TR 96/15 - Income tax: foreign tax credit system: issues relating to the practical application of section 23AG

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Taxation Ruling
Income tax: foreign tax credit system: issues relating to the practical application of section 23AG

other Rulings on this topic

IT 2441; IT 2508; IT 2563; TR 2002/D3

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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

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

What this Ruling is about

1. This Ruling is essentially an updated version of Taxation Ruling IT 2563. It takes into account the changes which have occurred in the law since that Ruling was released. In particular, section 19 of the *Taxation Laws Amendment Act (No. 2) 1991* which applies in relation to income derived in the 1990/91 and subsequent years of income made significant changes to the operation of section 23AG of the *Income Tax Assessment Act 1936* (the Act).

Class of person/arrangement

2. Section 23AG provides an exemption from Australian tax for foreign earnings derived by a resident individual taxpayer during a continuous period of foreign service exceeding 90 days. The purpose of this Ruling is to clarify certain aspects of the practical application of that section in relation to income derived in the 1990/91 and subsequent years of income. IT 2563 still applies in respect of earlier years.

3. The question has been raised whether section 23AG is capable of application where the residential status for Australian tax purposes of an individual taxpayer changes during a year of income from non-resident to resident and on or after that date the taxpayer receives foreign earnings in respect of a continuous period of foreign service performed whilst a non-resident. That question has been raised against the background of the well established principle that salary

and wages income, whether for current or past services, is generally derived when received.

4. One of the key tests to be satisfied before foreign earnings may qualify for an exemption from Australian tax under section 23AG is that those earnings be derived in respect of a continuous period of foreign service. Taxation Ruling IT 2441 deals with certain aspects of the practical application of that test. This Ruling deals principally with other circumstances, and distinguishes between certain breaks in foreign service that may be treated as forming part of that service and others that do not qualify for that treatment.

Ruling

Change in residential status

5. The taxpayer could not, in the circumstances described in paragraph 3 above, normally claim that the foreign earnings qualify for exemption from Australian tax pursuant to paragraph 23(r) of the Act. Although the income is ex-Australian income, it is not derived by a non-resident. Nevertheless, while it is a requirement for the operation of section 23AG that the foreign earnings be derived whilst the individual is a resident for Australian taxation purposes, it is not also a requirement that the relevant foreign service be performed whilst the individual is a resident for those purposes. Accordingly, exemption from Australian tax as provided under section 23AG may apply.

6. Where foreign earnings are derived (received) while the taxpayer is a non-resident, section 23AG is, of course, inapplicable, and the earnings would qualify for exemption from Australian tax under paragraph 23(r).

Exempted foreign earnings not to be aggregated with other foreign income for tax credit purposes

7. Taxation Ruling IT 2508, which deals with the aggregation of the various classes of income for foreign tax credit purposes, specifies that the worldwide basis for determining foreign tax credits requires that all foreign income of the same class, whether or not subject to foreign tax, be taken into account for those purposes. It is clear, however, from the terms of subsection 160AF(1), that the foreign income to be taken into account is only that which is included in the taxpayer's assessable income for Australian tax purposes. Taxation Ruling IT 2508 should be read as adjusted accordingly.

8. It follows that foreign earnings derived by a taxpayer in a year of income which is exempted from Australian tax under section 23AG, and the foreign tax paid in respect of those foreign earnings, are not to be taken into account in determining any foreign tax credit entitlements of the taxpayer with respect to a class of other foreign income derived by the taxpayer in the same year of income.

Temporary absences forming part of a period of foreign service

9. Subsection 23AG(6) identifies certain temporary absences from a period of foreign service that are related to the foreign service and will not be taken to constitute a break in a period of foreign service. These absences are recreation leave wholly attributable to the period of foreign service (other than, for example, long service leave, leave without pay, furlough and extended leave) and sick leave. Additional recreation leave entitlements granted to employees posted overseas are not considered to constitute extended leave where the additional leave is reasonable. For example, where the employer grants five weeks annual leave instead of the usual four weeks provided to employees working in Australia. It is acknowledged that the additional leave is granted because of factors associated with the foreign service, for example, the extra travel time required to return to Australia, the hardship involved in some overseas postings resulting in the need for more rest and recreation and the fact that some time will need to spent on matters other than rest and recreation.

9A. Whether a person is absent from foreign service because of recreation leave is a question of fact. However, for subsection 23AG(6) to apply, the recreation leave taken in Australia or elsewhere during a period of foreign service must be attributable to the period during which the person was engaged in foreign service. This means that, for the purposes of subsection 23AG(6), recreation leave can only arise where it accrues during the days that a person is actively engaged in foreign service. Annual leave that meets the requirements of subsection 23AG(6) will be regarded as recreation leave.

