

TR 2013/1 - Income tax: the identification of 'employer' for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia's tax treaties

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Taxation Ruling

Income tax: the identification of ‘employer’ for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia’s tax treaties

❶ Relying on this Ruling

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

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

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

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What this Ruling is about

1. This Ruling explains:
 - the meaning of the term ‘employer’ in the general exclusion provision provided under the Income from Employment Article, or its equivalent¹, of Australia’s tax treaties (‘short-term visit exception’²); and
 - the approach to be taken in determining who the employer is for the purposes of the short-term visit exception.
2. This Ruling applies to entities that engage non-resident individuals to render services in Australia and also to those non-resident individuals.
3. This Ruling does not deal with income that is specifically dealt with by other Articles in Australia’s tax treaties. This includes any of those Articles in one of Australia’s tax treaties dealing with directors’ fees, pensions, government service³ or entertainers and sportspersons.⁴

Previous Ruling

4. This Ruling replaces Taxation Ruling TR 2003/11 *Income tax: the interpretation of the general exclusion provision of the Dependent Personal Services Article, or its equivalent, of Australia’s Double Tax Agreements*. To the extent that the views in that Ruling still apply, they have been incorporated into this Ruling.

Ruling**The meaning of the term ‘employer’**

5. The term ‘employer’ for the purposes of the short-term visit exception in provisions of Australia’s tax treaties equivalent to Article 15(2) of the OECD Model Tax Convention on Income and on Capital⁵ (‘the OECD Model’) is undefined. Unless a particular tax treaty requires the term to have a different meaning, the term takes its meaning from Australian domestic tax law and the context, object and purpose of the short-term visit exception.

¹ The heading of equivalent Articles in other tax treaties vary. Consistent with the heading of Article 15 of the OECD Model until it changed in 2000, many such Articles are headed ‘Dependent Personal Services’, for example, Article 15 of the *Convention between Australia and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1981] ATS 14, as amended by the *Canadian Protocol (No. 1)* [2002] ATS 26 (Canadian convention). Others may have no heading at all, for example, Article 12 of the *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1969] ATS 14, as amended by the *Singaporean protocol (No. 1)* [1990] ATS 3 and the *Singaporean Protocol (No. 2)* [2010] ATS 26 (Singaporean agreement) or headed ‘Personal Services’, for example, Article 14 of the *Agreement between the Government of Australia and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1981] ATS 15 (Malaysian agreement).

² Appendix 2 of this Ruling sets out a glossary for some terms used in this Ruling: ‘intermediary’, ‘short-term visit exception’ and ‘user enterprise’.

³ Paragraph 1 of the Income from Employment Articles in Australia’s tax treaties provides that this Article is subject to the operation of Articles in a treaty dealing with these aspects.

⁴ The Entertainers and Sportspersons (or equivalent) Article in Australia’s tax treaties contains an express exception to the short-term visit exception.

⁵ As it read on 21 November 2017. See Organisation for Economic Co-operation and Development (OECD) (2019) *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, <https://doi.org/10.1787/g2g972ee-en>.

6. The employer for the purposes of the short-term visit exception is the enterprise to which a non-resident individual renders his or her services in what would be considered an employment relationship.

Determining the employer

7. In determining who the employer is for the purposes of the short-term visit exception, the Commissioner will in each case have regard to:

- the ordinary meaning of employee arising from Australian domestic tax law^{5A}; and
- the context, object and purpose of the short-term visit exception, especially subparagraphs b) and c).⁶

8. Taxation Ruling TR 2023/4 *Income tax and superannuation guarantee: who is an employee?* explains who an employee is within the ordinary meaning of that expression at paragraphs 18 to 82.^{6A} Application of the ordinary meaning of employee as set out in TR 2023/4 is, of itself and in most instances, unlikely to result in the short-term visit exception being applied in a way that is inconsistent with its object and purpose.

9. [Omitted.]

10. [Omitted.]

11. [Omitted.]

12. [Omitted.]

13. [Omitted.]

14. [Omitted.]

