


TD 2004/D84 - Income tax: does subsection 23AG(2) of the Income Tax Assessment Act 1936 apply where foreign earnings are exempt from tax in the foreign country for a reason listed in that subsection as well as a reason not listed?

 This cover sheet is provided for information only. It does not form part of *TD 2004/D84 - Income tax: does subsection 23AG(2) of the Income Tax Assessment Act 1936 apply where foreign earnings are exempt from tax in the foreign country for a reason listed in that subsection as well as a reason not listed?*

This document has been finalised by TD 2005/15.



Draft Taxation Determination

Income tax: does subsection 23AG(2) of the *Income Tax Assessment Act 1936* apply where foreign earnings are exempt from tax in the foreign country for a reason listed in that subsection as well as a reason not listed?

Preamble

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVA of the **Taxation Administration Act 1953**. It is only final Taxation Determinations that represent authoritative statements by the Australian Taxation Office.*

1. No. Subsection 23AG(2) does not apply if there is a reason for exempting the foreign earnings that is not listed in that subsection, even if another reason for exempting these earnings, that is listed, also applies.¹ Therefore, the foreign earnings remain exempt from Australian tax under subsection 23AG(1).

Explanation

2. Subsection 23AG(1) provides that where a resident taxpayer is engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived from the foreign service will be exempt from tax in Australia. The term 'foreign service' includes service in a foreign country in the capacity of an employee and the term 'foreign earnings' includes income consisting of salary and wages and allowances: subsection 23AG(7) of the ITAA 1936.

3. Subsection 23AG(1) is subject to subsection 23AG(2) so that the exemption from tax in Australia in subsection 23AG(1) does not apply if the income is exempt from taxation in the foreign country 'only because of any of the reasons set out in subsection 23AG(2).

4. The word 'only' is not defined and accordingly takes its ordinary meaning shaped by the context. The Australian Oxford Dictionary relevantly defines the word 'only' to mean 'solely, merely, exclusively; and no one or nothing more besides'.

¹ Draft TD 2004/D83 states that subsection 23AG(2) applies where there is more than one reason listed in that subsection for exempting the foreign earnings from foreign tax (and there are no other reasons for exempting the foreign earnings from foreign tax).

TD 2004/D84

5. The Explanatory Memorandum (EM) to the Taxation Laws Amendment Act (No.2) 1991 at page 82 provides the following context regarding the meaning of 'only':

Once the law is changed, foreign earnings that are exempt from tax overseas will also be exempt in Australia except where they are exempt in the overseas country **solely** because [of the reasons for exemption set out in s23AG(2)].

6. Accordingly, the use of the word 'only' in subsection 23AG(2) means that the reasons listed in that subsection must be the sole reasons for exempting the foreign earnings from tax in the foreign country.

7. Therefore, if a reason for exempting the foreign earnings from tax in the foreign country is not one of the reasons listed in subsection 23AG(2), the exemption in subsection 23AG(1) continues to apply.

Example

8. *The foreign earnings of an Australian resident volunteer aid worker in Fiji are exempt from taxation in that country because of Article 21 of the Double Tax Agreement concluded between Australia and Fiji ('DTA') and also because of a Memorandum of Understanding ('MoU') with the Fijian Government relating to aid workers (who are not connected to any international organisation).*

9. *The exemption from tax in Fiji as a result of the MoU is a reason for exempting the foreign earnings from foreign tax that is outside subsection 23AG(2). Therefore, regardless of the existence of the DTA, subsection 23AG(2) does not apply and the foreign earnings will be exempt from Australian tax under subsection 23AG(1).*

Date of Effect

10. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will 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 Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Your comments

11. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date.

Due date: 18 February 2005
Contact officer: Adrian Low
E-mail address: adrian.low@ato.gov.au
Telephone: (02) 937 42956
Facsimile: (02) 937 42588
Address: 100 Market Street, Sydney, 2001

Previous draft:

Not previously issued in draft form

- ITAA 1936 23AG(2)

- ITAA 1936 23AG(7)

Related Rulings/Determinations:

TR 92/20; TD 2004/D83

Other references:

- Explanatory Memorandum (EM) to the
Taxation laws Amendment Act (No.2) 1991 at
page 82

Legislative references:

- TAA 1953 Part IVAAA

- ITAA 1936 23AG(1)

ATO references

NO: 2004/17328

ISSN: 1038-8982