


TD 2013/D1 - Income tax: what is the meaning of 'deployment' in paragraph 23AG(1AA)(d) of the Income Tax Assessment Act 1936?

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This document has been finalised by TD 2013/14.



Draft Taxation Determination

Income tax: what is the meaning of ‘deployment’ in paragraph 23AG(1AA)(d) of the *Income Tax Assessment Act 1936*?

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

This publication is a draft for public comment. It represents the Commissioner’s preliminary view about the way in which a relevant taxation 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.

You can rely on this publication (excluding appendices) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don’t have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

Ruling

1. A person is ‘deployed’ within the meaning of paragraph 23AG(1AA)(d) of the *Income Tax Assessment Act 1936* if and only if they have been directed to perform duties overseas by the Commonwealth, a State or a Territory or an authority thereof in their capacity as a member of a disciplined force. This includes the member being sent overseas to undertake or participate in study or training activities in their capacity as a member of the relevant disciplined force.

Example 1

2. *Kylie, a resident of Australia for income tax purposes, is a member of the Australian Defence Force (ADF) within the meaning of the Defence Act 1903. Kylie receives a posting order to relocate to Country A in order to support a project between Australia and Country A.*
3. *Kylie is sent to Country A for 12 months commencing 1 July 2012.*

4. As a member of the ADF, Kylie is a member of a disciplined force. As Kylie has been directed to perform duties overseas by the ADF in her capacity as a member of the ADF, she has been deployed by the Commonwealth for the purposes of paragraph 23AG(1AA)(d).

Note: Kylie's foreign earnings are exempt only if all the remaining conditions in section 23AG are met. This includes considering whether, and why, her foreign earnings are exempt from tax in the foreign country: see subsection 23AG(2).

Example 2

5. Tim, a resident of Australia for income tax purposes, is a member of the Australian Federal Police (AFP) and is sent to Country B by the AFP as part of the United Nations (UN) Mission (UNMISS) in Country B.

6. Tim and other UNMISS members provide support in a number of areas including delivering training to assist in building a professional police service.

7. Tim is sent to Country B for 12 months commencing 1 July 2012. As an officer within the AFP, Tim is a member of a disciplined force.

8. As Tim has been directed to perform duties overseas by the AFP in his capacity as a member of the AFP, he has been deployed by the Commonwealth for the purposes of paragraph 23AG(1AA)(d).

Note: Tim's foreign earnings are exempt only if all the remaining conditions in section 23AG are met. This includes considering whether, and why, his foreign earnings are exempt from tax in the foreign country: see subsection 23AG(2).

Example 3

9. Mark is a resident of Australia for income tax purposes and a Lieutenant Commander in the Royal Australian Navy.

10. He is sent to Country C for 16 months for full-time advanced language studies. His study is to be undertaken at Country C's Navy Command and Staff College.

11. During this time he has no official duties other than to study while in Country C. He continues to receive his salary and allowances, including an overseas living allowance.

12. As Mark has been directed to perform duties overseas by the Royal Australian Navy in his capacity as a member of the Royal Australian Navy, he has been deployed as a member of a disciplined force by the Commonwealth for the purposes of paragraph 23AG(1AA)(d).

Note: Mark's foreign earnings are exempt only if all the remaining conditions in section 23AG are met. This includes considering whether, and why, his foreign earnings are exempt from tax in the foreign country: see subsection 23AG(2).

Date of effect

13. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, this Determination 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 Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

TD 2013/D1

Page status: **draft only – for comment**

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Commissioner of Taxation

27 March 2013

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.*

Explanation

14. Subsection 23AG(1) provides that, if Australian resident individuals are engaged in certain types of foreign service for a continuous period of no less than 91 days, foreign earnings derived from this foreign service are exempt from Australian tax.

15. Foreign service is defined in section 23AG(7) as:

foreign service means service in a foreign country as the holder of an office or in the capacity of an employee.

16. Paragraph 23AG(1AA) specifies which types of foreign service qualify. Specifically and relevantly it provides:

However, those foreign earnings are not exempt from tax under this section unless 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 that
 - (i) is 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); and
 - (ii) meets the special conditions mentioned in that item;
- (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.

17. Subsection 23AG(1AA) serves to limit the forms of foreign service that can give rise to foreign earnings that are eligible for exemption under section 23AG. Specifically and relevantly, it includes subparagraph 23AG(1AA)(d) which provides that a person's foreign earnings from foreign service are eligible if the foreign service is directly attributable to that person's deployment outside Australia by the Commonwealth, a State or a Territory or an authority thereof as a member of a disciplined force.

