

CR 2006/57 - Income tax: exempt income: approved projects: employees of JML Engineered Facades Pty Limited

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Class Ruling

Income tax: exempt income: approved projects: employees of JML Engineered Facades Pty Limited

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	12
Scheme	16
Ruling	37
NOT LEGALLY BINDING SECTION	
Appendix 1:	
<i>Explanation</i>	40
Appendix 2:	
<i>Detailed contents list</i>	63

ⓘ This publication provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provision dealt with in this Ruling is section 23AF of the *Income Tax Assessment Act 1936* (ITAA 1936).

Class of entities

3. The class of entities to which this Ruling applies are:

- general employees of JML Engineered Facades Pty Limited (JML); and
- project specific employees of JML,

who have been employed by JML to the United Arab Emirates (UAE) on approved projects titled:

- Dubai international airport internal screens;
- Dubai international airport car park canopy; and

- Dubai international airport light rail train station.
4. Those deployed as described in paragraph 3 of this Ruling to whom this Ruling applies will be collectively referred to in this Ruling as JML employees. The approved projects described in paragraph 3 of this Ruling will be collectively referred to in this Ruling as projects.
5. JML employees remain Australian residents throughout the period of deployment.
6. JML employees include those employees who while employed on the approved project return to Australia for a period during which they utilise leave that has wholly accrued from their service in UAE.
7. The class of entities does not include JML employees:
- who while employed in the UAE return to Australia for a period during which they utilise leave that has wholly or partly accrued from service in Australia; or
 - whose term of employment in the UAE is terminated before completing a continuous period of qualifying service of not less than 91 days.

Qualifications

8. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 16 to 36 of this Ruling.
10. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
 - this Ruling may be withdrawn or modified.
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Date of effect

12. This Ruling applies from 1 April 2006. 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

16. The scheme 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 Taxation 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 scheme are:

- the application for Class Ruling (dated 10 April 2006);
- current staff agreement letter;
- project specific staff agreement letter;
- current JML staff – General Terms and Conditions of employment;
- project specific staff – General Terms and Conditions of employment; and
- further information supplied by the applicant (received 20 April 2006).

17. Employees of JML perform personal services on the projects in the UAE.
18. The company, JML Engineered Facades Pty Limited is an Australian company which was successful in tendering for the projects in the UAE.
19. Each project has a separate contract representing a stage of completion of the entire development. These stages will be completed concurrently.
20. The 3 projects have been granted 'approved project status' by the Minister for Trade or the Minister's delegate under subsections 23AF(11) to (14) of the ITAA 1936.
21. The JML employees will be employed in the UAE for a period not less than 91 days.
22. The period of employment in the UAE is a minimum period of 12 months from the time the individual actually goes to Dubai. The contract will be revised after this date subject to progress on the projects.
23. JML employees employed to perform duties under the projects will comprise two categories:
 - general employees of JML; and
 - project specific employees of JML.
24. The remuneration for general employees of JML takes the form of an annual salary entitlement and the payment of an accommodation allowance. The salary and allowance will be paid into the employee's nominated account on a monthly basis.
25. A bonus will be paid to a general employee upon completion of the 12 month term of engagement. This will be prorated monthly for further service should the project be extended beyond the initial term of 12 months.
26. The accommodation allowance will be paid while the general employee is on leave accrued during the deployment period.
27. During the period of employment on the project general employees will accrue 20 days annual recreation leave.
28. While engaged in the UAE the leave entitlement for general employees can only be used for a maximum period of 7 days for recreational leave back to Australia and subsequent return to Dubai. This leave will allow employees to return to Australia to visit family and relations. This recreation leave will only be approved after a minimum of 91 days continuous service.
29. No work will be undertaken during recreational leave in Australia.
30. The remuneration for Project specific employees takes the form of an annual salary entitlement and the payment of an accommodation allowance. The salary and allowance will be paid into the employee's nominated account on a monthly basis.

31. A 'handcuff' bonus will be paid to project specific employees upon completion of the 12 month term of engagement. The bonus does not accrue monthly and will not be paid upon early termination whether involuntary or voluntary.

32. During the period of employment on the projects, project specific employees are not entitled to annual recreation leave.

33. No other breaks will be taken by JML employees in the UAE apart from a weekly day off and any rostered days.

34. The only personnel travelling outside the UAE in relation to this project will include the design manager who will travel to the Philippines to check on the drafting company engaged on the project. The project director will travel to India to source labour.

