

21 November 2011

You raised with me the question whether fringe benefits which you received whilst a Member of the House of Representatives form part of your allowance by way of salary for the purposes of determining your entitlement to superannuation on ceasing to be a member.

Section 18(1) of the Parliamentary Contributory Superannuation Act 1948 ("the Act") which I understand applies to you as a member provides that a member who ceases to be entitled to a parliamentary allowance should be entitled to benefits in accordance with the section. Subsection (1A) provides that where the period of service of a member is not less than 12 years, as in your case, then subject to subsections which I assume do not apply ((8A) and (8C)) the benefit shall be a retiring allowance during the member's lifetime at the rate applicable in accordance with the scale set out in subsection (6).

Subsection (6) states that the rate of retiring allowance payable to a person is such percentage of the rate of parliamentary allowance for the time being payable to a Member as is applicable in accordance with the scale set out. Depending on the period it rises from 50% to 75%.

There is a note to the subsection that the rate of parliamentary allowance for the time being payable may be affected by s.22T. I have looked at s.22T and have no information before me to form a view whether it does. Having read it I assume that it does not.

Paragraph (b) of the definition of parliamentary allowance states:

- "(b) *An allowance by way of salary under s.4 of the Parliamentary Allowances Act 1952 (other than an allowance by way of salary payable by reason of the holding of a particular office or the performing of particular functions in, or in relation to the parliament or either house);*" (emphasis added)

As you have pointed out "allowance by way of salary" is defined by s.4(1) of the Act. It states that it "does not include special allowance of office, electoral allowance, travelling allowance or any allowance included in a class of allowances prescribed for the purposes of this definition." I am not aware of any allowance or any allowances included in a class of allowances being prescribed for the

purposes of the definition. It is to be noted that it does not specifically exclude allowances of the nature of fringe benefits. I have looked at the regulations under the Act and I can find nothing in them that would exclude allowances for fringe benefits from the definition.

By itself the failure to mention or prescribe "fringe benefits" as being excluded as are other allowances supports an argument that they are not intended to be excluded from the definition "allowance by way of salary".

This definition has to be read therefore into the definition of "parliamentary allowance" paragraph (b) set out above because it commences with "An allowance by way of salary" and therefore, subject to any other relevant provision (I have not found one), the matter you have raised depends on whether the fringe benefits in question are allowances "by way of salary".

A provision of some significance is s.13 of the Act found in "Part IV - Contributions". It provides that a person entitled to a parliamentary allowance shall during his or her period of service pay contributions to the Commonwealth at rates per month being a percentage "of the monthly amount of the parliamentary allowance to which he or she is entitled" depending on whether the member's period of service is less than 18 years or not.

Having regard to the provisions of the Act to which I have referred I think it should follow that if "an allowance by way of salary" includes fringe benefits a member's contributions would also have to take them into account in assessing the member's monthly contributions.

Section 4 of the Parliamentary Allowances Act 1952 provides:

"There are payable to members such allowances (including allowances in accordance with s.48 of the Constitution) as are determined by the Remuneration Tribunal in pursuance of subsection 7(1) and (4) of the Remuneration Tribunals Act 1973."

In this act "member" is a reference to a member of either House of the Parliament.

"Allowance" is defined in s.3 of the Remuneration Tribunal Act 1973 as including but not limited to "an annual allowance and a travelling allowance".

"Parliamentary base salary" means so much of the allowances determined under subsection 7(1) as:

- (a) represents the annual allowance payable for the purposes of s.48 of the Constitution; and
- (b) is identified in the determination as base salary.

Section 7 of the Act provides

"(1) The Tribunal shall from time to time as provided by this Part enquire and determine the allowances (including allowances in accordance with s.48 of the Constitution) to be paid out of the public moneys of the Commonwealth to

members of the Parliament by reason of their membership of the Parliament or by reason of their holding particular offices or performing particular functions in, or in relation to, the parliament or either house of the Parliament."

- (1A) *The tribunal may determine that a portion of parliamentary base salary is not parliamentary allowance for the purpose of the Parliamentary Contributory Superannuation Act 1948.*

Section 48 of the Constitution provides that:

"Until Parliament otherwise provides each Senator and each Member of the House of Representatives shall receive an allowance of £400 per year to be reckoned from the day on which he takes his seat."

Parliament has, of course, "otherwise provided". But s.7(1) still preserves the notion of s.48 allowances.

Section 7(4) relates to enquiries into matters significantly related to the allowances related to membership of the Parliament as referred to in subsection 7(1). I have no reason to think that subsection (4) is relevant in this case.

