


TR 2013/D3 - Income tax: foreign employment income: interpretation of subsection 23AG(1AA) of the Income Tax Assessment Act 1936.

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Draft Taxation Ruling

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

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

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation 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.

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What this Ruling is about

1. This Ruling sets out the Commissioner's views on the interpretation of aspects of subsection 23AG(1AA) of the *Income Tax Assessment Act 1936* (ITAA 1936). This Ruling specifically considers:

- what is the 'delivery of Australian official development assistance by the person's employer' within the meaning of paragraph 23AG(1AA)(a);
- when foreign service is 'directly attributable' to the activities listed in subsection 23AG(1AA);
- what is a 'disciplined force' within the meaning of paragraph 23AG(1AA)(d); and
- who is a 'member' of a disciplined force within the meaning of paragraph 23AG(1AA)(d).

2. This Ruling applies to Australian resident individuals serving in a foreign country as an employee or office holder.

3. This Ruling does not consider terms in paragraphs 23AG(1AA)(b) or (c) or the meaning of 'deployment' in paragraph 23AG(1AA)(d). The meaning of 'deployment' is set out in Draft Taxation Determination TD 2013/D1 *Income tax: what is the meaning of 'deployment' for the purposes of paragraph 23AG(1AA)(d) of the ITAA 1936*. Taxation Determination TD 2012/8 *Income tax: what types of temporary absences from foreign service form part of a continuous period of foreign service under section 23AG of the ITAA 1936* deals with breaks in foreign service.

All references in this Ruling are to the ITAA 1936 unless otherwise indicated.

Ruling

Delivery of Australian official development assistance (ODA) by an employer

4. In the context of paragraph 23AG(1AA)(a), Australian ODA refers to programs for which the funding has been (or would properly be) classified by the Australian government as ODA for the purposes of the Australian Government's Aid Budget (embodying Australia's overseas aid program) or reporting to the Organisation for Economic Co-operation and Development (OECD). The classification of funding as ODA is based on guidance by the OECD Development Assistance Committee (DAC), which has established a definition of ODA.

5. In the context of paragraph 23AG(1AA)(a) 'delivery' means the act of providing or giving the relevant Australian ODA by the employer; that is, the act of providing the project or program or giving the assistance that is part of Australian ODA. The delivery of Australian ODA by an employer is the doing of the activities which are carrying out or sending forth Australia's overseas aid program including activities which are necessary to or assist with carrying out that program. Delivery of an aid project or program does not require an employer to undertake all activities associated with a particular project.

Directly attributable to

6. For the purposes of subsection 23AG(1AA) an employee's foreign service is 'directly attributable to' the activities of the employer where the requisite activities of the employer are the immediate and controlling reason why the employee is engaged in that foreign service. Similarly, the foreign service of an employee deployed as a member of a disciplined force is 'directly attributable' to that deployment where that deployment is the immediate and controlling reason why the employee is engaged in foreign service. This condition must be satisfied throughout the continuous period of foreign service in respect of which the foreign earnings are derived before the earnings can be eligible for exemption under section 23AG.

7. Where an employee is working for more than one employer, section 23AG applies to each employment separately. Only the foreign earnings derived from the foreign service which meets the conditions in paragraph 6 will be eligible for exemption under section 23AG.

Disciplined force

8. The phrase 'disciplined force' in paragraph 23AG(1AA)(d) refers to the Australian Defence Force (ADF), Australian Federal Police (AFP) and the State and Territory police forces.

Member

9. Any person subject to the strict code of conduct governing the above forces is a 'member' for the purposes of paragraph 23AG(1AA)(d). This will ordinarily include those employees who have undertaken the requisite oath or affirmation required to perform operational duties.

10. The term member includes an ADF member or police officer who, in their capacity as an ADF member or Australian police officer, is part of an international peacekeeping force.

11. Australian Public Service (APS) and State and Territory Public Service employees deployed alongside the disciplined force are members of a 'disciplined force' where they are effectively integrated into the 'disciplined force' and are subject to the same command structure and the same rules of conduct as those persons described in paragraph 10.

Examples

Example 1 – Employees of an entity contracted by AusAID to deliver Australian ODA

12. The Australian Agency for International Development (AusAID) enters into a contract for the delivery of a housing project in Papua New Guinea with B Co, a housing construction company.

13. The housing project is part of the Australian Government's overseas aid program and wholly funded from the Australian Government aid budget.

14. B Co, the employer, is delivering Australian ODA.

15. B Co sends its employees, who are Australian residents, to work on the housing project in Papua New Guinea for a period of 6 months.

16. The foreign service of B Co's employees sent to Papua New Guinea is directly attributable to the delivery of Australian ODA by their employer. The employees' earnings from their foreign service are exempt, subject to satisfying the remaining conditions in section 23AG.

Example 2 – Employee of an organisation funded by multiple governments

17. AusAID contribute funds to an international development fund in furtherance of the Australian Government's overseas aid program. The fund also receives contributions from other OECD donor countries. The funding from all countries is pooled. The Australian ODA component comprises 5% of the total funds.

18. Bill is an Australian resident and is employed as managing director of the international development fund. As managing director, Bill oversees the entire operation of the fund, which includes overseeing how each country's ODA contribution is spent.

