TD 2012/8 - Income tax: what types of temporary absences from foreign service form part of a continuous period of foreign service under section 23AG of the Income Tax Assessment Act 1936?

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Taxation Determination

Income tax: what types of temporary absences from foreign service form part of a continuous period of foreign service under section 23AG of the *Income Tax Assessment Act 1936*?

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Ruling

1. A period during which a person is engaged in foreign service for the purpose of section 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936)[1] includes a temporary absence from that service if, and only if, the absence is within the scheduled period of foreign service (see Examples 5 and 6) and is both:

- in accordance with the terms and conditions of that foreign service (that is, the absence is permitted by the employer, whether in an employment contract or under a separate arrangement); and
- for any of the following reasons:
  - recreation leave on full pay that is attributable to the period of foreign service;[2]

[1] All legislative references are to the ITAA 1936.
[2] The following recreation leave will be treated as attributable to a period of foreign service. First, recreation leave which accrues during the period of foreign service. Second, recreation leave that accrues during recreation leave which is treated as foreign service. Third, reasonable periods of additional recreation leave granted because of factors associated with the foreign service. Fourth, reasonable leave between periods of

- because of an accident or illness of the taxpayer;
- because of an accident or illness of a person other than the taxpayer, including the death of another person; or
- in the course of carrying out either duties or training required by the employer under a continuing foreign service engagement (that is, work related trips directly related to the foreign service) provided the absences are not excessive by comparison with the scheduled period of foreign service.

2. For section 23AG purposes, leave does not have to be applied in the order in which it accrues, so a period of leave covered by paragraph 1 is treated as leave that accrued during that period of foreign service, and that is attributable to that period of foreign service, to the extent that it does not exceed the amount of leave of that type that has accrued during the foreign service (see Examples 1 and 5).

3. An absence from foreign service does not form part of a continuous period of foreign service under section 23AG if it is of any of the following kinds:

- any recreation leave which is not attributable to the period of foreign service; that is, recreation leave that did not accrue during the period of foreign service;
- long service leave, regardless of whether or not it accrued during a period of foreign service;
- purchased leave, or other leave without pay or on reduced pay, other than any of the following: sick leave, leave because of an accident or illness of a person other than the taxpayer, including the death of another person (see Explanation at paragraphs 55 and 57 to 59);
- furlough;
- extended leave;
- any kind of leave that is similar to long service leave or extended leave or furlough, regardless of how it is described;
- maternity leave or parental leave.

4. A break between the end of one period of foreign service and the beginning of a later separate period of foreign service cannot form part of a continuous period of foreign service under section 23AG.

5. However, in some circumstances the 1/6 legislative rule in subsection 23AG(6A) allows periods of foreign service before and after a break in foreign service to be added together and treated as a continuous period of foreign service (see Explanation at paragraphs 74 to 77).

work under a cyclical arrangement under which a period working in a foreign country is followed by a period of paid leave.

6. A person is not treated as absent from foreign service on days such as weekends, public holidays, rostered days off, days off due to part-time arrangements, flex-days, 'compulsory lay off/over days',[3] 'grounded days'[4] and days off in lieu where those days are part of the normal working conditions for the foreign service (see Explanation at paragraphs 68 to 70). This is the case regardless of whether these days are spent in the country where the person is performing the foreign service or in Australia or a third country.

7. A person is not treated as absent from foreign service for any part of a day on which they are required to work and they work the hours that they are required to work (see Example 2).

8. Foreign earnings must be derived from foreign service for the exemption to apply. This is not satisfied by merely showing that income was received in a period during which a person is engaged in foreign service, or treated as being engaged in foreign service. The test for exemption requires the foreign earnings to be attributable to the service in a foreign country (see Example 5, and Explanation at paragraphs 78 to 81).

