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

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Draft Taxation Ruling

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

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What this Ruling is about

1. This draft Ruling clarifies the circumstances in which the ships and aircraft article[1] of Australia's tax treaties[2] allocates Australia a right to tax amounts falling within section 129 of the *Income Tax Assessment Act 1936* (ITAA 1936) (referred to in this draft Ruling as 'section 129 income').

[1] The articles of Australia's tax treaties which deal with profits from the operation of ships or aircraft or both are generally headed 'ships and aircraft article'. There are a number of variations in the wording of the headings of the applicable articles and some have no heading at all. For ease of reference, this draft Ruling will refer to these articles as the 'ships and aircraft article' when mentioning more than one of these articles collectively.

[2] This draft Ruling considers the treaties and other agreements described in section 3AAA of the *International Tax Agreements Act 1953* (the Agreements Act) as amended by any relevant protocol. For ease of reference this draft Ruling refers to these treaties and agreements as 'Australia's tax treaties'.

Class of person/arrangement

2. This draft Ruling applies to treaty partner residents[3] who:

(a) carry on an enterprise[4] for treaty purposes; and

(b) derive section 129 income from that enterprise in respect of the carriage of passengers, livestock, mails or goods[5] shipped in Australia.

Background

3. Section 129 of the ITAA 1936 deems 5% of the amount paid or payable in respect of the carriage of passengers or goods shipped in Australia to be the taxable income derived by a shipowner or charterer whose principal place of business is out of Australia.

4. The scope of section 129 of the ITAA 1936 is considered in detail 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*. Suffice to say that section 129 can apply to amounts such as freight under a 'bill of lading' or 'voyage charterparty', or hire under a 'time charterparty'[6], that are paid or payable by a shipper to a shipowner or charterer, as well as fares (also called 'passage money') paid or payable by passengers. Amounts such as 'demurrage' and 'dispatch (or despatch) money' can also be taken into account in determining taxable income under section 129.

5. While section 129 of the ITAA 1936 only applies to the carriage of passengers or goods that are shipped (that is, put on board a ship)[7] in Australia, there is no provision made as to where the passengers or goods are discharged. Therefore the section can apply to amounts paid or payable in respect of the carriage of passengers or goods that are discharged either overseas or at a port in Australia.[8]

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[3] For the purpose of this draft Ruling a 'treaty partner resident' is a reference to a resident (for treaty purposes) of a country or territory with which Australia has a tax treaty (consistent with the meaning given to that phrase at paragraph 4 of Taxation Ruling TR 2008/8 *Income tax: the taxation treatment of ship and aircraft leasing profits under the ships and aircraft articles of Australia's tax treaties*).

[4] Some of the ships and aircraft articles in Australia's tax treaties require that the resident ship or aircraft operator be carrying on an enterprise. This draft Ruling does not consider the meaning of 'enterprise'.

[5] For ease of reference these items will collectively be referred to in this draft Ruling as 'passengers or goods'.

[6] Otherwise referred to as a full basis lease. See paragraph 15 of Taxation Ruling TR 2008/8 and paragraph 15 of Taxation Ruling TR 2007/10 *Income tax: the treatment of shipping and aircraft leasing profits of United States and United Kingdom enterprises under the deemed substantial equipment permanent establishment provision of the respective Taxation Conventions*.

[7] As explained in paragraphs 23 and 72 of Taxation Ruling TR 2006/1.

[8] Refer to paragraph 73 of Taxation Ruling TR 2006/1.

6. However, in determining the Australian tax liability of a treaty partner resident, it is also necessary to consider the applicable tax treaty. In relevant circumstances, an applicable treaty can relieve a treaty partner resident of their tax liability in relation to section 129 income. In such circumstances, there will also be no requirement for the master of the ship, or the agent or other representative in Australia of the treaty partner resident to lodge a return in respect of that income (referred to as an 'overseas ships – voyage return'), unless the Commissioner specifically requires it.

7. The ships and aircraft article in Australia's tax treaties provides for the allocation of taxing rights between Contracting States in respect of 'profits from the operation of ships and aircraft'. The wording of the ships and aircraft article is considered in detail in Taxation Ruling TR 2008/8. Although that Ruling only applies to leasing profits it also considers how the ships and aircraft article applies more generally.

8. As noted in Taxation Ruling TR 2008/8, the phrase 'profits from the operation of ships and aircraft' includes profits directly obtained by an enterprise from the transportation of passengers or cargo by ships (whether owned, leased or otherwise at the disposal of the enterprise), as well as profits from activities directly connected with such operations and profits from activities which are not directly connected but are ancillary to such operations.[9]

9. As further noted in Taxation Ruling TR 2008/8, the ships and aircraft article may be based on article 8 of the OECD Model Tax Convention on Income and on Capital (the OECD Model), or may adopt approaches to accommodate countries' particular positions.[10] In that regard Australia reserves its right to tax profits from the carriage of passengers or cargo taken on board at one place in Australia for discharge in Australia.[11]

10. Due to the bilateral nature of tax treaties the text of the ships and aircraft article varies from treaty to treaty. Part A of this draft Ruling applies to Australia's tax treaties which include the following text ('the standard ships and aircraft article'):

> Ships and Aircraft
>
> 1. Profits of an enterprise of a Contracting State derived from the operation of ships or aircraft in international traffic shall be taxable only in that State.
>
> 2. Notwithstanding the provisions of paragraph 1, profits of an enterprise of a Contracting State derived from the operation of ships or aircraft may be taxed in the other Contracting State to the extent that they are profits derived directly or indirectly from ship or aircraft operations confined solely to places in that other State.

[9] See paragraph 8 of Taxation Ruling TR 2008/8.
[10] See paragraph 9 of Taxation Ruling TR 2008/8.
[11] As per Australia's reservation recorded at paragraph 38 of the Commentary on article 8 of the OECD Model.

> 3. The profits to which the provisions of paragraphs 1 and 2 apply include profits from the operation of ships or aircraft derived through participation in a pool service or other profit sharing arrangement.
>
> 4. For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise 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.[12]

11. Typically, in Australia's tax treaties containing the standard ships and aircraft article:[13]

> (a) the term 'international traffic' means any transport by a ship or aircraft operated by an enterprise of a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State; and
>
> (b) the term 'enterprise of a Contracting State' means an enterprise carried on by a resident of a Contracting State.

12. Part A of this draft Ruling also applies to the ships and aircraft articles in Australia's tax treaties which, although worded differently, have the same effect as the standard ships and aircraft article when allocating taxing rights in respect of section 129 income. Table 1 of Appendix 2 to this draft Ruling lists the tax treaties to which Part A of this draft Ruling applies.

13. Part B of this draft Ruling considers the ships and aircraft article of Australia's other tax treaties which provide a different outcome to the standard ships and aircraft article. The relevant text of these treaties is set out in Table 2 of Appendix 2 to this draft Ruling.

