



# ***CR 2013/2 - Income tax: assessable income: certain Australian Agency for International Development employees - deployed to Afghanistan to provide Official Development Assistance***

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## Class Ruling

# Income tax: assessable income: certain Australian Agency for International Development employees – deployed to Afghanistan to provide Official Development Assistance

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This publication (excluding appendices) 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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.

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## 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 provisions dealt with in this Ruling are:

- section 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)

All subsequent legislative references are to the ITAA 1936 unless otherwise indicated.

## Class of entities

3. The class of entities to which this Ruling applies is certain Australian Agency for International Development (AusAID) employees who are deployed to Afghanistan to deliver Australian Official Development Assistance (ODA) and who are covered by a Status of Forces Agreement between Australia and the Islamic Republic of Afghanistan dated 29 August 2005 (the SOFA). For completeness, at the time of issuing this Class Ruling, the ATO is advised that Development Advisers in Tarin Kowt and Kandahar; Stabilisation Advisers in Tarin Kowt and Forward Operating Bases in Uruzgan; Minister-Counsellor, Counsellor, First Secretary, Secondary Secretary positions in Kabul, are covered by the SOFA. In this Ruling, these entities are referred to as 'AusAID employees'.

4. AusAID employees remain Australian residents for income tax purposes throughout the period of their deployment.

5. AusAID employees include employees who while on deployment to Afghanistan return to Australia for a period during which they utilise leave that has wholly accrued from their service in Afghanistan.

6. AusAID employees include employees who while on deployment to Afghanistan return to Australia for a period during which they work or undertake training in Australia solely in relation to their deployment to Afghanistan.

## Qualifications

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

8. 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 12 to 28 of this Ruling.

9. 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

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11. This Ruling applies from 1 July 2011 to 30 June 2014. However, this Ruling will 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 this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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12. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- Application for Class Ruling received on 2 November 2011, including the Conditions of Service for AusAID Deployments to Afghanistan (CoS)
- Vienna Convention on Diplomatic Relations [1968] ATS 3 (VCDR)
- Status of Forces Agreement between Australia and the Islamic Republic of Afghanistan dated 29 August 2005 (the SOFA)
- Overseas Deployment of Australia-based Commonwealth Employees Manual dated 21 April 2010
- Department of Foreign Affairs and Trade (DFAT) website – Diplomatic and Official Passports
- Advice received from PricewaterhouseCoopers as the applicant's advisors on 18 October 2012 in relation to Afghanistan income tax law
- Advice received from the Office of International Law, Attorney General's Department on 22 October 2012 in relation to the status of the SOFA

13. AusAID is the key Australian Government agency responsible for delivering Australian ODA. Australian ODA is assistance delivered through the Australian Government's overseas aid program that is administered by the Department of Foreign Affairs and Trade or AusAID.

14. The AusAID employees are Australian public servants or Australian Civilian Corps employed by AusAID. They contribute to AusAID programs through day-to-day management of Australian aid programs, conduct strategic engagement with key stakeholders including the Afghanistan government, other donors, regional and multilateral organisations and civil society and represent the Australian Government and AusAID through a range of relationship-building activities in Afghanistan.

15. The AusAID employees are at all times engaged in service that is directly attributable to the delivery of ODA.

16. AusAID employees who submit themselves to the direction and orders of the Commander Australian Contingent and the officer in charge of any unit to which the employee is attached, are regarded as Defence Civilians under the *Defence Force Discipline Act 1982* (DFDA 1982).

17. As stated at paragraph 3, AusAID employees covered by this ruling comprise Development Advisers in Tarin Kowt and Kandahar; Stabilisation Advisers in Tarin Kowt and Forward Operating Bases in Uruzgan; Minister-Counsellor, Counsellor, First Secretary, Second Secretary positions in Kabul.

18. The AusAID employees identified at paragraph 3 of this ruling are covered by the SOFA.

19. The AusAID employees work in Afghanistan on a rotational basis. Employees will be deployed for 8 weeks, followed by 28 calendar days decompression leave. In a 52 week period they perform 4 x 8 week rotations. Employees may also be deployed for 104 weeks. In a 104 week period they perform 8 x 8 week rotations.

