TR 2006/1 - Income tax: the scope of and nature of payments falling within section 129 of the Income Tax Assessment Act 1936

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Taxation Ruling

Income tax: the scope of and nature of payments falling within section 129 of the *Income Tax Assessment Act 1936*

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This Ruling provides you with the following level of protection:

This publication (excluding appendices) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any under-paid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

Class of person/arrangement

1. This Ruling applies to persons whose principal place of business is out of Australia and who:

(a) carry passengers, livestock, mails or goods shipped in Australia on ships belonging to them (this would include ships owned or hired under a hire-purchase agreement by such persons); or

(b) carry passengers, livestock, mails or goods shipped in Australia on ships chartered by them.

(See paragraphs 63 to 67.)

2. This Ruling applies to payments made under arrangements relating to the carriage of passengers, livestock, mails or goods by sea internationally as well as for 'coasting trade'. The arrangements normally involve the carriage of goods etc. by chartered and unchartered ships under contractual arrangements known in the industry as 'bills of lading', 'voyage charterparties' and 'time charterparties'.

Issues discussed in the Ruling

3. This Ruling considers the liability to income tax, of the class of persons to whom this Ruling applies, arising in relation to amounts paid or payable in respect of the carriage of passengers, livestock, mails or goods shipped in Australia under section 129 of the *Income Tax Assessment Act 1936* (ITAA 1936).

4. This Ruling considers the nature of payments that form the basis for calculating the deemed taxable income under section 129 of the ITAA 1936. As contractual arrangements in the shipping industry can be rather complex and varied, this Ruling will make particular reference to payments made under 'bills of lading', 'voyage charterparties' and 'time charterparties'. To facilitate the discussion and analysis of section 129, this Ruling will, in the main, address the issues in the context of the carriage of goods by sea.

5. The principal issue raised by the shipping industry is whether 'hire' paid under a 'time charterparty' is an amount paid '**in respect of**' the carriage of goods. However, issues have also arisen with regard to other payments. This Ruling considers the tax treatment under section 129 of various specific payments that in the main are made under the contractual arrangements discussed in this Ruling. The payments in question are 'freight', 'demurrage', 'deadfreight', 'dispatch money', and cleaning charges payable under a 'bill of lading' or 'voyage charterparty' and 'hire' payable under a 'time charterparty'. However, there may be other payments that may or may not fall within the section and which are not addressed in this Ruling.

6. This Ruling is not concerned with the effect of the Ships and Aircraft Article in Australia's Double Tax Agreements. This Ruling is also not concerned with payments made to the shipowner by a charterer of a ship under a 'demise charterparty' of which the 'bareboat charterparty' is an example. The nature of a 'demise charterparty' is discussed in detail in Taxation Ruling TR 2003/2. Suffice to say that for the purposes of the present Ruling a 'demise charterparty' is tantamount to the lease of a ship. Unlike a 'voyage charterparty' and a 'time charterparty', a 'demise charterparty' does not constitute a contract of carriage or a contract for transportation services for goods carried by sea. Section 129 does not contemplate payments made for the lease of a ship.

Glossary of terms used in this Ruling

7. This Ruling uses terms that are commonplace in the shipping trade. Although some of the terms are also used in other contexts, for example, air transport, the definitions are limited to shipping. The meaning given to the following terms for the purposes of this Ruling has been obtained from various shipping dictionaries,[1] textbooks and maritime case law.

8. '**Bill of lading**' – is a document issued by a carrier by sea to a shipper of goods acknowledging the receipt by the carrier on board a named vessel (or for subsequent shipment on board) of the goods described therein, and containing an undertaking to deliver the goods at the place of delivery to the shipper or named consignee, or to his order or assigns, subject to the terms and conditions set out in or incorporated into the document. It represents the right to possession of the goods and, therefore, if an 'order' bill, allows traders to deal with the goods while they are at sea, the carrier automatically attorning to the holder on the terms of the bill.[2] A bill of lading is also:

(a) ordinarily prepared by the 'shipper' of goods or its agent and presented to the carrier or its agent for signing;

(b) signed by the master of the ship, but is frequently signed by other persons to whom authority has been granted to sign on behalf of the master or the contracting carrier (including a charterer or its agent);

(c) evidence of, or constitutes, a contract of carriage between the contracting carrier and 'shipper' or holder;

(d) usually an acknowledgment of the shipment of specified goods and describes the apparent order and condition of the goods and the date of shipment; and

(e) capable of being a document of title with endorsement or delivery operating to effect a transfer of the title of the goods described therein.

9. '**Charterer**' – is the party who hires a ship from a shipowner or another charterer for a period of time (see 'Time charterparty' and 'Demise charterparty') or who reserves a ship's cargo space for the carriage of goods (see 'Voyage charterparty').

10. '**Charterparty**' – is a generic term for the description of 'time charterparty', 'voyage charterparty' and 'demise (or bareboat) charterparty' contracts.

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[1] Brodie, PR 1997, *Dictionary of Shipping Terms*, 3rd edn, LLP; Ivamy, ERH 1988, *Law Dictionary*, Butterworths; Sullivan, E 1996, *The Marine Encyclopaedic Dictionary*, 5th edn, LLP; Brown, RH 1989, *Dictionary of Marine Insurance Terms and Clauses*, 5th edn, Witherby & Co Ltd; Nygh, P & Butt, P 1997, *Australian Legal Dictionary*, Butterworths.

[2] Cooke, J, Young, T, Taylor, A, Kimball, JD, Martowski, D & Lambert, L 2001, *Voyage Charters*, 2nd edn, LLP, paragraph 18.1 et seq.