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[12] This text is contained in some of Australia's more recent tax treaties. See paragraph 11 of Taxation Ruling TR 2008/8.

[13] The definitions set out in this paragraph have been drawn from Article 3 of the Finnish Agreement *Australian Treaty Series 2007* No.36 ([2007] ATS 36) however the relevant definitions vary from treaty to treaty. For example, the exclusion contained in the definition of international traffic in some of Australia's tax treaties applies when the 'transport' is solely between places in the other Contracting State – this affects the scope of the definition (as explained at paragraph 6.2 of the Commentary on article 3 of the OECD model).

Ruling

Part A: the standard ships and aircraft article and its equivalent in those treaties listed in Table 1 of Appendix 2 to this draft Ruling[14]

14. Section 129 income derived by a shipowner or charterer constitutes 'profits from the operation of ships' for the purposes of the standard ships and aircraft article.

15. Amounts of section 129 income in respect of the carriage of passengers or goods that are discharged at a place outside Australia[15] are profits from the operation of ships or aircraft in international traffic which fall under paragraph 1 of the standard ships and aircraft article.[16] Australia does not have the right to tax such amounts where they are derived by a relevant treaty partner resident[17] because paragraph 1 provides an exclusive residence country taxing right (see Example 1).[18]

16. However Australia does have the right to tax section 129 income from ship operations confined solely to places in Australia under paragraph 2 of the standard ships and aircraft article.[19] The operation of ships confined solely to places in Australia includes:

(a) an internal leg of an international voyage where passengers or cargo are taken onboard at a place in Australia for discharge in Australia (see Example 2); and

(b) 'voyages to nowhere' which start and end at the same port, or in two different ports in Australia, even where part of the travel takes place outside Australia's domestic waters (without stopping at another port) (see Example 3).

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[14] A reference in this draft Ruling to the standard ships and aircraft article includes a reference to its equivalent in each of the tax treaties listed in Table 1 of Appendix 2 to this draft Ruling.

[15] For the purposes of determining whether passengers or goods are discharged at a place in Australia or outside Australia, the term 'Australia' has the meaning given by the relevant tax treaty.

[16] In some treaties paragraph 1 is not limited to profits from the operation of ships or aircraft in 'international traffic'. Further, as explained at footnote 12, the definition of international traffic varies from treaty to treaty. However this does not affect the conclusions in this draft Ruling.

[17] That is, a treaty partner resident to whom a tax treaty listed in Table 1 of Appendix 2 to this draft Ruling applies.

[18] For the purposes of this draft Ruling the phrase 'exclusive residence country taxing right' refers to a situation where the country of residence (for treaty purposes) is granted sole taxing rights.

[19] However see paragraphs 19 to 21 of this draft Ruling in relation to the New Zealand convention.

17. In addition, profits from the carriage of passengers or goods which are shipped and discharged in Australia[20] are specifically treated as profits from ship operations confined solely to places in Australia under paragraph 4 of the standard ships and aircraft article.[21] Therefore if, in the course of carrying passengers or goods between places in Australia, a ship stops at a place outside Australia (but does not discharge its passengers or goods at that place) this will be treated as ship operations confined solely to places in Australia that Australia has the right to tax under the standard ships and aircraft article (see Example 4).

Apportionment of hire paid or payable under a time charterparty

18. Under paragraph 2 of the standard ships and aircraft article Australia only has a right to tax the relevant profits to the extent that they are derived directly or indirectly from ship or aircraft operations confined solely to places in Australia. Therefore an amount of section 129 income which relates to the hire of a ship under a time charterparty that is used partly for the carriage of goods shipped and discharged in Australia, and partly for the carriage of goods discharged outside Australia, will need to be apportioned (see Example 5).

New Zealand convention[22]

19. Unlike paragraph 2 of the standard ships and aircraft article, Article 8(2) of the New Zealand convention does not use the phrase 'operations confined solely to places' in Australia. Rather, it provides Australia the right to tax section 129 income in respect of the carriage of passengers or goods that are 'shipped' and 'discharged' in Australia.

20. Article 8(2) of the New Zealand convention has the same practical effect as the standard ships and aircraft article in relation to section 129 income as it would equally apply to the carriage of passengers or goods on those voyages described in paragraphs 16 and 17 of this draft Ruling.

21. Article 8(2) also specifically provides Australia a right to tax amounts paid or payable for leasing on a full basis of a ship for carriage of passengers or goods that are 'shipped' and 'discharged' in Australia. This would include section 129 income in respect of the hire paid or payable under a time charterparty.

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[20] In the case of the Singaporean agreement, this includes passengers or goods that are discharged at 'one or more structures used in connection with the exploration for or exploitation of natural resources situated in waters adjacent to the territorial waters of [Australia]'.

[21] The deeming provided under paragraph 4 does not apply to leasing arrangements because leasing profits are not derived from the carriage of passengers or goods, rather they are profits that the lessor derives from the provision of services under the lease. In the context of section 129 income this is relevant to the hire paid or payable by a shipper under a time charterparty.

[22] [2010] ATS 10.

Rate limits on Australia's taxing right

22. Certain paragraphs in the ships and aircraft articles in Australia's tax treaties with Belgium, France, Germany, Netherlands and Switzerland may limit the amount that Australia can tax under paragraph 2 of the ships and aircraft article to '5 per cent of the amount paid or payable (net of rebates) in respect of carriage'.[23] However this has no practical effect in relation to section 129 income (which is similarly limited to 5 per cent of the amount paid or payable in respect of carriage).

Part B: the ships and aircraft article in Australia's other treaties (Table 2 of Appendix 2 to this draft Ruling)

United States convention[24]

23. Similar to paragraph 1 of the standard ships and aircraft article, Australia does not have the right to tax section 129 income under Article 8(1) of the United States convention in respect of the carriage of passengers or goods that are discharged at a place outside Australia. However unlike paragraph 1 of the standard ships and aircraft article, Article 8(1) of the United States convention only applies to give the United States the exclusive right to tax section 129 income from hire fees paid or payable under a time charterparty in respect of a ship that is operated in international traffic by the lessee, if the lessor either:

(a) operates ships otherwise than solely between places in Australia; or

(b) regularly leases ships under a time charterparty.[25]

24. The question of whether Australia has a right to tax section 129 income from hire fees paid or payable under a time charterparty which is not dealt with by Article 8(1) of the United States convention will fall for consideration under the business profits article.

25. Further, unlike paragraph 2 of the standard ships and aircraft article, Article 8(4) of the United States convention does not use the phrase 'operations confined solely to places' in Australia. Rather, it provides Australia the right to tax section 129 income in respect of the carriage of passengers or goods that are 'taken on board … for discharge' in Australia.

26. Article 8(4) of the United States convention has the same practical effect as the standard ships and aircraft article in relation to section 129 income as it would equally apply to the carriage of passengers or goods on those voyages described in paragraphs 16 and 17 of this draft Ruling.

