



TR 2005/8 - Income tax: the meaning of particular terms in the Government Service Articles of Australia's tax treaties

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Taxation Ruling

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

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Preamble

The number, subject heading, **What this Ruling is about** (including **Class of person/arrangement** section), **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. 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.

[Note: This is a consolidated version of this document. Refer to the ATO Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

What this Ruling is about

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

- a. the term 'Remuneration (or salaries, wages and other similar remuneration)^{A1}, other than a pension or annuity, paid by a Contracting State or a political subdivision or local authority of that State in respect of services rendered in the discharge of governmental functions' where that term appears in the GSA of a tax treaty;
- b. the term 'Remuneration (other than a pension or annuity) paid by one of the Contracting States or by a political or administrative subdivision of that State or by a local authority of that State to any individual in respect of services rendered to that State or subdivision or authority' where that term appears in the GSA of a tax treaty;
- c. the term 'Wages, salaries and similar remuneration including pensions, paid from funds of one of the Contracting States, of a state or other political subdivision thereof or of an agency or authority of any of the foregoing for labour or personal services performed

^{A1} This wording is consistent with the GSA in the OECD Model Tax Convention as at November 2017.

as an employee of any of the above in the discharge of governmental functions to a citizen of that State' as it appears in the United States Convention.¹

d. [Omitted.]

2. Those tax treaties that use the terms in paragraph 1.a. and 1.b. in their GSAs are described as Category 1 and Category 2 tax treaties respectively.^{2A} For the purposes of this Ruling, those tax treaties which contain similar words in their GSAs to those in the terms stated at paragraphs 1.a. and 1.b are included within the Category 1 and 2 tax treaties
3. References to the words 'a Contracting State or a political subdivision or local authority of that State' or any variations of this in Australia's tax treaties shall, for the purposes of this Ruling, be referred to as either 'government' or 'governments'.
4. This Ruling focuses on the meaning of particular words contained within the terms referred to in paragraph 1. In doing so, it assists in defining the scope of the GSA in those tax treaties which use those words. In the case of Category 1 tax treaties, the key terms are: 'Remuneration (or salaries, wages and other similar remuneration), ... paid by (a government) ...in respect of services rendered in the discharge of governmental functions'. In the case of Category 2 tax treaties, the key terms are 'Remuneration ...paid by (a government) in respect of services rendered to that State.'
5. Accordingly, the Ruling does not focus on the meaning of particular words that may appear in the GSAs of Australia's tax treaties like 'pension or annuity', 'political subdivision' or a 'local authority thereof' or variations of those terms. Also, the Ruling does not deal with certain other interpretative issues governing the scope of the GSA such as the trade and business exception, whether pensions or annuities fall within the scope of the GSAs or issues surrounding locally engaged staff. These matters are referred to only where they assist to give meaning to the terms that are dealt with in the Ruling.
6. In dealing with particular aspects of the scope of the various GSAs in Australia's tax treaties, this Ruling provides guidance as to whether the GSA in the relevant tax treaty applies to the class of person covered by this Ruling.
7. The Ruling also identifies those tax treaties where the context may dictate a particular meaning to be given to the terms listed above.

¹ See Article 19 of the United States Convention given the force of law by the *International Tax Agreements Act 1953* (Agreements Act).

² [Omitted.]

^{2A} Note: some treaties use Category 1 wording in the first paragraph of the GSA and Category 2 wording in a later paragraph of the GSA, (for example the treaties with Austria and China). For the purposes of this Ruling, a treaty is categorised according to the wording used in the first paragraph of the GSA.

Class of person/arrangement

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

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

Background

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

10. Essentially, the different sets of words can be traced to changes in Article 19 of the OECD Model Tax Convention on Income and Capital ('OECD Model GSA').

11. The words used in Category 1 tax treaties are based on the 1963 OECD Model GSA, which used the term 'for services rendered in the discharge of governmental functions'. The 1977 OECD Model GSA altered this term to 'for services rendered to that State'. This form of words is reflected in the Category 2 tax treaties. In addition, the GSAs in other tax treaties, most notably the US Convention, rely on other forms of words.

