



CR 2010/56 - Income tax: assessable income: employees of the Australian Public Service deployed to Papua New Guinea as part of the Strongim Gavman Program

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Class Ruling

Income tax: assessable income: employees of the Australian Public Service deployed to Papua New Guinea as part of the Strongim Gavman Program

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

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant 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.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936); and
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).

All subsequent legislative references are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is employees of the Australian Public Service (APS employees), who are deployed to Papua New Guinea (PNG) as part of the Strongim Gavman Program (SGP) under the Joint Agreement on Enhanced Cooperation between Australia and PNG (the JAEC Treaty). In this Ruling these entities are referred to as APS employees. The class of entities only includes persons who remain Australian residents for tax purposes throughout the period of their deployment.

4. The class of entities does not include APS employees:

- who while on deployment to PNG return to Australia for a period during which they utilise leave that has wholly or partly accrued from service in Australia;
- whose term of deployment to PNG is suspended or terminated before completing a continuous period of foreign service of at least 91 days; or
- whose term of deployment is less than 91 days.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 11 to 21 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

9. This Ruling applies from 1 July 2009, to foreign earnings derived on or after 1 July 2009 from foreign service performed on or after 1 July 2009. However, this Ruling 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 Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Previous Rulings

10. This Ruling replaces Class Ruling CR 2006/119.

Scheme

11. The scheme that is the subject of this Ruling is described below. The relevant documents or parts of documents incorporated into this description of the scheme are:

- the original application for Class Ruling dated 1 April 2005, which resulted in the issuing of Class Ruling CR 2006/119;
- correspondence from the Australian Agency for International Development (AusAID) dated 18 July 2008 requesting updates to CR 2006/119;
- Guidelines for the deployment of whole of government employees to work on Australian overseas aid activities;
- APS Terms and Conditions of Employment for deployment to PNG;
- the JAEC Treaty.

12. Under the SGP, formerly the Enhanced Cooperation Program, the Australian Government has agreed to send APS employees to provide assistance to PNG in order to facilitate growth and stability by addressing core issues in PNG in the areas of governance, law and order and justice, transport and border security, financial management, economic and social progress as well as capacity in public administration. The SGP is administered by AusAID with additional support provided by the employees' home agencies for development of APS employees.

13. The areas of assistance are consistent with the government of PNG's Medium Term Development Strategy and are intended to encourage growth and stability in PNG.

14. For the period of their deployment to PNG, the APS employees will be engaged in the delivery of Australian official development assistance by their employers.

15. APS employees will not be afforded diplomatic status and will not be attached to a diplomatic mission.

16. The Secretary of an APS employee's home agency may at any time direct the APS employee to return to Australia. If such a direction is given, the employee must comply with it immediately. An APS employee returning to Australia on compassionate grounds may be redeployed at a later date, after the reason for the employee's return no longer exists. An APS employee may elect to return from the posting prior to the agreed date following an application to that effect from the employee being considered by the relevant Secretary.

17. APS employees will be deployed for a period specified by the Secretary, but deployment is expected to be a minimum of 12 months.

18. Salary and other remuneration entitlements will continue to be paid to APS employees on a fortnightly basis by their home agency during deployment and they will remain eligible for performance bonuses, if applicable.

19. APS employees deployed to PNG will also be entitled to some or all of the following allowances:

- Cost of posting allowance. The purpose of this allowance is to compensate employees for a wide range of impacts that deployment has on their lives, from the loss of access to family and friends to the career impairment suffered by many employees' spouses. The allowance includes a component to cover in-country household maintenance and assistance. The allowance may also be paid for a maximum of two weeks after the employee's return to Australia, where, immediately after their return to Australia, the employee takes recreation leave that was accrued in PNG.
- Cost of living allowance. The purpose of this allowance is to compensate employees for the increased costs of purchasing goods and services at a post.
- Hardship allowance. The purpose of this allowance is to compensate employees for the hardship arising from difficult living conditions at overseas locations. Hardship allowance commences on the day the employee arrives in PNG and ceases at the end of the day the employee leaves PNG at the end of their assignment.
- Child allowance. The purpose of this allowance is to compensate employees for costs associated with relocating and living overseas with children or, for children remaining in Australia, to compensate for communication and costs associated with reunion visits.

