryptoassets provided to an employee would, therefore, be a "benefit".

13. A benefit is treated as being received from an employer where the employer arranges with a third party to provide a benefit to an employee (s CX 2(2)). In the current context, this would apply, for example, when an employer entered into an arrangement for an associated company to provide cryptoassets to the employer's employees.

14. A benefit provided to an associate of an employee is treated as if it were provided by the employer to the employee (s CX 2(5)(b)).

When the benefit is provided

15. Where ownership of the cryptoassets will not pass unless certain requirements are met, the Commissioner's view is that no benefit is provided until the requirements are met. For example, if transfer of the cryptoassets is subject to an employee remaining in employment for six months or meeting certain performance targets, there will be no benefit for FBT purposes until those conditions are satisfied and the employee becomes entitled to the cryptoassets.

16. This is because, until the conditions are satisfied, it is not clear whether the employee will receive the cryptoassets – provision of the cryptoassets is contingent on future events that may or may not happen.

What the value of the benefit is

17. Sections RD 27 to RD 57 set out how to determine the value of a benefit for FBT purposes. The potentially relevant provisions are:

- s RD 40(1)(a), which applies where an employer provides an employee with "goods" the employer has produced; and
- s RD 27(2), which applies where none of the other valuation provisions applies.

18. Section RD 40(1)(a) states:

> *Market value or cost*
>
> (1) The value of a fringe benefit that an employer provides to an employee in goods is determined as follows:
>
> (a) when the person providing the goods manufactured, produced, or processed them, their market value:

Whether cryptoassets are "goods" for FBT valuation purposes

19. Section RD 40 raises an issue as to whether cryptoassets are "goods" for FBT purposes. The word "goods" is not defined. Further, no case law considers the meaning of "goods" in this context. In the absence of a definition, "goods" takes it meaning from the context in which it is used. In concluding that securities (in the form of bearer bonds or coupons) were "goods", the Privy Council in *The Noordam (No 2)* [1920] AC 904 made the following comments (at 908):

> At first sight the word "goods" might seem to be an equally inappropriate description. It must, however, be observed that the word is of very general and quite indefinite import, and primarily derives its meaning from the context in which it is used.
>
> …
>
> The content of the word "goods" differs greatly according to the context in which it is found and the instrument in which it occurs. … the word may sometimes be of the narrowest and sometimes of the widest scope.

20. The High Court in *Waimea Nurseries Ltd v Director-General for Primary Industries* [2019] 2 NZLR 107 cited *The Noordam (No 2)* favourably. Cooke J stated (at 124) that the meaning to be given to "goods" "will be highly dependent on the context".

21. Potential wide and narrow interpretations were discussed in *Spring House (Freehold) Ltd v Mount Cook Land Ltd* [2002] 2 All ER 822 (CA), where Ward and Rix LJJ stated (at 828):

> It is common ground, as the dictionary definition makes clear, that "goods" can be widely understood to mean "property or possessions", or more narrowly "saleable commodities, merchandise, wares" or … "tangible moveable property viewed as an item or items of commerce".

22. It can be seen from the above discussion that "goods" can be interpreted widely enough to include cryptoassets (which would, for example, be "property or possessions"). [2] Whether this is appropriate depends on the context of s RD 40 and the FBT provisions more generally.

23. Section RD 40 provides a valuation methodology for the situation where an employer provides an employee with "goods" the employer has produced. Section RD 41 provides a similar provision for services the employer provides as part of their business. Where neither provision applies, unclassified benefits fall to be valued under the default provision (and may require the Commissioner to determine the value). Where s RD 40(1) applies, the value of the benefit provided is based on the amount the employer sells those goods to the public for. There seems to be no reason to limit the type of goods that the provision applies to (for example, by distinguishing between tangible and intangible goods). Doing so would mean no specific valuation provision exists for those types of property. Consequently, in the Commissioner's view, cryptoassets are "goods" for the purposes of s RD 40.

[2] In *Ruscoe v Cryptopia Ltd (in liquidation)* [2020] NZHC 728 the High Court held that cryptoassets were "property" for the purposes of s 3 of the Companies Act 1993.

Application of s RD 40

24. Section RD 40(1)(a) provides that:

> (1) The value of a fringe benefit that an employer provides to an employee in goods is determined as follows:
>
> (a) when the person providing the goods manufactured, produced, or processed them, their market value:

25. "Market value" is defined for the purposes of s RD 40 in s RD 40(3) as:

> **market value** means the lowest price, at the time at which the goods were provided to the employee, for which identical goods were sold by the same person to an arm's length buyer, whether wholesaler, retailer, or the public, in the open market in New Zealand in a sale freely offered and made on ordinary trade terms

26. Therefore, s RD 40(1) applies only where the employer is selling the cryptoassets to arm's length buyers at the time the cryptoassets are provided to the employee.[3] In such a case, the "value" of the cryptoassets will be the lowest price for which the employer was selling identical cryptoassets to arm's length buyers in the open market in New Zealand.

