



# ***TD 2011/D12 - Income tax: what types of temporary absences from foreign service form part of a continuous period of foreign service under section 23AG of the Income Tax Assessment Act 1936?***

 This cover sheet is provided for information only. It does not form part of *TD 2011/D12 - Income tax: what types of temporary absences from foreign service form part of a continuous period of foreign service under section 23AG of the Income Tax Assessment Act 1936?*

This document has been finalised by [TD 2012/8](#).

 There is a Compendium for this document: [TD 2012/8EC](#) .



---

## Draft Taxation Determination

---

Income tax: what types of temporary absences from foreign service form part of a continuous period of foreign service under section 23AG of the *Income Tax Assessment Act 1936*?

**!** 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.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### Ruling

1. A period during which a person is engaged in foreign service for the purpose of section 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936)<sup>1</sup> includes a temporary absence from that service if, and only if, the absence is:

- in accordance with the terms and conditions of that foreign service; and
- for any of the following reasons:
  - recreation leave on full pay that is attributable to the period of foreign service (that is, recreation leave that accrues during that period of foreign service, and further recreation leave that accrues during recreation leave which is treated as foreign service), including reasonable periods of additional recreation leave and reasonable leave between periods of work under a cyclical arrangement;
  - leave because of an accident or illness;
  - leave because of an accident or illness of a person other than the taxpayer, or because of the death of another person;

---

<sup>1</sup> All legislative references are to the ITAA 1936.

- weekends, public holidays, rostered days off, days off due to part-time arrangements, or other approved paid time off, provided that, if such absences are used to return to Australia or to visit a third country, they are not excessive by comparison with the scheduled period of foreign service. The Commissioner considers that these absences are not excessive if the total of such absences is less than one-sixth of the scheduled period of foreign service (see paragraphs 56 to 59); or
- in the course of carrying out either duties or training required by the employer under a continuing foreign service engagement (that is, business trips directly related to the foreign service) provided the absences are not excessive by comparison with the scheduled period of foreign service.

2. An absence from foreign service does not form part of a continuous period of foreign service under section 23AG if it is for any of the following reasons:

- any recreation leave which is not attributable to the period of foreign service; in other words, recreation leave that did not accrue during the period of foreign service;
- long service leave, regardless of whether or not it accrued during a period of foreign service;
- leave without pay or on reduced pay, other than any of the following: sick leave, leave because of an accident or illness of a person other than the taxpayer, or leave because of the death of another person;
- furlough;
- extended leave;
- any kind of leave that is similar to long service leave or extended leave or furlough, regardless of how it is described;
- maternity leave;
- available days<sup>2</sup> spent in Australia.

3. A gap between the end of one period of foreign service and the beginning of a later separate period of foreign service cannot form part of a continuous period of foreign service under section 23AG.

4. However, in some circumstances the 1/6 legislative rule in subsection 23AG(6A) allows periods of foreign service before and after a break in foreign service to be added together and treated as a continuous period of foreign service (see paragraphs 62 to 65).

5. Periods during which a person is engaged in foreign service, or treated as being engaged in foreign service, do not necessarily correspond with periods for which income is exempt under section 23AG. The important test for exemption 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.

---

<sup>2</sup> 'Available days' (also known as 'grey days') are those where no work is allocated but the employee is available for duty. (The terminology may vary under different contracts with different employers and in different countries, but the nature of the periods is the same, irrespective of the way they are described.)

**Example 1**

6. Daniel is an Australian resident. He is deployed for a five month period of foreign service that satisfies subsection 23AG(1AA). Under the terms and conditions of his foreign service he is allowed to take five days of recreation leave during his deployment. After two months of foreign service Daniel has accrued a total of five days of recreation leave, comprising four days which accrued during the foreign service and one day which accrued during Daniel's employment in Australia with the same employer prior to Daniel commencing the foreign service. Daniel takes five consecutive days of recreation leave on full pay, while he is still deployed overseas.

7. Under subsection 23AG(6) the four days that accrued during the foreign service are treated as part of a continuous period of foreign service because they are taken in accordance with the terms and conditions of that foreign service; they are taken during the foreign service; and, since the leave is on full pay and it is not attributable to a period of employment other than that period of foreign service, those four days are not excluded by paragraph 23AG(6)(a).

8. The one day that accrued prior to the foreign service amounts to a break in the foreign service. Under subparagraph 23AG(6)(a)(i) this day is not treated as foreign service because it is recreation leave that is not attributable to the foreign service.