Example 1 – recreation leave attributable to foreign service

9. *Daniel is an Australian resident. He is deployed for a five month period of foreign service that satisfies subsection 23AG(1AA). Under the terms and conditions of his foreign service he is allowed to take five days of recreation leave during his deployment. After two months of foreign service Daniel has accrued a total of five days of recreation leave, comprising four days which accrued during the foreign service and one day which accrued during Daniel's employment in Australia with the same employer prior to Daniel commencing the foreign service. Daniel takes five consecutive days of recreation leave on full pay, while he is still deployed overseas.*

10. *Under subsection 23AG(6), the four days that accrued during the foreign service are treated as part of a continuous period of foreign service because they are taken in accordance with the terms and conditions of that foreign service; they are taken during the foreign service; and, since the leave is on full pay and it is not attributable to a period of employment other than that period of foreign service, those four days are not excluded by paragraph 23AG(6)(a). These four days are treated as part of a continuous period of foreign service regardless of the country Daniel spends them in.*

11. *The one day that accrued prior to the foreign service amounts to a break in the foreign service. Under subparagraph 23AG(6)(a)(i), this day is not treated as foreign service because it is recreation leave that is not attributable to the foreign service.*

12. *However, under the 1/6 legislative rule in subsection 23AG(6A) (see Explanation at paragraphs 74 to 77) the periods of foreign service before and after this one day break can be added together and treated as a continuous period of foreign service.*

[3] 'Compulsory lay off/over days' are those where an employee is prevented from working - possibly because of certain legal requirements.

[4] 'Grounded days' are those where an employee does not report for duty after being engaged in a series of long haul flights.

Example 2 – shorter working day

13. *Miles is an Australian resident. He is deployed for a 91 day period of foreign service that satisfies subsection 23AG(1AA). During his deployment he takes three days of leave, on Tuesday, Wednesday and Thursday. In the week that Miles takes the leave, his normal working day is from 2 am to 10 am. With his employer's permission, Miles finishes his shift on the Monday of that week at 5 am. Soon after 5 am on the Monday he departs from the place where he is deployed, to fly to another country.*

14. *The treatment of the three days of leave depends on the type of leave that Miles takes. However, regardless of whether the following three days are treated as part of a continuous period of foreign service, the Monday is not an absence from foreign service because Miles has completed the hours of work that he was required to do on that day.*

Example 3 – recreation leave

15. *Nick is an Australian resident. He is deployed for a six month period of foreign service that satisfies subsection 23AG(1AA). Except for when he is on approved leave, the terms and conditions of his foreign service require him to be available for duty at all times. Although Nick is sometimes required to work very long hours, he is not entitled to time off in lieu. This means he does not necessarily have weekends or equivalent days on which he is not required to work. However, if he takes leave during his foreign service, he is only required to use five days of leave to cover an absence of a full week. With his employer's permission, Nick takes five days of recreation leave during his deployment and returns to Australia for a full week, including a weekend. The recreation leave accrued during the foreign service and is taken on full pay.*

16. *The full week will be treated as part of Nick's foreign service, under subsection 23AG(6).*

Example 4 – cyclical arrangement

17. *Rochelle is an Australian resident. She is deployed for a twelve month period of foreign service that satisfies subsection 23AG(1AA). Under the terms and conditions of her employment she works under a cyclical arrangement in which each cycle consists of two months working in a foreign country followed by one month of leave on full pay which may be taken in Australia or elsewhere. During the time she is in the foreign country she works long hours in conditions of severe hardship, and her total working time per year, averaged over 52 weeks, amounts to approximately 35 hours per week. The month of leave in each cycle is given in recognition of the long hours and extreme conditions of the work in the foreign country resulting in the need for more rest and recreation and the fact that some time will need to be spent on matters other than rest and recreation.*

18. *Rochelle operates her own business in Australia and during each month of leave she is engaged in that business.*[5]

[5] The business income will not be exempt under section 23AG, even if it is derived during a period which is treated as foreign service. Section 23AG does not apply because the business income is neither foreign earnings nor derived from that foreign service.