27. Where the employer is not selling the cryptoassets at the time it is provided to the employee (which may be the case, for example, before or after an ICO), s RD 40(1) will not apply.

Valuation where s RD 40 does not apply

28. Section RD 27(2) applies where the value of a benefit cannot be determined under other provisions. It provides that the value of the fringe benefit is the market value or a value determined by the Commissioner:

> *When value cannot be ascertained*
>
> (2) If, under sections RD 28, RD 29, and RD 33 to RD 41, the value of a fringe benefit cannot be ascertained, the value is the market value or otherwise as the Commissioner determines.

29. Section RD 27(3) defines "market value" for the purposes of s RD 27(2). Unlike the definition of "market value" for the purposes of s RD 40(1), s RD 27(3) does not require the employer to be selling the cryptoassets. However, it does require the existence of an open market accessible to the public:

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[3] Although unlikely to occur in this context, an exception to this statement applies where the employer's sale price is greater than the open market value. In such a case, the open market value calculated under s RD 40(2) applies.

Meaning of market value

(3) In subsection (2), **market value** means the price normally paid, at the time when the fringe benefit is received by the employee, for the fringe benefit in a sale—

(a) in the open market; and

(b) freely offered; and

(c) made on ordinary trade terms; and

(d) to a member of the public at arm's length.

30. Where there is no market value, the Commissioner needs to determine the value of the fringe benefit. In the Commissioner's view, valuation in these circumstances should be determined as follows:

- Where the cryptoassets are provided to the employee before sale to the public, the employer should use the price at which the cryptoassets will first be sold to the public if such a price has been determined. For example, if the cryptoassets will initially be sold to the public as part of an ICO at $1 per token, cryptoassets provided to employees before the ICO should also be valued at $1. Where the first public sale price has not yet been determined, the employer can use a value based on the last arm's length sale price (if applicable). For example, if seed capital has been invested in return for a share of cryptoassets, a cryptoasset value could be determined from this.
- Where the cryptoassets are provided to the employee after the employer has ceased selling to the public but before there is an established market for the cryptoassets, the employer should use the price at which the cryptoassets were last sold to the public.
- If none of the above situations apply, the employer should contact Inland Revenue to discuss their particular situation.

Similar situations

31. This Ruling considers the situation where cryptoassets are promised to an employee at a future date if certain conditions are met. There are other similar arrangements under which an employer could provide its cryptoassets to employees.

32. Determining when a benefit has been provided requires a careful consideration of the legal arrangements between the employer and the employee. Arrangements with similar effect could have different treatments depending on their legal form.

33. Two potential scenarios are briefly considered below. These are both situations where the employee is not required to meet any conditions to be entitled to the cryptoassets.

Cryptoassets transferred to employee without any conditions or restrictions on sale

34. Where cryptoassets are transferred to the employee without any conditions, a benefit will be provided for FBT purposes at the time of transfer.

35. The value of the benefit will be determined under ss RD 40(1) and RD 27 as discussed in paras 17 to 30.

Legal or beneficial ownership transferred to employee subject to restrictions on sale

36. Sometimes cryptoassets are transferred to an employee subject to restrictions on their sale (for example, the cryptoassets cannot be sold for three months). In the Commissioner's view, a benefit would be provided for FBT purposes at the time the employee becomes legally entitled to receive the cryptoassets (regardless of any restrictions on disposal). This is different to the situation considered in the Ruling where the employee does not become legally entitled to the cryptoassets until certain conditions are met.

37. In the Commissioner's view, a benefit will also be provided where the cryptoassets are not physically provided to the employee but are held on trust for the employee until the restricted sale period is over.[4] In such a case, beneficial ownership of the cryptoassets passes to the employee. Any trust would be non-discretionary as there are no conditions that the employee must satisfy to be entitled to the cryptoassets.

38. Where the benefit being provided to the employee is a beneficial interest in the cryptoassets or the cryptoassets are subject to restrictions on sale, there is unlikely to be a "market value" for the benefit provided (under either s RD 40 or s RD 27).[5] In such a case, the Commissioner would need to determine the relevant value, which may differ from the market value for cryptoassets not subject to restrictions.