9. However, under the 1/6 legislative rule in subsection 23AG(6A) (see paragraphs 62 to 65) the periods of foreign service before and after this one day break can be added together and treated as a continuous period of foreign service.

**Example 2**

10. Rochelle is an Australian resident. She is deployed for a twelve month period of foreign service that satisfies subsection 23AG(1AA). Under the terms and conditions of her employment she works under a cyclical arrangement in which each cycle consists of two months working in a foreign country followed by one month of leave on full pay which may be taken in Australia or elsewhere. During the time she is in the foreign country she works long hours in conditions of severe hardship, and her total working time per year, averaged over 52 weeks, amounts to approximately 35 hours per week. The month of leave in each cycle is given in recognition of the long hours and extreme conditions of the work in the foreign country resulting in the need for more rest and recreation and the fact that some time will need to be spent on matters other than rest and recreation.

11. Rochelle operates her own business in Australia and during each month of leave she is engaged in that business.<sup>3</sup>

12. Considering the conditions of Rochelle's employment, the leave is reasonable. Her engagement in her own business during her leave will not result in a break in the period of foreign service. Consequently each month of leave is treated as recreation leave which accrued during the foreign service, and amounts to part of a continuous period of foreign service.

---

<sup>3</sup> The business income will not be exempt under section 23AG, even if it is derived during a period which is treated as foreign service. Section 23AG does not apply because the business income is neither foreign earnings nor derived from that foreign service.

**Example 3**

13. Rhys is an Australian resident. He is deployed overseas for a period of foreign service that satisfies subsection 23AG(1AA) but becomes ill five weeks before his foreign service is due to end. The terms and conditions of his foreign service allow him to take leave if he is ill. He has accrued a total of eight weeks of sick leave, comprising two weeks that accrued during his foreign service and six weeks that accrued during his previous Australian employment. He takes eight weeks of sick leave.

14. In the case of accident or illness there is no limit to the amount of absence that can be treated as foreign service under paragraph 23AG(6)(b), providing that the leave is during the foreign service, and the leave is allowed under the terms and conditions of the foreign service. Consequently the first five weeks of sick leave are treated as foreign service under paragraph 23AG(6)(b) but the last three weeks are not.

15. Payments for the sick leave that accrued from service in Australia are not exempt under section 23AG because the payments are derived from Australian service, not from foreign service. However, payments for the two weeks of sick leave that accrued during the foreign service are exempt if the other requirements of section 23AG are satisfied.

**Example 4**

16. Oliver is an Australian resident. He is deployed overseas for a period of foreign service that satisfies subsection 23AG(1AA). He is injured during the deployment and it is necessary for him to return to Australia for medical treatment. He works in Australia for the same employer for a short period as part of a return to work program. He returns to his deployment in the foreign country when he is found fit for duty. The terms and conditions of his foreign service provide for him to return to Australia for medical treatment if necessary, and to work in Australia for the same employer if he is fit to work during any time when he is in Australia for treatment.

17. As all of the requirements of subsection 23AG(6) are satisfied, Oliver's foreign service includes the time that he spends in Australia.

**Example 5**

18. Jacqueline is an Australian resident. She is deployed overseas for a period of foreign service that satisfies subsection 23AG(1AA). She is injured at work during the deployment. She applies for workers compensation, but takes sick leave on full pay while she is waiting for her claim to be decided. Her absence from work is allowed under the terms and conditions of her foreign service. After two months her workers compensation claim is approved. By that time Jacqueline has recovered and returned to the foreign country to complete her foreign service.

19. At all times during her absence, the absence satisfies the requirements of subsection 23AG(6) because Jacqueline is absent, in accordance with the terms and conditions of her foreign service, because of injury. Hence Jacqueline's total absence is treated as foreign service under paragraph 23AG(6)(b).

**Example 6**

20. Alex is an Australian resident. She is deployed overseas for a period of foreign service that satisfies subsection 23AG(1AA). A family member becomes ill, and during her deployment Alex returns to Australia several times to care for the family member. Alex is absent from foreign service for a total of six weeks. The terms and conditions of her foreign service allow her to take the six weeks of carer's leave, although some of the carer's leave is unpaid leave.

