



***CR 2007/62 - Income tax: assessable income:
employees of Inco Australia Management Pty Ltd
working in New Caledonia on the Goro Nickel Project
process plant***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *6 December 2006*



Class Ruling

Income tax: assessable income: employees of Inco Australia Management Pty Ltd working in New Caledonia on the Goro Nickel Project process plant

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📌 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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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 provisions dealt with in this Ruling are:
- section 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936); and
 - section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of entities

3. The class of entities to which this Ruling applies is Australian resident employees of Inco Australia Management Pty Ltd (Inco) who are employed on the commissioning phase of the development of the nickel process plant at the Goro Nickel Project site in New Caledonia. In this Ruling, these entities are referred to as Inco employees.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme 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 13 to 27 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.

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Date of effect

8. This Ruling applies from 6 December 2006.

9. 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

13. The following description of the scheme is based on information provided by the applicant.

14. Inco employs a significant number of Australian resident individuals to work on the Goro Nickel Project site in New Caledonia. The project involves the development of a nickel mine and associated process plant in the Southern Province of New Caledonia.

15. Inco employees will be employed on a 21 day fly-in fly-out cycle. Under this cycle employees work on the project site in New Caledonia for a minimum of 14 days; they are entitled to a maximum of seven days paid rest and recreation (R&R) leave at the end of each work cycle.

16. When they are working on site, Inco employees work seven days per week, for a minimum of 12 hours per day. Whilst on site, Inco employees are on call at all times.

17. It is expected that Inco employees will return to Australia for their R&R days in each cycle. Inco employees are not required to perform any employment duties while present in Australia.

18. Inco employees are accommodated at the project site in camp style accommodation. The project site is isolated; the return to Australia involves travel of approximately 10 hours each way. There is a real risk of civil unrest among the people of the community and at the project site.

19. Employees use equipment that operates under high pressure in high temperature conditions. If a site disruption occurs, employees are expected to remain working on site until the problem is resolved.

20. It is expected that Inco employees will be contracted to work on the commissioning phase of the development of the process plant for a period of not less than 91 days.

21. Inco employees are paid a base salary with an additional site uplift allowance paid for the days worked on site.

22. Inco employees receive allowances of \$250 at the start of their commissioning contract to assist with the costs of mobilising to the site and \$250 at the end of their commissioning contract to assist with the costs of demobilising from the site. These allowances are designed to compensate for the extra costs incurred in travelling between Australia and the project site (for example, fares, incidental expenses and excess baggage charges) at the start and end of the mobilisation period.

23. Inco employees on this cycle are entitled to four weeks (28 days) paid annual leave per year in addition to the R&R leave. The leave is accrued wholly in relation to their service in New Caledonia.

24. Inco employees accrue paid sick leave at the rate of eight days per year. Employees can accrue up to 30 days of paid sick leave.

25. Inco employees may be entitled to paid bereavement leave, maternity or paternal leave, jury duty leave, special leave, carers leave, military service, study leave, or personal leave if their circumstances warrant it. They are entitled only to the leave types that are described above in this section of the Class Ruling.

26. Inco employees are liable to pay income tax in New Caledonia on employment income that they derive in New Caledonia.

27. There is no tax treaty or Memorandum of Understanding in force between Australia and New Caledonia.

Ruling

28. The salary and allowances referred to in paragraph 21 and 22 of this Ruling derived by the Inco employees described in paragraph 3 of this Ruling are ordinary income under section 6-5 of the ITAA 1997.

Exempt income

29. The salary and allowances, other than the mobilisation/demobilisation allowances, derived by an Inco employee are foreign earnings that are exempt from tax under subsection 23AG(1) of the ITAA 1936 where the employee has been engaged in a continuous period of foreign service of not less than 91 days.

Assessable income

30. The salary and allowances derived by an Inco employee are included in their assessable income and are not exempt from tax under subsection 23AG(1) of the ITAA 1936 where:

- the employee has not been engaged in a continuous period of foreign service of not less than 91 days;
- it is not foreign earnings derived from that foreign service, as defined in subsection 23AG(7) of the ITAA 1936; or
- the employee had a change in circumstances and no longer satisfies the exemption conditions. The exemption will still apply for the period that the employee satisfied the exemption conditions.

