TR 2014/2 - Income tax: the application of the ships and aircraft article of Australia's tax treaties to taxable income derived under section 129 of the Income Tax Assessment Act 1936 by a non-resident shipowner or charterer

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Taxation Ruling

Income tax: the application of the ships and aircraft article of Australia's tax treaties to taxable income derived under section 129 of the *Income Tax Assessment Act 1936* by a non-resident shipowner or charterer

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What this Ruling is about

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

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

[2] This Ruling considers the treaties and other agreements (including any amending protocols) currently described in section 3AAA of the *International Tax Agreements Act 1953* (Agreements Act). For ease of reference this Ruling refers to them as 'Australia's tax treaties'.

Class of person/arrangement

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

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

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

Background

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

4. The scope of section 129 of the ITAA 1936 is considered in detail in Taxation Ruling TR 2006/1 *Income tax: the scope of and nature of payments falling within section 129 of the Income Tax Assessment Act 1936*. Suffice to say that section 129 can apply to amounts such as freight under a 'bill of lading' or 'voyage charterparty', or hire under a 'time charterparty',[6] that are paid or payable by a shipper to a shipowner or charterer, as well as fares (also called 'passage money') paid or payable by passengers. Amounts such as 'demurrage' and 'dispatch (or despatch) money' can also be taken into account in determining taxable income under section 129.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The profits to which the provisions of paragraphs 1 and 2 apply include profits from the operation of ships or aircraft derived through participation in a pool service or other profit sharing arrangement.

4. For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in a Contracting State and are discharged at a place in that State shall be treated as profits from ship or aircraft operations confined solely to places in that State.[12]

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

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

(b) the term 'enterprise of a Contracting State' means an enterprise carried on by a resident of a Contracting State.

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

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

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[12] This is the text described as the 'standard ships and aircraft article' by Taxation Ruling TR 2008/8 (published 22 October 2008) which was contained in some of Australia's then most recent tax treaties. Refer to paragraph 11 of Taxation Ruling TR 2008/8.

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

Ruling

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

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

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

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

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

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

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

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

[16] In some treaties paragraph 1 is not limited to profits from the operation of ships or aircraft in 'international traffic'. Further, as explained at footnote 13, the definition of international traffic varies from treaty to treaty. However this does not affect the conclusions in this Ruling.

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

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

[19] However see paragraphs 21 to 23 of this Ruling in relation to the New Zealand convention.

17. In addition, profits from the carriage of passengers or goods which are shipped and discharged solely in Australia[20] are specifically treated as profits from ship operations confined solely to places in Australia under paragraph 4 of the standard ships and aircraft article.[21]

Round trip cruises from Australia with ports of call overseas

18. Paragraph 4 of the standard ships and aircraft article treats section 129 income from the carriage of passengers on a 'round trip cruise', starting (with passengers embarking) and ending (with passengers disembarking) in Australia, as profits from ship operations confined solely to places in Australia – even if the ship travels through international waters, or (subject to paragraph 19 of this Ruling) stops outside Australia.

19. However section 129 income from the carriage of passengers on a 'round trip cruise' does not constitute profits from ship operations confined solely to places in Australia if the ship stops for the purpose of enabling those passengers to disembark at a port of call outside Australia (see Example 4).

Apportionment of hire paid or payable under a time charterparty

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

New Zealand convention[22]

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

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

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

[22] [2010] ATS 10.

22. Article 8(2) of the New Zealand convention has the same practical effect as the standard ships and aircraft article in relation to section 129 income as it would equally apply to the carriage of passengers or goods on those voyages described in paragraphs 16 to 18 of this Ruling.

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

Rate limits on Australia's taxing right

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

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

United States convention[24]

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

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

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

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

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

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

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

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

28. Article 8(4) of the United States convention has the same practical effect as the standard ships and aircraft article in relation to section 129 income as it would equally apply to the carriage of passengers or goods on those voyages described in paragraphs 16 to 18 of this Ruling.