20. Prior to the first rotation employees are required to participate in Reception, Staging and Onward-movement and Integration training in the United Arab Emirates (UAE). Travel to and from Afghanistan, and the UAE, will usually be by Australian Defence Force (ADF) scheduled flights. For periods of decompression leave, employees who do not use ADF flights will be provided with economy flights to Canberra.

21. AusAID employees are on call 24 hours per day seven days per week while on deployment. Employees are required to live in secure compounds.

22. The decompression leave taken at the end of every 8 week period is accrued due to the service in Afghanistan. Employees are not able to utilise their normal recreation leave or long service leave provided through AusAID's Enterprise Agreement or Common Law Contract during their deployments to Afghanistan.

23. In addition to salary, employees are entitled to a number of allowances and benefits for the duration of the posting, including:

- transfer allowance;
- cost of posting allowance;
- hardship allowance;
- special location supplement;
- additional household allowance; and
- miscellaneous allowance.

24. AusAID employees travel on diplomatic passports. The Afghan government is notified by Third Person note each month of the AusAID employees assigned for work in Afghanistan. The AusAID employees passports contain an observation specific to the role that they will be performing in Afghanistan.

25. There is no comprehensive tax treaty or other agreement between Australia and the Afghan Government dealing primarily with taxation.

26. Under the Income Tax Law 2009 of Afghanistan, resident natural persons are taxed on income from all sources worldwide, including but not limited to wages and salaries. Non-residents are subject to tax on all income with its source in Afghanistan.

27. A natural person shall be resident in Afghanistan, if the person is present in Afghanistan for a period or periods amounting to 183 days in an Afghan fiscal year.

28. AusAID employees covered by this class ruling are regarded as residents for Afghan tax purposes.

## **Ruling**

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29. The salary and allowances referred to in paragraph 23 of this Ruling, derived by the AusAID employees described in paragraphs 3 to 6 of this Ruling are ordinary income under section 6-5 of the ITAA 1997.

### **Exempt income**

30. Subject to paragraphs 31, 32 and 33 of this Ruling, the salary and allowances referred to in paragraph 23 of this Ruling, derived by the AusAID employees described in paragraphs 3 to 6 of this Ruling deployed to Afghanistan, are exempt from tax under section 23AG where:

- the AusAID employee has been engaged, or is taken to have been engaged, in foreign service in Afghanistan for a continuous period of at least 91 days,

- the salary and allowances of AusAID employees are derived from that foreign service, including payments for decompression leave payments that has wholly accrued from the period of service in Afghanistan,
- the AusAID employees travel on a diplomatic passport and the Afghan government is notified, by Third Person note each month, that the AusAID employee is assigned for work in Afghanistan, and
- the continuous period of service in Afghanistan is directly attributable to the delivery of Australian ODA.

## **Assessable income**

31. The salary and allowances derived by AusAID employees in Afghanistan are included in their assessable income and are not exempt from tax under subsection 23AG(1) where:

- the employee is engaged in a continuous period of foreign service of less than 91 days;
- they are not foreign earnings derived from that foreign service, as defined in subsection 23AG(7); or
- the employee had a change in circumstances and no longer satisfies the exemption conditions. The exemption will still apply for the period that the employee satisfies the exemption conditions.

32. The transfer allowance referred to in paragraph 23 of this Ruling is only exempt from tax under subsection 23AG(1) to the extent that it is derived from the foreign service. Therefore, any part of the transfer allowance that is in respect of expenses that are attributable to the period that an AusAID employee is engaged in foreign service, is exempt from tax. However, any part of the transfer allowance that is in respect of expenses that are attributable to a period prior to the commencement or after the completion of foreign service is not exempt from tax.

## **Exemption with progression**

33. The salary and allowances that are exempt from tax under paragraph 30 of this Ruling are nevertheless taken into account in calculating the Australian tax on other assessable income derived by the employee (subsection 23AG(3)).

## **Example 1**

34. *In the 2010-2011 income year, Daniel, an 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 exempt foreign employment income of \$100.

Assume that Daniel 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:

$$\frac{(\text{Notional gross tax})}{\text{Notional gross taxable income}} \times \text{Other taxable income}$$

Step 1

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

Step 2

The **notional gross tax** is \$22,600 (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 Daniel's Australian income is:

$$(\$22,600/\$90,000) \times \$60,000 = \$15,066.66$$

**Note:** this calculation is based on the 2011-2012 income tax rates. As the income tax rates for future years may change, you should refer to the tax rates for that current income year.

