

TR 2004/D22 - Income tax: the meaning of particular terms in the Government Services Articles of Australia's tax treaties



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Draft Taxation Ruling

Income tax: the meaning of particular terms in the Government Services Articles of Australia's tax treaties

Contents	Para
What this Ruling is about	1
Background	9
Date of effect	14
Ruling	15
Explanation	21
Examples	97
Your comments	107
Detailed contents list	108

Preamble

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVA of the **Taxation Administration Act 1953**. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office.*

What this Ruling is about

1. This ruling deals with the meaning of particular terms that appear in the various Government Service Articles (GSAs) in Australia's Double Tax Agreements and Conventions (tax treaties). Specifically, the ruling seeks to interpret the meaning of the following terms:

- a. the term 'Remuneration (or salaries, wages and other similar remuneration), other than a pension or annuity, paid by a Contracting State or a political subdivision or local authority of that State in respect of services rendered in the discharge of governmental functions' where that term appears in the GSA of a tax treaty;
- b. the term 'Remuneration (other than a pension or annuity) paid by one of the Contracting States or by a political or administrative subdivision of that State or by a local authority of that State to any individual in respect of services rendered to that State or subdivision or authority' where that term appears in the GSA of a tax treaty;
- c. the term 'Wages, salaries and similar remuneration including pensions, paid from funds of one of the Contracting States of a state or other political subdivision thereof or of an agency or authority of any of the foregoing for labour or personal services performed as an employee of any of the above in the discharge of

TR 2004/D22

governmental functions to a citizen of that State' as it appears in the United States Convention;¹ and

- d. the term 'Remuneration (other than a pension or annuity) paid by the Government of Australia, a State of the Commonwealth or a political subdivision or local authority of the Commonwealth or of a State (or the Republic of Germany, a Land or political subdivision or local authority thereof) to any individual in respect of an employment' as it appears in the German Agreement.²

2. Those tax treaties that use the terms in paragraph 1.a. and 1.b. in their GSAs are described as Category 1 and Category 2 tax treaties respectively and are listed at Attachments 1 and 2. For the purposes of this ruling, those tax treaties which contain similar words in their GSAs to those in the terms stated at paragraphs 1.a. and 1.b. above are included within the Category 1 and 2 tax treaties. Such variations are noted in the attachments.

3. References to the words 'a Contracting State or a political subdivision or local authority of that State' or any variations of this in Australia's tax treaties shall, for the purposes of this ruling, be referred to as either 'government' or 'governments'.

4. This ruling focuses on the meaning of particular words contained within the terms referred to in paragraph 1. In doing so, it assists in defining the scope of the GSA in those tax treaties which use those words. In the case of Category 1 tax treaties, the key terms are: 'Remuneration (or salaries, wages and other similar remuneration), ... paid by (a government) ...in respect of services rendered in the discharge of governmental functions'. In the case of Category 2 tax treaties, the key terms are 'Remuneration ...paid by (a government) in respect of services rendered to that State.'

5. Accordingly, the ruling does not focus on the meaning of particular words that may appear in the GSAs of Australia's tax treaties like 'pension or annuity', 'political subdivision' or a 'local authority thereof' or variations of those terms. Also, the ruling does not deal with certain other interpretative issues governing the scope of the GSA such as the trade and business exception or issues surrounding locally engaged staff. These matters are referred to only where they assist to give meaning to the terms that are dealt with in the ruling.

6. In dealing with particular aspects of the scope of the various GSAs in Australia's tax treaties, this Ruling provides guidance as to whether the GSA in the relevant tax treaty applies to the class of person covered by this ruling.

7. The ruling also identifies those treaties where the context may dictate a particular meaning to be given to the terms listed above.

¹ See Article 19 of the United States Convention at Schedule 2 of the *International Tax Agreements Act 1953* (Agreements Act) as amended by the Protocol at Schedule 2A of the Agreements Act.

² See Article 17 of the German Agreement at Schedule 9 of the Agreements Act.

Class of person/arrangement

8. The class of person/arrangement to which this ruling applies are:

- i) resident individuals who are paid salaries, wages or other similar remuneration by:
 - an Australian government to perform services in another country with whom Australia has a tax treaty; or
 - a government of another country with whom Australia has a tax treaty to perform services in that country or a third country; and
- ii) non-resident individuals who are paid salaries, wages or other similar remuneration by:
 - an Australian government to perform services in Australia; or
 - a government of another country with whom Australia has a tax treaty to perform services in Australia.

Background

9. All of Australia's comprehensive tax treaties have a GSA.³ However, as can be seen in the attachments, the GSAs in Australia's tax treaties use different sets of words.

10. Essentially, the different sets of words can be traced to changes in Article 19 of the OECD Model Tax Convention on Income and Capital ('OECD Model GSA'). The words used in Category 1 tax treaties are based on the 1963 OECD Model GSA, which used the term 'for services rendered in the discharge of governmental functions'. The 1977 OECD Model GSA altered this term to 'for services rendered to that State'. This form of words is reflected in the Category 2 tax treaties.

11. Wherever possible, Australia has continued to negotiate tax treaties based on the 1963 OECD Model GSA wording. In addition, other tax treaties, most notably the US Convention and the German Agreement, rely on other words to describe the GSA.

12. The wording used in the GSAs of Australia's tax treaties has created some uncertainty surrounding the scope and meaning of the GSAs. This uncertainty essentially relates to two types of scoping issues. Firstly, whether the GSAs in Australia's tax treaties apply only to employees of a government or extend to contractors. Secondly,

³ There are certain Airline Profits Agreements with France, Italy and the People's Republic of China that do not contain GSAs.

TR 2004/D22

whether the meaning of the terms ‘in discharge of governmental functions’ and ‘services rendered to that State’ restrict the scope of the GSA to particular types of services or labour.

13. This ruling seeks to deal with that uncertainty by interpreting the meaning of the different types of words used in Australia’s GSAs.