21. In the case of accident or illness of a person other than the taxpayer, there is no limit to the amount of absence that can be treated as foreign service under paragraph 23AG(6)(b), providing that the leave is during the period of foreign service, and the leave is allowed under the terms and conditions of the foreign service. Paragraph 23AG(6)(b) does not require the leave to be on full pay. Hence Alex's six week absence is treated as foreign service under subsection 23AG(6).

**Example 7**

22. Jane is an Australian resident. She is deployed overseas for a six month period of foreign service that satisfies subsection 23AG(1AA). The terms and conditions of the foreign service provide that in addition to recreation leave, her employer will fly her back to Australia for one weekend during the deployment. Jane is not rostered to work for the Easter long weekend and takes the opportunity to return to Australia for a visit for four days. This absence is not considered excessive as the total absence is less than one-sixth of the period of foreign service (4 days absent/182 days scheduled foreign service) and is therefore taken to form part of Jane's foreign service.

**Example 8**

23. Leah and Roland are Australian residents. Each is deployed overseas for 92 days of foreign service that satisfies subsection 23AG(1AA). Two weeks after commencing their deployment, each is required to return to Australia for two weeks, for reasons that are related to their foreign service. Leah returns to Australia to complete pre-deployment training which she was not able to complete prior to deployment because she was deployed as part of an emergency response. Roland returns to Australia to plan and arrange things that are needed in the foreign country. Both then return to the country where they are deployed, to complete their deployment. Given the circumstances, the absences from Leah's and Roland's scheduled foreign service are not considered excessive by comparison with the scheduled periods of foreign service, and are taken to form part of their foreign service.

**Example 9**

24. Sam is an Australian resident. He is deployed overseas for 92 days of foreign service that satisfies subsection 23AG(1AA). After Sam commences his deployment, his employer decides that he will be required to return to Australia immediately for a month, to plan and arrange things that are needed in the foreign country. At the end of the month in Australia Sam returns to the foreign country.

25. During the period that was initially scheduled as foreign service, Sam will be working in Australia for one third of the total time. This is considered to be excessive in comparison with the total period of foreign service. Consequently the month in Australia will not form part of a period of foreign service.

## **Example 10**

26. *Kate is an Australian resident. She is engaged in foreign service for 20 days, is absent for two days and is then engaged in foreign service for 10 days. Subsection 23AG(6A) applies such that these two periods of foreign service constitute a continuous period of 30 days of foreign service, because the total period of absence is never more than one-tenth, which is less than one-sixth, of the total period of foreign service (the terms 'total period of absence' and 'total period of foreign service' are defined in subsection 23AG(6B)- see paragraph 63).*

27. *Kate is then absent for five days before commencing a further period of foreign service. No matter how long the further period lasts, it can never constitute a continuous period of foreign service with the first two periods of foreign service under subsection 23AG(6A), because on the fourth day of the second absence the total period of absence is 6 days. This is one-fifth of the total period of foreign service (30 days).*

## **Date of effect**

28. When the final Determination is issued, it is proposed to apply to arrangements begun to be carried out from the date of issue of the final Determination.

29. The ATO view on most of the matters covered by this draft Determination is currently stated in Taxation Ruling TR 96/15. However, the draft Determination does alter the view in TR 96/15 on visits to Australia or another country by part-time employees engaged in foreign service.

30. Comments are invited on this proposed date of effect.

---

**Commissioner of Taxation**

16 November 2011

---

## Appendix 1 – Explanation

**①** *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.*

### Explanation

31. 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.

32. Subsection 23AG(7) states ‘foreign service means service in a foreign country as the holder of an office or in the capacity as an employee’.

33. If a person performs most of their work outside of Australia in international waters or international airspace, the time spent in those areas does not amount to foreign service because the service is not in a foreign country.

34. This was made clear by Graham J in *Overseas Aircrew Basing Ltd v. Federal Commissioner of Taxation* (2009) 175 FCR 449, [2009] FCA 7 (*Overseas Aircrew Basing*). At paragraph 92 of the decision Graham J pointed out that service *in a foreign country* is not synonymous with service *outside Australia*. He went on to say, at paragraph 92 of the decision:

92. ...Section 23AG is directed at, relevantly, exempting from tax in Australia, salaries derived in a foreign country in which those salaries are taxed. It is not directed at exempting from tax in Australia salaries derived in Australia, in Australian airspace, in international airspace, in the airspace of other countries of the world or in other countries to which and from which their employer directs them to fly aircraft.

