

TR 2019/D1 - Income tax: income of international organisations and persons connected with them that is exempt from income tax

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Draft Taxation Ruling

Income tax: income of international organisations and persons connected with them that is exempt from income tax

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❶ Relying on this draft Ruling

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if the draft ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

Summary – what this draft Ruling is about

1. This draft Ruling¹ considers the income of international organisations and persons connected with them that is exempt income under section 6-20 of the *Income Tax Assessment Act 1997* (ITAA 1997). The income is made exempt by the *International Organisations (Privileges and Immunities) Act 1963* (IOPI Act) which provides for the conferral, by regulation, of privileges and immunities (including specified tax exemptions) on international organisations and persons connected with them.

2. The IOPI Act is administered by the Department of Foreign Affairs and Trade (DFAT). DFAT's views of the IOPI Act, in its capacity as administrator, are reflected in this Ruling.

3. This Ruling does not consider excise duty, goods and services tax and other indirect taxes that may be paid by international organisations and persons connected with them.

Previous rulings

4. This Ruling updates the existing ATO view expressed in Taxation Ruling TR 92/14 *Income tax: taxation privileges and*

¹ All further references to 'this Ruling' refer to the Ruling as it will read when finalised. Note that this Ruling will not take effect until finalised.

immunities of prescribed International Organisations and their staff and Taxation Determination TD 92/153 *Income tax: who is a 'person who holds an office' as specified in various regulations made under the International Organisations (Privileges and Immunities) Act 1963?* to incorporate the decisions of the High Court in *Macoun v Commissioner of Taxation* [2015] HCA 44 (*Macoun*) and *Commissioner of Taxation v Jayasinghe* [2017] HCA 26 (*Jayasinghe*).

5. TR 92/14 and TD 92/153 are withdrawn with effect from 27 March 2019.

Ruling

6. An amount is exempt income under section 6-20 of the ITAA 1997 if it is made exempt from income tax by a provision of either the ITAA 1997 or another Commonwealth law. This includes income made exempt from income tax by the IOPI Act of:

- international organisations
- persons connected with international organisations.

International organisations

7. Subparagraph 6(1)(a)(ii) of the IOPI Act and items 7 and 8 of the First Schedule to the IOPI Act set out the taxation exemptions that can be conferred on an international organisation to which the IOPI Act applies. They are exemptions from:

- taxation for the organisation, its income, property, assets and transactions²,
- the liability (including the obligation) to collect taxes³, and
- the taxation of obligations and securities issued or guaranteed by the organisation, and of interest and dividends on such obligations and securities.⁴

8. The IOPI Act applies to an international organisation if regulations declare it to be an international organisation for the purposes of the IOPI Act. The exemptions from taxation outlined in items 7 and 8 of the First Schedule to the IOPI Act apply to an international organisation to which the IOPI Act applies to the extent of and subject to the conditions that are provided in the Regulation for that organisation.

² Item 7 of the First Schedule to the IOPI Act.

³ Item 7 of the First Schedule to the IOPI Act.

⁴ Item 8 of the First Schedule to the IOPI Act.

9. There are differences in the exemptions and concessions (and the levels and conditions that they may be subject to) conferred on international organisations. These arise at the time international organisations seek to set up in Australia, or expand their representation or engagement here. At that time, international organisations seek and negotiate exemptions, concessions and other benefits to suit their current and future needs. These vary significantly between international organisations, and it is necessary to review the particular Regulations that apply to an international organisation when determining, for example:

- whether income of that organisation is exempt income (or income of persons connected with that organisation)
- whether the organisation is subject to a particular taxation liability, or
- how other taxation matters that apply in relation to that organisation (for example, Pay As You Go (PAYG) withholding) and persons connected with it.

10. Section 6-20 of the ITAA 1997 then applies to any income of an international organisation exempted by the IOPI Act to characterise it as exempt income of that organisation for income tax purposes.

