



CR 2004/129 - Income tax: exempt foreign employment income: section 23AG: Australian Federal Police personnel on long term, non-diplomatic posting to Solomon Islands under the auspices of the Regional Assistance Mission to Solomon Islands

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 This document has changed over time. This is a consolidated version of the ruling which was published on *10 June 2004*



Class Ruling

Income tax: exempt foreign employment
income: section 23AG: Australian Federal
Police personnel on long term,
non-diplomatic posting to Solomon Islands
under the auspices of the Regional
Assistance Mission to Solomon Islands

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Preamble

*The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law dealt with in this Ruling is section 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936).

Class of persons

3. Subject to paragraphs 4 and 5 of this Ruling the class of persons to which this Ruling applies are Australian Federal Police (AFP) employees who are residents of Australia for tax purposes and are deployed as part of the Participating Police Force to Solomon Islands under the Regional Assistance Mission to Solomon Islands (RAMSI).

4. The class of person includes AFP employees who while on deployment to Solomon Islands return to Australia for a period during which they utilise leave that has wholly accrued from their service in Solomon Islands.

5. The class of person does not include AFP employees who while on deployment to Solomon Islands return to Australia for a period during which they utilise leave that has wholly or partly accrued from service in Australia or from a previous period of foreign service.

Qualifications

6. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

7. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 12 to 24.

8. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

10. This Ruling applies from 10 June 2004 until it is withdrawn (see paragraph 11). However, this Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*;
- it is not taken to be withdrawn by an inconsistent later Public Ruling; or
- the relevant tax laws are not amended.

Withdrawal

11. This Ruling is withdrawn and ceases to have effect after 31 December 2008. The ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

12. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents which are attached to the file record maintained by the Australian Tax Office for this ruling. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- the application for a class ruling dated 19 June 2004;
- AFP (Overseas Conditions of Service) Determination (No. 1) 2001; and
- further information provided by the applicant.

13. In February 2003, the Australian Government announced an ongoing program of capacity building assistance for the law and justice sector of Solomon Islands.

14. Following the withdrawal of many of the logistical support services provided by the Australian Defence Force, these services are now being provided by a contracted supplier. The AFP is placing employees in long term positions to manage the provision of services by the supplier.

15. In addition, other AFP employees and appointees will fulfil such roles as Police College Coordinator and Fire Commissioner.

16. The AFP employees will be deployed to Solomon Islands for a two year term posting. Conditions of service applicable to these members are contained in AFP (Overseas Conditions of Service) Determination (No. 1) 2001.

17. All employees selected for deployment to Solomon Islands as part of the Participating Police Force will be employees of the AFP. This includes employees on secondment from State and Territory police and fire departments.

18. The AFP employees will not be afforded diplomatic status and will not be attached to a diplomatic mission.

19. The AFP employees will continue to be paid salary and other remuneration by the AFP or their respective State or Territory police or fire department where applicable.

20. The AFP employees will be entitled to some or all of the following allowances:

- composite allowance;
- transfer allowances on departure;
- overseas loading;
- location allowance;
- cost of living allowance;
- overseas interim allowance;
- miscellaneous post specific allowance; and
- transfer allowance on return.

21. The AFP employees are entitled to the following categories of leave:

- Annual Leave;
- Personal Leave;
- Bereavement Leave;
- Miscellaneous Leave with Pay; and
- Miscellaneous Leave without Pay.

22. The AFP employees on long term posting to Solomon Islands are entitled to two return trips to their home base or an alternative location during the period of deployment. The AFP employees must utilise Recreation Leave for a minimum of five working days for these trips and must leave Solomon Islands for the duration of the leave. Where their posting to Solomon Islands exceeds one year, AFP employees must undertake one further trip, utilising Recreation Leave for five working days, which must be taken in Australia. In addition, AFP employees on long term posting to Solomon Islands may be entitled to further travel to reunite with dependants.