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[4] Where the cryptoassets are held on a trust of this type, it would generally be expected that any entitlements subsequently arising from the cryptoassets (such as "interest" or "dividend" type payments) would also be held for the benefit of the employee. These additional benefits would not be subject to FBT as they arise after the benefit has been provided to the employee.

[5] A possible exception would be if the employer were also offering cryptoassets with the same restrictions to arm's length parties.

Examples

39. The following examples illustrate the application of the law.

Example 1: Cryptoassets provided as an employee incentive

Bionic Animal Services Ltd (Bionic) is developing a new cryptoasset (Bio-record) to be used with a blockchain-based database that stores animal records. Bionic has hired two full stack developers, Lesley and Mei, to assist with the project.

To provide an incentive to Lesley and Mei to stay with Bionic until the project is completed, Bionic has agreed to provide Lesley and Mei with 1,000 Bio-record tokens if they are still employed by Bionic in 12 months' time. Bionic is currently offering Bio-record for sale to the public as part of an ICO. The current purchase price is $10 per token.

Bionic wants to know whether it should return FBT now. No FBT is payable at the current time as no benefit has been provided to the employees yet.

Lesley leaves Bionic within the 12-month period, so does not receive any Bio-record. After 12 months, Mei is still working for Bionic, so she becomes entitled to receive 1,000 Bio-record. Bionic is no longer selling Bio-record to the public. However, it is available through a local cryptocurrency exchange for $12 per token.

Bionic is liable for FBT at the time Mei becomes legally entitled to the Bio-record tokens. The value of the benefit for FBT purposes is $12,000 (1,000 tokens x $12 per token).

Example 2: Cryptoassets provided subject to restrictions

Bionic also hires a new manager, Raju. Bionic want to incentivise Raju to stay employed with them. However Bionic also wants to avoid its employees affecting the market for Bio-record tokens by selling as soon as they become entitled to their Bio-record.

Bionic agrees to provide Raju with 2,000 Bio-record tokens if he is still employed by Bionic in 12 months' time. However, the Bio-record will be provided subject to a restriction preventing Raju from selling the tokens for a further six-months.

Bionic wants to know when it should return FBT. No FBT is payable at the current time as no benefit has been provided to Raju yet. FBT will be payable if Raju is still employed with Bionic in 12 months' time, as this is when Raju becomes legally entitled to the Bio-record tokens.

As the Bio-record tokens will be subject to a six-month restriction on sale, this may affect their value. Bionic should contact Inland Revenue to discuss an appropriate value for FBT purposes.

Expired rulings | Whakatau mōnehu

BR Pub 19/03: Income tax – employer issued crypto-assets provided to an employer

Legislative references | Tohutoro whakatureture

Income Tax Act 2007, ss CE 7, CX 2 ("fringe benefit"), CX 6, CX 9, CX 10, CX 12 – CX 16, CX 37, GB 32, RD 27 – RD 57

Case references | Tohutoro kēhi

Case M9 (1990) 12 NZTC 2,069 (TRA)

Noordam (No 2), The [1920] AC 904 (PC)

Spring House (Freehold) Ltd v Mount Cook Land Ltd [2002] 2 All ER 822 (CA)

Waimea Nurseries Ltd v Director-General for Primary Industries [2019] 2 NZLR 107 (HC)

Other references | Tohutoro anō

Related rulings

BR Pub 23/04: Income tax – salary and wages paid in cryptoassets

BR Pub 23/05: Income tax – bonuses paid in cryptoassets

Br Pub 23/07: Income tax - application of the employee share scheme rules to employer issued cryptoassets provided to an employee

Subject references

Cryptoasset

Cryptocurrency

Employee

Fringe benefit tax

Income tax

Dictionary

Concise Oxford English Dictionary (12th edition, Oxford University Press, New York, 2011)

Legislation

40. The relevant provisions in the Income Tax Act 2007 are as follows:

CX 2 Meaning of fringe benefit

Meaning

(1) A fringe benefit is a benefit that—

(a) is provided by an employer to an employee in connection with their employment; and

(b) either—

(i) arises in a way described in any of sections CX 6, CX 9, CX 10, or CX 12 to CX 16; or

(ii) is an unclassified benefit; and

(c) is not a benefit excluded from being a fringe benefit by any provision of this subpart.

Arrangement to provide benefit

(2) A benefit that is provided to an employee through an arrangement made between their employer and another person for the benefit to be provided is treated as having been provided by the employer.

Past, present, or future employment

(3) It is not necessary to the existence of a fringe benefit that an employment relationship exists when the employee receives the benefit.

