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Ruling Compendium – TD 2012/8

This is a compendium of responses to the issues raised by external parties to draft TD 2011/D12 Income tax: what types of temporary absences from foreign service form part of a continuous period of foreign service under section 23AG of the *Income Tax Assessment Act 1936*?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1	It would be useful to clarify the meaning of 'in accordance with the terms and conditions of that service' in subsection 23AG(6).	Inserted 'that is, the absence is permitted by the employer, whether in an employment contract or under a separate arrangement' after 'in accordance with the terms and conditions of that foreign service' in paragraph 1.
2	Where a person takes leave they often work on the day they depart for leave. They then depart late in the afternoon. How should this day be treated?	Paragraph 7 and Example 2 have been inserted to address this issue.
3	A person returns to the overseas country early in the day after taking leave. They then work on this day. How should this day be treated?	Paragraph 7 has been inserted to address this issue.
4	Where a person returns to the overseas country, following any period of leave and does not work this day, how should this day be treated?	Not covered in the TD as the position will vary depending on the type of leave taken and the reason why the person does not work on the day of return.
5	A person will not necessarily have weekends or other days off work while they are in the	Example 3 has been inserted to address this issue.

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	foreign country because they are on call at all times, and not entitled to time off in lieu. They take five days of recreation leave which accrued during the foreign service and is on full pay. They return to Australia for a week, including a weekend. How is the weekend treated?	
6	It is not clear what periods are and are not counted as tax exempt when a person is on sick leave.	The TD relates to when an absence is treated as foreign service, not the periods for which income is exempt, so a detailed explanation of when income is exempt is outside the scope of the TD.
7	Is there a limitation on the length of sick leave that can be taken as forming part of foreign service?	Examples 5 and 6 and paragraph 59 cover this issue.
8	If a period of sick leave begins during foreign service and extends beyond the scheduled period of foreign service, is the whole of the sick leave treated as foreign service?	The final TD makes it clear that only sick leave during the scheduled period of foreign service is treated as foreign service.
9	Example 3 involving Rhys appears to contradict itself. The first two paragraphs in this example state that there is no limit to the amount of sick leave that can be treated as foreign service while the final paragraph in the example restricts the exemption to sick leave that accrued during the foreign service.	This is now Example 5 in the final TD. Example 5 points out that the period that is treated as foreign service does not necessarily correspond with the period for which income is exempt. The first two paragraphs in the example relate to the period that will be treated as foreign service. The final paragraph in the example relates to the period for which income is exempt.

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10	When a person takes sick leave does it matter whether they remain in the foreign country or travel to Australia or another country for treatment?	Paragraph 58 and Example 7 now cover this issue.
11	How are absences treated where a person is employed under an arrangement in which sick leave does not accrue but they are not required to work when they are unfit for duty?	Example 6 has been added to the final TD to address this issue.
12	How should purchased leave be treated?	Paragraphs 3 and 55 now make it clear that purchased leave does not form part of continuous period of foreign service.
13	Where a person has leave that has accrued both prior to foreign service and during foreign service, in what order should that leave be taken?	Paragraph 2 has been inserted which explains that for section 23AG purposes leave does not have to be taken in the order it accrues. This means that leave covered by paragraph 1 of the final TD is treated as leave that accrued during that period of foreign service, and that is attributable to that period of foreign service, to the extent that it does not exceed the amount of leave of that type that has accrued during the foreign service. Example 5 also covers this issue.
14	TD 2011/D12 took the view that a period of foreign service includes weekends, public holidays, rostered days off, or days off due to part-time arrangements, provided that, if such absences are used to return to Australia or to visit a third country, they are not excessive by comparison with the scheduled period of	The Tax Office has reconsidered its position in respect of this issue and has concluded that irrespective of where spent, a period of foreign service includes weekends, public holidays, rostered days off, days off due to part-time arrangements, flex-days, compulsory lay off/over days, grounded days and days off in lieu where those days are part of the working conditions for the foreign service. Therefore, the so called 'one-sixth

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	<p>foreign service.</p> <p>It is arguable that these days off cannot be said to be an absence from service even though they are absences from the workplace, and that where the absence is spent should be irrelevant.</p>	<p>administrative test' provided by TR 96/15 and TD 2011/12 is no longer relevant.</p> <p>This issue is addressed in paragraphs 6 and 68 to 70 and Example 10 of the final TD.</p> <p>This change in view is favourable to taxpayers.</p>
15	<p>TD 2011/D12 provides that available days spent in Australia do not form part of a continuous period of foreign service. This appears to be in conflict with the views expressed for a work-related trip to Australia.</p>	<p>The final TD recognises that an available day should be included in the foreign service period provided it was spent in the country of foreign service or, if spent outside the foreign country it is not excessive by comparison with the scheduled period of foreign service.</p> <p>This is explained in paragraph 73 of the TD.</p>
16	<p>TD 2011/D12 proposed that the date of effect of the final TD should be prospective only. Is this appropriate?</p>	<p>TD 2011/D12 proposed a change in view for the treatment of visits to Australia or another country by part-time employees engaged in foreign service. Compared to the previous position in TR 96/15 with respect to part-time workers, this change in view was potentially unfavourable to some taxpayers.</p> <p>As mentioned in issue 14 above, the final TD takes the view that a period of foreign service includes days off due to part-time</p>

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		<p>arrangements, irrespective of where they are spent.</p> <p>All of the positions taken in the final TD are consistent with the views previously expressed in TR 96/15 or are more favourable to taxpayers. Therefore, the final TD will apply both before and after its date of issue.</p>