Reference is made to "base salary" in the pamphlet distributed by the Department of Finance and Administration. Reference is also made to the parliamentary allowance which is equated with back bench salary. The term "back bench salary" is not used in the relevant legislation as far as my reading goes. The term "base salary" is also used and I assume it is a reference to the definition I have cited. The term "parliamentary allowance" is however the relevant matter and it means as the definitions set out above seem to indicate, "an allowance by way of salary".

As a result of these provisions one may reasonably conclude that what constitutes the parliamentary allowance on which a benefit is based is dependent on the definition of "an allowance by way of salary".

It is possibly true for the purposes of considering this matter that, in ordinary parlance, reference is made to "back bench salary" and that this is an amount which is paid to members periodically.

However, in commerce generally, particularly in relation to executive positions, it is now common to treat the salary of a person as including not only the annual amount actually paid periodically but also any benefits such as superannuation contributions and the provision of a car or telephone and perhaps health benefits which the employer provides or meets and that these latter amounts are treated as part of the employee's salary package. In the ordinary course they form the basis of the fringe benefits tax and are taken into account for other purposes as are those identified above and provided to members of Parliament

I think there are strong arguments to support the view that, in a commercial context, they would be treated as part of the salary of employees who received them. The fact that fringe benefits are not taxed in the hands of the employee does not determine the matter.

Of course, having regard to past practice, any argument that fringe benefits are to be included in "the parliamentary allowance" of a former member of Parliament for the purposes of calculating his or her pension entitlement is likely to be strongly resisted because to date they have not been so included and to do so would be seen as giving members much greater benefits than thought to be the case.

However, as I have observed much depends on the meaning given by the Act to "an allowance by way of salary". If support is to be found for the view that payments which constitute fringe benefits are included in it. It will be observed that the definition of "allowance by way of salary" specifically excludes special allowances of offices, electorate allowances and travelling allowances. These are not normally seen as part of the base salary of members but Parliament has specifically excluded them from the definition and therefore they support an argument that fringe benefits such as those outlined in the Departmental correspondence as applying to you including the car are, within the meaning of the Act, "allowances by way of salary". The words "by way of" also invite a comparison which equates an allowance of personal benefit to a member paid in lieu of increasing base salary.

In my view, there are strong arguments to support the proposition that they are so included. There was a tendency in my time in Parliament for the Parliament not to push up the base salary but to reward members by way of additional allowances. The fact that this is done may well have been encouraged in later years by the circumstance that, to the extent that they constitute fringe benefits, they are not taxed in the hands of members or senators. This tendency, however, is difficult to use as a basis for construing the words "allowances by way of salary".

Notwithstanding that I can see strong arguments in favour of this view I am inclined to think that if a court looked at the matter thoroughly including past legislation and practice in relation to salaries and benefits, the development over the years of the Parliamentary Superannuation Scheme, the appointment of a Remuneration Tribunal and did so in the context of the legislation I have referred to above, it may well hold that the fringe benefits you received were not "amounts by way of salary" within the meaning of the Act. It would get some support from s.48 of the Constitution for the view that what was intended to be included in the parliamentary allowance for superannuation purposes is what is referred to in the Remuneration Tribunal Act as "the parliamentary base salary". The fact that contributions would, if the argument in your favour were correct, have to be based on an amount which included the value of the fringe benefits also assists the argument that they are not included.

The benefits made available to members result from decisions of the Remuneration Tribunal pursuant to its powers under s.7(1) of the Remuneration Tribunal Act 1973. These determine the parliamentary base salary payable to members as an amount per annum payable monthly. It is this to which the Department of Finance refers as "base salary".

In your case, electoral allowance, travelling allowance, provision of private car and other allowances, including spouse and dependent children allowances in 2008 and 2009, as the letters from the Department of Finance illustrate, totalled \$81,635 and \$85,489 respectively. In making superannuation contributions under the Act, if they were part of the parliamentary allowance, there would have to be a calculation each month in respect of each member of the fringe benefits made available during that month, even though not necessarily paid monthly. This would be seen as a complication which, it might be thought the legislation did not intend.

Under the definition of *"allowance by way of salary"* it is open to government to prescribe other allowances as not being included in the amount by way of salary. This is a way by which a government could avoid fringe benefits being so treated. It has not done this. It could be argued that this supported the view that fringe benefits are, in your case, still included in salary and therefore in the Parliamentary allowance for superannuation purposes.

In expressing these views it will be apparent that the issues involved are complex and that there are strong arguments either way. I think the matter you have raised is surrounded by sufficient doubt for the Department to be asked to obtain an opinion from independent counsel as to whether or not these amounts are part of the allowance by way of salary for the purposes of the Parliamentary Contributory Superannuation Act 1948.

Kind regards

BOB ELLICOTT