Date of effect

14. It is proposed that when the final Ruling is issued, it will apply both before and after its date of issue. However, the final Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the final Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Ruling

Category 1 tax treaties

15. The Category 1 tax treaties, listed at Attachment 1, which contain the terms ‘remuneration (or salaries, wages or other similar remuneration) paid by a government in respect of services rendered in the discharge of governmental functions’ or such similar wording, are to be interpreted as follows:

- The terms ‘remuneration’ or ‘salaries, wages and other similar remuneration’ refer to amounts paid by a government to employees or office holders but not to contractors or consultants.
- With the exception of the Russian Agreement,⁴ the term ‘services rendered in discharge of governmental functions’ or such similar wording, when read with the other words of the GSA, is a reference to services rendered by the employee or office holder in completing or performing any functions undertaken by a government.
- In the case of the Russian Agreement, the ‘*consensus ad idem*’ struck between the bilateral parties restricts the term ‘services rendered in discharge of governmental functions’ to core governmental functions undertaken by a government and completed or performed by the employee or office holder. In this context, these ‘core’ functions include police, defence, foreign affairs and the judiciary.

⁴ See Article 19 of the Russian Agreement at Schedule 46 of the Agreements Act.

Category 2 tax treaties

16. The Category 2 tax treaties, listed at Attachment 2, which contain the words 'remuneration paid by government in respect of services rendered to that State' or such similar wording, are to be interpreted as follows:

- The term 'remuneration' refers to amounts paid by a government to employees or office holders but not to contractors or consultants.
- The term 'services rendered to that State', when read with the other words of this category of GSA, is a reference to services rendered by the employee or office holder and does not require the employee to be undertaking governmental functions. In practice, this means that the term refers to employees or office holders completing or performing any functions undertaken by a government.

Article 19 of the United States Convention

17. Article 19 of the United States Convention which contains the words 'wages, salaries and similar remuneration including pensions, paid from funds of one of the Contracting States or a state or other political subdivision thereof or of an agency or authority of any of the foregoing for labour or personal services performed as an employee of any of the above in the discharge of governmental functions to a citizen of that State' is to be interpreted as follows:

- The term 'wages, salaries and similar remuneration', when read with other words of the Article, particularly the words 'for labour or personal services performed as an employee', refer to amounts paid by a government to employees or office holders but not to contractors or consultants.
- The term 'in the discharge of governmental functions', when read with the Article as a whole, is restricted to core functions undertaken by a government and completed or performed by the relevant employee or office holder. For the purposes of the United States Convention, 'core' functions refer to those functions that are carried on solely by a government and activities that directly support the carrying out of those functions. In this context, it includes military, diplomatic service and tax administration.

Article 17 of the German Agreement

18. Article 17 of the German Agreement which, in paragraph 1, contains the term 'Remuneration (other than a pension or annuity) paid by the Commonwealth of Australia, a State of Australia or a political subdivision or local authority of the Commonwealth or of a State to any individual in respect of an employment' and, in paragraph 2, contains the words 'Remuneration (other than a pension or annuity) paid by the Federal Republic of Germany, a Land or a political subdivision or local authority thereof to any individual in respect of an employment' is to be interpreted as follows:

- The term 'remuneration', when read with other words of the Article, particularly the words 'in respect of an employment', refers to amounts paid by a government to employees or office holders but not to contractors or consultants.
- The term 'in respect of an employment' refers to any remuneration paid by a government to any individual in their capacity as an employee or office holder, and does not require the employee to be undertaking governmental functions. In practice, this means that the term refers to employees or office holders completing or performing any function undertaken by a government.

Summary

19. The terms 'remuneration' and 'salaries, wages and other similar remuneration' in the GSAs of Australia's tax treaties referred to above, apply to amounts paid by a government to employees or office holders but not to contractors or consultants.

20. Except for the United States Convention and the Russian Agreement (see paragraphs 15 and 17), the terms 'in the discharge of governmental functions', 'services rendered to that State' and 'in respect of an employment' all have the same practical effect. That is, these terms refer to employees or office holders completing or performing any function undertaken by a government.

Explanation

21. In examining the particular categories of terms set out at paragraph 1, the Commissioner recognises that a GSA in one DTA may, for a variety of reasons,⁵ have been phrased differently to the Article dealing with the same category of income in another DTA.

⁵ See paragraphs 46 to 48 of Taxation Ruling TR 2001/13.

22. Whilst the words used in a particular Article of Australia's treaties may not be uniform, particular words or terms in one treaty that vary from those in another may still have the same intended meaning.⁶

23. Conversely, it may also be possible that the same words in two tax treaties have different meaning, based on the *consensus ad idem* (the bargain) struck between the parties.⁷

24. Consequently, this Ruling has grouped the different categories of words contained in GSAs to reflect substantive differences in wording. In determining the meaning of these terms, the Ruling then applies treaty interpretation principles, as set out in Taxation Ruling TR 2001/13.

Undefined terms

25. The terms that appear in the four categories specified at paragraph 1 are not defined within Australia's tax treaties.

26. The General Definitions Article of each of Australia's tax treaties broadly provides that where a term is not defined in the Convention, it takes on the meaning it has under the domestic law of the country applying the Convention, unless the context otherwise requires.⁸

27. Furthermore, as outlined at paragraphs 95 to 97 of Taxation Ruling TR 2001/13, the Vienna Convention on the Law of Treaties ('Vienna Convention') provides that a treaty be interpreted in accordance with the ordinary meaning of the treaty terms in their context, having regard to object, purpose and certain items of extrinsic material.

28. The wording of the GSAs in our tax treaties have been based largely on the wording contained in the OECD Model GSA. Consequently, the OECD Model GSA and its associated Commentary are important factors in setting the context for GSAs in Australia's tax treaties.

Category 1 tax treaties

29. The Category 1 tax treaties are set out at Attachment 1. This explanation focuses on the following terms as they relate to the scope of the GSAs in Australia's tax treaties:

- 'salaries wages and other similar remuneration' and 'remuneration'; and
- 'in discharge of governmental functions'.

⁶ See paragraph 49 of Taxation Ruling TR 2001/13.