19. *Considering the conditions of Rochelle's employment, the leave is reasonable. Her engagement in her own business during her leave will not result in a break in the period of foreign service. Consequently each month of leave is treated as recreation leave which accrued during the foreign service, and amounts to part of a continuous period of foreign service.*

Example 5 – sick leave, period of foreign service and foreign earnings

20. *Rhys is an Australian resident. He is deployed overseas for a period of foreign service that satisfies subsection 23AG(1AA) but becomes ill five weeks before his foreign service is due to end. The terms and conditions of his foreign service provide that sick leave accrues at a fixed rate of hours and allow him to take sick leave if he is ill. He has accrued a total of eight weeks of sick leave, comprising two weeks that accrued during his foreign service and six weeks that accrued during his previous Australian employment. He takes eight weeks of sick leave.*

21. *In the case of accident or illness there is no limit to the amount of absence that can be treated as foreign service under paragraph 23AG(6)(b), providing that the leave is during the scheduled period of foreign service, and the leave is allowed under the terms and conditions of that foreign service. Consequently only the first five weeks of sick leave are treated as foreign service under paragraph 23AG(6)(b).*

22. *Payments for the sick leave that accrued from service in Australia are not exempt under section 23AG because the payments are derived from Australian service, not from foreign service. However, the two weeks of sick leave that accrued during the foreign service will be treated as the first two weeks of leave that Rhys takes, and payments for those two weeks are exempt if the other requirements of section 23AG are satisfied (see Explanation at paragraphs 78 to 81 which relate to the distinction between periods which are treated as foreign service and when income is exempt under section 23AG).*

Example 6 – absence because of accident or illness (standing down)

23. *Mary is an Australian resident. She is deployed overseas for a period of foreign service that satisfies subsection 23AG(1AA), but is injured five weeks before her foreign service is due to end. Under the terms and conditions of service, sick leave does not accrue, so when a person is not able to perform their duties because of sickness or accident or convalescence, a sick day or absence is not called 'leave'; it is a time when they are stood down because they are not able to perform duty. Mary is absent from duty for eight weeks as a result of her injury and her five week absence from foreign service is allowed under the terms and conditions of that service.*

24. *In the case of accident or illness there is no limit to the amount of absence that can be treated as foreign service under paragraph 23AG(6)(b), providing that the absence is during the scheduled period of foreign service, and the absence is allowed under the terms and conditions of that foreign service. Consequently only the first five weeks of absence are treated as foreign service under paragraph 23AG(6)(b)*.

25. *Provided the other requirements of section 23AG are satisfied, payments for the period Mary is absent from duty during her scheduled period of foreign service due to her injury (that is, the first five weeks) are exempt under section 23AG, unless they are already exempt under another provision*.

Example 7 – absence because of accident or illness (return to work program)

26. *Oliver is an Australian resident. He is deployed overseas for a period of foreign service that satisfies subsection 23AG(1AA). He is injured during the deployment and it is necessary for him to return to Australia for medical treatment. While receiving medical treatment in Australia and as part of a return to work program, Oliver works in Australia for the same employer for a short period. He returns to his deployment in the foreign country when he is declared fit for duty. The terms and conditions of his foreign service provide for him to return to Australia for medical treatment if necessary, and to work in Australia for the same employer if he is fit to work during any time when he is in Australia for treatment.*

27. *As all of the requirements of subsection 23AG(6) are satisfied, Oliver's foreign service includes the time that he spends in Australia.*

Example 8 – absence because of accident or injury (workers' compensation)

28. *Jacqueline is an Australian resident. She is deployed overseas for a period of foreign service that satisfies subsection 23AG(1AA). She is injured at work during the deployment. She applies for workers' compensation, but takes sick leave on full pay while she is waiting for her claim to be decided. Her absence from work is allowed under the terms and conditions of her foreign service. After two months her workers' compensation claim is approved. By that time Jacqueline has recovered and returned to the foreign country to complete her foreign service.*

29. *At all times during her absence, the absence satisfies the requirements of subsection 23AG(6) because Jacqueline is absent, in accordance with the terms and conditions of her foreign service, because of injury. Hence Jacqueline's total absence is treated as foreign service under paragraph 23AG(6)(b).*

Example 9 – carer's leave

30. *Alex is an Australian resident. She is deployed overseas for a period of foreign service that satisfies subsection 23AG(1AA). A family member becomes ill, and during her deployment Alex returns to Australia several times to care for the family member. Alex is absent from foreign service for a total of six weeks. The terms and conditions of her foreign service allow her to take the six weeks of carer's leave, although some of the carer's leave is unpaid leave.*

