



Taxation Determination

Income tax: does subsection 23AG(2) of the *Income Tax Assessment Act 1936* apply where foreign earnings are exempt from tax in the foreign country for a reason listed in that subsection as well as a reason not listed?

Preamble

*The number, subject heading, date of effect and paragraphs to paragraphs of this document are a 'public ruling' for the purposes of Part IVA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner.*

1. No. Subsection 23AG(2) of the *Income Tax Assessment Act 1936* (ITAA 1936) does not apply if there is a reason for exempting the foreign earnings that is not listed in that subsection, even if another reason for exempting these earnings, that is listed, also applies.¹ As a result, the foreign earnings remain exempt from Australian tax under subsection 23AG(1).

Explanation

2. Subsection 23AG(1) provides that where a resident taxpayer is engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived from the foreign service will be exempt from tax in Australia. The term 'foreign service' means service in a foreign country as the holder of an office or in the capacity of an employee and the term 'foreign earnings' includes income consisting of salary and wages and allowances: subsection 23AG(7) of the ITAA 1936.

3. Subsection 23AG(1) is subject to subsection 23AG(2) so that the exemption from tax in Australia in subsection 23AG(1) does not apply if the income is exempt from taxation in the foreign country 'only because of any of' the reasons set out in subsection 23AG(2).

4. The word 'only' is not defined and accordingly takes its ordinary meaning shaped by the context. The *Australian Oxford Dictionary* relevantly defines the word 'only' to mean 'solely, merely, exclusively; and no one or nothing more besides'.

¹ TD 2004/D83 states that subsection 23AG(2) applies where there is one or more of the reasons listed in that subsection for exempting the foreign earnings from foreign tax (and no reason not listed in the subsection also applies).

5. The Explanatory Memorandum to the Taxation Laws Amendment Act (No. 2) 1991 (the EM) at page 82 provides the following context regarding the meaning of 'only':

Once the law is changed, foreign earnings that are exempt from tax overseas will also be exempt in Australia except where they are exempt in the overseas country **solely** because [of the reasons for exemption set out in s23AG(2)].

6. Accordingly, the use of the word 'only' in subsection 23AG(2) means that the reasons listed in that subsection must be the sole reasons for exempting the foreign earnings from tax in the foreign country.

7. The example provided on page 84 of the EM is consistent with this interpretation.

8. Therefore, if a reason for exempting the foreign earnings from tax in the foreign country is not one of the reasons listed in subsection 23AG(2), the exemption in subsection 23AG(1) continues to apply, provided the other requirements of the section are satisfied.

Example

9. *The foreign earnings of an Australian resident volunteer aid worker in a foreign country are exempt from taxation in that foreign country because of a Double Tax Agreement concluded with Australia ('DTA') and also because of a Memorandum of Understanding ('MoU') between the Government of that foreign country and an aid organisation. The MoU is not one to which Australia is a party.*

10. *The exemption from tax in the foreign country as a result of the MoU is a reason for exempting the foreign earnings from foreign tax that is outside subsection 23AG(2). Therefore, regardless of the existence of the DTA, subsection 23AG(2) does not apply and the foreign earnings will be exempt from Australian tax under subsection 23AG(1).*

Date of effect

11. This Determination applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Commissioner of Taxation

11 May 2005

Previous draft:
TD 2004/D84

- ITAA 1936 23AG(2)
- ITAA 1936 23AG(7)

Related Rulings/Determinations:
TR 92/20; TD 2004/D83

Other references:

- Explanatory Memorandum to the Taxation laws Amendment Act (No. 2) 1991
- Australia Oxford Dictionary

Legislative references:
- TAA 1953 Pt IVA
- ITAA 1936 23AG(1)

ATO references

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