31. The mobilisation/demobilisation allowances are not foreign earnings derived from that foreign service. They are paid as a compensation for expenditure incurred by the Inco employee prior to commencing and after completion of their foreign service and do not, therefore, qualify for exemption under section 23AG of the ITAA 1936.

Temporary absences form part of foreign service

32. An Inco employee is considered to be engaged in a continuous period of foreign service where:

- the Inco employee has a temporary absence from foreign service taken in accordance with the terms and conditions of employment for accident, illness or recreation leave (subsection 23AG(6) of the ITAA 1936 and paragraphs 9 to 11 of TR 96/15); or
- the Inco employee has two or more periods of foreign service that constitute a continuous period of foreign service (subsection 23AG(6A) of the ITAA 1936).

33. An Inco employee who takes leave other than that outlined at paragraph 32 of this Ruling will break their continuous period of foreign service.

34. The Inco employee is engaged in a continuous period of foreign service for the 21 day fly-in fly-out cycle.

Exemption with progression

35. Where the salary and allowances are exempt foreign earnings, they are taken into account in calculating the Australian tax on other assessable income derived by the Inco employee (subsection 23AG(3) of the ITAA 1936).

Example

36. In the 2006-2007 income year, Daniel, an employee derives the following types of income:

- Australian employment income of \$60,300;
- allowable deductions against Australian income of \$300;
- foreign exempt employment income of \$30,100; and
- expenses directly related to exempt foreign employment income of \$100.

Assume that Daniel has appropriate private patient hospital cover for Medicare levy surcharge purposes.

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

$$\text{Notional gross tax/Notional gross taxable income) } \times \text{ other taxable income}$$

Step 1

Daniel's **notional gross taxable income** is \$90,000
(\$60,300 - \$300] + [\$30,100 - \$100]).

Step 2

The **notional gross tax** is \$25,200 (the normal Australian income tax and Medicare levy payable on a taxable income of \$90,000).

Step 3

The **other taxable income** is \$60,000 (Australian employment income).

Step 4

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

$$\$25,200/\$90,000) \times \$60,000 = \$16,800$$

Note: this calculation is based on the 2006-2007 income tax rates. If the income tax rates for future years change, you should refer to the tax rates for that current income year.

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.***

37. Subsection 6-5(2) of the ITAA 1997 provides that the assessable income of a resident taxpayer includes ordinary income derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

38. Salary and wages are ordinary income for the purposes of subsection 6-5(2) of the ITAA 1997.

39. Subsection 6-15(2) of the ITAA 1997 provides that if an amount is exempt income then it is not assessable income.

40. Section 11-15 of the ITAA 1997 lists those provisions dealing with income which may be exempt. Included in this list is section 23AG of the ITAA 1936 which deals with exempt foreign employment income.

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

42. Subsection 23AG(1) of the ITAA 1936 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.

43. The basic tests for the exemption of foreign employment income in subsection 23AG(1) of the ITAA 1936 are:

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

44. However, certain foreign earnings that meet these tests may not be exempt from tax (see paragraphs 75 to 77 of this Ruling).

Resident of Australia

45. The determination of a person's residency status depends on that person's circumstances and is a determination made in relation to each year of income. For further information see Taxation Ruling IT 2650. This Ruling only applies to the class of entities described in paragraph 3 of this Ruling who remain Australian residents for tax purposes for the purposes during their employment in New Caledonia.

46. Inco employees employed in New Caledonia are Australian residents for tax purposes throughout the period of their employment.

Engaged in foreign service

47. 'Foreign service' is defined as 'service in a foreign country as the holder of an office or in the capacity of an employee' (subsection 23AG(7) of the ITAA 1936).

48. The term 'employee' is defined within subsection 23AG(7) of the ITAA 1936 to include 'a person employed by a government or an authority of a government or by an international organisation'.