⁷ See paragraph 51 of Taxation Ruling TR 2001/13.

⁸ This definition usually appears in General Definitions Article of Australia's tax treaties, for example, the definition is provided for in Article 3(2) of the US DTC.

The meaning of ‘Salaries, wages and other similar remuneration’ and ‘remuneration’

30. The meaning, as it relates to the scope of the GSA of Australia's tax treaties, to be given to the terms 'salaries, wages and other similar remuneration' and 'remuneration' is central to the resolution of the first scoping issue referred to at paragraph 12. The focusing question here is whether the GSA is limited to employees in Australia's tax treaties or extends to contractors or consultants.

31. Category 1 treaties which rely on the terms 'Remuneration' and 'for services rendered in the discharge of governmental functions' are based on the 1963 OECD Model GSA.

32. Paragraph 2 of the Commentary on the 1963 OECD Model GSA stated:

It should be noted that the term 'remuneration' used in Article 19 covers wages and salaries and pensions, to the exclusion of any other payments.

33. The term 'salaries, wages and other similar remuneration', instead of 'remuneration', has been used in the GSAs of Australia's tax treaties negotiated since the OECD Model GSA was similarly amended in 1994.⁹

34. Paragraph 2.1 of the Commentary as at January 2003 on the OECD Model GSA specifies:

This amendment was intended to clarify the scope of the Article, which only applies to State employees ..., and not to persons rendering independent services to a State or deriving pensions related to such services.

35. Paragraphs 35 and 36 of the Introduction to the OECD Model and Commentary states that amendments 'intended to simply clarify, not change the meaning of the Articles or the Commentary' are 'normally applicable to the interpretation and application of Conventions before their adoption, because they reflect the consensus of OECD Member countries as to the proper interpretation of existing provisions and their application to specific situations. As specified in paragraph 108 of TR 2001/13, this type of change is intended to reflect the fact that the Commentaries are usually expressed as reflecting a common view as to what the meaning is and has always been.

36. In this context, paragraph 2.1 of the Commentary on the OECD Model Commentary as at January 2003, when read with paragraph 2 of the Commentary on the 1963 OECD Model GSA, suggests that both 'remuneration' and 'salaries, wages or other similar remuneration' are limited to amounts paid to State employees, rather than extending to persons rendering independent services to a State.

⁹ An example of this wording is set out at Article 19(1) of the DTA with Vietnam.

37. This view limiting the scope of the GSA to employees is supported by the words of GSAs in Category 1 tax treaties. These GSAs provide that other Article(s) and not the GSA will apply to salaries, wages and other similar remuneration paid in respect of services rendered in connection with any trade or business carried on by a government. An example for present purposes of the other Articles specified is the Dependent Personal Services Article ('DPSA').

38. Although other Articles are specified, there is no reference in that part of the GSAs in Australia's tax treaties dealing with the trade or business exception to the Independent Personal Services Article (IPSA) or Business Profits Articles (BPA).¹⁰ The same applies to Article 19(3) of the OECD Model GSA. The absence of such an ordering rule in the GSAs with respect to the IPSA or BPA indicates that amounts paid to independent contractors or consultants by a government were not intended to fall within the scope of the GSA.

39. Furthermore, the DPSAs in Australia's tax treaties provide that the operation of that Article is subject to other Article(s) such as the GSA of the relevant tax treaty.¹¹ The existence of this ordering rule recognises that there is potential overlap between the two Articles. By comparison, the IPSAs and BPAs in Australia's tax treaties do not contain any ordering rule in respect of the GSAs in those same tax treaties. Again, the lack of such an ordering rule indicates that these articles operate mutually exclusively and is consistent with an interpretation that contractors and consultants are not included within the scope of the GSAs in Australia's tax treaties.

40. Finally, it is noted that the heading of the GSAs in our tax treaties is 'Government Service' rather than 'Government Services'. In *Thiel's*¹² case, McHugh J held that the heading to Article 7 must be taken into consideration in determining the meaning of the term 'profits'. Applying this principle for present purposes, the use of the word 'service' rather than 'services' in the heading is consistent with an interpretation that limits the scope of the GSA to contracts 'of service'; that is persons who render service as an employee, rather than contracts 'for services' as a contractor or consultant.

41. Accordingly, for the reasons stated above, the meaning to be given to the term 'remuneration' or 'salaries, wages or other similar remuneration' in the GSAs of Category 1 tax treaties is one that is limited to employees and office holders and does not extend to persons rendering independent personal services to a government.

¹⁰ For example, there are specific references to Articles 15 (Dependent personal Services) and 16 (Directors) in the Mexican Agreement, but no reference to the IPSA or the BPA.

¹¹ Usually, the DPSAs state something like 'Subject to the provisions of Article...'.

¹² *Thiel v. Federal Commissioner of Taxation* (1990) 64 ALJR 516; (1990) 94 ALR 647; (1990) 90 ATC 4717; (1990) 21 ATR 531; (1990) 171 CLR 338.

Office holders

42. It is evident from Australia's domestic taxation law that there are a number of different categories of individuals that are not employees under common law¹³ yet still receive amounts paid by a government. Examples include Members of Parliament, judges and other holders of statutory office or positions. They are collectively referred to as 'office holders' in this ruling.

43. Amounts paid by a government to office-holders can be 'other similar remuneration' to that of salaries or wages paid by a government to one of its employees in respect of services rendered in the discharge of governmental functions.

44. The term 'in discharge of governmental functions' also assists here as office-holders will discharge the government functions that are relevant to the office.

45. Accordingly, the Commissioner adopts the view that amounts paid by a government to an office holder is included within the meaning of the terms 'remuneration' or 'other similar remuneration', particularly when those terms are read together with the term 'in discharge of governmental functions'.

The meaning of 'in the discharge of governmental functions'

46. There are a number of contextual matters that affect the meaning of the above term in the GSAs of Category 1 tax treaties.