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

Italian convention[26]

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

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

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

Romanian agreement[27]

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

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

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

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

Maltese agreement[28]

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

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

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

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

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

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

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

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

Korean convention[32]

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

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

Philippine agreement[34]

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

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

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

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

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

Sri Lankan agreement[36]

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

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

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

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

Examples

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

Example 1 – carriage of goods discharged outside Australia

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

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[35] Profits from the operations of ships confined solely to places within the source State are excluded from Article 8(1) of the Philippine agreement because of the definition of 'international traffic' in Article 3(1)(k).

[36] [1991] ATS 42.

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

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

Example 2 – carriage of goods discharged in Australia

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

50. *As specifically confirmed by Article 8(4) of the Chinese Agreement, the income from the carriage of goods between Melbourne, Port Botany, Newcastle and Brisbane is derived from ship operations confined solely to places in Australia. Therefore the income will be taxed in Australia under section 129 of the ITAA 1936 as permitted by Article 8(2) of the Chinese agreement.*

Example 3 – voyage to nowhere

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

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

53. *Given the passengers are both shipped and discharged at a port in Australia (and are not discharged at any port outside Australia), Australia has the right to tax Seaco's section 129 income under Article 7(2) of the Singaporean agreement as it is derived from operations of ships confined solely to places in Australia (as specifically confirmed by Article 7(5) of the Singaporean Agreement).*

Example 4 – round trip cruise from Australia with ports of call overseas

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

55. *Although the cruise starts and ends in Australia, where the passengers are originally shipped and finally discharged, the ship also stops to enable those passengers to disembark at places outside Australia (that is, Noumea and Port Vila). Therefore Seaco's section 129 income from the carriage of these passengers does not come within Article 7(2) of the Singaporean agreement because it does not constitute profits from operations of ships confined solely to places in Australia, and neither does Article 7(5) apply to treat the income as such. Accordingly, Australia does not have the right to tax Seaco's section 129 income from the carriage of these passengers.*

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

56. *CarrierCo is a shipowner and a resident of the United Kingdom for the purpose of the United Kingdom convention. ShipperCo charters a ship from CarrierCo under a time charterparty. ShipperCo requires the fully crewed ship to transport its goods from Sydney. Of the goods that are loaded onto the ship in Sydney, 40% are unloaded in Brisbane and the remaining 60% are unloaded in the United Kingdom. CarrierCo derives section 129 income in respect of the daily hire paid by ShipperCo under the time charterparty.*

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

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

Example 6 – Korean convention

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

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

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

Date of effect

61. This Ruling applies to years of income commencing both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
28 May 2014

Appendix 1 – Explanation

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

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

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

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

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

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

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

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

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

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

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

70. Notwithstanding the exclusive residence country taxing right provided by paragraph 1, paragraph 2 of the standard ships and aircraft article provides a source country taxing right over profits from the operation of ships or aircraft to the extent that they are 'confined solely to places in that other State'.

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

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

72. Further, paragraph 4 of the standard ships and aircraft article specifically provides that profits derived 'from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in a Contracting State and are discharged at a place in that State' shall be treated as profits from ship or aircraft operations 'confined solely to places in that State'.

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[38] The relevant definition is generally contained in Article 3.
[39] Except of course where the exclusion in the international traffic definition applies, that is, where the ship or aircraft is operated solely between places in the other State.

73. The combined operation of paragraphs 2 and 4 of the standard ships and aircraft article is consistent with Australia's reservation at paragraph 38 of the Commentary on article 8 of the OECD Model where:

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

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

Application to section 129 income

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

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

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

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

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

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

79. Paragraph 4 of the standard ships and aircraft article will also apply if a ship stops at a place outside Australia otherwise than for the purpose of discharging its passengers or goods.

