TD 2005/15 - Income tax: does subsection 23AG(2) of the Income Tax Assessment Act 1936 apply where foreign earnings are exempt from tax in the foreign country for a reason listed in that subsection as well as a reason not listed?

This document has changed over time. This is a consolidated version of the ruling which was published on *6 September 2023*

Status: **legally binding**

Taxation Determination

Income tax: does subsection 23AG(2) of the *Income Tax Assessment Act 1936* apply where foreign earnings are exempt from tax in the foreign country for a reason listed in that subsection as well as a reason not listed?

Relying on this Determination

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

*[**Note:** This is a consolidated version of this document. Refer to the Legal Database (ato.gov.au/law) to check its currency and to view the details of all changes.]*

Table of Contents **Paragraph**

Ruling

1. No. Subsection 23AG(2) of the *Income Tax Assessment Act 1936* (ITAA 1936) does not apply if there is a reason for exempting the foreign earnings that is not listed in that subsection, even if another reason for exempting these earnings, that is listed, also applies.[1] As a result, the foreign earnings remain exempt from Australian tax under subsection 23AG(1).

[1] TD 2005/14 *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?* states that subsection 23AG(2) applies where there is one or more of the reasons listed in that subsection for exempting the foreign earnings from foreign tax (and no reason not listed in the subsection also applies).

Status: **legally binding**

Date of effect

1A. This Determination applies to years commencing both before and after its date of issue. However, it 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 75 and 76 of TR 2006/10 *Public Rulings*).

Commissioner of Taxation
11 May 2005

Status: **not legally binding**

Appendix 1 – Explanation

This Explanation is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the binding public ruling.

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. The term 'foreign service' means service in a foreign country as the holder of an office or 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 tax in Australia in subsection 23AG(1) does not apply if the income is exempt from taxation in the foreign country *'only because of any of'* the reasons set out in subsection 23AG(2).

4. The word 'only' is not defined and accordingly takes its ordinary meaning shaped by the context. The *Australian Oxford Dictionary* relevantly defines the word 'only' to mean 'solely, merely, exclusively; and no one or nothing more besides'.

5. The Explanatory Memorandum to the Taxation Laws Amendment Act (No. 2) 1991 (the EM) at page 82 provides the following context regarding the meaning of 'only':

> Once the law is changed, foreign earnings that are exempt from tax overseas will also be exempt in Australia except where they are exempt in the overseas country solely because [of the reasons for exemption set out in s23AG(2)].

6. Accordingly, the use of the word 'only' in subsection 23AG(2) means that the reasons listed in that subsection must be the sole reasons for exempting the foreign earnings from tax in the foreign country.

7. The example provided on page 84 of the EM is consistent with this interpretation.

8. Therefore, if a reason for exempting the foreign earnings from tax in the foreign country is not one of the reasons listed in subsection 23AG(2), the exemption in subsection 23AG(1) continues to apply, provided the other requirements of the section are satisfied.

Status: **not legally binding**

Appendix 2 – Example

This Appendix provides an example which illustrates the principles in the Determination. Decisions on individual cases will depend on the overall circumstances of that case. Consequently, the conclusions reached in the following example are not necessarily determinative of the Commissioner's views on cases with similar, but different, facts.

Example 1: Exempt income – foreign aid worker

9. *The foreign earnings of an Australian resident volunteer aid worker in a foreign country are exempt from taxation in that foreign country because of a Double Tax Agreement concluded with Australia ('DTA') and also because of a Memorandum of Understanding ('MoU') between the Government of that foreign country and an aid organisation.*[2] *The MoU is not one to which Australia is a party.*

10. *The exemption from tax in the foreign country as a result of the MoU is a reason for exempting the foreign earnings from foreign tax that is outside subsection 23AG(2). Therefore, regardless of the existence of the DTA, subsection 23AG(2) does not apply and the foreign earnings will be exempt from Australian tax under subsection 23AG(1).*

[2] Because the taxpayer is undertaking an activity in the other country which has been selected for implementation under the relevant MoU. Where it has not been so selected, the MoU does not apply to grant the exemption in the foreign country – refer to *Tanddo and Commissioner of Taxation* [2022] AATA 4143.

Status: **not legally binding**

References

Previous draft:
TD 2004/D84

Related Rulings/Determinations:
TR 2006/10; TD 2005/14

Legislative references:
- TAA 1953 Pt IVAAA
- ITAA 1936 23AG(1)
- ITAA 1936 23AG(2)
- ITAA 1936 23AG(7)

Cases relied on:
Tanddo v Commissioner of Taxation [2022] AATA 4143

Other references:
- Explanatory Memorandum to the Taxation laws Amendment Act (No. 2) 1991
- Australian Oxford Dictionary

ATO references

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