Disagreements and application of the exception

15. In accordance with paragraph 8.12 of the Commentary on Article 15 of the OECD Model, where a disagreement between States arises as to whether an employment relationship exists, the Australian competent authority will endeavour to resolve that disagreement, having regard to the relevant principles and examples in paragraphs 8.13 to 8.27 of the Commentary.

16. The availability of the short-term visit exception may be denied in abusive cases, as contemplated by paragraphs 8.8 and 8.10 of the Commentary on Article 15 of the OECD Model.

Examples

17. In the examples below, the non-resident individual is in an employment relationship. As a result, the Income from Employment Article in Australia's tax treaties deals with the remuneration derived by the non-resident individual. These examples illustrate the analysis of the factors to be taken into account in determining the identity of

^{5A} See paragraphs 63 to 71 of Taxation Ruling TR 2001/13 *Income tax: Interpreting Australia's Double Tax Agreements*.

⁶ In relation to the object and purpose of these subparagraphs, see paragraph 62 of this Ruling.

^{6A} Furthermore, applying the principles and factors at paragraphs 18 to 82 of TR 2023/4 does not affect the application of Part 2-42 of the *Income Tax Assessment Act* (ITAA 1997), which deals with the alienation of personal services income.

⁷ [Omitted.]

the employer of the non-resident individual for the purposes of the short-term visit exception, in particular instances.

18. The facts contained in these examples are based on the examples in paragraphs 8.16 to 8.27 of the Commentary on Article 15 of the OECD Model. In each of the examples, Australia and State H have entered into a tax treaty that contains an Income from Employment Article that is on the same terms as that in the Finnish Agreement^{7A}, the terms of which are set out at paragraphs 52 and 54 of this Ruling.

Example 1 – Services to client enterprise – Employer is a non-resident services company

19. *Accounting Co, a company which is a resident of State H, contracts with Mano Co, an Australian-resident company that is a manufacturer in Australia, to provide accounting services. Accounting Co specialises in providing accounting services and Mano Co wishes to use those services. Peter, a resident of State H who works for Accounting Co, is assigned by Accounting Co to work for Mano Co pursuant to the contract between Accounting Co and Mano Co.*

20. *Accounting Co is responsible for Peter performing the work to an acceptable standard and within the terms required under the contract between Accounting Co and Mano Co. Accounting Co bears the responsibility or risk for Peter's work.*

21. *Peter performs work at Mano Co's premises in Australia under the day-to-day direction of Mano Co.*

22. *Peter's contract with Accounting Co specifies the nature of the services to be provided, the period the services are to be provided, rate of pay and other benefits to be paid whilst in Australia.*

23. *Accounting Co pays Peter weekly and charges a fee for the services to Mano Co. The fee includes employment costs for Peter plus a percentage mark up to cover profits, overheads and other administration costs of Accounting Co.*

24. *The ultimate authority over Peter in the performance of his work rests with Accounting Co even though day-to-day control is with Mano Co.*

25. *The accounting services Peter provides to Mano Co are integral to the business activities of Accounting Co.*

26. *Peter is employed by Accounting Co and provides the accounting services to Mano Co on behalf of Accounting Co.*

27. *Accounting Co is the employer of Peter for purposes of the short-term visit exception in the Income from Employment Article of the tax treaty between State H and Australia.*

28. *Thus, as the remuneration is paid by Accounting Co who is the non-resident employer of Peter, the second condition in the short-term visit exception is satisfied. (Note: the short-term visit exception will only apply if all the conditions for its operation are satisfied).*

29. [Omitted.]

^{7A} Agreement Between the Government of Australia and the Government of Finland for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion and Protocol [2007] ATS 36.

- 30. [Omitted.]
- 31. [Omitted.]
- 32. [Omitted.]
- 33. [Omitted.]
- 34. [Omitted.]
- 35. [Omitted.]
- 36. [Omitted.]
- 37. [Omitted.]
- 38. [Omitted.]
- 39. [Omitted.]
- 40. [Omitted.]
- 41. [Omitted.]
- 42. [Omitted.]
- 43. [Omitted.]
- 44. [Omitted.]