49. Inco employees referred to in paragraph 3 of this Ruling are considered to meet the above definition of an 'employee'.

50. Employment of Inco employees in New Caledonia constitutes 'foreign service' as each employee is 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

51. Each Inco employee based in New Caledonia is expected to serve continuously in New Caledonia for a period of at least 91 days. These periods of 'foreign service', if met, satisfy the test that Australian residents working overseas must be engaged in foreign service 'for a continuous period of not less than 91 days'.

52. Should an Inco employee leave their employment prior to the completion of 91 days of continuous service, that employee will normally be ineligible for the exemption.

53. However, in certain instances, an Inco employee who leaves their employment prior to serving the necessary number of days, may still qualify for exemption if they return to their employment at a later date (refer paragraphs 9 to 12 of Taxation Ruling TR 96/15 and paragraphs 62 to 64 of this Ruling).

Temporary absences forming part of a period of foreign service

54. Subsection 23AG(6) of the ITAA 1936 treats certain temporary absences from foreign service as forming part of the period of foreign service. The Commissioner's view on the application of that subsection is reflected in paragraphs 9 to 11 of TR 96/15.

55. Absences which form part of the period of foreign service include absences taken in accordance with the terms and conditions of employment because of accident or illness or recreation leave.

56. 'Recreation leave' is leave in the nature of paid holidays to which an employee has accrued an entitlement. Most usually it is the employee's accrued annual leave. Leave which fits this description is 'recreation leave', even if it is not called this.

57. However, 'recreation leave' does not include:

- leave that is not in the nature of paid holidays, such as weekends, rostered days off, flexidays, and days off in lieu;
- public holidays;
- leave wholly or partly attributable to a period of employment other than foreign service;
- long service leave, furlough, extended leave or similar leave; and
- leave without pay or on reduced pay.

58. The Inco employees receive the following leave being:

- 7 days R&R leave in a 21 day fly-in-fly out cycle – as this leave is taken in circumstances similar to those mentioned in Taxation Ruling IT 2015 (Taxation Ruling IT 2441), it is treated as recreation leave; and
- 28 days annual leave.

Given the working conditions of Inco employees, this leave is considered reasonable (Taxation Ruling TR 96/15). This leave is recreation leave that forms part of a period of foreign service under subsection 23AG(6) of the ITAA 1936.

59. An Inco employee's period of continuous foreign service will be maintained where the employee is granted:

- leave relating to their sickness or accident; or
- leave because of the accident, illness or death of another person – where the leave is for a short period.

Temporary absences not breaking the period of foreign service: the legislative rule

60. Where an employee takes leave other than the leave outlined at paragraphs 55, 58, and 59 of this Ruling, they need to determine whether the continuity of service can be maintained (subsection 23AG(6A) of the ITAA 1936).

61. Paragraphs 62 to 64 of this Ruling provide an explanation of this tax provision. Alternatively, the Inco employee could seek professional advice from their taxation adviser or the Australian Taxation Office.

Continuity of the period of foreign service: 1/6 legislative rule

62. The 1/6 legislative rule allows two or more continuous periods of foreign service to be joined as a total period of foreign service, unless, at any time, the total period of absence (in days) from foreign service between the continuous periods of foreign service exceeds 1/6 of the number of days of the total period of foreign service.

63. If the period of absence exceeds 1/6 of the total period of foreign service at any time, continuity of foreign service is broken. The Inco employee will begin a new period of foreign service when he or she next engages in foreign service and must determine whether that period of foreign service lasts for at least 91 continuous days (subsection 23AG(6A) of the ITAA 1936).

64. The 1/6 legislative rule in subsection 23AG(6A) permits two or more periods of foreign service to constitute a continuous period of foreign service where continuity would be otherwise broken by absence. Absences between the periods of foreign service under the 1/6 legislative rule do not form part of the continuous period of foreign service.

Foreign earnings

65. The definition of 'foreign earnings' is contained in subsection 23AG(7) of the ITAA 1936, which provides that:

'foreign earnings' means income consisting of earnings, salary, wages, commission, bonuses or allowances, or of amounts included in a person's assessable income under Division 13A, but does not include any payment, consideration or amount that:

- (i) is included in assessable income under Subdivision AA of Division 2; or
- (ii) 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.