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**Commissioner of Taxation**

9 January 2013]

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## 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.*

35. Subsection 6-5(2) of the 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.

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

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

38. 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.

### Exempt income

39. Section 23AG provides an exemption from Australian tax on the foreign earnings derived by an Australian resident individual from foreign service which they have been engaged in continuously for at least 91 days.

40. Further, for the exemption to apply, the continuous period of foreign service must be directly attributable to the activities which are listed in subsection 23AG(1AA) (see paragraphs 89 to 101 of this Ruling).

41. Further, the foreign earnings must not be exempt from income tax in the foreign country only because of the reasons listed in subsection 23AG(2) (see paragraphs 102 to 120 of this Ruling) and all of the other requirements in section 23AG must be satisfied.

42. Accordingly, the basic tests for the exemption of foreign employment income in section 23AG 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';
- the taxpayer must derive 'foreign earnings' from that 'foreign service';
- the foreign service must be directly attributable to an activity that is listed in subsection 23AG(1AA); and
- the foreign earnings must not be covered by subsection 23AG(2).

**Resident of Australia**

43. This Ruling is based on the fact that AusAID employees deployed to Afghanistan will remain Australian residents for tax purposes throughout the period of their deployment.

44. 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 Taxation Ruling IT 2650.

**Engaged in foreign service**

45. '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)).

46. 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'.

47. AusAID employees referred to in paragraphs 3 to 6 of this Ruling are considered to meet the above definition of an 'employee'.

48. Deployment of AusAID employees to Afghanistan 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'.

**Continuous period of not less than 91 days**

49. Each AusAID employee based in Afghanistan is expected to serve in Afghanistan for a period of at least 91 days. These periods of 'foreign service', if met, satisfy the test that Australian residents working overseas must be engaged in foreign service 'for a continuous period of not less than 91 days'.

50. Should an AusAID employee depart Afghanistan prior to the completion of 91 days of continuous service, that employee will normally be ineligible for the exemption.

51. However, in certain instances, an employee who departs Afghanistan 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 Taxation Determination TD 2012/8; and paragraphs 53 to 78 of this Ruling).

52. If a taxpayer dies at a time when they have been engaged in foreign service for a continuous period of less than 91 days, subsection 23AG(1A) deems the taxpayer to have satisfied the 91-day rule if they would otherwise have continued to be engaged in that foreign service and met the 91-day rule.

## **Temporary absences forming part of a period of foreign service**

53. Subsection 23AG(6) treats certain temporary absences from foreign service as forming part of the period of foreign service. The Commissioner's view on the application of that subsection is reflected in TD 2012/8.

54. Absences which form part of the period of foreign service include absences taken in accordance with the terms and conditions of employment because of accident or illness or recreation leave.

55. 'Recreation leave' is leave in the nature of paid holidays to which an employee has accrued an entitlement. Usually it is the employee's accrued annual leave. Leave which fits this description is 'recreation leave', even if it is not called this.

56. However, recreation leave does not include:

- leave that is not in the nature of paid holidays, such as weekends, public holidays, rostered days off, days off due to part time arrangements, flex-days, 'compulsory lay-off/over days', 'grounded days' and days off in lieu;
- purchased leave;
- maternity and parental leave;
- 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

57. According to TD 2012/8, while weekends, public holidays, rostered days off, days off due to part time arrangements, flex-days, 'compulsory lay-offs/over days', 'grounded days' and days off in lieu are not recreation leave for the purposes of subsection 23AG(6), a person will not be treated as absent from foreign service on these days. This is the case regardless of whether these days are spent in the country where the person is performing the foreign service or in Australia or a third country.

58. According to TD 2012/8, maternity leave and parental leave are not 'recreation leave' and are not covered by paragraph 23AG(6)(a). These leave types are distinct categories of leave each with a distinct rationale. (See paragraphs 60 to 62 of TD 2012/8.)

59. TD 2012/8 addresses questions in relation to the length of the working day. (See paragraph 7 and example 2 of TD 2012/8.)

60. If the terms and conditions of employment require a person to work on a cyclical arrangement under which they spend a period working in a foreign country followed by a period of paid leave, each period of paid leave is treated as recreation leave to which paragraph 23AG(6)(a) applies, such that it amounts to part of a continuous period of foreign service, if the leave is reasonable and does not amount to extended leave (refer TD 2012/8).