Example 2 – Intra-group centralised corporate services – Employer is a non-resident services company

45. *Foreign Co, a company that is a resident of State H, and Aust Co, an Australian-resident company, are part of the same multinational group of companies. A large part of the activities of that group are structured along function lines, which requires employees of different companies of the group to work together under the supervision of managers who are located in different States and employed by other companies of the group.*

46. *Caitlin is a resident of State H. She is employed by Foreign Co and is a senior manager in charge of supervising human resources functions within the multinational group. Since Caitlin is formally employed by Foreign Co, Foreign Co acts as a cost centre for the human resource costs of the group. Periodically, these costs are charged out to each of the companies of the group on the basis of a formula that takes account of various factors such as the number of employees of each company. Caitlin is required to travel frequently to other States where other companies of the group have their offices. During the last year, Caitlin spent 3 months in Australia dealing with human resources issues at Aust Co. Whilst she is in Australia, Caitlin continues to report to and receive instructions from her Director at Foreign Co.*

47. *The work performed by Caitlin is part of the activities that Foreign Co performs for its multinational group. Although Caitlin's day-to-day work whilst she was in Australia may be determined by the Australian entity, Foreign Co has the ultimate authority in regard to her work and performance. In addition, the work that Caitlin performs is an integral part of the business of Foreign Co in managing the resource functions of the group. The responsibility and risk for Caitlin's work and performance whilst she is in Australia remains with Foreign Co.*

48. *The services that Caitlin provides to Aust Co are rendered on behalf of Foreign Co under the contractual arrangements for services concluded between the enterprises of the multinational group of companies, not under a contract of service between Caitlin and Aust Co.*

49. *Accordingly, the second condition of the short-term visit exception is satisfied for the remuneration derived by Caitlin for her work in Australia. (Note: the short-term visit exception will only apply if all the conditions for its operation are satisfied).*

Date of effect

50. This Ruling applies to income years commencing both before and after its date of issue.

Commissioner of Taxation

30 January 2013

Appendix 1 – Explanation

❶ This Explanation 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.

Background

51. Australia’s tax treaties contain an article that allocates source and residence country taxing rights in respect of income derived from employment. The relevant article is on the same terms as, or based on, Article 15 of the OECD Model.

52. For example, paragraph 1 of Article 14 of the Finnish Agreement:

Subject to the provisions of Articles 15, 17 and 18,⁹ salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

53. This paragraph states that income from employment derived by an individual who is a resident of one of the Contracting States may be taxed in the other Contracting State (the State of source) if the employment is exercised, that is the services are rendered, in that State.

54. Paragraph 2 of Article 14 of the Finnish Agreement (paragraph 2) states:

Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- a) the recipient is present in that other State for a period or periods not exceeding in the aggregate 183 days in any 12 month period commencing or ending in the year of income of that other State, and
- b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
- c) the remuneration is not borne by a permanent establishment which the employer has in the other State.¹⁰

55. This paragraph establishes the short-term visit exception from taxation in the State of source. All the conditions prescribed in paragraph 2 must be satisfied for the remuneration to qualify for the short-term visit exception. However, given that the Income from Employment Article in a tax treaty is subject to certain other specified articles,¹¹ this exclusion applies only to the extent that the remuneration of the non-resident is not dealt with by another one of the Articles specified, such as those applying to government services or entertainers and sportspersons.¹²

⁸ [Omitted.]

⁹ Each dealing with directors’ fees, pensions and annuities and government service respectively.

¹⁰ Some of Australia’s tax treaties may also contain a fourth condition for exception. For example, the *Agreement between Australia and the Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1988] ATS 21 contains the following additional condition in Article 15(2)(d):

the remuneration is, or upon the application of this Article will be, subject to tax in the first-mentioned State.

¹¹ For example, see Article 14(1) of the Finnish Agreement at paragraph 52 of this Ruling.

¹² ‘Entertainers and Sportspersons’ is the heading of Article 17 of the OECD Model. Equivalent Articles in Australia’s tax treaties may state other headings, such as ‘Entertainers’, ‘Entertainers and Athletes’, ‘Artistes and Sportspersons’, ‘Artistes and Athletes’, or have no heading at all.