19. Bill's employer is delivering an aspect of Australian ODA in that the employer is carrying into effect Australia's contribution to development efforts in specific countries. However, Bill's foreign service is not directly attributable to this. The immediate and controlling reason for his foreign service is his employment as the managing director of the development fund. The receipt of the funding in furtherance of the Australian aid program, and the subsequent oversight of those funds, is not the main reason why Bill is engaged in foreign service. Bill's foreign earnings will not be exempt under section 23AG.

Example 3 – Same employer with two roles

20. An overseas micro finance bank is funded by AusAID as part of an ODA program to provide development loans to local communities in Papua New Guinea. The bank also makes loans for purely commercial reasons separate to its role in the Australian ODA program.

21. Mary is appointed to oversee the distribution of all the funds of the bank, including those received from AusAID.

22. The bank specifically needed to employ Mary in order to deliver the Australian overseas aid. Although Mary's role is broader than just the delivery of the Australian aid, this is the principal reason for her employment.

23. As the immediate and controlling reason for Mary's foreign service is the delivery of Australian ODA by her employer, all her foreign earnings from the bank will be exempt subject to satisfying the remaining conditions in section 23AG.

Example 4 – Security guard deployed alongside AusAID workers delivering ODA

24. AusAID enters into a contract with an Australian resident security firm 'Secure Co' to provide for the security of AusAID's employees delivering a humanitarian program in an overseas country. This program forms part of Australia's aid program and is Australian ODA.

25. Expenditure in respect of these security services is not reportable as ODA in accordance with the OECD DAC Directives. However, the services of Secure Co are supporting the delivery of this aid program. Therefore, Secure Co is delivering Australian ODA.

26. Frank is an employee of Secure Co, who acts as a security guard for a senior AusAID official who is tasked with delivering an element of the program.

27. Frank works as security for the official exclusively while in the overseas country and is the only reason he is working in the country.

28. The immediate and controlling reason that Frank is engaged in foreign service is the delivery of ODA by his employer.

29. Therefore, any income derived from Frank's employment as a security guard while in the overseas country will be exempt, subject to satisfying the remaining conditions in section 23AG.

Example 5 – Medical services provided to ADF personnel

30. Medical Co is an Australian resident company. The ADF enters into a contract with Medical Co to provide medical services to ADF employees sent overseas to deliver Australian ODA. The contract is paid for by the ADF out of the funds allocated by the Commonwealth Government to the ADF to fund that ODA program.

31. The provision of services by Medical Co is supporting the delivery of the aid program. Therefore, Medical Co is delivering Australian ODA.

32. Medical Co sends its employees, who are Australian residents, overseas to fulfil its contractual obligations. Therefore, the employee's foreign service is directly attributable to the delivery of Australian ODA by Medical Co. The foreign earnings of Medical Co's employees will be exempt, subject to satisfying the remaining conditions under section 23AG.

Example 6 – Non-government organisation employees delivering a training program not related to a specific aid program

33. Training Co is an Australian resident company. AusAID enters into a contract with Training Co to assist with the training and development of AusAID staff to allow Australia to deliver on its ODA commitments. This training and development occurs overseas.

34. Whilst the training has a connection to the delivery of Australian ODA, it is not itself a part of the delivery of any particular aid program.

35. Therefore, the training and development of staff is not itself the delivery of Australian ODA. As Training Co is not delivering Australian ODA the earnings of its employees are not exempt under section 23AG.

Example 7 – Co-funded project

36. The Australian Government provides funding to the Government of an overseas country to support the implementation of their strategic health plan. Funding is also provided by other donor countries and global bodies.

37. AusAID make their funding conditional on the appointment of one of their employees as project supervisor.

38. Isabel, an Australian resident AusAID employee, is appointed to undertake this role.

39. The delivery of Australian ODA by Isabel's employer is the immediate and controlling reason for her foreign service. Therefore, her foreign service is directly attributable to the delivery of Australian ODA by her employer and her foreign earnings will be exempt, subject to satisfying the remaining conditions in section 23AG.

Example 8 – Employment changes while overseas

40. The facts are the same as example 7 except as modified below.

41. Isabel is employed by a commercial bank in the overseas country on a full-time basis. While working overseas she successfully applies for an AusAID position. Isabel resigns from her position in the commercial bank and AusAID appoint her as project supervisor.

42. From the date of this appointment, Isabel's foreign service is directly attributable to the delivery of Australian ODA by her employer. Her foreign earnings, derived from the date of that appointment, will therefore be exempt, subject to satisfying the remaining conditions in section 23AG.

Example 9 – Working for two employers

43. The facts are the same as example 7 except as modified below.

44. Isabel is employed by a commercial bank in the overseas country. While working overseas she successfully applies for an AusAID position and they appoint her as a project supervisor on a part-time basis. Isabel is able to continue her role in the bank also on a part time basis.

45. Hence, Isabel has two employers one of which (AusAID) is delivering Australian ODA.

46. In respect of Isabel's AusAID employment, her foreign service is directly attributable to the delivery of Australian ODA by her employer. Therefore, her foreign earnings from this foreign service will be exempt, subject to satisfying the remaining conditions in section 23AG. Conversely her earnings from the bank would not be exempt.