23. The Governments of Australia and Solomon Islands have concluded the 'Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the operations and status of the police and armed forces and other personnel deployed to Solomon Islands to assist in the restoration of law and order and security' (the RAMSI Agreement) covering the operations and status of the police deployed to Solomon Islands to assist in the restoration of law and order and security.

24. Article 16.6 of the RAMSI Agreement exempts members of the Visiting Contingent (including AFP employees deployed as part of the Participating Police Force) from taxation on their pay and other emoluments. The RAMSI agreement was given effect in Solomon Islands through the passing of Solomon Islands *Facilitation of International Assistance Act 2003*.

Ruling

25. The salary and allowances referred to in paragraphs 19 and 20 of this ruling, derived by an AFP employee described in paragraphs 3 and 4 of this ruling deployed to Solomon Islands, are exempt from tax under section 23AG where:

- the employee has been engaged, or is taken to have been engaged, in service in Solomon Islands for a continuous period of not less than 91 days; and
- the salary and allowances are derived from that foreign service, including payments for recreation leave that has wholly accrued from the period of service in Solomon Islands.

Explanation

26. Subsection 6-5(2) of the *Income Tax Assessment Act 1997* (ITAA 1997) provides that the assessable income of a resident taxpayer includes ordinary income derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

27. Salary and wages are ordinary income for the purposes of subsection 6-5(2) of the ITAA 1997.

28. Subsection 6-15(2) of the ITAA 1997 provides that if an amount is exempt income then it is not assessable income.

29. Section 11-15 of the ITAA 1997 lists those provisions dealing with income which may be exempt. Included in this list is section 23AG of the ITAA 1936 which deals with exempt foreign employment income.

30. Section 23AG of the ITAA 1936 provides an exemption from Australian tax on the foreign earnings derived by an Australian resident who has been engaged in foreign service continuously for 91 days or more.

31. Subsection 23AG(1) states:

Where a resident, being a natural person, has been engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived by the person from that foreign service is exempt from tax.

32. The basic tests for the exemption of foreign employment income in subsection 23AG(1) are:

- the taxpayer must be a 'resident of Australia';
- the taxpayer must be engaged in 'foreign service';
- the foreign service must be for a continuous period of not less than 91 days; and
- the taxpayer must derive 'foreign earnings' from that 'foreign service'.

33. However, certain foreign earnings that meet these tests may not be exempt from tax (see paragraphs 56 to 62).

Resident of Australia

34. The determination of a person's residency status depends on that person's circumstances and is a determination made in relation to each year of income. For further information see Income Tax Ruling IT 2650. This Class Ruling only applies to the class of persons described in paragraph 3 of this ruling who remain Australian residents for tax purposes during their deployment to Solomon Islands.

35. However, it is expected that the AFP employees who are deployed as part of the Participating Police Force to Solomon Islands under RAMSI will remain residents of Australia throughout the period of their deployment.

Engaged in foreign service

36. 'Foreign service' is defined as 'service in a foreign country as the holder of an office or in the capacity of an employee' (subsection 23AG(7)).

37. The term 'employee' is defined within subsection 23AG(7) to include 'a person employed by a government or an authority of a government or by an international organisation'.

38. AFP employees referred to in paragraph 3 meet the above definition of an 'employee'.

39. Deployment of an AFP employee to Solomon Islands constitutes 'foreign service' as each employee is undertaking 'service in a foreign country as a holder of an office or in the capacity of an employee'.

For a continuous period of not less than 91 days

40. Each AFP employee is expected to serve continuously in Solomon Islands for a period of not less than 91 days. Employees are to serve two year term postings or short term contracts of four to six months. These periods of 'foreign service', if met, meet the test that Australian residents working overseas must be engaged 'for a continuous period of not less than 91 days'.

41. Should an employee of the AFP depart Solomon Islands prior to the completion of 91 days of continuous service, that employee will normally be ineligible for the exemption.

42. In certain instances, an AFP employee who departs Solomon Islands prior to serving the necessary number of days, may still qualify for exemption if they return to continue their posting at a later date (refer to paragraphs 9 to 16 of Taxation Ruling TR 96/15).