61. Whilst subsection 23AG(6) of the ITAA 1936 provides that extended leave is not part of recreation leave, TD 2012/8 concludes that additional recreation leave entitlements granted to employees posted overseas are not extended leave where the additional leave is reasonable. For example where it is granted due to the hardship involved in the postings resulting in the need for more rest and recreation.

62. The Conditions of Service for AusAID Deployments to Afghanistan (CoS) allows the deployed AusAID employees 28 calendar days decompression leave per 8 week rotation of the deployment.

63. The decompression leave is granted to AusAID employees deployed in Afghanistan in recognition of the hostile and difficult environment in which the employees are expected to live and work. The conditions include for example:

- being on call 24 hours per day seven days per week
- the physical risk as Afghanistan is a hostile security environment
- living on military bases or in secure areas
- being considered to be Defence Civilians.

64. Given the arduous conditions of the overseas deployment, it is considered that the 28 day period of paid decompression leave granted to AusAID employees is reasonable.

65. Accordingly, it is considered that the rotational basis of the postings is a cyclical arrangement (as described in TD 2012/8) and the periods of decompression leave are temporary absences from duty authorised by the terms and conditions of the employee's foreign service which will not break the continuity of eligible foreign service. Therefore, the entire period of the cyclical arrangement will form part of a continuous period of 'foreign service' for the purposes of subsection 23AG(1).

**Example 2**

66. *Rochelle is an Australian resident. She is deployed for a twelve month period of foreign service that satisfies subsection 23AG(1AA). Under the terms and conditions of her employment she works under a cyclical arrangement in which each cycle consists of two months working in a foreign country followed by one month of leave on full pay which may be taken in Australia or elsewhere. During the time she is in the foreign country she works long hours in conditions of severe hardship, and her total working time per year, averaged over 52 weeks, amounts to approximately 35 hours per week. The month of leave in each cycle is given in recognition of the long hours and extreme conditions of the work in the foreign country resulting in the need for more rest and recreation and the fact that some time will need to be spent on matters other than rest and recreation.*

*Rochelle operates her own business in Australia and during each month of leave she is engaged in that business.*

*Considering the conditions of Rochelle's employment, the leave is reasonable. Her engagement in her own business during her leave will not result in a break in the period of foreign service. Consequently each month of leave is treated as recreation leave which accrued during the foreign service, and amounts to part of a continuous period of foreign service.*

67. According to paragraph 55 of TD 2012/8, purchased leave cannot be treated as part of a period of foreign service. When a person purchases leave, they accept a reduction in salary in consideration for additional leave. Therefore purchased leave is not treated as foreign service because it is, in essence, leave without pay for the purposes of subparagraph 23AG(6)(a)(iii). Additionally, purchased leave will in some cases be extended leave, which, by virtue of subparagraph 23AG(6)(a)(ii), is not treated as foreign service.

68. Paragraph 23AG(6)(b) provides that a period during which a person is engaged in foreign service includes a period during which the person is, in accordance with the terms and conditions of that service, 'absent from work because of accident or illness'. As discussed at paragraph 57 of TD 2012/8, this applies if in accordance with the terms and conditions of the foreign service the person is absent on sick leave or other leave such as convalescence leave, because they are ill or have had an accident, regardless of whether the accident or illness is caused by the foreign service. (See also examples 5 to 8 of TD 2012/8).

69. TD 2012/8 concludes paragraph 23AG(6)(b) also applies if the person takes leave because of an accident or illness of another person, including the death of another person. Accordingly, a visit to Australia or a third country for such a reason, in accordance with the terms and conditions of the foreign service, is treated as forming part of the person's period of continuous foreign service.

70. According to TD 2012/8 there is no limit to the period of absence that can be treated as foreign service under paragraph 23AG(6)(b), providing that the leave is during the scheduled period of foreign service, and is allowed under the terms and conditions of the foreign service. This is the case regardless of whether the absence is on full pay, on reduced pay or without pay. Paragraph 23AG(6)(b) applies independently of subparagraph 23AG(6)(a)(iii).

71. However, an absence from work on maternity leave or parental leave cannot be described as an absence 'because of accident or illness' for the purpose of paragraph 23AG(6)(b). As concluded by TD 2012/8, a period of maternity leave or parental leave does not come within the extended meaning of 'engaged in foreign service' in subsection 23AG(6) and so will constitute a break in foreign service. (See paragraphs 63 to 67 of TD 2012/8).