- Child supplement allowance. The purpose of this allowance is to recognise the additional costs associated with raising dependent children at the post.
- Child reunion allowance. The purpose of this allowance is to provide assistance with the additional cost of maintaining a dependent child in full-time primary, secondary or tertiary education who does not live at the post.
- Child hardship allowance. This is an additional supplement that is paid for each child at a hardship post who attracts a child supplement allowance.
- Australian household allowance. The purpose of this allowance is to compensate employees for the cost of maintaining a household in Australia for recognised dependants who are not accompanying them on deployment. This allowance ceases on conclusion of the employee's deployment.
- Relief fares allowance. The purpose of this allowance is to compensate for the cost of regular relief travel from PNG as well as reunion with dependants remaining in Australia.
- Special Location Supplement. This allowance is payable to employees at specific Hardship Posts where it is considered that there are additional hardships that warrant payment of an extra allowance. This allowance is paid in addition to other hardship entitlements.
- Transfer allowance. The purpose of this allowance is to compensate employees for the additional costs associated with embarking on an overseas deployment and returning to Australia at the end of that deployment. Costs covered by the transfer allowance include hotel accommodation after uplift of goods, taxi fares to and from airports, loss on sale of motor vehicle, cost of obtaining a dental assessment, purchase of travel equipment, and conversion of electrical equipment. This allowance is paid as a lump sum payment six weeks prior to departure from Australia, and a second lump sum payment on completion of deployment.

20. APS employees will accrue recreation, sick (personal) and long service leave entitlements as per the Certified/Enterprise Agreements for the employee's home agency while deployed to PNG. APS employees deployed to PNG will also be entitled to an additional ten days recreation leave per annum.

21. APS employees deployed to PNG may take recreation leave in accordance with their home agency's policy and with the agreement of their manager in PNG. APS employees may utilise recreation leave to return to Australia (for example, for reunion visits).

Ruling

22. The salary and allowances referred to in paragraphs 18 and 19 of this Ruling derived by APS employees described in paragraph 3 of this Ruling are ordinary income under section 6-5 of the ITAA 1997.

Exempt income

23. Subject to paragraphs 24, 25 and 26 of this Ruling, the salary and allowances referred to in paragraphs 18 and 19 of this Ruling, derived by APS employees described in paragraph 3 of this Ruling deployed to PNG, are exempt from tax under section 23AG where:

- the employee has been engaged, or is taken to have been engaged, in service in PNG for a continuous period of at least 91 days;
- the salary and allowances are derived from that foreign service, including payments for recreation leave or long service leave that has wholly accrued from the period of service in PNG; and
- the continuous period of service in PNG is directly attributable to the delivery of Australian official development assistance by the person's employer.

Assessable income

24. The salary and allowances derived by APS employees are included in their assessable income and are not exempt from tax under subsection 23AG(1) where:

- the employee is engaged in a continuous period of foreign service of less than 91 days;
- they are not foreign earnings derived from that foreign service, as defined in subsection 23AG(7); or
- the employee had a change in circumstances and no longer satisfies the exemption conditions. The exemption will still apply for the period that the employee satisfied the exemption conditions.

25. The transfer allowance referred to in paragraph 19 of this Ruling is exempt from tax under subsection 23AG(1) only to the extent that it is derived from the foreign service. Any part of the transfer allowance that is in respect of expenses that are attributable to the period that an APS employee is engaged in foreign service, is exempt from tax. However, any part of the transfer allowance that is in respect of expenses that are attributable to a period prior to the commencement or after the completion of foreign service is not exempt from tax.

Exemption with progression

26. The salary and allowances that are exempt from tax under paragraph 23 of this Ruling are nevertheless taken into account in calculating the Australian tax on other assessable income derived by the employee (subsection 23AG(3)).

Example 1

27. *In the 2009-2010 income year, Daniel, an employee derives the following types of income:*

- *Australian employment income of \$60,300;*
- *allowable deductions against Australian income of \$300;*
- *foreign exempt employment income of \$30,100; and*
- *expenses directly related to exempt foreign employment income of \$100.*

Assume that Daniel has appropriate private patient hospital cover for Medicare levy surcharge purposes.

