TR 2003/2 - Income tax: the royalty withholding tax implications of ship chartering arrangements

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Taxation Ruling
Income tax: the royalty withholding tax implications of ship chartering arrangements

Contents Para

What this Ruling is about 1
Background 7
Ruling 20
Date of effect 23
Explanations 24
Examples 119
Detailed contents list 124

Preamble

The number, subject heading, ***Class of person/arrangement, Date of effect*** *and* ***Ruling*** *parts of this document are a 'public ruling' for the purposes of Part IVAAA of the* ***Taxation Administration Act 1953*** *and are legally binding on the Commissioner. The remainder of the document is administratively binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Ruling is about

Class of person/arrangement

1. This Ruling applies to non-residents who charter ships to residents of Australia under arrangements known in the shipping industry as charterparties.

2. This Ruling also applies in those situations involving permanent establishments (PE) where:

- The charterparty is between two residents of Australia and the royalty income is attributable to a PE outside Australia of the recipient of the royalty income (paragraph 128B(2C)(a) and sub-paragraph 128B(2C)(b)(i) of the *Income Tax Assessment Act* 1936 (ITAA 1936));
- The charterparty is between two non-residents and the royalty is an expense attributable to a PE of the payer in Australia (paragraph 128B(2B)(a) and subparagraph (b)(ii) ITAA 1936); and
- An Australian resident charters a ship to a non-resident and the payment is, income attributable to a PE of the resident in a country outside Australia and, an outgoing of the non-resident attributable to a PE in Australia (paragraph 128B(2C)(a) and sub-paragraph (b)(ii)).

3. The arrangements to which this Ruling applies are commonly known as:

- a demise charterparty where, for example, a ship is chartered without the captain and crew (also known as a bareboat or dry charterparty or dry lease);
- a time charterparty where, for example, a ship is chartered with captain and crew (also known as a wet charterparty or wet lease); and
- a voyage charterparty.

Issues Discussed in the Ruling

4. This Ruling considers the liability to royalty withholding tax (RWT) arising under the ITAA 1936 of the class of persons to whom this Ruling applies in respect of payments made for the chartering of ships. As charterparties normally involve the chartering of ships for the carriage of goods by sea, the Ruling will in the main discuss the tax issues in this context.

5. This Ruling considers the question of whether a payment under a charterparty constitutes a 'royalty' (as defined in subsection 6(1) of the ITAA 1936), being a payment for the 'use of, or the right to use' equipment. Relevant to this question is also the subsidiary question as to whether the payment, or part of the payment, is for rendering services and thus falls outside the definition of 'royalty'.

6. This Ruling is not concerned with the effect of the Ships and aircraft Article or its interaction with the Royalty Article in Australia's Double Tax Agreements (DTAs).

Background

Liability for royalty withholding tax

7. RWT is a liability arising under subsections 128B(2B), 128B(2C) and 128B(5A) of the ITAA 1936 to pay income tax on royalty income.

8. Subsection 6(1) of the ITAA 1936 defines 'royalty' or 'royalties' in so far as is relevant to this Ruling as follows:

> **'royalty' or 'royalties'** includes any amount paid or credited, however described or computed, and whether the payment or credit is periodical or not, to the extent to which it is paid or credited, as the case may be, as consideration for:
>
> (a) …;
>
> (b) the use of, or the right to use, any industrial, commercial or scientific equipment;
>
> (c) …; and
>
> (d) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of…any such equipment as is mentioned in paragraph (b)…

9. The principal issue arising with respect to charterparties is whether the arrangement between the shipowner and the charterer is a contract for services (e.g. a contract for the carriage of goods or transportation services) or a contract for the use of, or the right to use, the ship. If it is the former, the payments will be for services and not royalties. If it is the latter, the payments will be royalties as defined for tax purposes.

Shipping trade practice

10. The transportation of goods is, generally speaking, arranged by the exporter or importer of goods (**shippers**) depending on whether the sale is made on f.o.b. (free on board), c.i.f. (cost, insurance and freight) or other bases. Under the classic type of f.o.b.contract, the buyer arranges and pays for the shipment of the goods. Under a c.i.f. contract, the seller arranges for the shipment of the goods and insurance and charges these and the cost of the goods to the buyer. The nature of the contractual arrangements entered into for the carriage of goods by sea (which are generally referred to as contracts of affreightment - **COA**) are to a large extent influenced by the nature and size of the cargo to be carried. A shipper of a small quantity of goods is likely to reserve space on a liner ship which is in the business of carrying goods for several shippers between advertised routes around the world (**liner services**). Here, the contract for the carriage of goods by sea is between the shipowner and the shipper and is prima facie governed by a **bill of lading** ordinarily issued by the master of the ship to the shipper.

11. By contrast, a shipper of a large quantity of goods may require the entire carrying capacity of a ship to carry its goods to a particular destination. In this case the contract of carriage is likely to be governed by a **voyage charterparty** between the shipper and the shipowner.

12. Shipowners do not always directly undertake to carry the goods of shippers on their vessel. They may simply charter their vessels to another party (the **charterer**) who will then enter into a COA with the shipper. As between the shipowner and the charterer their rights and obligations will be governed by the **charterparty**. In this context, the arrangement entered into between shipowner and charterer may be a **time charterparty** or a **demise charterparty.**

13. The main distinctions between the various COA referred to above may be summarised as follows:

> **Liner services** - The shipowner is providing a cargo carrying service with the bill of lading being prima facie evidence of the contract of carriage. (See paragraphs 27-33).
>
> **Voyage charterparty** – The shipowner undertakes to carry the charterer's cargo (the charterer also being the shipper) between specific points. The contract of carriage in this case is the charterparty. The issue of a bill of lading in these cases acts as a mere receipt and a document of title. (See paragraphs 34-40).
>
> **Demise charterparty** – The shipowner transfers to the charterer for a period of time not only the possession but also the navigation of the ship. The services of the master and crew may or may not be added to a demise charterparty. Where the ship comes without a master and crew it is called a **bareboat charterparty**. The charterer will then engage its own master and crew to manage and navigate the ship. The demise charterer may then use the ship for liner services or sub-charter the ship under a bareboat, time or voyage charterparty to others. (See paragraphs 41-43).
>
> **Time charterparty** – Like a demise charterparty, the shipowner is placing its ship for an agreed time at the disposal of the charterer who is free to employ the ship for its own purposes within the permitted contractual limits of the charterparty. Unlike a demise charterparty, a time charterparty involves a division of the ship's management. The charterer controls the commercial function of the ship and is therefore responsible for the expenses of such activities. The shipowner retains possession of the ship through the control it has over the master and crew who remain in the employment of the shipowner. The shipowner is responsible for the navigation and general management of the ship through the master and crew. The charterer has the ship at its disposal for a specified

period of time for the purpose of transporting its own goods. The charterer may also enter into COA under bills of lading or voyage charterparties with third parties. (See paragraphs 44-60).

14. A further difference is in the characterisation of the amount payable under each COA. With a demise and time charterparty 'hire' is payable according to the amount of time the vessel is placed at the disposal of the charterer. With liner services and voyage charterparty 'freight' is payable for carriage of the cargo. This difference is also reflected in the way the two amounts are calculated. (See paragraphs 61-71).

15. Not all COA fall neatly within the four classical arrangements discussed above. In modern shipping practice, there are a variety of commercial arrangements that often make it difficult to identify the nature of the arrangement and who the carrier is. A ship may be the subject of several charterparties in a chain. The form of charterparties may include a variety of hybrids such as a trip charter, a consecutive voyage charter and the long-term freighting contract.

16. This Ruling looks at the character of payments made by a charterer to a shipowner or by a sub-charterer to a charterer and so on under the three classical charterparty arrangements. This entails an understanding of the relationship that exists between a shipowner and charterer or sub-charterer and charterer and the nature and purpose of the charterparty.

17. This Ruling is not concerned with the contractual relationship that may exist between the shipper of goods and the shipowner, the charterer, or the sub-charterer, where the contract of carriage involves a time charterparty. Special rules have developed under both common law and international conventions known as the Hague Rules 1924, the Hague/Visby Rules 1968 and the Hamburg Rules 1978 which govern the rights and obligations of the carrier and the shipper. These Rules have been adopted by major maritime and cargo owning countries. Some of these Rules are entrenched in legislation. The relevant Statute in Australia is the *Carriage of Goods by Sea Act 1991 (Cth)*.

18. The Hague and Hague/Visby Rules generally apply to contracts of carriage of goods by sea covered by a bill of lading. The Hamburg Rules have a wider application and generally apply to all contracts of carriage of goods by sea. As time charterparties normally contain a clause empowering the master of the ship or its agent to issue bills of lading on behalf of the shipowner it is often found that the shipowner is one of the carriers for the purposes of these Rules and also under common law.

19. These Rules do not apply to charterparties. In other words, the relationship that exists between shipowner and charterer under a charterparty is not affected. They simply determine the rights and obligations as between carrier and shipper but not between shipowner and charterer.