80. As mentioned at paragraph 74 above, paragraph 4 of the standard ships and aircraft article does not apply to the hire paid or payable under a time charterparty, however the use of a ship under a time charterparty to transport passengers or goods which are shipped and discharged in Australia, without stopping at a port outside Australia, would still constitute operations confined solely to places in Australia for the purposes of paragraph 2.[40]

Round trip cruises from Australia with ports of call overseas

81. Where passengers on a round trip cruise from Australia disembark at an intervening port of call (that is, a 'place') outside Australia, the transport or carriage of these passengers (being the relevant ship operation) is clearly not 'confined solely to places in Australia' as that phrase is ordinarily understood.[41] However paragraph 4 of the standard ships and aircraft article provides that:

> For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in a Contracting State and are discharged at a place in that State shall be treated as profits from ship or aircraft operations confined solely to places in that State.

82. Therefore the question arises as to whether this provision applies to a round trip cruise where passengers are shipped in Australia and, although they disembark at one or more foreign ports, they return to the ship to continue on the cruise until they are discharged at its destination in Australia. Paragraph 4 of the standard ships and aircraft article would apply to the carriage of these passengers if it were considered either that:

- they are not 'discharged' when they disembark at a foreign port of call (typically in situations where their luggage remains onboard and they retain access to the ship and their cabins), or
- even though they are 'discharged' when they disembark, it is sufficient for paragraph 4 to apply that they are also discharged in Australia at the end of the cruise (where they are unloaded and removed from the responsibility of the carrier).

83. However as explained below the Commissioner accepts that paragraph 4 of the standard ships and aircraft article does not operate to deem section 129 income from the carriage of these passengers to be profits from the operation of ships confined solely to places in Australia for the purposes of the source country taxing right in paragraph 2.

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[40] See paragraph 30 of Taxation Ruling TR 2008/8.
[41] Refer to paragraphs 130 to 136 of Taxation Ruling TR 2008/8 for a discussion of the meaning of 'place' in this context.

84. Australia's tax treaties do not define 'discharged' and therefore the term should be interpreted in accordance with its ordinary meaning having regard to its context and the object and purpose of the treaty.[42] When used in relation to passengers and goods on ships, both the Macquarie and Oxford dictionaries define the verb 'discharge' as meaning 'unload' and there is no other relevant maritime or technical meaning. The Commissioner considers that this meaning can apply to a temporary 'landing' of passengers where they disembark at a port of call.

85. The enquiry under paragraph 4 of the standard ships and aircraft article is whether passengers or goods have been 'shipped' and 'discharged' in Australia. In that context discharged is used as the opposite of shipped. Given that shipped, or to ship, means to put on board a ship, the word discharged is simply used to refer to the place where the relevant passengers are unloaded or landed – without distinguishing between different circumstances in which they might be landed (that is, whether it be a 'port of call' in transit, or 'finally' at an end destination). It is also noted that, in context, the words shipped and discharged are used in a physical sense; rather than to prescribe, for example, the scope of the carrier's legal obligations.

86. In light of the above the Commissioner accepts that passengers are relevantly 'discharged' at a place outside Australia if they disembark at a foreign port of call during the course of a round trip cruise from Australia. Further, in light of its object and purpose which is to define what transport is confined **solely** to places in Australia, the Commissioner accepts that paragraph 4 of the standard ships and aircraft article will only apply in respect of the carriage of passengers who are shipped and discharged **solely** in Australia (that is, without being discharged outside Australia).

87. This interpretation is consistent with the express qualification provided in Article 8(6) of the French Convention:[43]

> For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in a Contracting State and are discharged at a place in that State ***(without having been discharged outside that State***) shall be treated as profits from ship or aircraft operations confined solely to places in that State. (emphasis added)

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[42] In accordance with the approach set out in paragraphs 63 to 76 of Taxation Ruling TR 2001/13 *Income tax: Interpreting Australia's Double Tax Agreements*.

[43] It is also noted that the French language version of the Convention uses the words discharge and disembark interchangeably.

88. The emphasised words clearly contemplate that passengers or goods can be 'discharged' more than once (such as at one or more ports of call) in the course of a particular carriage. There is no reason to doubt that the word discharged in the French Convention has the same meaning as it has in Australia's other tax treaties. And although there is no express qualification in paragraph 4 of the standard ships and aircraft article consistent with that in the French Convention, the Commissioner considers that it can be inferred.