**Temporary work related absences not breaking the period of foreign service: excessive administrative test**

72. TD 2012/8 provides that if a person engaged in foreign service is required by their employer to spend a short time in Australia or in another foreign country during a period of foreign service for reasons directly related to that person's continuing foreign service engagement, that time will be treated as part of the person's continuous period of foreign service **provided it is not excessive by comparison with the scheduled period of foreign service**. For example, this will apply to time spent to attend conferences, training sessions or briefing sessions.

73. TD 2012/8 provides that what is considered excessive will depend on the circumstances (see examples 11 and 12 of TD 2012/8 and paragraphs 71 to 73 of the TD). When determining whether the total days spent outside of the country of foreign service are excessive, all work related absences and available days (see paragraph 73 of the TD) spent outside of the country of foreign service will be aggregated.

**Temporary absences not breaking the period of foreign service: the legislative rule**

74. Where an employee takes leave other than:

- the leave outlined at paragraph 54 of this Ruling; or
- leave that is not considered excessive as outlined in paragraphs 72-73 of this Ruling,

they need to determine whether the continuity of service can be maintained (subsection 23AG(6A)).

75. Paragraphs 76 to 78 of this Ruling provide an explanation of this tax provision. Alternatively, the AusAID employee could seek professional advice from their taxation adviser or the Tax Office.

### **Continuity of the period of foreign service: 1/6 legislative rule**

76. The 1/6 legislative rule allows two or more periods of foreign service to be joined as a continuous period of foreign service, unless, at any time, the total period of absence (in days) between the periods of foreign service exceeds 1/6 of the total number of days of foreign service.

77. If the period of absence exceeds 1/6 of the total period of foreign service at any time, continuity of foreign service is broken. The AusAID employee will begin a new period of foreign service when he or she next engages in foreign service and must determine whether that period of foreign service lasts for at least 91 continuous days (subsection 23AG(6A)).

78. The 1/6 legislative rule should not be confused with the excessive administrative test outlined at paragraphs 72 to 73 of this Ruling. The 1/6 legislative rule in subsection 23AG(6A) permits two or more periods of foreign service to constitute a continuous period of foreign service where continuity would be otherwise broken by absence. Absences between the periods of foreign service under the 1/6 legislative rule do not form part of the continuous period of foreign service. In contrast, the excessive administrative test permits what would otherwise be a break in the foreign service to be included in a continuous period of foreign service, where that absence is work related and not excessive. (For the 1/6 legislative rule see example 13 of TD 2012/8 and paragraphs 74 to 77 of the TD; and, for the excessive administrative test, see paragraphs 72 and 73 of this Ruling.)

### **Foreign earnings**

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

**foreign earnings** means income consisting of earnings, salary, wages, commission, bonuses or allowances, or of amounts included in a person's assessable income under Division 83A of the *Income Tax Assessment Act 1997* (about employee share schemes), but does not include any payment, consideration or amount that:

- (a) is included in assessable income under Division 82 or Subdivision 83-295 or Division 301, 302, 304 or 305 of the *Income Tax Assessment Act 1997*; or
- (b) is included in assessable income under Division 82 of the *Income Tax (Transitional Provisions) Act 1997*; or
- (c) is mentioned in paragraph 82-135(e), (f), (g), (i) or (j) of the *Income Tax Assessment Act 1997*; or

(d) is an amount transferred to a fund, if the amount is included in the assessable income of the fund under section 295-200 of the *Income Tax Assessment Act 1997*.

80. However, the exclusions to the definition of 'foreign earnings' in paragraph 79 of this Ruling are not relevant to this scheme as they relate to pensions, annuities, employment termination payments and other similar amounts.

81. The remuneration of AusAID employees deployed to Afghanistan takes the form of an annual salary entitlement and the payment of various allowances.

82. The salary and allowances which are described in paragraph 23 of this Ruling, are types of income which are included in the definition of 'foreign earnings' in subsection 23AG(7).

83. Whilst the salary of AusAID employees may be paid into financial institutions in Australia, those 'earnings' are still considered 'foreign earnings'.