Ruling

20. Payments made under a standard demise charterparty of a ship will be subject to RWT. Demise charterparties are tantamount to the lease of equipment and payments made under such an arrangement clearly fall within the definition of 'royalty' because they are payments for the *use of, or the right to use* the ship. (See paragraphs 13 and 41-43).

21. Payments under a standard time charterparty of a ship will not be subject to RWT. The essence of such arrangements is the rendering of services by the owner to the charterer; for example, the provision of transportation services in the case of the carriage of goods. (See paragraphs 13 and 44-60).

22. Payments under a standard voyage charterparty are not considered to be royalties. Voyage charterparties are considered to be contracts for the carriage of goods etc. (See paragraphs 13 and 34-40).

Date of effect

23. This Ruling applies to royalties derived by both non-residents and residents (who fall under the provisions of subsection 128B(2C)), during the 1993-1994 year of income and subsequent years of income. This Ruling does not apply to equipment royalties paid under a pre-18 August 1992 contract. This Ruling also does not apply 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 21 and 22 of Taxation Ruling TR 92/20).

Explanations

Shipping law and practice on the nature and purpose of charterparties

24. The identification of the nature and purpose of an arrangement will ordinarily determine the character of the payments made thereunder. However, as will be seen from the discussion below this is not the case with respect to all forms of charterparties. A time

charterparty, for instance, is a complex commercial arrangement and the characterisation of payments made there under needs to be resolved by looking at other factors such as the meaning attributed to terms like 'use' or 'the right to use' in the relevant case law and in the treaty context of the Royalty Article. Such an analysis will demonstrate that payments under a demise charterparty fall within the definition of 'royalty'. On the other hand, payments under a time or voyage charterparty, or for liner services will be in respect of, or for, the provision of transportation services and constitute payments for services rendered and not royalties.

25. A brief introduction to shipping trade practice is given in paragraphs 10-19 of this Ruling. A more detailed examination of this practice and the law governing shipping trade follows. In particular, this part considers the nature of the various contractual arrangements that shippers, shipowners and charterers enter into, the legal and commercial relationship between the parties and the difference between payments for the hire/letting of a ship ('hire') and 'freight' payments for the carriage of goods.

26. However, because of the complexity of contractual arrangements that exist in the shipping trade, it is difficult to lay down hard and fast rules as to whether an arrangement falls within a particular class of charterparty. The circumstances and terms of the documents may differ in different cases and must therefore be carefully considered. The use of standard charterparty forms such as the Baltime, the NYPE 1993, the NYPE 1946, Linertime, Gencon, Genvoy, Barecon 'A', Barecon 89 and others is helpful to the identification of an arrangement as a particular class of charterparty. To provide certainty, this Ruling applies to charterparties drafted along similar lines to standard charterparties of the type referred to above. Where material differences exist between the actual charterparty used and the standard charterparty, a further analysis will need to be done.

The bill of lading contract of carriage

27. The bill of lading is one of the main documents evidencing the contract of carriage of goods by sea between shipper and carrier. The contract itself is made when the shipper books space on the carrier's ship, long before the goods are actually delivered to the ship for carriage. The contract is reduced to writing when the bill of lading is issued. The bill of lading is then prima facie evidence of the terms of the contract.[1]

[1] The 'Ardennes' (1950) 84 LI L Rep 340; [1951] 1 K.B. 55 (C.A.).

28. The bill of lading serves two other purposes - it is a receipt for the goods shipped and is also a negotiable document of title to the goods shipped. A COA may also be contained in or evidenced by other documents of title such as a sea waybill or mate's receipt which are also receipts for the goods shipped, but are not negotiable documents (see Article 1 (b) *Carriage of Goods by Sea Act 1991*).

29. The bill of lading is normally issued by the master of the ship engaged in liner services to the shipper at the time the goods are put on board the ship. The fee paid by the shipper for the carriage of goods under a bill of lading is called 'freight'.

30. The payment of 'freight' by the shipper to the carrier is clearly a payment for the carriage of goods and therefore a payment for services and not a royalty payment.

31. The large variety of commercial transactions in modern shipping practice can make the identification of the carrier difficult. This is particularly so where the ship is the subject matter of several charterparties. While special rules exist to govern the rights and obligations of the carrier and shipper (see paragraph 17) the identification of the carrier broadly remains a question to be determined according to the facts and circumstances of each particular case.

32. Where the bill of lading evidences the contract of carriage and the bill is a shipowner's bill (i.e. one issued by the master on behalf of the shipowner), the contract of carriage at law is between the shipowner and the shippers. Where the bill of lading is a charterer's bill (i.e. one issued by the master on behalf of the charterer) the contract of carriage is between the charterer and the shippers.

33. In the context of the subject matter of this Ruling, the 'freight' paid by a shipper to a carrier will not be a royalty. However, the contract of carriage may not be evidenced by a bill of lading but rather by the charterparty document itself. If the charterparty is the contract of carriage between a shipper and a carrier, the fee paid under the charterparty is likely to be a payment for services. One situation where this arises is in the case of a voyage charterparty.

Voyage charterparty[2]

34. Under a voyage charterparty the ship is chartered for a specific voyage (e.g. Melbourne to London). It is usually used as a contract of carriage where a large quantity of cargo, requiring the entire carrying capacity of the ship, is carried between designated ports. The ship may

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[2] *Shipping Law*, by Martin Davies and Anthony Dickey, second edition, LBC Information Services 1995, chapter 10; *Carriage Of Goods By Sea*, by John F Wilson, third edition, Chapters 1 & 3.

be chartered for the voyage directly from the shipowner or sub-chartered from another charterer. Generally speaking, the charterer or sub-charterer is also the shipper under a voyage charterparty, although in some cases the charterer may have sublet some of the space to a third party.

35. The shipowner has the whole management of the ship and is responsible for finding employment for her. He is responsible for safe navigation and making the ship seaworthy. The shipowner generally bears most of the risks relating to the ship and cargo and all operating costs except for loading and discharging costs. If the charterer does not provide a full cargo he is liable for deadfreight. Although there is provision for laytime, the charterer is liable for demurrage for delay in loading and discharging exceeding the laytime period. The relevant judicial authorities consider a voyage charterparty to be a contract for the carriage of goods. This view is reflected in the relevant shipping law textbooks.

36. When the charterer ships goods under a voyage charterparty, a bill of lading is usually issued when the goods are put on board the ship. In these circumstances, there are two documents which appear to regulate the relationship between the charterer and the shipowner – the voyage charterparty and the bill of lading. Which of these two documents evidences the contract of carriage is again a question of fact, depending on the documents and circumstances of each case.

37. By way of general principles, in the case where the charterer is also the shipper of the goods, the bill of lading acts only as a receipt for, and a document of title to, the goods. The contract of carriage between the charterer-shipper and the shipowner-carrier is the voyage charterparty.[3]

[3] *Rodoconachi Sons & Co v. Milburn Brothers* (1886) 18 Q.B.D 67 and *The Ship 'Socofl Stream' v. CMC (Australia) Pty Ltd* [2001] FCA 961.

38. In contrast, if a time charterer enters into a voyage sub-charterparty, and if the shipowner issues a bill of lading to the voyage sub-charterer on shipment of the goods, the bill of lading does act as evidence of a contract of carriage between the shipowner and the voyage sub-charterer.[4] If the time charterer were to issue a bill of lading in its own name to the voyage sub-charterer, the contract of carriage between these two parties would be the voyage sub-charterparty and not the bill of lading. The relationship between the shipowner and time charterer will, in both cases, still be governed by the time charterparty.

39. Another basic characteristic of a voyage charterparty, in contrast to a time charterparty, is that 'freight' is payable under the former, whereas 'hire' is payable under the latter[5] (see distinction in paragraphs 61-71).

40. In the case where the charterer is also the shipper (see paragraph 37), the charterer's payment to the shipowner for the carriage of its goods under the voyage charterparty will be in the nature of 'freight' and not a royalty. In the case where the shipper is the voyage sub-charterer (see paragraph 38 above) the payments made to the time charterer under the voyage sub-charterparty will also be in the nature of 'freight' and not a royalty.

Demise charterparty[6]

41. Most relevant case law and shipping law textbooks describe a demise charterparty as a lease of the ship by the owner to the charterer for an agreed period of time, in exchange for periodic payments of 'hire'.[7]

42. A charterparty by demise is one where the charterer obtains possession and control of the ship. The general test to determine this is to see 'whose servants the master and crew were'.[8] It has been said that if the control of master and crew in the navigation of the ship passes to the charterer he has possession and, generally speaking, the master and crew will be regarded as the servants of the person who has the power of appointing and dismissing them.[9]

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[4] *Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc* (2000) 173 ALR 263.
[5] *Skibs Snefonn v. Kawasaki Kisen Kaisha (The 'Berge Tasta')* [1975] 1 Lloyd's Rep. 422 at 424.
[6] See references under notes 2 supra and 10 below.
[7] e.g. *Scrutton on Charterparties and Bills of Lading* (note 10 below) states at page 59 'A charter by demise operates as a lease of the ship itself, to which the services of the master and crew may or may not be superadded'.
[8] *Australasian United Steam Navigation Co Ltd v. The Shipping Control Board* (1945) 71 CLR 508 per Latham CJ at 521; *Baumwoll Manufactur von Carl Scheibler v. Furness* [1893] AC 8.
[9] See *Australasian United Steam Navigation Co Ltd* case at 521-522, note 8 supra.