The purpose of the GSA

47. Typically, a GSA allocates a sole taxing right to the government that is the paying authority. Paragraph 2 of the Commentary on the OECD Model GSA as at January 2003 states:

The principle of giving the exclusive taxing right to the paying State is contained in so many of the existing conventions between OECD Member countries that it can be said to be already internationally accepted.

48. This is to ensure that the taxing rights applicable to payments of salaries, wages or other similar remuneration to employees and office-holders by a government in respect of services rendered flow to that same government.

49. It would be inconsistent with this purpose and effect if some of the remuneration paid to employees or office holders of the paying State fell outside the scope of the GSAs in Australia's tax treaties because of the nature of services rendered by a government employee or office-holder (subject to the current exceptions to the general rule of sole taxing rights to the paying State).

¹³ For example, see the definition of 'eligible persons' in section 221A of the *Income Tax Assessment Act 1936*.

The development of the GSA in the early treaties and the OECD Model

50. The GSA (Article 19) of the 1963 OECD Model, upon which the wording of the GSAs of Category 1 tax treaties are based, referred to 'remuneration, ..., paid by, or out of funds created by, [government] to any individual in respect of services rendered to that [government] in the discharge of functions of a governmental nature...'.¹⁴

51. The Commentary as at January 2003 on the OECD Model GSA states the following in relation to the scope of that GSA:

Similar provisions in old bilateral conventions were framed in order to conform with the rules of international courtesy and mutual respect between sovereign States. They were therefore rather limited in scope. However, the importance and scope of Article 19 has increased on account of the fact that, consequent on the growth of the public sector in many countries, governmental activities abroad have been considerably extended.

52. The scope of the Article has developed as the increase in governmental activity abroad has developed. In this regard, there is no indication that the 'governmental functions' language was intended to have any limiting effect during this development (apart from the trade or business exception).¹⁵

53. Except in the case of the Russian Agreement, the same applies in relation to the GSAs of Category 1 tax treaties, as these GSAs are based on the 1963 OECD Model Article.

*The meaning of the term when read in the context of the Article as a whole**The trade or business exception*

54. Paragraph 1 of the GSAs in Category 1 tax treaties typically refers to the terms 'remuneration ... paid to individuals in respect of services rendered in the discharge of governmental functions'. Paragraph 2 then 'carves out' from the GSA, remuneration paid to individuals 'in respect of services rendered in connection with any trade or business carried on by one of the Contracting States'. In such cases, other Articles of the treaty apply to the remuneration.

55. This 'carve-out' for the trade or business exception suggests that paragraph 1 of the Article was intended to cover all governmental functions. Otherwise, there would be no need for the trade or business exception to 'carve out' those activities from paragraph 1 of the Article on the basis that such activities would not be core or inalienable functions of government.

¹⁴ It is noted that Australia's tax treaties use the term 'in discharge of governmental functions'. Despite this difference in wording, it is considered that the two terms have the same substantive meaning.

¹⁵ Contracting States can negotiate the scope of the GSA (see paragraph 1 of the Commentary on the 1963 OECD Model GSA).

56. The existence of this trade or business exception, when read with paragraph 1, suggests that the meaning of the term 'in discharge of governmental functions' in a GSA of a Category 1 tax treaty is a reference to all functions undertaken by a government and performed by individuals as employees or office holders of that State.

The provisions regarding locally engaged staff

57. The GSAs in Category 1 tax treaties also contain provisions in relation to 'locally-engaged staff'. Where these provisions apply, the GSAs still have application but sole taxing rights are not allocated to the paying State. The relevant wording in relation to this is set out at the second sentence of the Category 1 wording at Attachment 1.

58. As with the trade and business exception, if the scope of paragraph 1 the GSA was intended to be limited to 'core' or 'inalienable' governmental functions, the need for provisions in a GSA in relation to locally engaged staff are lessened because of the functions typically performed by such locally engaged staff.

59. For example, a locally engaged person working as an embassy cleaner would not fall within the meaning of the term 'in discharge of governmental functions' if such term is limited to those 'core' or 'inalienable' governmental functions. As such, there would be no need for a locally engaged staff exception to give effect to the intent of the Article which is to not allocate exclusive taxing rights to the paying State in this situation.

60. However, the existence of provisions concerning locally engaged staff in the GSAs of Category 1 tax treaties is consistent with the term 'in discharge of governmental functions' referring to any functions undertaken by a government and performed by individuals as employees or office holders of that State.

Domestic law and the meaning of the term

61. As the terms 'in discharge of governmental functions' or 'governmental functions' are not defined in Australia's tax treaties, they may take on their domestic law meaning (see paragraph 25 to 28). Australia's domestic tax law does not define what is meant by the term 'governmental function', nor is there unequivocal case law that provides a definitive, domestic law meaning.

62. However, there are indications in the case law that a governmental function would be likely to be defined broadly to encompass any function that a government chooses to undertake.

63. Courts have expressed doubt about the ability to clearly distinguish between different types of functions governments undertake. Because of this inability to draw a distinction, a court could consider the unqualified term 'governmental' to cover everything a government does. These sentiments were expressed by Latham CJ in *South Australia v. The Commonwealth*.¹⁶

There is no universal or even general opinion as to what are the essential functions, capacities, powers, or activities of a State. Some would limit them to the administration of justice and policy and necessary associated activities. There are those who object to a State action in relation to health, education, and the development of natural resources. On the other hand, many would regard the provision of social services as an essential function of government... In a fully self-governing country where a parliament determines legislative policy and an executive government carries it out, *any activity may become a function of government if parliament so determines*. It is not for a court to impose upon any parliament any political doctrine as to what are and what are not functions of government, or to attempt the impossible task of distinguishing, within functions of government, between essential and non-essential or between normal or abnormal. There is no sure basis for such a distinction. Only the firm establishment of some political doctrine as an obligatory dogma could bring about certainty in such a sphere, and Australia has not come to that. [emphasis added]

64. Other Court decisions have also expressed similar sentiments and have indicated that any activity may become a function of government if Parliament so determines.¹⁷

65. On the other hand, judicial consideration has been given to distinguishing between the traditional, core or inalienable activities of government and other activities undertaken by government. However, such distinctions have not precluded the view that any activity undertaken by a government is 'governmental'. Instead, these distinctions seem to have created sub-categories of governmental functions such as 'essential' or 'primary' functions.