89. Paragraph 4 of the standard ships and aircraft article focuses on places where passengers or goods are shipped and discharged (as opposed to where the ship might stop for example). If these are places in the same Contracting State, it characterises the entire 'carriage' as being confined solely to places in that State. Accordingly, where passengers or goods are shipped and discharged in Australia (without having been discharged outside Australia), then regardless of whether the ship stops at a place outside Australia for some other purpose or travels through international waters, paragraph 4 applies to treat section 129 income from such carriage as profits from ship operations confined solely to places in Australia which Australia has a right to tax under paragraph 2 of the standard ships and aircraft article.

90. The Commissioner accepts for these purposes that passengers are 'discharged' at a place outside Australia if they are permitted to disembark at such a place (that is, notwithstanding that they might not actually disembark because, for example, they choose not to). It is considered unlikely that paragraph 4 was intended to distinguish in its application between passengers who actually disembark at a foreign port of call and passengers on the same cruise who do not. For income from the carriage of the passengers not to be treated as profits from operations confined solely to Australia it is sufficient that the ship stops for the purpose of enabling them to disembark at a foreign port of call.

Apportionment of hire paid or payable under a time charterparty

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

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

New Zealand convention

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

94. Article 8(2) of the New Zealand convention nonetheless has the same practical effect as the standard ships and aircraft article in relation to section 129 income as it would equally apply to the carriage of passengers or goods on those voyages explained at paragraphs 76 to 79 and 89 of this Ruling.

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

Rate limits on Australia's taxing right

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

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

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

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

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

United States convention

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

100. Also there is no equivalent to paragraph 2 of the standard ships and aircraft article dealing with ship 'operations confined solely to places in' Australia which would otherwise cover leasing profits in respect of the carriage of passengers or goods that are shipped and discharged in Australia. Therefore the question of whether Australia has a right to tax section 129 income from these leases will also fall for consideration under the business profits article.[45]

Italian convention

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

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

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

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

Romanian agreement

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

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

Maltese agreement

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

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

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

107. The Explanatory Memorandum relevant to the Maltese agreement[46] outlines the intention of Article 8(5) as follows:

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

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

Kiribati agreement and Thai agreement

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

Korean convention

109. There is no equivalent to paragraph 2 of the standard ships and aircraft article in the Korean convention dealing with profits from the operation of ships confined solely to places within the source State. And given that paragraph 1 only applies to profits from the operation of ships in 'international traffic',[47] the question of whether Australia has a right to tax section 129 income in respect of the carriage of passengers or goods that are shipped and discharged in Australia will fall for consideration under the business profits article.

Philippine agreement

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

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

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

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

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

Sri Lankan agreement

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

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

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

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

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

Table 1: The tax treaties covered by Part A of this Ruling	
Agreement or Convention[48]	**Relevant paragraph(s) of this Ruling**
Argentine agreement Austrian agreement Belgian agreement^ Canadian convention[49] Chilean convention* Chinese agreement Czech agreement Danish agreement Fijian agreement Finnish agreement* French convention*^ German agreement[50]^ Hungarian agreement Indian agreement Indonesian agreement Irish agreement Japanese convention* Malaysian agreement Mexican agreement Netherlands agreement^	14 – 24 and 67 – 96

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

New Zealand convention[51]* Norwegian convention* Papua New Guinea agreement Polish agreement* Russian agreement Singaporean agreement[52] Slovak agreement South African agreement Spanish agreement Swedish agreement Swiss agreement^ Taipei agreement Turkish convention United Kingdom convention* Vietnamese agreement * The exclusive residence country taxing right in these treaties is limited to the operation of ships in 'international traffic'. ^ Rate limit on source country taxing right, see paragraphs 24 and 96 of this Ruling.	