11. An international organisation may be exempted from the liability (including the obligation) to collect taxes, which can include PAYG withholding from salaries and wages of its employees.⁵ The particular regulations for an international organisation specify whether this exemption applies to it.

12. Even if the exemption in paragraph 11 of this Ruling does not apply, an international organisation is not required to collect PAYG withholding from salaries and emoluments a person connected with the organisation receives from it where that income is wholly exempted under the IOPI Act. This is because subsection 12-1(1) of Schedule 1 to the *Taxation Administration Act 1953* provides that an entity is not required to withhold from an amount it pays to another entity if the whole of that payment is exempt income of the entity receiving the payment.

13. Regulations for international organisations can be accessed at legislation.gov.au (under the Legislative instruments category).

⁵ Item 7 of the First Schedule to the IOPI Act.

Persons currently connected with an international organisation

14. Subsection 6(1) of the IOPI Act and Part I of each of the Second to the Fifth Schedules to the IOPI Act inclusive, set out the taxation exemptions that can be conferred upon certain persons currently connected with an international organisation. The following table outlines the categories of persons with the legislative provisions and paragraphs of this Ruling that apply to them:

Category of person	References in the IOPI Act		Paragraphs of this Ruling
a person who holds, or is performing the duties of, an office prescribed by regulations to be a high office	Paragraph 6(1)(b)	Part I of the Second Schedule	18–19
a person who is accredited to, or is in attendance at an international conference convened by an international organisation	Paragraph 6(1)(c)	Part I of the Third Schedule	20
a person who holds an office in an international organisation (but who is not a holder of a high office)	Paragraph 6(1)(d)	Part I of the Fourth Schedule	21–28
a person who is serving on a committee, or is participating in the work or performing a mission	Paragraph 6(1)(e)	Part I of the Fifth Schedule	29–31

15. Whether a person is currently connected with an international organisation concerns the relationship between the person and that organisation. The substance of the terms of the engagement of the person, and the relationship between that engagement and the organisation performing its functions, must be considered.

16. The IOPI Act exempts from taxation certain income of a person connected with an international organisation, to the extent it satisfies all of these elements:

- the income is received from an international organisation to which the IOPI Act applies (see paragraph 8 of this Ruling)
- the person is connected with the international organisation in one of the ways set out in paragraph 14 of this Ruling, and
- the conditions and other particulars provided in the Regulations are satisfied for the international organisation in relation to the income of the person.

17. Section 6-20 of the ITAA 1997 then applies to that income to ensure that it is characterised as exempt income of that person for income tax purposes.

18. Paragraph 44 of this Ruling sets out information that the Commissioner will accept as documentary evidence that a person has a connection to an international organisation.

Person who is a holder of a high office

19. A person who holds a high office is usually a senior officer of the international organisation or their deputy, for example, the Secretary-General, President or Director of the international organisation (see paragraphs 24 to 29 of this Ruling for more information on who is an office holder of an international organisation). An office of an international organisation is only a high office if it has been prescribed by the Regulation or Regulations for that international organisation to be one.

20. A holder of a high office may be conferred the same privileges and immunities as those given to a diplomatic agent under the Vienna Convention on Diplomatic Relations.⁶ These include exemption from all dues and taxes, personal or real, national, regional or municipal, subject to a number of exceptions including taxes on private immovable property in Australia, private income sourced in Australia and investments in commercial undertakings in Australia.⁷

Person who is accredited to, or is in attendance at, an international conference convened by an international organisation

21. A person who is accredited to, or is in attendance at, an international conference convened by an international organisation may be provided with similar privileges and immunities as those given to a diplomatic agent. For income tax this includes the same privileges as referred to in paragraph 20 of this Ruling.

Person who holds an office in an international organisation

22. A person who holds an office in an international organisation, but who does not hold a high office (see paragraph 19 of this Ruling), may be exempted from taxation on salary and emoluments received from an international organisation.⁸

23. The regulations for international organisations generally preclude this exemption from tax where an ‘office holder’ is a resident of Australia for taxation purposes and their remuneration is for

⁶ Part I of the Second Schedule to the IOPI Act, section 7 of the *Diplomatic Privileges and Immunities Act 1967* and Article 34 of the Vienna Convention on Diplomatic Relations.