35. In the same case Graham J also explained at paragraphs 93 and 94:

93. Section 23AG exempts salaries from tax in Australia where they are derived by persons engaged in service in a particular foreign country and the particular foreign country is the base from which they derive those salaries. The section was not directed at exempting earnings of international airline aircrew based in Australia from tax.

94. It is fallacious to say that a person who is a resident of Australia, whose home is in Australia, whose Home Base or Preferred Port is in Australia and whose duty cycles begin and end in Australia is engaged in service in a foreign country in the capacity of an employee within the meaning of s 23AG of the 1936 Act. The section is concerned with persons who are ‘actually on the job’ in the particular overseas country in which their foreign earnings are derived.

36. This Determination considers whether temporary absences from foreign service form part of a continuous period of foreign service, and the effect of:

- subsection 23AG(6), which provides an extended meaning of ‘engaged in foreign service’, with the result that certain temporary absences from a period of foreign service that are related to the foreign service will not be taken to constitute a break in a period of foreign service (paragraphs 38 to 55);
- the one-sixth administrative test which treats certain short absences as part of a period of foreign service (paragraphs 56 to 59).



37. In addition to the rules which treat a temporary absence as part of a continuous period, the 1/6 legislative rule in subsection 23AG(6A) allows two or more periods of foreign service to be taken as a continuous period of foreign service in some circumstances (paragraphs 62 to 65).

## **Extended meaning of 'engaged in foreign service' – subsection 23AG(6)**

38. Subsection 23AG(6) states:

For the purposes of this section, a period during which a person is engaged in foreign service includes any period during which the person is, in accordance with the terms and conditions of that service:

- (a) absent on recreation leave, other than:
  - (i) leave wholly or partly attributable to a period of service or employment other than that foreign service;
  - (ii) long service leave, furlough, extended leave or leave of a similar kind (however described); or
  - (iii) leave without pay or on reduced pay; or
- (b) absent from work because of accident or illness.

39. An absence that forms part of a period of foreign service under subsection 23AG(6) is treated as foreign service regardless of whether the person is in the country where they are performing the foreign service, or in Australia or another country, during the absence.

## **Recreation leave**

40. If recreation leave accrues during a period of foreign service, and is taken during the foreign service, on full pay, and in accordance with the terms and conditions of that service, subsection 23AG(6) treats the recreation leave as part of the period of foreign service.

41. Since the recreation leave is treated as foreign service, further recreation leave which accrues during that leave will be treated as foreign service if it is taken during the foreign service, on full pay, and in accordance with the terms and conditions of the foreign service.

42. Additional recreation leave entitlements granted to employees posted overseas are not considered to constitute extended leave covered by subparagraph 23AG(6)(a)(ii) if the additional leave is reasonable.

43. For subsection 23AG(6) to apply, the recreation leave taken in Australia or elsewhere during a period of foreign service must be attributable to the period during which the person is engaged in foreign service. This means that under subsection 23AG(6), recreation leave can only form part of a continuous period of foreign service if it accrues during the days that a person is engaged in that foreign service. Annual leave that meets the requirements of subsection 23AG(6) is regarded as recreation leave.

44. Rostered days off, compulsory lay off/over days, grounded days and flexidays are not considered to be recreation leave for the purposes of subsection 23AG(6). That is because such absences are not recreation days that are granted as a result of leave that has accrued while a person is engaged in foreign service. However, such days might nonetheless count as foreign service under other principles – see paragraphs 56 to 59.

### **Cyclical arrangements**

45. If the terms and conditions of employment require a person to work on a cyclical arrangement under which they spend a period working in a foreign country followed by a period of paid leave, each period of paid leave is treated as recreation leave to which paragraph 23AG(6)(a) applies such that it amounts to part of a continuous period of foreign service if the leave is reasonable and does not amount to extended leave.

### **Sick leave or leave because of an accident or illness of a person other than the taxpayer, or because of the death of another person**

46. Paragraph 23AG(6)(b) provides that a period during which a person is engaged in foreign service includes a period during which the person is, in accordance with the terms and conditions of that service, 'absent from work because of accident or illness'. This applies if in accordance with the terms and conditions of the foreign service the person is absent on sick leave because they are ill or have had an accident, regardless of whether the accident or illness is caused by the foreign service.

47. Paragraph 23AG(6)(b) also applies if the person takes leave because of an accident or illness of another person, or because of the death of another person. Accordingly, a visit to Australia or another country for such a reason, in accordance with the terms and conditions of the foreign service, is treated as forming part of the person's period of continuous foreign service.