The total amount of Australian tax payable will be calculated with reference to the following formula:

$$\frac{(\text{Notional gross tax/Notional gross taxable income}) \times \text{Other taxable income}}{\text{income}}$$

Step 1

*Daniel's **notional gross taxable income** is \$90,000 ($[\$60,300 - \$300] + [\$30,100 - \$100]$).*

Step 2

*The **notional gross tax** is \$23,000 (the normal Australian income tax and Medicare levy payable on a taxable income of \$90,000).*

Step 3

The **other taxable income** is \$60,000 (Australian employment income).

Step 4

The Australian tax payable (including Medicare levy) on Daniel's Australian income is:

$$(\$23,000/\$90,000) \times \$60,000 = \$15,333.33$$

Note: this calculation is based on the 2009-2010 income tax rates. If the income tax rates for future years change, you should refer to the tax rates for that current income year.

Commissioner of Taxation

20 October 2010

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.*

28. Subsection 6-5(2) of the ITAA 1997 provides that the assessable income of a resident taxpayer includes ordinary income derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

29. Salary and wages and allowances are ordinary income for the purposes of subsection 6-5(2) of the ITAA 1997.

30. Subsection 6-15(2) of the ITAA 1997 provides that if an amount is exempt income then it is not assessable income.

31. Section 11-15 of the ITAA 1997 lists those provisions dealing with income which may be exempt. Included in this list is section 23AG which deals with exempt foreign employment income.

32. Section 23AG provides an exemption from Australian tax on the foreign earnings derived by an Australian resident from foreign service which they have been engaged in continuously for at least 91 days.

33. Subsection 23AG(1) states:

Where a resident, being a natural person, has been engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived by the person from that foreign service is exempt from tax.

34. However, new subsection 23AG(1AA), which applies to foreign earnings derived on or after 1 July 2009 from foreign service performed on or after 1 July 2009, provides that those foreign earnings will not be exempt under section 23AG unless the continuous period of foreign service is directly attributable to an activity that is listed in subsection 23AG(1AA) (see paragraphs 72 to 80 of this Ruling).

35. Further, certain foreign earnings that meet the requirements of subsections 23AG(1) and 23AG(1AA) may not be exempt from tax under section 23AG if the amount is exempt from income tax in the foreign country only because of any of the reasons listed in subsection 23AG(2) (see paragraphs 81 to 91 of this Ruling).

36. Accordingly, the basic tests for the exemption of foreign employment income in section 23AG are:

- the taxpayer must be a 'resident of Australia';
- the taxpayer must be 'engaged in foreign service';
- the foreign service must be for a 'continuous period of not less than 91 days';

- the taxpayer must derive 'foreign earnings' 'from that foreign service';
- the foreign service must be directly attributable to an activity that is listed in subsection 23AG(1AA); and
- the foreign earnings must not be covered by subsection 23AG(2).

Resident of Australia

37. The determination of a person's residency status depends on that person's circumstances and is a determination made in relation to each year of income. For further information see Taxation Ruling IT 2650. This Ruling only applies to the class of entities described in paragraph 3 of this Ruling who remain Australian residents for tax purposes during their deployment to PNG.

Engaged in foreign service

38. 'Foreign service' is defined as 'service in a foreign country as the holder of an office or in the capacity of an employee' (subsection 23AG(7)).

39. The term 'employee' is defined within subsection 23AG(7) to include 'a person employed by a government or an authority of a government or by an international organisation'.

40. APS employees referred to in paragraph 3 of this Ruling are considered to meet the above definition of an 'employee'.

41. Deployment of APS employees to PNG constitutes 'foreign service' as each employee is undertaking 'service in a foreign country as a holder of an office or in the capacity of an employee'.

Continuous period of not less than 91 days

42. Generally, APS employees based in PNG are expected to serve continuously in PNG for a period of at least 91 days. These periods of 'foreign service', if met, satisfy the test that Australian residents working overseas must be engaged in foreign service 'for a continuous period of not less than 91 days'.

43. Should an APS employee depart PNG prior to the completion of 91 days of continuous service, that employee will normally be ineligible for the exemption.