#### **From that foreign service**

84. To qualify for the exemption the 'foreign earnings' must be derived 'from that foreign service'. This does not mean that the foreign earnings need to be received at the time of engaging in foreign service. The important test is that the foreign earnings need to be attributable to that period of service in a foreign country rather than to a period before or after the period of foreign service.

85. In the case of allowances paid after the taxpayer returns to Australia that relate to the period of foreign service, such allowances 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 would be treated as foreign earnings from foreign service if they arise from the undertaking of that foreign service.

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

87. The following allowances received by AusAID employees:

- cost of posting allowance
- hardship allowance
- special location supplement
- additional household allowance
- miscellaneous allowance



are considered to be exempt as they are derived from that foreign service in Afghanistan.

88. The transfer allowance that is attributable to a period prior to the commencement or after the completion of the foreign service (paid to cover costs such as accommodation costs in Australia prior to posting; taxi fares to and from airports in Australia; loss on sale of motor vehicle (or storage of motor vehicle) and purchase of special equipment and clothing requirements), is not attributable to the period where the employee is engaged in service in a foreign country, and not exempt from tax under subsection 23AG(1).

### **Specific employment activities**

89. Subsection 23AG(1AA) restricts the foreign earnings that are exempt from tax to earnings where the continuous period of foreign service is directly attributable to any of the following:

- (a) the delivery of Australian official development assistance by the person's employer;
- (b) the activities of the person's employer in operating a public fund covered by item 9.1.1 or 9.1.2 of the table in subsection 30-80(1) of the *Income Tax Assessment Act 1997* (international affairs deductible gift recipients);
- (c) the activities of the person's employer, if the employer is exempt from income tax because of paragraph 50-50(c) or (d) of the *Income Tax Assessment Act 1997* (prescribed institutions located or pursuing objectives outside Australia);
- (d) the person's deployment outside Australia as a member of a disciplined force by:
  - (i) the Commonwealth, a State or a Territory; or
  - (ii) an authority of the Commonwealth, a State or a Territory;
- (e) an activity of a kind specified in the regulations

90. The term 'Australian official development assistance' is not defined for the purposes of section 23AG. However, the Explanatory Memorandum (EM) which accompanied Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009 introducing subsection 23AG(1AA) provides guidance on the meaning of the phrase. The relevant paragraphs are below:

#### **Australian official development assistance**

1.19 Australian official development assistance (ODA) is assistance delivered through the Australian Government's overseas aid program, as administered by the Department of Foreign Affairs and Trade and/or the Australian Agency for International Development (AusAID). Australian ODA aims to reduce poverty and achieve sustainable development in developing countries, in line with Australia's national interest.

1.20 In addition to providing Australian ODA directly, AusAID also competitively contracts aid work to Australian and international entities. Thus, in practice, individuals involved in the delivery of Australian ODA can include both Australian Public Service (APS) employees and non-APS employees.

1.21 For the purposes of subsection 23AG(1AA) of the ITAA 1936 the delivery of Australian ODA must be undertaken by the person's employer, which includes AusAID and an entity contracted by AusAID to assist in the delivery of Australian ODA.

91. Paragraphs 1.19 to 1.22, along with Examples 1.1 to 1.3, in the Explanatory Memorandum reveal that paragraph 23AG(1AA)(a) is intended to restrict the section 23AG exemption to foreign earnings derived by:

- Australian Public Service (APS) employees providing assistance that is classified as Australian official development assistance and is delivered through the Australian Government's aid program which is administered by AusAID or the Department of Foreign Affairs and Trade (DFAT); or
- other employees delivering Australian official development assistance on behalf of their employers who in turn have been contracted by the Australian Government to assist in the delivery of Australian official development assistance under the aid program that is administered by AusAID or DFAT.

92. The ordinary meaning of 'assistance' in the Macquarie Dictionary is 'the act of assisting; help; aid'. Therefore, adopting the ordinary meaning, 'assistance' for the purposes of section 23AG would encompass the provision of money, goods or services capable of affording help or aid.