35. The employees do not pay tax on this income in the UAE.

36. The UAE does not impose income tax on income derived in the capacity of an employee; income from personal service or similar income.

Ruling

37. The income referred to at paragraphs 24 to 26, 30 and 31 of this Ruling, derived by JML employees described in paragraphs 3 to 6 of this Ruling who work in the UAE on the projects, is exempt from tax under subsection 23AF(1) of the ITAA 1936 where:

- the projects are eligible projects (that is the approval for the project has not expired or been withdrawn by the Minister for Trade);
- the employee has been engaged on qualifying service in the UAE for a continuous period of not less than 91 days; and
- the income is attributable to that qualifying service.

38. Where the income is exempt from tax under paragraph 37 of this Ruling, the income is 'eligible foreign remuneration' of the employees under subsection 23AF(18) of the ITAA 1936 and is taken into account in calculating the Australian tax on other assessable income derived by the employee (subsection 23AF(17A) of the ITAA 1936).

Example

39. *In the 2005-2006 income year, an employee derives the following types of income:*

- a) *Australian employment income of \$45,000;*
- b) *eligible foreign remuneration of \$15,100;*
- c) *expenses directly related to eligible foreign remuneration of \$100.*

Assume that the 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 \$60,000 (\$45,000 + \$15,100 – \$100).*

Step 2

*The **notional gross tax** is \$14,760 (the normal Australian income tax and Medicare levy payable on a taxable income of \$60,000).*

Step 3

*The **other taxable income** is \$45,000 (Australian employment income).*

Step 4

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

$$(\$14,760/\$60,000) \times \$45,000 = \$11,070$$

Appendix 1 – Explanation

❶ *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.*

40. A payment or other benefit received by a taxpayer is assessable income if it is:

- income in the ordinary sense of the word (ordinary income); or
- an amount or benefit that through the operation of the provisions of the tax law is included in assessable income (statutory income).

Ordinary income

41. Subsection 6-5(1) of the ITAA 1997 provides that assessable income includes income according to ordinary concepts (ordinary income).

42. Payments made by JML to the employees are considered to be ordinary income.

43. Subsection 6-5(2) of the ITAA 1997 further provides that the assessable income of an Australian resident will include the ordinary income derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

44. The determination of a person's residency status depends on their own circumstances and is a determination made in relation to each year of income. For further information, see Taxation Ruling IT 2650. This Ruling only applies to the class of entities who remain Australian residents for taxation purposes during the posting period in the UAE.

45. Subsection 6-15(2) of the ITAA 1997 provides that if an amount is exempt income then it is not assessable income. Exempt income is that which is made exempt from income tax by a provision of the ITAA 1997 or another Commonwealth law (section 6-20 of the ITAA 1997).

46. Section 11-15 of the ITAA 1997 lists those provisions dealing with income which may be exempt. Included in this list is section 23AF of the ITAA 1936.

47. Section 23AF of the ITAA 1936 provides that where a natural person is engaged on qualifying service on a particular approved project for a continuous period of not less than 91 days, any eligible foreign remuneration derived by the person from that qualifying service is exempt from tax.

Eligible foreign remuneration

48. Subsection 23AF(18) of the ITAA 1936 defines 'eligible foreign remuneration'. The definition refers to income that is directly attributable to qualifying service by a resident individual on an approved project. The income referred to in paragraphs 24 to 26, 30 and 31 is income derived under a contract that is wholly or substantially for the personal services of the employee.

49. Subsection 23AF(17) of the ITAA 1936 excludes the following types of income from being eligible foreign remuneration:

- income from overseas employment that is exempt from Australian tax due to the application of section 23AG of the ITAA 1936;
- income from superannuation, termination of employment or kindred payment or an amount that is excluded from the definition of eligible termination payment;
- income that is derived in a foreign country and is exempt from income tax in that country but would not have been exempt if not for the operation of a double tax agreement;
- payments in lieu of long service leave; or
- payment by way of superannuation or pension.

The payments to the employees described in paragraphs 24 to 26, 30 and 31 of this Ruling are not income of the type excluded by subsection 23AF(17) of the ITAA 1936.

50. The income referred to in paragraphs 24 to 26, 30 and 31 of this Ruling derived by the employees is eligible foreign remuneration.

51. If, however, an employee is remunerated at above the appropriate market rate for services on the project, the employee should seek advice from a taxation advisor or the Tax Office.