43. Subsection 23AG(6) and paragraph 11 of TR 96/15 treat certain temporary absences from foreign service as forming part of the period of foreign service.

44. This includes absences on recreation leave, other than:

- leave wholly or partly attributable to a period of service or employment other than the foreign service;
- long service leave, furlough, extended leave or leave of a similar kind (however described); or
- leave without pay or on reduced pay.

45. Where an AFP employee is temporarily absent from foreign service due to any of the absences listed in subsection 23AG(6) or paragraph 11 of TR 96/15, these absences will be taken to form part of the period of foreign service.

46. For example, where an AFP employee takes recreation leave to return to Australia or another country on a mandatory break or for the purposes of a reunion visit, and the leave taken is wholly attributable to the deployment as part of the Participating Police Force under RAMSI, the leave period forms part of the foreign service period.

47. However, leave taken that is wholly or partly attributable to a period of service other than the period of foreign service performed as part of the Participating Police Force under RAMSI will not be taken to form part of the period of foreign service. Further, Miscellaneous Leave without Pay as described in paragraph 21 will not form part of the period of foreign service.

Foreign earnings

48. The definition of 'foreign earnings' is also contained in subsection 23AG(7), which provides that:

'foreign earnings' means income consisting of earnings, salary, wages, commission, bonuses or allowances but does not include any payment, consideration or amount that:

- (a) is included in assessable income under Subdivision AA of Division 2; or
- (b) is excluded from the definition of 'eligible termination payment' in subsection 27A(1) because of paragraph (ja), (k), (ka), (m), (ma), (n) or (p) of that definition.

49. The exclusions to the definition of 'foreign earnings' at paragraphs (a) and (b) above are not relevant to this arrangement as they relate to pensions, annuities, eligible termination payments and other similar amounts.

50. The remuneration of the AFP employees takes the form of an annual salary entitlement and the payment of various allowances (see paragraphs 19 and 20).

51. These salaries, bonuses and allowances are specifically included in the subsection 23AG(7) definition of 'foreign earnings'.

52. Whilst the salary of an AFP employee may be paid into financial institutions in Australia, those 'earnings' are still considered to be 'foreign earnings'.

From that foreign service

53. To qualify for the exemption the 'foreign earnings' must be derived from the 'foreign service'. That does not mean that the foreign earnings need to be derived at the time of engaging in foreign service. The important test is that the foreign earnings, when derived, need to be derived as a result of the undertaking of that foreign service.

54. In the case of allowances or performance bonuses paid after the person returns to Australia that relate to the period of foreign service, such allowances or bonuses are treated as foreign earnings derived from that foreign service. Also, any advances against salary or allowances paid to the taxpayer prior to the undertaking of foreign service arising from the undertaking of that foreign service would be treated as foreign earnings from foreign service.

55. The salary that is paid when taking recreation leave that accrued during the period of foreign service is also considered to be foreign earnings from that foreign service, even though the recreation leave may be taken after the completion of the foreign service.

Certain foreign earnings are not exempt

56. Subsection 23AG(2) provides that no exemption is available under subsection 23AG(1) in circumstances where an amount of foreign earnings derived in a foreign country is exempt from tax in the foreign country solely because of:

- a double tax agreement or a law of a country that gives effect to such an agreement (paragraphs 23AG(2)(a) and (b));
- a law of that foreign country which generally exempts from, or does not provide for, the imposition of income tax on income derived in the capacity of an employee, income from personal services or any other similar income (paragraphs 23AG(2)(c) and (d)); and
- a law or international agreement dealing with privileges and immunities of diplomats or consuls or of persons connected with international organisations (paragraphs 23AG(2)(e), (f) and (g)).

57. However, if the foreign earnings are exempt from tax in the foreign country because of another reason (for example a Memorandum of Understanding [MOU] or some similar agreement), subsection 23AG(2) will not apply to deny the exemption under subsection 23AG(1). This is because the foreign earnings are not exempt in the foreign country solely because of events listed in that subsection – the foreign earnings are also exempt because of the MOU or similar agreement which is not a reason listed in subsection 23AG(2).