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

12. The wording used in the GSAs of Australia's tax treaties has created some uncertainty surrounding the scope and meaning of the GSAs. This uncertainty essentially relates to two types of scoping issues. Firstly, whether the GSAs in Australia's tax treaties apply only to employees of a government or extend to contractors. Secondly, whether the meaning of the terms 'in discharge of governmental functions' and 'services rendered to that State' restrict the scope of the GSA to particular types of services or labour.

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

Date of effect

14. This Ruling applies both before and after its date of issue. However, the Ruling does 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 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Ruling

Category 1 tax treaties

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

- The terms 'remuneration' or 'salaries, wages and other similar remuneration' refer to amounts paid by a government to employees or office holders.
- With the exception of the Russian Agreement,⁴ the term 'services rendered in discharge of governmental functions' or such similar wording, when read with the other words of the GSA, is a reference to services rendered by the employee or office holder in completing or performing any functions undertaken by a government.
- In the case of the Russian Agreement, the '*consensus ad idem*' struck between the bilateral parties restricts the term 'services rendered in discharge of governmental functions' to core governmental functions undertaken by a government and completed or performed by the employee or office holder. In this context, examples of

⁴ See Article 19 of the Russian Agreement, given the force of law by the Agreements Act.

these 'core' functions include police, defence, foreign affairs and the judiciary.

Category 2 tax treaties

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

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

Article 19 of the United States Convention

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

- The term 'wages, salaries and similar remuneration', when read with other words of the Article, particularly the words 'for labour or personal services performed as an employee', refer to amounts paid by a government to employees or office holders.
- The term 'in the discharge of governmental functions', when read with the Article as a whole, is restricted to core functions undertaken by a government and completed or performed by the relevant employee or office holder. For the purposes of the United States Convention, 'core' functions refer to those functions that are carried on solely by a government and activities that directly support the carrying out of those functions. In this context, examples include military service, diplomatic service and tax administration.

18. [Omitted.]

Summary

19. The terms 'remuneration' and 'salaries, wages and other similar remuneration' in the GSAs of Australia's tax treaties referred to above, apply to amounts paid by a government to employees or office holders.

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

Explanation

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

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

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

24. Consequently, the different terms contained in GSAs are grouped in this Ruling into categories reflecting particular differences in wording. Treaty interpretation principles, as set out in Taxation Ruling TR 2001/13 are applied in determining the meaning of these terms.

Undefined terms

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

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

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

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

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

the country applying the Convention, unless the context otherwise requires.⁸

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

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

Category 1 tax treaties

29. This explanation focuses on the meaning of the following terms as they relate to the scope of the GSAs in Australia's tax treaties:

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

The meaning of 'Salaries, wages and other similar remuneration' and 'remuneration'

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

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

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

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

33. The term 'salaries, wages and other similar remuneration', instead of 'remuneration', has been used in the GSAs of Australia's

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

tax treaties negotiated since the OECD Model GSA was similarly amended in 1994.⁹

34. Paragraph 2.1 of the Commentary as at November 2017 on the OECD Model GSA specifies:

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

35. Paragraphs 35 and 36 of the Introduction to the OECD Model and Commentary as at November 2017 states that amendments 'intended to simply clarify, not change the meaning of the Articles or the Commentaries' are 'normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations. As specified in paragraph 108 of TR 2001/13, this type of change is intended to reflect the fact that the Commentaries are usually expressed as reflecting a common view as to what the meaning is and has always been.

36. In this context, paragraph 2.1 of the Commentary on the OECD Model Commentary as at November 2017, when read with paragraph 2 of the Commentary on the 1963 OECD Model GSA, suggests that both 'remuneration' and 'salaries, wages or other similar remuneration' are limited to amounts paid to State employees, rather than extending to persons rendering independent services to a State.