¹⁶ (1942) 65 CLR 373 at 423.

¹⁷ See also per *Ex Parte Professional Engineer's Association* (1959) 107 CLR 208, at 247 and 272-273 per Windeyer J who was quoted with approval in *Queensland Electricity Commission v. The Commonwealth* (1985) 159 CLR 192, at 214 per Mason J.; *Victoria v. The Commonwealth* (1970-1971) 122 CLR 353 at 382-383 per Barwick J; *Committee of Direction of Fruit Marketing v. Australian Postal Commission* (1980) 144 CLR 577 at 594 per Mason and Wilson JJ; *SGH Ltd v. FC of T* (2002) 210 CLR 51, at 87 per Kirby J.; *DFC of T v. State Bank of New South Wales* (1992) 92 ATC 4079 at 4,084 per Griffith CJ.; *Australian Industrial Relations Commission, Re v. Australian Teacher's Union* [HCA] 07/04/1995 per Mason CJ, Brennan, Deane, Dawson, Gaudron & McHugh JJ.

66. In *Ex Parte Professional Engineers' Association*¹⁸ Taylor J, rejecting an argument that something that is governmental in nature cannot also be industrial, stated:

The difficulty with the first of those propositions is that it does not define what is meant by 'governmental'. However, in illustrating its application the assertion is made that any activity undertaken by a State or State authority is properly so described. It may be conceded at once that in a sense this is true but to say that it may be so described is no indication of the essential character of the activity itself, or, of the fundamental distinction between essential functions of government and other activities in which, for its own legitimate purposes, a State may engage. It is beyond doubt that the administration of justice is of the former character but is it possible to say that the work of building court houses is of the same fundamental character?... To my mind only one answer can be given to these questions. Clearly they are not. Such activities, though undertaken for legitimate governmental purposes, are clearly industrial in character whether actually undertaken by the State itself or by contractors on its behalf. Indeed, the fact that the State may arrange for such work to be performed by outside agencies is, itself, a denial that work of this character is an essential function of government...' [emphasis added]

67. Also, Isaacs J in *Federated State School Teachers' Association of Australia v. State of Victoria*¹⁹ described 'primary and inalienable functions of a constitutional Government' as those 'impossible of performance by private individuals, and appertain solely to the Crown in its regal character.' He also drew a line between 'inalienable' functions and other functions.²⁰

68. On balance, it is acknowledged that applying the Court decisions referred to above to give meaning to the term 'governmental functions' in its treaty context is not entirely conclusive. This is because the decided cases dealt with different contexts and did not interpret the same term as 'governmental functions'. Nonetheless, at least in more recent times, there is a sense from the domestic law cases that the term 'governmental function' is more likely to be inclusive of anything that is done by government.

Summary – the meaning of 'in discharge of governmental functions'

69. Having regard to the matters raised at paragraphs 46 to 68, with the exception of the Russian Agreement dealt with at paragraphs 70 to 73, the term 'services rendered in the discharge of governmental functions' in the GSAs of Category 1 tax treaties means those services rendered by an employee or office-holder in the completion or performance of *any* functions undertaken by government.

¹⁸ (1959) 107 CLR 208 at 260-261.

¹⁹ (1929) 41 CLR 569 at 584.

²⁰ At 585.

The Russian Agreement

70. The GSA featured in the Russian Agreement is an exception to the Commissioner's interpretation of the terms stated at paragraph 1.a. for the GSAs in Category 1 tax treaties in relation to the meaning of the term 'in discharge of governmental functions'.

71. The context of the Russian Agreement provides for an interpretation of the term 'in discharge of governmental functions' that is consistent with the more restrictive view stated at paragraph 65 to 67.

72. Although the GSA in the Russian Agreement uses Category 1 tax treaty GSA wording, there is evidence from the extrinsic materials that the scope of the GSA was intended to be more restrictive.

73. The Vienna Convention²¹ permits reference, *inter alia*, to supplementary materials in order to establish the meaning of words used in a treaty, particularly when those words are open to different interpretations.

74. The Explanatory Memorandum accompanying the *International Tax Agreements Amendment Act (No. 1) 2002*, the law which incorporated the Russian Agreement into Australian domestic tax law, states:

It has been agreed with the Russian negotiators that governmental functions will only include those core activities of government (e.g. police, defences, foreign affairs, judiciary).

75. This interpretation of the scope of the GSA reflects the specific bargain or *consensus ad idem* between Russia and Australia on the scope of the GSA. Therefore, the GSA in the Russian Agreement is to be interpreted in accordance with the above statement from the Explanatory Memorandum.

Category 2 tax treaties

76. The wording in Category 2 tax treaties, which is set out at Attachment 2, is consistent with the wording of the 1977 OECD Model GSA. The term 'services rendered to that State' is used in Category 2 tax treaties, not the term 'in discharge of governmental functions'.

Employees and office holders

77. The term 'remuneration' is used in GSAs in both Category 2 tax treaties and many Category 1 tax treaties. Given the lack of any extrinsic materials in respect of GSAs in Category 2 tax treaties indicating that a different meaning is to be adopted, the term 'remuneration' should have the same meaning in GSAs in both categories 1 and 2 tax treaties.

²¹ See Articles 31(3) and 32 of the Vienna Convention on the Law of Treaties as outlined in paragraphs 95 to 97 of Taxation Ruling TR 2001/13.

78. Therefore, the term is to be interpreted in accordance with meaning given to it in Category 1 tax treaties; that is, it applies to employees and office holders but not to contractors or consultants (see paragraphs 30 to 41).

‘Services rendered to that State’

79. Whilst the term ‘services rendered to that State’ does not expressly refer to governmental functions, the term takes its meaning from the context in which the term was inserted into the 1977 OECD Model GSA.