56. The first condition is that the short-term visit exception is limited to periods less than or equal to 183 days in any 12-month period.¹³

57. The second condition is that the employer paying the remuneration, or on whose behalf it is paid, must not be a resident of the State in which the employment is exercised.¹⁴

58. Under the third condition, if the employer has a permanent establishment in the State in which the employment is exercised, the remuneration must not be borne by the permanent establishment which it has in that State.^{14A}

The meaning of the term ‘employer’

59. The term ‘employer’ is not defined in Australia’s tax treaties. Article 3(2) of the Finnish Agreement, which deals with undefined terms and is on the same terms as Article 3(2) of the OECD Model, provides:

As regards the application of the Agreement at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State concerning the taxes to which the Agreement applies, any meaning under the applicable tax law of that State prevailing over a meaning given to the term under other law of that State.

60. In ascertaining the meaning of undefined terms in a tax treaty, this Ruling uses the approach set out in paragraphs 63 to 75 of Taxation Ruling TR 2001/13 *Income Tax: Interpreting Australia’s Double Tax Agreements*. Paragraph 74 of TR 2001/13 states:

... Reliance cannot necessarily be placed on an undefined term in a [double tax agreement] being interpreted according to its domestic law meaning as the context of its use in the [double tax agreement] may indicate that such a meaning is inappropriate (in that it would not be an accurate representation of the ‘bargain’ or ‘*consensus ad idem*’ which objective evidence shows has been reached by the negotiating countries).

61. In relation to interpreting a treaty term, Article 31(1) of the *Vienna Convention on the Law of Treaties* [1974] ATS 2 (Vienna Convention)¹⁵ states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹⁶ Also, *Thiel v*

¹³ The number of days and the time period within which the number of days are counted in some treaties may vary. For example, the number of days is 90 days in the Papua New Guinea, Fijian and Kiribati agreements. Examples of variations of the period of time referred to above include: ‘183 days in the year of income or fiscal year ...’ in Article 15(2)(a) of the Netherlands agreement and ‘183 days in any 12 month period commencing or ending in the taxable year of the other Contracting State’ in Article 14(2)(a) of the Japanese convention. Article 14(1)(a) of the Sri Lankan agreement refers to ‘year of income or in the year of assessment’ during which the employment is exercised.

¹⁴ Some of Australia’s tax treaties provide that the employer must be a resident of the same State as the individual deriving the income from employment. For example, Article 15(2)(b) of the Mexican agreement states:

the remuneration is paid by, or on behalf of, an employer who is a resident of the first mentioned State.

^{14A} The wording of this condition differs depending on the treaty with Australia. For example, Article 15(2)(c) of the *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1983] ATS 16 states:

the remuneration is not deductible in determining taxable profits of a permanent establishment, a fixed base or a trade or business which the employer or company has in that other State.

¹⁵ The Vienna Convention which entered into force internationally on 27 January 1980. Article 31 (and 32) of this Convention is applied as a matter of practice when interpreting any of Australia’s tax treaties (see paragraph 96 of TR 2001/13).

¹⁶ Specifically in the Australian context, the Court in *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 at [38] stated, in summarising the principles applicable to the interpretation of tax treaties:

The courts must, however, in addition to having regard to the text, have regard as well to the context, object and purpose of the treaty provisions. The approach to interpretation involves a holistic approach.

Federal Commissioner of Taxation [1990] HCA 37 supports consideration of the Commentaries to the OECD Model in interpreting tax treaties.¹⁷

62. The object and purpose of those subparagraphs in the short-term visit exception containing the term 'employer'¹⁸ are set out in paragraph 6.2 of the Commentary on Article 15 of the OECD Model as follows:

The object and purpose of subparagraphs *b*) and *c*) of paragraph 2 are to avoid the source taxation of short-term employments to the extent that the employment income is not allowed as a deductible expense in the State of source because the employer is not taxable in that State as [it] neither is a resident nor has a permanent establishment therein. These subparagraphs can also be justified by the fact that imposing source deduction requirements with respect to short-term employments in a given State may be considered to constitute an excessive administrative burden where the employer neither resides nor has a permanent establishment in that State.