44. However, in certain instances, an APS employee who departs PNG prior to serving the necessary number of days, may still qualify for exemption if they return to continue their posting at a later date (refer paragraphs 9 to 12 of Taxation Ruling TR 96/15 and paragraphs 57 to 59 of this Ruling).

45. If a taxpayer dies at a time when they have been engaged in foreign service for a continuous period of less than 91 days, subsection 23AG(1A) deems the taxpayer to have satisfied the 91-day rule if they would otherwise have continued to be engaged in that foreign service and met the 91-day rule.

Temporary absences forming part of a period of foreign service

46. Subsection 23AG(6) treats certain temporary absences from foreign service as forming part of the period of foreign service. The Commissioner's view on the application of that subsection is reflected in paragraphs 9 to 11 of Taxation Ruling TR 96/15.

47. Absences which form part of the period of foreign service include absences taken in accordance with the terms and conditions of that service because of recreation leave, accident or illness.

48. 'Recreation leave' is leave in the nature of paid holidays to which an employee has accrued an entitlement. Usually it is the employee's accrued annual leave. Leave which fits this description is 'recreation leave', even if it is not called this.

49. However, 'recreation leave' does not include:

- leave that is not in the nature of paid holidays, such as weekends, rostered days off, flexidays, and days off in lieu;
- public holidays;
- leave wholly or partly attributable to a period of employment other than that foreign service;
- long service leave, furlough, extended leave or similar leave; and
- leave without pay or on reduced pay.

50. During the period of deployment, APS employees will accrue entitlements to recreation leave in accordance with the APS Certified Agreement plus an additional 10 days per annum.

51. Given the nature of the overseas deployment, it is considered that the recreation leave in paragraph 50 of this Ruling granted to APS employees deployed to PNG is reasonable. This recreation leave is wholly attributable to the period of foreign service and forms part of a continuous period of foreign service for the purposes of subsection 23AG(1).

52. An employee's period of continuous foreign service will be maintained where the employee is granted:

- personal leave relating to their sickness or an accident; or
- miscellaneous leave with pay or personal leave because of the accident, illness or death of another person where the leave is for a short period.

Temporary absences not breaking the period of foreign service: the one-sixth administrative test

53. In certain limited circumstances, breaks other than those specified in paragraph 47 of this Ruling are also taken to form part of a period of foreign service. Such breaks include weekends, public holidays, rostered days off, and days off in lieu of such, where such breaks are authorised by the terms and conditions of the deployment. However, where such breaks are used to return to Australia they must not be excessive. Where the break is excessive the period of foreign service will still not be broken if continuity of the foreign service period can be maintained by application of the rules outlined in paragraph 55 of this Ruling.

54. Breaks taken to visit or return to Australia are considered excessive when the total of such breaks is 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. This one-sixth administrative test is different to the 1/6 legislative rule covered in paragraphs 57 to 59 of this Ruling.

Temporary absences not breaking the period of foreign service: the legislative rule

55. Where an employee takes leave other than the leave outlined at:

- paragraphs 50 and 52 of this Ruling; or
- paragraph 53 of this Ruling that is not considered excessive as outlined in paragraph 54 of this Ruling,

they need to determine whether the continuity of service can be maintained (subsection 23AG(6A)).

56. Paragraphs 57 to 59 of this Ruling provide an explanation of this tax provision. Alternatively, the APS employee could seek professional advice from their taxation adviser or the Tax Office.

Continuity of the period of foreign service – 1/6 legislative rule

57. The 1/6 legislative rule allows two or more periods of foreign service to be joined as a continuous period of foreign service, unless, at any time, the total period of absence (in days) between the periods of foreign service exceeds 1/6 of the total number of days of foreign service.

58. If the period of absence exceeds 1/6 of the total period of foreign service at any time, continuity of foreign service is broken. The APS employee will begin a new period of foreign service when he or she next engages in foreign service and must determine whether that period of foreign service lasts for at least 91 continuous days (subsection 23AG(6A)).

59. The 1/6 legislative rule should not be confused with the one-sixth administrative test outlined at paragraphs 53 and 54 of this Ruling. The 1/6 legislative rule in subsection 23AG(6A) permits two or more periods of foreign service to constitute a continuous period of foreign service where continuity would be otherwise broken by absence. Absences between the periods of foreign service under the 1/6 legislative rule do not form part of the continuous period of foreign service. In contrast, the one-sixth administrative test permits what would otherwise be a break in the foreign service to be included in a continuous period of foreign service.