80. Paragraph 5 of the Commentary as at January 2003 on the OECD Model GSA states:

Some member countries, however, thought that the exclusion [of the term ‘in discharge of functions of a governmental nature’ from the OECD Model GSA] would lead to a widening of the scope of the Article. Contracting States who are of that view and feel that such a widening is not desirable may continue to use, and preferably specify, the expression ‘in discharge of functions of a governmental nature’ in their bilateral conventions.

81. The term ‘services rendered to that State’ has a broad application that does not require a link to government functions. This implies that the Article would apply in practice to any functions undertaken by government. The reference to the widening of the scope was based on concerns that the new wording would extend the Article to include contractors. There was no intention to change the scope of the Article in terms of governmental functions, and for this purpose, the term ‘services rendered to that State’ was only seen as clarifying the already wide scope that applied to the term ‘in discharge of governmental functions’. This adds further support to the approach taken in this Ruling for the term ‘in discharge of governmental functions’.

82. Furthermore, there is no contextual material in respect of the five tax treaties specified at Attachment 2 indicating this form of words has a different meaning as regards the scope of the GSA to that of GSAs in Category 1 tax treaties.

83. For the above reasons, the term ‘services rendered to that State’ refers to remuneration paid by a government to any individual in their capacity as an employee or office holder, and does not require the employee to be undertaking governmental functions. In practice, this means that the term refers to employees or office holders completing or performing any function undertaken by government.

Article 19 of the United States Convention***Employees and office holders***

84. Article 19 of the United States Convention, which is set out at Attachment 3, is to be interpreted in a manner consistent with the GSAs in Category 1 and 2 tax treaties in that employees and office holders but not contractors or consultants fall within the scope of the GSA.

85. 'Similar remuneration' (to wages and salaries) includes those amounts paid by a government to its employees and to office holders, but not contractors or consultants.

86. Article 19 of the United States Convention expressly provides that the Article applies in respect of 'labour or personal services performed as an employee'; thus precluding its application to contractors. The Commissioner considers that the term 'employee' is to be interpreted for the purposes of Article 19 of the United States Convention as including office-holders and not just employees under common law. In this respect, the meaning is consistent with the GSAs in categories 1 and 2 tax treaties.

The meaning of 'in discharge of governmental functions'

87. In order to establish the meaning of the words used in a treaty, the Vienna Convention²² permits reference, *inter alia*, to any subsequent practice regarding the application of the treaty that establishes such an agreement.

88. Whilst the words of Article 19 of the United States Convention are open to different interpretations, the term 'in discharge of governmental functions' is understood in the United States²³ to 'encompass functions traditionally carried on by a government. It would not include functions that are commonly found in the private sector (e.g., education, health care, utilities). Rather, it is limited to functions that generally are carried on solely by the government (e.g., military, diplomatic service, tax administrators) and activities that directly support the carrying out of those functions'.

89. Australia has also adopted this interpretation of the term 'in discharge of governmental functions' in the context of the United States Convention. The subsequent practice of both countries in relation to the interpretation of Article 19 of the United States Convention demonstrates bilateral acceptance of the position limiting the scope of the term 'in discharge of governmental functions' to

²² See Article 31(3)(b) of the Vienna Convention as outlined in paragraphs 95 to 97 of Taxation Ruling TR 2001/13.

²³ See the US Treasury Department Technical Explanation to the 1996 US Model Income Tax Convention.

particular core, traditional or inalienable functions discharged by government.²⁴

90. The absence of provisions in Article 19 of the United States Convention concerning locally engaged staff and business and trade carried on by government²⁵ is also consistent with the view that both countries intended that the term be interpreted in the manner specified at paragraph 88.

91. Accordingly, the term ‘in discharge of governmental functions’ in the United States Convention means those functions that are generally carried on solely by the government and activities that directly support the carrying out of those functions.

Article 17 of the German Agreement

92. Article 17 of the German Agreement is set out at Attachment 4 and makes express reference to remuneration paid by a government to any individual in respect of ‘an employment’.

Employees and office holders

93. Consistent with the GSAs in Category 1 and 2 tax treaties and the reasoning at paragraphs 30 to 41, the term ‘remuneration’ is to be interpreted as including employees and office holders but not contractors or consultants.

94. Furthermore, when the term ‘remuneration’ is read together with ‘an individual in respect of an employment’, it provides added support for this GSA to apply to all persons paid as employees or office holders by a government but not to contractors or consultants.

The meaning of ‘in respect of an employment’

95. The term ‘in respect of an employment’ should not be interpreted as being further restricted to particular types of services that the employee or office-holder may render to a government as the employer for the following reasons:

- the ordinary meaning of the term ‘employment’ in this context refers to any functions performed by the individual as an employee/office holder;
- the context of the Article as a whole (see paragraphs 47 to 49); and
- the absence of any extrinsic materials in this treaty context that provides for an alternative meaning.

²⁴ The Commissioner has most recently expressed this view as regards teachers participating in exchange programs between both countries (see Taxation Ruling TR 2004/10).

²⁵ See Articles 19(1) and 19(3) of the OECD Model Tax Convention on Income and Capital published January 2003.

96. Accordingly, the terms 'remuneration' and 'in respect of an employment' in Article 17 of the German Agreement means remuneration paid by a government to any individual in their capacity as an employee or office holder, and does not require the employee to be undertaking governmental functions. In practice, this means that the term refers to employees or office holders completing or performing any function undertaken by government.

Examples

Example 1 – Category 1 tax treaty

97. Kevin is an officer employed and paid by Australia's armed forces. He is stationed at a military base in the Philippines for one year and participates in joint military exercises there.

98. Kevin is an employee of the Commonwealth of Australia and the services he renders by participating in the joint military exercises is one of discharging governmental functions. Therefore, any remuneration received by the individual falls within the scope of Article 19(1) of the Philippine Agreement.

Example 2 – Russian Agreement

99. Natasha, a Russian teacher employed and paid by the Government of Russia for working in a State-operated school in Russia, participates in a teacher exchange program with Australia. She teaches in Australia for 10 months and returns home.