Example 10 – Australian Federal Police deployed overseas

47. Catherine is a member of the AFP within the meaning of the *Australian Federal Police Act 1979* and is deployed by the AFP as part of the Regional Assistance Mission to Solomon Islands (RAMSI).

48. As a member of the AFP, Catherine is a 'member of a disciplined force' for the purposes of paragraph 23AG(1AA)(d). Her foreign service is a direct result of deployment as part of this disciplined force.

49. Therefore, Catherine's earnings from her foreign service will be exempt, subject to satisfying the remaining conditions in section 23AG.

50. Similarly if Catherine was employed by the New South Wales Police Force and was designated as a police officer within the meaning of section 11 of the *Police Act 1990 (NSW)*, section 23AG would be equally applicable.

Example 11 – APS employee acting in a support role to ADF

51. Doug is employed by the Department of Defence as an APS employee.

52. Doug is deployed alongside ADF personnel to play an operational support role in a foreign country.

53. Doug has signed an official ADF document which states that he is subject to defence force discipline during the course of his deployment giving Doug the status of ‘defence civilian’ under the *Defence Force Discipline Act 1982*. Therefore, for the duration of this deployment, Doug is under the command of the ADF.

54. As Doug is working under identical conditions to ADF personnel, is subject to the same code of conduct and works under the same command structure for the duration of the deployment he is considered to be a member of a disciplined force under paragraph 23AG(1AA)(d).

55. Therefore, Doug’s earnings from his foreign service will be exempt, subject to satisfying the remaining conditions in section 23AG.

Example 12 – Contractor’s employees acting in a support role to ADF

56. The Commonwealth Government enters into a contract with Service Co, an Australian resident company, to provide support services to the ADF overseas. In this particular case the ADF is not delivering Australian ODA. The contract provides that Service Co’s employees are to sign an official ADF document stating they are subject to defence force discipline during the course of the deployment giving them the status of ‘defence civilians’ under the *Defence Force Discipline Act 1982*. The contract also specifically provides that the employees are not deemed to be employees of the Commonwealth by virtue of the contract.

57. The employees of Service Co, while members of a disciplined force for the purposes of paragraph 23AG(1AA)(d), have not been deployed by the Commonwealth, a State or Territory (or an authority thereof). Their earnings are therefore not exempt under section 23AG.¹

¹ However, if the ADF was delivering Australian ODA, the position in respect of the employees of the contractor may be different – see example 5.

Example 13 – AFP employee who is not a member of the AFP

58. Emma is an employee of the AFP who is not a ‘member’ within the meaning of the AFP Act 1979. Emma is deployed alongside AFP employees who are ‘members’ within the meaning of that Act as part of the RAMSI.

59. Emma is, due to the conditions of her deployment, subject to the same operating conditions and command structure as the employees she is working alongside.

60. Therefore, Emma is considered to be a ‘member of a disciplined force’ for the purposes of subparagraph 23AG(1AA)(d).

61. Emma’s earnings from her foreign service will be exempt, subject to satisfying the remaining conditions in section 23AG.

Date of effect

62. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation29 May 2013

Appendix 1 – Explanation

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

63. Section 23AG provides an exemption from Australian income tax for:

- certain foreign earnings derived by a resident individual;
- from a continuous period of foreign service of at least 91 days;

if:

- the foreign service is directly attributable to certain activities which are listed in subsection 23AG(1AA); and
- all of the other requirements of section 23AG are satisfied.

64. Subsection 23AG(1AA) provides that the foreign earnings are exempt only if the continuous period of foreign service is ‘directly attributable to’ any of the following:

- (a) the delivery of Australian ODA by the person’s employer;
- (b) the activities of the person’s employer in operating a public fund;
 - (i) declared by the Treasurer to be a developing country fund; or
 - (ii) established and maintained to provide monetary relief to people in a developing foreign country who are distressed as a result of a disaster;
- (c) the activities of the person’s employer, if the employer is exempt from income tax because they are a prescribed institution located outside Australia or pursuing objectives principally outside Australia and meets certain other conditions;
- (d) deployment outside Australia as a member of a disciplined force;
- (e) any activity of a kind specified in the regulations.

Delivery of Australian ODA by an employer

65. Paragraph 23AG(1AA)(a) provides that foreign earnings are not exempt under subsection 23AG(1) unless the continuous period of foreign service is directly attributable to the delivery of Australian ODA by the person's employer.

66. The term 'Australian official development assistance' is not defined for the purposes of section 23AG.

67. The term 'official development assistance' (ODA) is a term used in international standards developed by the OECD for the purposes of co-ordinating and monitoring foreign aid projects, and is a widely recognised and internationally accepted term within the aid industry. The OECD DAC advises on what expenditure can be considered ODA for the OECD DAC purposes. The OECD DAC is an international forum bringing together donor government and certain other organisations to compare, improve and coordinate the provisions of aid to developing countries.²

68. The DAC Directives³ give guidance on what can be reported as ODA and defines ODA as those flows to countries and territories on the DAC List of ODA Recipients⁴ and to multilateral development institutions which are:

- i provided by official agencies, including state and local governments, or by their executing agencies; and
- ii each transaction of which:
 - (a) is administered with the promotion of the economic development and welfare of developing countries as its main objective; and
 - (b) is concessional in character and conveys a grant element of at least 25 per cent (calculated at a rate of discount of 10 per cent).