43. In these circumstances, the payments clearly fall within the definition of 'royalty', being amounts paid as consideration for the 'use of, or the right to use' the ship.

Time charterparty[10]

44. A time charterparty has certain similarities with both a demise and voyage charterparty but it also differs from these types of charterparties in many respects. For instance, as with a demise charterparty, the time charterparty is also based on the use of the ship for a specified period of time, hire is paid in respect of that use and the charterer has the right to commercially exploit the ship for its own benefit. Some time charterparties (e.g. the NYPE 93) provide that the charterer may fly their own house flag and paint the vessel with their own markings. Unlike a demise and voyage charterparty, the management of the ship under a time charterparty is divided between the shipowner and charterer.

45. Like a voyage charterparty, the whole carrying capacity of the ship is devoted to carrying the goods that the time charterer puts on board the ship, the shipowner is responsible for the seaworthiness of the ship and its navigation, the charterer can present bills of lading to the master for signature and indemnifies the shipowner for any risks resulting therefrom but not contemplated or assumed by the shipowner under the charterparty. However, unlike a voyage charterparty, the time charterer finds employment for the ship, pays for the costs of the voyage (e.g. bunkers) shares some of the risks associated with the carriage, generally indemnifies the shipowner for losses resulting from any directions given to the master in connection with the employment of the ship and pays hire instead of freight. Generally speaking, the terms are different. There are no laytime, demurrage or deadfreight provisions. However, a time charterparty contains an off-hire clause for dry docking and undertaking necessary repairs to the ship by the shipowner in which case the payment of hire is suspended.

46. Thus, in ascertaining the true nature of a time charterparty one must have regard to its characteristics and substance, the character of the payment made thereunder and the criteria that normally distinguishes between a payment for rendering services and a payment for the lease of, or right to use, equipment.

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[10] *Carriage of Goods by Sea*, supra, note 2, chapter 4; *Shipping Law*, supra, note 2, chapters 10 & 13; *Time Charters*, by Michael Wilford, Terence Coghlin and John D Kimball. fourth edition, 1995, Lloyd's of London Press Ltd; *Australian Maritime Law*, by MWD White, The Federation Press 1991, chapter 5; *Carver's Carriage by Sea*, thirteenth edition by Raoul Colinvaux, London Stevens & Sons 1982, chapter 5 sub-chapter 6; *Scrutton on Charterparties and Bills of Lading*, twentieth edition, London Sweet & Maxwell 1996, sections IV and XVI.

47. It is appropriate to start with the judicial consideration of a time charterparty under maritime law. There are few maritime cases dealing directly with the question of whether a time charterparty is a contract for services, or a contract for the use of the ship.

48. In the main, judicial comments on the nature of a time charterparty are by way of *obiter dicta*. The contexts in which a time charterparty has been considered vary and its description as to its nature and purpose do not appear to follow a consistent pattern.

49. The nature of a time charterparty was recently considered by Lord Bingham of the House of Lords in the case of *Whistler International Limited v. Kawasaki Kisen Kaisha Limited*.[11] At page 641 His Lordship states:

> 'A time charterparty such as the present represents a complex commercial bargain between owner and charterer. The owner undertakes for the period of the charter to make his vessel available to serve the commercial purposes of the charterer. To this end the hull, machinery and equipment of the vessel are to be in a thoroughly efficient state, the capacity and fuel consumption of the vessel are specified and the vessel is to be ready to receive the charterer's intended cargo. The owner undertakes these obligations in consideration of the charterer's undertaking to **pay for the hire of the vessel** at an agreed rate.
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> **The charterer agrees to pay hire for the vessel because he wants to make use of it**. Crucial to the bargain, for him, are the terms which require the master to prosecute his voyages with the utmost despatch, which provide that the master (although appointed by the owner) shall be under the orders and directions of the charterer as regards employment and which require the charterer to furnish the master from time to time with all requisite instructions and sailing directions.
>
> The complexity of a time charterparty derives partly from the fact that ownership and possession of the vessel, which remain in the owner, are separated from **use of the vessel**, which is **granted to the charterer**, and partly from the peculiar characteristics and hazards of carriage by sea…The owners are to remain responsible for the navigation of the vessel.' (Emphasis added).

50. In the same case, Lord Hobhouse also recognised that the employment of a vessel and its navigation reflected different aspects of the operation of the vessel. 'Employment' embraces the economic aspect - the exploitation of the earning potential of the vessel. 'Navigation' embraces matters of seamanship. A voyage charter is

[11] *Whistler International Limited v. Kawasaki Kisen Kaisha Limited*, [2000] 1 AC 638.

different to a time charter because under the former it is the owner who is using the vessel to trade for his own account. He decides and controls how he will exploit the earning capacity of the vessel, what trades he will compete in, what cargoes he will carry. He bears the full commercial risk and expense and enjoys the full benefit of the earnings of the vessel.

51. On the other hand, under a time charter, the owner still has to bear the expense of maintaining the ship and the crew. He still carries the risk of marine accidents and has to insure his interest in the vessel appropriately. But, in return for the payment of hire, he transfers the right to exploit the earning capacity of the vessel to the time charterer. His Lordship goes on to say that where the charter is for a period of time rather than a voyage, and the remuneration is calculated according to the time used rather than the service performed, the risk of delay is primarily on the charterer. The shipowner's right to remuneration is unaffected.

52. In *The 'Nanfri'*[12] the House of Lords also described the nature and purpose of a time charterparty as being a contract for the use of the ship to enable the charterer to carry on his trade. And, as early as 1918 the House of Lords had in *Fred Drughorn Ltd v. Rederiaktiebolaget Trans-Atlantic*[13] described a charterparty as '…prima facie it is a contract for the hiring or use of the vessel'.

53. The above cases tend to suggest that a time charterparty is, in a sense, an arrangement for the use of the ship. However, there are a number of cases where the nature and purpose of a time charterparty is described as being a **contract** by the shipowner **to render services** by his servants and crew.

54. A case which is often cited for that proposition and referred to in other cases is the opinion expressed by MacKinnon L.J. in *Sea and Land Securities Ltd v. William Dickinson & Co Ltd*[14] where he states at pages 69-70:

> 'A time charter party is, in fact, a misleading document, because the real nature of what is undertaken by the shipowner is disguised by the use of language dating from a century or more ago, which was appropriate to a contract of a different character then in use. At that time a time charterparty (now known as a demise charterparty) was an agreement under which possession of the ship was handed by the shipowner to the charterer for the latter to put his servants and crew in her and sail her for his own benefit. A demise charterparty has

[12] *Federal Commerce And Navigation Ltd v. Molena Alpha Inc*. (*The 'Nanfri'*) [1979] 1 Lloyd's Rep 201 (HL), per Lord Wilberforce and Lord Fraser at pages 206 and 210 respectively.
[13] [1919] AC 203 at 207 per Viscount Haldane.
[14] *Sea and Land Securities Ltd v. Dickinson* [1942] 2 K.B. 65.

> long been obsolete. The modern form of time charterparty is, in essence, one by which the shipowner agrees with the time charterer that during a certain named period he will render services by his servants and crew to carry the goods which are put on board his ship by the time charterer. But certain phrases which survive in the printed form now used are only pertinent to the older form of demise charterparty. Such phrases, in the charterparty now before the court, are: 'the owners agree to let,' and 'the charterers agree to hire' the steamer. There was no 'letting' or 'hiring' of this steamer.
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> … The ship at all times was in the possession of the shipowners and they simply undertook to do services with their crew in carrying the goods of the charterers. As I ventured to suggest quite early in the argument, between the old and the modern form of contract there is all the difference between the contract which a man makes when he hires a boat in which to row himself about and the contract he makes with a boatman that he shall take him for a row.'

55. *Sea and Land Securities* was referred to with approval by the High Court of Australia in the *Australian United Steam Navigation* case[15]. That case concerned a claim for compensation in respect of the use of a ship, the services of which had been requisitioned by the Commonwealth, and for services rendered during the use of the ship, under the *Shipping Control Regulations* in force at the relevant time. The regulations were governed by the terms and conditions of the standard time charter party contained in the schedule to the regulations. Latham CJ made the following comments at 521:

> All charterers of ships, by virtue of the charter party, have some control over the ship. Such control may relate only to a particular voyage; it may operate during a specified period. If the charter party is by way of demise, property in the ship temporarily passes to the charterer – for the duration of the charter. If possession, as well as some degree of control, passes to the charterer, then the property passes to the charterer and he is *pro tempore* the owner. But no property in the ship passes if possession is not given to the charterer by virtue of the terms of the charter. If the control of master and crew in the navigation of the ship passes to the charterer he has possession. **If, on the other hand, he acquires only a right to the use of the ship – a right to use her carrying capacity (*Carver, Carriage by Sea,* 8th ed. (1938), p. 244, par. 153) there is no demise, but only a contract for services** – *locatio operis vehendarum mercium* … Thus the general test is 'whose servants the master and crew were' [emphasis added]

[15] Supra, note 8.