100. In accordance with the *consensus ad idem* of the Russian Agreement, only core or inalienable functions of government fall within the scope of the GSA. As teaching is not considered to be a core or inalienable function of government, the services Natasha rendered to her country's government are not in the discharge of governmental functions for the purposes of Article 19(1) of the Russian Agreement. Instead, the remuneration would fall for consideration under Article 15 of the Russian Agreement.

Example 3 – Category 2 tax treaty

101. Jim is a fire-fighter who is employed by a local authority in Australia. He goes to Italy for one year as part of an exchange program with a local Italian fire-fighting authority. Whilst there, he continues to be paid by the Australian local authority.

102. As Jim is an employee of the local authority and renders services to that State through his participation in the exchange program, his remuneration for the period of the deployment is covered by the GSA (Article 19) of the Italian Agreement.

TR 2004/D22

Example 4 – United States Convention

103. Jane is employed in Australia as a middle manager by a local government electricity supplier. As part of her duties, she goes to the United States for a six-month period to learn more about the latest technological developments.

104. Jane's activities as an employee of a utility are not a function that is carried on solely by government. Consequently, although an employee of a local government, she is not engaged in the discharge of governmental functions for the purposes of Article 19 of the United States Convention. As such, the remuneration derived by Jane for the period of her deployment to the United States is not covered by Article 19 of the United States Convention. Instead, the remuneration would fall for consideration under Article 15 of the United States Convention.

Example 5 – Contractor – German Agreement

105. Peter, an Australian builder, contracts with the Australian government to build a small annexe to the Australian embassy in Berlin. Peter is present in Germany for 7 months so that he can supervise the construction.

106. The facts indicate that Peter is a contractor. Therefore, Article 17 of the German Agreement will not apply on the basis that the term 'remuneration' in the Article does not include amounts paid by a government to contractors and the remuneration paid to Peter was not 'in respect of an employment'.

Your comments

107. We invite you to comment on this draft Taxation Ruling. Please forward your comments to the contact officers by the due date.

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Detailed contents list

108. Below is a detailed contents list for this draft Taxation Ruling:

	Paragraph
What this Ruling is about	1
Class of person/arrangement	8
Background	9
Date of effect	14
Ruling	15
Category 1 tax treaties	15
Category 2 tax treaties	16
Article 19 of the United States Convention	17
Article 17 of the German Agreement	18
Summary	19
Explanation	21
Undefined terms	25
Category 1 tax treaties	29
<i>The meaning of ‘Salaries, wages and other similar remuneration’ and ‘remuneration’</i>	30
<i>Office holders</i>	42
<i>The meaning of ‘in the discharge of governmental functions’</i>	46
<i>The purpose of the GSA</i>	47
<i>The development of the GSA in the early treaties and the OECD Model</i>	50
<i>The meaning of the term when read in the context of the Article as a whole</i>	54
<i>The trade or business exception</i>	54
<i>The provisions regarding locally engaged staff</i>	57
<i>Domestic law and the meaning of the term</i>	61
<i>Summary – the meaning of ‘in discharge of governmental functions’</i>	69
<i>The Russian Agreement</i>	70
Category 2 tax treaties	76
<i>Employees and office holders</i>	77
<i>‘Services rendered to that State’</i>	79
Article 19 of the United States Convention	84

TR 2004/D22

<i>Employees and office holders</i>	84
<i>The meaning of ‘in discharge of governmental functions’</i>	87
Article 17 of the German Agreement	92
<i>Employees and office holders</i>	93
<i>The meaning of ‘in respect of an employment’</i>	95
Examples	97
Example 1 – Category 1 tax treaty	97
Example 2 – Russian Agreement	99
Example 3 – Category 2 tax treaty	101
Example 4 – United States Convention	103
Example 5 – Contractor – German Agreement	105
Your comments	107
Detailed contents list	108

Commissioner of Taxation
 24 November 2004

<i>Previous draft:</i>	- International Tax Agreements Act
Not previously issued as a draft	1953 Sch 2
	- International Tax Agreements Act
<i>Related Rulings/Determinations:</i>	1953 Sch 3
TR 92/20; TR 2001/13;	- International Tax Agreements Act
TR 2004/10	1953 Sch 4
	- International Tax Agreements Act
<i>Subject references:</i>	1953 Sch 5
- contractors	- International Tax Agreements Act
- Double Tax Agreements	1953 Sch 6
- Double Tax Conventions	- International Tax Agreements Act
- employees	1953 Sch 7
- foreign government employees	- International Tax Agreements Act
- Germany	1953 Sch 8
- international law	- International Tax Agreements Act
- international tax	1953 Sch 9
- overseas countries	- International Tax Agreements Act
- overseas employees	1953 Sch 10
- Russia	- International Tax Agreements Act
- treaties	1953 Sch 11
- United States	- International Tax Agreements Act
	1953 Sch 12
	- International Tax Agreements Act
<i>Legislative references:</i>	1953 Sch 13
- TAA 1953 Pt IVA	- International Tax Agreements Act
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1953	- International Tax Agreements Act
- International Tax Agreements Act	1953 Sch 15
1953 Sch 1	

- International Tax Agreements Act 1953 Sch 16
- International Tax Agreements Act 1953 Sch 17
- International Tax Agreements Act 1953 Sch 18
- International Tax Agreements Act 1953 Sch 20
- International Tax Agreements Act 1953 Sch 21
- International Tax Agreements Act 1953 Sch 22
- International Tax Agreements Act 1953 Sch 23
- International Tax Agreements Act 1953 Sch 24
- International Tax Agreements Act 1953 Sch 25
- International Tax Agreements Act 1953 Sch 26
- International Tax Agreements Act 1953 Sch 27
- International Tax Agreements Act 1953 Sch 28
- International Tax Agreements Act 1953 Sch 29
- International Tax Agreements Act 1953 Sch 30
- International Tax Agreements Act 1953 Sch 31
- International Tax Agreements Act 1953 Sch 32
- International Tax Agreements Act 1953 Sch 33
- International Tax Agreements Act 1953 Sch 34
- International Tax Agreements Act 1953 Sch 35
- International Tax Agreements Act 1953 Sch 36
- International Tax Agreements Act 1953 Sch 37
- International Tax Agreements Act 1953 Sch 38
- International Tax Agreements Act 1953 Sch 39
- International Tax Agreements Act 1953 Sch 40
- International Tax Agreements Act 1953 Sch 41
- International Tax Agreements Act 1953 Sch 42
- International Tax Agreements Act 1953 Sch 43
- International Tax Agreements Act 1953 Sch 44