[51] See paragraph 21 of this Ruling. The source country taxing right in Article 8(2) of the New Zealand convention provides that 'Notwithstanding the provisions of paragraph 1, amounts paid or payable to an enterprise of a Contracting State for carriage by ship or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in the other Contracting State and are discharged at a place in that other State, or for leasing on a full basis of a ship or aircraft for purposes of such carriage, may be taxed in that other State'.

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

Table 2: The ships and aircraft articles covered by Part B of this Ruling		
Agreement or Convention	**Relevant article**	**Relevant paragraph(s) of this Ruling**
United States convention[53]	Article 8 Shipping and air transport (1) Profits derived by a resident of one of the Contracting States from the operation in international traffic of ships or aircraft shall be taxable only in that State. For the purposes of this Article, profits from the operation in international traffic of ships or aircraft include: (a) profits from the lease on a full basis of ships or aircraft operated in international traffic by the lessee, provided that the lessor either operates ships or aircraft otherwise than solely between places in the other Contracting State or regularly leases ships or aircraft on a full basis; and (b) profits from the lease of ships or aircraft on a bare boat basis, provided that such lease is merely incidental to the operation in international traffic of ships or aircraft by the lessor. (2) Profits of an enterprise of one of the Contracting States from the use, maintenance, or rental of containers (including trailers, barges, and related equipment for the transport of containers) used in international traffic shall be taxable only in that State. (3) The profits to which the provisions of paragraphs (1) and (2) apply include profits from the participation in a pool service or other profit sharing	25 – 29 and 99 – 100

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

	arrangement. (4) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise taken on board in a Contracting State for discharge in that State shall not be treated as profits from the operation in international traffic of ships or aircraft and may be taxed in that State.	
Italian convention	Article 8 Shipping and aircraft (1) Where profits are derived by a resident of one of the Contracting States from the operation of ships and the place of the effective management of the shipping enterprise is situated in that State, those profits shall be taxable only in that State. (2) Notwithstanding the provisions of paragraph (1), such profits may be taxed in the other Contracting State where they are profits from operations of ships confined solely to places in that other State. (3) The provisions of paragraphs (1) and (2) shall apply in relation to the share of the profits from the operation of ships derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organization or in an international operating agency. (4) For the purpose of this Article, profits derived from the carriage by ships of passengers, livestock, mail, goods or merchandise shipped in one of the Contracting States for discharge at another place in that State shall be treated as profits from operations of ships confined solely to places in that State. (5) If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the	30 – 32 and 101 – 103

	Contracting State in which the home harbour of the ship is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship is a resident. (6) Nothing in this Convention shall affect the operation of the Agreement between the Governments of the Contracting States for the avoidance of double taxation of income derived from international air transport signed at Canberra on 13 April 1972.	
Romanian agreement	Article 8 Ships and aircraft (1) Profits of an enterprise derived from the operation of ships or aircraft shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated. (2) Notwithstanding the provisions of paragraph 1, such profits may be taxed in the other Contracting State to the extent that they are profits derived directly or indirectly from ship or aircraft operations confined solely to places in that other State. (3) If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship is resident. (4) The profits to which the provisions of paragraphs 1 and 2 apply include profits from the operation of ships or aircraft derived through participation in a pool service or other profit sharing arrangement. (5) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise	33 – 35 and 104 – 105

	shipped in a Contracting State for discharge at a place in that State shall be treated as profits from ship or aircraft operations confined solely to places in that State.	
Maltese agreement	Article 8 Shipping and air transport (1) Profits from the operation of ships or aircraft derived by a resident of one of the Contracting States shall be taxable only in that State. (2) Notwithstanding the provisions of paragraph (1), such profits may be taxed in the other Contracting State where they are profits from operations of ships or aircraft confined solely to places in that other State. (3) The provisions of paragraphs (1) and (2) shall apply in relation to the share of the profits from the operation of ships or aircraft derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organization or in an international operating agency. (4) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise shipped in a Contracting State for discharge at another place in that State shall be treated as profits from operations of ships or aircraft confined solely to places in that State. (5) Notwithstanding the provisions of this Article, profits from the operation of ships in international traffic derived by a company which is a resident of Malta may be taxed in Australia unless the company proves that such profits are not relieved from Malta tax under the provisions of the *Merchant Shipping Act 1973*, or under any identical or similar provision. The foregoing sentence, however, shall not apply if the company proves that not	36 – 37 and 106 – 107

