

TD 2004/D83 - Income tax: does subsection 23AG(2) of the Income Tax Assessment Act 1936 apply where foreign earnings are exempt from tax in a foreign country for one or more of the reasons listed in that subsection and there is no additional reason for exempting that income?

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This document has been finalised by TD 2005/14.



Draft Taxation Determination

Income tax: does subsection 23AG(2) of the *Income Tax Assessment Act 1936* apply where foreign earnings are exempt from tax in a foreign country for one or more of the reasons listed in that subsection and there is no additional reason for exempting that income?

Preamble

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the **Taxation Administration Act 1953**. It is only final Taxation Determinations that represent authoritative statements by the Australian Taxation Office.*

1. Yes. Subsection 23AG(2) applies where one or more reasons listed in that subsection for exempting the income from foreign tax are satisfied, provided there are no other reasons for exempting the income.¹ Therefore the income is subject to taxation in Australia because the exemption in subsection 23AG(1) does not apply.

Explanation

2. Subsection 23AG(1) provides that where a resident taxpayer is engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived from the foreign service will be exempt from tax in Australia ('Australian tax'). The term '*foreign service*' includes service in a foreign country in the capacity of an employee and the term '*foreign earnings*' includes income consisting of salary and wages and allowances: subsection 23AG(7) of the ITAA 1936.

3. Subsection 23AG(1) is subject to subsection 23AG(2) so that the exemption from Australian tax does not apply if the foreign earnings are exempt from foreign tax 'only because of any of the following' reasons set out in subsection 23AG(2). Subsection 23AG(2) provides:

¹ According to Draft TD 2004/D84, subsection 23AG(2) does not apply where there is a reason for exempting the foreign earnings from foreign tax that is not a reason listed in that subsection.

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An amount of foreign earnings derived in a foreign country is not exempt from tax under this section if the amount is exempt from income tax in the foreign country only because of any of the following:

(a) ...

...

(g) ...

4. The application of subsection 23AG(2) depends, among other things, on whether the phrase 'only because of any of the following' can be construed to mean:

(a) only because of any one or more of the reasons listed in the subsection; or

(b) only because of any one, but not more, of those reasons.

5. The better view is considered to be the first of these meanings. The second meaning would result in foreign earnings which are exempt from foreign tax for two or more of the listed reasons also being exempt from Australian tax. It is not considered that Parliament intended this result.

6. Therefore, where foreign earnings are exempt from foreign tax only because of one or more reasons listed in subsection 23AG(2), the exemption in subsection 23AG(1) does not apply and those earnings will be subject to Australian tax.

Example

7. *An Australian resident derives foreign earnings in a foreign country. The foreign earnings are exempt from tax in that country for the following reasons:*

1. *a law in that country that corresponds to the International Organisations (Privileges and Immunities) Act 1963; and*

2. *a law of that country that gives effect to a double taxation agreement.*

8. *The first reason set out above is a reason covered by paragraph 23AG(2)(e). The second is covered by paragraph 23AG(2)(b).*

9. *In these circumstances, provided there is no reason for exempting the income additional to those listed in subsection 23AG(2), the subsection applies. Therefore, the foreign earnings are not exempt from tax under section 23AG.*

Date of Effect

10. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination 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 the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Your comments

11. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date.

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Commissioner of Taxation22 December 2004

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

TR 92/20; TD 2004/D84

Legislative references:

- TAA 1953 Part IVAAA
- ITAA 1936 23AG
- ITAA 1936 23AG(1)
- ITAA 1936 23AG(2)
- ITAA 1936 23AG(2)(b)
- ITAA 1936 23AG(2)(e)
- ITAA 1936 23AG(7)
- International Organisations (Privileges and Immunities) Act 1963

ATO references

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