TR 96/15A - Addendum - Income tax: foreign tax credit system: issues relating to the practical application of section 23AG

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Addendum

Income tax: foreign tax credit system: issues relating to the practical application of section 23AG

The following changes to Taxation Ruling TR 19/15 apply from 17 July 2002.

1. Add the following paragraph:

9A. Whether a person is absent from foreign service because of recreation leave is a question of fact. However, for subsection 23AG(6) to apply, the recreation leave taken in Australia or elsewhere during a period of foreign service must be attributable to the period during which the person was engaged in foreign service. This means that, for the purposes of subsection 23AG(6), recreation leave can only arise where it accrues during the days that a person is actively engaged in foreign service. Annual leave that meets the requirements of subsection 23AG(6) will be regarded as recreation leave.

2. Replace the content contained in subparagraph 11(b) with the following:

A period of foreign service is taken to include weekends, public holidays, rostered days off, 'compulsory lay off/over days', 'grounded days' and flexidays (which are not 'available days' spent in Australia),[1] and days off in lieu of such, provided:

(i) such breaks are authorised by the terms and conditions of the foreign service employment or engagement; and

(ii) where such breaks are used by the person to visit or return to Australia they must not be excessive by comparison with the scheduled period of foreign service or, if the period of foreign service is ongoing, by comparison with the income year. As a guide, the

[1] 'Compulsory lay off/over days' are those where an employee is prevented from working - possibly because of certain legal requirements. 'Grounded days' are those where an employee does not report for duty after being engaged in a series of long haul flights. 'Available days' (also known as 'grey days') are those where no work is allocated but the employee is available for duty. (The terminology may vary under different contracts with different employers and in different countries, but the nature of the periods is the same, irrespective of the way they are described.)

> Commissioner considers that where such breaks are used to visit or return to Australia, they will be excessive where the total of such breaks are more than one-sixth of the period of scheduled foreign service or, if the period of foreign service is ongoing, more than one sixth of the income year. Therefore, where the total of temporary absences is excessive in terms of this paragraph, each temporary absence will be taken to break the foreign service period, subject to section 23AG(6A) to (6E).

Rostered days off, compulsory lay off/over days, grounded days and flexidays are not considered to be recreation leave for the purposes of section 23AG(6). That is because such absences are not recreation days that are granted as a result of leave that has accrued while a person is actively engaged in foreign service.

Available days spent in Australia are not considered to be a period of foreign service. Where an employee spends available days in Australia, this period is considered to be a break in foreign service, unless subsections 23AG(6A) to (6E) apply. That is because such time is not recreation leave for the purposes of subsection 23AG(6), nor does it come within any of the temporary absences set out in paragraph 11 of this Ruling. If available days are spent in a foreign country, it is considered that those days will form part of the foreign service period.

3. Add the following paragraph:

31A. The following is an example where temporary absences spent in Australia would be regarded as excessive.

Pilots

An international pilot resides in Australia and is employed by a foreign airline on an ongoing basis. During the 2003 income year, the pilot flies for approximately 800 hours. She is entitled to six weeks annual leave and also has other days where she is not actively performing service, such as compulsory lay off days, grounded days and rostered days off, which in conjunction with her recreation leave she chooses to spend in Australia.

Typically, the pilot flies internationally (including stopovers and rests) for ten days and receives six days off. Assume that each six day period is spent in Australia and falls within the types of temporary absences set out in paragraph 11(b) of this Ruling. She also has an absentee credit balance - section 23AG(6B) - of three days at the start of the 2003 income year. Looked at over the 2003 income year, this

means the pilot spends approximately 120 days (in addition to six weeks annual leave) in Australia on those absences covered by paragraph 11(b) of this Ruling.

In judging whether the 120 days spent in Australia during the income year is excessive in terms of paragraph 11(b) of this Ruling, the Commissioner considers that as a guide the total of such breaks spent in Australia should not be more than one-sixth of the income year (61 days) because there is ongoing foreign service. In this case, the number of days spent in Australia during the income year on temporary absences covered by paragraph 11(b) of this Ruling is 120 days and is clearly excessive.

This means that each time the pilot returns to Australia during the 2003 income year for the six day break, there is a break in foreign service, unless there are sufficient absentee credits accumulated in accordance with section 23AG(6B). In this case, the absentee credit of three days at the start of the year would be extinguished the first time the taxpayer returns to Australia during the 2003 income year for a six day break.

Moreover, throughout the year there would not be sufficient absentee credits that accumulate each time there is foreign service to cover the pattern of six day breaks. This means that each time the taxpayer returns from a ten day period of foreign service during the income year for a six day break, there is a break in foreign service.

As a result, there is no period during the income year where the foreign service period is for 91 continuous days or more. Therefore, the pilot will not be entitled to the exemption under section 23AG.

4. Add the following paragraph:

31B. The following is an example where temporary absences spent in Australia would not be regarded as excessive.

Frank is an Australian resident. As a helicopter pilot, he enters into a one-year employment contract to work for a company that operates in the Papua New Guinea and Indonesian areas. The contract runs from 1 July 2002 to 30 June 2003. During that year, Frank habitually returns to Australia on days off in lieu of weekends and rostered days off. In total, he returns to Australia on these temporary absences for 50 days during the 2003 income year.

The temporary absences covered by Frank's return to Australia fall within the type of absences contemplated by paragraph 11(b) of this Ruling and are not excessive by comparison with the scheduled period of foreign service (50 days out of 365). Therefore, each time Frank returns to Australia on these breaks, such breaks are taken to be part of Frank's foreign service period. Consequently, Frank is entitled to a

section 23AG exemption during the 2003 income year in respect of his employment income as a helicopter pilot.

Commissioner of Taxation
17 July 2002

Related Rulings etc:
These changes previously issued in draft Taxation Determination TD 2002/D3.

ATO references:
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