48. There is no limit to the amount of absence that can be treated as foreign service under paragraph 23AG(6)(b), providing that the leave is during the foreign service, and the leave is allowed under the terms and conditions of the foreign service.

### **Maternity leave and parental leave**

49. An absence from work due to the taking of maternity leave or parental leave is not expressly covered in paragraph 23AG(6)(a), which relates to 'recreation leave'.

50. In *The Macquarie Dictionary*, the word 'recreation' is relevantly defined as:

1. refreshment by means of some pastime, agreeable exercise, or the like.
2. a pastime, diversion, exercise, or other resource affording relaxation and enjoyment.

51. Maternity leave and parental leave are distinct categories of leave each with a distinct rationale. The definition of 'maternity leave' given in *The Macquarie Dictionary* is 'time off from one's job, usually with pay, in order to have a baby'. It is therefore a type of leave granted to a female employee prior to childbirth, to give birth and subsequently to care for an infant. 'Parental leave' is another type of leave granted to an employee on becoming a parent, typically when the employee's spouse has had a baby, but would also cover leave granted because of the adoption of a child. Consequently, maternity leave and parental leave are not 'recreation leave' and are not covered by paragraph 23AG(6)(a).

52. Further, an absence from work on maternity leave or parental leave cannot be described as an absence 'because of accident or illness' for the purpose of paragraph 23AG(6)(b).

53. The *Macquarie Dictionary* relevantly defines 'illness' as follows:

1. a state of bad health; sickness.

Furthermore, it relevantly defines ‘accident’ as:

1. an undesirable or unfortunate happening; casualty; mishap.

54. An absence from work on maternity leave or parental leave cannot be described as an absence attributable to sickness or mishap. In the case of maternity leave, the absence is occasioned by the last stages of pregnancy and subsequent childbirth. Similar reasoning applies to parental leave.

55. Therefore a period of maternity leave or parental leave does not come within the extended meaning of ‘engaged in foreign service’ in subsection 23AG(6) and so will constitute a break in foreign service.

### **The one-sixth administrative test – weekends, public holidays etcetera**

56. In *Overseas Aircrew Basing*, at paragraph 96 Graham J stated:

...I should make it clear that engagement in service in a foreign country is not limited to days on which work is undertaken. It includes all days during a period in which work is undertaken on working days for the relevant employee.

57. The one-sixth administrative test applies to some absences that do not satisfy the extended meaning of ‘engaged in foreign service’ in subsection 23AG(6). Such absences include weekends, public holidays, rostered days off, days off due to part-time arrangements, ‘compulsory lay off/over days’<sup>4</sup>, ‘grounded days’ and flexidays (which are not ‘available days’ spent in Australia), and days off in lieu of such. The one-sixth administrative test allows absences to be treated as part of a continuous period of foreign service if:

- (i) such absences are authorised by the terms and conditions of the foreign service; and
- (ii) where such absences are used by the person to visit or return to Australia they are not excessive by comparison with the scheduled period of foreign service or, if the period of foreign service is ongoing, by comparison with the income year. As a guide, the Commissioner considers that if such absences are used to visit or return to Australia, they are excessive if the total of such absences 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. Therefore, if the total of temporary absences is excessive in terms of this paragraph, each temporary absence will be taken to break the foreign service period, subject to subsection 23AG(6A).

58. Available days spent in Australia are not considered to be a period of foreign service. If an employee spends available days in Australia, this period is considered to be a break in foreign service. That is because such time is not considered to be leave for the purposes of subsection 23AG(6) or the one-sixth administrative test. If available days are spent in the foreign country where the person is engaged in foreign service, those days will form part of that foreign service period.

---

<sup>4</sup> ‘Compulsory lay off/over days’ are those where an employee is prevented from working - possibly because of certain legal requirements. ‘Grounded days’ are those where an employee does not report for duty after being engaged in a series of long haul flights.

59. The one-sixth administrative test does not allow an absence to be treated as foreign service if it is because of maternity leave or parental leave or if it is a type of absence that is dealt with in subsection 23AG(6) but can not be treated as foreign service under that subsection.

### **Business trips to Australia**

60. If a person engaged in foreign service is required by their employer to make a short business trip to Australia or to another foreign country during a period of foreign service for reasons directly related to that person's continuing foreign service engagement, and the trip is made bona fide for that purpose, for example, to attend conferences, training sessions or briefing sessions, those trips will be treated as part of the person's continuous period of foreign service provided they are not excessive by comparison with the scheduled period of foreign service.