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[23] Article 8(5) of the Belgian agreement [1979] ATS 21; Article 8(3) of the French convention [2009] ATS 13; Article 8(5) of the German agreement [1975] ATS 8; Article 8(5) of the Netherlands agreement [1976] ATS 24 and Article 8(5) of the Swiss agreement [1981] ATS 5.

[24] [1983] ATS 16 as amended by the United States protocol (No. 1) [2003] ATS 14.

[25] As explained in paragraph 15 of Taxation Ruling TR 2007/10.

27. As Article 8(4) of the United States convention does not apply to leasing profits, the question of whether Australia has a right to tax section 129 income from the lease of a ship used to carry passengers or goods that are taken on board and discharged in Australia will fall for consideration under the business profits article.

Italian convention[26]

28. Similar to paragraphs 2 and 4 of the standard ships and aircraft article, Australia has the right to tax section 129 income from ship operations confined solely to places in Australia, and this is deemed to include income from the carriage of passengers or goods that are shipped and discharged in Australia (Article 8(2) and Article 8(4) of the Italian convention).

29. However unlike paragraph 1 of the standard ships and aircraft article, the exclusive residence country taxing right under Article 8(1) of the Italian convention only applies where the place of effective management of the shipping enterprise is situated in the country of residence.

30. Article 8(1) of the Italian convention does not apply where the place of effective management of the shipping enterprise is not situated in the country of residence. In such cases, the question of whether Australia has a right to tax section 129 income in respect of the carriage of passengers or goods that are discharged at a place outside Australia will fall for consideration under the business profits article.

Romanian agreement[27]

31. Similar to paragraphs 2 and 4 of the standard ships and aircraft article, Australia has the right to tax section 129 income from ship operations confined solely to places in Australia, and this is deemed to include income from the carriage of passengers or goods that are shipped and discharged in Australia (Article 8(2) and Article 8(5) of the Romanian agreement).

32. However unlike paragraph 1 of the standard ships and aircraft article, Article 8(1) of the Romanian agreement provides an exclusive taxing right to the Contracting State in which the place of effective management of the shipping enterprise is situated.

33. Article 8(1) of the Romanian agreement does not apply where the place of effective management of the enterprise is not situated in either of the Contracting States. In such cases, the question of whether Australia has a right to tax section 129 income in respect of the carriage of passengers or goods that are discharged at a place outside Australia will fall for consideration under the business profits article.

[26] [1985] ATS 27.
[27] [2001] ATS 4.

Maltese agreement[28]

34. Similar to paragraphs 2 and 4 of the standard ships and aircraft article, Australia has the right to tax section 129 income from ship operations confined solely to places in Australia, and this is deemed to include income from the carriage of passengers or goods that are shipped and discharged in Australia (Article 8(2) and Article 8(4) of the Maltese agreement).

35. However, unlike paragraph 1 of the standard ships and aircraft article, Australia also has the right to tax section 129 income derived by a Maltese resident company in respect of the carriage of passengers or goods that are discharged at a place outside Australia unless the company proves that:

(a) not more than 25% of its capital is owned, directly or indirectly, by persons who are not residents of Malta; or

(b) the amounts are not relieved from Malta tax under the provisions of Malta's *Merchant Shipping Act 1973*, or under any identical or similar provision. (Article 8(5) of the Maltese agreement).

Thai agreement[29] *and Kiribati agreement*[30]

36. Similar to paragraphs 2 and 4 of the standard ships and aircraft article, Australia has the right to tax section 129 income from ship operations confined solely to places in Australia, and this is deemed to include income from the carriage of passengers or goods that are shipped and discharged in Australia (Articles 8(3) and 8(5) of the Kiribati agreement and Articles 8(3) and 8(5) of the Thai agreement).[31]

37. Unlike paragraph 1 of the standard ships and aircraft article, Australia also has the right to tax section 129 income in respect of the carriage of passengers or goods that are discharged at a place outside Australia. However the amount of tax which Australia can charge is reduced to half of the amount of tax which would otherwise be payable in respect of that income (Article 8(2) of the Kiribati agreement and Article 8(2) of the Thai agreement).

[28] [1985] ATS 15.
[29] [1989] ATS 36.
[30] [1991] ATS 34.
[31] The Kiribati agreement refers to 'profits' whereas the Thai agreement refers to 'income or profits' but otherwise the agreements are relevantly the same.

Korean convention[32]

38. Similar to paragraph 1 of the standard ships and aircraft article, Australia does not have the right to tax section 129 income under Article 8(1) of the Korean convention in respect of the carriage of passengers or goods that are discharged at a place outside Australia.

39. However there is no equivalent to paragraph 2 of the standard ships and aircraft article in the Korean convention dealing with profits from the operation of ships confined solely to places within the source State. As a result, the question of whether Australia has a right to tax section 129 income in respect of the carriage of passengers or goods that are shipped and discharged in Australia will fall for consideration under the business profits article.[33]

Philippine agreement[34]

40. Unlike paragraph 1 of the standard ships and aircraft article, Australia has the right to tax section 129 income under Article 8(1) of the Philippine agreement in respect of the carriage of passengers or goods that are discharged at a place outside Australia. However the amount of tax which Australia can charge on such amounts is limited to the lesser of:

(a) 1½ per cent of the gross revenues derived from sources in Australia; and

(b) the lowest rate of Philippine tax that may be imposed on profits of the same kind derived under similar circumstances by a resident of a third state. (Article 8(1) of the Philippine agreement).

41. There is no equivalent to paragraph 2 of the standard ships and aircraft article in the Philippine agreement dealing with profits from the operation of ships confined solely to places within the source State. As a result, the question of whether Australia has a right to tax section 129 income in respect of the carriage of passengers or goods that are shipped and discharged in Australia will fall for consideration under the business profits article.[35]

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[32] [1984] ATS 2.
[33] Profits from the operations of ships confined solely to places within the source State are excluded from Article 8(1) of the Korean convention because of the definition of 'international traffic' in Article 3(1)(k).
[34] [1980] ATS 16.
[35] Profits from the operations of ships confined solely to places within the source State are excluded from Article 8(1) of the Philippine agreement because of the definition of 'international traffic' in Article 3(1)(k).

Sri Lankan agreement[36]

42. Similar to paragraphs 2 and 4 of the standard ships and aircraft article, Australia has the right to tax section 129 income from ship operations confined solely to places in Australia, and this is deemed to include income from the carriage of passengers of goods that are shipped and discharged in Australia (Article 8(2) and Article 8(4) of the Sri Lankan agreement).

43. Unlike paragraph 1 of the standard ships and aircraft article, Australia also has the right to tax section 129 income in respect of the carriage of passengers or goods that are shipped in Australia but discharged at a place outside Australia. However the amount of tax which Australia can charge on such amounts is limited to the lesser of:

(a) half the amount which would otherwise be payable under section 129; and

(b) the lowest amount, if any, of Sri Lanka tax that may be imposed on profits of the same kind derived under similar circumstances by a resident of a third State. (Article 8(2) of the Sri Lankan agreement).

