CR 2010/51 - Income tax: taxation of Joint Petroleum Development Area (JPDA) employment income: foreign income tax offsets - employees of ConocoPhillips Australia Pty Ltd and ConocoPhillips (03-12) Pty Ltd

Class Ruling

Income tax: taxation of Joint Petroleum Development Area (JPDA) employment income: foreign income tax offsets – employees of ConocoPhillips Australia Pty Ltd and ConocoPhillips (03-12) Pty Ltd

Contents Para

This publication provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

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

What this Ruling is about

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

Relevant provision(s)

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

- section 160AF of the *Income Tax Assessment Act 1936* (ITAA 1936) (repealed as of 1 July 2008);
- section 160AFE of the ITAA 1936 (repealed as of 1 July 2008);
- section 4-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- subsection 63-10(1) table item 22 of the ITAA 1997;
- Division 770 of the ITAA 1997;

- section 770-10 of the ITAA 1997;
- subdivision 770-D of the *Income Tax (Transitional Provisions) Act 1997*;
- subsection 14(2) of the *Petroleum (Timor Sea Treaty) Act 2003* (the Treaty Act);
- Article 1.2 of the Taxation Code at Annexure G of the *Petroleum (Timor Sea Treaty) Act 2003* (the Taxation Code); and
- Article 13 of the Taxation Code.

Class of entities

3. The class of entities to which this Ruling applies is Australian resident individuals:

- who are employed by ConocoPhillips Australia Pty Ltd and ConocoPhillips (03-12) Pty Ltd (collectively referred to as the ConocoPhillips Group);
- who are performing services within the Joint Petroleum Development Area (JPDA) as defined in the Treaty Act; and
- who have their employment income, set out in paragraphs 12 and 13 of this ruling, governed by Article 13 of the Taxation Code.

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 13 of this Ruling.

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

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

Date of effect

8. This Ruling applies from 1 July 2008. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Previous Rulings

9. This Ruling replaces Class Ruling CR 2006/94, which was withdrawn 6 October 2010.

Scheme

10. The scheme that is the subject of this Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- the application for Class Ruling from the ConocoPhillips Group dated 31 March 2010; and
- the previous application for Class Ruling from the ConocoPhillips Group dated 6 December 2004. This document includes the standard contract of employment used by the ConocoPhillips Group; Timor-Leste ETRS/SRTL Public Ruling 2001/5 and UNTAET Regulation 2000/18.

11. ConocoPhillips Australia Pty Ltd is an integrated petroleum company and is the operator of the Bayu-Undan project in the JPDA.

12. ConocoPhillips Group employees are entitled to a remuneration package which includes salary and wages and a number of employment benefits which are taxed as 'taxable wages' in Timor-Leste. The employment benefits are taxed in Timor-Leste as 'taxable wages' but are not included in an individual employee's assessable income in Australia. These include, but are not limited to the following in accordance with their contracts of employment:

- employer superannuation contributions;
- motor vehicle benefits; and
- private medical benefits.

13. All full-time and part-time ConocoPhillips Group employees are eligible to participate in an employee share plan ('employee shares') which was introduced for employees from 1 July 2007. For participating employees, employee share benefits are taxed as 'taxable wages' in Timor-Leste in the year in which an allocation of employee shares is made, based on the cost of the shares to ConocoPhillips. For Australian tax purposes, the discount on the employee shares (employee share benefit) will be included in an individual employee's assessable income either in the year the employee shares are acquired, or a later year of income where the benefit is deferred and certain other conditions are satisfied.

Ruling

14. Employees of the ConocoPhillips Group who are Australian residents for tax purposes are entitled to claim foreign income tax offsets in accordance with Article 13.2 of the Taxation Code on the foreign income tax paid in Timor-Leste on their JPDA employment income.

15. The term 'tax offset', in the context of Article 13.2 of the Taxation Code, 'has the meaning given by section 4-10'[1] but without the express limitation imposed on the calculation of a foreign income tax offset set out in Division 770 of the ITAA 1997.

16. Accordingly, for Australian residents deriving employment income from the JPDA, they are entitled to a tax offset for Timor-Leste tax paid on their remuneration, including on the employment benefits and employee share benefits referred to in paragraphs 12 and 13 of this Ruling, up to the Australian tax payable on such remuneration.

[1] See section 995-1 of the ITAA 1997, the definitions section.

17. In situations where the Timor-Leste tax paid on the remuneration is greater than the Australian tax payable on such remuneration for an income year, the excess foreign income tax offset cannot be transferred, cannot be carried forward to a later income year, nor refunded (subsection 63-10(1) table item 22 of the ITAA 1997). To the extent that an employee has excess foreign tax credits under former section 160AFE of the ITAA 1936, that excess can be utilised in accordance with subdivision 770-D of the *Income Tax (Transitional Provisions) Act 1997*. See paragraph 28 in Appendix 1 – Explanation.