In this passage, his Honour clearly expresses the view that if a charter party does not effect a demise, but merely gives a right to use the carrying capacity of a ship, there is only a contract for services. In this case, the court concluded that the standard charter party set out in the schedule to the regulations did not effect a demise, despite the fact that it provided that the owners 'let' and the charterer 'hires' the ship, referred to the ship being placed at the disposal of the charterer, included clauses referring to 'delivery' and 'redelivery', and gave the charterer the right of subletting the ship. In this regard, Latham CJ said at 522:

> Such provisions would suggest a true letting of the ship so as to pass property in her by way of demise, but it has long been settled that the use of such terms, which are derived from forms of charter (namely charters by demise) which have become almost obsolete, do not necessarily bring about this result.

McTiernan J agreed with the reasons of the Chief Justice. The other High Court judges in that case made comments that are relevant in this context. For instance, Rich J said at 525:

> I think that it is perfectly plain that the document is a charter in respect of the use or services of ships, and not a demise charter. It performs the ordinary function of a charter of affreightment, leaving the possession of the ship in the master as the servant of the owner.

Starke J said at 526:

> The charter party on its proper construction does not operate as a demise or lease of the ship, but gives the charterer the temporary right to have goods loaded and conveyed in the ship.'

Finally, Williams J said at 528:

> The words 'let' and 'hire' by themselves would point to a demise of the ship … But the whole of the clauses must be considered, and I venture to repeat the statement in *Scanlan's New Neon Ltd. v. Tooheys Ltd.* (2) that "it must be remembered in considering the charter party cases that the modern time charter although often expressed to be a 'lease' of the ship, does not provide for the transfer of the possession of the ship to a charterer who engages his own crew to navigate her, but for the placing of the ship complete with officers and crew at his disposal, so that the owner retains throughout the possession of the vessel through the officers and crew … This is made clear in *Sea and Land Securities Ltd* … where MacKinnon LJ pointed out that 'between the old and the modern form of contract there is all the difference between the

> contract which a man makes when he hires a boat in which to row himself about and the contract he makes with a boatman that he shall take him for a row.'"

56. Other cases refer to a time charterparty as a contract for the **services of a ship**, master and crew or one where the **shipowner places the ship, master and crew at the disposal of the charterer**.[16] In *Whistler International*[17], Lord Hobhouse, after clearly stating that the owner transfers to the time charterer the right to exploit the earning capacity of the vessel, later on in a different context states that a time charter is not a contract of carriage but describes it as a contract for the provision of the services of a crewed vessel.

57. Legal textbooks on the subject are not consistent in the way they describe the purpose and nature of a time charterparty. For instance, *Shipping Law,*[18] *Australian Maritime Law*[19] and *Carver's Carriage by Sea*[20] at places tend to describe the purpose and nature of a time charterparty as contracts for the use or the hiring of the ship. However, at pages 417-418, Carver groups charterparties into three classes and described the time charterparty as a 'contract for service of the ship for a period of time, during which the charterer is to have the right…….of directing how the ship shall be used…..' Shipping Law at page 34, in discussing the nature of a time charter, relies on the statement of Mackinnon LJ in Sea and Land Securities (see paragraph 55 above) that a time charter is in essence a carriage contract, but continues 'it is for the time charterer to decide, within the terms of the charter party, what use he will make of the vessel.'

58. *Time Charters*, and *Scrutton on Charterparties and Bills of Lading*[21] describe a time charter as a contract for the provision of services. However, *Time Charters* at page 536 states that under American law a charterer's interest under a time charter is regarded simply as a contract for the use of the vessel giving the time charterer no proprietary interest in the ship. *Carriage of Goods by Sea* [22] at places describes voyage and time charters as carriage charters with the shipowner agreeing to provide a carrying service. In other places he refers to the shipowner placing the ship at the disposal of the charterer and the object of the charterer 'in hiring' the vessel is to raise income either by using it in the liner trade or sub-chartering it for specific voyages.

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[16] *Italian State Railways v. Mavrogordatos* [1919] 2 K.B. 305; *Tankexpress A/S v. Compagnie Financiere Belge Des Petroles S.A*. [1949] A.C. 76.
[17] Supra, note 11.
[18] Supra, note 2, at page 166.
[19] Supra, note 10, at pages 111 & 126.
[20] 13th edition (1982), vol 1.
[21] Supra, note 10, at page 530 and at p.59 respectively.
[22] Supra, note 2, at pages 4, 5, 85 and 92.

59. The issue as to whether the engagement of a ship was a contract for services or a contract for the use of the ship arose in *The Queen of the South*.[23] In this case, motor boats, suitably manned, were used to moor and unmoor the ship, *Queen of the South* and to convey her crew between the ship and the shore. The case arose in the context of an action in rem against the *Queen of the South* which was only available if the claim arose out of an agreement relating to the carriage of goods in a ship or to the 'use or hire' of a ship. The boats were by definition regarded as ships. Brandon J. held that the engagement of the boats was an agreement for the 'use or hire' of the boats and not an agreement relating to the rendering of services. He conceived that there might be an agreement for services in a case where there was only some incidental and minor use of a ship. Like the *Laemthong International Lines Co Ltd* case above, this case was concerned with the scope of the court's jurisdiction and may be distinguishable on that basis.

60. A consideration of the case law and the relevant shipping law textbooks indicates that, while it can be said that a charterer, in a sense, has the use of the ship – in the sense that the charterer has the use of the carrying capacity of the ship – the true nature of a time charter is generally acknowledged to be the provision of transportation services by the owner to the hirer. However, in view of the references to the use of the ship, or to the right to use the ship, in some of the cases, it is appropriate to review the true meaning of the term 'use, or right to use' in the context in which it appears in the royalty definition. This is discussed at paragraphs 81-110.

Character of payments under charterparties - distinction between 'freight' and 'hire'

61. Recent shipping law cases draw a distinction between 'hire' and 'freight'. This is generally followed by legal textbook writers on the subject. Most ordinary and commercial dictionaries make the distinction.

62. The nature of 'hire' and 'freight' was considered by Lord Denning M.R. in *The 'Nanfri'*.[24] In this case the ship *Nanfri* was time

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[23] *Corps v. Owners of the Paddle Steamer Queen of the South (The Queen of the South)* [1968] P 449, [1968] 1 All ER 1163. **Note**: *The Queen of the South* is one case in a line of authorities which decided that charterparties fell within the expression 'use or hire' of a ship appearing in English Acts concerned with the jurisdiction of certain courts (see also: *The Alina* (1880) 5 Ex.D. 227 and *R. v. Judge of the City of London Court* (1883) 12 QBD 115). All 3 cases subsequently approved and considered by House of Lords in *The Eschersheim* [1976] 1 WLR 430 or *Gatoil International Inc. v. Arkwright-Boston Manufacturers Mutual Insurance Co.* [1985] AC 255.

[24] *Federal Commerce And Navigation Ltd v. Molena Alpha Inc*. (*The 'Nanfri'*) [1978] 2 Lloyd's Rep 132 (C.A.).

chartered by the owners to the charterer who had sub-chartered it to third party shippers. The time charterparty provided for the payment of 'hire' calculated at $5 per ton deadweight per calendar month. The time charterer deducted certain amounts from the 'hire' payable due to time lost caused by the slow steaming of the ship. The owners objected and threatened to withdraw the charterer's authority to sign bills of lading as agents of the owners unless certain conditions were met.

63. The charterer treated the owner's threat as a repudiation of the charterparty and terminated it. The issues before the court were, first, whether the time charterer had a right to make the deductions under a settled rule of law which allowed deductions or abatement to be made for breach of contract under contracts for services and for the sale of goods. Secondly, whether the charterer had validly terminated the charterparty. The rule did not apply to 'freight' under contracts for the carriage of goods by sea.

64. In the course of determining that question Lord Denning M.R. said at page 139:

> 'At one time it was common to describe the sums payable under a time charter-party as 'freight'. Such description is to be found used by judges and text book writers of great distinction. But in modern times a change has come about. The payments due under a time charter are usually now described as 'hire' and those under a voyage charter as 'freight'. This change of language corresponds, I believe, to a recognition that the two things are different. **'Freight' is payable for carrying a quantity of cargo from one place to another. 'Hire' is payable for the right to use a vessel for a specified period of time, irrespective of whether the charterer chooses to use it for carrying cargo or lays it up, out of use.** Every time charter contains clauses which are quite inappropriate to a voyage charter, such as the off-hire clause and the withdrawal clause.' (Emphasis added).