10. As subsection 23AG(6) does not cover the gamut of temporary absences, representations have been received seeking clarification of when section 23AG will be treated as applicable in circumstances where there is a temporary break within a person's commenced foreign service engagement as a consequence of visiting Australia (or another country):

(a) in the course of carrying out duties under a continuing foreign service engagement (i.e., business trips);

(b) on weekends, public holidays, rostered days off, or other approved paid time off; or

(c) compassionate leave.

11. In each case such visits fall to be treated as temporary absences related to a period of foreign service and are to be dealt with as follows:

(a) Business trips to Australia

Where an employee/office holder engaged in foreign service makes a short business trip to Australia or to another foreign country during a period of foreign service for reasons directly related to that person's continuing foreign service engagement, and made bona fide for that purpose, for example, to attend conferences, training sessions or briefing sessions, it is accepted that those trips should 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.

(b) Weekends, public holidays, etc.

A period of foreign service is taken to include weekends, public holidays, rostered days off, 'compulsory lay off/over days', 'grounded days' and flexidays (which are not 'available days' spent in Australia),[1] and days off in lieu of such, provided:

(i) such breaks are authorised by the terms and conditions of the foreign service employment or engagement; and

(ii) where such breaks are used by the person to visit or return to Australia they must not be excessive by comparison with the scheduled period of foreign service or, if the period of foreign service is ongoing, by comparison with the income year. As a guide, the Commissioner considers that where such breaks are used to visit or return to Australia, they will be excessive where the total of such breaks are more than one-sixth of the period of scheduled foreign service or, if the period of foreign service is ongoing,

[1] 'Compulsory lay off/over days' are those where an employee is prevented from working - possibly because of certain legal requirements. 'Grounded days' are those where an employee does not report for duty after being engaged in a series of long haul flights. 'Available days' (also known as 'grey days') are those where no work is allocated but the employee is available for duty. (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.)

more than one sixth of the income year. Therefore, where the total of temporary absences is excessive in terms of this paragraph, each temporary absence will be taken to break the foreign service period, subject to section 23AG(6A) to (6E).

Rostered days off, compulsory lay off/over days, grounded days and flexidays are not considered to be recreation leave for the purposes of section 23AG(6). That is because such absences are not recreation days that are granted as a result of leave that has accrued while a person is actively engaged in foreign service.

Available days spent in Australia are not considered to be a period of foreign service. Where an employee spends available days in Australia, this period is considered to be a break in foreign service, unless subsections 23AG(6A) to (6E) apply. That is because such time is not recreation leave for the purposes of subsection 23AG(6), nor does it come within any of the temporary absences set out in paragraph 11 of this Ruling. If available days are spent in a foreign country, it is considered that those days will form part of the foreign service period.

(c) Compassionate leave

Given that the absence of a person from foreign service due to an accident or illness is specifically treated as part of foreign service by reason of paragraph 23AG(6)(b), it is accepted that similar treatment would be appropriate in the case of compassionate leave granted for reason of an accident or illness of a person other than the taxpayer, or because of the death of another person. Accordingly, a short visit to Australia or another country for such a reason as permitted by the employer should be treated as forming part of the taxpayer's period of continuous foreign service. However, where leave not covered in this Ruling is granted for other reasons it is considered that a break will have occurred in the continuous foreign service.

12. Similarly, where the foreign service employment or engagement is part time in nature, it will be accepted that visits to Australia or another foreign country would not constitute a break in continuous foreign service provided the visits, etc., do not occur in times that attendance at work is required and there are no other restrictions in the foreign service engagement preventing such visits.

13. Each day of a visit to Australia or another country which, in accordance with subparagraphs (a), (b), or (c) of paragraph 11, or paragraph 12 of this Ruling, is treated as forming part of a person's continuous period of foreign service would qualify to be taken into account in determining the person's 'absentee credits' in relation to that

period of foreign service pursuant to subsection 23AG(6B). Conversely, each day of a visit which is treated as constituting a break in a person's continuous period of foreign service would give rise to an 'absentee debit' in accordance with subsection 23AG(6C). (See examples at paragraph 30 concerning the operation of subsections 23AG(6B) and (6C)).

Temporary absences not forming part of a period of foreign service

14. Broadly speaking, subsections 23AG(6A) to (6E) allow in certain circumstances for successive periods of foreign service, which are broken by a period where the person is not engaged in that service, to be added together to constitute a single continuous period of foreign service. For example, when the person is between jobs in a foreign country or breaks a period of foreign service for reasons not directly related to his or her foreign service engagement.