⁷ See Article 34 of the Vienna Convention on Diplomatic Relations.

⁸ Item 2 of Part I of the Fourth Schedule to the IOPI Act.

services rendered in Australia. However, this is not the case where the resident is not an Australian citizen and came to Australia solely to perform the duties of the office held in the particular organisation.⁹

Who is an office holder?

24. The IOPI Act does not define the term ‘office’ or the phrase ‘holds an office in an international organisation’. The term ‘office’ cannot be defined by reference to permanence or succession.¹⁰ Whether a person holds or performs the duties of an office in an international organisation concerns the relationship between the person and that organisation. The substance of the terms of the engagement of the person and the relationship between that engagement and the organisation performing its functions must be considered.¹¹ Whether someone is an office holder is a question of fact, considered on a case by case basis.

25. An office typically has the following characteristics:

- independent existence – the office must exist regardless of the individual who occupies the office from time to time. If the individual that currently occupies the office vacates that office, the office must continue to exist to be filled by another individual
- duties, functions and responsibilities – the office must have identifiable duties, functions and responsibilities or powers other than merely an advisory function, and
- the relevant duties, functions and responsibilities, or powers must attach to the office itself, rather than the individual who occupies that office.¹²

26. The duties and authority associated with the person’s position within the international organisation are relevant to whether the tax exemption applies. A person is unlikely to be an ‘office holder’ if their terms of engagement place them outside the organisational structure and do not include defined duties or authority in relation to the organisation and its functions.¹³ This is consistent with the purpose of the IOPI Act to confer privileges and immunities to assist

⁹ For example the International Organization for Migration – see regulation 6 of the *International Organization for Migration (Privileges and Immunities) Regulations 1991*.

¹⁰ *Jayasinghe* [2017] HCA 256, paragraphs 31 and 34.

¹¹ *Jayasinghe* [2017] HCA 256, paragraph 37.

¹² Refer also to paragraphs 15, 59 to 61, and 76 to 91 of Taxation Ruling TR 2002/21 *Income tax: Pay As You Go (PAYG) Withholding from salary, wages, commissions, bonuses or allowances paid to office holders*.

¹³ *Jayasinghe* [2017] HCA 256, paragraph 38.

organisations to perform their functions, rather than to personally benefit persons connected with the organisation.¹⁴

27. Therefore, a holder of an office can include a person who works as an employee of the international organisation, but it does not include a person (whether an employee or not)¹⁵ who is:

- locally engaged and paid an hourly rate, or
- engaged as an expert or consultant.¹⁶

28. The following examples illustrate the concept of a person who is an office holder.

Example 1 – person is an office holder

29. *Chris is employed by an international organisation in a role where he leads a team that provides ongoing professional advice the organisation relies on to carry out its core functions. Chris has significant organisational responsibilities and functions which include developing organisational strategy and managing employees. He is also able to engage and enter contracts on behalf of the organisation and make financial commitments. If Chris was to leave the organisation another person would be engaged as there is an ongoing need for the responsibilities and functions that he undertakes to continue to be performed. Chris is a person who is an office holder for the purposes of the IOPI Act.*

Example 2 – person is not an office holder

30. *Kylie is engaged in her individual capacity to undertake an operational review of an international organisation by that organisation. Kylie's sole task is to complete the review. Once it is completed she satisfies her engagement. She has the legal status of an independent contractor, serving in her individual capacity and with no authority or other right to enter into any legal or financial commitments on behalf of the international organisation. The position that Kylie occupies does not exist either before or after her engagement. Furthermore, there is no requirement for any functions she performs to continue to be performed after she completes her engagement. Kylie is not a person who is an office holder for the purposes of the IOPI Act.*

¹⁴ *Macoun* [2015] HCA 44, paragraph 54; *Jayasinghe* [2017] HCA 256, paragraph 39.