69. The DAC Directives and the DAC guidelines for reporting to the aid activity database in the Creditor Reporting System (CRS)/DAC converged format (the CRS++ Guidelines)⁵ are designed to aid in the completion of the OECD's aid related reporting requirements and provide technical guidance to statistical reporters.

70. The DAC Fact Sheet 'Is it ODA?'⁶ supplements the DAC Directives and provides a general overview to help donors decide whether particular expenditure qualifies as ODA.

71. Therefore, the term 'ODA' can be said to have a very precise meaning founded in the DAC Directives.

² See OECD 2010, *Inside the DAC – A Guide to the OECD Development Assistance Committee 2009-2010*.

³ See OECD (DAC) 2010, DAC Statistical Reporting Directives, 12 November.

⁴ Available at www.oecd.org/dac/stats/daclist

⁵ Available at www.oecd.org/dac/stats/crsdirectives

⁶ OECD 2008, *Is it ODA?*

72. Australia is a member of the OECD DAC, and as a requirement of that membership, the aid activities of the member country are reviewed every four years through the DAC Peer Review Process.⁷

73. According to the memorandum prepared by AusAID and submitted to the OECD DAC for the 2013 peer review of Australia, AusAID is the lead agency in delivering Australia's aid program, responsible for approximately 92 per cent of Australian ODA.⁸

74. Thus, AusAID is the Australian body which is ultimately responsible for determining whether Australian government expenditure represents Australian ODA and for reporting on such projects to the OECD. In undertaking this reporting AusAID must follow the OECD DAC⁹ international standards for defining and recording ODA (DAC Directives).

75. The OECD DAC meaning of ODA and AusAID's application of this meaning to report Australian ODA expenditure is tied to Australia's International Development Assistance Program and in particular to the budget funding that program. Thus, the Government's monetary commitment to the International Development Assistance Budget is described in the Minister for Foreign Affairs' Budget ministerial statement delivered on 8 May 2012 entitled *Australia's International Development Assistance Program 2012-13*¹⁰ as total ODA and represented as a percentage of gross national income (GNI).¹¹ That document goes on to describe various programs and initiatives.¹²

⁷ See OECD (DAC) 2012, *DAC Peer Review Reference Guide*, adopted at the DAC meeting on 12 July 2012.

⁸ AusAID (2012), *OECD DAC Peer Review of Australia, 2013: Memorandum*, Canberra, pp. 2-3.

⁹ The DAC is an international forum bringing together donor governments and certain other organisations to compare, improve and co-ordinate the provisions of aid to developing countries. Australia is a member.

The DAC sets the international standard for defining and recording ODA. Members are required to report the provision of ODA to the DAC. The DAC then uses this data for a variety of activities such as tracking and comparing aid efforts and improving the division of aid amongst members. See OECD 2010, *Inside the DAC – A Guide to the OECD Development Assistance Committee 2009-2010*.

¹⁰ Carr B (Minister for Foreign Affairs) 2012, *Australia's International Development Assistance Program 2012-13*, Budget ministerial statement, Canberra, 8 May.

¹¹ This can be directly linked back to the commitment of most DAC member countries to ultimately reaching the target of their ODA expenditure representing 0.7% of GNI (see OECD (DAC), *The DAC: 50 years, 50 Highlights*, pp 10-15; OECD (DAC), *DAC in Dates: the History of OECD's Development Assistance Committee*, 2006 Edition, pp 42-43.

¹² See also AusAID 2012, *An Effective Aid Program for Australia Making a real difference – Delivering real results*, Canberra; AusAID 2012, *Helping the World's Poor through Effective Aid: Australia's Comprehensive Aid Policy Framework to 2015-16*, Canberra.

76. Therefore, in the context of section 23AG, Australian ODA refers to certain overseas aid programs. These are programs for which the funding has been (or would properly be) classified by the Australian government as ODA for budgetary purposes or reporting to the OECD. The classification of funding as ODA is based on guidance by the OECD DAC, which has established a definition of ODA that is agreed between member states.

77. Paragraph 23AG(1AA)(a) refers to the ‘*delivery* of Australian ODA by [an] employer’ (emphasis added). The term ‘*delivery*’, also not defined, is in this context of section 23AG not referring to an allocation or expenditure of funds but to the underlying activity. Thus, the *Australian Oxford Dictionary* defines ‘*delivery*’ to include the act of giving or surrendering, a distribution (letters). The *Macquarie Dictionary* defines ‘*delivery*’ to include the delivering of letters, goods, etc.; a giving up or handing over; and the act or manner of giving or sending forth. Additionally, the ordinary meaning of the verb ‘*deliver*’ in the *Macquarie Dictionary* includes to give up or surrender; give into another’s possession or keeping; and to carry and pass over (letters, goods, etc.) to the intended recipient.

78. In the context of paragraph 23AG(1AA)(a), the *delivery* of Australian ODA is referring to the doing of the activities which are carrying out or sending forth Australia’s overseas aid program including activities which are necessary to or assist with carrying out that program. Thus, ultimately, the question of whether an employer is delivering Australian ODA can be answered by ascertaining whether their activities are delivering an element of Australia’s overseas aid program or assisting with the delivery of that program.