11. '**C.I.F.**' – means 'cost, insurance and freight'. It is a term relating to the sale of goods for carriage by sea. The seller pays for all costs of transit to the port of destination and arranges the transportation of the goods. The insurance and shipping charges are included in the price paid for the goods by the buyer. The goods are placed at the buyer's risk upon delivery of the shipping documents.

12. '**Coasting trade**' – also referred to as '**coastal trade**', is the carriage of goods by a ship which are shipped and discharged at a port in Australia. This will include both inter-State and intra-State voyages irrespective of whether such voyages are undertaken by licensed ships or under various permits or registration requirements provided under relevant State or Commonwealth legislation.

13. '**Deadfreight**' – is ordinarily a liquidated amount of damages payable under a 'bill of lading' or 'voyage charterparty' by the 'shipper' to the shipowner for providing less than the quantity of cargo agreed to be carried under the contract of carriage.

14. '**Demise (or bareboat) charterparty**' – under a 'charterparty' by demise the ship is hired to the 'charterer' for a period of time with or without a master or crew. A charter without master and crew (where the bare ship is transferred) is known as a 'bareboat charter'. Under a demise charter with master and crew the possession of the ship and control of the master and crew are completely transferred to the 'charterer'.

15. '**Demurrage**' – is ordinarily an amount of money paid as liquidated damages to the shipowner by the 'charterer' or 'shipper' for failing to complete loading and discharging within the time allowed under a 'voyage charterparty' or 'bill of lading'.

16. '**Dispatch (or despatch) money**' – is an amount paid by the shipowner or 'charterer' to the 'shipper' or voyage 'charterer' for completing the loading and discharging before the time allowed under the 'bill of lading' or 'voyage charterparty'.

17. '**F.O.B.**' – means 'free on board'. It is a term relating to the sale of goods for carriage by sea. The buyer arranges the ship on which the goods are to be carried. The seller puts the goods 'on board' the ship (that is, over the ship's rail) at his expense on account of the buyer and procures a 'bill of lading' in the name of the buyer. The seller is discharged from his obligation to deliver when the goods pass over the ship's rail at loading.

18. '**Freight**' – is the fee payable to the carrier for the carriage of goods under a 'voyage charterparty' or 'bill of lading'.

19. '**Hire**' – is a sum of money paid to the shipowner by a 'charterer' under a 'time or demise charterparty' for the use of the vessel.

20. '**Laytime**' – refers to the time granted free of charge to the 'charterer' or 'shipper' under a 'voyage charterparty' or 'bill of lading' for the loading and unloading of the cargo.

21. '**Liner trade**' or '**Liner Service**' – Is the service provided by a shipping company whereby cargo-carrying ships are operated between scheduled, advertised ports of loading and discharging on a regular basis. The freight rates which are charged are based on the shipping company's tariff or, if the company is a member of a liner conference, the tariff of that conference.

22. '**Shipper**' – is the person who has entered into a contract of carriage with the carrier or in whose name the goods are actually delivered to the carrier. This is normally the exporter (seller) of goods sold although under 'F.O.B.' contracts the buyer may assume the role of shipper.[3]

23. '**Ship (to) or Shipped**' – means to put (goods) on board a ship.[4]

24. '**Time charterparty**' – is the hiring of a ship from a shipowner for a period of time. Here, the shipowner places his ship, with crew and equipment, at the disposal of the 'charterer', for which the 'charterer' pays 'hire' money. The technical operation and navigation of the ship remain the responsibility of the shipowner. For other descriptions given to a time charterparty see paragraph 94.

25. '**Voyage charterparty**' – is a contract of carriage in which the 'charterer' pays 'freight' for the use of a ship's cargo space for one or more voyages.

Background

Liability under section 129 of the ITAA 1936

26. The taxable income determined under section 129 of the ITAA 1936, on which a liability to pay income tax arises, is 5% of the amount paid or payable in respect of the carriage of the items listed in the section. Specifically, section 129 provides as follows:

> Where a ship belonging to or chartered by a person whose principal place of business is out of Australia carries passengers, livestock, mails or goods shipped in Australia, 5% of the **amount paid or payable** to him **in respect of such carriage**, whether that amount is payable in or out of Australia, shall be deemed to be taxable income derived by him in Australia. (Emphasis added).

27. It is to be noted from the outset that the tax raised under Division 12 of Part III, of which section 129 is part, is meant to be a simple tax. It is based on an arbitrary amount of profit made in respect of the carriage of passengers, livestock, mails or goods shipped in Australia by a shipowner or 'charterer'. The arbitrary profit is 5% of the gross amounts paid or payable in respect of such carriage. The section is not concerned with the actual profit made on such carriage or how that profit may be divided up among the various parties involved with the carriage. In the generality of cases, the section is not concerned with matters such as the form of the carriage arrangement, the nature of the rights and obligations arising

[3] *Ribble Navigation Company v. Hargreaves* 17 CB 385.
[4] *Bowes v. Shand* 2 App. Ca. 455.

thereunder or whether the payment for the carriage is due under the 'bill of lading' to the shipowner or to the 'charterer'.

Shipping trade law & practice

28. Although section 129 is concerned with the consideration paid or payable by passengers and shippers of livestock, mails or goods embarking in Australia and not with the intricacies of the relationship between shipowner, 'charterer' and 'shipper', an understanding of the framework involved in the carriage of goods by sea will assist in determining the scope of the section. The provisions have their origins in the 19th Century legislation of Australian and New Zealand colonies and it would be reasonable to assume that the legislature in framing the predecessors to section 129 had in mind ordinary maritime law and practice at the time.

29. The transportation of goods by sea is usually arranged by the vendor or purchaser of goods depending on whether the sale is made 'F.O.B.', 'C.I.F.' or other bases. The nature and size of the cargo to be carried also influence the contractual arrangements that the parties choose to make. A 'shipper' of a small quantity of goods is likely to reserve space on a ship that is in the 'liner trade' of carrying goods for several 'shippers' between advertised routes around the world. This normally occurs in the container trades where it is common practice for liner shipping companies to operate in conferences. Here, in most instances, the industry practice is for the individual conference members to contract as carriers under 'bills of lading' issued by them for goods shipped on the service.

