

CR 2004/73 - Income tax: assessable income: employees of the Australian Public Service and the Australian Federal Police working in Papua New Guinea as part of the 'Enhanced Cooperation Package' program

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2003*



Class Ruling

Income tax: assessable income:
employees of the Australian Public
Service and the Australian Federal Police
working in Papua New Guinea as part of
the 'Enhanced Cooperation Package'
program

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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**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVA 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 which this Ruling applies are employees of the Australian Public Service (the APS) and the Australian Federal Police (the AFP) who are deployed to Papua New Guinea (PNG) as part of the Enhanced Cooperation Package program (the ECP program) and who remain residents of Australia for the purposes of the Australia PNG Double Tax Agreement (the PNG DTA) throughout the period of deployment to PNG.

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 actually carried out is carried out in accordance with the arrangement described in paragraphs 9 to 22.
6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:
 - 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
 - this Ruling may be withdrawn or modified.
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Date of effect

8. This Ruling applies from 1 July 2003. However, the Ruling 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 issue of the Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore, the Ruling only applies to the extent that:
 - it is not later withdrawn by notice in the *Gazette*;
 - it is not taken to be withdrawn by an inconsistent later public ruling; or
 - the relevant tax laws are not amended.

Arrangement

9. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents which are attached to the file record maintained by the Australian Tax Office

for this ruling. 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 documents or parts of documents incorporated into this description of the arrangement are:

- application for a Class Ruling dated 7 November 2003;
- APS Terms and Conditions of Employment for deployment to PNG;
- Determination setting out AFP Terms and Conditions of Employment for deployment to PNG; and
- further information provided by the applicant.

10. Under the ECP program, the Australian Government has agreed to send APS and AFP employees to provide assistance to PNG in order to facilitate growth and stability by addressing core issues in PNG in the areas of governance, law and order and justice, transport and border security, financial management, economic and social progress as well as capacity in public administration. The ECP program will be administered by the Australian Agency for International Development (AusAID) with additional support provided by the employees' home agencies.

11. Employees selected for deployment will be officers of the APS and the AFP.

12. Officers not employed by the APS or the AFP may also be selected for deployment. Where this occurs, such officers will be seconded to the APS or AFP for the duration of their deployment (and are therefore APS or AFP employees).

13. It is expected that APS employees will be deployed to PNG for a minimum period of 91 days.

14. It is expected that AFP employees will be deployed for a minimum period of 4 months and may be extended for a period of up to 24 months.

15. The Secretary of an APS employee's home agency or the Commissioner of the AFP may at any time direct the APS or AFP employee to return to Australia. If such a direction is given, the employee must comply with it immediately. An APS or AFP employee returning to Australia on compassionate grounds may be redeployed at a later date, after the reason for the employee's return no longer exists. An APS employee may elect to return from the posting prior to the agreed date following an application to that effect from the employee being considered by the relevant Secretary.

16. Salary and other remuneration entitlements will continue to be paid to APS and AFP employees on a fortnightly basis by their home agency during deployment and they will remain eligible for performance bonuses, if applicable.

17. APS employees deployed to PNG will also be entitled to some or all of the following allowances:

- Cost of Posting Allowance;
- Hardship Allowance;
- Child Allowance;
- Additional Household Allowance;
- Reunion/Disturbance Allowance; and
- Transfer Allowance.

18. AFP employees deployed to PNG will be entitled to some or all of the following allowances:

- Composite Allowance (first payable while the employee is engaged in pre-deployment training and thereafter for the duration of the deployment period);
- Motor Vehicle Allowance;
- Transfer Allowance;
- Extended Unaccompanied Overseas Service Allowance;
- Incidental Allowance;
- Cost of Posting Allowance; and
- Mission Allowance.

19. Article 12.1(a) of the Treaty on Development Co-operation between the Government of Australia and the Government of Papua New Guinea (the Treaty) provides that APS and AFP employees deployed to PNG as part of the ECP program shall be exempt from taxation by the PNG government on their salaries and allowances.

20. APS and AFP employees will accrue recreation, sick (personal) and long service leave entitlements while deployed to PNG. APS employees deployed to PNG will also be entitled to an additional 10 days recreation leave per annum.

21. APS employees deployed to PNG may take recreation leave in accordance with their home agency's policy and with the agreement of their manager in PNG. APS employees may utilise recreation leave to return to Australia (for example for reunion visits).

22. AFP employees deployed to PNG are not permitted to take standard recreation leave while on deployment. Standard recreation leave accrued by an AFP employee while deployed to PNG must be taken at the end of the deployment.