37. This view limiting the scope of the GSA to employees is supported by the words of GSAs in Category 1 tax treaties. These GSAs provide that other Article(s) and not the GSA will apply to salaries, wages and other similar remuneration paid in respect of services rendered in connection with any trade or business carried on by a government. A current example of the other Articles specified is the Income From Employment Article (IFEA).^{9A}

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

⁹ An example of this wording is set out at Article 19(1) of the Vietnamese Agreement, given the force of the law by the Agreements Act.

^{9A} Before 2000, the IFE Article was titled 'Dependent Personal Services'. The title was changed to reflect the elimination of Article 14, which referred to 'Independent Personal Services', the deletion of which had the intended effect of income from professional services or other activities of an independent character being dealt with under Article 7.

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

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

40. Finally, it is noted that the heading of the GSAs in most of our tax treaties is 'Government Service' rather than 'Government Services'.¹² In *Thiel's*¹³ case, McHugh J held that the heading to Article 7 must be taken into consideration in determining the meaning of the term 'profits'. Applying this principle for present purposes, the use of the word 'service' rather than 'services' in the heading is consistent with an interpretation that limits the scope of the GSA to contracts 'of service', not to contracts 'for services'; that is, to persons who render service as an employee.

41. Accordingly, for the reasons stated above, the meaning to be given to the term 'remuneration' or 'salaries, wages or other similar remuneration' in the GSAs of Category 1 tax treaties is one that is limited to amounts paid by government to employees. The term does not include amounts paid by government to persons who are not employees, including contractors, consultants and others that render independent personal services to government.

Office holders

42. It is evident from Australia's domestic taxation law that there are a number of different categories of individuals that are not employees under common law¹⁴ yet still receive amounts paid by a government. Examples include Members of Parliament, judges and other holders of statutory office or positions. They are collectively referred to as 'office holders' in this Ruling.

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

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

¹² In the United States Convention, the heading of the GSA is 'Governmental Remuneration'. In the Russian Agreement, the heading is 'Income from Government Service'. There is no heading to the GSA in the Singapore Agreement that names the Article.

¹³ *Thiel v. Federal Commissioner of Taxation* (1990) 64 ALJR 516; (1990) 94 ALR 647; (1990) 90 ATC 4717; (1990) 21 ATR 531; (1990) 171 CLR 338.

¹⁴ For example, see the definition of 'eligible persons' in the former section 221A of the *Income Tax Assessment Act 1936*.

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

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

The meaning of 'in the discharge of governmental functions'

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

The purpose of the GSA

47. Typically, a GSA allocates a sole taxing right to the government that is the paying authority. Paragraph 2 of the Commentary on the OECD Model GSA as at November 2017 states:

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

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

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

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

50. The GSA (Article 19) of the 1963 OECD Model, upon which the wording of the GSAs of Category 1 tax treaties are based, referred to 'remuneration, ..., paid by, or out of funds created by, [government] to any individual in respect of services rendered to that [government] in the discharge of functions of a governmental nature...'.¹⁵

¹⁵ It is noted that Australia's tax treaties use the term 'in discharge of governmental functions'. Despite this difference in wording, it is considered that the two terms have the same substantive meaning.

51. Paragraph 1 of the OECD Model Commentary on the GSA as at November 2017 states the following in relation to the scope of that GSA:

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

52. The scope of the Article has developed as the increase in governmental activity abroad has developed. In this regard, there is no indication that the 'governmental functions' language was intended to have any limiting effect during this development (apart from the trade or business exception).¹⁶

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

The meaning of the term when read in the context of the Article as a whole

The trade or business exception

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

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

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

The provisions regarding locally engaged staff

57. The GSAs in Category 1 tax treaties also contain provisions in relation to 'locally-engaged staff'. Where these provisions apply, the

¹⁶ Contracting States can negotiate the scope of the GSA (see paragraph 1 of the Commentary on the 1963 OECD Model GSA).

GSAs still have application but sole taxing rights are not allocated to the paying State.