Examples

Part A: the standard ships and aircraft article and its equivalent in those treaties listed in Table 1 of Appendix 2 to this draft Ruling

Example 1 – carriage of goods discharged outside Australia

44. *The 'Iron Maiden' is a bulk ore carrier owned and operated by 'RedOre' a company resident in China. RedOre contracts with an Australian mining company to load iron ore onto the 'Iron Maiden' at a terminal in Port Hedland where it is shipped directly to ports in China and Japan. RedOre derives section 129 income in respect of such carriage.*

45. *The Chinese agreement is one of the tax treaties listed in Table 1 of Appendix 2 to this draft Ruling. Article 8(1) of the Chinese agreement provides an exclusive residence country taxing right to China in relation to profits derived by RedOre from the operation of ships. However this is subject to Article 8(2) of the agreement which provides Australia a taxing right in relation to profits from ship operations confined solely to places in Australia.*

46. *RedOre's section 129 income does not come within Article 8(2) of the agreement because it is in respect of the carriage of goods discharged in Japan and China. Therefore, Australia does not have the right to tax such income.*

[36] [1991] ATS 42.

Example 2 – carriage of goods discharged in Australia

47. *Building on from Example 1, RedOre also enters contracts to ship and discharge goods between Melbourne, Port Botany, Newcastle and Brisbane, prior to departing Australian waters for China and Japan. RedOre derives section 129 income in respect of such carriage.*

48. *The income from the carriage of goods between Melbourne, Port Botany, Newcastle and Brisbane may be taxed in Australia under Article 8(2) of the Chinese agreement (and will be taxed under section 129 of the ITAA 1936) as it is derived from ship operations confined solely to places in Australia.*

Example 3 – voyage to nowhere

49. *Seaco is a resident of Singapore for purposes of the Singapore agreement. Under Article 7(2) of the Singapore agreement Australia may tax profits derived by a Singapore resident from operations of ships confined solely to places in Australia.*

50. *Seaco derives section 129 income in respect of the carriage of passengers on whale watching tours off the coast of Australia. Passengers board the ship at a port in Cairns and disembark at the same port at the end of the tour. During the tour, the ship may venture outside Australia's domestic waters, however at no time does the ship stop at a port outside Australia.*

51. *Given the passengers are both shipped and discharged at a port in Australia, Australia has the right to tax Seaco's section 129 income under Article 7(2) of the Singaporean agreement as it is derived from operations of ships confined solely to places in Australia.*

Example 4 – cruise starting and ending in Australia with ports of call overseas

52. *Building on from Example 3, Seaco also derives section 129 income in respect of the carriage of passengers on a cruise to the Pacific Islands. Passengers board the ship in Cairns and after taking in the sights of the Great Barrier Reef, the ship continues to Noumea in New Caledonia and Port Vila in Vanuatu where the ship docks for two nights each. Passengers may join local tours during these stops however their luggage remains onboard the ship and they retain access to the ship and their cabins. The ship departs from Port Vila and the passengers continue on the cruise until it ends back in Cairns.*

53. *Article 7(5) of the Singapore agreement deems profits from the carriage of passengers shipped and discharged in Australia to be profits from the operations of ships confined solely to places in Australia. Although the ship stops at Noumea and Port Vila, and passengers may temporarily alight, they are not discharged from the ship until the cruise ends in Cairns. Therefore, given the passengers are both shipped and discharged at a port in Australia, Australia has the right to tax Seaco's section 129 income under Article 7(2) of the Singaporean agreement as this income is treated as profits from operations of ships confined solely to places in Australia.*

Example 5 – apportionment of hire paid or payable under a time charterparty

54. *Cargoco is a resident of the United Kingdom for the purpose of the United Kingdom convention. Cargoco leases out a ship under a time charterparty to another company (the shipper) which requires a fully crewed ship to transport goods from Sydney. Of the goods that are loaded onto the ship in Sydney, 40% are unloaded in Brisbane and the remaining 60% are unloaded in the United Kingdom. Cargoco derives section 129 income in respect of the daily hire paid by the shipper.*

55. *In this case, only the amount of section 129 income attributable to the carriage of goods between Sydney and Brisbane is taxable in Australia under Article 8(2) of the United Kingdom convention. This will require a reasonable basis of apportionment which may be based on evidence of matters such as the time spent loading and unloading the goods that are shipped to Brisbane, the time spent travelling from Sydney to Brisbane, and the proportion of goods shipped to Brisbane.*

Part B: the ships and aircraft article in Australia's other treaties (Table 2 of Appendix 2 to this draft Ruling)

Example 6 – Korean convention

56. *Assume the same facts as Examples 1 and 2 except assume that RedOre is a resident of Korea for the purposes of the Korean convention.*

57. *Article 8(1) of the Korean convention provides an exclusive residence country taxing right to Korea in relation to profits derived by RedOre from the operation of ships in international traffic. Therefore, similar to Example 1, Australia will not have the right to tax RedOre's section 129 income in respect of the carriage of goods discharged in Japan and China.*

58. *The definition of international traffic in the Korean convention relevantly excludes operations of ships which are confined solely to places in Australia. Therefore RedOre's section 129 income in respect of the carriage of goods between Melbourne, Port Botany, Newcastle and Brisbane is not subject to the exclusive residence country taxing right under Article 8(1) of the Korean convention. However there is no equivalent to paragraph 2 of the standard ships and aircraft article in the Korean convention dealing with profits from the operations of ships confined solely to places within the source State. This means that Australia's right to tax this income will fall for consideration under the business profits article.*

Date of effect

59. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the 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 Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
28 August 2013

Appendix 1 – Explanation

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

60. In determining the liability of a treaty partner resident to Australian tax in respect of section 129 income it is necessary to consider the applicable tax treaty.

61. The Agreements Act gives force of law to Australia's tax treaties. Subsection 4(1) of the Agreements Act relevantly provides that the ITAA 1936 is incorporated and shall be read as one with the Agreements Act. And subsection 4(2) relevantly provides that the provisions of the Agreements Act have effect notwithstanding anything inconsistent with those provisions contained in the ITAA 1936 (other than Part IVA) or in an Act imposing Australian tax.

62. The ships and aircraft article in Australia's tax treaties provides for the allocation of taxing rights between Contracting States in respect of 'profits from the operation of ships and aircraft'. As explained by paragraph 8 of Taxation Ruling TR 2008/8, the phrase 'profits from the operation of ships and aircraft' includes profits 'directly obtained by an enterprise from the transportation of passengers or cargo by ships or aircraft (whether owned, leased or otherwise at the disposal of the enterprise), as well as profits from activities directly connected with such operations and profits from activities which are not directly connected but are ancillary to such operations'.[37]

63. The ships and aircraft article applies to 'profits' from the operation of ships or aircraft. However a reference in a tax treaty to 'profits' of an activity or business shall be read, for the purposes of Australian tax, as a reference to 'taxable income' derived from that activity or business (subsection 3(2) of the Agreements Act).