30. By contrast, a 'shipper' of a large quantity of goods may require the entire carrying capacity of a ship to carry goods to a particular destination. In this case, the shipowner may charter the ship to the 'shipper' for either a particular voyage or a specified period of time. Here, the contractual arrangement normally takes the form of a 'voyage charterparty' or 'time charterparty' respectively.

31. The characterisation given to the amount payable under each of the contractual arrangements referred to above in relation to the carriage of goods also differs. Under a 'time charterparty' 'hire' is payable according to the amount of time the vessel is placed at the disposal of the charterer. With 'liner services' and 'voyage charterparty' 'freight' is payable for the carriage of the cargo.

32. The difference between 'hire' and 'freight' is also reflected in the computation of the two. 'Hire' is computed by reference to the carrying capacity of the ship. It is calculated on the basis of a fixed sum per ton of the vessel deadweight for a specific period of time or an amount per day. It is normally payable in advance at monthly or semi-monthly intervals. Generally speaking, 'freight' is computed by reference to the quantity of cargo carried. 'Freight' is normally payable on delivery of the goods at the point of discharge unless the agreement expressly provides otherwise.

33. The commercial arrangements in the shipping trade are varied and a ship, more often than not, is made the subject matter of several 'charterparties' in a chain. This often makes it difficult to identify the nature and purpose of the arrangement and the relationship that exists between the shipowner, 'charterer', sub-charterer and 'shipper'. It also raises the question as to which party, if any, in the chain is liable under section 129.

34. When a ship is chartered the contractual relationship between the shipowner, 'charterer' and 'shipper' is more complicated. In this case, too, a 'bill of lading' is usually issued by or on behalf of the shipowner as carrier. However, it may also be issued on behalf of the 'charterer' (as happens in the container trades) so as to constitute a contract of carriage between the 'charterer' and the 'shipper'. In the circumstances there are two documents that appear to regulate the relationship of the parties and the carriage – the charterparty and the 'bill of lading'.

35. Special Rules have developed under both common law and under international conventions[5] governing the rights and obligations of the carrier and the 'shipper'. Some of these Rules have been adopted by Australia and are contained in the *Carriage of Goods by Sea Act 1991*. These Rules generally apply to the carriage of goods by sea under a 'bill of lading' and are not applicable to 'charterparties'. In other words, the relationship that exists between shipowner and 'charterer' under a 'charterparty' is not affected. However, the Hamburg Rules apply where a 'bill of lading' is issued pursuant to a 'charterparty' and the holder of the bill is not the 'charterer'. As standard 'voyage charterparties' and 'time charterparties' normally contain a clause empowering the master of the ship or his agent to issue 'bills of lading' on behalf of the shipowner, it is often found that the shipowner is one of the carriers at common law and for the purposes of these Rules.

Ruling

36. The provisions of section 129 are set out in full in paragraph 26. In general terms, the section deems 5% of all amounts paid or payable in respect of the carriage of passengers, livestock, mails 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. The section has the effect of calculating a deemed taxable income and giving that taxable income a source in Australia.

[5] Known as the Hague Rules 1924, the Hague/Visby Rules 1968 and the Hamburg Rules 1978. Australia has adopted an amended version of the Hague Rules but at the time of the issue of this Ruling had not adopted the Hamburg Rules.

37. The amounts paid or payable referred to in the section are amounts paid or payable under the particular contractual arrangement used to carry passengers, livestock, mails or goods 'shipped' in Australia. The carriage of goods by sea, for example, normally entails carriage arrangements commonly known in the shipping industry as 'bill of lading', 'voyage charterparty' and 'time charterparty'. In this context, the section brings to account amounts payable by the 'shipper', to the class of persons mentioned in paragraph 1, in respect of the shipment of its goods, livestock or mail from Australia and fares payable by passengers embarking in Australia.

38. The amount paid or payable by way of 'freight' under a 'bill of lading' and 'voyage charterparty' to the class of persons mentioned in paragraph 1 by the 'shipper' under a 'bill of lading' or by the 'charterer' under a 'voyage charterparty' who is also the 'shipper' is to be included in determining the taxable income under section 129 of the ITAA 1936. 'Freight' payable in these circumstances under such contracts of carriage is an amount paid or payable for the carriage of goods. Amounts paid or payable for the carriage of the items listed in section 129 clearly fall within the expression '**amount paid or payable ... in respect of such carriage**' appearing in the section (see paragraphs 75 to 93 and Examples 1 & 2).

39. The carriage of goods by sea can also be undertaken under a 'time charterparty'. This will normally occur where the 'charterer' under a 'time charterparty' is also the 'shipper' ('shipper charterer') of the goods shipped in Australia. In this context, the ship under a 'time charterparty' serves the purpose of carrying the goods of the 'shipper charterer'. Thus 'hire' paid or payable under a 'time charterparty' in these circumstances to the class of persons mentioned in paragraph 1 is also to be included in determining the taxable income under section 129 of the ITAA 1936 (see paragraphs 75 to 82 & 94 to 104). The amount of 'hire' to be brought to account under section 129 is the amount that is attributable to the carriage of goods shipped in Australia. From a practical point of view there may be several instances where a time-chartered ship is not utilised to carry goods 'shipped' in Australia. For example, in any income year, the ship may also carry goods 'shipped' in other countries. In the circumstances, the 'hire' paid in that income year by the 'shipper charterer' will need to be apportioned (see paragraphs 105 & 106 and Example 4).