79. This is consistent with the EM which provides:

Australian official development assistance

1.19. Australian official development assistance (ODA) is assistance delivered through the Australian Government’s overseas aid program, as administered by the Department of Foreign Affairs and Trade and/or the Australian Agency for International Development (AusAID). Australian ODA aims to reduce poverty and achieve sustainable development in developing countries, in line with Australia’s national interest

80. It would normally be the case that expenditure on programs forming part of the overseas aid program would be ultimately reported to the OECD DAC under one of the heads of expenditure because of the links, as demonstrated above, between Australia's aid budget and its commitment to and membership of the OECD DAC. Thus, if AusAID have reported expenditure to the OECD DAC as representing Australian ODA, there is no question that the underlying activity will be Australian ODA for the purposes of section 23AG. However, there are cases where some functions in assisting the delivery of an aid program would not be reported as ODA to the OECD, even though direct expenditure on the program itself is reportable as ODA. These functions assisting in the delivery of aid can still be part of the 'delivery of Australian ODA', within the meaning of paragraph 23AG(1AA)(a), because they are necessary for, or support, the aid program.

81. By way of example, a service company is contracted by the ADF to provide medical services to ADF personnel (where the ADF are engaged in the delivery of Australia's aid program). While the service company may not actually be engaged in the activities which directly result in the delivery of the aid program, and the expenditure may not necessarily be ultimately reported as Australian ODA by AusAID, they are nonetheless assisting and supporting the delivery of that program. The service company is therefore itself delivering ODA in the necessary sense.

82. What this example also shows is that to come within paragraph 23AG(1AA)(a), the employer need not necessarily be delivering the aid directly. The services or assistance they provide under a particular contract may nonetheless qualify as the delivery of Australian ODA where that service or assistance is provided in respect of a specific aid program. Thus, the employer need not itself undertake all the activities required to deliver the project to meet the statutory description of 'delivery of Australian ODA'.

83. However, the service or assistance must be provided in respect of a specific aid program to assist in the delivery of that program.

84. Paragraph 23AG(1AA)(a) does not require that an Australian Government agency be the employer actually delivering the Australian ODA or in fact that a Government agency be directly involved. The employer may be a contractor (contracted by a Commonwealth Government body on behalf of the Commonwealth Government to assist in the delivery of the Australian ODA), sub-contractor (contracted by the contractor previously identified, to assist in the delivery of the Australian ODA) or another Commonwealth Government body directly delivering the ODA.

85. This is also consistent with the EM which provides the following:

1.20. In addition to providing Australian ODA directly, AusAID also competitively contracts aid work to Australian and international entities. Thus, in practice, individuals involved in the delivery of Australian ODA can include both Australian Public Service (APS) employees and non-APS employees.

1.21. For the purposes of subsection 23AG(1AA) the delivery of Australian ODA must be undertaken by the person's employer, which includes AusAID and an entity contracted by AusAID to assist in the delivery of Australian ODA.

...

Example 1.2

Robert is an APS employee employed by the Commonwealth Department of Climate Change. He is posted to Tokelau for 150 continuous days, to work on a project aimed at minimising the impact of rising sea levels in Tokelau.

Robert is not an AusAID employee but the project is classified as Australian ODA by AusAID. Robert's foreign service is directly attributable to the delivery of Australian ODA by his employer and his foreign earnings are therefore eligible for exemption pursuant to section 23AG, subject to the conditions contained in subsection 23AG(2).

Directly attributable to

86. The term 'directly attributable to' is not defined for the purpose of section 23AG. The words 'attributable to' have commonly been interpreted to require a causal connection. For example, in *Commissioner of Taxation (Cth) v. Sun Alliance Investments Pty Ltd (In Liq)* the High Court said:

It is the concept of causation, rather than source, with which s160ZK(5) is concerned. In determining whether the plaintiff's loss of employment was 'attributable to' the provisions of the Local Government Act 1972 (UK), Donaldson J in *Walsh v. Rother District Council* said:

'[T]hese are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient.'¹³

¹³ *Commissioner of Taxation (Cth) v. Sun Alliance Investments Pty Ltd (In Liq)* (2005) 225 CLR 488; [2005] HCA 70, at paragraph 80.

87. In *Repatriation Commission v. Law*, the Full Federal Court said:

It seems clear the expression ‘attributable to’ in each case involves an element of causation.¹⁴

88. The addition of the word ‘directly’ describes the quality that connection must have.

89. The High Court, in *Federal Commissioner of Taxation v. Dixon* said, of the phrase ‘directly or indirectly’ in former paragraph 26(e) of the ITAA 1936 that ‘in relation directly... to, any employment’ means ‘where employment is the proximate cause of the payment’.¹⁵ Conversely, an indirect relation was ‘one where the employment is a cause less proximate or, indeed, only one contributory cause.’¹⁶

90. Subsection 23AG(1AA) requires that it is the ‘foreign service’ that must be directly attributable to the listed activities of the person’s employer. The term ‘foreign service’ is defined in subsection 23AG(7) to mean ‘service in a foreign country as the holder of an office or in the capacity of an employee’. Thus, in this context, foreign service is directly attributable to the activities of the employer where the requisite activities of the employer are the immediate and controlling reason why the employee is engaged in that foreign service. This condition must be satisfied throughout the continuous period.

