



***CR 2004/98 - Income tax: assessability of income:
City of Calgary employees working in Australia under
a fire fighter exchange program with an Australian
fire fighting authority***

 This cover sheet is provided for information only. It does not form part of *CR 2004/98 - Income tax: assessability of income: City of Calgary employees working in Australia under a fire fighter exchange program with an Australian fire fighting authority*

 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2004*



Class Ruling

Income tax: assessability of income: City of Calgary employees working in Australia under a fire fighter exchange program with an Australian fire fighting authority

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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 IVA 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 laws dealt with in this Ruling are subsection 6-5(2) of the *Income Tax Assessment Act 1997* (ITAA 1997), section 4 of the *International Tax Agreements Act 1953* (the Agreements Act) and Schedules 3 and 3A of the Agreements Act.

Class of persons

3. The class of persons to which this Ruling applies are employees of the City of Calgary who are residents of Australia for tax purposes and who enter Australia to participate in a fire fighter exchange program with an Australian fire fighting authority.

Qualifications

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

5. 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 10 to 18.

6. 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

8. This Ruling applies from 1 July 2004. However, the 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 the 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 Gazette;
- It is not taken to be withdrawn by an inconsistent later public Ruling; or
- The relevant tax laws are not amended.

Withdrawal

9. This Class Ruling is withdrawn and ceases to have effect after 30 June 2006. The Ruling continues to apply, in respect of the tax law ruled upon, to all persons within the specified arrangement during the term of the Ruling.

Arrangement

10. 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 10 March 2004; and
- further information provided by the applicant.

11. The Fire Department of the City of Calgary, Canada (CCFD) and an Australian fire fighting authority have an employee exchange program to exchange the services of their respective fire fighters for periods of less than one year.

12. The CCFD is a Canadian government authority.

13. Under the program, CCFD employees will travel to Australia and assume the job responsibilities of their Australian counterparts.

14. CCFD employees, and their families where applicable, will reside in the family home and will have access to private vehicles of their Australian counterparts while in Australia.

15. While on exchange, CCFD employees will continue to be paid salary and other remuneration by the CCFD.

16. It is expected that most CCFD employees who participate in the employee exchange program will be present in Australia for 11 to 11 ½ months.

17. CCFD employees will commence their duties in Australia in September 2004 and will return to Canada in August 2005. In all cases, CCFD employees will return to Canada within 12 months of entering Australia.

18. CCFD employees are entitled to their normal annual leave entitlements accrued from service with the CCFD and may return to Canada or other overseas destinations while on annual leave.

Ruling

19. Article 19 of the double tax agreement between Australia and Canada contained in Schedule 3 to the Agreements Act provides that the salary and wages referred to in paragraph 15 of this Ruling are taxable only in Canada.

20. The salary and wages are not assessable under subsection 6-5(2) of the ITAA 1997.

Explanation

21. Subsection 6-5(2) of the ITAA 1997 provides that the assessable income of an Australian resident includes ordinary income derived directly or indirectly from all sources during the income year.

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

Resident of Australia

23. 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 about the residency of individuals entering Australia, see Income Tax Ruling TR 98/17. This Class Ruling only applies to the class of persons described in paragraph 3 of this Ruling who become Australian residents for tax purposes during the term of their presence in Australia under the exchange program.

24. It is expected that CCFD employees who enter Australia under the exchange program will be residents of Australia throughout the period of their presence in Australia.

25. CCFD employees will also remain residents of Canada for Canadian tax purposes throughout the period of the presence in Australia.

Double Tax Convention between Australia and Canada

26. In determining liability to Australian tax on foreign sourced income received by a resident, it is necessary to consider not only the income tax laws but also any applicable double tax agreement contained in the Agreements Act.

27. Section 4 of the Agreements Act incorporates that Act with the ITAA 1997 so that both Acts are read as one.

28. Schedule 3 to the Agreements Act contains the double tax convention between Australia and Canada (the Canadian Convention). Schedule 3A of the Agreements Act contains the protocol amending the Canadian Convention (the Canadian Protocol). The Canadian Convention and Canadian Protocol operate to avoid the double taxation of income received by Australian and Canadian residents.