40. Where a ship is the subject matter of a chain of charterparties, the amounts brought to account under section 129 are the amounts paid or payable by the 'shipper' or 'shipper charterer', as the case may be, of the goods 'shipped' in Australia to the immediate 'charterer' up the chain so long as that person's principal place of business is out of Australia. This person may be a 'voyage charterer' or a 'time charterer' (see paragraphs 68 to 71 and Example 3).

41. Where:

(a) a 'shipper' or 'shipper charterer' makes a payment of 'freight' or 'hire' for the carriage of its goods to a person whose principal place of business is in Australia (Australian operator);

(b) the ship is obtained by the Australian operator under a charterparty from a shipowner or charterer whose principal place of business is out of Australia for an amount of 'freight' or 'hire'; and

(c) the Australian operator is not itself a 'shipper' or 'shipper charterer',

then:

(1) the amount paid by way of 'freight' or 'hire' to the Australian operator falls outside the scope of section 129 because it is not a payment made to a person whose principal place of business is out of Australia. However, the liability to income tax of the Australian operator on the amount in question will be determined under the general assessment provisions of the *Income Tax Assessment Act 1997* (ITAA 1997); and

(2) the amount paid by way of 'freight' or 'hire' by the Australian operator to the shipowner or 'charterer' also falls outside the scope of section 129 because it is not considered to be an amount paid or payable in respect of the carriage of the goods.

(See Example 5.)

42. Fares (also called passage money) paid or payable, to the class of persons to whom this Ruling applies, for the carriage of passengers embarking in Australia are to be included in determining the taxable income under section 129.

43. The words 'in respect of such carriage' appearing in section 129 embrace any activity relating to carriage by sea of the items listed in the section. In relation to the carriage of goods, for example, the activities would include the loading of the goods at the port of shipment and unloading at the port of discharge. In the light of the context in which carriage by sea is undertaken, as explained in paragraph 62, the following payments made by a 'shipper' or 'shipper charterer' in respect of the carriage of its goods embarked in Australia are for the purposes of section 129 to be treated as follows:

(a) Amounts paid or payable by way of 'demurrage' on the loading and unloading of the goods are to be included in determining the taxable income under the section (see paragraphs 107 to 111).

(b) Amounts paid or payable by way of 'deadfreight' to the extent that such payments constitute payments for not providing a full cargo as required under a bill of lading or voyage charterparty fall outside the scope of the section (see paragraphs 112 to 115).

(c) Payments for cleaning charges by a 'shipper' to a shipowner by way of contribution or to reimburse the shipowner for such expenditure are to be excluded in determining the taxable income under the section (see paragraphs 120 to 124).

44. The carriage of goods by sea also involves payments in the nature of 'dispatch moneys' made by a shipowner or 'charterer' to a 'shipper' or 'shipper charterer'. Such payments are to be deducted from the amount that would otherwise be treated as the amount paid or payable for the carriage of goods (see paragraphs 116 to 119).

45. Section 129 applies to amounts paid or payable in respect of the carriage of goods etc. 'shipped' in Australia and discharged overseas as well as '**coasting trade**' where the ship is operated by a person whose principal place of business is outside Australia. Coasting trade includes sight seeing tours where the carriage of passengers 'shipped' in Australia disembark at a port in Australia (see paragraph 73). However where, for example, goods 'shipped' in Australia are transhipped to another ship outside Australia, only the 'freight' applicable for shipping goods in Australia to the point of **transhipment** overseas falls within the provisions of section 129. Also where, under a contract, goods shipped from overseas are to be transhipped to another ship in Australia, the freight applicable to the goods shipped in Australia only, would fall within the provisions (see paragraphs 72 to 74).

Examples

Example 1 (carriage under bill of lading)

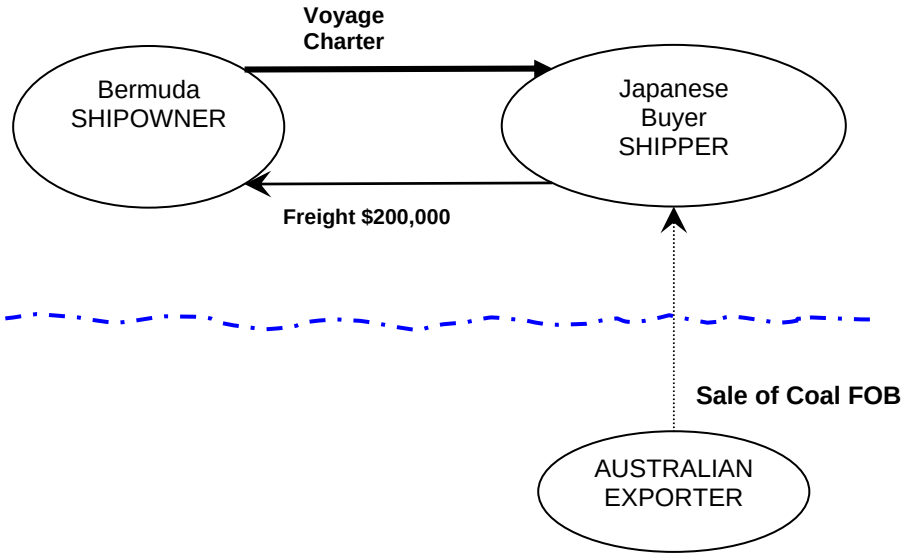
46. A shipowner whose principal place of business is in Bermuda owns the ship '*The Fishpen*' and trades in carrying refrigerated fish between Australia and Singapore. It contracts with an Australian exporter of fish to carry a quantity of fish to Singapore. The 'bill of lading' provides, amongst other things, that the goods are to be loaded at a nominated port in Melbourne and discharged at a nominated port in Singapore. The agreed 'freight' is $12,000 payable as to 80% on completion of the loading and the balance in Singapore on completion of the discharge of the goods.