91. Where the employee has been sent overseas by their employer to deliver an aspect of the aid program that their employer has responsibility for delivering, it is clear that the employee’s foreign service is directly attributable to the delivery of Australian ODA by their employer.

92. However, the position is less clear where the employee performs multiple roles, has more than one employer or was already present in the foreign country.

93. In these circumstances the enquiry is a fact and circumstances one answered by looking to the main (controlling) and most proximate (immediate) reason why the employee is engaged in that foreign service. This test will not be satisfied where the activities of the employer are merely a contributory cause to the employee being engaged in foreign service – the reason must be the most immediate cause.

¹⁴ *Repatriation Commission v. Law* [1980] FCA 92; (1980) 31 ALR 140 at 151.

¹⁵ *Federal Commissioner of Taxation v. Dixon* (1952) 86 CLR 540 at 553 to 554; [1952] HCA 65 at paragraph 2

¹⁶ See also *Coxe v. Employers’ Liability Assurance Corporation Limited* [1916] 2 KB 629, per Scrutton J at 634.

94. For example, an Australian services company successfully tenders for a contract with AusAID to build water sanitation facilities in an overseas country in relation to an Australian ODA program. The company has other business in that same country. The company sends an employee to the foreign country to build the water sanitation facilities. While the employee is present in that country, they are also required to perform duties in respect of the other unrelated business activities. However, notwithstanding these other tasks, the main reason the employee is undertaking service in the overseas country is the delivery of the water sanitation facilities. It is the most immediate reason for the employee's continued presence. The whole of the employee's foreign earnings from this foreign service will therefore be exempt providing the other conditions in section 23AG are satisfied.

95. The result would be the same if the employee was already present in the foreign country and commenced work on the water sanitation facilities provided that the immediate and controlling reason for their continued presence is the building of those facilities. The foreign earnings from the point of commencing this work will then be exempt.

96. However, the test would not be satisfied if the employee was sent to primarily undertake functions related to the non-Australian ODA component of the employer's functions and was asked to perform duties from time to time in respect of the water sanitation project. In these circumstances, none of the foreign earnings would be eligible for exemption.

97. By way of another example, a non-government organisation (NGO) implements and monitors certain aid projects. It obtains funding from multiple governments from time to time, and then allocates these to projects which it implements and monitors. The NGO receives funding through the AusAID-NGO Cooperation Program and its activities, in this respect, therefore form part of the Australian aid program. The delivery of Australian ODA is but one part of the organisation's activities, which are carried out in respect of the combined funds. The NGO employs a chief financial officer who has financial oversight of all the NGO's projects. The delivery of the Australian ODA by the NGO in this instance is not the immediate reason for this employee being engaged in foreign service. The employee is engaged as a result of the NGO's activities in respect of all its projects and just because funding happens to come from the Australian government does not mean that the foreign service then becomes directly attributable to the delivery of Australian ODA.

98. Similarly, an employee working overseas for a multi-lateral organisation, for example a Development Bank, in receipt of Australian aid will not qualify for exemption. Their most immediate reason for their foreign service is not the delivery of Australian ODA by their employer. However, if AusAID send an employee overseas to participate in a project oversight forum for a co-funded project delivered by the Bank, this foreign service would be directly attributable to the delivery of Australian ODA by AusAID.

99. Where an employee works for two separate employers, section 23AG applies to each employment relationship separately. As noted above, ‘foreign service’ is defined as service in the foreign country ‘as the holder of *an* office or in the capacity of *an* employee’ (emphasis added). This definition can be applied in respect of each employment relationship separately such that there is a period of foreign service in respect of each employment. Thus, if the foreign service in respect of the employer who is delivering ODA is directly attributable to that delivery of ODA by that employer, the foreign earnings from that foreign service qualify (providing the other conditions in section 23AG are met). However, the foreign earnings in respect of another employer, who is not delivering Australian ODA, do not qualify.

Paragraph 23AG(1AA)(d)

100. Paragraph 23AG(1AA)(d) provides that foreign earnings from foreign service directly attributable to the following are exempt:

The person’s deployment outside Australia as a member of a disciplined force by:

- (i) the Commonwealth, a State or a Territory; or
- (ii) an authority of the Commonwealth, a State or a Territory.

101. What constitutes a ‘deployment’ is set out in TD 2013/D1.

Meaning of ‘disciplined force’

102. The meaning of ‘discipline’ in the *Australian Oxford Dictionary* is:

noun

- i control or order exercised over people or animals, especially children, prisoners, military personnel, church members etc.
 - the system of rules used to maintain this control.
 - The behaviour of groups subjected to such rules: *poor discipline in the ranks*.

103. The *Macquarie Dictionary* defines the term, as relevant:

noun

- 1. training to act in accordance with rules; drill: military discipline.
- ...
- 5. subjection to rules of conduct of behaviour; a state of order maintained by training and control: good discipline in an army.

6. a set or system of rules and regulations.

104. The *Australian Oxford Dictionary* defines ‘force’ as relevant:
noun

3. military strength.
- [in pl.] troops; fighting resources.
 - An organised body of people, especially soldiers, police or workers.