¹⁵ *Jayasinghe* [2017] HCA 256, paragraph 52.

¹⁶ *Jayasinghe* [2017] HCA 256, paragraph 52.

Person who is serving on a committee or participating in the work or performing a mission

31. Persons who serve on a committee, participate in the work of, or perform a mission on behalf of an international organisation may be exempted from taxation on salaries and emoluments received from the organisation.¹⁷ Whether these persons are entitled to an exemption from taxation of salaries and emoluments has to be determined in accordance with paragraph 16 of this Ruling.

32. Examples of persons serving on a committee or participating in the work or performing a mission include:

- experts
- consultants, or
- other persons engaged by the organisation to perform a specific act or thing.

33. Generally, Australia's approach to persons serving on a committee or participating in the work or performing a mission is that they are exempt from tax in Australia. However, this exemption may be limited or subject to conditions, particularly where the person is rendering the services in Australia and is a resident of Australia for taxation purposes. To the extent that the exemption is limited or subject to conditions in relation to a particular international organisation it will be specified in the regulations for that organisation. See for example:

- Asian Development Bank¹⁸
- Customs Co-operative Council¹⁹
- the International Court of Justice.²⁰

Persons formerly connected with an international organisation

34. Subsection 6(1) of the IOPI Act and Part II of each of the Second to Fifth Schedules to the IOPI Act inclusive do not provide any taxation exemptions for persons who were formerly connected with an international organisation.

¹⁷ Item 2A of Part I of the Fifth Schedule to the IOPI Act.

¹⁸ The exemption is denied if the person is an Australian resident and the services are rendered in Australia, unless the person is not an Australian citizen and came to Australia solely to perform his or her duties – see regulation 7 of the *Asian Development Bank (Privileges and Immunities) Regulations 1967*.

¹⁹ Refer to regulation 9 of the *Customs Co-operation Council (Privileges and Immunities) Regulations 1979*.

²⁰ Refer to regulation 5 of the *International Court of Justice (Privileges and Immunities) Regulations 1967*.

35. The IOPI Act and the regulations distinguish between persons currently connected with an international organisation (see paragraph 14 of this Ruling) and those who have stopped or ceased being connected.²¹ The privileges and immunities differ depending on this status. Part I of each of the Second to Fifth Schedules to the IOPI Act (that provides privileges concerning taxation) only applies to persons currently connected with an international organisation. Part II of each of those Schedules, applying to persons formerly connected with international organisations, does not provide any privileges concerning taxation.²² (See paragraphs 38 to 40 of this Ruling in relation to pensions).

36. This distinction is consistent with the purpose of the IOPI Act to confer privileges and immunities to assist organisations to perform their functions, rather than to personally benefit persons connected with the organisation.²³ The latter occurs if a person was provided an exemption from taxation for amounts they received after their connection with an international organisation ceased (even if that amount was a consequence of that earlier connection (for example, an eligible termination payment or a pension)).

37. Therefore, section 6-20 of the ITAA 1997 does not apply to the income of a person formerly connected with an international organisation as the IOPI Act does not confer any taxation exemptions upon such a person.

Pensions of former office holders

38. A pension received by a former office holder in an international organisation is not exempt from tax in Australia, as the IOPI Act does not extend tax exemptions to persons formerly connected with an international organisation (see paragraphs 34 and 35 of this Ruling).

39. For income of an office holder to be exempted by the IOPI Act, the income must be received:

- as a salary or emolument
- while the person is an officer of an international organisation, and
- from the relevant international organisation itself (rather than from a retirement or superannuation fund).²⁴

²¹ In relation to office holders refer to *Macoun* [2015] HCA 44, paragraph 46.

²² In relation to office holders refer to *Macoun* [2015] HCA 44, paragraph 47.

²³ *Macoun* [2015] HCA 44, paragraph 54; *Jayasinghe* [2017] HCA 256, paragraph 39.

²⁴ *Macoun* [2015] HCA 44, paragraphs 50–51.