63. Having regard to the object and purpose stated in the Commentary on Article 15 of the OECD Model, the meaning given to 'employer' in the context of the Article seeks to ensure that the short-term visit exception does not apply in unintended situations. For example, this object and purpose would be defeated if:

- the user enterprise is the employer, and it deducts the payment to a non-resident intermediary (including the remuneration of the non-resident individual) as a cost incurred in carrying on business in the source country to earn assessable income for the purposes of section 8-1 of the ITAA 1997; and
- the non-resident individual is not taxed in the source country on the remuneration they receive.

64. Consistent with the undefined terms provision in Australia's tax treaties, paragraph 8.4 of the Commentary on Article 15 of the OECD Model states (in part):

Subject to the limit described in paragraph 8.11 [that disregarding a formal contractual relationship can only be done on the basis of objective criteria] and unless the context of a particular convention requires otherwise, it is a matter of domestic law of the State of source to determine whether services rendered by an individual in that State are provided in an employment relationship and that determination will govern how that State applies the Convention.

65. The Commentary extracted in paragraph 64 of this Ruling refers to it being a matter of domestic law to determine whether services rendered by an individual are provided in an employment relationship subject to the limitation and potential exception specified. However, from the authorities listed in paragraph 61 of this Ruling and as a matter of tax treaty interpretation, Australia's domestic law is not the only consideration in determining the meaning of the term 'employer' and, as a consequence, the identity of the employer for the purposes of short-term visit exception. The context, object and purpose of the short-term visit exception, subparagraphs 2(b) and (c) of the Income from Employment Article in particular, are also to be considered in interpreting the term 'employer'.

66. TR 2023/4 contains an analysis of the underlying principles and factors to be applied in identifying whether an individual is an employee within the ordinary meaning of that expression under Australian domestic tax law. These are applied to the facts and circumstances of particular arrangements in determining whether an individual is rendering services in an employment relationship and, in some cases, who the employer is. The Commissioner considers that TR 2023/4 summarises the principles and factors that constitute from Australia's perspective, the 'various ... jurisprudential rules' and 'objective

¹⁷ See also paragraphs 101 to 108 of TR 2001/13.

¹⁸ That is, subparagraphs 2(b) and 2(c) of the Income from Employment Article.

¹⁹ [Omitted.]

criteria' referred to in paragraphs 8.4 and 8.11 respectively of the Commentary on Article 15 of the OECD Model.

67. Where there is a contractual relationship between particular parties that is one of employment, one of the parties will be the employer in the relationship. The employer for the purposes of the short-term visit exception is, from Australia's perspective, the enterprise to which a non-resident individual renders his or her services in what is considered an employment relationship.

Determining the employer

68. In determining who the employer is for the purposes of the short-term visit exception, the Commissioner will in each case have regard to:

- the underlying principles and factors to be applied in identifying whether an individual is an employee within the ordinary meaning of that expression as set out in TR 2023/4 arising from Australian domestic tax law; and
- the context, object and purpose of the short-term visit exception, especially subparagraphs 2(b) and (c) of the Income from Employment Article.²⁰

69. The application of the principles and factors in determining the employment status of an individual for domestic tax law purposes, as set out in TR 2023/4 is, of itself and in most instances, unlikely to result in the short-term visit exception being applied so as not to be in accordance with its object and purpose.²¹

70. [Omitted.]

71. [Omitted.]

72. [Omitted.]

73. [Omitted.]

74. [Omitted.]

75. [Omitted.]

76. [Omitted.]

77. [Omitted.]

78. [Omitted.]

79. [Omitted.]

80. [Omitted.]

81. [Omitted.]

²⁰ In relation to the object and purpose of these subparagraphs, see paragraph 62 of this Ruling.

²¹ Furthermore, applying the principles of TR 2023/4 does not affect the application of Part 2-42 of the ITAA 1997, which deals with the alienation of personal services income.

²² [Omitted.]

²³ [Omitted.]

²⁴ [Omitted.]

²⁵ [Omitted.]

²⁶ [Omitted.]

²⁷ [Omitted.]

²⁸ [Omitted.]

²⁹ [Omitted.]

³⁰ [Omitted.]

³¹ [Omitted.]

³² [Omitted.]