### **Example 3**

93. *Lisa is an APS employee employed by AusAID. On 1 July 2009 Lisa is posted to PNG for 45 days, as a project advisor on an Australian ODA project.*

*At the end of the 45 day posting, Lisa resigns from AusAID and takes up a position as an aid worker in PNG, employed by a prescribed charitable institution covered by paragraph 23AG(1AA)(c). Lisa remains in her new position for another 100 days.*

*Lisa's continuous period of foreign service for the purpose of subsection 23AG(1AA) is 145 days and her foreign earnings for the whole period are eligible for exemption pursuant to section 23AG, subject to the conditions contained in subsection 23AG(2).*

## **Example 4**

94. *As in the above example, Lisa resigns from AusAID at the end of her 45 day posting. However, rather than commencing work as an aid worker, Lisa takes up permanent employment with a bank in PNG.*

*Lisa's continuous period of foreign service in PNG exceeds 91 days but none of her foreign earnings are eligible for exemption because she did not attain 91 days of continuous foreign service in relation to an activity covered by subsection 23AG(1AA).*

## **Example 5**

95. *Michael is an APS employee employed by AusAID. On 1 July 2009 Michael is posted to PNG for 100 days, as a project advisor on an Australian ODA project.*

*At the end of the 100 day posting, Michael resigns from AusAID and takes up a position as an aid worker in PNG, employed by a prescribed charitable institution covered by paragraph 23AG(1AA)(c). Michael remains in his new position for another 100 days.*

*Michael's continuous period of foreign service for the purpose of subsection 23AG(1AA) is 200 days and his foreign earnings for the whole period are eligible for exemption pursuant to section 23AG, subject to the conditions contained in subsection 23AG(2).*

## **Example 6**

96. *As in the above example, Michael resigns from AusAID at the end of his 100 day posting. However, rather than commencing work as an aid worker, Michael takes up permanent employment with a bank in PNG.*

*Michael's continuous period of foreign service in PNG exceeds 91 days. His foreign earnings for the first 100 days are eligible for exemption pursuant to section 23AG, subject to the conditions contained in subsection 23AG(2). His foreign earnings for the second 100 days are not eligible for exemption because that period of foreign service does not relate to an activity covered by subsection 23AG(1AA).*

97. AusAID, an Australian government agency, is delivering Australian ODA in Afghanistan.

98. As this Ruling applies only to AusAID employees who are engaged in the delivery of Australia's ODA program for the period of their deployment to Afghanistan (refer to paragraph 15 of this Ruling), subsection 23AG(1AA) does not prevent the exemption provided by subsection 23AG(1) from applying.

99. In addition, it is considered that the AusAID employees who are deployed as 'defence civilians' under the DFDA 1982 fall within paragraph 23AG(1AA)(d), as members of a disciplined force.

100. Section 3 of the DFDA 1982 provides (emphasis added):

*defence civilian* means a person (other than a defence member) who:  
 (a) **with the authority of an authorized officer, accompanies a part of the Defence Force that is: (i) outside Australia; or (ii) on operations against the enemy; and (b) has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.** (emphasis added)

101. Accordingly, for the purposes of paragraph 23AG(1AA)(d), a disciplined force includes persons performing defence, policing and peacekeeping functions and also those accompanying and providing assistance and support to those so engaged, provided they are subject to the same or similar command structure and rules of conduct as those performing the primary functions of that 'disciplined force'.

### **Certain foreign earnings not exempt**

102. 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 diplomatic or consular privileges and immunities, or privileges and immunities of persons connected with international organisations (paragraphs 23AG(2)(e), (f) and (g)).

103. Australia has not entered into a double tax agreement or tax treaty with Afghanistan.

104. The Income Tax Law of Afghanistan does not generally exempt employment income earned in Afghanistan from income tax.

105. AusAID does not meet the definition of an International Organisation (section 5 of the *International Organisations (Privileges and Immunities) Act 1963*) as AusAID is established solely in Australia and Australia is the only member.

106. All AusAID employees travel on Diplomatic passports which contain an observation specific to the role that they will be performing in Afghanistan. The Afghan government is notified by Third Person Note each month of the Diplomatic and other staff assigned for work in Afghanistan. The government accepts these regular updates.

107. The Department of Foreign Affairs and Trade (DFAT) website states:

**Accreditation: Diplomatic & Official Passport**

Diplomatic passport holders who are posted to an Australian diplomatic mission must be recognised by the host country as a member of the diplomatic staff of the Australian mission before being afforded the rights and privileges as set out in the Vienna Convention on Diplomatic Relations (VCDR).