65. The case went on appeal to the House of Lords only on the 'termination' issue and was decided in the charterer's favour. Nevertheless, the House of Lords described the nature and purpose of time charters as being for the use of the ship (see paragraph 52 above). The purpose of the time charter, as indicated by Lord Fraser at page 210 is clearly to enable the hirer to make use of the ship in carrying on his business. However, this does not address the issue of the way in which the ship is made available for such use. The cases show that the proper characterisation is that the owner provides transportation services to the hirer by which, within the limits specified in the charter, he will carry the charterer's goods to ports specified by the charterer. It is not an arrangement akin to the lease of a ship.

66. A more recent case on the distinction between 'hire' and 'freight' is *The 'Cebu' No.2*.[25] In this case the owners of the ship 'Cebu' time chartered it to a charterer who in turn sub-time chartered the ship to a sub-charterer who in turn sub-sub-time chartered the ship to the defendants who used the ship to carry the cargo of shippers. The issue was whether the owners were entitled to the 'hire' under the sub-sub-time charter under a clause in the head time charter which gave the owners a lien over all cargoes and all sub-freights for any amount due under the head time charter. It was held that sub-freights did not include sub-time or sub-sub-time charter hire. In other words, time charter 'hire' was not 'freight'.

67. The court traced the history of the use of the word 'freight' and concluded that a change in the use of the term in the shipping trade came about in modern times. That is, sometime before 1946 when the widely used standard NYPE time charter amended form which consistently uses the word 'hire' was published. By 1950, at least, the popular Baltime form also consistently called the periodic payments under a time charter 'hire'.

68. The court also observed that specialist dictionaries, namely, Ivamy's Dictionary of Shipping Law, 1984 and Brodie's Dictionary of Shipping Terms, 1985, relevantly defined 'freight' and 'hire' as follows:

> **'Freight**: The remuneration payable in respect of the carriage of goods by sea under a voyage charter-party or bill of lading.'
>
> **'Hire**: A sum of money to be paid to the ship owner by a charterer under a time charter-party for the use of the vessel.'

69. The court noted that legal textbooks probably tend to be a little behind the time in reflecting changes in specialist vocabulary. Indeed, the current editions of legal textbooks referred to in this Ruling now clearly make the distinction between 'hire' and 'freight' often citing cases like *The Nanfri* and *The Cebu No.2* as authorities.

70. The difference between 'hire' and 'freight' is also reflected in the computation of the two. 'Hire' is computed by reference to the carrying capacity of the ship. It is calculated on the basis of a fixed sum per ton of the vessel deadweight for a specific period of time or an amount per day. It is normally payable in advance at monthly or semi-monthly intervals. Generally speaking, 'freight' is computed by reference to the quantity of cargo carried. In the oil tanker trade, the rate per metric tonne of cargo is normally established by *Worldscale* (Worldwide Tanker Nominal Freight Scale). This is a Table of rates giving the amount of dollars per ton of cargo for each of a number of standard routes. 'Freight' is normally payable on delivery of the goods

[25] *Itex Itagrani Export S.A. v. Care Shipping Corporation and Others (The 'Cebu' No. 2)* [1990] 2 Lloyd's Rep. 316.

at the point of discharge unless the agreement expressly provides otherwise. Nevertheless, the description of the remuneration cannot alter the true nature of the time charter. As McKinnon LJ said in *Sea and Land Securities* (see paragraph 54), the concepts of 'letting' and 'hiring' are inappropriate to the modern form of time charter.

71. *Sea and Land Securities Ltd* was also a deduction case and also a decision of the Court of Appeal. The fact that Lord Denning in *The 'Nanfri'* did not adopt the service characterisation given to a time charterparty by MacKinnon L.J. in the former case appears to be the result of the nature of the issue before the court in *The 'Nanfri'*. Whether or not a time charter was in the nature of a demise charter was irrelevant and does not appear to have been argued or considered. Adopting the service characterisation would not have altered the decision reached in *The 'Nanfri'* since service contracts fell within the rule of abatement. In the circumstances, the different approaches adopted by the Court of Appeal in the two cases make it difficult to extract any clear precedent on the nature of a time charterparty.

Liability to pay RWT

72. The liability to pay RWT is found in subsection 128B(5A) (ITAA 1936) which provides that RWT is payable on the gross amount of the royalty at the rate declared by Parliament. That rate is currently 30% tax on the gross amount of royalty reduced to 10% under most of Australia's DTAs.

73. By subsection 128B(2B) (ITAA 1936), RWT applies to income that consists of a royalty derived by a non-resident and:

- Is paid to the non-resident by a resident of Australia. No RWT applies where the royalty paid by the resident is an outgoing incurred in carrying on business in a foreign country at or through a PE of the resident in that country (paragraph 128B(2B)(a) and subparagraph (b)(i)).
- Is paid to the non-resident by another non-resident and the royalty paid is an outgoing incurred by the second non-resident in carrying on business in Australia at or through a PE in Australia (paragraph 128B(2B)(a) and subparagraph (b)(ii)).

74. The liability for RWT is further extended under subsection 128B(2C) (ITAA 1936) to two other situations where a PE is involved, namely:

- Where a royalty is paid by an Australian resident to another Australian resident and the royalty income is derived by the second mentioned Australian resident in

carrying on business at or through a PE in a country outside Australia. No RWT applies if the royalty paid by the first mentioned Australian resident is an outgoing wholly incurred by that resident in carrying on business at or through a PE in a country outside Australia (paragraph 128B(2C)(a) and sub-paragraph (b)(i));

- Where a royalty is paid to an Australian resident by a non-resident and:
  - (i) the royalty income is income of the resident in carrying on business at or through a PE in a country outside Australia; and
  - (ii) the royalty is an outgoing of the non-resident in carrying on business at or through a PE in Australia (paragraph.128B(2C)(a) and sub-paragraph (b)(ii)).

75. RWT is not payable where a DTA applies and subsection 17A(4) of the *International Tax Agreements Act 1953* operates to exclude a royalty from section 128B.[26]

76. The crucial aspect of the definition of royalty contained in subsection 6(1) (ITAA 1936), (see paragraph 8), in the context of charterparties is whether payments made under a demise, time or voyage charterparty can be said to be amounts paid or credited as consideration for:

- the use of, or the right to use, the ship; or
- the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of the ship.

77. The contradistinction to the payment being for the 'use of, or the right to use' the equipment and hence a royalty is that the payment is for services rendered. The distinction between royalties and payments for services rendered is considered in Taxation Ruling

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[26] Subsection 17A(4) of the *International Tax Agreements Act 1953* provides:
'If:
(a) a provision ('basic royalty provision') of an agreement is covered by either of the following paragraphs:
(i) paragraph 1 or 2 of Article 12 of the Chinese agreement;
(ii) a corresponding provision of another agreement; and
(b) another provision of the agreement expressly excludes particular royalties ('excluded royalties') from the scope of the basic royalty provision;
section 128B of the Assessment Act (which deals with liability for withholding tax) does not apply to the excluded royalties.'

IT 2660 but only in the context of payments for the supply of know-how.

78. Paragraph 25 of IT 2660 states:

> 'Payments for services rendered and work done are not royalties unless the services are ancillary to, or part and parcel of, enabling relevant technology, information, know-how, copyright, machinery or equipment to be transferred or used. **Whether the payment is a royalty payment or a payment for services depends on the nature and purpose of the arrangement giving rise to the payment**. Only those payments which are for the use of, or the right to use, property or a right belonging to another person are 'royalties' within the definition' (emphasis added).

79. Other aspects of the paragraph 6(1)(b) (ITAA 1936) definition of 'royalty' such as the question of what constitutes 'industrial, commercial or scientific equipment' (ICS equipment) have been considered in Taxation Rulings IT 2660 and TR 98/21. These Rulings conclude that, in the context of the tax definition of the term 'royalties', the word 'equipment' does not have a narrow meaning and would include such things as machinery, apparatus, ships and aircraft (see paragraphs 18 of IT 2660 and paragraphs 33-38 of TR 98/21).

80. The nature and purpose of a demise charterparty as a contract akin to a lease is clearly settled by maritime law and legal textbooks. Payments under a demise charterparty are therefore amounts paid as consideration for the use of, or the right to use ICS equipment. Likewise, it is well settled that a voyage charterparty is a contract for the carriage of goods. As such, it is a contract for rendering services and excluded from the definition of 'royalty'. However, as indicated in paragraph 60, while the purpose of a time charter may be to allow the charterer to make use of the vessel, in the sense that he has the right to use her carrying capacity, for the purposes of his business, the better view is that the true nature of the time charter is that it is for the provision of a carriage service by the owner to the charterer for a period of time. However, as references to 'use' appear frequently in the cases, it is appropriate to consider the meaning of the phrase 'use of, or right to use' in the context of the royalty definition to determine the relevance in this context of such reference to 'use'.

