TR 2014/2EC - Compendium

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Ruling Compendium – TR 2014/2

This is a compendium of responses to the issues raised by external parties to Draft Taxation Ruling TR 2013/D5 *Income tax: the application of the ships and aircraft article of Australia's tax treaties to taxable income derived under section 129 of the Income Tax Assessment Act 1936 by a non-resident shipowner or charterer*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the Draft Ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
General Comments		
1	Contrary to the view taken in paragraph 17 and Example 4 of the Draft Ruling, paragraph 4 of the standard ships and aircraft article should not be interpreted as applying to profits from the carriage of passengers on a cruise starting and ending in Australia if the ship stops at ports of call overseas.	While the interpretation of paragraph 4 taken in the Draft Ruling is technically open, the Commissioner now accepts that passengers are relevantly 'discharged' at a place outside Australia if they disembark at a foreign port of call during the course of a round trip cruise starting and ending in Australia. Further, the Commissioner accepts that paragraph 4 of the standard ships and aircraft article only applies in respect of the carriage of passengers who are shipped and discharged solely in Australia (that is, without being discharged outside Australia). Accordingly, the Commissioner's view is that Australia does not have a right to tax section 129 income from the carriage of passengers on a 'round trip cruise' from Australia if the ship stops for the purpose of enabling those passengers to disembark at a port of call outside Australia. Such income does not constitute, and is not treated as, profits from ship operations 'confined solely to places' in Australia for the purposes of paragraph 2 of the standard ships and aircraft article. This view is taken in light of the object and purpose of paragraph 4 (which is to define, for present purposes, what transport is 'confined solely to places' in Australia), and the approach to interpreting tax treaties set out in paragraphs 63 to 76 of Taxation Ruling TR 2001/13 *Income tax: Interpreting Australia's Double Tax Agreements* (in particular, the principle that international agreements should be

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		interpreted more 'liberally' than domestic legislation). However if there are no ports of call outside Australia at which passengers are allowed to disembark then, regardless of whether the ship stops outside Australia for some other purpose or travels through international waters, paragraph 4 of the standard ships and aircraft article treats section 129 income from the carriage of these passengers as profits from ship operations ‘confined solely to places’ in Australia (which Australia has a right to tax under paragraph 2). Paragraph 4 focuses on places where passengers or goods are shipped and discharged (as opposed to where the ship might merely stop) and, if these are places in the same Contracting State, it characterises the entire ‘carriage’ as being confined solely to places in that State. The Commissioner’s view is contained in paragraphs 18 and 19 of the Ruling, and explained at paragraphs 81 to 89.
2	Example 5 in the Draft Ruling requires clarification. It suggests that section 129 of the *Income Tax Assessment Act 1936* (ITAA 1936) can apply to multiple taxpayers in a chain of charterparties which is contrary to the Commissioner’s prior considered view in Taxation Ruling TR 2006/1 *Income tax: the scope of and nature of payments falling within section 129 of the Income Tax Assessment Act 1936*.	Example 5 was not intended to give the impression that section 129 of the ITAA 1936 could apply to multiple taxpayers in respect of the same voyage. Rather, Example 5 was meant to deal with a scenario where payments are made by a shipper charterer (as contemplated by paragraph 39 of TR 2006/1) The facts in the Example have been amended to clarify that the shipper is a 'shipper charterer' paying amounts to a shipowner under a time charterparty. The shipowner is the relevant taxpayer deriving section 129 income in respect of the daily hire paid by the shipper charterer.
Specific Comments		
3	A cruise voyage which stops at overseas ports should be considered as ‘international traffic’ or ‘international transport’ - profits from which are taxable only in the country of residence.	Whether the transport of passengers on such a cruise is ‘international traffic’ does not determine whether the transport is ‘confined solely to places in Australia’ for the purposes of Australia’s tax treaties. Paragraph 2 of the standard ships and aircraft article in Australia’s tax treaties generally allocates a taxing right to the source country in relation to profits from