47. In this case the deemed taxable income of the owner under section 129 is 5% of the whole amount of $12,000, namely, $600. It is irrelevant that part of the 'freight' is payable overseas.

Example 2 (carriage by shipowner under voyage charterparty)

48. The shipowner in **Example 1** owns another ship '*The Energy*' which it charters under a 'voyage charterparty' to a Japanese buyer of coal sold by an Australian exporter 'F.O.B.'. A 'bill of lading' is issued by the master of the ship in the name of the buyer as 'shipper'. The contract of carriage in this case is the 'voyage charterparty' since the 'shipper' is also the 'charterer'. The amount of 'freight' payable by the 'shipper' under the 'charterparty' is $200,000.

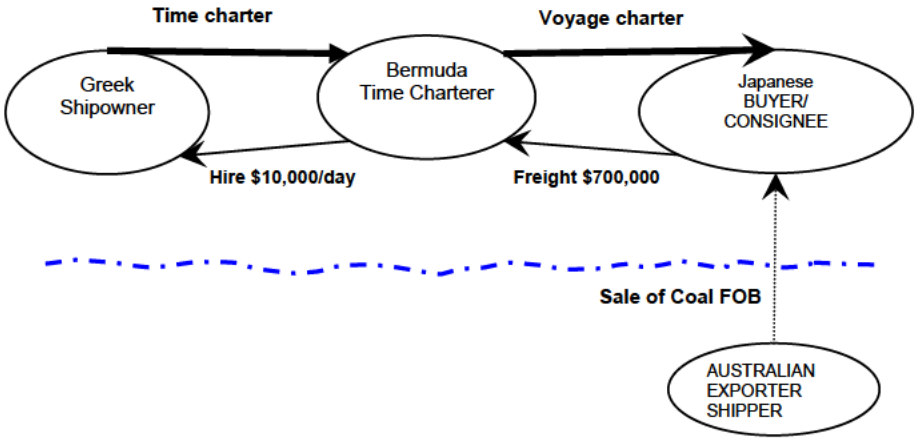
49. In this case, the deemed taxable income of the shipowner is 5% of $200,000, namely $10,000. It should be noted that if the coal was carried from Australia to Japan under a 'time charterparty', the contract of carriage would be the 'time charterparty' and any 'hire' payable in respect of goods 'shipped' in Australia would come under section 129.



Example 3 (carriage under voyage charterparty by a time charterer)

50. A Greek shipowner charters one of its ships to a Bermuda time charterer under a 'time charterparty' for a period of two years. The 'hire' payable under the 'time charterparty' is $10,000 a day. The Bermuda time charterer in turn sub-charters the ship under a 'voyage charterparty' to a Japanese buyer of coal sold 'F.O.B.' by an Australian exporter. The 'freight' payable under the 'voyage charterparty' for the particular voyage is $700,000. The Bermuda time charterer hopes to make a profit on this ship by undertaking several voyages during an income year. A 'bill of lading' is issued by the shipowner naming the Australian Exporter the 'shipper'. The bill is endorsed to the Japanese buyer.

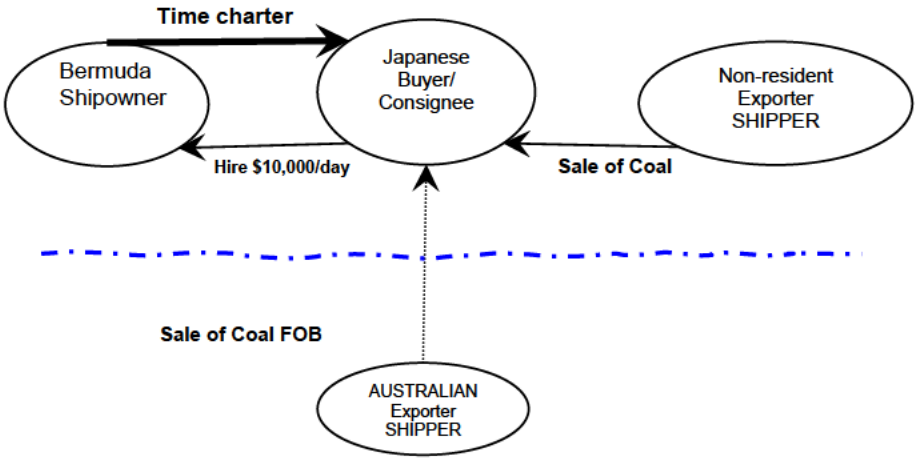
51. In this case only the 'freight' of $700,000 paid by the Japanese buyer to the Bermuda time charterer falls under section 129. The only payment for the carriage of coal directly linked to carriage by a ship under a 'charterparty' is the payment made under the 'voyage charterparty'. In the circumstances, 5% of the amount of $700,000 will be deemed to be the taxable income of the Bermuda time charterer.



Example 4 (apportionment of time charter 'hire')

52. The Bermuda shipowner charters the ship *'The Energy'* under a 'time charterparty' to a Japanese buyer of coal for an amount of 'hire' of $10,000 a day. The Japanese buyer uses the ship to ship coal from Australia for nine months of an income year making a total of 3 voyages. It also ships coal from another country for the remaining 3 months of the year.