61. What is considered excessive will depend on the circumstances.

### **The 1/6 legislative rule – subsection 23AG(6A)**

62. The 1/6 legislative rule in subsection 23AG(6A) allows periods of foreign service before and after a break in foreign service to be added together and treated as a continuous period of foreign service. Subsection 23AG(6A) states:

2 or more periods in which a person has been engaged in foreign service are together taken to constitute a continuous period of foreign service until:

- (a) the end of the last of the 2 or more periods; or
- (b) a time (if any), since the start of the first of the 2 or more periods, when the person's total period of absence exceeds 1/6 of the person's total period of foreign service;

whichever happens sooner.

63. Subsection 23AG(6B) states:

In subsection (6A):

**total period of absence**, in relation to a particular time, means the number of days, in the period starting at the start of the first of the 2 or more periods and ending at that time, for which the person was not engaged in foreign service.

**total period of foreign service**, in relation to a particular time, means the number of days, in the period starting at the start of the first of the 2 or more periods and ending at that time, for which the person was engaged in foreign service.

64. In applying the 1/6 legislative rule at a particular time, the numerator is the number of days absent from foreign service that do not constitute foreign service up to that time, and the denominator is the total number of days of foreign service up to that time.

65. The 1/6 legislative rule should not be confused with the one-sixth administrative test outlined at paragraphs 56 to 59. 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 if continuity would be otherwise broken. Breaks 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 service and exempt income**

66. Income cannot be exempt under section 23AG unless it is 'foreign earnings' derived by a resident of Australia who was 'engaged in foreign service' and whose foreign earnings were 'derived from that foreign service'.

67. That does not mean that the foreign earnings need to be received during the time when the person is engaged in a period of 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.

68. In some cases, an amount of income is not exempt under section 23AG even though the income is salary or wages for a period of foreign service or a period that is treated as foreign service. Such a situation would arise if a person takes leave that accrued before the foreign service commenced. The salary or wages paid for that period of leave are not exempt under section 23AG because, being for leave that accrued before the foreign service, the payments are not attributable to the foreign service. Example 3 illustrates this.

69. Conversely, in some cases an amount of income is exempt under section 23AG even though it is salary or wages for a period in which the person was not engaged in foreign service. This would typically occur if recreation leave or long service leave accrued during the period when the person was engaged in foreign service but the person works for the same employer in Australia after the completion of their foreign service, and takes the leave during the time when they are employed in Australia. If the other requirements of section 23AG are satisfied, the salary or wages paid for that period of leave are exempt because, as the leave accrued during a period of foreign service, the earnings are attributable to the period of foreign service and hence are foreign earnings derived from that foreign service.

---

## **Appendix 2 – Your comments**

---

70. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

71. A compendium of comments is also 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
- publish on the ATO website at [www.ato.gov.au](http://www.ato.gov.au)

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

**Due date:** 11 January 2012  
**Contact officer:** Larrie Strautmanis  
**Email address:** [larrie.strautmanis@ato.gov.au](mailto:larrie.strautmanis@ato.gov.au)  
**Telephone:** 08 8208 1875  
**Facsimile:** 08 8208 1898  
**Address:** Australian Taxation Office  
GPO Box 9977  
Adelaide SA 5001

## References

---

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Previous Rulings/Determinations:*

TR 96/15

*Subject references:*

- exempt income
- foreign income
- foreign salary & wages
- terms of employment
- annual leave
- long service leave
- sick leave

*Legislative references:*

- ITAA 1936 23AG
- ITAA 1936 23AG(1AA)
- ITAA 1936 23AG(6)
- ITAA 1936 23AG(6)(a)
- ITAA 1936 23AG(6)(a)(i)
- ITAA 1936 23AG(6)(a)(ii)
- ITAA 1936 23AG(6)(b)
- ITAA 1936 23AG(6A)
- ITAA 1936 23AG(6B)
- ITAA 1936 23AG(7)

*Case references:*

- *Overseas Aircrew Basing Ltd v Federal Commissioner of Taxation* [2009] FCA 7; (2009) 175 FCR 449; 2009 ATC 20-089; (2009) 74 ATR 850

---

ATO references

NO: 1-2P82TGI

ISSN: 1038-8982

ATOlaw topic: Income tax ~~ Exempt income ~~ employment income – foreign sourced