82. [Omitted.]
83. [Omitted.]
84. [Omitted.]
85. [Omitted.]
86. [Omitted.]
87. [Omitted.]
88. [Omitted.]
89. [Omitted.]
90. [Omitted.]
91. [Omitted.]
92. [Omitted.]
93. [Omitted.]
94. [Omitted.]
95. [Omitted.]
96. [Omitted.]
97. [Omitted.]
98. [Omitted.]
99. [Omitted.]
100. [Omitted.]
101. [Omitted.]
102. [Omitted.]
103. [Omitted.]
104. [Omitted.]
105. [Omitted.]

-
- ³³ [Omitted.]
 - ³⁴ [Omitted.]
 - ³⁵ [Omitted.]
 - ³⁶ [Omitted.]
 - ³⁷ [Omitted.]
 - ³⁸ [Omitted.]
 - ³⁹ [Omitted.]
 - ⁴⁰ [Omitted.]
 - ⁴¹ [Omitted.]
 - ⁴² [Omitted.]
 - ⁴³ [Omitted.]
 - ⁴⁴ [Omitted.]
 - ⁴⁵ [Omitted.]
 - ⁴⁶ [Omitted.]
 - ⁴⁷ [Omitted.]
 - ⁴⁸ [Omitted.]
 - ⁴⁹ [Omitted.]
 - ⁵⁰ [Omitted.]
 - ⁵¹ [Omitted.]

106. [Omitted.]
107. [Omitted.]
108. [Omitted.]
109. [Omitted.]
110. [Omitted.]
111. [Omitted.]
112. [Omitted.]
113. [Omitted.]
114. [Omitted.]
115. [Omitted.]
116. [Omitted.]
117. [Omitted.]
118. [Omitted.]
119. [Omitted.]
120. [Omitted.]
121. [Omitted.]
122. [Omitted.]
123. [Omitted.]
124. [Omitted.]
125. [Omitted.]

Disagreements and application of the exception

126. Where there is a disagreement between States about whether services rendered by an individual who is not a resident of the source country may properly be regarded by that State as rendered in an employment relationship, then paragraph 8.12 of the Commentary on Article 15 of the OECD Model states:

Any disagreement between States as to whether this [services rendered by an individual may properly be regarded by a State as rendered in an employment relationship] is the case should be solved having regard to the following principles and examples [using, where appropriate, the mutual agreement procedure].

-
- ⁵² [Omitted.]
 - ⁵³ [Omitted.]
 - ⁵⁴ [Omitted.]
 - ⁵⁵ [Omitted.]
 - ⁵⁶ [Omitted.]
 - ⁵⁷ [Omitted.]
 - ⁵⁸ [Omitted.]
 - ⁵⁹ [Omitted.]
 - ⁶⁰ [Omitted.]
 - ⁶¹ [Omitted.]
 - ⁶² [Omitted.]
 - ⁶³ [Omitted.]
 - ⁶⁴ [Omitted.]
 - ⁶⁵ [Omitted.]

126A. The 'principles and examples' being referred to at paragraph 8.12 of the Commentary on Article 15 of the OECD Model are contained in paragraphs 8.13 to 8.27 of the Commentary.

127. Paragraphs 8.13 to 8.15 of the Commentary on Article 15 of the OECD Model set out the approach the OECD uses where there is disagreement as referred to in paragraph 8.12 of the Commentary. Paragraphs 8.13 to 8.15 of the Commentary on Article 15 of the OECD Model are attached at Appendix 3 to this Ruling.

128. It is possible for the State applying the convention to deny the application of the short-term visit exception in abusive cases. Paragraph 8.8 of the Commentary on Article 15 of the OECD Model states the guiding principle as being:

As mentioned in paragraph 8.2, even where the domestic law of the State that applies the Convention does not offer the possibility of questioning a formal contractual relationship and therefore does not allow the State to consider that services rendered to a local enterprise by an individual who is formally employed by a non-resident are rendered in an employment relationship (contract of service) with that local enterprise, that State may deny the application of the exception of paragraph 2 in abusive cases, as recognised by paragraph 9 of Article 29 (see also paragraphs 54 to 80 of the Commentary on Article 1).