58. There is currently no double tax agreement between Australia and Solomon Islands.

59. The privileges and immunities of persons connected with an international organisation do not apply to the AFP employees deployed to Solomon Islands as part of the Participating Police Force under RAMSI.

60. The foreign earnings derived by the AFP employees in Solomon Islands are not exempt, under a general provision from income tax in Solomon Islands.

61. However, Article 16.6 of the RAMSI Agreement and the *Facilitation of International Assistance Act 2003* provide that personnel deployed to Solomon Islands as part of RAMSI shall be exempt from taxation by Solomon Islands government on their pay and other emoluments.

62. As the foreign earnings of the AFP employees are not exempt from tax in Solomon Islands solely because of events listed in subsection 23AG(2), subsection 23AG(2) will not apply to deny the exemption under subsection 23AG(1).

Exemption with progression

63. The 'foreign earnings' of employees that are exempt from Australian tax under section 23AG are nevertheless taken into account in calculating the Australian tax on other assessable income derived by the employee (subsection 23AG(3)).

64. Tax on other assessable income will be calculated by applying to the non-exempt income (for example Australian salary, investment income), the notional average rate of tax payable on the sum of exempt income and non-exempt income.

65. Any deductions that relate to the exempt income are allowed as if the exempt income was assessable income. That is, expenses which relate directly to earning income in Solomon Islands are deductible from exempt income.

Example

66. In the 2004-2005 income year, an AFP employee derives the following types of income:

- Australian employment income of \$60,300;
- allowable deductions against Australian income of \$300;
- foreign exempt employment income of \$30,100; and
- expenses directly related to foreign exempt employment income of \$100.

Assume that the AFP employee has appropriate private patient hospital cover for Medicare levy surcharge purposes.

The total amount of Australian tax payable will be calculated with reference to the following formula:

(Notional gross tax/Notional gross taxable income) × Other taxable income

Step 1

The employee's **notional gross taxable income** is \$90,000 (\$60,300 - \$300] + [\$30,100 - \$100]).

Step 2

The **notional gross tax** is \$29,362 (the normal Australian income tax and Medicare levy payable on a taxable income of \$90,000).

Step 3

The **other taxable income** is \$60,000 (Australian employment income).

Step 4

The Australian tax payable (including Medicare levy) on the employee's Australian income is:

$$(\$29,362/\$90,000) \times \$60,000 = \$19,574.67$$

Detailed contents list

67. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

24 November 2004

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 92/20;
TR 96/15; TR 97/16; IT 2650

Subject references:

- foreign exempt employment
income
- foreign income
- foreign salary & wages

- foreign source income

- international tax

- overseas countries

- overseas tax laws

- residence of individuals

- Solomon Islands

Legislative references:

- ITAA 1936 23AG

- ITAA 1936 23AG(1)

- ITAA 1936 23AG(2)

- ITAA 1936 23AG(2)(a)

- ITAA 1936 23AG(2)(b)

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|------------------------------------|---------------------------------|
| - ITAA 1936 23AG(2)(c) | - ITAA 1997 6-15(2) |
| - ITAA 1936 23AG(2)(d) | - ITAA 1997 11-15 |
| - ITAA 1936 23AG(2)(e) | - Copyright Act 1968 |
| - ITAA 1936 23AG(2)(f) | - TAA 1953 Pt IVAAA |
| - ITAA 1936 23AG(2)(g) | - Facilitation of International |
| - ITAA 1936 23AG(3) | Assistance Act 2003 (Solomon |
| - ITAA 1936 23AG(6) | Islands) |
| - ITAA 1936 23AG(7) | |
| - ITAA 1936 Pt III Div 2 Subdiv AA | |
| - ITAA 1936 27A(1) | |
| - ITAA 1997 6-5(2) | |
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ATO references

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