Ruling

23. The salary, bonuses and allowances referred to at paragraphs 16, 17 and 18 of this Ruling, derived by APS and AFP employees described in paragraph 3 deployed to PNG as part of the ECP program, are exempt from income tax under section 23AG of the ITAA 1936 where:

- the employee has been engaged, or is taken to have been engaged, in service in PNG for a continuous period of not less than 91 days; and
- the salary, bonuses and allowances are derived from that foreign service.

Explanation

24. Section 23AG of the ITAA 1936 provides an exemption from Australian tax on the foreign earnings derived from foreign service by an Australian resident who has been engaged in that foreign service continuously for 91 days or more.

25. Subsection 23AG(1) states:

Where a resident, being a natural person, has been engaged in 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.

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

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

However, certain foreign earnings that meet these tests may not be exempt (see paragraph 49).

Resident of Australia

27. The determination of a person's residency status depends on their own circumstances and is a determination made in relation to each year of income. For further information, see Income Tax Ruling IT 2650. This Class Ruling only applies to the class of persons who remain solely as residents of Australia for the purposes of the PNG DTA (see paragraph 3) during their deployment to PNG.

28. However, it is expected that APS and AFP employees who are deployed to PNG under the ECP program will remain residents of Australia throughout the period of their deployment.

Engaged in foreign service

29. '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)).

30. The term 'employee' is defined within subsection 23AG(7) to include '*a person employed by a government or an authority of a government or by an international organisation*'.

31. APS and AFP employees referred to in paragraph 3 meet the above definition of an 'employee'.

32. Deployment to PNG constitutes 'foreign service' as the APS and AFP employees are undertaking '*service in a foreign country as a holder of an office or in the capacity of an employee*'.

For a continuous period of not less than 91 days

33. Each APS employee is expected to serve continuously in PNG for a period of at least 91 days. Each AFP employee is expected to serve continuously for a period of at least 4 months. These periods of 'foreign service', if for a period of at least 91 days, meet the test that Australian residents working overseas must be engaged 'for a continuous period of not less than 91 days'.

34. Should an APS or AFP employee depart PNG prior to the completion of 91 days of continuous service, that employee will normally be ineligible for the exemption.

35. In certain instances, an APS or AFP employee who departs PNG prior to serving the necessary number of days, may still qualify for exemption if they return to continue their posting at a later date (refer to Taxation Ruling TR 96/15).

Temporary Absences

36. Subsection 23AG(6) and paragraph 11 of TR 96/15 treat certain temporary absences from foreign service as forming part of the period of foreign service.

37. This includes absences on recreation leave, other than:

- leave wholly or partly attributable to a period of service or employment other than the foreign service;
- long service leave, furlough, extended leave or leave of a similar kind (however described); or
- leave without pay or on reduced pay.

38. Where an APS or AFP employee is temporarily absent from foreign service due to any of the absences listed in subsection 23AG(6) or paragraph 11 of TR 96/15, these absences will be taken to form part of the period of foreign service.

39. For example, where an APS employee deployed to PNG takes recreation leave to return to Australia for the purposes of a reunion visit, and the leave taken is wholly attributable to that foreign service, the leave period forms part of the foreign service period.

Foreign earnings

40. The definition of 'foreign earnings' is also contained in subsection 23AG(7), which provides that:

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.

41. 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.

42. The remuneration of the APS and AFP employees takes the form of an annual salary entitlement (with performance bonuses, where applicable) and the payment of various allowances (see paragraphs 16, 17 and 18).

43. These salaries, bonuses and allowances are specifically included in the subsection 23AG(7) definition of 'foreign earnings'.

44. Whilst the salary of an APS or AFP employee may be paid into financial institutions in Australia, those 'earnings' are still considered to be 'foreign earnings'.

From that foreign service

45. To qualify for the exemption the 'foreign earnings' must be derived from the 'foreign service'. That does not mean that the foreign earnings need to be derived at the time of engaging in foreign service. The important test is that the foreign earnings, when derived, need to be derived as a result of the undertaking of that foreign service.

46. In the case of allowances or performance bonuses paid after the person returns to Australia that relate to the period of foreign service, such allowances or bonuses are treated as foreign earnings derived from that foreign service. Also, any advances against salary or allowances paid to the taxpayer prior to the undertaking of foreign service arising from the undertaking of that foreign service would be treated as foreign earnings from foreign service.

47. The salary that is paid when taking recreation leave that accrued during the period of foreign service is also considered to be foreign earnings from that foreign service, even though the recreation leave may be taken after the completion of the foreign service.