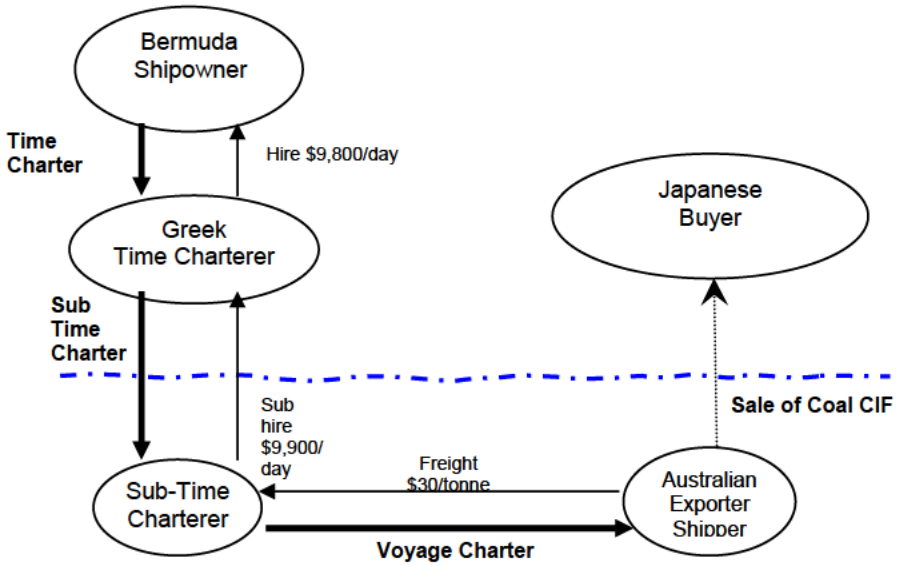
53. In this case, only the amount attributable to the carriage of coal from Australia is brought to account under section 129. The time spent on return trips to Australia are excluded from the calculation. Using the time basis of apportionment and the information on the ship's Statement of Facts (see paragraph 106) the ship took a total of 120 days in respect of the 3 voyages covering the period the ship arrived at the Australian port for loading to the time it arrived and unloaded at the discharge port in Japan for each trip. On this basis, the amount paid to the Bermuda shipowner for the carriage of goods shipped in Australia is $1,200,000 (namely $10,000 × 120 days). The deemed taxable income under section 129 would be $60,000 (namely 5% of $1,200,000).



Example 5 (carriage by an Australian charterer)

54. The Bermuda shipowner time charters the ship '*The Energy*' to a Greek time charterer who in turn sub-time charters the ship to an Australian sub-time charterer whose principal place of business is in Australia. The Australian sub-time charterer then voyage charters the ship to an Australian 'shipper' who has sold coal on a 'C.I.F.' basis to a Japanese buyer. The 'freight' payable under the 'voyage charterparty' is $30 a tonne. The amount of sub-hire payable under the sub-time charterparty is $9,900 a day and the amount payable under the 'time charterparty' is $9,800 a day.

55. In this case none of the amounts referred to above come within section 129. This is because the carriage leg under which an amount is paid or payable for the carriage of goods 'shipped' in Australia is the 'voyage charterparty'. As the 'freight' payable under the 'voyage charterparty' is not a payment to a person whose principal place of business is out of Australia section 129 has no application. However, the 'freight' of $30 a tonne falls to be assessed under the general assessment provisions of the ITAA 1997.



Date of effect

56. This Ruling applies to years of income commencing 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 21 and 22 of Taxation Ruling TR 92/20).

Commissioner of Taxation
8 March 2006

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.

The scope of and calculation of the deemed taxable income under section 129 of the ITAA 1936

57. Unlike the ordinary assessment provisions of the ITAA 1997 which ascertain taxable income on an actual net income basis, section 129 deems an arbitrary amount of profit to be the taxable income of the shipowner or 'charterer' derived in Australia. That arbitrary amount of profit is 5% of the gross amount paid or payable in respect of the carriage of goods etc. 'shipped' in Australia. No deductions are allowed under any provisions of the ITAA 1936 or the ITAA 1997. In adopting this methodology, the section resolves the practical problem of ascertaining the actual profit made on, and the allocation of overheads attributable to, a particular shipment of goods from Australia.

58. The nature and object of a predecessor to section 129 was explained by the High Court in *Union Steamship Co. of New Zealand v. Federal Commissioner of Taxation* where Knox CJ, Isaacs and Starke JJ held that there was to be no deduction from the amount liable to tax under the section for the dividends in question.[6]

59. At p. 215, Knox CJ said:

> It is clear that the proportion of the gross receipts of the taxpayer on which tax is made payable by this section is an arbitrary amount which bears no necessary relation to the profits made by the taxpayer on the transactions from which the gross receipts are derived, and may be either greater or less than the amount of such profits. The amount is the same whether such transactions result in profits available for distribution to shareholders or in a loss.

60. At p. 219, Isaacs J said of the then 10%: 'In the first place, the sum in question is not a specific identifiable portion of the receipts. It is merely a conceptual sum arrived at by an arbitrary arithmetical process adopted for the very purpose of avoiding actual operations'. And, at p. 220 Starke J said: 'It is an arbitrary method of determining taxable income in certain cases, and renders inapplicable the provisions of secs.14, 16 and 18 of the Act'.

[6] The predecessor to section 129 considered by the High Court in *Union Steamship Co. of New Zealand v. Federal Commissioner of Taxation* (1924) 35 CLR 209, was section 22 of the *Income Tax Assessment Act 1915-1918* under which 10% of the gross receipts of the owner or charterer were subjected to tax. Under section 16 of that Act, dividends paid by a company were an allowable deduction for the purposes of ascertaining the taxable income of the company. The issue in the case was whether such deductions were also allowable in determining the taxable income under section 22.