64. Therefore amounts of taxable income derived by a shipowner or charterer under section 129 of the ITAA 1936 in respect of the carriage of passengers or goods are profits from the operation of ships for the purposes of the ships and aircraft article.

[37] Citing paragraph 4 of the Commentary on article 8 of the OECD Model.

Part A: the standard ships and aircraft article and its equivalent in those treaties listed in Table 1 of Appendix 2 to this draft Ruling

65. Paragraph 1 of the standard ships and aircraft article provides an exclusive residence country taxing right over profits from the operations of ships or aircraft in 'international traffic'. The term 'international traffic' is generally defined as any transport by a ship or aircraft operated by an enterprise of a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State.[38]

66. As explained in paragraph 97 of Taxation Ruling TR 2008/8, a consequence of this definition is that the exclusive residence country taxing right in the standard ships and aircraft article is limited to profits from transport. However this would include section 129 income derived in respect of the carriage of passengers or goods.[39]

67. The exclusive residence country taxing right in some of the treaties listed in Table 1 of Appendix 2 to this draft Ruling extends to any profits from the operation of ships and is not limited to 'international traffic'. Paragraph 1 of these treaties would also cover section 129 income.

68. Notwithstanding the exclusive residence country taxing right provided by paragraph 1, paragraph 2 of the standard ships and aircraft article provides a source country taxing right over profits from the operation of ships or aircraft to the extent that they are 'confined solely to places in that other State'. This is consistent with Australia's reservation at paragraph 38 of the Commentary on article 8 of the OECD Model where:

> Australia reserves the right to tax profits from the carriage of passengers or cargo taken on board at one place in Australia for discharge in Australia.

69. As explained in paragraph 27 of Taxation Ruling TR 2008/8:

> … Profits from the operation of ships or aircraft confined solely to places in that other State includes voyages that start and end at the same port or airport, or in two different ports or airports in the other State, even if part of the transport takes place outside that other State (without stopping at another port). It also includes the internal leg of an international voyage where it involves the same passengers or cargo being loaded and unloaded in that State. …

70. Further, paragraph 4 of the standard ships and aircraft article specifically provides that profits derived from the 'carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise 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'.

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[38] The relevant definition is generally contained in Article 3.

[39] Except of course where the exclusion in the international traffic definition applies, that is, where the ship or aircraft is operated solely between places in the other State.

71. As explained at paragraph 137 of Taxation Ruling TR 2008/8, the deeming provided under paragraph 4 does not apply to leasing arrangements because leasing profits are not derived from the carriage of passengers or goods, rather they are profits that the lessor derives from the provision of services under the lease. In the context of section 129 income this is relevant to the hire paid or payable by a shipper under a time charterparty.

Application to section 129 income

72. Amounts of section 129 income derived by a treaty partner resident in respect of the carriage of passengers or goods that are discharged at a place outside Australia are profits derived 'from the operation of ships or aircraft in international traffic' which fall under paragraph 1 of the standard ships and aircraft article. Australia does not have the right to tax such amounts.

73. However Australia does have the right to tax amounts of section 129 income in respect of the carriage of passengers or goods that are shipped and discharged in Australia (sometimes referred to as 'coasting trade' or 'coastal trade'). Such amounts are profits from ship or aircraft 'operations confined solely to places in' Australia for the purposes of paragraph 2 of the standard ships and aircraft article.

74. As explained at paragraph 30 of Taxation Ruling TR 2008/8 'operations confined solely to places in' Australia include where the ship is used for:

(a) an internal leg of an international voyage where passengers or cargo are taken onboard at a place in Australia for discharge in Australia; and

(b) a voyage that starts and ends at the same port, or in two different ports in Australia, even if part of the transport takes place outside Australia (without stopping at another port).

75. This is specifically confirmed by paragraph 4 of the standard ships and aircraft article which includes profits from the carriage of passengers or goods shipped and discharged in Australia within the scope of paragraph 2.

76. Paragraph 4 of the standard ships and aircraft article will also apply if a ship stops at a place outside Australia but does not discharge its passengers or goods until returning to Australia. It will therefore apply where, in the course of a passenger cruise which starts and ends in Australia, the ship stops at a port outside Australia to enable passengers to temporarily alight before returning to the ship for discharge in Australia.

77. The place at which passengers and goods are discharged is a question of fact to be determined in each particular case. However in relation to the carriage of passengers and their luggage on a cruise there will not be a relevant 'discharge' for the purposes of paragraph 4 until the cruise terminates and the passengers and their luggage are unloaded and removed from the responsibility of the shipper. Therefore even though a ship may stop at a port outside Australia to allow passengers to temporarily alight (but where their luggage typically remains onboard the ship and they retain access to the ship and their cabins), paragraph 4 will still deem the relevant profits to be treated as profits from the operation of ships confined solely to places in Australia.

78. As mentioned at paragraph 71 above, paragraph 4 of the standard ships and aircraft article will not apply to the hire paid or payable under a time charterparty. However the use of a ship under a time charterparty to transport passengers or goods which are shipped and discharged in Australia, without stopping at a port outside Australia, would still constitute operations confined solely to places in Australia for the purposes of paragraph 2.[40]

Apportionment of hire paid or payable under a time charterparty

79. Under paragraph 2 of the standard ships and aircraft article Australia only has a right to tax amounts that are attributable to operations confined solely to places in Australia. This would not ordinarily give rise to issues of apportionment in the case of freight payable under a bill of lading or voyage charterparty, or fares payable by passengers. However there will be a need for apportionment where an amount of section 129 income relates to the hire of a ship under a time charterparty that is used partly for the carriage of goods shipped and discharged in Australia and partly for the carriage of goods discharged outside Australia.

80. This will require a reasonable basis of apportionment based on factors such as the time spent loading and unloading the goods that are discharged in Australia, the time spent travelling between ports in Australia, and the proportion of goods discharged in Australia.

New Zealand convention

81. Unlike the standard ships and aircraft article, the source country taxing right provided by Article 8(2) of the New Zealand convention does not refer to profits from the 'operations confined solely to places' in Australia. Rather, it provides Australia the right to tax amounts paid or payable for the carriage of passengers or goods that are 'shipped' and 'discharged' in Australia.

[40] See paragraph 30 of Taxation Ruling TR 2008/8.

82. Article 8(2) of the New Zealand convention nonetheless has the same practical effect as the standard ships and aircraft article in relation to section 129 income as it would equally apply to the carriage of passengers or goods on those voyages explained at paragraphs 73 to 77 of this draft Ruling.