31. *In the case of accident or illness of a person other than the taxpayer, there is no limit to the amount of absence that can be treated as foreign service under paragraph 23AG(6)(b), providing that the leave is during the scheduled period of foreign service, and the leave is allowed under the terms and conditions of the foreign service. Paragraph 23AG(6)(b) does not require the leave to be on full pay. Hence Alex's absences totalling six weeks are treated as foreign service under subsection 23AG(6).*

Example 10 – weekend and public holidays

32. *Jane is an Australian resident. She is deployed overseas for a six month period of foreign service that satisfies subsection 23AG(1AA). The terms and conditions of the foreign service provide that in addition to recreation leave, her employer will fly her back to Australia for one weekend during the deployment. Jane is not rostered to work for the Easter long weekend and takes the opportunity to return to Australia for a visit for four days.*

33. *The four days form part of Jane's foreign service because weekends and public holidays that Jane is not required to work do not break an otherwise continuous period of foreign service.*

Example 11 – work related absence (not excessive)

34. *Leah and Roland are Australian residents. Each is deployed overseas for 92 days of foreign service that satisfies subsection 23AG(1AA). Two weeks after commencing their deployment, each is required to return to Australia for two weeks, for reasons that are related to their foreign service. Leah returns to Australia to complete pre-deployment training which she was not able to complete prior to deployment because she was deployed as part of an emergency response. Roland returns to Australia to plan and arrange things that are needed in the foreign country. Both then return to the country where they are deployed, to complete their deployment.*

35. *Given the circumstances, the absences from Leah's and Roland's scheduled foreign service are not considered excessive by comparison with the scheduled periods of foreign service, and are taken to form part of their foreign service.*

Example 12 – work related absence (excessive)

36. *Sam is an Australian resident. He is deployed overseas for 92 days of foreign service that satisfies subsection 23AG(1AA). After Sam commences his deployment, his employer decides that Sam is required to return to Australia immediately for a month, to plan and arrange things that are needed in the foreign country. At the end of the month in Australia, Sam returns to the foreign country.*

37. *During the period that was initially scheduled as foreign service, Sam will be working in Australia for one third of the total time. This is considered to be excessive in comparison with the total period of foreign service. Consequently the month in Australia will not form part of a period of foreign service. This means that Sam's foreign earnings will not be exempt from tax under subsection 23AG(1) as he was not engaged in foreign service for 91 days or more.*

Example 13 – 1/6 legislative rule

38. *Kate is an Australian resident. She is engaged in foreign service for 20 days, is absent for two days and is then engaged in foreign service for 10 days.*

39. *Subsection 23AG(6A) applies such that these two periods of foreign service constitute a continuous period of 30 days of foreign service, because the total period of absence is never more than one-tenth (which is less than one-sixth) of the total period of foreign service (the terms 'total period of absence' and 'total period of foreign service' are defined in subsection 23AG(6B)- see Explanation at paragraph 75).*

40. *Kate is then absent for five days before commencing a further period of foreign service. No matter how long the further period lasts, it can never constitute a continuous period of foreign service with the first two periods of foreign service under subsection 23AG(6A). This is because on the fourth day of the second absence, the total period of absence is 6 days. This is one-fifth (which is more than one-sixth) of the total period of foreign service (30 days).*

Date of effect

41. This Determination applies both before and after its date of issue. As this final Determination can apply before its date of issue, taxpayers can choose to apply this Determination to arrangements begun to be carried out before its issue, where there is a discrepancy between Taxation Ruling TR 96/15 (withdrawn on the date of issue of this Determination) and this Determination. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
27 June 2012

Appendix 1 – Explanation

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.

Explanation

42. Section 23AG provides an exemption from Australian income tax for certain foreign earnings derived by a resident individual from a continuous period of foreign service of at least 91 days, if the foreign service is directly attributable to activities which are listed in subsection 23AG(1AA) and all of the other requirements of section 23AG are satisfied.

43. Subsection 23AG(7) provides that '***foreign service*** means service in a foreign country as the holder of an office or in the capacity of an employee'.

44. If a person performs most of their work outside of Australia in international waters or international airspace, the time spent in those areas does not amount to foreign service because the service is not in a foreign country.

