



***TD 2005/37 - Income tax: does subsection 23AG(2) of the Income Tax Assessment Act 1936 apply where a member of the Australian Defence Force is engaged in foreign service for a continuous period of at least 91 days as part of certain UN operations conducted under a UN agreement with a 'host country' which exempts from taxation in that country, the pay and emoluments received from the UN or from a participating State and on any income received from outside the host country?***

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 This document has changed over time. This is a consolidated version of the ruling which was published on 17 August 2011



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## Taxation Determination

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Income tax: does subsection 23AG(2) of the *Income Tax Assessment Act 1936* apply where a member of the Australian Defence Force is engaged in foreign service for a continuous period of at least 91 days as part of certain UN operations conducted under a UN agreement with a 'host country' which exempts from taxation in that country, the pay and emoluments received from the UN or from a participating State and on any income received from outside the host country

### **Preamble**

*The number, subject heading, date of effect and paragraph 1 of this document are a 'public ruling' for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner.*

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

1. No. Subsection 23AG(2) of the *Income Tax Assessment Act 1936* (ITAA 1936) does not apply to deny the exemption<sup>1</sup> in subsection 23AG(1) of the ITAA 1936 where the United Nations (UN) enters into an agreement with a 'host country'<sup>2</sup> in relation to certain UN operations (UN Operation)<sup>3</sup> and Australia deploys members of the Australian Defence Force (ADF) as part of the UN Operation without entering into a Participation Agreement or similar agreement.

### **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

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<sup>1</sup> The interaction between sections 23AG and 23AD of the ITAA 1936 and items 1.1 and 1.2 of the table in section 51-5 of *Income Tax Assessment Act 1997* (subparagraph 23(t)(iii) of the ITAA 1936) is not addressed in this Taxation Determination.

<sup>2</sup> The nation in which personnel are to be deployed.

<sup>3</sup> For the purposes of this Taxation Determination a 'UN Operation' is one that follows the procedure set out at paragraphs 4 to 7.

the foreign service will be exempt from tax in Australia. 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. Under subsection 23AG(2), the exemption in subsection 23AG(1) will not apply where the foreign earnings are exempt from income tax in the foreign country only because of any of the conditions set out in subsection 23AG(2). If the foreign earnings are exempt because of one or more of the reasons in subsection 23AG(2), and also exempt because of a reason not listed in the subsection, the subsection does not apply. Consequently, subsection 23AG(1) would apply to make the relevant earnings exempt from tax in Australia.<sup>4</sup>

3A. Note, subsection 23AG(1AA) of the ITAA 1936, which took effect from 1 July 2009, and applies to foreign earnings derived on or after 1 July 2009 from foreign service performed on or after 1 July 2009, provides that foreign earnings will not be exempt under section 23AG of the ITAA 1936 unless the continuous period of foreign service is directly attributable to, amongst other things, the individual's deployment outside Australia as a member of a disciplined force. 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'.

### **Procedure for deployment of members of the ADF to UN Operations**

4. Generally, UN Operations are governed by a model established by the UN General Assembly. The model arrangement involves the UN entering into an Agreement (Status Agreement) with the host nation.<sup>5</sup> A participating State, such as Australia, does not enter into this Agreement.

5. The Status Agreement sets out the terms of the deployment, including the privileges and immunities to be afforded personnel serving with the UN Operation. One of its terms provides that personnel serving on the Operation shall be exempt from taxation on the pay and emoluments received from the United Nations or from a participating State and on any income received from outside the host country.

6. The model process then requires the UN to enter into separate agreements, known as 'Participation Agreements', with each of the Governments committing personnel to the Operation. These Participation Agreements refer to and adopt the terms of the Status Agreement in terms stating that personnel provided by the Participating State shall enjoy the privileges and immunities, rights and facilities and comply with the obligations provided for in the Status Agreement.

7. The Department of Defence advise that the general Australian practice is not to enter into a model participation agreement, but to set out the terms of Australian participation in the UN Operation in a Diplomatic Note (or series of Notes) which is exchanged with the UN.

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<sup>4</sup> TD 2005/14 and TD 2005/15 explain the operation of subsection 23AG(2).

<sup>5</sup> For the purposes of this Taxation Determination, we have assumed that the Status Agreement entered into between the host country and the UN is identical in all terms to the 'Model Status-of-Forces Agreement for Peace-Keeping Operations' A/45/594 issued on 9 October 1990 as Agenda Item 76, Forty-fifth session.

8. Therefore, where members of the ADF serve as part of a UN Operation, under the model process there will be a Status Agreement between the UN and the host country and a Diplomatic Note issued by Australia to the UN.