18. The requirements in the paragraph can therefore be set out as follows:

- (a) the person engaged in foreign service must be ‘a member of a disciplined force’;
and
- (b) that person must be deployed by the Commonwealth, a State or Territory or an authority thereof in their capacity as a member of a disciplined force.

19. This latter requirement focuses on the actions of the Commonwealth, State or Territory or authority thereof.

Member of a disciplined force

20. This expression is not defined in section 23AG. The use of the phrase in lower case in paragraph 23AG(1AA)(d) of the ITAA 1936 indicates that this expression is not to be limited to a military force.

21. This is confirmed in the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures) No 1 Bill 2009 (EM) which provides:

1.31 A person’s foreign earnings will be eligible for exemption if the foreign service is directly attributable to that person’s deployment outside Australia as a member of a disciplined force by an Australian government or an authority thereof. A disciplined force is intended to refer to a defence force, including a peacekeeping force, and a police force.

22. The term ‘disciplined force’ includes the Australian Defence Force, the Australian Federal Police, and the state and territory police forces.

Deployment by the Commonwealth, a State or Territory or authority thereof

23. Having established that the person engaged in the foreign service is a member of a disciplined force, the focus of paragraph 23AG(1AA)(d) is on the actions of the Commonwealth, State or Territory or authority thereof. Thus, the deployment of the person as a member of a disciplined force must be ‘by’ the specified entity.

24. The term ‘deployment’ is not defined in the Act. The term ‘deploy’ is defined in the *Australian Oxford Dictionary* (2nd edition), as:

- 1. (*Mil.*) [*tr.*] cause (troops) to spread out from a column into a line.
[*intr.*] (of troops) spread out in this way.
- 2. [*tr.*] bring (arguments, forces, etc.) into effective action.

25. So, according to the dictionary, the word ‘deploy’ has both a specific meaning, linked specifically to a military context, and a more general meaning.

26. The statutory context indicates that the more specific meaning of ‘deployment’, in the sense of the spreading out of troops by way of military manoeuvre, is not readily applicable to paragraph 23AG(1AA)(d). The provision is not limited to military personnel and can apply to a member of any disciplined force. Also, the provision contemplates that a single member of a disciplined force may be the subject of a ‘deployment’.

27. In the context of paragraph 23AG(1AA)(d), a member of a disciplined force may be brought into effective action by being sent overseas to perform duties as directed by the Commonwealth, State or Territory, or authority thereof. It is in this sense of bringing into effective action that the word ‘deployment’ is to be understood.

28. Thus, a person has been subjected to a ‘deployment’ by the Commonwealth, a State or Territory or an authority thereof if they have been directed to perform duties overseas by that specified government or authority in their capacity as a member of a disciplined force.

29. Therefore, the term ‘deployment’ does not require a distinction to be made on the basis of the nature of the task the member is undertaking. Accordingly, a member who undertakes or participates in study or training activities in their capacity as a member of the relevant disciplined force can be said to be the subject of a ‘deployment’.

30. The EM provides relevantly:

1.32 In a defence force context, the exemption would apply to a person’s deployment outside Australia as part of a non-warlike operation. In a police force context, the exemption would apply to Australian Federal Police employees deployed on an International Deployment Group mission who are subject to Commanders Orders to achieve operational policing outcomes.

31. These examples illustrate the more common types of activities intended to be covered by paragraph 23AG(1AA)(d), and support the view that ‘deployment’ does not take on a narrow meaning related to military usage only.

Appendix 3 – Your comments

32. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

33. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TD 2012/8

Subject references:

- Exempt income
- Foreign exempt employment income
- Foreign income
- Foreign salary and wages
- Foreign source income
- International tax

Legislative references:

- ITAA 1936 23AG
- ITAA 1936 23AG(1)
- ITAA 1936 23AG(1AA)

- ITAA 1936 23AG(1AA)(a)
- ITAA 1936 23AG(1AA)(b)
- ITAA 1936 23AG(1AA)(c)
- ITAA 1936 23AG(1AA)(d)
- ITAA 1936 23AG(1AA)(e)
- ITAA 1936 23AG(2)
- ITAA 1936 23AG(2)(b)
- ITAA 1936 23AG(7)
- Defence Act 1903

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures) No 1 Bill 2009
- The Australian Oxford Dictionary, 2004, rev. 2nd edn, Oxford University Press, Melbourne

ATO references

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