61. The application of the section is predicated on the existence of several factors. In the first place, the section applies only to carriage by sea. Section 129 does not deal with carriage by air. Nor is it concerned with inland carriage. Thus, where goods are received at an inland point and carried by road or rail to an Australian seaport, the land part of the carriage is not governed by the section. In situations where the contract covers inland carriage and carriage by sea an apportionment will be required on a reasonable basis to exclude inland carriage amounts. Secondly, the section applies to a particular class of persons (namely shipowners and 'charterers') whose principal place of business is out of Australia. Thirdly, the particular ship mentioned in the section (that is, the ship leaving Australia) must be carrying the items listed in the section that are 'shipped' in Australia. Fourthly, the section applies to an amount paid or payable in respect of the carriage of the items in question on the particular ship. The third and fourth factors suggest that the section is concerned with the particular carriage of goods etc. by a particular ship and does not extend to transactions or events before or after that carriage (see paragraphs 69 to 70 and 74). Finally, it matters not whether the amount is payable in or out of Australia. Some of these factors are discussed in more detail below.

Carriage of goods by sea

62. The complexity and intricacies of the carriage of goods by sea have already been alluded to under the heading '***Shipping trade law & practice***' (paragraphs 28 to 35). It is governed by trade customs and also various national and international legislation and conventions. The contractual arrangements are complex and for financing, risk sharing and other reasons there has been a proliferation of the use of multiple charterparties. The performance of the carriage arrangement itself also involves several stages and operations. The ship has to arrive at the place specified as the loading point. The shipowner has to provide a seaworthy ship fit for navigational purposes, properly manned and suitable to carry the cargo put on board. The cargo needs to be loaded at the port of shipment and unloaded at the port of discharge. The ship's holds may need to be cleaned immediately before the loading or after unloading the cargo. The cargo needs to be properly stowed on the ship. Arrangements need to be made with port authorities and port services procured. And, the navigation of the ship and the voyage itself give rise to further obligations concerning safe navigation and preserving the cargo in good condition during transit. Thus any determination as to the nature of payments made in respect of the carriage of goods etc. will need to be made having regard to the above context.

Persons covered

63. The section applies to shipowners or 'charterers' whose principal place of business is out of Australia. These, in the main, would be non-resident shipping operators who 'ship' goods in Australia. However, the section is equally applicable to a resident of Australia that has its principal place of business out of Australia. The words in the section '**ship belonging to or chartered by**' clearly envisage the carriage of goods by chartered and unchartered ships. A shipowner, a voyage 'charterer', a time 'charterer' and demise 'charterer' engaged in shipping goods in Australia would thus fall within the scope of the section. However, for the reasons explained in paragraph 6 and in TR 2003/2 payments for the lease of a ship under a 'demise charterparty' fall outside the scope of section 129.

64. The words '**belonging to**' would also encompass the hirer of a ship under a hire-purchase agreement engaged in shipping goods in Australia. It is trite law that the meaning given to words depends on the context in which they are used. Some case authorities[7] have considered that the words 'belonging to' should be given their natural meaning of 'beneficial ownership' and 'absolute ownership'. However, these cases can be distinguished on the basis that the context was different, one involving the illegal seizure of chattels punishable by penalty and imprisonment and the other the application of the law of fixtures.

65. The context of section 129 suggests that a more liberal meaning should be given to the words so as to encompass ships under a hire-purchase agreement operated by a non-resident 'to ship' goods in Australia. In extending the application of the section to 'charterers' the policy of the text suggests that persons who operate ships which are not owned by them fall within its provisions. The provisions of section 129 would have an anomalous operation if ships hired by means of a 'charterparty' fall within its provisions while ships hired under a hire-purchase agreement are excluded.

66. It is of some significance that the predecessors to section 129 in the *Income Tax Assessment Act 1915* and *1922* the word 'owner' was used and that this was changed to the current words of 'belonging to' in the ITAA 1936 by the Income Tax Assessment Bill 1935. This change in language suggests that the words 'belonging to' should be given an extended meaning to include ships hired under a hire-purchase agreement rather than a restrictive one. For ease of reference, the use of the words 'owner' or 'shipowner' in this Ruling are to be read as encompassing the words 'belonging to'.

[7] *Myerson v. Collard* (1918) 25 CLR 154; *Melluish v. BMI (No. 3) Ltd* [1995] 4 All ER 453.

67. A further indicator, for giving the words an extended meaning, is the custom in the shipping trade to refer to the person who has hired a ship from the owner as the 'disponent owner'[8] in those cases where that person in turn charters or hires the ship to another person.

Multiple charterparties

68. In the simple case of carriage of goods under a single carriage arrangement involving a 'voyage charterparty' or a 'time charterparty' there is a direct link between the payments of 'freight' and 'hire' and the carriage of goods under each arrangement. In both cases the shipowner is the carrier and the 'shipper' is the 'charterer'. However, where there is a chain of charterparties interposed between the shipowner and the 'shipper', all of whom have their principal place of business out of Australia, a question arises as to which party in the chain is liable and what amounts should be assessed under section 129.

69. The practical outcome of having multiple charterparties is that the profit made from the carriage of a particular shipment of goods is shared, in varying degrees, by all the parties in the chain. However, the object of the section in assessing an arbitrary amount of profit, on a particular shipment of goods from Australia, is achieved if the last 'charterer' in the chain is assessed on the amount of 'freight' or 'hire' paid to him. From a commercial perspective, all the profits made in respect of the carriage of a particular shipment of goods by the parties up the chain (assuming they are all dealing at arm's length and there are no abnormal market conditions prevailing) would be reflected in the amount that the last 'charterer' in the chain charges the 'shipper'.

70. The above approach is supported by the use of the word '**or**' in the phrase 'ship belonging to **or** chartered by' and the words '**to him**' appearing in the section. They identify a singular payment to one of those persons in respect of the carriage of goods etc. on a ship which is operated by them either as owner or 'charterer' for their own commercial benefit. It is customary in the industry to refer to the person who benefits from such a carriage as the 'freight beneficiary'. Therefore, where a ship is the subject matter of a chain of 'charterparties' the section will apply to the last 'charterer' in the chain whose principal place of business is out of Australia and who is paid by the 'shipper' an amount of 'freight' or 'hire' in respect of the carriage of goods 'shipped' in Australia. Adopting this approach achieves tax symmetry with cases where goods are carried under a single 'voyage charterparty' or 'time charterparty' arrangement.

