



TD 2013/18 - Income tax: are foreign earnings derived by Australian Defence Force (ADF) members from a period of leave as a result of an accident or illness that occurred while deployed overseas as a member of a disciplined force exempt under section 23AG of the Income Tax Assessment Act 1936 (ITAA 1936)?

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 There is a Compendium for this document: **TD 2013/18EC** .



Taxation Determination

Income tax: are foreign earnings derived by Australian Defence Force (ADF) members from a period of leave as a result of an accident or illness that occurred while deployed overseas as a member of a disciplined force exempt under section 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936)?

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

Ruling

1. Yes. Foreign earnings derived by an ADF member from a period of leave as a result of an accident or illness that occurred while deployed overseas by the ADF as a member of a disciplined force are exempt under section 23AG of the ITAA 1936 where the earnings are derived during the period the ADF member would otherwise have remained deployed overseas had the accident or illness not occurred and all the other requirements of section 23AG are satisfied.

2. The period of foreign service ends when:

- the ADF member would have returned from the deployment but for the accident or illness; or
- the ADF member resumes duty in Australia; or
- the ADF member receives a medical discharge,

whichever occurs the earliest.

3. Earnings derived during an absence from work due to the accident or illness (as described in paragraph 1) after this period has ended will not be exempt under section 23AG.
4. The period of foreign service, for the purposes of section 23AG will include the period during which section 23AD of the ITAA 1936 applies to exempt pay and allowances. However, section 23AG will only apply to exempt earnings derived from the period of foreign service that occurs after section 23AD has ceased to apply.

Example 1

5. *An ADF member deploys overseas with their unit on 1 January 2012. The member's expected period of deployment is 1 January 2012 to 25 September 2012. The ADF member is injured on 20 February 2012 and is transferred to another country for hospital treatment. The ADF member then returns to Australia for further hospital treatment until 15 May. On being discharged from hospital, the member is then on convalescence leave until 25 September 2012. The member's unit returns as expected on 25 September 2012. The member is not serving on eligible duty for the purposes of section 23AD.*
6. *The period of convalescence leave is included in the period of foreign service as it is in accordance with the terms and conditions of the foreign service. Therefore, the earnings received during the period 1 January 2012 to 25 September 2012 will be exempt under section 23AG providing the remaining conditions in section 23AG are satisfied .*

Example 2

7. *The facts are the same as in Example 1. The ADF member is readmitted to hospital on 15 April 2013 for the same condition and is discharged from hospital on 29 April 2013. They remain on convalescence leave until 15 July 2013.*
8. *Any earnings paid during the second period of hospital treatment (commencing 15 April 2013) and convalescence leave are not exempt under section 23AG.*

Example 3

9. *The facts are the same as an Example 1 except that the unit with which the member was deployed returns early on 10 September 2012.*
10. *The period of foreign service ends on 10 September 2012 as this is when the member would have returned but for the accident or illness. The continued absence after 10 September is not in accordance with the terms and conditions of the foreign service. Earnings paid in respect of service/employment after this date are not derived from foreign service.*

Example 4

11. An ADF member deploys overseas with their unit. Their expected period of deployment is 1 January 2012 to 25 September 2012. The Chief of the Defence Force issued a certificate declaring that ADF members deployed on the military operation were on eligible duty for the purposes of section 23AD. The ADF member was injured on 15 February 2012 and returned to Australia for hospital treatment. They were discharged from hospital on 15 May and were on convalescence leave until 25 September 2012. The member's unit returns as expected on 25 September 2012.

12. The pay and allowances paid up until 15 May 2012 are exempt under section 23AD of the ITAA 1936. Earnings paid in respect of the period 16 May to 25 September 2012 will be exempt under section 23AG providing the remaining conditions in section 23AG are satisfied.

Date of effect

13. This Determination applies to years of income commencing both before and after its date of issue. 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 Taxation14 August 2013

Appendix 1 – Explanation

❶ *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

14. Subsection 23AG(1) 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.

Extended meaning of engaged in foreign service

15. In respect of leave taken for accident or illness, 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) ...
- (b) absent from work because of accident or illness.

16. As stated in Taxation Determination TD 2012/8, an absence that forms part 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.

17. ADF members' (as described in section 4 of the *Defence Act 1903*) entitlement to leave is governed by the ADF Pay and Conditions Manual (the PACMAN). According to clause 5.1.4A of the PACMAN, members may be on leave (convalescence leave) for whatever time is necessary to recuperate from an illness or injury. ADF members do not accrue sick or personal leave as such and there is no limit to the leave available. ADF members have access to this leave irrespective of whether the illness or injury occurs while deployed overseas or serving in Australia. This type of leave is described in the ADF vernacular as sick or convalescence leave.

18. Therefore, where an ADF member is deployed overseas, an absence from that deployment because of an accident or illness is allowed under the terms and conditions of their foreign service. As established in TD 2012/8, this means that, in respect of an ADF member who departs from the foreign country to which they were deployed before their expected period of deployment ends (either to Australia or to a third country) and is on convalescence leave (because of an accident or illness) for the remainder of their expected period of deployment, the period of foreign service continues until the date the member would have been deployed but for the accident or illness. An absence after this date is no longer an absence which is in accordance with the terms and conditions of the foreign service. It is in accordance with the terms and conditions of their continued Australian service.