	more than 25 per cent of its capital is owned, directly or indirectly, by persons who are not residents of Malta.	
Thai agreement	Article 8 Shipping and aircraft 1. Income or profits from the operation of aircraft derived by a resident of one of the Contracting States shall be taxable only in that State. 2. Income or profits from the operation of ships derived by a resident of one of the Contracting States may be taxed in that Contracting State and may also be taxed in the other State, but the tax so charged in the other State shall be reduced by an amount equal to one half of the amount which would be payable in respect of that income or those profits but for this paragraph. 3. Notwithstanding the provisions of paragraph 1, such income or profits may be taxed in the other Contracting State, where they are income or profits from the operation of aircraft confined solely to places in that other State; and notwithstanding the provisions of paragraph 2 such income or profits may be taxed in the other Contracting State without reduction, where they are income or profits from the operation of ships confined solely to places in that other State. 4. The provisions of paragraphs 1, 2 and 3 shall apply in relation to the share of income or profits from the operation of ships or aircraft derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organisation or in an international operating agency. 5. For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise	38 – 39 and 108

	shipped in a Contracting State for discharge at another place in that State shall be treated as profits from the operation of ships or aircraft confined solely to places in that State.	
Kiribati agreement	Article 8 Ships and aircraft 1. Profits from the operation of aircraft derived by a resident of one of the Contracting States shall be taxable only in that State. 2. Profits from the operation of ships derived by a resident of one of the Contracting States may be taxed in that Contracting State and may also be taxed in the other State, but the tax so charged in the other State shall be reduced by an amount equal to one half of the amount which would be payable in respect of those profits but for this paragraph. 3. Notwithstanding the provisions of paragraph 1, such profits may be taxed in the other Contracting State, where they are profits from the operation of aircraft confined solely to places in that other State; and notwithstanding the provisions of paragraph 2, such profits may be taxed in the other Contracting State without reduction, where they are profits from the operation of ships confined solely to places in that other State. 4. The provisions of paragraphs 1, 2 and 3 shall apply in relation to the share of profits from the operation of ships or aircraft derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organisation or in an international operating agency. 5. For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise	38 – 39 and 108

	shipped in a Contracting State for discharge at another place in that State shall be treated as profits from the operation of ships or aircraft confined solely to places in that State.	
Korean convention	Article 8 Ships and aircraft (1) Profits of a resident of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State. (2) The provisions of paragraph (1) shall also apply to profits derived from participation in a pool, a joint business or an international operating agency.	40 – 41 and 109
Philippine agreement	Article 8 Shipping (1) The tax payable in a Contracting State by a resident of the other Contracting State in respect of profits from the operation of ships in international traffic shall not exceed the lesser of – (a) one and one-half per cent of the gross revenues derived from sources in that State; and (b) the lowest rate of Philippine tax that may be imposed on profits of the same kind derived under similar circumstances by a resident of a third State. (2) Paragraph (1) shall apply in relation to the share of the profits from the operation of ships derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organization or in an international operating agency.	42 – 43 and 110 – 111
Sri Lankan agreement	Article 8 Ships and aircraft	44 – 45 and 112

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

Appendix 3 – Detailed contents list

114. The following is a detailed contents list for this Ruling:

References

Previous draft:

TR 2013/D5

Related Rulings/Determinations:

TR 2001/13; TR 2006/1;
TR 2006/10; TR 2007/10;
TR 2008/8

Subject references:

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

Legislative references:

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

Other references:

- Argentine agreement [1999] ATS 36
- Austrian agreement [1988] ATS 21
- Belgian agreement [1979] ATS 21
- Canadian convention [1981] ATS 14
- Canadian protocol (No. 1) [2002] ATS 26
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