The meaning of the expression 'use of, or the right to use' in a taxation context

Treaty meaning of 'royalties'

81. With one exception, the definition of 'royalties' in the Royalty Articles of Australia's DTAs are similar to the subsection 6(1) (ITAA 1936) definition with regard to payments for the 'use of, or the right to use', any ICS equipment. They have, in the main, evolved from the same historical background. That is, the definition of 'royalties' evolved from the United Kingdom treaty definition and it was intended to have the same meaning as the equivalent part of the definition in the UK treaty. The exception is the United States Convention, which was amended by the Protocol dated 27 September 2001 to remove the reference to ICS equipment from the definition of 'royalties' contained in the Convention.

82. The expression 'use of, or the right to use' is not defined in the DTAs. Therefore, the domestic law meaning of that expression is to be applied unless the context of the Royalty Articles requires otherwise.

83. In determining treaty context it is appropriate to consider the OECD Commentary on ICS equipment leasing 'royalties' in the Royalties Article of the OECD Model Tax Convention and other relevant OECD Reports. The relevant OECD Model is the *1977 Model Double Taxation Convention on Income and on Capital* (1977 OECD Model) as the reference to ICS equipment has been deleted from the definition of 'royalties' in Article 12 of the 1992 OECD Model.

84. Article 12 of the 1977 OECD Model included in the definition of the term 'royalties', payments 'for the use of, or the right to use, industrial, commercial or scientific equipment'. None of the terms contained in the expression are defined. However, paragraph 9 of the Commentary on the Article does distinguish between royalties paid for the use of equipment and payments constituting consideration for the sale of equipment (e.g. payments under a hire-purchase agreement). It concludes that in the case of **leasing in particular**, the sole or at least the principal, purposes of the contract is normally that of hire.

85. The term 'ICS equipment' is also not defined in Australia's DTAs or the OECD Model. However, there are sufficient indications in the text and context of Australia's DTAs as well as the OECD Model and Commentary to suggest that 'ICS equipment' has a broad meaning and includes ships, aircraft, drilling rigs, apparatus, machinery, containers, motor cars, wax figures and so on.[27]

86. The Report on the leasing of ICS equipment,[28] at paragraph 5, states that 'in the field of transport an enterprise may prefer **leasing** a container, a truck or a ship rather than asking the services of a transportation enterprise'. At paragraph 9, the Report considers the legal aspects of lease contracts and states that '*lease contracts are based on the separation of the ownership of an asset and its usage*'.

87. It is arguable that in the use of the word 'leasing' the OECD Reports were considering a narrower and technical meaning of the expression 'use of, or the right to use' in the context of equipment leasing. However, it is generally accepted that DTAs are written in very much more general terms than domestic law (see paragraph 85 of TR 2001/13). If this were not the case, then the word 'ownership' referred to in paragraph 9 of the Report on the leasing of ICS equipment would also need to be given its technical meaning of 'legal ownership' in which case all three forms of classical charterparties would fall outside the expression.

88. The Commentary on the Ships and aircraft Article (Article 8) at paragraph 5 also refers to the **leasing of a ship**. This Article gives preference to taxing the profits obtained from leasing a ship or aircraft on charter fully equipped, manned and supplied and the occasional bareboat charter under Article 8. The Commentary is silent on whether time and bareboat charterparties falling outside the scope of the Ships and aircraft Article fall under the Royalties Article or some other Article.

89. However, Klaus Vogel[29] in his commentary on the effect of Article 8 of the 1977 OECD Model on leasing a ship on charter fully equipped, manned and supplied and bareboat charters recognises that as a general rule income from a bareboat charter would fall under the Royalty Article. It is only the 'occasional' (which he describes as 'casual') bareboat charter that falls outside the Royalty Article. Another example he gives of a bareboat charter falling within the Royalty Article is where a shipping operator leases a ship on a

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[27] For a detailed discussion of the meaning of 'ICS equipment' see paragraphs 33-38 of TR 98/21. More particularly see OECD Reports on, '*The Taxation Of Income Derived From The Leasing Of Industrial, Commercial Or Scientific Equipment* (paragraphs 5, 10, 12 and 21) and, *The Taxation Of Income Derived From The Leasing Of Containers* (paragraphs 13 and 40) published in Trends in International Taxation, 1985 and Volume II of the 2000 OECD Model.

[28] See note 27, supra.

[29] Klaus Vogel on Double Taxation Conventions, Kluwer, p 390, m.no.32.

bareboat charter basis and instead of using it in its shipping operations it subleases the ship on a bareboat charter basis to a third party. However, there is no discussion as to which Article applies where a time charter falls outside Article 8.

90. The 1977 OECD Commentary on Article 12 provides little guidance on the meaning of the expression 'the use of, or the right to use'. What is clear from the discussion on mixed contracts at paragraphs 12 & 13 of Commentary is that payments for services are excluded unless they are of an ancillary or largely unimportant character in terms of the principal purpose of the mixed contract. The description given to a contract of services in paragraph 12 as one 'in which one of the parties undertakes to use the customary skills of his calling to execute work himself for the other party' is also of little guidance when applied to a time charterparty. (See paragraphs 11.2 and 11.6 of current OECD Commentary).

91. However, the Committee of Fiscal Affairs Report on *Treaty Characterisation Issues Arising from E-Commerce* (the *'Treaty Characterisation Report'*[30]) at paragraph 25 refers to the following three factors in helping to distinguish between equipment rental and service contracts:

(a) the customer is in physical possession of the property;

(b) the customer controls the property; and

(c) the provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient.

Paragraph 26 of the Report states that this is a non-exclusive list of factors, and that all relevant facts bearing on the substance of the transaction should be taken into account when determining whether the agreement is a service contract or a lease.

92. The above factors originated from the Committee Reports accompanying amending legislation to section 7701(e) of the U.S. Internal Revenue Code (the U.S. Code). For the purposes of its Code the U.S. also considers the following additional factors as indicating a lease rather than the provision for services:

[30] The *Treaty Characterisation Report* was unpublished at the time of writing this Ruling. However, it is officially reproduced at p.23 of DAFFE/CFA(2002)45. The Report recognises the application of the guidelines to bilateral conventions that include in the definition of 'royalties' payments for the use of, or the right to use, ICS equipment. Although the analysis on characterisation issues is in the context of computer equipment the factors listed are equally relevant to other equipment.

(a) the customer has a significant economic or possessory interest in the property,

(b) the provider does not bear any risk of substantially diminished receipts or substantially increased expenditure if there is non-performance under the contract,

(c) the total payment does not substantially exceed the rental value of the equipment for the contract period.

While the *Treaty Characterisation Report* did not adopt these additional factors they nonetheless appear relevant to the question of whether charterparties are rental or service contracts.

93. It is clear from the cases discussed in this Ruling that a time or voyage charterer does not have **physical possession** of the ship but a demise charterer does. This factor would thus indicate that a time or voyage charterparty is one for the provision of services and a demise charterparty a lease.

94. The *Treaty Characterisation Report* does not spell out the criteria to be used for determining the question of **control**. Generally speaking, if one has physical possession of the equipment it would also have control. The listing of control as a separate factor indicates that it is an independent factor so as to cover cases where one does not have possession but is nonetheless in the position to direct the general course of work to be performed by the equipment. The Committee Reports on section 7701(e) of the U.S. Code provide further guidelines on the criteria listed in paragraphs 91 & 92. The Committee Reports regard the control test to be met if the recipient dictates or has a right to dictate the manner in which the property is operated, maintained or improved. However, control is not established merely by reason of contractual provisions designed to enable the recipient to monitor or ensure the service provider's compliance with performance, safety, pollution control, or other general standards.

95. Taxation Ruling SST 4 also lists at paragraph 3.8 a number of factors which indicate whether a hirer of goods has control: They include:

- the operator is a servant of the hirer;
- the hirer directs the course of the task being undertaken, that is, the hirer determines what work the goods are to perform, where it is to work and the period of its operation;
- the hirer is liable for any negligence of the operator or damage caused while the goods are in use;
- the hirer makes positive arrangements for the security of the goods while not in use;

- the hirer has the right to dictate what is to happen to the goods when not in use; and
- the goods are used by the hirer rather than for the hirer.

96. Applying these control factors to a time charter party, some indicate that the charterer has control and others that the shipowner has control. For instance, the captain and crew are the employees of the shipowner, the shipowner insures and maintains the ship and is responsible for complying with the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code). The shipowner is also responsible for the navigation and general management of the ship. In other words, once the goods are put on board the ship the activities on the ship are under the control of the master. The shipowner is responsible for loss of cargo due to negligent navigation or the ship's unseaworthiness.

97. On the other hand, the charterer has the ship at his disposal, and determines how the ship is to be employed and when and where it is to be employed. The charterer also takes the risk of the ship being unemployed. Through the General Employment clause found in all standard time charterparties the charterer is also made responsible for loss to cargo or ship if the loss was the result of directions given by the charterer to the master.