105. The *Macquarie Dictionary* defines the term in a similar manner.

106. Thus, the combined phrase ‘disciplined force’ can be said to have a meaning specifically linked to the military. However, as established in TD 2013/D1, paragraph 23AG(1AA)(d) is not limited to military personnel. In this regard, assistance is provided by the broader statutory context (see *Cooper Brookes (Wollongong) Pty Ltd v. Federal Commissioner of Taxation*).¹⁷ Specifically, subject to certain conditions, section 23AD exempts the pay and allowances earned on overseas duty of a person serving as a ‘member of the Defence Force’. The use of capitals indicates that the words ‘Defence Force’ derive their meaning from the *Defence Act 1903* and so refers to persons appointed or enlisted as members of the Australian Navy, Army and Air Forces within section 30 of that Act.¹⁸ Accordingly, the use of a different phrase in lower case in paragraph 23AG(1AA)(d) – ‘disciplined force’ – suggests that it has a broader meaning and is not confined to Defence Force members.

107. However, while the term ‘disciplined force’ is not limited to military forces, neither is it correct to say that it can encompass any group of persons subject to a system or code of common rules.

108. In *New South Wales v. Fahy*,¹⁹ Chief Justice Gleeson observed of the *Police Service Act 1990 (NSW)*:

Read as a whole, the *Police Service Act* demonstrated that the evident purpose of the legislation was, as may be expected, to create an hierarchical and disciplined force. Chief among the statutory provisions giving effect to that purpose was s 201 which made it a criminal offence for a police officer to neglect or refuse either to obey any lawful order or to carry out any lawful duty as a police officer.²⁰

¹⁷ *Cooper Brookes (Wollongong) Pty Ltd v. Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26; (1981) 81 ATC 4292; (1981) 11 ATR 949.

¹⁸ See *Commonwealth Taxation Board of Review Case T39 86* ATC 330; (1986) 29 CTBR (NS) 379.

¹⁹ *New South Wales v. Fahy* (2007) 232 CLR 486; [2007] HCA 20; (2007) 81 ALJR 1021.

²⁰ *New South Wales v. Fahy* [2007] HCA 20 at paragraph 21.

109. In *White v. Director of Military Prosecutions & Anor*²¹ Kirby J said, of the defence forces:

It is of the nature of naval and military (and now air) forces that they must be subject to elaborate requirements of discipline. This is essential both to ensure the effectiveness of such forces and to provide the proper protection for civilians from service personnel who bear, or have access to, arms.²²

110. These passages show that the discipline to which the employees are subject must be more demanding and severe to that which other groups of employees are subject to meet the description of 'disciplined force'. They further show that the discipline existing in the military and police setting governing those charged with the responsibility of performing the defence or operational policing functions is of the requisite degree to satisfy the description of 'disciplined force'.

111. This is confirmed by the statutory context. The phrase appears as part of the composite phrase 'deployment ...as a member of a disciplined force'. The word 'deploy', as set out in TD 2013/D1, is referring to the act of sending into effective action by the person's employer. It is commonly used in police and military settings. The term 'member' denotes someone specifically appointed to a readily identifiable group of people. While these two terms are also capable of wider application, their combination with the phrase 'disciplined force' is highly suggestive of the paragraph being limited to military and police services.

112. Therefore, members of fire services and rescue services are excluded from paragraph 23AG(1AA)(d). While employees of such organisations are subject to a disciplinary code,²³ that code is not to the same level or extent of the disciplinary code to which military and police personnel are subject.

113. Limiting paragraph 23AG(1AA)(d) to the armed services is consistent with the language used in the EM and the Second Reading Speech. The EM contains the following statements:

1.31. A person's foreign earnings will be eligible for exemption if the foreign service is directly attributable to that person's deployment outside Australia as a member of a disciplined force by an Australian government or an authority thereof. A disciplined force is intended to refer to a defence force, including a peacekeeping force, and a police force.

²¹ *White v. Director of Military Prosecutions & Anor* [2007] HCA 29; 235 ALR 455

²² *White v. Director of Military Prosecutions & Anor* [2007] HCA 29 at paragraph 152.

²³ For example, in *Mines Rescue Board of NSW v. Singleton Council* [1998] NSWCA 144, Meagher JA referred to officers of the Mines Rescue Board as forming a 'disciplined force' (at 5). In *R v. Industrial Appeals Court and the Fire Fighters Board; Ex parte The Metropolitan Fire Brigades Board and the Country Fire Authority* [1959] VR 345 Dean J referred to the fire brigades as a 'disciplined force' (at 356). However, the courts, in both cases, were not interpreting the phrase 'disciplined force' and nothing turned on this phrase. It was merely used as a descriptor.

1.32. In a defence force context, the exemption would apply to a person's deployment outside Australia as part of a non-warlike operation. In a police force context, the exemption would apply to Australian Federal Police employees deployed on an International Deployment Group mission who are subject to Commanders Orders to achieve operational policing outcomes.

114. In the Second Reading Speech to Tax Laws Amendment (2009 Budget Measures No 1) Bill 2009 in the House of Representatives the Treasurer relevantly stated:

From 1 July 2009, an exemption will apply to income earned as an aid worker, a charitable worker or under certain types of government employment such as a defence or police deployment. It will also apply to income earned as prescribed under regulations.

115. Therefore, the phrase 'disciplined force' as it appears in paragraph 23AG(1AA)(d) is referring only to military and police services. This would include military and police personnel Australia has contributed to international peacekeeping forces.