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

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

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

Domestic law and the meaning of the term

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

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

63. Courts have expressed doubt about the ability to clearly distinguish between different types of functions governments undertake. Because of this inability to draw a distinction, a court could consider the unqualified term 'governmental' to cover everything a government does. These sentiments were expressed by Latham CJ in *South Australia v. The Commonwealth*:¹⁷

There is no universal or even general opinion as to what are the essential functions, capacities, powers, or activities of a State. Some would limit them to the administration of justice and policy and necessary associated activities. There are those who object to a State action in relation to health, education, and the development of natural resources. On the other hand, many would regard the provision of social services as an essential function of government... In a fully self-governing country where a parliament determines legislative policy and an executive government carries it out, any activity may become a function of government if parliament so

¹⁷ (1942) 65 CLR 373 at 423.

determines. It is not for a court to impose upon any parliament any political doctrine as to what are and what are not functions of government, or to attempt the impossible task of distinguishing, within functions of government, between essential and non-essential or between normal or abnormal. There is no sure basis for such a distinction. Only the firm establishment of some political doctrine as an obligatory dogma could bring about certainty in such a sphere, and Australia has not come to that. [emphasis added]

64. Other Court decisions have also expressed similar sentiments and have indicated that any activity may become a function of government if Parliament so determines.¹⁸

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

66. In *Ex Parte Professional Engineers' Association*¹⁹ Taylor J, rejecting an argument that something that is governmental in nature cannot also be industrial, stated:

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

¹⁸ See also per *Ex Parte Professional Engineer's Association* (1959) 107 CLR 208, at 247 and 272-273 per Windeyer J who was quoted with approval in *Queensland Electricity Commission v. The Commonwealth* (1985) 159 CLR 192, at 214 per Mason J.; *Victoria v. The Commonwealth* (1970-1971) 122 CLR 353 at 382-383 per Barwick J; *Committee of Direction of Fruit Marketing v. Australian Postal Commission* (1980) 144 CLR 577 at 594 per Mason and Wilson JJ; *SGH Ltd v. FC of T* (2002) 210 CLR 51, at 87 per Kirby J.; *DFC of T v. State Bank of New South Wales* (1992) 92 ATC 4079 at 4,084 per Griffith CJ.; *Australian Industrial Relations Commission, Re v. Australian Teacher's Union* (Unreported, High Court of Australia, Mason CJ, Brennan, Deane, Dawson, Gaudron & McHugh JJ, 7 April 1995).

¹⁹ (1959) 107 CLR 208 at 260-261.

67. Also, Isaacs J in *Federated State School Teachers' Association of Australia v. State of Victoria*²⁰ described 'primary and inalienable functions of a constitutional Government' as those 'impossible of performance by private individuals, and appertain solely to the Crown in its regal character.' His Honour also drew a line between 'inalienable' functions and other functions.²¹

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

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

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

The Russian Agreement

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

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

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

73. The Vienna Convention²² permits reference, *inter alia*, to supplementary materials in order to establish the meaning of words used in a treaty, particularly when those words are open to different interpretations.

74. The Explanatory Memorandum accompanying the *International Tax Agreements Amendment Act (No. 1) 2002*, the law

²⁰ (1929) 41 CLR 569 at 584.

²¹ At 585.

²² See Articles 31(3) and 32 of the Vienna Convention on the Law of Treaties as outlined in paragraphs 95 to 97 of Taxation Ruling TR 2001/13.

which incorporated the Russian Agreement into Australian domestic tax law, states:

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

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

Category 2 tax treaties

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

Employees and office holders

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

78. Therefore, the term is to be interpreted in accordance with meaning given to it in Category 1 tax treaties; that is, it applies to amounts paid by government to employees and office holders. The term does not apply to amounts paid by government to persons who are not employees or office holders, for example, contractors or consultants (see paragraphs 30 to 41).

'Services rendered to that State'

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

80. Paragraph 5 of the OECD Model of the Commentary on Article 19 as at November 2017 states:

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

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

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

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

Article 19 of the United States Convention

Employees and office holders

84. Article 19 of the United States Convention is to be interpreted in a manner consistent with the GSAs in Category 1 and 2 tax treaties in that employees and office holders fall within the scope of the GSA.