129. [Omitted.]

130. Accordingly, the availability of the short-term visit exception may be denied in abusive cases, subject to there being no disagreement between the Contracting States. In such instances, the country of residence of the non-resident individual must relieve double taxation under the Elimination of Double Taxation Article, or its equivalent, in Australia's tax treaties.

Appendix 2 – Glossary of terms

❗ This Glossary 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.

131. This glossary provides an explanation or description of a number of the terms used in this Ruling:

- **'intermediary'** refers to an entity which enters into a contractual agreement with a non-resident individual to provide a salary, wages or other similar remuneration in return for that individual providing his or her labour or personal services. The intermediary of the non-resident individual may or may not be the employer for the purposes of the short-term visit exception.
- **'short-term visit exception'**⁶⁶ refers to the provisions in the Income from Employment Article (or equivalent ones) in Australia's tax treaties that, from the perspective of the country where the work is performed, prohibit taxation by that country of remuneration derived by a non-resident working there.
- **'user enterprise'** refers to the enterprise to which a non-resident individual's services are rendered whether or not the enterprise has entered into a formal contract with that individual. The enterprise may be a resident of the source country or a permanent establishment of a non-resident of that country.

⁶⁶ This term has been used in this Ruling because it is descriptive of the true nature of paragraph 2 of the Income from Employment Articles and its equivalent provisions in Australia's tax treaties as an exception to the general rule in paragraph 1 of the same Article. This term 'exception' is also used in the Commentary to Article 15 of the OECD Model.

Appendix 3 – Extract from the Commentary to Article 15 of the OECD Model

❗ 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.

132. Extracted below are paragraphs 8.13 to 8.15 of the Commentary on Article 15 of the OECD Model:

8.13 The nature of the services rendered by the individual will be an important factor since it is logical to assume that an employee provides services which are an integral part of the business activities carried on by his employer. It will therefore be important to determine whether the services rendered by the individual constitute an integral part of the business of the enterprise to which these services are provided. For that purpose, a key consideration will be which enterprise bears the responsibility or risk for the results produced by the individual's work. Clearly, however, this analysis will only be relevant if the services of an individual are rendered directly to an enterprise. Where, for example, an individual provides services to a contract manufacturer or to an enterprise to which business is outsourced, the services of that individual are not rendered to enterprises that will obtain the products or services in question.

8.14 Where a comparison of the nature of the services rendered by the individual with the business activities carried on by his formal employer and by the enterprise to which the services are provided points to an employment relationship that is different from the formal contractual relationship, the following additional factors may be relevant to determine whether this is really the case:

- who has the authority to instruct the individual regarding the manner in which the work has to be performed;
- who controls and has responsibility for the place at which the work is performed;
- the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided (see paragraph 8.15 below);
- who puts the tools and materials necessary for the work at the individual's disposal;
- who determines the number and qualifications of the individuals performing the work;
- who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose;
- who has the right to impose disciplinary sanctions related to the work of that individual;
- who determines the holidays and work schedule of that individual.

8.15 Where an individual who is formally an employee of one enterprise provides services to another enterprise, the financial arrangements made between the two enterprises will clearly be relevant, although not necessarily conclusive, for the purposes of determining whether the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided. For instance, if the fees charged by the enterprise that formally employs the individual represent the remuneration, employment benefits and other employment costs of that individual for the services that he provided to the other enterprise, with no profit element or with a profit element that is computed as a percentage of that remuneration, benefits and other employment costs, this would be indicative that the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided. That should not be considered to be the case, however, if the fee charged for the services bears no relationship to the remuneration of the individual or if that remuneration is only one of many factors taken into account in the fee charged for what is really a contract for services (e.g. where a consulting firm charges a client on the basis of an hourly fee for the time spent by one of its employees to perform a particular contract and that fee takes account of the various costs of the enterprise), provided that this is in conformity with the arm's length principle if the two enterprises are associated. It is important to note, however, that the question of whether the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided is only one of the subsidiary factors that are relevant in determining whether services rendered by that individual may properly be regarded by a State as rendered in an employment relationship rather than as under a contract for services concluded between two enterprises.

133. [Omitted.]

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