IT 2221 - Income tax : income derived by non-resident from ex-australian source, permanent place of abode

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TAXATION RULING NO. IT 2221

INCOME TAX : INCOME DERIVED BY NON-RESIDENT FROM EX-AUSTRALIAN SOURCE, PERMANENT PLACE OF ABODE.

F.O.I. EMBARGO: May be released

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1194247	RESIDENT	6(1)
	PERMANENT PLACE OF ABODE	23(q) 23(r) 25(1)

PREAMBLE In a decision handed down by Taxation Board of Review No. 2, the Board held that the salaried income derived by an engineer while he was employed in the Philippines was exempt from income tax under paragraph 23(r) of the Income Tax Assessment Act. It was decided that no appeal would be lodged against the decision which has been reported as Case R92 84 ATC 615 and Case 145 27 CTBR (NS) 1131.

FACTS 2. In April 1978 the taxpayer, whose domicile is Australia, was sent by his employer to supervise the implementation of a swamp area reclamation and low cost housing project in the Philippines. The project was being undertaken by the Philippines National Housing Authority in conjunction with the taxpayer's employer. The taxpayer was accompanied by his wife and three children. The term of the appointment was not specified and was largely dependent upon the number of extensions obtained by the employer to the initial contract negotiated with the Authority. It was envisaged that the taxpayer would remain in the Philippines until the completion of the project. The taxpayer estimated that his stay in the Philippines would be for a minimum period of three to four years and it was for that reason he decided to relocate his family in that country. The taxpayer acknowledged that it was his intention to return to Australia at some time in the future.

3. Shortly after arriving in the Philippines, the taxpayer obtained a sub-lease of a house and arranged for various household items to be transported to his new address. He leased the family residence in Australia and retained his membership in a private health fund. Existing bank accounts continued to be used for transfers of salary and for the receipt of rental payments and child endowment, the latter enduring until December 1979.

4. By June 1980 work on the project had advanced

significantly and it became apparent the taxpayer's services were no longer required on a full-time basis. Moreover, the prospect of obtaining further extensions to the project became more uncertain. In July 1980 the taxpayer and his family returned to Australia.

5. It was a term of the contract entered into by the taxpayer's employer and the Philippines National Housing Authority that the Philippines Government would exempt non-Philippinos employed by the employer from all taxes and charges levied by the Government or any political subdivisions thereof.

6. The Board rejected the Commissioner's submissions that the taxpayer was a "resident of Australia" as defined in sub-section 6(1) and that the income from his employment in the Philippines was included by paragraph 25(1)(a) in his assessable income. It held that the taxpayer's income was exempt from tax under paragraph 23(r) or alternatively under paragraph 23(q).

7. On the evidence adduced, the Board, standing in the position of the Commissioner (sub-section 193(1)), was satisfied for the purposes of sub-paragraph (a)(i) of the definition of "resident" that the taxpayer had established a permanent place of abode outside Australia during the year ended 30 June 1979. Although it was the taxpayer's intention and that of his employer that he would eventually return to Australia, the Board was of the view that he left Australia for an indefinite period and his stay in the Philippines could not be described as temporary or transitory. c.f. FCT v. Applegate (1979) 9 ATR 899, 79 ATC 4307. An analysis of the evidence led the Board to conclude that it was expected the taxpayer would remain in the Philippines until the completion of the assignment which would probably take several years, or even longer, if additional extensions had been forthcoming. In this particular case, the retention of assets in Australia, the continued receipt of child endowment payments and the maintenance of private health insurance were not considered by the Board to be of paramount significance. The Board said that these factors may act as signposts in borderline cases.

8. The Board concluded that as the taxpayer was a non-resident during the year under review and the income derived was from sources wholly out of Australia, it was exempt from tax under paragraph 23(r). The Board went on to say that if it had erred in concluding that the taxpayer was a non-resident, the income would nevertheless be exempt from tax under paragraph 23(q). Although finding that the income was not exempt from tax in the Philippines for the purposes of paragraph 23(q), the Board said that under the terms of the contract entered into by the employer with the Philippines National Housing Authority, it was the taxpayer, as distinct from the income derived by him, which had been granted exemption from the payment of income tax in the Philippines. In these circumstances the proviso to paragrah 23(q) did not
apply. c.f. Australian Machinery & Investment Co Ltd v. D.F.C. of T. (1946) 8 ATD 81 at p.100 and contrast FCT v. Angus

(1960-61) 105 CLR 489 at p. 510.

RULING 9. Having regard to the Board's findings it is considered that the decision falls within the parameters defined in Applegate's Case. The decision is not seen as having widespread application and generally will not result in an Australian domiciled taxpayer qualifying as a non-resident where a definite period of absence is established prior to leaving Australia or where the absence is to be for a short but undefined term. However, where the absence is to be of indefinite duration, the permanence or otherwise of the overseas abode will need to be assessed on the basis of the facts of each particular case.

COMMISSIONER OF TAXATION
28 November 1985

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