### **Application of 23AG(2)(f)(ii) and 23AG(2) generally**

9. Under subparagraph 23AG(2)(f)(ii) an amount of foreign earnings will not be exempt if that amount is exempt from income tax in the foreign country because of:

- (f) an international agreement to which Australia is a party and that deals with:
  - ...
  - (ii) privileges and immunities in relation to persons connected with international organisations...

10. Thus, foreign earnings will not be exempt under subparagraph 23AG(2)(f)(ii) if both of the following conditions are satisfied:

- Australia is a party to an international agreement dealing with privileges and immunities in relation to persons connected with international organisations and, because of the agreement, foreign earnings derived from service in the foreign country are exempt from income tax in that country; and
- there are no reasons outside of those listed in subsection 23AG(2) for exempting the foreign earnings.<sup>6</sup>

11. The Status Agreement is an 'international agreement' which relates to privileges and immunities for persons connected with the UN which is an international organisation. The executed Agreement operates to exempt the foreign earnings of ADF personnel engaged in the UN Operation. Therefore, the critical question is whether Australia, directly or indirectly, is a party to the Status Agreement.

12. As stated in paragraph 4, Australia is not a party to the Status Agreement. Therefore, the reason in subparagraph 23AG(2)(f)(ii), for why the foreign earnings are exempt in the host country, cannot apply to the Status Agreement. Further, the Diplomatic Note, either alone or when read together with the Status Agreement, does not satisfy the requirements of subparagraph 23AG(2)(f)(ii).

13. As a result, the exemption from tax in the host country provided by the Status Agreement is not a reason listed in subsection 23AG(2). Consequently, all foreign earnings of members of the ADF earned as a result of deployments under the process described in paragraphs 5 to 8 of this Determination, are exempt from tax in Australia under subsection 23AG(1) of the ITAA 1936 (provided the other requirements of section 23AG of the ITAA 1936 are satisfied).

14. This Taxation Determination does not apply if:

- a UN operation and subsequent ADF deployment occurs under arrangements not based on the model process in the manner described above; or
- the host nation has a law that corresponds to the *International Organisations (Privileges and Immunities) Act 1963* or its regulations as contemplated in paragraph 23AG(2)(e)

<sup>6</sup> As noted in Footnote 4, TD 2005/14 and TD 2005/15 explain the operation of subsection 23AG(2).

In these circumstances ADF members would need to approach the Tax Office for advice on the application of section 23AG.

**Example**

15. *The Government of Rwanda and the United Nations (UN) executed an 'Agreement on the Status of the United Nations Assistance Mission for Rwanda (UNAMIR)' on 5 November 1993 ('the Status Agreement'). Article 26 of the Status Agreement exempts from taxation the 'pay and emoluments' received by members of the UNAMIR. Rwanda does not have a Double Tax Agreement with Australia and it generally imposes taxation on employment income.*

16. *Sascha, an Australian resident taxpayer and member of the ADF, served in Rwanda as a member of the UNAMIR for a continuous period of 180 days. Pursuant to Article 26 of the Status Agreement, the salary and wages that Sascha received while on deployment in Rwanda are exempt from taxation in Rwanda.*

17. *Subsection 23AG(2) does not apply to deny the exemption because the reason for exemption from taxation in Rwanda is not a reason listed in subsection 23AG(2). In addition, Australia is not a party to any 'international agreement' for the purposes of subparagraph 23AG(2)(f)(ii), nor is there any other reason listed in subsection 23AG(2) present to deny the exemption.*

18. *As Sascha served in Rwanda for a continuous period of not less than 91 days, the salary and wages she received in relation to that service are exempt from Australian taxation under subsection 23AG(1) for the reasons stated above.*

18A. Note, subsection 23AG(1AA) of the ITAA 1936, which took effect from 1 July 2009, and applies to foreign earnings derived on or after 1 July 2009 from foreign service performed on or after 1 July 2009, provides that foreign earnings will not be exempt under section 23AG of the ITAA 1936 unless the continuous period of foreign service is directly attributable to, amongst other things, the individual's deployment outside Australia as a member of a disciplined force.

**Date of effect**

19. 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 21 and 22 of Taxation Ruling TR 92/20).

**Commissioner of Taxation**

12 October 2005

*Previous draft:*

TD 2005/D5

- defence force overseas service
- exempt income
- foreign income
- peacekeeping

*Related Rulings/Determinations:*

TR 92/20; TD 2005/14; TD 2005/15

*Legislative references:*

- TAA 1953 Pt IVA
- ITAA 1936 23AD

*Subject references:*

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- ITAA 1936 23AG
- ITAA 1936 23AG(1)
- ITAA 1936 23AG(1AA)
- ITAA 1936 23AG(2)
- ITAA 1936 23AG(2)(e)
- ITAA 1936 23AG(2)(f)(ii)

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- ITAA 1936 23AG(7)
- ITAA 1997 51-5
- International Organisations (Privileges and Immunities) Act 1963

## ATO references

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