15. In broad terms, these subsections operate on the basis that, provided a person is not absent from foreign service for such reasons for a period in excess of an 'absentee credit balance' of days accrued during a continuous period of foreign service, the periods of foreign service either side of the period of absence will together constitute a continuous period of foreign service.

16. In other words, provided a person has an absentee credit balance, the continuity of the person's foreign service will not be broken even when there is an intervening period between engagement on a foreign job or jobs. Conversely, when a person ceases to have an absentee credit balance, continuity will be interrupted by such an intervening period and it will be necessary to consider whether the foreign earnings qualify for exemption. The purpose of the subsections is further explained in the Explanatory Memorandum to the *Taxation Laws Amendment Act (No. 2) 1988*. This Ruling does not incorporate that explanation but sets out examples to illustrate the practical application of the subsections: see paragraphs 30 and 31 below.

Meaning of 'foreign earnings' and 'foreign service'

17. An exemption afforded by section 23AG applies only in respect of foreign earnings derived from a continuous period of foreign service. In general, subsection 23AG(7) defines the term 'foreign earnings' to mean income consisting of earnings, salary, wages, commission, bonuses or allowances and the term 'foreign service' to mean service in a foreign country as the holder of an office or in the capacity of an employee.

18. Representations have been received seeking guidance on whether certain types of payments fall within the ambit of the definitions of 'foreign earnings' and 'foreign service'. The position of these payments is discussed in the following paragraphs.

Service on a foreign ship

19. To fall within the definition of 'foreign service' the service must be performed in a foreign country. Service on a foreign ship in international waters does not therefore constitute 'foreign service'.

Fees for independent personal services

20. While the term 'foreign earnings' as defined may, on its own, be capable of being construed as sufficiently broad to include earnings derived from the provision of independent personal services by professional persons such as doctors, lawyers, architects and the like, such earnings fail to qualify for exemption under section 23AG because they are not rendered during the course of a period of 'foreign service', i.e., as the holder of an office or in the capacity of an employee (see *Case R45* 84 ATC 369 and *FC of T v. White*; *FC of T v. Griffin* 85 ATC 4743; (1985) 16 ATR 510). Accordingly, foreign earnings from the provision of independent personal services remain subject to the provisions of the general foreign tax credit system.

Directors' fees

21. Directors may be classified as either executive directors or non-executive directors. The former are generally salaried employees as well as directors and may receive no separate fee for their activities as directors although their salary package may recognise such a role. In such a case there would be no doubt that the income in this situation would be 'earnings, salary, wages,' etc., derived as the holder of an office or in the capacity of an employee. Similarly, while fees paid to non-executive directors might not come within the ordinary meaning of salary or wages, such remuneration would nevertheless fall within the concept of 'earnings' derived as the holder of an office.

22. However, in order for such earnings to qualify for exemption under section 23AG the requirement of derivation during a continuous period of 'foreign service' must also be satisfied. This means that the director must perform his or her duties in a foreign country for at least 3 continuous months.

Supplements paid under the Australian Staffing Assistance Scheme (ASAS), or similar arrangements for the 1990/91 and subsequent years of income

23. Where the remuneration package of an Australian resident in respect of foreign service performed in a foreign country under the ASAS, or a similar arrangement, consists of a base salary paid and taxed in the foreign country, as well as a supplement paid in Australia and not subject to tax in the foreign country, the supplement (in common with the base salary) is considered to be derived from sources in the country where the service is performed (see *FC of T v. French* (1957) 98 CLR 398).

24. If the salary is exempt from tax in the foreign country by virtue of a Memorandum of Understanding (MOU), or some similar agreement, it will not be denied exemption from Australian tax by virtue of subsection 23AG(2). This is because it is not exempt in the foreign country **solely** because of events listed in that subsection; it is also exempt because of the MOU which is not a reason listed in subsection 23AG(2).

25. Similarly, salary supplements paid in Australia and not subject to tax in the foreign country will be exempt from Australian tax under section 23AG as they are not exempt from tax in the foreign country solely because of events listed in subsection 23AG(2).

Exemption with progression

26. Some taxpayers who derive foreign earnings or other foreign income which is exempt from income tax under provisions other than section 23AG have asked whether this exempt income is to be treated as subject to 'exemption with progression', and therefore taken into account in calculating the Australian tax on the income of the taxpayer.

27. This is true only with respect to remuneration derived by persons working overseas on approved projects, which qualifies in certain circumstances for exemption from Australian tax pursuant to section 23AF of the Act.