- International Tax Agreements Act 1953 Sch 45
- International Tax Agreements Act 1953 Sch 46
- International Tax Agreements Act 1953 Sch 47

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TR 2004/D22

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Condensed Version as at January
2003

ATO references

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Attachment 1: Category 1 Tax Treaty Wording

<i>(1) Remuneration (other than a pension or annuity) paid by a Contracting State or a political subdivision or a local authority thereof to any individual in respect of services rendered in the discharge of governmental functions shall be taxable only in that State. However, such remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the recipient is a resident of that State who:</i> <i>(A) is a citizen of that State; or</i> <i>(B) did not become a resident of that State solely for the purpose of performing the services.</i> <i>(2) The provision of paragraph (1) shall not apply to remuneration in respect of services rendered in connection with any trade or business carried on by one of the Contracting States or a political subdivision or a local authority thereof. In such a case the provisions of Articles 14 and 16 apply.</i>	UK Canada Philippines Switzerland Malaysia Sweden Denmark Ireland Norway Malta²⁶ Austria²⁷ China PNG Thailand Sri Lanka Fiji Kiribati Poland Vietnam Spain Czech Slovakia Argentina Romania Russia South Africa Mexico
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²⁶ The Maltese agreement contains a specific deeming provision in respect of development assistance programs.

²⁷ The Austrian agreement contains deems Article 19(1) to apply to remuneration paid out of public funds provided by Austria to any individual in respect of services rendered as a member of the Austrian permanent delegation of foreign commerce in Australia.

TR 2004/D22

<i>'Remuneration (other than a pension or annuity) paid by the Government of Australia, the Australian Capital Territory or the Northern Territory , or any other Australian political subdivision or local authority to an individual in respect of services rendered to any such government in the discharge of governmental functions shall be exempt from New Zealand Tax if the individual is not a resident of New Zealand for the purposes of New Zealand tax or is a resident in New Zealand for the purposes of New Zealand Tax solely for the purposes of rendering those services.'</i> Article 20(2) of the NZ tax treaty contains the same provision as regards remuneration paid by the New Zealand Government.	New Zealand
<i>'Remuneration (other than pensions) paid by the Government of the Commonwealth or of any State of the Commonwealth to any individual for services rendered to that government in the discharge of governmental functions shall be exempt from Singapore tax, except where the individual is resident in Singapore and is not an Australian citizen.'</i>	Singapore Japan
<i>'Remuneration (including a pension) paid to any individual in respect of services rendered in the discharge of governmental functions to one of the States or to a political subdivision of one of the States or to a local authority of one of the States may be taxed in that State....'</i> Article 19(1) of the Belgian treaty excludes pensions and deals with them in Article 19(2). Article 19(1) uses the words 'an' in relation to 'individual' and 'shall be taxable only', rather than 'may be taxed'.	Netherlands Belgium

<i>‘(1) Remuneration (other than a pension or annuity, or remuneration to which Article 19 applies) paid by Australia, a State of Australia or a political subdivision or local authority of Australia or of a State to any individual in respect of services rendered in the discharge of governmental functions shall be exempt from French tax unless the services are rendered in France by an individual who is a French national or is permanently resident in France.</i> <i>(2) Remuneration (other than a pension or annuity, or remuneration to which Article 19 applies) paid by France or a local authority thereof to any individual in respect of services rendered in the discharge of governmental functions shall be exempt from Australian tax unless the services are rendered in Australia by an individual who is a Australian citizen or is permanently resident in Australia.’</i> The reference to Article 19 in this GSA means that the GSA does not apply to remuneration where the visiting professors and teachers article applies.	France
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TR 2004/D22

Attachment 2: Category 2 wording

<i>(1) Remuneration (other than a pension or annuity) paid by one of the Contracting States or by a political or administrative subdivision of that State or by a local authority of that State to any individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State. However, such remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the recipient is a resident of that State who:</i> <i>(a) is a citizen or national of that State, or</i> <i>(b) did not become a resident of that State solely for the purpose of performing the services.</i>	Italy Korea²⁸ Finland Hungary Indonesia
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²⁸ But note additional Article 19(4).

Attachment 3: USA Double Tax Convention Wording

*'Wages salaries and similar remuneration, including pensions, paid from funds of one of the Contracting States, of a State or other political subdivision thereof or of an agency or authority of any of the foregoing **for labour or personal services performed as an employee of any of the above in the discharge of governmental functions to a citizen of that State** shall be exempt from tax by the other Contracting State.'*

TR 2004/D22

Attachment 4: The German Double Tax Agreement wording

*(1) Remuneration (other than a pension or annuity) paid by the Commonwealth of Australia, a State of the Commonwealth or a political subdivision or local authority of the Commonwealth or of a State **to any individual in respect of an employment** shall be taxable only in Australia. If, however, the employment is exercised in the Federal Republic of Germany by an individual who is a German citizen or is subject to unlimited tax liability in the Federal Republic of Germany such remuneration shall be taxable only in the Federal Republic of Germany.*

*(2) Remuneration (other than a pension or annuity) paid by the Federal Republic of Germany, a Land or a political subdivision or local authority thereof **to any individual in respect of an employment** shall be taxable only in the Federal Republic of Germany. If, however, the employment is exercised in Australia by an individual who is an Australia citizen or is ordinarily resident in Australia such remuneration shall be taxable only in Australia.*