45. This was made clear by Graham J in *Overseas Aircrew Basing Ltd v. Federal Commissioner of Taxation* (2009) 175 FCR 449, [2009] FCA 7; 2009 ATC 20-089; (2009) 74 ATR 850 (*Overseas Aircrew Basing*). At paragraph 92 of the decision Graham J pointed out that service *in a foreign country* is not synonymous with service *outside Australia*, and went on to say:

> 92. …Section 23AG is directed at, relevantly, exempting from tax in Australia, salaries derived in a foreign country in which those salaries are taxed. It is not directed at exempting from tax in Australia salaries derived in Australia, in Australian airspace, in international airspace, in the airspace of other countries of the world or in other countries to which and from which their employer directs them to fly aircraft. …

46. His Honour also explained at paragraphs 93 and 94:

> 93. Section 23AG exempts salaries from tax in Australia where they are derived by persons engaged in service in a particular foreign country and the particular foreign country is the base from which they derive those salaries. The section was not directed at exempting earnings of international airline aircrew based in Australia from tax.
>
> 94. It is fallacious to say that a person who is a resident of Australia, whose home is in Australia, whose Home Base or Preferred Port is in Australia and whose duty cycles begin and end in Australia is engaged in service in a foreign country in the capacity of an employee within the meaning of s 23AG of the 1936 Act. The section is concerned with persons who are 'actually on the job' in the particular overseas country in which their foreign earnings are derived. …

47. This Determination considers whether temporary absences from foreign service form part of a continuous period of foreign service, and the effect of subsection 23AG(6) on what is a period during which a person is engaged in foreign service. The result is that some temporary absences from a period of foreign service that are related to the foreign service will not be taken to constitute a break in the period of foreign service (see paragraphs 49 to 73).

48. In addition to the rules which treat a temporary absence as part of a continuous period, the 1/6 legislative rule in subsection 23AG(6A) allows two or more periods of foreign service to be taken to be a continuous period of foreign service in some circumstances (see paragraphs 74 to 77).

Extended meaning of 'engaged in foreign service' – subsection 23AG(6)

49. Subsection 23AG(6) states:

> For the purposes of this section, a period during which a person is engaged in foreign service includes any period during which the person is, in accordance with the terms and conditions of that service:
>
> (a) absent on recreation leave, other than:
>
> (i) leave wholly or partly attributable to a period of service or employment other than that foreign service;
>
> (ii) long service leave, furlough, extended leave or leave of a similar kind (however described); or
>
> (iii) leave without pay or on reduced pay; or
>
> (b) absent from work because of accident or illness.

50. An absence that forms part of a period of foreign service under subsection 23AG(6) is treated as foreign service regardless of whether the person remains in the country where they are performing the foreign service, or is in Australia or a third country, during the absence.

Recreation leave

51. If recreation leave accrues during a period of foreign service, and is taken during the foreign service, on full pay and in accordance with the terms and conditions of that service, subsection 23AG(6) treats the recreation leave as part of the period of foreign service.

52. Since the recreation leave is treated as foreign service, further recreation leave which accrues during that leave will be treated as foreign service if it is taken during the foreign service, on full pay, and in accordance with the terms and conditions of the foreign service.

53. Additional recreation leave on full pay granted to employees posted overseas because of factors associated with that foreign service is not considered to constitute extended leave covered by subparagraph 23AG(6)(a)(ii) if the additional leave is reasonable.

54. For subsection 23AG(6) to apply, recreation leave taken in Australia or elsewhere during a period of foreign service must be attributable to the period during which the person is engaged in foreign service. This means that under subsection 23AG(6), a period of recreation leave can only form part of a continuous period of foreign service if it does not exceed the amount of recreation leave that has accrued during the days that the person is engaged in that foreign service. Annual leave that meets the requirements of subsection 23AG(6) is regarded as recreation leave.

55. However, purchased leave cannot be treated as part of a period of foreign service. When a person purchases leave, they accept a reduction in salary in consideration for additional leave. Therefore purchased leave is not treated as foreign service because it is, in essence, leave without pay for the purposes of subparagraph 23AG(6)(a)(iii). Additionally, purchased leave will in some cases be extended leave, which, by virtue of subparagraph 23AG(6)(a)(ii), is not treated as foreign service.