40. Pension payments do not generally satisfy these conditions as they are not received by a person while they are an officer holder, nor are they paid by an international organisation. Further, a pension cannot be an emolument because it does not flow from the occupation of an office; it flows only on and from ceasing that office.²⁵

Income tax exemption

41. Salaries or emoluments exempt from Australian tax under the IOPI Act and under section 6-20 of the ITAA 1997 are not taken into account in calculating the Australian tax on other assessable income derived by the person.

42. This contrasts to foreign remuneration and earnings of a person working overseas that may be exempt from Australian tax under sections 23AF or 23AG of the *Income Tax Assessment Act 1936*. These are subject to what is referred to as ‘exemption with progression’, where they are taken into account in calculating the Australian tax on the person’s other assessable income (although these amounts themselves are not subject to tax).

Date of effect

43. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, this Ruling will 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 this Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation

27 March 2019

²⁵ *Macoun* [2015] HCA 44, paragraph 65 and *Case M90 80 ATC 648*, 24 CTBR(NS) Case 65.

Appendix 1 – Compliance approach

❶ ***This Appendix sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow the advice in this appendix in good faith and consistently with the ruling section, the Commissioner will administer the law in accordance with this approach.***

Evidence of connection to an international organisation

44. The Commissioner will accept, as documentary evidence that a person is connected with an international organisation, subject to any evidence to the contrary, a statement from the organisation that contains:

- the name of the person
- a statement that the person is connected with that organisation, and
- the capacity in which the person is connected (such as, high office or office holder).

Appendix 2 – Your comments

45. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

46. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments, and
- be published on the ATO website at ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 28 May 2019
Contact officer: Simon Weiss
Email address: Simon.Weiss@ato.gov.au
Telephone: (02) 6216 1943

Appendix 3 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2002/21; TR 2006/10

Previous Rulings/Determinations:

TR 92/14; TD 92/153

Previous interpretative decisions:

ATO ID 2003/909;
ATO ID 2004/64;
ATO ID 2004/136;
ATO ID 2004/285;
ATO ID 2004/286;
ATO ID 2004/287;
ATO ID 2004/866;
ATO ID 2005/116;
ATO ID 2006/240;
ATO ID 2006/241;
ATO ID 2007/220

Legislative references:

- ITAA 1997
- ITAA 1997 6-20
- ITAA 1936
- ITAA 1936 23AF
- ITAA 1936 23AG
- TAA 1953
- TAA 1953 Sch1 12-1(1)
- IOPI Act
- IOPI Act 6(1)
- IOPI Act 6(1)(a)(ii)
- IOPI Act 6(1)(b)
- IOPI Act 6(1)(c)
- IOPI Act 6(1)(d)
- IOPI Act 6(1)(e)
- IOPI Act First Sch
- IOPI Act Second Sch
- IOPI Act Second Sch Part I
- IOPI Act Third Sch
- IOPI Act Third Sch Part I
- IOPI Act Fourth Sch
- IOPI Act Fourth Sch Part I
- IOPI Act Fifth Sch
- IOPI Act Fifth Sch Part I
- Asian Development Bank (Privileges and Immunities) Regulations 1967 7
- Customs Co-operation Council (Privileges and Immunities) Regulations 1979 9

- Diplomatic Privileges and Immunities Act 1967 7
- International Court of Justice (Privileges and Immunities) Regulations 1967 5
- International Organization for Migration (Privileges and Immunities) Regulations 1991
- Multilateral Investment Guarantee Agency (Privileges and Immunities) Regulations 1998 6

Cases relied on:

- Case M90 80 ATC 648; 24 CTBR (NS) Case 65;
- Federal Commissioner of Taxation v Jayasinghe (2017) 260 CLR 400; [2017] HCA 26; 2017 ATC 20-627
- Macoun v Federal Commissioner of Taxation (2015) 257 CLR 519; [2015] HCA 44; 2015 ATC 20-543; (2015) 102 ATR 263

Other references:

- Vienna Convention on Diplomatic Relations

ATO references

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