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		ship 'operations confined solely to places in that other State'. Paragraph 2 applies notwithstanding paragraph 1 of the ships and aircraft article. Therefore the source country is allocated taxing rights in respect of certain profits under paragraph 2 even though those profits might be from the operation of ships in 'international traffic' as defined in the particular treaty. Similarly paragraph 2 may apply to profits from ship operations which are considered to be 'international carriage', 'international voyages' and similar phrases used in other conventions, regulatory measures and other contexts. Furthermore paragraph 4 specifically provides that profits from the carriage of passengers or goods 'shipped' and 'discharged' in Australia shall be treated as profits from ship operations confined solely to places in Australia. There is no qualification in paragraph 4 that the voyage must not otherwise 'stop' or 'call at a port' in a foreign country. See also, ATO Response to Issue 1.
4	A cruise voyage which stops at overseas ports is not 'confined solely' to places in Australia.	While such a cruise might not otherwise constitute a ship operation confined solely to places in Australia, paragraph 4 provides that profits from the carriage of passengers or goods 'shipped' and 'discharged' in Australia shall be treated as profits from ship operations confined solely to places in Australia for the purposes of paragraph 2 of the standard ships and aircraft article. Paragraph 4 focuses on places where passengers or goods are shipped and discharged (as opposed to where the ship might merely stop) and, if these are places in the same Contracting State, it characterises the entire 'carriage' as being confined solely to places in that State. See also, ATO Response to Issue 1.
5	Cruises which stop at overseas ports are treated as international voyages under Australia's customs and immigration policies and procedures and in a range of other contexts.	This forms part of the broader context in which Australia's tax treaties would have been negotiated, however whether a cruise is 'international' is not a substitute for the words in paragraphs 2 and 4 of the standard ships and aircraft article. See also, ATO Response to Issues 1 and 3.

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6	The term 'discharge' is a shipping term and only refers to cargo. With passengers, the language generally used is 'disembark'.	It is considered that 'discharged' was used in paragraph 4 because it is capable of applying to both passengers and cargo (consistent with the definition of discharge provided by the *Oxford Dictionary of English* (3rd edition) for example). It is also noted that paragraph 4 refers to the carriage of passengers 'which are shipped … and are discharged'; while it is apt to describe passengers that 'disembark' or who have 'disembarked' at a place, it is inapt to refer to passengers that 'are disembarked' at a place. However the Commissioner accepts that passengers are relevantly 'discharged' for the purposes of paragraph 4 of the standard ships and aircraft article if they 'disembark'. The enquiry under paragraph 4 is whether goods and passengers have been 'shipped' and 'discharged' in Australia. In that context discharged is used as the opposite of shipped. Given that shipped means put on board a ship, it is considered that the word discharged is simply used to denote the point at which the relevant goods or passengers are unloaded or landed – without distinguishing between different circumstances in which passengers, for example, might be landed (that is, whether it be a 'port of call' in transit or 'finally' at an end destination). See also, ATO Response to Issue 1.
7	Discharged is used in a physical or locational sense and passengers are relevantly 'discharged' if they disembark from the ship at a foreign port.	The Commissioner now accepts that passengers are relevantly 'discharged' at a place outside Australia if they disembark at a foreign port of call during the course of a round trip cruise starting and ending in Australia. See also, ATO Response to Issue 1 and 6.
8	The view taken in paragraph 17 and Example 4 of the Draft Ruling is inconsistent with the Commissioner's prior considered view in Taxation Ruling TR 2008/8 *Income tax: the taxation treatment of ship and aircraft leasing profits under*	The references in Taxation Ruling TR 2008/8 need to be read in their context. The subject of that Ruling is leasing profits and, as paragraph 137 of that Ruling states, paragraph 4 of the ships and aircraft article does not apply to leasing profits (and nor is it likely that profits from the carriage of passengers on a cruise would be leasing profits). Therefore Taxation Ruling TR 2008/8 should not be read as