Foreign earnings

60. The definition of 'foreign earnings' is contained in subsection 23AG(7), which provides that:

foreign earnings means income consisting of earnings, salary, wages, commission, bonuses or allowances, or of amounts included in a person's assessable income under Division 83A of the *Income Tax Assessment Act 1997* (about employee share schemes), but does not include any payment, consideration or amount that:

- (a) is included in assessable income under Division 82 or Subdivision 83-295 or Division 301, 302, 304 or 305 of the *Income Tax Assessment Act 1997*; or
- (b) is included in assessable income under Division 82 of the *Income Tax (Transitional Provisions) Act 1997*; or
- (c) is mentioned in paragraph 82-135(e), (f), (g), (i) or (j) of the *Income Tax Assessment Act 1997*; or
- (d) is an amount transferred to a fund, if the amount is included in the assessable income of the fund under section 295-200 of the *Income Tax Assessment Act 1997*.

61. However, the exclusions to the definition of 'foreign earnings' in paragraph 60 of this Ruling are not relevant to this scheme as they relate to pensions, annuities, employment termination payments and other similar amounts.

62. The remuneration of APS employees deployed to PNG takes the form of an annual salary entitlement (with performance bonuses, where applicable) and the payment of various allowances.

63. These salary, bonuses and allowances which are described in paragraphs 18 and 19 of this Ruling, are types of income which are included in the definition of 'foreign earnings' in subsection 23AG(7).

64. Whilst the salary of APS employees may be paid into financial institutions in Australia, those 'earnings' are still considered 'foreign earnings'.

From that foreign service

65. To qualify for the exemption the 'foreign earnings' must be derived 'from that foreign service'. That does not mean that the foreign earnings need to be received at the time of engaging in foreign service. The important test is that the foreign earnings need to be attributable to that period of service in a foreign country rather than to a period before or after the period of foreign service.

66. In the case of allowances or performance bonuses paid after the taxpayer returns to Australia that relate to the period of foreign service, such allowances or bonuses are treated as foreign earnings derived from that foreign service. Also, any advances against salary or allowances paid to the taxpayer prior to the undertaking of foreign service would be treated as foreign earnings from foreign service if they arise from the undertaking of that foreign service.

67. The salary that is paid when taking recreation leave or long service leave that accrued during the period of foreign service is also considered to be foreign earnings from that service even though the recreation leave or long service leave may be taken after the completion of the foreign service.

68. The following allowances received by APS employees:

- cost of posting allowance;
- cost of living allowance;
- hardship allowance;
- child allowance;
- child supplement allowance;
- child reunion allowance;
- child hardship allowance;
- Australian household allowance;
- relief fares allowance; and
- special location supplement,

are considered to be exempt as they are derived from that foreign service in PNG.

69. That part of the transfer allowance that is attributable to the period where the employee is engaged in service in PNG, such as accommodation in PNG after uplift of goods and conversion of electrical equipment, is attributable to the period of the foreign service, and exempt from tax under subsection 23AG(1).

70. That part of the transfer allowance that is attributable to a period prior to the commencement or after the completion of the foreign service, such as accommodation in Australia after uplift of goods; taxi fares to and from airports in Australia; loss on sale of motor vehicle; cost of obtaining a dental assessment; and purchase of travel equipment for use prior to the commencement or after the completion of the foreign service, is not attributable to the period where the employee is engaged in service in a foreign country, and not exempt from tax under subsection 23AG(1).

71. The part of the allowance that is to meet the cost of taxis to and from airports in PNG will not necessarily be exempt even though the employee is in PNG at the time when those expenses arise. That part of the allowance will not be exempt if the expenses arise before the employee commences foreign service and after the employee completes the foreign service. However, if the foreign service encompasses the times when those expenses arise, that part of the allowance is exempt.