Qualifying service

52. Subsection 23AF(3) of the ITAA 1936 provides that a person shall be taken to be engaged on qualifying service on an approved project during any of the following periods during which the person:

- a) is outside Australia and engaged in performing services on the project, including days within those periods when, as a normal incidence of work schemes, the person is not actually performing services on the project (for example weekends, public holidays and equivalent time-off);
- b) is travelling between Australia and the project site, provided the Commissioner considers the time taken for the journey is reasonable;

- c) is absent from work due to accident or illness occurring while the person was on qualifying service as described in (a) or (b); or
- d) is on leave, other than long service leave, that accrued while the person was engaged in qualifying service on the project, whether or not taken in Australia.

Employees working on the project are taken to be engaged in qualifying service. If the period of continuous qualifying service completed by the employee is less than 91 days, the income is not exempt under section 23AF of the ITAA 1936.

Breaks in continuity of qualifying service

53. If during the period of qualifying service, a person returns to Australia for an intervening period of short duration (and is therefore not present in a foreign location), the person may still remain eligible for exemption from Australian tax on the income derived from the approved project.

54. Provided that the number of intervening days spent in Australia does not exceed one-sixth of the number of days engaged on qualifying service on the approved project, the continuity of the period of qualifying service will not be broken. However, the number of these intervening days spent in Australia does not count as days engaged on qualifying service on the approved project (see subsection 23AF(8) of the ITAA 1936).

Unforeseen circumstances

55. A period of qualifying service may be deemed to have been met even though a person ceased to be engaged on an approved project prior to completing 91 continuous days of service because of unforeseen circumstances. The period of qualifying service of that person shall be deemed to include the period during which the person would, in the opinion of the Commissioner, have continued to be engaged on qualifying service on the approved project but for the consequences of those unforeseen circumstances (subsection 23AF(6) of the ITAA 1936).

56. However, only the eligible foreign remuneration derived from the period of qualifying service completed before the cessation due to unforeseen circumstances is eligible for exemption under section 23AF of the ITAA 1936.

Substituted person

57. If a person (the substituted person) replaces another person engaged by JML whose qualifying service was prematurely terminated for unforeseen reasons, special rules apply to work out the qualifying service period of the substituted person.

58. The substituted person's period of qualifying service will include the period of the person originally assigned to the project and the period in which they were actually engaged on the project. If the sum of these periods is not less than 91 days, the substituted person will be eligible for the exemption (subsection 23AF(7) of the ITAA 1936).

59. It is only the eligible foreign remuneration that the substituted person derives from qualifying service that commenced from the time when the substitution commences that will be exempt.

Exempt 23AF income and other income

60. The eligible foreign remuneration of the employees that are exempt from Australian tax under section 23AF of the ITAA 1936 are nevertheless taken into account in calculating the Australian tax on other assessable income derived by the employee (subsection 23AF(17A) of the ITAA 1936).

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

62. In calculating these amounts, 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 the UAE are deductible from exempt income.

Appendix 2 – Detailed contents list

63. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	8
Date of effect	12
Scheme	16
Ruling	37
Example	39
Appendix 1 – Explanation	40
Ordinary income	41
Eligible foreign remuneration	48
Qualifying service	52
Breaks in continuity of qualifying service	53
Unforeseen circumstances	55
Substituted person	57
Exempt 23AF income and other income	60
Appendix 2 – Detailed contents list	63

References

- Previous draft:*
- ITAA 1936 23AF(1)
- Not previously issued as a draft
- ITAA 1936 23AF(3)
 - ITAA 1936 23AF(6)
- Related Rulings/Determinations:*
- IT 2650
- ITAA 1936 23AF(7)
 - ITAA 1936 23AF(8)
 - ITAA 1936 23AF(11)
 - ITAA 1936 23AF(12)
- Subject references:*
- approved overseas project - ITAA 1936 23AF(13)
 - exempt income - ITAA 1936 23AF(14)
 - foreign income - ITAA 1936 23AF(17)
 - foreign income deductions - ITAA 1936 23AF(17A)
 - foreign source income - ITAA 1936 23AF(18)
 - international tax - ITAA 1936 23AG
 - international tax - ITAA 1997 6-5(1)
 - overseas countries - ITAA 1997 6-5(2)
 - overseas employees - ITAA 1997 6-15(2)
 - overseas tax laws - ITAA 1997 6-20
 - residence of individuals - ITAA 1997 11-15
 - United Arab Emirates - TAA 1953
 - TAA 1953 Sch 1 357-75(1)
- Legislative references:*
- ITAA 1936 23AF
 - Copyright Act 1968
-

ATO references

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