



TD 2005/14 - Income tax: does subsection 23AG(2) of the Income Tax Assessment Act 1936 apply where foreign earnings are exempt from tax in a foreign country for one or more of the reasons listed in that subsection and there is no additional reason for exempting that income?

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 This document has changed over time. This is a consolidated version of the ruling which was published on *6 September 2023*



Status: **legally binding**

Taxation Determination

Income tax: does subsection 23AG(2) of the *Income Tax Assessment Act 1936* apply where foreign earnings are exempt from tax in a foreign country for one or more of the reasons listed in that subsection and there is no additional reason for exempting that income?

📌 Relying on this Determination

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

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

[Note: This is a consolidated version of this document. Refer to the Legal Database (ato.gov.au/law) to check its currency and to view the details of all changes.]

Table of Contents	Paragraph
Ruling	1
Date of effect	1A
Appendix 1 – Explanation	2
Appendix 2 – Example	7
Example 1: Exempt income – foreign aid worker with foreign earnings exempt from tax in foreign country	7

Ruling

1. Yes. Subsection 23AG(2) of the *Income Tax Assessment Act 1936* applies where one or more reasons listed in that subsection for exempting the income from foreign tax are satisfied, provided there are no other reasons for exempting the income.¹ As a result, the income is subject to taxation in Australia because the exemption in subsection 23AG(1) does not apply.

¹ TD 2005/15 *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?* states that subsection 23AG(2) does not apply where there is a reason for exempting the foreign earnings from foreign tax that is not a reason listed in that subsection.

Status: **legally binding**

Date of effect

1A. This Determination applies to years commencing both before and after its date of issue. However, it 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 the Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation

11 May 2005

Status: **not legally binding**

Appendix 1 – Explanation

❶ ***This Explanation is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the binding public ruling.***

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 ('Australian tax'). The term '*foreign service*' means service in a foreign country as the holder of an office or 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 Australian tax does not apply if the foreign earnings are exempt from foreign tax 'only because of any of the following' reasons set out in subsection 23AG(2). Subsection 23AG(2) provides:

An amount of foreign earnings derived in a foreign country is not exempt from tax under this section if the amount is exempt from income tax in the foreign country only because of any of the following:

- (a) a law of the foreign country giving effect to a double tax agreement;
- (b) a double tax agreement;
- (c) provisions of a law of the foreign country under which income covered by any of the following categories is generally exempt from income tax:
 - (i) income derived in the capacity of an employee;
 - (ii) income from personal services;
 - (iii) similar income;
- (d) the law of the foreign country does not provide for the imposition of income tax on one or more of the categories of income mentioned in paragraph (c);
- (e) a law of the foreign country corresponding to the *International Organisations (Privileges and Immunities) Act 1963* or to the regulations under that Act;
- (f) an international agreement to which Australia is a party and that deals with:
 - (i) diplomatic or consular privileges and immunities; or
 - (ii) privileges and immunities in relation to persons connected with international organisations;
- (g) a law of the foreign country giving effect to an agreement covered by paragraph (f).

4. The application of subsection 23AG(2) depends, among other things, on whether the phrase '*only because of any of the following*' can be construed to mean:²

- (a) only because of any one or more of the reasons listed in the subsection; or
- (b) only because of any one, but not more, of those reasons.

² The *Macquarie Dictionary*, [Multimedia], version 5.0.0, 1/10/01, provides the following relevant definitions: (determiner) 2. in whatever quantity or number, great or small; (phrase) 10. **any one** ..., any single or individual (person or thing).

Status: **legally binding**

5. The correct view is considered to be the first of these meanings. The second meaning would result in foreign earnings which are exempt from foreign tax for two or more of the listed reasons also being exempt from Australian tax. It is not considered that Parliament intended this result.

6. Where foreign earnings are exempt from foreign tax only because of one or more reasons listed in subsection 23AG(2), the exemption in subsection 23AG(1) does not apply and those earnings will be subject to Australian tax.

Status: not legally binding

Appendix 2 – Example

❶ *This Appendix provides an example which illustrates the principles in the Determination. Decisions on individual cases will depend on the overall circumstances of that case. Consequently, the conclusions reached in the following example are not necessarily determinative of the Commissioner's views on cases with similar, but different, facts.*

Example 1: Exempt income – foreign worker with foreign earnings exempt from tax in foreign country

7. *An Australian resident derives foreign earnings in a foreign country. The foreign earnings are exempt from tax in that country for the following reasons:*

- (i) *a law in that country that corresponds to the International Organisations (Privileges and Immunities) Act 1963; and*
- (ii) *a law of that country that gives effect to a double taxation agreement.*

8. *The first reason set out above is a reason covered by paragraph 23AG(2)(e). The second is covered by paragraph 23AG(2)(b).*

9. *In these circumstances, provided there is no reason for exempting the income additional to those listed in subsection 23AG(2),³ the subsection applies. Therefore, the foreign earnings are not exempt from tax under section 23AG.*

³ As noted in Footnote 1 of this Determination, TD 2005/15 explains this conclusion.

Status: **not legally binding**

References

Previous draft:

TD 2004/D83

Related Rulings/Determinations:

TR 2006/10; TD 2005/15

Previous Rulings/Determinations:

Legislative references:

- ITAA 1936 23AG(1)
- ITAA 1936 23AG(2)

- ITAA 1936 23AG(2)(b)
- ITAA 1936 23AG(2)(e)
- ITAA 1936 23AG(7)
- International Organisations
(Privileges and Immunities)
Act 1963

Other references:

- Macquarie Dictionary [Multimedia]
version 5.0.0, 1/10/01

ATO references

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