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

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

The meaning of 'in discharge of governmental functions'

87. In order to establish the meaning of the words used in a treaty, the Vienna Convention²³ permits reference, *inter alia*, to any subsequent practice regarding the application of the treaty that establishes such an agreement.

88. Whilst the words of Article 19 of the United States Convention are open to different interpretations, the term 'in discharge of governmental functions' is understood in the United States²⁴ to 'encompass functions traditionally carried on by a government. It would not include functions that are commonly found in the private sector (for example, education, health care, utilities). Rather, it is limited to functions that generally are carried on solely by the government (for example, military service, diplomatic service, tax administrators) and activities that directly support the carrying out of those functions'.

89. Australia has also adopted this interpretation of the term 'in discharge of governmental functions' in the context of the United States Convention. The subsequent practice of both countries in relation to the interpretation of Article 19 of the United States Convention demonstrates bilateral acceptance of the position limiting the scope of the term 'in discharge of governmental functions' to particular core, traditional or inalienable functions discharged by government.

90. The absence of provisions in Article 19 of the United States Convention concerning locally engaged staff and business and trade carried on by government²⁶ is also consistent with the view that both countries intended that the term be interpreted in the manner specified at paragraph 88.

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

92. [Omitted.]

93. [Omitted.]

94. [Omitted.]

95. [Omitted.]

96. [Omitted.]

²³ See Article 31(3)(b) of the Vienna Convention as outlined in paragraphs 95 to 97 of Taxation Ruling TR 2001/13.

²⁴ See the US Treasury Department Technical Explanation to the 1996 US Model Income Tax Convention.

²⁵ [Omitted.]

²⁶ For examples of these types of provisions in GSAs see Articles 19(1)(b) and 19(2)(b) of the OECD Model Tax Convention on Income and Capital published November 2017.

Examples

Example 1 – Category 1 tax treaty

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

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

Example 2 – Russian Agreement

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

100. In accordance with the *consensus ad idem* of the Russian Agreement, only core or inalienable functions of government fall within the scope of the GSA. As teaching is not considered to be a core or inalienable function of government, the services Natasha rendered to her country's government are not in the discharge of governmental functions for the purposes of Article 19(1) of the Russian Agreement. Instead, the remuneration would fall for consideration under Article 15 of the Russian Agreement. As Natasha teaches in Australia and is present here for more than 183 days, Australia may tax that part of Natasha's salary paid in respect of the teaching duties she performed in Australia.

Example 3 – Category 2 tax treaty

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

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

Example 4 – United States Convention

103. Jane is an Australian resident employed in Australia as a middle manager by a local government electricity supplier. As part of

her duties, she goes to the United States for an eleven-month period to learn more about the latest technological developments.

104. Jane's activities as an employee of a utility are not a function that is carried on solely by government. Consequently, although an employee of a local government, she is not engaged in the discharge of governmental functions for the purposes of Article 19 of the United States Convention. As such, the remuneration derived by Jane for the period of her deployment to the United States is not covered by Article 19 of the United States Convention. Instead, the remuneration would fall for consideration under Article 15 of the United States Convention. Where Jane's employment is exercised in the United States, the United States may tax that part of the remuneration Jane derives that is in respect of the work done while she was in the United States. Australia may tax that part of the remuneration because Jane is an Australian resident.

105. [Omitted.]

106. [Omitted.]

Detailed contents list

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Commissioner of Taxation

25 May 2005

<i>Previous draft:</i> TR 2004/D22	the Prevention of Fiscal Evasion with respect to Taxes on Income [1988] ATS 21
<i>Related Rulings/Determinations:</i> TR 92/1; TR 97/16; TR 2001/13; TR 2006/10	- Agreement between the Government of Australia and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income [2004] ATS 4
<i>Legislative references:</i> - ITAA 1936 former 221A - TAA 1953 Pt IVAAA - International Tax Agreements Act 1953 - Agreement between Australia and the Republic of Austria for the Avoidance of Double Taxation and	- Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with

respect to taxes on income [1969] ATS 14, as amended by the Singaporean protocol (No. 1) [1990] ATS 3 and the Singaporean protocol (No. 2) [2010] ATS 26

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