83. Article 8(2) also specifically provides Australia a right to tax amounts paid or payable for leasing on a full basis of a ship for carriage of passengers or goods that are 'shipped' and 'discharged' in Australia. This would include section 129 income in respect of the hire paid or payable under a time charterparty.

Rate limits on Australia's taxing right

84. Certain paragraphs in the ships and aircraft articles in Australia's tax treaties with Belgium, France, Germany, Netherlands and Switzerland may limit the amount that Australia can tax under paragraph 2 of the ships and aircraft article to '5 per cent of the amount paid or payable (net of rebates) in respect of carriage'.[41] However this limitation has no practical effect in relation to section 129 income which is similarly limited to 5 per cent of the amount paid or payable in respect of carriage. And, as explained in paragraphs 44 and 116 to 119 of Taxation Ruling TR 2006/1, amounts such as dispatch (or despatch) money are similarly deducted from the amount that would otherwise be treated as the amount paid or payable for the carriage of goods for the purposes of section 129.

Part B: the ships and aircraft article in Australia's other treaties (Table 2 of Appendix 2 to this draft Ruling)

85. Part B considers the ships and aircraft article of Australia's other tax treaties which provide a different outcome to the standard ships and aircraft article in relation to section 129 income. The relevant text of these treaties is set out in Table 2 of Appendix 2 to this draft Ruling.

86. The relevant differences from the standard ships and aircraft article are explained below.

[41] This limitation does not apply to all profits that come within paragraph 2. For example, Article 8(4) of the French Convention provides that the limit does not apply to profits that are attributable to a permanent establishment of the enterprise situated in Australia.

United States convention

87. Unlike paragraph 1 of the standard ships and aircraft article, the exclusive residence country taxing right in Article 8(1) of the United States convention only applies to certain leasing profits from the operation of ships in international traffic. The question of whether Australia has a right to tax section 129 income from hire fees paid or payable under a time charterparty which is not dealt with by Article 8(1) of the United States convention will fall for consideration under the business profits article.

88. Also there is no equivalent to paragraph 2 of the standard ships and aircraft article dealing with ship 'operations confined solely to places in' Australia which would otherwise cover leasing profits in respect of the carriage of passengers or goods that are shipped and discharged in Australia. Therefore the question of whether Australia has a right to tax section 129 income from these leases will also fall for consideration under the business profits article.[42]

Italian convention

89. Unlike paragraph 1 of the standard ships and aircraft article, Article 8(1) of the Italian convention provides an exclusive residence country taxing right only where the place of effective management of the shipping enterprise is situated in the country of residence.

90. Article 8(1) of the Italian convention does not apply where the place of effective management of the shipping enterprise is not situated in the country of residence. In such cases, the question of whether Australia has a right to tax section 129 income in respect of the carriage of passengers or goods that are discharged at a place outside Australia will fall for consideration under the business profits article.

91. In understanding the meaning of the phrase 'place of effective management', guidance can be drawn from paragraph 24 of the Commentary on Article 4 of the OECD Model which refers to it as being the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made. In the context of Article 8(1) of the Italian convention, it will be the place of effective management of the *shipping* enterprise that is relevant as opposed to the entity's business as a whole.

Romanian agreement

92. Unlike paragraph 1 of the standard ships and aircraft article, Article 8(1) of the Romanian agreement provides an exclusive taxing right to the Contracting State in which the place of effective management of the shipping enterprise is situated. This will not necessarily be the country of residence.

[42] See paragraphs 171 to 173 of Taxation Ruling 2008/8.

93. Article 8(1) of the Romanian agreement does not apply where the place of effective management of the enterprise is not situated in either of the Contracting States. In such cases, the question of whether Australia has a right to tax section 129 income in respect of the carriage of passengers or goods that are discharged at a place outside Australia will fall for consideration under the business profits article.

Maltese agreement

94. Unlike paragraph 1 of the standard ships and aircraft article, Australia has the right to tax section 129 income derived by a Maltese resident company in respect of the carriage of passengers or goods that are discharged at a place outside Australia unless the company proves that:

(a) not more than 25% of its capital is owned, directly or indirectly, by persons who are not residents of Malta; or

(b) the amounts are not relieved from Malta tax under the provisions of Malta's *Merchant Shipping Act 1973*, or under any identical or similar provision. (Article 8(5) of the Maltese agreement).

95. The Explanatory Memorandum relevant to the Maltese agreement[43] outlines the intention of Article 8(5) as follows:

> By virtue of Malta's Merchant Shipping Act 1973, a company resident in Malta is not generally liable to income tax on the profits earned from qualifying ships. Paragraph (5) is intended as a safeguarding measure to ensure that there is no unwarranted avoidance of Australian tax by Australian or other non-Maltese shipowners who, by transferring their ships to Malta, would otherwise be able to obtain exemption from Australian tax under Article 8 of this agreement, and from Malta tax under the terms of Malta's merchant shipping law.
>
> By paragraph (5), a Malta company may be taxed in Australia on the profits from the operation of ships in international traffic (as defined in Article 3) where more than 25% of that company's capital is owned by persons who are not residents of Malta, unless the company can prove that the profits are not relieved from Malta tax under the Merchant Shipping Act 1973, or under any identical or substantially similar provision.

[43] Explanatory Memorandum to the Income Tax (International Agreements) Amendment Bill 1984.

Thai agreement and Kiribati agreement

96. Unlike paragraph 1 of the standard ships and aircraft article, Australia has the right to tax section 129 income in respect of the carriage of passengers or goods that are discharged at a place outside Australia. However the amount of tax which Australia can charge is reduced to half of the amount of tax which would otherwise be payable in respect of that income (Article 8(2) of the Kiribati agreement and Article 8(2) of the Thai agreement).

Korean convention

97. There is no equivalent to paragraph 2 of the standard ships and aircraft article in the Korean convention dealing with profits from the operation of ships confined solely to places within the source State. And given that paragraph 1 only applies to profits from the operation of ships in 'international traffic',[44] the question of whether Australia has a right to tax section 129 income in respect of the carriage of passengers or goods that are shipped and discharged in Australia will fall for consideration under the business profits article.

Philippine agreement

98. Unlike paragraph 1 of the standard ships and aircraft article, Australia has the right to tax section 129 income under Article 8(1) of the Philippine agreement in respect of the carriage of passengers or goods that are shipped in Australia and discharged at a place outside Australia. However the amount of tax which Australia can charge on such amounts is limited to the lesser of:

(a) 1½ per cent of the gross revenues derived from sources in Australia; and

(b) the lowest rate of Philippine tax that may be imposed on profits of the same kind derived under similar circumstances by a resident of a third state. (Article 8(1) of the Philippine agreement)

99. There is no equivalent to paragraph 2 of the standard ships and aircraft article in the Philippine agreement dealing with profits from the operation of ships confined solely to places within the source State. As a result, the question of whether Australia has a right to tax section 129 income in respect of the carriage of passengers or goods that are shipped and discharged in Australia will fall for consideration under the business profits article.