28. Subsection 23AF(17A), which contains such 'exemption with progression' provisions, specifically applies only in respect of income which is exempt from tax under section 23AF. Likewise, the terms of the 'exemption with progression' provisions of subsection 23AG(3) are specifically limited to foreign earnings that qualify for exemption under section 23AG.

29. Accordingly, pay and allowances of members of the Defence Forces or Australian Federal Police serving in special areas overseas which are exempted by section 23AC, section 23AD, or section

23ADA are not subject to 'exemption with progression'. Neither is income derived by persons serving overseas for international organisations which is exempt under regulations made under the *International Organisations (Privileges and Immunities) Act 1963*.

Examples

30. With respect to subsections 23AG(6A) to (6D), assume a resident taxpayer is engaged in foreign service for three successive continuous periods of foreign service as shown below:

FOREIGN SERVICE PERIOD	BREAK	SERVICE (days)	BREAK (days)
1		400	
	A		40
2		200	
	B		16
3		50	
	C		Indefinite

- **Period 1**

  Subsection 23AG(6B) operates to accrue an absentee credit of 31/334 x 24 hours for each of the first 334 days. As there are no breaks in period 1, the absentee credit balance (subsection 23AG(6A)) in whole days at the end of the 334th day will be 31 days. As the balance would exceed 31 if there were further credits, no credits will arise in respect of days 335 to 400. Thus, the balance at the end of the 400th day will be 31 days.

- **Break A**

  Subsection 23AG(6C) operates to reduce the absentee credit balance of 31 days at the end of each whole day of the break by 1 day. Thus, after a break of 30 days (i.e., at the beginning of the 31st day) the balance will be 1 day. A further absentee debit of 24 hours will arise at the end of the 31st day resulting in an absentee credit balance of nil. As the balance is nil at the start of the 32nd day, paragraph 23AG(6C)(d) will operate to prevent an absentee debit of 24 hours arising for break days 32 to 40.

- **Periods 2 and 3**

  At the commencement of period 2, paragraph 23AG(6D)(c) will operate to prevent periods 1 and 2 constituting a single continuous period of foreign service. Continuity is not achieved as the 'absentee credit balance' at the beginning of break day 40, i.e., the day before the commencement of period 2, did not exceed nil. (Note that if break A was less than 32 days duration, continuity would have followed.)

- It should also be noted that once the absentee credit balance is reduced to nil, which is the position at the commencement of period 2, it is not necessary to have regard to all prior absentee credits and debits in calculating future balances. They are, in effect, reflected in the nil balance. The following results in respect of periods 2 and 3 are achieved:

	BALANCE (whole days)	CREDITS - DEBITS (hours)
Absentee credit at end of period 2	18	$(200 \times \frac{31}{334} \times 24)$
Absentee credit balance at the beginning of the day before commencement of period 3 *	3	$(200 \times \frac{31}{334} \times 24) - (15 \times 24)$
Absentee credit balance at the commencement of period 3	2	$(200 \times \frac{31}{334} \times 24) - (16 \times 24)$
Absentee credit balance at the end of period 3	7	$(250 \times \frac{31}{334} \times 24) - (16 \times 24)$

* As this exceeds nil, periods 2 and 3 would constitute a single continuous period of foreign service.

31. The following further example illustrates the interaction of subsections 23AG(6D) and (6E). Assume that a resident taxpayer is engaged in foreign service for a period of 30 whole days and takes 27 hours leave without pay (LWOP) from 9 am on the 31st day to midday on the 32nd day. LWOP of 7 hours is subsequently taken from 9 am on the 95th day.

FOREIGN SERVICE PERIOD	BREAK	SERVICE (days)	BREAK (hours)
1		30 - 3/8	
	A		27
2		62 - 7/8	
	B		7
3		Indefinite	

- Break A is not less than 24 hours and subsection 23AG(6E) will not apply. As Break A consists of two part days (as distinct from a 'whole day' as defined in subsection 23AG(6J), subsections 23AG(6B) and (6C) will not operate and there will be no absentee credits or absentee debits arising in respect of either the 31st or 32nd days. The absentee credit balance at the commencement and conclusion of Break A will therefore remain at 2 days (30 x 31/334). The application of subsection 23AG(6D) will result in foreign service periods 1 and 2 constituting a continuous period during which the taxpayer was engaged in foreign service.

- At the end of period 2 (i.e., at 9 am on the 95th day), the continuous period of foreign service will be 93 days and the absentee credit balance will be 8 whole days (92 (i.e., 30 + 62) x 31/334). As with the 31st and 32nd days, no absentee credits or debits will arise in respect of the 95th day, the day on which Break B of 7 hours occurs.