66. The exclusions to the definition of 'foreign earnings' in paragraph 65 of this Ruling are not, however, relevant to this arrangement as they relate to pensions, annuities, eligible termination payments and other similar amounts.

67. The remuneration of Inco employees takes the form of an annual salary entitlement and the payment of a site uplift allowance.

68. The salary and allowance which are described in paragraph 21 of this Ruling, but not the mobilisation/demobilisation allowances described in paragraph 22, come within the definition of 'foreign earnings' in subsection 23AG(7) of the ITAA 1936.

69. Whilst the salary and allowance of Inco employees may be paid into financial institutions in Australia, those 'earnings' are still considered 'foreign earnings'.

From that foreign service

70. 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.

71. In the case of allowances paid after the taxpayer returns to Australia that relate to the period of foreign service, such allowances 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.

72. The receipt of the site uplift allowance by Inco employees is considered to be foreign earnings from the foreign service as it relates to engaging in foreign service in New Caledonia.

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

74. An Inco employee is also entitled to a mobilisation/demobilisation allowance to assist with expenses incurred prior to commencing and after the completion of their foreign service. These allowances are not foreign earnings derived from that foreign service. They are paid as a compensation for expenditure incurred by the Inco employee prior to engaging in foreign service and after completion of foreign service and do not, therefore, qualify for exemption under section 23AG of the ITAA 1936.

Certain foreign earnings not exempt

75. No exemption is available under subsection 23AG(1) of the ITAA 1936 in circumstances where an amount of foreign earnings derived in a foreign country is exempt from tax in the foreign country solely because of the conditions specified in subsection 23AG(2) of the ITAA 1936. The relevant conditions in subsection 23AG(2) are:

- the non-imposition of tax on employees in the foreign country; or
- a double tax agreement; or a law of a country that gives effect to such an agreement.

76. Employment income is normally subject to income tax in New Caledonia. There is no tax treaty or Memorandum of Understanding in force between Australia and New Caledonia.

77. As a result, the foreign earnings of the Inco employees are not exempt from tax in New Caledonia because of any of the reasons listed in subsection 23AG(2) of the ITAA 1936. Therefore, subsection 23AG(2) will not operate to deny the 'foreign earnings' exemption under subsection 23AG(1) of the ITAA 1936.

Exemption with progression

78. The 'foreign earnings' of Inco employees that are exempt from Australian tax under section 23AG of the ITAA 1936 are nevertheless taken into account in calculating the Australian tax on other assessable income derived by the employee (subsection 23AG(3) of the ITAA 1936).

79. 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.

80. In calculating these amounts, 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 New Caledonia are deductible from exempt income.

Appendix 2 – Detailed contents list

81. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

IT 2015; IT 2441; IT 2650;
TR 96/15

Subject references:

- cyclical arrangement
- exempt foreign income
- exempt income
- foreign exempt employment income
- foreign income
- foreign income deductions
- foreign salary & wages
- foreign source income
- international tax
- New Caledonia
- overseas countries
- overseas employees
- overseas tax laws

- residence of individuals

Legislative references:

- ITAA 1936 23AG
 - ITAA 1936 23AG(1)
 - ITAA 1936 23AG(2)
 - ITAA 1936 23AG(3)
 - ITAA 1936 23AG(6)
 - ITAA 1936 23AG(6A)
 - ITAA 1936 23AG(7)
 - ITAA 1936 Pt III Div 2 Subdiv AA
 - ITAA 1936 27A(1)
 - ITAA 1936 Pt III Div 13A
 - ITAA 1997 6-5
 - ITAA 1997 6-5(2)
 - ITAA 1997 6-15(2)
 - ITAA 1997 11-15
 - TAA 1953
 - TAA 1953 Sch 1 357-75(1)
 - Copyright Act 1968
-

ATO references

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Income Tax ~~ Exempt income ~~ employment income - foreign sourced