[44] Which relevantly excludes operation of ships or aircraft which are confined solely to places in the other Contracting State under Article 3(1)(k) of the Korean convention.

Sri Lankan agreement

100. Unlike paragraph 1 of the standard ships and aircraft article, Australia has the right to tax section 129 income in respect of the carriage of passengers or goods that are shipped in but discharged at a place outside Australia. However the amount of tax which Australia can charge on such amounts is limited to the lesser of:

(a) half the amount which would otherwise be payable under section 129; and

(b) the lowest amount, if any, of Sri Lanka tax that may be imposed on profits of the same kind derived under similar circumstances by a resident of a third State. (Article 8(2) of the Sri Lankan agreement).

Appendix 2 – Australia's tax treaties covered by Part A and the text of the ships and aircraft articles covered by Part B of this draft Ruling

101. The following tables list the tax treaties covered by Part A and set out the text of the ships and aircraft articles covered by Part B of this draft Ruling.

Table 1: The tax treaties covered by Part A of this draft Ruling	
Agreement or Convention[45]	**Relevant paragraph(s) of this draft Ruling**
Argentine agreement Austrian agreement Belgian agreement^ Canadian convention[46] Chilean convention* Chinese agreement Czech agreement Danish agreement Fijian agreement Finnish agreement* French convention*^ German agreement[47]^ Hungarian agreement Indian agreement Indonesian agreement Irish agreement Japanese convention* Malaysian agreement Mexican agreement Netherlands agreement^ New Zealand convention[48]*	14 – 22 and 65 – 84

[45] As described in section 3AAA of the Agreements Act.
[46] As amended by the Canadian Protocol (No. 1)
[47] The German agreement provides a reciprocal exemption from source country tax which has same practical effect as providing an exclusive residence country taxing right.

Norwegian convention* Papua New Guinea agreement Polish agreement* Russian agreement Singaporean agreement[49] Slovak agreement South African agreement Spanish agreement Swedish agreement Swiss agreement^ Taipei agreement Turkish convention United Kingdom convention* Vietnamese agreement * The exclusive residence country taxing right in these treaties is limited to the operation of ships in 'international traffic'. ^ Rate limit on source country taxing right, see paragraph 22 and 84 of this draft Ruling.	

[48] See paragraph 19 of this draft Ruling. The source country taxing right in Article 8(2) of the New Zealand convention provides that 'Notwithstanding the provisions of paragraph 1, amounts paid or payable to an enterprise of a Contracting State for carriage by ship or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in the other Contracting State and are discharged at a place in that other State, or for leasing on a full basis of a ship or aircraft for purposes of such carriage, may be taxed in that other State'.

[49] As amended by the Singaporean protocol (No. 1).

Table 2: The ships and aircraft articles covered by Part B of this draft Ruling		
Agreement or Convention	**Relevant article**	**Relevant paragraph(s) of this draft Ruling**
United States convention[50]	Article 8 Shipping and air transport (1) Profits derived by a resident of one of the Contracting States from the operation in international traffic of ships or aircraft shall be taxable only in that State. For the purposes of this Article, profits from the operation in international traffic of ships or aircraft include: (a) profits from the lease on a full basis of ships or aircraft operated in international traffic by the lessee, provided that the lessor either operates ships or aircraft otherwise than solely between places in the other Contracting State or regularly leases ships or aircraft on a full basis; and (b) profits from the lease of ships or aircraft on a bare boat basis, provided that such lease is merely incidental to the operation in international traffic of ships or aircraft by the lessor. (2) Profits of an enterprise of one of the Contracting States from the use, maintenance, or rental of containers (including trailers, barges, and related equipment for the transport of containers) used in international traffic shall be taxable only in that State. (3) The profits to which the provisions of paragraphs (1) and (2) apply include profits from the participation in a pool service or other profit sharing arrangement. (4) For the purposes of this Article,	23 – 27 and 87 – 88

[50] As amended by the United States protocol (No. 1).

	profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise taken on board in a Contracting State for discharge in that State shall not be treated as profits from the operation in international traffic of ships or aircraft and may be taxed in that State.	
Italian convention	Article 8 Shipping and aircraft (1) Where profits are derived by a resident of one of the Contracting States from the operation of ships and the place of the effective management of the shipping enterprise is situated in that State, those profits shall be taxable only in that State. (2) Notwithstanding the provisions of paragraph (1), such profits may be taxed in the other Contracting State where they are profits from operations of ships confined solely to places in that other State. (3) The provisions of paragraphs (1) and (2) shall apply in relation to the share of the profits from the operation of ships derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organization or in an international operating agency. (4) For the purpose of this Article, profits derived from the carriage by ships of passengers, livestock, mail, goods or merchandise shipped in one of the Contracting States for discharge at another place in that State shall be treated as profits from operations of ships confined solely to places in that State. (5) If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship is situated, or, if there is no such home harbour, in the Contracting State of which the	28 – 30 and 89 – 91

	operator of the ship is a resident. (6) Nothing in this Convention shall affect the operation of the Agreement between the Governments of the Contracting States for the avoidance of double taxation of income derived from international air transport signed at Canberra on 13 April 1972.	
Romanian agreement	Article 8 Ships and aircraft (1) Profits of an enterprise derived from the operation of ships or aircraft shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated. (2) Notwithstanding the provisions of paragraph 1, such profits may be taxed in the other Contracting State to the extent that they are profits derived directly or indirectly from ship or aircraft operations confined solely to places in that other State. (3) If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship is resident. (4) The profits to which the provisions of paragraphs 1 and 2 apply include profits from the operation of ships or aircraft derived through participation in a pool service or other profit sharing arrangement. (5) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise shipped in a Contracting State for discharge at a place in that State shall be treated as profits from ship or aircraft operations confined solely to places in that State.	31 – 33 and 92 – 93

Maltese agreement	Article 8 Shipping and air transport (1) Profits from the operation of ships or aircraft derived by a resident of one of the Contracting States shall be taxable only in that State. (2) Notwithstanding the provisions of paragraph (1), such profits may be taxed in the other Contracting State where they are profits from operations of ships or aircraft confined solely to places in that other State. (3) The provisions of paragraphs (1) and (2) shall apply in relation to the share of the profits from the operation of ships or aircraft derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organization or in an international operating agency. (4) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise shipped in a Contracting State for discharge at another place in that State shall be treated as profits from operations of ships or aircraft confined solely to places in that State. (5) Notwithstanding the provisions of this Article, profits from the operation of ships in international traffic derived by a company which is a resident of Malta may be taxed in Australia unless the company proves that such profits are not relieved from Malta tax under the provisions of the *Merchant Shipping Act 1973*, or under any identical or similar provision. The foregoing sentence, however, shall not apply if the company proves that not more than 25 per cent of its capital is owned, directly or indirectly, by persons who are not residents of Malta.	34 – 35 and 94 – 95
Thai agreement	Article 8 Shipping and aircraft	36 – 37 and 96

