


# ***TR 2013/7A2 - Addendum - Income tax: foreign employment income: interpretation of subsection 23AG(1AA) of the Income Tax Assessment Act 1936.***

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# Addendum

## Taxation Ruling

### Income tax: foreign employment income: interpretation of subsection 23AG(1AA) of the *Income Tax Assessment Act 1936*

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Ruling TR 2013/7 to confirm a member of the Australian Border Force is not a member of a disciplined force for the purpose of paragraph 23AG(1AA)(d) of the *Income Tax Assessment Act 1936* as set out in *Willard and Commissioner of Taxation* [2022] AATA 3723.

TR 2013/7 is amended as follows:

#### 1. Paragraph 51

- (a) After paragraph 51, insert new paragraphs 51A, 51B and 51C, including heading:

***Example 11A – Australian Border Force employee seconded overseas***

51A. *Joshua, a resident of Australia for income tax purposes, is employed by the Australian Border Force (ABF). He successfully applies for a temporary secondment overseas with the Papua New Guinea Customs Service in the Strongim Gavman Program.*

51B. *At all times during the secondment Joshua remains an employee of the Australian Public Service pursuant to the Public Service Act 1999 as a sworn officer under the Australian Border Force Act 2015.*

51C. *Joshua is not a ‘member of a disciplined force’ for the purposes of paragraph 23AG(1AA)(d). His earnings from this employment are therefore not exempt under section 23AG.<sup>1B</sup>*

- (b) At the end of new paragraph 51C, insert new footnote 1B:

<sup>1B</sup> Joshua would also not be eligible for the exemption if the work he was undertaking was delivering Australian ODA for the purposes of paragraph 23AG(1AA)(a). This is because the ABF is an Australian government agency. Refer to footnote 1A of this Ruling for further information.

#### 2. Paragraph 83

- (a) In the first sentence, omit the word ‘Secretariat’.
- (b) Omit footnote 5B.
- (c) In footnote 5C, omit ‘[DCDDAC\(2016\)3FINAL.pdf \(oecd.org\)](#). These directives, dated 8 April 2016, implement the new grant system in reporting

on ODA.’; substitute

[‘https://one.oecd.org/document/DCD/DAC/STAT\(2023\)9/FINAL/en/pdf](https://one.oecd.org/document/DCD/DAC/STAT(2023)9/FINAL/en/pdf)

(dated 27 April 2023).’

### 3. Paragraph 126

- (a) After paragraph 126, insert new paragraphs 126A and 126B:

126A. In *Haskins v The Commonwealth (Haskins)*<sup>19A</sup>, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said:

A defining characteristic of the defence force is that each service is a disciplined force [*Re Aird* (2004) 220 CLR 308 at 323 [42] per McHugh J] organised hierarchically. The maintenance of discipline is critical [*Re Aird* (2004) 220 CLR 308 at 329-330 [65]-[68] per Gummow J] to the efficiency of the services.

126B. Senior Member Kirk in *Willard and Commissioner of Taxation (Willard)*<sup>19B</sup> noted *Haskins* and then went on to say:

...It was for that reason that a Court found that no tortious liability for false imprisonment arose against a member of the defence force acting in obedience of orders against another member of that service. This distinguishing feature is recognised in section 27 of the *Defence Force Discipline Act 1982* (Cth) which makes it an offence for a member of the defence force to disobey a lawful command of a superior officer.

The authorities therefore recognise that the key factor that distinguishes military and police forces as ‘disciplined forces’ is that each member of that force is under a legal obligation to comply with any lawful directions of any superior officer in the hierarchy.

- (b) After the case reference ‘*Haskins v Commonwealth (Haskins)*’ in new paragraph 126A, insert new footnote 19A:

<sup>19A</sup> [2011] HCA 28 at [54].

- (c) After the case reference ‘*Willard and Commissioner of Taxation (Willard)*’ in new paragraph 126B, insert new footnote 19B:

<sup>19B</sup> [2022] AATA 3723 at [84–85].

### 4. Paragraph 128

- (a) After paragraph 128, insert new paragraph 128A:

128A. This is confirmed in *Willard*, where the Tribunal found the ABF was not a ‘disciplined force’ for the purpose of paragraph 23AG1AA(d) because ‘the obligations of ABF officers are not the same as those members of a “disciplined” force who are obliged to obey all lawful directions of a superior officer’.<sup>21A</sup> Senior Member Kirk further considered Mr Willard’s participation in the Strongim Gavman Program (SGP) and concluded<sup>21B</sup>:

The evidence before the Tribunal in relation to the activities in which participants in the SGP were involved during their secondment do not meet the key requirements of a “disciplined force” as that term is recognised in the authorities... Participants in the SGP, including the Applicant, were not subject to an obligation to obey a lawful direction of a superior officer, and therefore they were not members of a “disciplined force”. Furthermore, the

nature of the work performed by the Applicant as a participant in the SGP as a Customs Advisor in Trade Facilitation at PNGCS is not one which is in any manner akin to the military and policing context to which s23AG(1AA)(d) is directed.

- (b) At the end of the first sentence in new paragraph 128A, insert new footnote 21A:

<sup>21A</sup> *Willard* at [101]. Mr Willard was an employee of the APS working in the Department of Immigration and Border Protection as part of the ABF. The ABF was established in 1 July 2015. His employment was regulated by the *Public Service Act 1999*.

- (c) At the end of the second sentence in new paragraph 128A, insert new footnote 21B:

<sup>21B</sup> *Willard* at [107].

## **5. Paragraph 129**

Omit the first 2 sentences; substitute:

The position set out in paragraphs 128 and 128A is also confirmed by the statutory context. The phrase 'disciplined force' appears as part of the composite phrase 'deployment ...as a member of a disciplined force'.

This Addendum applies before and after its date of issue.

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**Commissioner of Taxation**

6 September 2023

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### ATO references

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