98. It is difficult to place particular weight on any item that establishes control. However, the management of the ship and its cargo while the ship is in transit may require significant effort and attention throughout the voyage. These obligations extend not only to preserving the cargo in good condition during transit but also, in the case of noxious and otherwise 'dirty' commodities, ensuring that they are properly contained during transit to avoid pollution and other harm. These and other matters discussed under this heading may involve greater control on the part of the shipowner than the tasks undertaken by the time charterer to balance the scale in favour of the service argument. The control factors clearly support a finding that a voyage charterparty is a contract for services and a demise charterparty a lease.

99. The **concurrent use factor** favours a finding that a time charterparty is a lease since the charterer has exclusive rights of use during the period of the charter. There is also no concurrent use under a voyage charterparty but the shipowner is likely to use the ship to carry the goods of different shippers on different voyages. The demise charterer has exclusive possession and use of the ship thus indicating a lease.

100. The **possessory or economic interest factor** has some similarities to the physical possession factor. The Committee Reports on section 7701(e) of the US Code suggests that 'possessory or economic interest' is established by facts that show:

(a) the property's use is likely to be dedicated to the recipient for a substantial portion of the useful life of the property;

(b) the recipients shares the risk that the property will decline in value;

(c) the recipient shares in any appreciation in the value of the property;

(d) the recipient shares in savings in the property's operating costs; or

(e) the recipient bears the risk of damage to or loss of the property.

101. Generally speaking time charters would not extend over a substantial portion of the useful life of the ship although there may be some that do. Demise charterparties may be in a similar position while voyage charterparties normally extend to a single voyage. The charterers under each type of charterparty would also not share in any decline or appreciation in the value of the ship. In the main, damage or loss of the ship is borne by the shipowner or demise charterer. However, where the damage or loss results from directions given by a time charterer under the General Employment clause the time charterer indemnifies the shipowner for such damage or loss.

102. On the other hand, the operating costs of the ship are shared between the shipowner and time charterer and wholly incurred by the shipowner under a voyage charterparty and by the demise charterer under a demise charterparty. The following **Table** shows how the total costs of operating a ship are apportioned and whether it is the shipowner (S), shipper or the charterer (C) who bears them under a bill of lading, voyage charter, time charter (TC) and demise charter (BB). It needs to be borne in mind that the terms and condition of a charterparty may vary and may contain provisions to the contrary. Further, costs are likely to vary over time and according to the type of ship involved. As is demonstrated by the **Table**, the time charterer bears the voyage costs and cargo handling costs which, are about 35% of total costs. The shipowner bears other operating costs which, are about 25% of total costs.[31] The operating costs are borne by the

[31] See *Maritime Economics*, by Martin Stopford, second edition, New York Routledge 1997 chapter 5; Open Registry Shipping *A Comparative Study Of Costs And Freight Rates*, by S.R. Tolofari, UK Gordon And Breach Science Publishers.

shipowner or demise charterer respectively under voyage and demise charterparties.

Table

Cost Item	% of total cost	Bill of lading	Voyage charter	TC	BB
Operating Crew, stores, insurance, routine repair & maintenance, administration	**25%**	**S**	**S**	**S**	**C**
Voyage Fuel, port dues, tugs, pilotage, agency fees, canal dues	**35%**	**S**	**S**	**C**	**C**
Maintenance Dry docking and special surveys	**<1%**	**S**	**S**	**S**	**C**
Cargo handling Loading & unloading	**<1%**	**S**	**S**	**C**	**C**
Capital Depreciation	**39%**	**S**	**S**	**S**	**S**

103. A weighing of the above factors would tend to favour a finding that time charterparties are contracts for services and demise charterparties are leases. The possessory or economic interest factor clearly establishes that a voyage charterparty is a contract for services.

104. However, the economic benefit derived from the right to exploit the ship would also need to be considered and on the view expressed by Lord Hobhouse in *Whistler International Limited* on the economic aspect of a time charterparty this is clearly with the time charterer. Furthermore, in a practical sense one could argue that the time charterer does have possession or possessory interest. In the *Venore Transportation Company* case[32] the United States Court of Appeal at p. 711 made the following observation on the possessory interest under a time charterparty:

[32] *Venore Transportation Company v. M/V Struma*, 583 F.2d 708 (1978)

> 'It is only in a highly technical sense that the time charterer may be said not to be in possession of the vessel. It is a consequence of the distinction between a demise of a vessel under a bare boat charter and a time charter under which the owner furnishes the master, officers and crew, together with certain stores, supplies, insurance and taxes. But the time chartered vessel is under the direction of the charterer. The vessel sails when and where the charterer directs, carries what cargo the charterer provides, and the master is specifically required to comply with the orders of the charterer in such things as the selection and appointment of agents. The charterer is authorised to sub-charter the vessel, but so long as it is operating the vessel for its own account and profit, it is only in a highly technical sense that it may be said that the charterer has no possessory interest in the vessel.'

105. As regards the **risk for non-performance**, under a service contract the service provider bears the risks of substantially diminished receipts or substantially increased expenditures if there is non-performance by the service provider or the property. Under a time and demise charterparty the shipowner is paid a fixed sum of 'hire' irrespective of whether the ship is employed or laid off. The risk of finding employment for the ship is with the charterer not the shipowner. The charterer also bears the risk of delay caused by such factors as bad weather, congestion in ports or strikes of stevedores. However, if the shipowner does not perform his navigational (transportation) responsibilities under a time charterparty he will not be entitled to be paid the 'hire'. Thus the risk of the property not performing is borne by the charterer under both a time and demise charterparty and by the shipowner under a voyage charterparty. The risk of not providing the transportation services under a time or voyage charterparty is borne by the shipowner. The shipowner does not provide transportation services under a demise charterparty.

106. In respect of **the rental value of property relative to total contract price factor**, the Committee Reports on section 7701(e) of the US Code provide that if the total contract price reflects substantial costs that are attributed to items other than the use of the property subject to the contract, then the contract more closely resembles a service contract. Conversely, the fact that the total contract price is based principally on recovery of the costs of the property is indicative of a lease. A contract that states charges for services separately from charges for use of property is indicative of a lease.

107. The **Table** above contains the costs that a shipowner would take into account when calculating the amount of 'hire' to be paid by a time charterer. It would include the Operating costs, the Maintenance costs and Depreciation (the latter being costs attributable to the use of the property). The Operating costs would constitute 39% of the sum of these costs. While such costs may be considered to be substantial, they are not as high as the Depreciation component, which is 61% of the said costs.

108. Under a demise charterparty the hire charge would reflect the annual cost of the ship (represented by the depreciation component) since all the operating costs are borne by the charterer.

109. It is emphasised that the factors listed above are not an exclusive list; a particular factor may be insignificant in the context of any given case and that the presence or absence of any particular factor may not be determinative in every case. Other factors such as the significance or uniqueness of the asset may also assist with the characterisation question. A high level of skills is involved in operating a ship and the shipowner through the master and crew acts as a carriage of goods specialist.

110. Thus, a weighing of the totality of the factors discussed above favours a finding that a standard time charterparty is a contract for services. On the other hand, a preponderance of the factors clearly establishes that a standard demise charterparty is a lease and a standard voyage charterparty is a contract for services.

Domestic meaning

111. The meaning of the expression 'the use of, or the right to use' has been considered by several case authorities and various ATO Rulings[33]. As explained in various cases, the term 'use' is a word of 'wide import' and its meaning in any particular case will depend to a great extent upon the context in which it is employed.[34] The authorities in which the courts have explained the meaning of 'use' in particular contexts make it difficult to apply any general rule to the context of the definition of 'royalty'.

[33] See Taxation Rulings TR 95/32 and IT 2660.

[34] *Ryde Municipal Council v. Macquarie University* (1978) 139 CLR 633 as per Gibbs ACJ at 637; *Council of the City of New Castle v. Royal Newcastle Hospital* (1956-57) 96 CLR 493 as per Taylor J at 515.

112. There are several domestic tax cases which have given the terms 'use' and 'the right to use' a wide meaning; the latter term picking up cases where there is no grant of possession.[35] These cases were concerned with the investment allowance provisions under subdivision B of Division 3 of Part III (ITAA 1936). They may be distinguished on the basis that the objective of the legislation was to restrict the tax concession to taxpayers who kept both the property and the exclusive right to use it.

113. On its face, the domestic definition of 'royalty' provides little guidance. However, if the domestic meaning of 'royalty' is affected by the meaning attributed to such a term under the Royalty Articles of Australia's DTAs that meaning would prevail. As a general rule of statutory interpretation, if a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of the domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way [36]. In Taxation Ruling TR 98/21 at paragraph 24 the ATO accepts that the domestic meaning of 'royalty' as it relates to equipment leasing is intended to have the same meaning as the equivalent part of the definition in the UK tax treaty from which it is derived.