29. It is expected that the CCFD employees will be residents of Australia for taxation purposes throughout the period of their presence in Australia. The CCFD employees are also residents of Canada for Canadian taxation purposes.

30. For the period of dual residency, it is necessary to consider the tie breaker rules in the Canadian Convention. Article 4(3) of the Canadian Convention provides that if an individual is a resident of both Australia and Canada, their residency status for the purposes of applying the provisions of the Canadian Convention shall be determined in accordance with the following rules:

- (a) they shall be a resident solely of the Contracting State in which they have a permanent home available; and
- (b) if they have a permanent home available to them in both Contracting States, or if they do not have a permanent home available to them in either, they shall be deemed to be a resident solely of the Contracting State with which their personal and economic relations are the closer.

31. The terms 'permanent home' and 'personal and economic relations' are otherwise undefined in the Canadian Convention. Article 3(3) of the Canadian Convention provides that any term not defined shall, unless the context otherwise requires, have the meaning which it has under the law relating to taxes of the country applying the Canadian Convention.

32. Taxation Ruling TR 2001/13 discusses the Commissioner's views about interpreting double tax agreements. Paragraph 104 provides that the OECD Model Tax Convention and Commentary will often need to be considered in interpreting double tax agreements.

33. The OECD Commentary provides that in relation to a 'permanent home':

- (a) for a home to be permanent, an individual must have arranged and retained it for his or her permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration. The dwelling has to be available at all times continuously and not occasionally for the purposes of a stay, which owing to the reasons for it is necessarily of short duration (for example, travel for pleasure, business travel, attending a course and so on); and
- (b) any form of home may be taken into account, including a house or apartment belonging to or rented by the individual and a rented furnished room.

34. As the CCFD employees maintain residences in both countries which are available for their permanent use at all times continuously, the CCFD employees have a permanent home in Australia and in Canada.

35. In relation to a taxpayer's personal and economic relations, the OECD Commentary provides that regard should be had to factors such as family and social relations, occupation, political, cultural or other activities and place of business.

36. The CCFD employees have personal and economic ties with Australia and Canada. However, it is accepted that the CCFD employees' personal and economic ties are closer with Canada than with Australia.

37. Therefore, the CCFD employees will be considered residents of Canada for the purposes of applying the provisions of the Canadian Convention.

38. Article 15(1) of the Canadian Convention provides that subject to Article 19, remuneration derived by an individual who is a resident of Canada in respect of employment shall be taxable only in Canada unless the employment is exercised in Australia. If the employment is exercised in Australia, any remuneration received may be taxable in Australia.

39. Article 19 of the Canadian Convention provides that salary and wages paid by Canada to any individual in respect of services rendered in the discharge of governmental functions shall be taxable only in Canada.

40. The CCFD employees' salary and wages are paid by the City of Calgary. Duties performed by a CCFD employee are considered to involve the discharge of governmental functions for the purposes of Article 19.

41. Therefore, the salary and wages derived by CCFD employees who participate in the exchange program are taxable only in Canada under Article 19 of the Canadian Convention. Article 15(1) of the Canadian Convention does not apply.

42. As Australia does not have a taxing right over the salary and wages derived by the CCFD employees, the salary and wages are not assessable under 6-5(2) of the ITAA 1997.

Detailed contents list

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

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Commissioner of Taxation

22 September 2004

Previous draft:

Not previously issued as a draft

- ITAA 1997 6-5(2)

- International Tax Agreements Act 1953 4

*Related Rulings/Determinations:*CR 2001/1; TR 92/1; TR 92/20;
TR 97/16; TR 98/17; TR 2001/13

- International Tax Agreements Act 1953 Sch 3

- International Tax Agreements Act 1953 Sch 3 Article 3(3)

- International Tax Agreements Act 1953 Sch 3 Article 4(3)

- International Tax Agreements Act 1953 Sch 3 Article 15(1)

- International Tax Agreements Act 1953 Sch 3 Article 19

- International Tax Agreements Act 1953 Sch 3A

Subject references:

- Canada
- exempt income
- government service income
- international tax
- residency

Legislative references:

- Copyright Act 1968
- TAA 1953 Pt IVA

ATO references

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