Cyclical arrangements

56. If the terms and conditions of employment require a person to work on a cyclical arrangement under which they spend a period working in a foreign country followed by a period of paid leave, each period of paid leave within the scheduled period of foreign service is treated as recreation leave to which paragraph 23AG(6)(a) applies, such that it amounts to part of a continuous period of foreign service if the leave is reasonable and does not amount to extended leave.

Sick leave or leave because of an accident or illness of a person other than the taxpayer, including death of another person

57. Paragraph 23AG(6)(b) provides that a period during which a person is engaged in foreign service includes a period during which the person is, in accordance with the terms and conditions of that service, 'absent from work because of accident or illness'. This applies if in accordance with the terms and conditions of the foreign service the person is absent on sick leave or other leave such as convalescence leave, because they are ill or have had an accident, regardless of whether the accident or illness is caused by the foreign service.

58. Paragraph 23AG(6)(b) also applies if the person takes leave because of an accident or illness of another person, including the death of another person. Accordingly, a visit to Australia or a third country for such a reason, in accordance with the terms and conditions of the foreign service, is treated as forming part of the person's period of continuous foreign service.

59. There is no limit to the period of absence that can be treated as foreign service under paragraph 23AG(6)(b), providing that the leave is during the scheduled period of foreign service, and is allowed under the terms and conditions of the foreign service. This is the case regardless of whether the absence is on full pay, on reduced pay or without pay. Paragraph 23AG(6)(b) applies independently of subparagraph 23AG(6)(a)(iii).

Maternity leave and parental leave

60. An absence from work due to the taking of maternity leave or parental leave is not expressly covered in paragraph 23AG(6)(a), which relates to 'recreation leave'.

61. In *The Macquarie Dictionary,* the word 'recreation' is relevantly defined as:

> **1.** refreshment by means of some pastime, agreeable exercise, or the like.
>
> **2.** a pastime, diversion, exercise, or other resource affording relaxation and enjoyment.

62. Maternity leave and parental leave are distinct categories of leave each with a distinct rationale. The definition of 'maternity leave' given in *The Macquarie Dictionary* is 'time off from one's job, usually with pay, in order to have a baby'. It is therefore a type of leave granted to a female employee prior to childbirth, to give birth and subsequently to care for an infant. 'Parental leave' is another type of leave granted to an employee on becoming a parent, typically when the employee's spouse has had a baby, but would also cover leave granted because of the adoption of a child. Consequently, maternity leave and parental leave are not 'recreation leave' and are not covered by paragraph 23AG(6)(a).

63. Further, an absence from work on maternity leave or parental leave cannot be described as an absence 'because of accident or illness' for the purpose of paragraph 23AG(6)(b).

64. The *Macquarie Dictionary* relevantly defines 'illness' as:

> **1.** a state of bad health; sickness.

65. Furthermore, it relevantly defines 'accident' as:

> **1.** an undesirable or unfortunate happening; casualty; mishap.

66. An absence from work on maternity leave or parental leave is not an absence attributable to sickness or mishap. In the case of maternity leave, the absence is occasioned by the last stages of pregnancy and subsequent childbirth. Similar reasoning applies to parental leave.

67. Therefore a period of maternity leave or parental leave does not come within the extended meaning of 'engaged in foreign service' in subsection 23AG(6) and so will constitute a break in foreign service.

Weekends, public holidays etcetera

68. In *Overseas Aircrew Basing*, Graham J stated at paragraph 96:

> Having said that, I should make it clear that engagement in service in a foreign country is not limited to days on which work is undertaken. It includes all days during a period in which work is undertaken on working days for the relevant employee.

69. A person is treated as being engaged in foreign service on days such as weekends, public holidays, rostered days off, days off due to part-time arrangements, flex-days, 'compulsory lay off/over days', 'grounded days' and days off in lieu where those days are part of the normal working conditions for the foreign service. On such days, a person is either not required to work (in the case of weekends, public holidays and days off due to part-time arrangements) or is absent due to having already worked their required hours.

70. Such days are not recreation leave which must satisfy subsection 23AG(6) to be treated as a period of foreign service.