Relationship with subpart RD

(4) Sections RD 25 to RD 63 (which relate to fringe benefit tax) deal with the calculation of the taxable value of fringe benefits.

Arrangements

(5) A benefit may be treated for the purposes of the FBT rules as being provided by an employer to an employee under—

(a) section GB 31 (FBT arrangements: general):

(b) section GB 32 (Benefits provided to employee's associates).

GB 32 Benefits provided to employee's associates

When this section applies

(1) This section applies when—

(a) a benefit is provided to a person who is associated with an employee of an employer; and

(b) the benefit would be a fringe benefit if provided to the employee; and

(c) the benefit is provided either by the employer or by another person under an arrangement with the employer for providing the benefit; and

(d) the exemptions in subsections (2) and (2B) do not apply.

Exemption for shareholder-employees and corporate associates

(2) Subsection (3) does not apply when—

(a) the benefit is provided by an employer that is a company; and

(b) the employee is a shareholder in the company; and

(c) the person associated with the employee is a company; and

(d) the benefit is not provided under an arrangement that has a purpose of providing the benefit either—

(i) in place of employment income; or

(ii) free from fringe benefit tax.

Exemption for LTCs and partnerships

(2B) Subsection (3) does not apply when—

(a) the benefit is provided by an employer that is—

(i) a look-through company (an LTC):

(ii) a partnership or limited partnership; and

(b) the person associated with the employee, described in subsection (1)(a), is—

(i) an owner of the relevant LTC:

(ii) a partner of the relevant partnership or limited partnership.

Benefit treated as provided to employee

(3) For the purposes of the FBT rules, the benefit is treated as provided by the employer to the employee.

Application of section CX 18

(4) Section CX 18 (Benefits provided to associates of both employees and shareholders) applies to determine when a benefit provided to an associate of both an employee and a shareholder is treated as a fringe benefit and not a dividend.

RD 27 Determining fringe benefit values

What sections RD 28 to RD 53 do

(1) Sections RD 28 to RD 53 set out the rules for determining the value of a fringe benefit provided by an employer to an employee in connection with their employment. The taxable value of a fringe benefit when an employee pays an amount for receiving the benefit is dealt with in sections RD 54 to RD 57.

When value cannot be ascertained

(2) If, under sections RD 28, RD 29, and RD 33 to RD 41, the value of a fringe benefit cannot be ascertained, the value is the market value or otherwise as the Commissioner determines.

Meaning of market value

(3) In subsection (2), **market value** means the price normally paid, at the time when the fringe benefit is received by the employee, for the fringe benefit in a sale—

(a) in the open market; and

(b) freely offered; and

(c) made on ordinary trade terms; and

(d) to a member of the public at arm's length.

RD 40 Goods

Market value or cost

(1) The value of a fringe benefit that an employer provides to an employee in goods is determined as follows:

(a) when the person providing the goods manufactured, produced, or processed them, their market value:

(b) when the person providing the goods otherwise acquired them, or paid for them to be acquired, dealing at arm's length with the supplier of the goods, the cost of the goods to the person:

(c) if the person providing the goods is a company included in a group of companies, then, as the person chooses, the value of the benefit under either paragraph (a) or (b), applying the provisions as if the group of companies were 1 company.

Sale in open market

(2) Despite subsection (1), if the value of the fringe benefit as determined under that subsection would be more than the amount that would have been paid to the employer for the purchase of the goods in a sale described in paragraphs (a) to (d), then the value is treated as that amount. The sale must be—

(a) at retail in the open market in New Zealand; and

(b) freely offered; and

(c) made on ordinary trade terms; and

(d) to a member of the public with whom the employer is at arm's length.

Some definitions

(3) In this section,—

...

market value means the lowest price, at the time at which the goods were provided to the employee, for which identical goods were sold by the same person to an arm's length buyer, whether wholesaler, retailer, or the public, in the open market in New Zealand in a sale freely offered and made on ordinary trade terms

...

About this document | Mō tēnei tuhinga

Public Rulings are issued by the Tax Counsel Office. Public Rulings set out the Commissioner's view on how tax laws apply to a specific set of facts – called an arrangement. Taxpayers whose circumstances match the arrangement described in a Public Ruling may apply the ruling but are not obliged to do so. Public Rulings are binding on the Commissioner. This means that if you are entitled to apply a Public Ruling and you have calculated your tax liability in accordance with the ruling, the Commissioner must accept that assessment. A Public Ruling applies only to the taxation laws and arrangement set out in the ruling, and only for the period specified in the ruling. It is important to note that a general similarity between a taxpayer's circumstances and the arrangement covered by a Public Ruling will not necessarily lead to the same tax result.