TD 2002/D3 - Income tax: exemption for foreign service: do periods of physical presence in Australia constitute a break in foreign service for the purposes of section 23AG of the Income Tax Assessment Act 1936 ('ITAA 1936')?

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Draft Taxation Determination

Income tax: exemption for foreign service: do periods of physical presence in Australia constitute a break in foreign service for the purposes of section 23AG of the *Income Tax Assessment Act 1936* ('ITAA 1936')?

Preamble

Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office. DTDs should not be relied on; only final Taxation Determinations represent authoritative statements by the Australian Taxation Office.

1. Yes, unless subsections 23AG(6) to (6E) or Taxation Ruling TR 96/15 apply.

2. The exemption under subsection 23AG(1) requires continuous foreign service for a period of not less than 91 days. Subsection 23AG(7) says in part that foreign service means service in a foreign country. Easy access to rapid transport (such as commercial jets) means that some employees are able to physically reside in Australia and yet perform service overseas. One question is whether the time spent in Australia while an employee is contracted to perform foreign service but is not actively performing the duties of the office or employment is not a break in the foreign service period by virtue of subsections 23AG(6) to (6E) or Taxation Ruling TR 96/15.

3. Such periods, depending on the particular contractual arrangements,[1] could include:

"compulsory lay off/over days" where an employee is prevented from working perhaps because of certain legal requirements;

"rostered days off" (also known as "designated duty free days") where an employee is given an equivalent amount of time for weekends, public holidays or a day off per month;

[1] The terminology may vary under different contracts with different employers and in different countries, but the nature of the periods is the same, irrespective of the way they are described. The substance of the type of period involved is the important factor here.

"available days" (also known as "grey days") where no work is allocated but the employee is available for duty;

"recreation or sick leave" as per subsection 23AG(6)[2].

4. "Compulsory lay off days" and "rostered days off" fall within the existing type of temporary absences set out under paragraph 11(b) of Taxation Ruling TR 96/15. Such absences - where all the conditions are met as set out in the paragraph below - form part of a person's foreign service period.

5. Where there are temporary absences that fall within paragraph 11(b) of Taxation Ruling TR 96/15, a reasonableness test will be applied. Paragraph 11(b) of Taxation Ruling TR 96/15 is therefore withdrawn and replaced by the following:

> "A period of foreign service is taken to include weekends, public holidays, rostered days off and flexidays, and days off in lieu of such, provided such breaks are authorised by the terms and conditions of the foreign service employment or engagement. Any such breaks utilised to visit Australia or another foreign country do not break the continuity of service provided that there are no restrictions in the terms and conditions of employment or engagement prohibiting the employee or officer from leaving the country of foreign service on those occasions. Where such breaks are used by the person to visit Australia or another foreign country they must not be excessive by comparison with the scheduled period of foreign service."

6. Where an employee spends "available days" in Australia this period is considered to be a break in foreign service because it is service in Australia, unless subsections 23AG(6A) to (6E) apply.

Example

Pilots

7. A pilot physically resides in Australia. The airline she works for flies the pilot from Australia to another country where she commences her international flight service. The pilot flies for approximately 800 hours during the income year. She is entitled to 6 weeks annual leave and also has other days where she is not actively performing service such as "compulsory lay off" days, "rostered days off" and "available" days which in conjunction with holidays and other leave she often chooses to spend in Australia. Typically, the pilot flies internationally (including stopovers and rests) for five days and receives 12 days off. Setting aside periods during the income year when recreation leave is taken, the amount of time that a pilot spends in Australia either on "compulsory lay off" days, "rostered days off" or "available days" in between periods of foreign service would lead to a conclusion that there is a break in the foreign service period. That is because the "available days" spent in Australia do not form part of foreign service and/or because the "rostered days off" and "compulsory lay off" days are excessive compared to the scheduled period of foreign

[2] See paragraph 9 of Taxation Rulings TR 96/15 as an example of what is considered reasonable for recreation leave.

service over an income year. Moreover, as the breaks in foreign service typically exist between periods of "active" foreign service of five days each time, there is no period during the income year where the foreign service period is likely to be for 91 continuous days or more. Therefore, the pilot will not be entitled to the exemption under section 23AG.

8. Where the matters listed in paragraph 177D(b) of the ITAA 1936 indicate that a person has entered into or carried out an arrangement with the sole or dominant purpose of obtaining a tax benefit under section 23AG, the Commissioner will consider applying Part IVA of the ITAA 1936. The application of Part IVA is a question of fact to be determined on a case by case basis.

9. This Draft Taxation Determiantion, when finalised, will apply from 1 July 2002 onwards or its date of effect, whichever is the later. It will, at that time withdraw any private ruling or previous public rulings to the extent that it is inconsistent with the Taxation Determination.[3] Finally, this Determination 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 the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Your comments

10. We invite you to comment on this draft Taxation Determination. We are allowing 4 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

Comments by Date: **8 May 2002**
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Commissioner of Taxation
10 April 2002

Previous draft:
Not previously released in draft form.

Related Rulings/Determinations:
TR 96/15; TR 92/20; TR 92/20A; TR 92/20A2; TD 93/34; TD 93/34A

[3] See Taxation Ruling TR 92/20 and its various addenda, and Taxation Determination TD 93/34 and its addendum.

Subject references:

- foreign salary & wages
- foreign income
- exempt income
- residence in Australia
- residence of Individuals

Legislative references:

- ITAA 1936 23AG
- ITAA 1936 23AG(1)
- ITAA 1936 23AG(6)
- ITAA 1936 23AG(6A)
- ITAA 1936 23AG(6B)
- ITAA 1936 23AG(6C)
- ITAA 1936 23AG(6D)
- ITAA 1936 23AG(6E)
- ITAA 1936 23AG(7)
- ITAA 1936 Part IVA
- ITAA 1997 177D(b)

ATO References
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