



Class Ruling

Income tax: foreign income tax offset: Brazilian tax paid on employment income by Vale S.A. employees

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❶ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provision dealt with in this Ruling is section 770-10 of the *Income Tax Assessment Act 1997* (ITAA 1997).

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies are persons employed by Vale S.A. in Brazil who are subsequently sent to Australia on assignment and continue to receive income from Vale S.A. on which Brazilian tax is paid.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 11 of this Ruling.
6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
 - this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
 - this Ruling may be withdrawn or modified.

Date of effect

7. This Ruling applies from 1 July 2011. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

8. The following description of the scheme is based on a number of documents provided to the Commissioner. These documents or relevant parts of them, as the case may be, form part of and are to be read with this description. The documents include:
 - the application for class ruling dated 12 April 2013; and
 - communications with representatives of the applicant dated 21 May 2013, 22 July 2013, 21 August 2013 and 16 October 2013.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

9. Vale S.A. is a large Brazilian company which has operations in Australia carried on by its Australian subsidiary.
10. At times persons employed by Vale S.A. in Brazil are seconded to Australia on assignment. These situations fall into two categories:
 - Short term assignments of less than six months where the employees remain on the payroll of Vale S.A. for the purposes of administrative expediency, that is, Vale S.A. continue to pay the salary and wages of these employees.

- Longer term assignments (generally up to two years) where the employees are transferred onto the payroll of Vale S.A.'s Australian subsidiary. These employees are paid their ordinary salary and wages by the Australian subsidiary but are also paid residual benefits by Vale S.A. under long term incentive plans.

11. Income tax is withheld in Brazil on the income paid by Vale S.A. to its employees on assignment in Australia. Brazilian income tax is not imposed on income paid by Vale S.A.'s Australian subsidiary.

Ruling

12. Persons employed by Vale S.A. in Brazil who are subsequently sent to Australia on assignment will be entitled to a tax offset for the income year under subsection 770-10(1) for Brazilian tax paid on income they receive from Vale S.A. which is included in their assessable income in Australia for that income year.

Commissioner of Taxation

12 February 2014

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Taxing of income paid by Vale S.A.

13. Under Brazilian tax law, income paid from an entity located in Brazil is considered Brazilian sourced income and is subject to tax levied at the source.¹ This is the case irrespective of where the recipient resides or in the case of employment income, where the employment is carried out.

14. Vale S.A. is required under Brazilian tax law to withhold income tax in Brazil from income that it pays to employees on assignment in Australia.

15. Under Australian tax law, the source of income earned from employment will usually be considered to be where the employment is carried out.² Therefore, income from employment in Australia is generally considered to be sourced in Australia. Australian sourced employment income is included in the assessable income of an employee irrespective of whether they are a resident or non-resident of Australia for tax purposes.³

16. Income paid by Vale S.A. to employees in relation to their employment in Australia must be included in the assessable income of the employees.

Entitlement to foreign income tax offset

17. In order to be entitled to a tax offset for foreign income tax under subsection 770-10(1), the employee must have paid an amount of foreign income tax in respect of an amount included in their assessable income.

18. Under subsection 770-10(1), it is not a requirement for entitlement to a foreign income tax offset that the income have a foreign source, only that foreign income tax is paid on it and that it is included in the taxpayer's assessable income in Australia. This is confirmed in paragraph 1.39 of the Explanatory Memorandum to the Tax Laws Amendment (2007 Measures No. 4) Bill 2007.

19. Subsection 770-15(1) defines 'foreign income tax' and includes tax that is imposed by a law other than an Australian law and is a tax on income.

¹ Article 685 of the *Brazilian Income Tax Regulations*.

² *Federal Commissioner of Taxation v. French* (1957) 98 CLR 398; (1957) 11 ATD 288; (1957) 7 AITR 76.

³ Subsections 6-5(2) and (3).

