



Submission No 13

Inquiry into Australia's trade and investment relationship with the economies of the Gulf States

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**Joint Standing Committee on Foreign Affairs,
Defence and Trade**

(Inquiry into Expanding Australia's Trade and Investment Relationship with the
economies of the Gulf States)

**Supplementary Submission in relation to the Administration of Section
23AF**

Purpose

To provide background to the Joint Standing Committee on Foreign Affairs, Defence and Trade in relation to the administration of s23AF of the Income Tax Assessment Act 1936.

23AF Tax Relief Background

Section 23AF provides an income tax exemption for income derived by Australian residents whilst working on an approved overseas project for at least 91 consecutive days. To be approved, the Minister for Trade (or his delegate) must be satisfied that the project is of a certain type (an 'eligible project') and that it is in the national interest.

Eligible Projects

23AF "Approved Project" status may be granted by the Minister of Trade or approved delegate to an eligible project where the Minister is satisfied that the project is in the "national interest".

An eligible project is:

- a project for the design, supply or installation of any equipment or facilities;
- a project for the construction of works;
- a project for the development of an urban area or a regional area;
- a project for the development of agriculture;
- a project consisting of giving advice or assistance relating to the management or administration of a Government department or public utility; or
- a project included in a class of projects, which may be approved in writing by the Minister of Trade.

National Interest

Broad guidelines used in determining if a project is in the national interest are:

- The employment of Australians on the project will bring tangible economic benefits to Australia; eg. in the form of sale of Australian goods and/or services and indirect employment benefits.

- The association of Australia with the project would be of benefit in terms of goodwill, prestige or some similar benefit and not run counter to Australia's political or trade relations objectives.
- There is foreign competition for the project, except where the project is being undertaken commercially on a Government to Government basis. It should be apparent that the exemption of tax will be used to make the Australian bid or application more competitive or enable an individual to accept a fixed salary at a level which would otherwise involve personal hardship.
- There will be a net foreign exchange benefit; eg. projects funded or subscribed by AusAID would not be considered to be eligible projects.
- Proposals aimed at tax avoidance are not admissible.
- Any other special factors that might be relevant or become apparent after consultations with relevant Commonwealth authorities.

The main intent of the Section 23AF is to ensure that Australian consultants and contractors, working overseas on 'approved projects' do not suffer a tax disadvantage compared to similar workers of foreign countries, allowing them to operate and compete under tax-free conditions.

Approval of Eligible Projects

Under sub-section 12, the Minister may delegate the authority to approve eligible projects. Since 1996, this authority has been delegated to designated officers of Austrade.

In this capacity, Austrade evaluates and makes formal determinations on applications for 23AF project approval against strict legislative criteria and published guidelines for application. Austrade's offshore network, where necessary, is consulted on applications, assisting in the assessment and determination of project eligibility.

Accordingly, each approval under section 23AF is on a case-by-case examination of eligibility under the guidelines and legislative criteria. In all cases, approvals are provided for a defined period. Under no circumstances does the legislation guarantee that a particular project will receive initial or continuing approvals.

Austrade, from time-to-time in its administration of this facility, consults with the Australian Taxation Office (ATO) in relation to matters of taxation policy in order to ensure compliance with the legislative requirements and adherence to the intent of the section. Legal opinions are regularly sought on complex cases.

Recent Developments

In recognition of the ever-evolving nature of international business transactions, and in order to ensure the ongoing appropriateness of its administration of this delegated authority, Austrade periodically reviews the processes and framework under which s23AF is administered. The main purpose of this practice is to ensure the consistency and relevance of Austrade's determinations, in line with the intent of the legislation.

Given the steady rise in the number of applications from companies engaged in the recruitment of personnel over the last 4 years, Austrade undertook an internal review of this practice in late 2002. Legal advice sought by Austrade in this context, confirmed that the "provision of personnel" is not consistent with the purpose or intent of the legislation.

The intent of the 23AF legislation is that a project must be included in one of the categories listed in subsection 23AF(18) or be included in a class of projects approved for the purposes of s 23AF by the Minister for Trade. The "provision of personnel" is not an "eligible project", and by itself does not result in a development, management or administration of a program or facility. "Development" involves a concept of advancing, growing or evolving a program or improving and strengthening a facility.

As a consequence, Austrade has rejected applications for projects where it is clear the main purpose is to supply personnel to work overseas on a tax-free basis. As a result of the tighter scrutiny of applications, the Minister for Trade and Austrade have received numerous enquiries regarding "Approved Project" status and concerns from affected parties. The common issue and theme expressed by these groups is that the current 23AF and 23AG tax legislation fails to address the special circumstances that exist within the Middle East and Gulf States. To date these enquires have been addressed on a case-by-case basis, clearly defining the disqualifying elements of each application and the limitations of the 23AF legislation.

Section 23 AG of the Income Tax Assessment Act (ITAA)

Tax exemptions under section 23AG of the ITAA are available on foreign earnings derived by Australian employees engaged in a foreign country for at least 91 days' continuous employment. Foreign earnings that are exempt from tax overseas can also be exempt from tax in Australia under section 23AG, except where they are exempt in the overseas country solely because:

- a 'double tax' agreement applies,
- employment income is not generally taxable in the foreign country,
- or a law or international agreement applies dealing with privileges and immunities of diplomats, consuls and personnel and international organisations.

A tax exemption is not available under section 23AF for income to which section 23AG applies.

As most countries within the Middle East do not levy income tax upon residents or the ex-pat community, the majority of earnings by Australian employees in these countries are ineligible under section 23AG. Austrade has received numerous applications for 23AF tax exemption from representatives of Australian personnel working in the Middle East, who have failed to meet the 23AG qualifying criteria. The majority of these applications also do not meet with the qualifying criteria of the section 23AF provision, where the intent of the legislation is to ensure that Australian companies remain competitive when bidding for tenure overseas of certain project types that fall within Australia's 'national interest'.

Role of other Government agencies

The Department of the Treasury is responsible for advising on taxation policy. The Commissioner of Taxation (the Australian Taxation Office) is responsible for administering the current taxation laws. All enquiries and questions relating to the Australian taxation system and taxation policy, should be directed to the Department of the Treasury or the Commissioner of Taxation, as appropriate.

It should be noted that while the Minister for Trade is responsible for granting 23 AF approved project status, the Australian Taxation Office is responsible for administering section 23AG.

Austrade
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