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<tr><td></td><td>the ships and aircraft articles of Australia's tax treaties.</td><td>making any pronouncement about the application of the standard ships and aircraft article to passenger fares from cruises.
In any event, the Commissioner now accepts that the ATO does not have the right to tax the section 129 income in Example 4.
See also, ATO Response to Issue 1.</td></tr>
<tr><td>9</td><td>There are no examples provided in any of the Explanatory Memoranda to Australia's tax treaties (EMs) which equate to Example 4 of the Draft Ruling, or any other guidance which specifically indicates an intention to allocate taxing rights to the source country in those circumstances. Rather, the EMs focus on sightseeing tours which travel through international waters or airspace but which do not stop at a foreign port (that is, voyages to nowhere).</td><td>The lack of a cruise example in the EMs doesn't necessarily support either view of paragraph 4 of the standard ships and aircraft article. This is because there is no example which shows paragraph 4 does apply and equally there is no example to show that it does not apply.
However it is true that the focus on 'voyages to nowhere' in the various EM examples (although most of these examples are identical) indicates that the more common scenario, described in Example 4 of the Ruling, was not regarded as an operation confined solely to places in Australia.
In any event, the Commissioner now accepts that the ATO does not have the right to tax the section 129 income in Example 4.
See also, ATO Response to Issue 1.</td></tr>
<tr><td>10</td><td>The view in paragraph 17 and Example 4 of the Draft Ruling can't be sustained based on Australia's reservation to Article 8 of the OECD Model Convention. The reservation is not binding and the position may be challenged under a MAP procedure.</td><td>Paragraph 2 of the standard ships and aircraft article in Australia's tax treaties provides a source country taxing right in relation to profits from the operation of ships or aircraft to the extent that they are 'confined solely to places in that other State'. And paragraph 4 specifically provides that profits derived from the carriage of passengers or goods 'which are shipped in a Contracting State and are discharged at a place in that State' shall be treated as profits from ship or aircraft operations 'confined solely to places in that State'.
The inclusion of these provisions in Australia's tax treaties is consistent with Australia's reservation recorded in the Commentary to Article 8 of the OECD Model Convention. However the Commissioner did not base the view in the Draft Ruling on Australia's reservation. Rather the view was based on the specific wording in Australia's tax treaties.</td></tr>
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		In any event, the Commissioner now accepts that the ATO does not have the right to tax the section 129 income in Example 4. See also, ATO Response to Issue 1.
11	Prior to July 2010 Australia's reservation to Article 8 of the OECD Model Convention also included the right to tax profits from '***other*** coastal and continental shelf activities' (emphasis added). In that context, the phrase 'carriage of passengers or cargo taken on board at one place in Australia for discharge in Australia' in the current reservation should be read as a reference to coastal trade.	The Commissioner does not accept that the phrase 'other coastal and continental shelf activities' was intended to limit the scope of transport covered by the current reservation. Rather, it was simply a reference to additional (that is, other) non-transport activities which Australia reserved the right to tax. See also, ATO Response to Issue 1.
12	Paragraph 4 of the standard ships and aircraft article should be interpreted in a way which does not render the requirement that voyages be 'confined solely' to places in Australia meaningless	The interpretation of paragraph 4 taken in the Draft Ruling does not render paragraph 2 meaningless. It is noted that paragraph 2 of the standard ships and aircraft article applies to transport and non-transport activities. In the case of transport, paragraph 4 relevantly defines what is 'confined solely to places' in Australia for the purposes of the source country taxing right allocated by paragraph 2. In that way, paragraph 4 complements the operative provision in paragraph 2. The Commissioner also notes that the Article should not be interpreted in a way that renders paragraph 4 meaningless, that is, in a manner that would leave it with very little (or no) work to do. See also, ATO Response to Issue 1.