114. Therefore, the treaty meaning of the expression 'use of, or the right to use' as discussed in paragraphs 81-110 above should also be adopted when interpreting the domestic tax definition of 'royalty' in subsection 6(1) ITAA 1936. The consequence of this is that time and voyage charterparties will be treated as contracts for services for the purposes of the definition of 'royalty' in both the Royalty Article of a DTA as well as the domestic definition of 'royalty' in subsection 6(1) ITAA 1936. Payments made thereunder are not subject to RWT. On the other hand, it has been the longstanding view under both treaty and domestic law that a demise charterparty is akin to a lease and therefore payments thereunder are subject to RWT.

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[35] *Tourapark Pty Ltd v. FCT* (1982) 12 ATR 842; 82 ATC 4,105 (as per Aickin J at ATR 850 and ATC 4,111); *Hamilton Island Enterprises Pty Ltd v. FCT*, (1982) 43 ALR 519; 13 ATR 220; 82 ATC 4302; *Kirby v. FCT,* 87 ATC 4503; 18 ATR 839

[36] As per Brennan CJ in *Applicant A v. Minister for Immigration and Ethnic Affairs* (1977) 190 CLR 225, at 230-231.

The issue of apportionment and the application of paragraph 6(1)(d) (ITAA 1936) of the definition of 'royalty'

115. It is recognised at paragraph 25 of IT 2660 that: 'Payments for services rendered and work done are not royalties unless the services are ancillary to, or part and parcel of, enabling relevant…machinery or equipment to be …used'.

116. The definition of the term 'royalty' under both the Royalty Articles and domestic law adopts, the use of the expression, 'to the extent to which', which is the principle of apportionment. This principle is also recognised in paragraph 35 of IT 2660.

117. However, as the view taken in this Ruling is that a time and voyage charterparty is a contract for rendering services and a demise charterparty is a contract for the lease of a ship the question of apportionment and the application of the 'ancillary and subsidiary' test in paragraph 6(1)(d) would not arise with regard to charterparties based on the standard forms.

118. The question of apportionment and the application of the 'ancillary and subsidiary' test could arise in those cases where the charterparty used is one which is materially different to the standard forms of charterparties referred to in paragraph 26 and additional services or equipment are provided. In these cases, a further analysis of the nature and purpose of the charterparty and what is being provided thereunder will need to be made.

Examples

Example 1

119. Nigerian shipowner A enters into a charterparty with Australian resident charterer C whereby A agreed to let and C agreed to hire the ship for four months. The charterer is to provide and pay for provisions and wages of master, officers, engineers and crew. Owner to pay insurance and maintain steamer in an efficient condition during service. Charterer to provide and pay for coal, port charges, pilotage, etc. Payment for use and hire of ship to be at the rate of $300,000 per calendar month, hire to continue until delivery of ship to owners, unless lost. Owner had option of appointing chief engineer. C appointed and paid the master, officers and crew; A appointed chief engineer. A was registered as owner and managing owner.

120. The charterparty in this case is a demise charterparty. A has parted with the possession and control of the ship since in the main the master and crew are the servants of the charterer. The monthly hire of $300,000 is subject to RWT.

Example 2

121. A bulk carrier owned by O of Panama is time chartered to C of the Cayman Islands who in turn sub-charters the vessel to an Australian coal exporter for the carriage of 150,000 tons of coal from Newcastle to Indonesia. The cargo takes up the whole carrying capacity of the carrier. The freight to be paid for the voyage is calculated at the rate of $10 per ton. The master and crew are the servants of O. The master issues a bill of lading in respect of the cargo to be carried as agent of the time charterer (i.e. a charterer's bill of lading).

122. In this example, the arrangement between the time charterer and the exporter of coal is a voyage charterparty. There is a contract for the carriage of the coal between C and the Australian coal exporter as evidenced by the voyage charterparty. The bill of lading in this case acts only as a receipt and a document of title. The freight payable under the voyage charterparty is not subject to RWT.

Example 3

123. Shipowner A enters into a charter with charterer C that his ship being staunch, and so maintained by owners shall be placed under the direction of the charterer for conveyance of goods within specified limits. The ship is let for six months for the sole use and benefit of the charterers and for a specified amount of hire. Charterers are to have the whole reach of hold and usual places of loading with room being reserved to owners for crew. The Captain is to use dispatch in prosecuting the voyage; crew to render customary assistance in loading; captain to sign bills of lading and to follow the instructions of the charterers. Fuel to be paid by charterers, owners paying for ship's stores and crew wages. Captain to furnish charterers with log. Ship to be returned at end of period by charterers.

124. The facts of this case indicate that the charter is a time charterparty. The amount of hire payable under the charterparty will not be subject to RWT.

Detailed contents list

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

	Paragraph
What this Ruling is about	**1**
Class of person/arrangement	1
Issues Discussed in the Ruling	4
Background	**7**
Liability for royalty withholding tax	7
Shipping trade practice	10
Ruling	**20**
Date of effect	**23**
Explanations	**24**
Shipping law and practice on the nature and purpose of charterparties	24
The bill of lading contract of carriage	27
Voyage charterparty	34
Demise charterparty	41
Time charterparty	44
Character of payments under charterparties - distinction between 'freight' and 'hire'	61
Liability to pay RWT	72
The meaning of the expression 'use of, or the right to use' in a taxation context	81
Treaty meaning of 'royalties'	81
Domestic meaning	111
The issue of apportionment and the application of paragraph 6(1)(d) (ITAA 1936) of the definition of 'royalty'	115
Examples	**119**
Example 1	119
Example 2	121
Example 3	123
Detailed contents list	**125**

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Previous draft:

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Related Rulings/Determinations:

IT 2660; TR 92/1; TR 92/20; TR 95/32; TR 97/16 TR 98/21; TR 2001/13

Subject references:

- bareboat charter
- charterparties
- demise charter
- dry lease
- equipment leasing
- freight
- hire
- royalty
- royalty article
- royalty withholding tax
- right to use
- services
- time charter
- use
- voyage charter
- wet lease

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 6(1)(b)
- ITAA 1936 128B
- ITAA 1936 128B(2B)
- ITAA 1936 128B(2B)(a)
- ITAA 1936 128B(2B)(a)(ii)
- ITAA 1936 128B(2C)
- ITAA 1936 128B(2C)(a)
- ITAA 1936 128B(2C)(b)(i)
- ITAA 1936 128B(5A)
- ITAA 1936 Div 3 Subdiv B Pt III
- International Tax Agreements Act 1953 17A(4)
- Carriage of Goods by Sea Act 1991
- U.S Internal Revenue Code 7701(e)
- TAA 1953 Part IVAAA

Case references:

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- Australasian United Steam Navigation Co Ltd v. The Shipping Control Board (1945) 71 CLR 508; (1945) 19 ALJ 353; (1946) ALR 82;
- Baumwoll Manufactur von Carl Scheibler v. Furness [1893] AC 8
- Brambles Australia Ltd v. Commissioner of Taxation (NT) 93 ATC 4888; (1993) 26 ATR 587
- Corps v. Owners of the Paddle Steamer Queen of the South (The Queen of the South) [1968] P 449, [1968] 1 All ER 1163
- Council of the City of New Castle v. Royal Newcastle Hospital (1956-57) 96 CLR 493; (1957) 31 ALJ 20; (1957) ALR 277
- Federal Commerce And Navigation Ltd v. Molena Alpha Inc. (The 'Nanfri') [1979] 1 Lloyd's Rep 201 (HL); [1978] 2 Lloyd's Rep 132 (C.A.); (1979) AC 757
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- Gatoil International Inc. v. Arkwright-Boston Manufacturers Mutual Insurance Co. [1985] AC 255;
- Hamilton Island Enterprises Pty Ltd v. FCT, (1982) 43 ALR 519; 13 ATR 220; 82 ATC 4302
- Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc (2000) 173 ALR 263; (2000) FCA 660
- Italian State Railways v. Mavrogordatos [1919] 2 K.B. 305
- Itex Itagrani Export S.A. v. Care Shipping Corporation and Others (The 'Cebu' No. 2) [1990] 2 Lloyd's Rep. 316; (1993) QB1; (1993) 3 WLR 609
- Kirby v. FCT, 87 ATC 4503, 18 ATR 839

- Laemthong International Lines Co Ltd v. BPS Shipping, (1997) 190 CLR 181; (1997) 72 ALJR 129; (1997) 149 ALR 675
- R. v. Judge of the City of London Court (1883) 12 QBD 115
- Rodoconachi Sons & Co v. Milburn Brothers (1886) 18 QBD 67
- Ryde Municipal Council v. Macquarie University (1978) 139 CLR 633; (1978) 53 ALJR 179; (1978) 23 ALR 41
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- The Alina (1880) 5 Ex D 227;
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- Venore Transportation Company v. M/V Struma, 583 F. 2d 708 (1978);
- Whistler International Limited v. Kawasaki Kisen Kaisha Limited [2000] 1 AC 638

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