108. The Overseas Deployment of Australia-Based Commonwealth Employees Manual (prepared by DFAT) advises that 'the diplomatic status of deployed staff is not derived from an incumbent's diplomatic position but conferred on an individual staff member by the host government. Diplomatic accreditation must be sought prior to the deployment of the staff member.'

109. Accreditation is defined in the Overseas Deployment of Australia-Based Commonwealth Employees Manual as 'the process whereby the receiving State accepts an individual nominated by the sending State as its agent for certain functions defined in the Vienna Conventions on Diplomatic and Consular Relations.'

110. The notification of AusAID employees assigned for work in Afghanistan by Third Person Note each month, and the Afghan government's acceptance of these regular updates is considered to meet the requirement that the AusAID employees receive accreditation as administrative and technical staff at the diplomatic mission. Such accreditation provides the holder with the privileges and immunities set down in the VCDR.

111. The VCDR sets out the special rules, that is privileges and immunities, which enable diplomatic missions to act without fear of coercion or harassment through enforcement of local laws and to communicate securely with their sending Governments.

112. It recognises the status of diplomatic agents to enable the efficient performance of the functions of diplomatic missions representing States.

113. Article 37(2) of the VCDR states that members of the administrative and technical staff of the mission shall enjoy the privileges and immunities specified in Article 29 to 35 of the VCDR. Article 34 of the VCDR provides an exemption from all dues and taxes, personal or real, national, regional or municipal of the staff member, except certain taxes including dues and taxes on private income having its source in the receiving State (Afghanistan) and capital taxes on investments made in commercial undertakings in the receiving State (Afghanistan).

114. Accordingly, the VCDR will apply to exempt from tax in Afghanistan the salary, wages and allowances earned by AusAID employees in Afghanistan.

115. The VCDR is an international agreement to which Australia is a party and that deals with diplomatic or consular privileges and immunities, and as such, the reason for this exemption from tax in Afghanistan for AusAID employees is because of one of those reasons listed in subsection 23AG(2).

116. However, AusAID employees identified at paragraph 3 of this ruling are also covered by the SOFA.

117. The SOFA is an agreement between Australia and Afghanistan, which provides that Australian Personnel will be accorded the status equivalent to that accorded administrative and technical staff of the Australian Government under the VCDR.

118. As a result, AusAID employees covered by the SOFA are exempt from income tax in Afghanistan.

119. The SOFA is not an international agreement to which Australia is a party and that deals with diplomatic or consular privileges and immunities. Rather, the SOFA is a document of less than treaty status and hence is not an 'international agreement' for the purposes of section 23AG(2)(f). Further, even if the SOFA were an international agreement to which Australia is a party it does not deal with diplomatic privileges and immunities directly (rather it confers benefits from the VCDR).

120. As the SOFA is not a reason listed in subsection 23AG(2), the exemption from income tax in Afghanistan is not solely because of one or more of the reasons listed in subsection 23AG(2). Therefore subsection 23AG(2) will not operate to deny the 'foreign earnings' exemption under subsection 23AG(1) (see Taxation Determination TD 2005/15).

### **Exemption with progression**

121. The 'foreign earnings' of AusAID 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)).

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

123. 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 Afghanistan are deductible from exempt income.

## Appendix 2 – Detailed contents list

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## Appendix 2 – Detailed contents list

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

TD 2005/14

TD 2005/15

TD 2012/8

*Subject references:*

- Afghanistan
- exempt income
- foreign income
- foreign income deductions
- foreign salary & wages
- foreign source income
- international tax
- overseas countries
- overseas employees
- overseas tax laws
- official development assistance
- residence of individuals

*Legislative references:*

- ITAA 1936 23AG
- ITAA 1936 23AG(1)
- ITAA 1936 23AG(1A)
- ITAA 1936 23AG(1AA)
- ITAA 1936 23AG(2)
- ITAA 1936 23AG(2)(a)
- ITAA 1936 23AG(2)(b)
- ITAA 1936 23AG(2)(c)
- ITAA 1936 23AG(2)(d)
- ITAA 1936 23AG(2)(e)
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- Defence Force Discipline Act 1982
- Diplomatic Privileges and Immunities Act 1967
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- Taxation Administration Act 1953
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*Other references:*

- Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009
- The Income Tax Law of Afghanistan 2009
- Status of Forces Agreement between Australia and the Islamic Republic of Afghanistan dated 29 August 2005

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