- As Break B is less than 24 hours, subsection 23AG(6E) will operate to make the first period (periods 1 and 2 by a previous application of subsection 23AG(6D)) and the second period (period 3) constitute one continuous period. The absentee credit balance at the commencement and conclusion of Break B will remain at 8 days and the next credit will accrue at the end of the

96th day at which time the foreign service period will be 94 7/12 days (93 1/4 + 1 1/3).

31A. The following is an example where temporary absences spent in Australia would be regarded as excessive.

Pilots

An international pilot resides in Australia and is employed by a foreign airline on an ongoing basis. During the 2003 income year, the pilot flies for approximately 800 hours. She is entitled to six weeks annual leave and also has other days where she is not actively performing service, such as compulsory lay off days, grounded days and rostered days off, which in conjunction with her recreation leave she chooses to spend in Australia.

Typically, the pilot flies internationally (including stopovers and rests) for ten days and receives six days off. Assume that each six day period is spent in Australia and falls within the types of temporary absences set out in paragraph 11(b) of this Ruling. She also has an absentee credit balance - section 23AG(6B) - of three days at the start of the 2003 income year. Looked at over the 2003 income year, this means the pilot spends approximately 120 days (in addition to six weeks annual leave) in Australia on those absences covered by paragraph 11(b) of this Ruling.

In judging whether the 120 days spent in Australia during the income year is excessive in terms of paragraph 11(b) of this Ruling, the Commissioner considers that as a guide the total of such breaks spent in Australia should not be more than one-sixth of the income year (61 days) because there is ongoing foreign service. In this case, the number of days spent in Australia during the income year on temporary absences covered by paragraph 11(b) of this Ruling is 120 days and is clearly excessive.

This means that each time the pilot returns to Australia during the 2003 income year for the six day break, there is a break in foreign service, unless there are sufficient absentee credits accumulated in accordance with section 23AG(6B). In this case, the absentee credit of three days at the start of the year would be extinguished the first time the taxpayer returns to Australia during the 2003 income year for a six day break.

Moreover, throughout the year there would not be sufficient absentee credits that accumulate each time there is foreign service to cover the pattern of six day breaks. This means that each time the taxpayer returns from a ten day period of foreign service during the income year for a six day break, there is a break in foreign service.

As a result, there is no period during the income year where the foreign service period is for 91 continuous days or more. Therefore, the pilot will not be entitled to the exemption under section 23AG.

31B. The following is an example where temporary absences spent in Australia would not be regarded as excessive.

Frank is an Australian resident. As a helicopter pilot, he enters into a one-year employment contract to work for a company that operates in the Papua New Guinea and Indonesian areas. The contract runs from 1 July 2002 to 30 June 2003. During that year, Frank habitually returns to Australia on days off in lieu of weekends and rostered days off. In total, he returns to Australia on these temporary absences for 50 days during the 2003 income year.

The temporary absences covered by Frank's return to Australia fall within the type of absences contemplated by paragraph 11(b) of this Ruling and are not excessive by comparison with the scheduled period of foreign service (50 days out of 365). Therefore, each time Frank returns to Australia on these breaks, such breaks are taken to be part of Frank's foreign service period. Consequently, Frank is entitled to a section 23AG exemption during the 2003 income year in respect of his employment income as a helicopter pilot.

Date of effect

32. This Ruling applies to income derived on or after 1 July 1990. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). Taxation Ruling IT 2563 applies in respect of income derived on or before 30 June 1990.

33. Following the enactment of the Tax Laws Amendment (2005 Measures No. 5) Act 2005 former subsections 23AG(6A) to (6E) of the ITAA 1936 have been replaced by new subsections 23AG(6A) and (6B). As a result of this:

- paragraphs 13 to 16, 30 and 31 of this Ruling do not apply to foreign service performed on or after 19 December 2005; and
- paragraphs 11(b) and 31A of this Ruling, to the extent that they refer to former subsections 23AG(6A) to (6E), do not apply to foreign service performed on or after 19 December 2005.

Note: The Addendum to this Ruling that issued on 17 July 2002, applies from 17 July 2002.

Note: The Addendum to this Ruling that issued on 20 December 2006, applies from 19 December 2005.

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- International Organisations (Privileges and Immunities) Act 1963
- Tax Laws Amendment (2005 Measures No. 5) Act 2005

case references
- FC of T v. French (1957) 98 CLR 398
- FC of T v. White; FC of T v. Griffin 85 ATC 4743; (1985) 16 ATR 510
- Case R45 84 ATC 369