



CR 2001/81 - Income tax: exempt foreign employment income: section 23AG: Boeing Australia Limited

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Class Ruling

Income tax: exempt foreign employment income: 23AG: Boeing Australia Limited

Contents	Para
What this Class Ruling is about	1
Date of effect	8
Arrangement	9
Ruling	13
Explanations	14
Detailed contents list	28

Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law dealt with in this Ruling is section 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936).

Class of persons

3. The class of persons to whom this Ruling applies are Australian resident employees of Boeing Australia Limited (BAL) seconded to the United States of America (USA) on a 'J' class visa.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 9 to 11 is carried out in accordance with the details of the arrangement provided in this Ruling.

6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- (b) this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies to years commencing both before and after its date of issue.

Arrangement

9. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant document incorporated into this description of the arrangement is:

- Application for Class Ruling dated 17 July 2001.

10. Boeing Australia Limited (BAL) has and will continue to send a number of its Australian resident employees to the USA for a training program referred to as the "Commercial Project". This training is specifically aimed at developing the aviation skills of BAL employees in Boeing aeroplanes.

11. BAL employees will enter the USA under a 'J class' exchange visitor visa and typically stay between 6 and 10 months in duration. The J class visa is designed to promote the interchange of persons, knowledge and skills. This visa can only be granted if applicants can exhibit binding ties to a foreign country which they have no intention of abandoning and that they are going to the USA for a temporary period.

Ruling

12. Foreign earnings derived by an employee of BAL, being an Australian resident individual, who is temporarily present in the USA under a 'J' class visa (designated by the US Department of State, Exchange Visitor Program and Designation Staff), will be exempt from tax where the foreign service is for a continuous period of not less than 91 days.

Explanations

13. Section 23AG of ITAA 1936 provides an exemption from Australian income tax of income earned in overseas service, where certain requirements (including the requirement that an Australian resident has been engaged in foreign service for a continuous period of not less than 91 days) are met.

14. Subsection 23AG(1) states:

“Where a resident, being a natural person, has been engaged in a foreign service for a continuous period of not less than 91 days, any foreign earnings derived by the person from that foreign service is exempt from tax.”

15. The basic tests for the exemption of foreign employment income in subsection 23AG(1) are as follows. The taxpayer:

- must be a resident of Australia;
- must have been engaged in 'foreign service' for a continuous period of not less than 91 days; and,
- must derive 'foreign earnings' from that foreign service.

Foreign Service

16. 'Foreign service' is defined as 'service in a foreign country as a holder of an office or in the capacity of an employee' (subsection 23AG(7)).

17. BAL employees who travel to the USA at the expense of the employer to receive specific training are considered to be engaged in 'foreign service'.

18. Employees are expected to remain in the USA continuously for a period of at least 91 days. If they do so these periods of 'foreign service' would meet the test that Australian residents working overseas must be engaged in foreign service *'for a continuous period*

of not less than 91 days'. Should an employee of the BAL depart the USA prior to the completion of 91 days of continuous service, that employee will normally be ineligible for the exemption (subject to certain exceptions outlined in section 23AG and Taxation Ruling TR 96/15.)

Foreign earnings

19. The definition of 'foreign earnings' is contained in subsection 23AG(7). It provides that, in section 23AG:

“**foreign earnings**” means income consisting of earnings, salary, wages, commission, bonuses or allowances but does not include any payment, consideration or amount that:

- (a) is included in assessable income under Subdivision AA of Division 2; or
- (b) is excluded from the definition of “**eligible termination payment**” in subsection 27A(1) because of paragraph (ja), (k), (ka), (m), (ma), (n) or (p) of that definition.’

20. The exclusions to the definition of 'foreign earnings' at paragraphs (a) and (b) above are not relevant to this arrangement as they relate to pensions, annuities, eligible termination payments and other similar amounts.

21. Employment income derived by BAL employees, such as allowances or salary and wages are specifically included in the subsection 23AG(7) definition of 'foreign earnings'.

22. The subsection 23AG(1) exemption from Australian tax does not apply in certain circumstances. Subsection 23AG(2) provides that the exemption does not apply if the foreign earnings are exempt from income tax in the foreign country *only* because of any of the following:

- a double tax agreement or a law of a country that gives effect to such an agreement (paragraphs 23AG(2)(a) and (b));
- the law of a foreign country which generally exempts from, or does not provide for the imposition of income tax on, income derived in the capacity of an employee, income from personal services or any other similar income (paragraphs 23AG(2)(c) and (d));
- a law or international agreement dealing with privileges and immunities of diplomats or consuls or of persons connected with international organisations applies (paragraphs 23AG(2)(e)(f) and (g)).

23. Article 15 of the Australia US Double Tax Convention (DTC) is relevant. It is not possible on the facts presented to determine which particular aspects of that Article may apply. However, even if the income is exempt under the US DTC, we understand this is not the *only* reason why the income is exempt in the United States.

24. The foreign earnings derived by BAL employees permitted entry to the USA on 'J' class visa are, we have been advised, exempt from tax in the USA.

25. The exemption from tax in the USA of any income derived by a resident employee entering the USA under a 'J' class visa is not caught under subsection 23AG(2) as the exemption from tax arises for a reason *other* than those listed in that subsection.

Other relevant information

26. The 'foreign earnings' of BAL employees that are exempt from Australian tax under section 23AG are nevertheless taken into account in calculating the Australian tax on other assessable income derived by them.

27. Tax will be calculated by applying to the non-exempt component (e.g., Australian salary, investment income), the notional average rate of tax payable on the sum of exempt income and non-exempt income.

Detailed contents list

28. Below is a detailed contents list for this Class Ruling:

	Page
What this Class Ruling is about	1
Tax law(s)	2
Class of persons	3
Qualifications	4
Date of effect	8
Arrangement	9
Ruling	13
Explanation	14
Foreign Service	17
Foreign earnings	19
Other relevant information	26

Detailed contents list

28

Commissioner of Taxation

12 December 2001

<i>Previous draft:</i>	- ITAA 1936 23AG(2)(d)
Not previously released in draft form	- ITAA 1936 23AG(2)(e)
	- ITAA 1936 23AG(2)(f)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 23AG(2)(g)
TR 96/15, IT 2441	- ITAA 1936 23AG(7)
	- ITAA 1936 27A(1)
<i>Subject references:</i>	- ITAA 1936 27A(1)(ja)
- Foreign income	- ITAA 1936 27A(1)(k)
- Foreign salary	- ITAA 1936 27A(1)(ka)
	- ITAA 1936 27A(1)(m)
<i>Legislative references</i>	- ITAA 1936 27A(1)(ma)
- ITAA 1936 23AG	- ITAA 1936 27A(1)(n)
- ITAA 1936 23AG(1)	- ITAA 1936 27A(1)(p)
- ITAA 1936 23AG(2)	- Copyright Act 1968
- ITAA 1936 23AG(2)(a)	
- ITAA 1936 23AG(2)(b)	
- ITAA 1936 23AG(2)(c)	

ATO References

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