20. The Brazilian income tax withheld by Vale S.A. on income it pays to employees on assignment in Australia is levied by a law other than an Australian law and is a tax on income. Accordingly, this tax is 'foreign income tax' as defined.

21. Where the foreign jurisdiction has a tax treaty with Australia, the foreign income tax includes only the tax that has been correctly imposed in accordance with that tax treaty.⁴ As Australia has not entered into a tax treaty with Brazil, this limitation is not applicable.

22. Therefore, the conditions in subsection 770-15(1) have been satisfied.

23. Under section 770-130, in certain circumstances a person is considered to have paid foreign income tax when it has been paid by someone else, for example, if the foreign income tax has been withheld from the income at its source.

24. Therefore, the Brazilian tax withheld by Vale S.A. from income paid to an employee in relation to their employment in Australia is considered to be foreign income tax that the employee has paid.

Exception for certain residence based income taxes

25. Subsection 770-10(3) provides that foreign income tax does not count toward the tax offset for the year if that tax is paid:

- (a) to a foreign country because the taxpayer is a resident of that country for tax purposes; and
- (b) in respect of amounts sourced outside that country.

26. As discussed in paragraphs 15 and 16 of this Ruling, from an Australian tax law perspective, the income paid by Vale S.A. to an employee in relation to their employment in Australia is considered to be sourced in Australia. Therefore, the paragraph 770-10(3)(b) requirement for the exception is met as from an Australian tax law perspective, the Brazilian tax on this income is paid in respect of amounts sourced outside of Brazil.

27. However, the Brazilian tax is payable regardless of whether the employee is a resident of Brazil for tax purposes or not. Therefore, the tax is paid not because the employee is a resident of Brazil. Accordingly, the paragraph 770-10(3)(a) requirement for the exception is not met.

28. As only one of the two requirements for the exception provided by subsection 770-10(3) is met, the exception does not apply in this case.

29. Accordingly, the tax paid in Brazil on the income received from Vale S.A. which is included in the assessable income of the employee in Australia for the income year will count towards the foreign income tax offset for the purposes of subsection 770-10(1).

⁴ See the note to subsection 770-15(1).

Foreign income tax offset limit

30. The amount of the foreign income tax that counts towards the foreign income tax offset is subject to the foreign income tax offset limit.⁵

31. Where the employee is claiming a foreign income tax offset of more than \$1,000, he or she must calculate their foreign income tax offset limit.⁶ If the amount of the foreign income tax offset exceeds the limit, then the tax offset must be reduced by the amount of the excess to the amount of the limit.⁷ Any foreign income tax paid in excess of the limit is not available to be carried forward to a later income year and cannot be refunded to the employee.

Refund of tax paid in Brazil

32. If an employee becomes entitled at any time to a refund of any amount of the tax paid in Brazil, the amount of any such refund is taken under section 770-140 not to be an amount of foreign income tax paid. Accordingly, the amount of any foreign income tax offset to which an employee is entitled is reduced. In such instances, the participant should request an amendment to ensure their assessment reflects the correct amount of foreign income tax offset.

⁵ See subsection 770-75(2).

⁶ More information about how to calculate the foreign income tax offset limit is contained in the 'Guide to the foreign income tax offset rules'.

⁷ See subsection 770-75(1).

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- foreign tax credits

Legislative references:

- ITAA 1997 6-5(2)
- ITAA 1997 6-5(3)
- ITAA 1997 770-10(1)
- ITAA 1997 770-10(3)
- ITAA 1997 770-15(1)
- ITAA 1997 770-75(1)
- ITAA 1997 770-75(2)

- ITAA 1997 770-130

- ITAA 1997 770-140

- Brazilian Income Tax Regulations 685

Case references:

- Federal Commissioner of Taxation v. French (1957) 98 CLR 398; (1957) 11 ATD 288; (1957) 7 AITR 76

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2007 Measures No. 4) Bill 2007

ATO references

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