Specific activities

72. Subsection 23AG(1AA) provides that foreign earnings that satisfy the requirements of subsection 23AG(1) will only be exempt from income tax if it is derived in the person's capacity as:

- an aid worker employed in the delivery of Australian official development assistance (paragraph 23AG(1AA)(a));
- an aid or charitable worker employed by an organisation in providing overseas aid relief (paragraphs 23AG(1AA)(b) and (c));
- a specified government employee deployed overseas as a member of a disciplined force (paragraph 23AG(1AA)(d)); or
- an employee undertaking an activity of a kind specified in the regulations (paragraph 23AG(1AA)(e)).

73. The term 'Australian official development assistance' contained in paragraph 23AG(1AA)(a) is not defined for the purposes of section 23AG. However, the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009 (the Explanatory Memorandum) introducing subsection 23AG(1AA) provides guidance on the meaning of the phrase.

74. Paragraphs 1.19 to 1.22, along with Examples 1.1 to 1.3, in the Explanatory Memorandum reveal that paragraph 23AG(1AA)(a) is intended to restrict the section 23AG exemption to foreign earnings derived by:

- Australian Public Service (APS) employees providing assistance that is classified as Australian official development assistance and is delivered through the Australian Government's aid program which is administered by AusAID or the Department of Foreign Affairs and Trade (DFAT); or
- other employees delivering Australian official development assistance on behalf of their employers who in turn have been contracted by the Australian Government to assist in the delivery of Australian official development assistance under the aid program that is administered by AusAID or DFAT.

75. The ordinary meaning of 'assistance' in the Macquarie Dictionary is 'the act of assisting; help; aid'. Therefore, adopting the ordinary meaning, 'assistance' for the purposes of section 23AG would encompass the provision of money, goods or services capable of affording help or aid.

Example 2

76. *Lisa is an APS employee employed by AusAID. On 1 July 2009 Lisa is posted to PNG for 45 days, as a project advisor on an Australian ODA project.*

At the end of the 45 day posting, Lisa resigns from AusAID and takes up a position as an aid worker in PNG, employed by a prescribed charitable institution covered by paragraph 23AG(1AA)(c). Lisa remains in her new position for another 100 days.

Lisa's continuous period of foreign service for the purpose of subsection 23AG(1AA) is 145 days and her foreign earnings for the whole period are eligible for exemption pursuant to section 23AG, subject to the conditions contained in subsection 23AG(2).

Example 3

77. *As in the above example, Lisa resigns from AusAID at the end of her 45 day posting. However, rather than commencing work as an aid worker, Lisa takes up permanent employment with a bank in PNG.*

Lisa's continuous period of foreign service in PNG exceeds 91 days but none of her foreign earnings are eligible for exemption because she did not attain 91 days of continuous foreign service in relation to an activity covered by subsection 23AG(1AA).

Example 4

78. *Michael is an APS employee employed by AusAID. On 1 July 2009 Michael is posted to PNG for 100 days, as a project advisor on an Australian ODA project.*

At the end of the 100 day posting, Michael resigns from AusAID and takes up a position as an aid worker in PNG, employed by a prescribed charitable institution covered by paragraph 23AG(1AA)(c). Michael remains in his new position for another 100 days.

Michael's continuous period of foreign service for the purpose of subsection 23AG(1AA) is 200 days and his foreign earnings for the whole period are eligible for exemption pursuant to section 23AG, subject to the conditions contained in subsection 23AG(2).

Example 5

79. *As in the above example, Michael resigns from AusAID at the end of his 100 day posting. However, rather than commencing work as an aid worker, Michael takes up permanent employment with a bank in PNG.*

Michael's continuous period of foreign service in PNG exceeds 91 days. His foreign earnings for the first 100 days are eligible for exemption pursuant to section 23AG, subject to the conditions contained in subsection 23AG(2). His foreign earnings for the second 100 days are not eligible for exemption because that period of foreign service does not relate to an activity covered by subsection 23AG(1AA).

80. As this Ruling applies only to APS employees who are engaged in the delivery of Australian official development assistance by their employers for the period of their deployment to PNG (refer to paragraph 14 of this Ruling), subsection 23AG(1AA) does not prevent the exemption provided by subsection 23AG(1) from applying.

