

TR 2013/1A1 - Addendum - 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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Addendum

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

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Ruling TR 2013/1 to reflect the decisions of the High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and the Full Federal Court in *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76.

TR 2013/1 is amended as follows:

1. Preamble

Omit the preamble; substitute:

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.

2. Table of Contents

Omit the Table of Contents; substitute:

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3. Paragraph 1

- (a) Omit ‘equivalent¹ of Australia’s tax treaties (‘short-term visit exception’;²)’; substitute ‘equivalent¹ of Australia’s tax treaties (‘short-term visit exception’;²)’.
- (b) Omit the wording of footnote 1; substitute:

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).

- (c) In footnote 2, omit “international labour hire arrangements”,.

4. Paragraph 2

After ‘services in Australia and’, insert ‘also’.

5. Paragraph 3

- (a) Omit ‘from employment’.
- (b) After ‘government service³’, omit ‘and’; substitute ‘or’.
- (c) Omit the wording of footnote 4; substitute:

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

6. Paragraph 5

- (a) Omit 'domestic law'; substitute 'domestic tax law'.
- (b) Omit the wording of footnote 5; substitute:

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>.

7. Paragraph 7

- (a) Omit the wording of the first dot point; substitute 'the ordinary meaning of employee arising from domestic tax law^{5A}; and'.
- (b) After 'domestic tax law' in the first dot point, insert new footnote 5A:
^{5A} See paragraphs 63 to 71 of Taxation Ruling TR 2001/13 *Income tax: Interpreting Australia's Double Tax Agreements*.
- (c) In footnote 6, omit 'below'; substitute 'of this Ruling'.

8. Paragraph 8

- (a) Omit the wording of the paragraph; substitute:
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.
- (b) After 'paragraphs 18 to 82.', insert new footnote 6A
^{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.
- (c) Omit footnote 7.

9. Paragraphs 9 to 14

Omit the paragraphs, including headings.

10. Paragraph 15

Omit 'resolve it by'; substitute 'resolve that disagreement,'.

11. Paragraph 16

Omit 'paragraphs 8.9 and 8.10'; substitute 'paragraphs 8.8 and 8.10'.

12. Paragraph 18

- (a) After 'Finnish Agreement', insert new footnote 7A:

^{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.

- (b) After 'paragraphs 52 and 54', insert 'of this Ruling'.

13. Paragraph 19

- (a) In the heading, after '**Employer is**', insert '**a**'.
- (b) Omit '*Australian resident company*'; substitute '*Australian-resident company*'.

14. Paragraph 21

Omit the wording of the paragraph; substitute:

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

15. Paragraph 24

Omit '*day to day*'; substitute '*day-to-day*'.

16. Paragraphs 29 to 44

Omit the paragraphs, including headings.

17. Paragraph 45

- (a) Omit the wording of the heading; substitute '**Example 2 – Intra-group centralised corporate services – Employer is a non-resident services company**'.
- (b) Omit '*Australian resident company*'; substitute '*Australian-resident company*'.

18. Paragraph 47

Omit '*day to day*'; substitute '*day-to-day*'.

19. Paragraph 50

Omit the wording of the paragraph; substitute:

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

20. Paragraph 51

- (a) In the preamble, omit '**Appendix**'; substitute '**Explanation**'.
- (b) Omit 'terms as or based on'; substitute 'terms as, or based on,'.

21. Paragraph 52

- (a) Omit 'Finnish agreement'; substitute 'Finnish Agreement'.
- (b) Omit footnote 8.
- (c) In the quote, omit 'Articles 15, 17, and 18,⁹'; substitute 'Articles 15, 17 and 18,^[9]'.

22. Paragraph 53

Omit 'the general rule'.

23. Paragraph 54

- (a) Omit 'Finnish agreement'; substitute 'Finnish Agreement (paragraph 2)'.
- (b) In the quote, omit 'one of the Contracting States'; substitute 'a Contracting State'.
- (c) Omit the wording of footnote 10; substitute:

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.

24. Paragraph 55

- (a) Omit the wording of footnote 11; substitute:
For example, see Article 14(1) of the Finnish Agreement at paragraph 52 of this Ruling.
- (b) Omit the wording of footnote 12; substitute:
'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.

25. Paragraph 56

- (a) Omit '12 month'; substitute '12-month'.
- (b) Omit the wording of footnote 13; substitute:

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.

26. Paragraph 58

After the paragraph, insert new footnote 14A:

^{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.

27. Paragraph 59

Omit 'Finnish agreement'; substitute 'Finnish Agreement'.

28. Paragraph 60

(a) Omit 'paragraphs 63 to 75 of Taxation Ruling TR 2001/13 *Income Tax: Interpreting Australia's Double Tax Agreements* (TR 2001/13)'; substitute 'paragraphs 63 to 75 of Taxation Ruling TR 2001/13 *Income Tax: Interpreting Australia's Double Tax Agreements*'.

(b) Omit the wording of the quote; substitute:

... 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).

29. Paragraph 61

(a) After '*Vienna Convention of the Law of Treaties*', insert '[1974] ATS 2'.

(b) In footnote 16, omit '(2005 142 FCR 134; [2005] FCAFC 67 (*McDermott*) at paragraph 38'; substitute '[2005] FCAFC 67 at [38]'.

(c) Omit '*Thiel v. Federal Commissioner of Taxation* (1990) 171 CLR 388;'; substitute '*Thiel v Federal Commissioner of Taxation*'.

(d) In footnote 17, omit 'Taxation Ruling'.

30. Paragraph 62

(a) In footnote 18, after 'subparagraphs 2(b) and 2(c), insert 'of the Income from Employment Article'.

(b) In the quote, omit 'that State as he neither'; substitute 'that State as [it] neither'.

31. Paragraph 63

(a) Omit 'stated above'; substitute 'stated in the Commentary on Article 15 of the OECD Model'.

(b) After 'the user enterprise is the employer', insert a comma.

- (c) Omit 'remuneration he receives'; substitute 'remuneration they receive'.

32. Paragraph 64

In the quote, omit 'context of the particular convention'; substitute 'context of a particular convention'.

33. Paragraph 65

- (a) Omit the wording of the paragraph; substitute:

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'.

- (b) Omit footnote 19.

34. Paragraph 66

Omit the wording of the paragraph; substitute:

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

35. Paragraph 68

Omit the wording of the paragraph (excluding footnote 20); substitute:

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

36. Paragraph 69

- (a) Omit the wording of the paragraph (excluding footnote 21); substitute:

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

- (b) Omit the wording of footnote 21; substitute:

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.

37. Paragraphs 70 to 125

- (a) Omit the paragraphs, including headings.
(b) Omit footnotes 22 to 65.

38. Paragraph 126

- (a) Omit the wording of the quote; substitute:

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].

- (b) After the paragraph, insert new paragraph 126A:

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.

39. Paragraph 127

Omit the wording of the paragraph; substitute:

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.

40. Paragraph 128

Omit the wording of the paragraph; substitute:

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).

41. Paragraph 129

Omit the paragraph.

42. Paragraph 131

(a) Omit the heading; substitute:

Appendix 2 – Glossary of terms

❶ 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.

(b) Omit the wording of the paragraph (excluding footnotes); substitute:

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'**¹⁶⁶ 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.

43. Paragraph 132

- (a) Omit the heading; substitute:

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.

- (b) In paragraph 8.15 of the Extract, omit 'spent by one of its employee to perform'; substitute 'spent by one of its employees to perform'.

44. Paragraph 133

Omit the paragraph.

This Addendum applies before and after date of issue.

Commissioner of Taxation

23 September 2026

ATO references

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