19. Where the member was deployed as an individual, the period of foreign service ends on the date they would have returned but for the accident or illness. Where the member was deployed as a unit, it ends on the date the unit would have returned but for the accident or illness. Therefore, the period of foreign service, for section 23AG purposes and as relevant to an individual member, will be affected by circumstances that may occur after the member has returned to Australia and is on convalescence leave. Where the unit returned to Australia before the expected date, and the member would have returned with their unit, the period of foreign service ends on the date of return. Conversely, where the deployment is extended, and the member would have remained deployed but for the accident or illness, the foreign service in respect of the member is similarly extended.

Earnings which are and which are not derived from foreign service

20. Under subsection 23AG(1), the foreign earnings must be from foreign service. Earnings paid to the returned ADF member, referable to the period of foreign service as established above in paragraphs 18 and 19, are exempt from income tax under section 23AG. However, earnings paid beyond this date are not exempt. Although it could be argued that these earnings are 'from' foreign service in that they are being derived because of the accident or illness sustained during the period of foreign service, they are not referable to the period of foreign service. They are referable to a period when the foreign service has ended. Just as earnings derived by a non-injured ADF member are no longer exempt where they are referable to a period occurring after the deployment has ended, the earnings derived by an injured ADF member are equally no longer exempt on the same basis. Once the period of deployment has ended, or the period for which the member would have been deployed but for the accident or illness has ended, the earnings are derived as a member of the ADF without the requisite connection to foreign service.

Recurrence of the accident or illness

21. Where, after a period of resumption of duty in Australia, the ADF member is readmitted to hospital in Australia for treatment, or takes convalescence leave, because of the same accident or illness sustained while deployed overseas, the earnings paid during this second period of leave are not exempt under section 23AG. Again, earnings paid in these circumstances do not meet the legislative description of foreign earnings derived from foreign service.

Return to duty in Australia during the original period of deployment

22. An ADF member may be found fit to resume duty in Australia but not to return to duty overseas to join their unit for the remainder of the period they would otherwise have been deployed. Their foreign service, for the purposes of section 23AG, therefore ends upon being found fit to resume duty in Australia. Earnings paid in respect of the period commencing when the ADF member has been found fit to resume duty in Australia will therefore not be exempt under section 23AG.

Medical discharge

23. As stated in the PACMAN (at clause 5.1.5):

If members are on leave due to illness or injury for more than 28 days their employment category will be reviewed. In some cases they may be medically discharged, depending on the extent of their incapacity and their capacity for rehabilitation.

24. Where an ADF member has been medically discharged, and this discharge takes effect during the period the member would otherwise have been deployed, the foreign service ends on the day that discharge takes effect.

Interaction of sections 23AD and 23AG

25. Both section 23AD and section 23AG can, on their terms, apply to the same income derived during the same period. In this situation, section 23AD, as the more specific section, applies to the exclusion of section 23AG.

26. However, when section 23AD no longer applies, section 23AG may apply. Section 23AG (like section 23AD) applies to exempt specified income, being foreign earnings. Whether or not the income qualifies for exemption under section 23AG depends on satisfying certain conditions including 'being engaged in foreign service for a continuous period of not less than 91 days' and, in the case of ADF personnel, provided that that 91 days of foreign service is directly attributable to their deployment outside Australia as a member of a disciplined force.

27. The term 'foreign service' is defined in subsection 23AG(7) to mean 'service in a foreign country as the holder of an office or in the capacity of an employee'. The composite term 'engaged in foreign services', as it appears in subsection 23AG(1), is extended by subsection 23AG(6).

28. There is nothing in those definitions or in the remaining provisions of section 23AG, either by their terms or context, which restricts the period of foreign service to a period during which the income derived is not covered by another exemption provision.

29. Thus, when applying section 23AG, the period of 'foreign service' is determined as it would be determined had section 23AD never applied to the taxpayer. The foreign earnings derived after section 23AD has ceased application can then be exempt under section 23AG assuming all the remaining applicable conditions in section 23AG have been met.

30. This means that payments made while on leave, such as annual leave accrued during the period covered by section 23AD and accruing during convalescence leave treated as part of the period of foreign service, may then be exempt under section 23AG when taken upon return to Australia providing all other requirements of section 23AG have been met.

References

Previous draft:

TD 2013/D2

Related Rulings/Determinations:

TR 2006/10; TD 2012/8

Subject references:

- defence force overseas service
- exempt income
- foreign income
- foreign salary & wages
- foreign source income
- international tax
- overseas employees

Legislative references:

- *Defence Act 1903* 4
- ITAA 1936 23AD
- ITAA 1936 23AG
- ITAA 1936 23AG(1)
- ITAA 1936 23AG(1AA)
- ITAA 1936 23AG(6)
- ITAA 1936 23AG(7)
- TAA 1953

Other references:

- Australian Defence Force Pay and Conditions Manual

ATO references

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