Certain foreign earnings not exempt

81. Subsection 23AG(2) provides that no exemption is available under subsection 23AG(1) in circumstances where an amount of foreign earnings derived in a foreign country is exempt from tax in the foreign country only because of:

- a double tax agreement or a law of a country that gives effect to such an agreement (paragraphs 23AG(2)(a) and (b));
- a law of that foreign country which generally exempts from, or does not provide for, the imposition of income tax on income derived in the capacity of an employee, income from personal services or any other similar income (paragraphs 23AG(2)(c) and (d)); and

- a law or international agreement dealing with privileges and immunities of diplomats or consuls or of persons connected with international organisations (paragraphs 23AG(2)(e), (f) and (g)).

82. The laws of PNG provide for the imposition of income tax and do not provide for a general exemption from tax.

83. However, Australia has entered into a tax treaty with PNG (the PNG Agreement) which is contained in Schedule 29 of the *International Tax Agreements Act 1953*.

84. Article 19(1) of the PNG Agreement provides that remuneration paid by the Australian Government to any individual in respect of services rendered in the discharge of governmental functions shall be taxable only in Australia. However, such remuneration will be taxable only in PNG if the services are rendered in PNG and the individual is a resident of PNG who is a citizen or national of PNG, or a resident of PNG who did not become a resident of PNG solely for the purpose of performing the services.

85. Paragraph 69 of Taxation Ruling TR 2005/8 provides that the term 'services rendered in the discharge of governmental functions' means those services rendered by an employee or office holder in the completion of *any* functions undertaken by government.

86. For the period of deployment, the APS employees are Australian residents and receive remuneration, in the form of salary, bonuses and allowances, from the Australian Government.

87. Therefore, income received by APS employees while deployed to PNG is exempt from taxation in PNG due to the double tax agreement between the Governments of Australia and PNG.

88. In addition, Article 14 of the JAEC Treaty grants APS employees deployed to PNG as part of the SGP an exemption from PNG income tax or other taxes on their pay and other emoluments.

89. The JAEC Treaty is an international agreement, but it does not deal with diplomatic or consular privileges and immunities. Whilst the APS employees receive privileges and immunities, they do not receive diplomatic or consular immunities.

90. The exemption from tax in PNG as a result of the JAEC Treaty is a reason for exempting the foreign earnings from foreign tax that is outside subsection 23AG(2).

91. As a result, the foreign earnings of the deployed APS employees are not exempt from tax in PNG only because of any of the reasons listed in subsection 23AG(2) (see Taxation Determination TD 2005/15). Therefore, subsection 23AG(2) will not operate to deny the 'foreign earnings' exemption under subsection 23AG(1).

Exemption with progression

92. The 'foreign earnings' of APS employees that are exempt from Australian tax under section 23AG are nevertheless taken into account in calculating the Australian tax on other assessable income derived by the employee (subsection 23AG(3)).

93. Tax on other assessable income will be calculated by applying to the non-exempt income (for example, Australian salary and investment income), the notional average rate of tax payable on the sum of exempt income and non-exempt income.

94. In calculating these amounts, any deductions that relate to the exempt income are allowed as if the exempt income was assessable income. That is, expenses which relate directly to earning income in PNG are deductible from exempt income.

Appendix 2 – Detailed contents list

95. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

IT 2650; TR 96/15; TR 2005/8;
TR 2006/10; TD 2005/15

Previous Rulings / Determinations:

CR 2006/119

Subject references:

- exempt income
- foreign income
- foreign income deductions
- foreign salary & wages
- foreign source income
- international tax
- PNG
- overseas countries
- overseas employees
- overseas tax laws
- residence of individuals

Legislative references:

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- ITAA 1936 23AG
- ITAA 1936 23AG(1)
- ITAA 1936 23AG(1A)
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- Income Tax (Transitional Provisions) Act 1997
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- TAA 1953
- Copyright Act 1968

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009
- APS Certified / Enterprise Agreement
- APS Terms and Conditions of Employment for deployment to PNG
- Joint Agreement on Enhanced Cooperation between Australia and PNG (JAEC)
- PNG Agreement
- Strongim Gavman Program

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NO: 1-1YOQ9S0

ISSN: 1445-2014

ATOLaw topic: Income Tax ~~ Exempt income ~~ allowances and benefits
Income Tax ~~ Exempt income ~~ employment income – foreign sourced