	1. Income or profits from the operation of aircraft derived by a resident of one of the Contracting States shall be taxable only in that State. 2. Income or profits from the operation of ships derived by a resident of one of the Contracting States may be taxed in that Contracting State and may also be taxed in the other State, but the tax so charged in the other State shall be reduced by an amount equal to one half of the amount which would be payable in respect of that income or those profits but for this paragraph. 3. Notwithstanding the provisions of paragraph 1, such income or profits may be taxed in the other Contracting State, where they are income or profits from the operation of aircraft confined solely to places in that other State; and notwithstanding the provisions of paragraph 2 such income or profits may be taxed in the other Contracting State without reduction, where they are income or profits from the operation of ships confined solely to places in that other State. 4. The provisions of paragraphs 1, 2 and 3 shall apply in relation to the share of income or profits from the operation of ships or aircraft derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organisation or in an international operating agency. 5. For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise shipped in a Contracting State for discharge at another place in that State shall be treated as profits from the operation of ships or aircraft confined solely to places in that State.	
Kiribati agreement	Article 8 Ships and aircraft	36 – 37 and 96

	1. Profits from the operation of aircraft derived by a resident of one of the Contracting States shall be taxable only in that State. 2. Profits from the operation of ships derived by a resident of one of the Contracting States may be taxed in that Contracting State and may also be taxed in the other State, but the tax so charged in the other State shall be reduced by an amount equal to one half of the amount which would be payable in respect of those profits but for this paragraph. 3. Notwithstanding the provisions of paragraph 1, such profits may be taxed in the other Contracting State, where they are profits from the operation of aircraft confined solely to places in that other State; and notwithstanding the provisions of paragraph 2, such profits may be taxed in the other Contracting State without reduction, where they are profits from the operation of ships confined solely to places in that other State. 4. The provisions of paragraphs 1, 2 and 3 shall apply in relation to the share of profits from the operation of ships or aircraft derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organisation or in an international operating agency. 5. For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise shipped in a Contracting State for discharge at another place in that State shall be treated as profits from the operation of ships or aircraft confined solely to places in that State.	
Korean convention	Article 8 Ships and aircraft (1) Profits of a resident of a	38 – 39 and 97

	Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State. (2) The provisions of paragraph (1) shall also apply to profits derived from participation in a pool, a joint business or an international operating agency.	
Philippine agreement	Article 8 Shipping (1) The tax payable in a Contracting State by a resident of the other Contracting State in respect of profits from the operation of ships in international traffic shall not exceed the lesser of – (a) one and one-half per cent of the gross revenues derived from sources in that State; and (b) the lowest rate of Philippine tax that may be imposed on profits of the same kind derived under similar circumstances by a resident of a third State. (2) Paragraph (1) shall apply in relation to the share of the profits from the operation of ships derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organization or in an international operating agency.	40 – 41 and 98 – 99
Sri Lankan agreement	Article 8 Ships and aircraft (1) Profits from the operation of ships or aircraft derived by a resident of one of the Contracting States shall be taxable only in that State. (2) Notwithstanding the provisions of paragraph (1), such profits may be taxed in the other Contracting State where: (a) they are profits from operations of ships or aircraft confined solely to places in that other State; or (b) they are profits, other than profits	42 – 43 and 100

	to which sub-paragraph (a) applies, from operations of ships in that other State, in which case the tax payable in that other State shall not exceed the lesser of: (i) half the amount which would be payable in respect of those profits but for this sub-paragraph; and (ii) the lowest amount, if any, of Sri Lanka tax that may be imposed on profits of the same kind derived under similar circumstances by a resident of a third State. (3) The provisions of paragraphs (1) and (2) shall apply in relation to the share of the profits from the operation of ships or aircraft derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organisation or in an international operating agency. (4) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise shipped in a Contracting State for discharge at another place in that State shall be treated as profits from operations of ships or aircraft confined solely to places in that State.	

Appendix 3 – Your comments

102. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

103. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

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References

Related Rulings/Determinations:

TR 2006/1; TR 2006/10;
TR 2007/10; TR 2008/8

Subject references:

- carriage of goods
- double tax agreements
- shipping income
- ships and aircraft article
- treaties

Legislative references:

- ITAA 1936
- ITAA 1936 129
- ITAA 1953
- ITAA 1953 3AAA
- ITAA 1953 3(2)
- ITAA 1953 4(1)
- ITAA 1953 4(2)

Other references:

- Argentine agreement [1999] ATS 36
- Austrian agreement [1988] ATS 21
- Belgian agreement [1979] ATS 21
- Canadian convention [1981] ATS 14
- Canadian protocol (No. 1) [2002] ATS 26
- Chilean convention [1990] ATS 45
- Czech agreement [1995] ATS 30
- Danish agreement [1981] ATS 26
- Fijian agreement [1990] ATS 44
- Finnish agreement 2007] ATS 36
- French convention [2009] ATS 13
- German agreement [1975] ATS 8
- Hungarian agreement [1992] ATS 18
- Indian agreement [1991] ATS 49
- Indonesian agreement [1992] ATS 40
- Irish agreement [1983] ATS 25
- Italian convention [1985] ATS 27
- Japanese convention [2008] ATS 21
- Kiribati agreement [1991] ATS 34
- Korean convention [1984] ATS 2
- Malaysian agreement [1981] ATS 15
- Maltese agreement [1985] ATS 15
- Mexican agreement [2004] ATS 4
- Netherlands agreement [1976] ATS 24
- New Zealand convention [2010] ATS 10
- Norwegian convention [2007] ATS 32
- Papua New Guinea agreement [1989] ATS 37
- Philippine agreement [1980] ATS 16
- Polish agreement [1992] ATS 14
- Romanian agreement [2001] ATS 4
- Russian agreement [2003] ATS 23
- Singaporean agreement [1969] ATS 14
- Singaporean protocol (No. 1) [1990] ATS 3
- Slovak agreement [1999] ATS 35
- South African agreement [1999] ATS 34
- Spanish agreement [1992] ATS 41
- Sri Lankan agreement [1991] ATS 42
- Swedish agreement [1981] ATS 18
- Swiss agreement [1981] ATS 5
- Thai agreement [1989] ATS 36
- Turkish convention [2013] ATS 19
- United Kingdom convention [2003] ATS 22
- United States convention [1983] ATS 16
- United States protocol (No. 1) [2003] ATS 14

- Vietnamese agreement [1992] ATS 44
- Explanatory Memorandum to the Income Tax (International Agreements) Amendment Bill 1984 (in relation to the Maltese agreement)
- OECD Model Tax Convention on Income and on Capital, condensed version, 22 July 2010

ATO references

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