48. An AFP employee is entitled to a composite allowance while undertaking pre-deployment training prior to engaging in foreign service. The composite allowance payable during the pre-deployment period is not derived from foreign service. It is derived as a result of the training undertaken prior to leaving Australia and does not therefore qualify for exemption under section 23AG.

Certain foreign earnings are not exempt

49. Subsection 23AG(2) provides that no exemption is available under subsection 23AG(1) in circumstances where an amount of foreign earnings derived in a foreign country is exempt from tax in the foreign country solely because of:

- a double tax agreement or a law of a country that gives effect to such an agreement (paragraphs 23AG(2)(a) and (b));
- a law of that 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)); and
- a law or international agreement dealing with privileges and immunities of diplomats or consuls or of persons connected with international organisations (paragraphs 23AG(2)(e), (f) and (g)).

50. However, if the foreign earnings are exempt from tax in the foreign country because of another reason (for example a Memorandum of Understanding [MOU] or some similar agreement), subsection 23AG(2) will not apply to deny the exemption under subsection 23AG(1). This is because the foreign earnings are not exempt in the foreign country **solely** because of events listed in that subsection – the foreign earnings are also exempt because of the MOU or similar agreement which is not a reason listed in subsection 23AG(2).

51. As Article 12.1(a) of the Treaty provides that APS and AFP employees deployed to PNG as part of the ECP program shall be exempt from taxation by the PNG government on their salary and allowances, the foreign earnings of those employees will be exempt in PNG for a reason other than those listed in subsection 23AG(2). Therefore, subsection 23AG(2) will not apply to deny the exemption under subsection 23AG(1).

Exemption with progression

52. The 'foreign earnings' of 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 the employee (subsection 23AG(3)).

53. Tax on other assessable income will be calculated by applying to the non-exempt income (for example Australian salary, investment income), the notional average rate of tax payable on the sum of exempt income and non-exempt income.

54. Any deductions that relate to the exempt income are allowed as if the exempt income was assessable income. That is, expenses which relate directly to earning income in PNG are deductible from exempt income.

Example

55. In the 2003-2004 income year, an APS employee derives the following types of income:

- Australian employment income of \$45,000;
- foreign exempt employment income of \$15,100; and
- expenses directly related to foreign exempt employment income of \$100.

56. Assume that the APS employee has appropriate private patient hospital cover for Medicare levy surcharge purposes.

57. The total amount of Australian tax payable will be calculated with reference to the following formula:

$$\frac{\textit{Notional gross tax}}{\textit{Notional gross taxable income}} \times \textit{Other taxable income}$$

Step 1

The employee's **notional gross taxable income** is \$60,000 (\$45,000 + \$15,100 - \$100).

Step 2

The **notional gross tax** is \$16,032 (the normal Australian income tax and Medicare levy payable on a taxable income of \$60,000).

Step 3

The **other taxable income** is \$45,000 (Australian employment income).

Step 4

The Australian tax payable (including Medicare levy) on the employee's Australian income is:

$$\frac{\$16,032}{\$60,000} \times \$45,000$$

$$=\$12,024.00.$$

Detailed contents list

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

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 92/20;
TR 96/15; TR 97/16; IT 2650

Subject references:

- foreign exempt employment income
- foreign income
- foreign salary & wages
- foreign source income
- international tax
- overseas countries
- overseas tax laws
- Papua New Guinea
- residence of individuals

Legislative references:

- ITAA 1936 23AG
- ITAA 1936 23AG(1)
- ITAA 1936 23AG(2)
- ITAA 1936 23AG(2)(a)
- ITAA 1936 23AG(2)(b)
- ITAA 1936 23AG(2)(c)

- ITAA 1936 23AG(2)(d)
- ITAA 1936 23AG(2)(e)
- ITAA 1936 23AG(2)(f)
- ITAA 1936 23AG(2)(g)
- ITAA 1936 23AG(3)
- ITAA 1936 23AG(6)
- ITAA 1936 23AG(7)
- ITAA 1936 Pt III Div 2 Subdiv AA
- ITAA 1936 27A(1)
- ITAA 1936 27A(1)(ja)
- ITAA 1936 27A(1)(k)
- ITAA 1936 27A(1)(ka)
- ITAA 1936 27A(1)(m)
- ITAA 1936 27A(1)(ma)
- ITAA 1936 27A(1)(n)
- ITAA 1936 27A(1)(p)
- TAA 1953 Pt IVAAA
- Copyright Act 1968

Other references:

- Treaty on Development Co-operation between the Government of Australia and the Government of Papua New Guinea Article 12.1(a)

ATO references

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