Work related absences from the foreign country

71. If a person engaged in foreign service is required by their employer to spend a short time in Australia or in another foreign country during a period of foreign service for reasons directly related to that person's continuing foreign service engagement, that time will be treated as part of the person's continuous period of foreign service provided it is not excessive by comparison with the scheduled period of foreign service. For example, this will apply to time spent to attend conferences, training sessions or briefing sessions.

72. What is considered excessive will depend on the circumstances. When determining whether the total days spent outside of the country of foreign service are excessive, all work related absences and available days (see paragraph 73) spent outside of the country of foreign service will be aggregated.

Available days

73. 'Available days' (also known as 'grey days') are days where no work is allocated but the employee is available for duty.[6] An available day should be treated as a work day. While a person is physically absent from work on an available day, they are carrying out the function required of them on that day. Available days are included in the foreign service period where they are spent in the country of foreign service. Where available days are spent outside the foreign country, paragraph 71 applies such that they will be treated as part of the person's continuous period of foreign service provided they are not excessive by comparison with the scheduled period of foreign service.

The 1/6 legislative rule in subsection 23AG(6A)

74. The 1/6 legislative rule in subsection 23AG(6A) allows periods of foreign service before and after a break in foreign service to be added together and treated as a continuous period of foreign service. Subsection 23AG(6A) states:

> 2 or more periods in which a person has been engaged in foreign service are together taken to constitute a continuous period of foreign service until:
>
> (a) the end of the last of the 2 or more periods; or
>
> (b) a time (if any), since the start of the first of the 2 or more periods, when the person's total period of absence exceeds 1/6 of the person's total period of foreign service;
>
> whichever happens sooner.

75. Subsection 23AG(6B) states:

> In subsection (6A):
>
> **total period of absence**, in relation to a particular time, means the number of days, in the period starting at the start of the first of the 2 or more periods and ending at that time, for which the person was not engaged in foreign service.
>
> **total period of foreign service**, in relation to a particular time, means the number of days, in the period starting at the start of the first of the 2 or more periods and ending at that time, for which the person was engaged in foreign service.

76. In applying the 1/6 legislative rule at a particular time, the numerator is the number of days absent from foreign service that do not constitute foreign service up to that time, and the denominator is the total number of days of foreign service up to that time.

77. 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 if continuity would be otherwise broken. Breaks between the periods of foreign service under the 1/6 legislative rule do not form part of the continuous period of foreign service.

Foreign service and exempt income

78. Income cannot be exempt under section 23AG unless it is 'foreign earnings' derived by a resident of Australia who was 'engaged in foreign service' and whose foreign earnings were 'derived from that foreign service'.

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[6] 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.

79. That does not mean that the foreign earnings need to be received during the time when the person is engaged in a period of foreign service. Nor does it mean that all amounts of income received during that time are necessarily foreign earnings. The important test is that the foreign earnings need to be attributable to that period of service in a foreign country rather than to a period before or after the period of foreign service.

80. In some cases, an amount of income is not exempt under section 23AG even though the income is salary or wages for a period that is treated as foreign service under subsection 23AG(6). Such a situation would arise if a person takes sick leave that is treated as a period of foreign service, but accrued before the foreign service commenced. The salary or wages paid for that period of leave are not exempt under section 23AG because, being for leave that accrued before the foreign service commenced, the payments are not attributable to the foreign service (see Example 5).

81. Conversely, in some cases an amount of income is exempt under section 23AG even though it is salary or wages for a period during which the person was not engaged in foreign service. For example, this would occur if recreation leave accrued during the period when the person was engaged in foreign service but the person having not taken any of that leave during that period, takes the leave during a later time when they are employed in Australia. If the other requirements of section 23AG are satisfied, the salary or wages paid for that period of leave is exempt because, as the leave accrued during a period of foreign service, the earnings are attributable to the period of foreign service and hence are foreign earnings derived from that foreign service.

References

Previous draft:

TD 2011/D12

Related Rulings/Determinations:

TR 2006/10

Previous Rulings/Determinations:

TR 96/15

Subject references:

- exempt income
- foreign income
- foreign salary & wages
- terms of employment
- annual leave
- long service leave
- sick leave

Legislative references:

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Case references:

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