Commissioner of Taxation
6 October 2010

Appendix 1 – Explanation

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

18. Articles 13.1 and 13.2 of the Taxation Code for 'Dependent personal services' state:

> 1. Salaries, wages and other similar remuneration derived by an individual who is a resident of a Contracting State in respect of employment exercised in the JPDA may be taxed in both Contracting States as reduced by the reduction percentage.
>
> 2. Notwithstanding paragraph (1), the Contracting State in which the individual is a resident may tax such remuneration without such reduction. In such a case, that State shall provide a tax offset against the tax payable on such remuneration by the individual in that Contracting State for the tax paid in the other Contracting State.

19. Pursuant to Article 13.2 of the Taxation Code, Australia is permitted to tax 100 per cent of an Australian resident individual's salary, wages and other similar remuneration from employment in the JPDA.

20. However, because Timor-Leste is permitted to tax 90 per cent of such remuneration under Article 13.1, Article 13.2 seeks to relieve double taxation by requiring that Australia provides a tax offset against the tax payable on such remuneration in Australia for tax paid in Timor-Leste.

21. It is accepted that the term 'salaries, wages and other similar remuneration' in Article 13 includes benefits in kind (that is, non-cash benefits) received in respect of employment.

22. In this case it is accepted that the non-cash employment benefits referred to in paragraphs 12 and 13 of this Ruling have been taxed by Timor-Leste in accordance with Article 13.1 and, as such, Australia is obliged to provide relief from double taxation in accordance with Article 13.2.

23. Article 13.2 requires a 'tax offset' to be provided for Timor-Leste tax paid on the remuneration derived by the resident individual in respect of employment exercised in the JPDA, whether such remuneration (in whole or in part) is taxable in Australia or not. However, the tax offset is limited to the Australian tax payable on such remuneration by that resident individual.

24. Although paragraph 70 of the Explanatory Memorandum to Petroleum (Timor Sea Treaty) Bill 2003 states that the term 'tax offset' means a foreign tax credit (replaced with the term 'foreign income tax offset' in Australian tax legislation from 1 July 2008), there is no express reference in the Taxation Code to such offset being calculated exclusively according to the Australian domestic law rules contained in former section 160AF of the ITAA 1936, or in Division 770 of the ITAA 1997.

25. On the contrary, as the term 'tax offset' is not a defined term in the Taxation Code, its meaning is governed by Article 1.2 which states that any undefined terms take on their meaning under the domestic tax laws of the respective States. Under Australian tax law, the term 'tax offset' is defined in section 4-10 of the ITAA 1997 as essentially 'an amount that reduces tax payable'. Consequently, while the term 'tax offset' can refer to a foreign income tax offset, its meaning, in the context of Article 13.2, derives from section 4-10 of the ITAA 1997 and not the rules contained in Division 770 of the ITAA 1997.

26. Accordingly, for Australian residents deriving employment income from the JPDA, they are entitled to a tax offset for Timor-Leste tax paid on their remuneration, including on the employment benefits and employee share benefits referred to in paragraphs 12 and 13 of this Ruling, up to the Australian tax payable on such remuneration.

27. In situations where the Timor-Leste tax on the remuneration is greater than the Australian tax payable on such remuneration, from 1 July 2008 the excess foreign income tax offsets cannot be transferred, cannot be carried forward to a later income year, nor refunded (subsection 63-10(1) table item 22 of the ITAA 1997). The Explanatory Memorandum to the Tax Laws Amendment (2007 Measures No. 4) Bill 2007 further confirms (at paragraph 1.29) that 'there is no carry-forward of excess foreign income tax offsets for use in a later year.'

28. To the extent that an employee has excess foreign tax credits under former section 160AFE of the ITAA 1936, that excess can be utilised in accordance with subdivision 770-D of the *Income Tax (Transitional Provisions) Act 1997*. This transitional provision allows employees (with pre-1 July 2008 excess foreign tax credits) to carry these tax credits forward for application against the Australian tax payable on their JPDA remuneration for a maximum period of five years. The excess credits can only be utilised in the order in which they occur. Further information including an instruction sheet is available by visiting the ATO website. The latest year any excess pre-1 July 2008 foreign tax credits may be applied is for the income year ending 30 June 2013.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- foreign source income
- foreign income tax offsets

Legislative references:

- ITAA 1936 160AF
- ITAA 1936 160AFE
- ITAA 1997 4-10
- ITAA 1997 63-10(1)
- ITAA 1997 Div 770
- ITAA 1997 770-10
- ITAA 1997 995-1
- Income Tax (Transitional Provisions) Act 1997 770-D
- Petroleum (Timor Sea Treaty) Act 2003 14(2)
- Petroleum (Timor Sea Treaty) Act 2003 Annexure G Article 1.2
- Petroleum (Timor Sea Treaty) Act 2003 Annexure G Article 13
- Petroleum (Timor Sea Treaty) Act 2003 Annexure G Article 13.1
- Petroleum (Timor Sea Treaty) Act 2003 Annexure G Article 13.2
- TAA 1953
- Copyright Act 1968

Other references:

- Explanatory Memorandum to Petroleum (Timor Sea Treaty) Bill 2003
- Explanatory Memorandum to the Tax Laws Amendment (2007 Measures No. 4) Bill 2007

ATO references

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