Meaning of member

116. As established above, the term 'disciplined force' covers military and police services. These organisations are governed by legislation. There is often a distinction made in the legislation between employees and members – employees being all persons employed by the various bodies and members a subset thereof.

117. Thus, for example, under the *Australian Federal Police Act 1979*, section 40B allows the Commissioner to declare an AFP employee to be a member of the AFP subject to the employee meeting certain conditions. Within the Department of Defence ADF 'members' are officers, soldiers, sailors or airmen (within the meaning of section 4 of the *Defence Act 1903*) and then there are APS employees employed by the Department of Defence under the *Public Service Act 1999*. The various State and Territory statutes governing the police forces use slightly different formulations again.

118. Because paragraph 23AG(1AA)(d) covers more than one agency, the term 'member' cannot be said to derive its meaning from any one particular statute. Furthermore, because of variances in how the different statutes use and define 'member', and whether the term is used at all, the use of that term in those statutes cannot necessarily determine whether or not paragraph 23AG(1AA)(d) applies.

119. According to the *Australian Oxford Dictionary* 'member' means:

1. a person belonging to a society, team, etc.

120. Therefore, in this context, ‘member’ means belonging to the disciplined force. As the term ‘disciplined force’ is closely connected to and informed by the code of conduct governing the relevant force, a person will belong to, and hence be a member of, the disciplined force if they are subject to the discipline of the relevant force. This would ordinarily be the case where the employee has taken an oath or affirmation and so is required to follow orders in line with the organisation’s command structure and subject to formal disciplinary procedures if orders are not followed or the code of conduct breached. That is, they are subject to the code of conduct ‘essential to the effectiveness’ of that force and which provides the ‘protection for civilians from service personnel who bear, or have access to, arms’. Without taking such an oath or affirmation, employees are not permitted to carry out the operational duties of the armed service.

121. Therefore, employees appointed as or meeting the description of members in the *Australian Federal Police Act 1979* and the *Defence Act 1903* are all ‘members of a disciplined force’ as that phrase appears in paragraph 23AG(1AA)(d). Similarly, any employees appointed to a police force carrying the designation of ‘police officer’ are also members. This includes protective service officers and persons seconded to the police force.

122. The personnel tasked with the performance of a particular overseas mission or operation can comprise not only persons specifically performing the defence, policing and peacekeeping functions but also those accompanying and providing assistance and support to those so engaged. The persons providing such ancillary support would not be performing, or be permitted to perform, operational duties.

123. Nonetheless, persons providing such ancillary support are considered a ‘member of the disciplined force’ for the purposes of paragraph 23AG(1AA)(d) provided they are effectively integrated into the force performing the primary functions of defence, peacekeeping, and policing. These people will be considered to be effectively integrated into the primary force where they are subject to the same or similar command structure and rules of conduct as those performing the primary functions of that ‘disciplined force’.

124. For example, employees of the Department of Defence, who are not members of the ADF (within the meaning of section 4 of the *Defence Act 1903*), may receive deployment orders from the Commonwealth for the purpose of performing operational support roles in a specified area outside Australia to support ADF operations. The employees consent in writing to subject themselves to Defence Force discipline for the duration of the deployment. These employees have the status of ‘defence civilian’ within the meaning of section 3 of the *Defence Force Discipline Act 1982*. As defence civilians, the employees are subject to ADF command and control and the same rules of conduct as those who have taken the requisite oath or affirmation required to perform operational duties. Such employees will be considered to be deployed as a member of a disciplined force for the purposes of paragraph 23AG(1AA)(d).

125. The Department of Defence may also engage a contractor to provide support services to the ADF on overseas missions. Employees of that contractor may then accompany the members of the ADF and, as with APS employees, may have the status of 'defence civilians' subject to Defence Force discipline. However, they are not employees of the Department of Defence and may not be employees of any Commonwealth or State agency. Such employees are not therefore, being deployed 'by' the Commonwealth, State or Territory or an authority thereof.²⁴

126. The AFP may send both sworn (members within the meaning of section 40B of the *Australian Federal Police Act 1979*) and unsworn (APS employees that have not taken the required oath or affirmation) employees on active deployment as part of either the International Liaison Network (ILN) or the International Deployment Group (IDG). Unsworn employees often perform duties similar to and alongside sworn employees that are deployed outside Australia. If the unsworn employee, while on deployment, is subject to the same command structure and code of discipline as the members, the unsworn employees will be considered to be deployed as a member of a disciplined force for the purposes of paragraph 23AG(1AA)(d).

²⁴ However, if the ADF are delivering Australian ODA, the foreign earnings derived by the employees of the contractors may be eligible for exemption because of paragraph 23AG(1AA)(a).

Appendix 2 – Your comments

127. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 10 July 2013
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Appendix 3 – Detailed contents list

128. 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:

TR 2006/10; TD 2012/8;
TD 2013/D1;

Subject references:

- exempt income
- foreign income
- foreign salary and wages
- foreign source income
- international tax
- overseas employees

Legislative references:

- ITAA 1936 23AD
- ITAA 1936 23AG
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- ITAA 1936 23AG(1AA)(a)
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- ITAA 1936 23AG(7)
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