[8] Defined in *Dictionary of Shipping Terms* by PR Brodie, see footnote 1, as a 'Person or company who controls the commercial operation of a ship, responsible for deciding the ports of call and the cargoes to be carried. Very often, the disponent owner is a shipping line which time charters a ship and issues its own liner bills of lading'.

71. It is also understood from the industry that ships involved in international trade are, in the main, not operated by their owners. The operator is several times removed from the owner. Ships used to carry goods 'shipped' in Australia are normally the subject matter of a chain of 'charterparties' and the last leg of that chain is commonly a 'voyage charterparty' between the 'shipper' and a 'charterer' as operator whose principal place of business is out of Australia. In these cases section 129 will apply to the 'freight' (and other amounts discussed in this Ruling such as 'demurrage') earned by the 'charterer' and not to any other amounts earned by way of 'freight', 'hire' or other amounts up the chain. However, variations from this carriage arrangement do occur and the identity of the person liable and hence the amount to be assessed under the section will need to be determined from the circumstances of each case.

Meaning of 'shipped in Australia'

72. The section only applies to the carriage of goods that are 'shipped' in Australia. The expression 'shipped in Australia' means that the goods are put on board a ship in Australia.[9] This forms the factual basis upon which the deemed taxable income is given an Australian source.

73. There is no provision made in section 129 as to where the goods are to be discharged. This means that amounts paid to a shipowner or 'charterer' whose principal place of business is outside of Australia who is engaged in 'coasting trade' or the carriage of goods internationally fall within its provisions. The section will also apply to those situations where, for example, a cruise ship undertakes sightseeing voyages to observe whales in the Southern Ocean and passengers board the ship in Hobart, and disembark at the same port. Fares paid in respect of such sightseeing tours also come within the provisions of section 129. The income from 'coasting trade' would normally have an Australian source and be assessable in full under the general assessment provisions contained in the ITAA 1997. As section 129 of the ITAA 1936 is the more specific provision it prevails over the general provisions of the ITAA 1997. However, income from 'coasting trade' (or the carriage of goods internationally) derived by a shipowner or charterer whose principal place of business is in Australia is still assessable under the general assessment provisions of the ITAA 1997.

[9] *Bowes v. Shand* 2 App. Ca. 455.

74. The combined effect of the references to 'a ship', 'the ship' and 'shipped in Australia' in section 129 or its accompanying provisions in sections 130 and 135 of the ITAA 1936 is to restrict the section to amounts paid in respect of the carriage of goods by the particular ship (that is, the ship leaving Australia) that 'shipped' goods in Australia. In cases of **transhipment**, for example where ship A under a contract loaded goods in Australia for delivery to London, transhipped the goods to ship B in Hong Kong for on-carriage to London, only the 'freight' charged on the Australia-Hong Kong leg would be included under section 129. This issue was decided by the High Court in *Ocean Steamship Company Limited v. Federal Commissioner of Taxation*.[10] Furthermore, where under a contract, goods are shipped in an overseas country and then transhipped to another ship in Australia, only the 'freight' charged in respect of the goods shipped in Australia would be included under section 129.

The nature of payments falling within section 129

The meaning of the expression 'amount paid or payable ... in respect of such carriage'

75. Section 129 provides guidance concerning the scope of payments falling within it. In the first place, the section uses the general word 'amount' instead of the more restrictive words 'freight' for the carriage of goods, livestock or mail and 'fares' for the carriage of passengers. If the section was to be restricted to 'freight' and fares one would have expected words like 'freight' and 'fares' or 'amount paid ***for*** the carriage of goods etc.' to have been used.

76. Secondly, an extended application of the section to other payments is also evident from the use of the words 'in respect of' contained in the expression. The words 'in respect of' have been judicially considered in several contexts and in the main have been recognised as having a wide meaning.[11]

[10] *Ocean Steamship Company Limited v. Federal Commissioner of Taxation* (1918) 25 CLR 412.
[11] See cases referred to in footnotes 12 to 15.

77. However, courts have also consistently maintained that the words 'in respect of' gather meaning from the context in which they appear. The context therefore may restrict the broad width to which the words generally apply.[12] In determining the width of the words courts have also applied a number of tests as guidelines. For instance, the High Court in *Technical Products Pty Ltd v. State Government Insurance Office (Qld)*[13] said:

> The words 'in respect of' have a very wide meaning. Indeed, they have a chameleon-like quality in that they commonly reflect the context in which they appear. The nexus between legal liability and motor vehicle which their use introduces in s 3(1) is a broad one which is not susceptible of precise definition. **That nexus will not, however, exist unless there is some discernible and rational link** between the basis of legal liability and the particular motor vehicle. (Emphasis added)

78. Dawson J in *Technical Products Pty Ltd* (above) added that the connection must be 'material'. Courts have also held that a nexus which is 'discernible and rational' may be indirect.[14] Still in other cases a causal relationship which is sufficient or material may provide the necessary link and so too where one of the matters is a product or incident of the other.[15]

79. Context is used in a broad sense and may be ascertained from the purpose and object of the legislature, its language aided by extrinsic materials and the mischief, if any, which the legislature sought to remedy. A brief discussion of the object of section 129 and the context in which the carriage of goods by sea is undertaken are contained in paragraphs 27 to 35, 57 to 62, and 68 to 71.

80. The subject matter of section 129 is the carriage of goods 'shipped' in Australia by overseas shipping operators. As was said by Barton J at 414 in *Ocean Steamship Company Ltd*[16] when considering the section: 'It must be assumed that the Legislature in framing this section……..had in mind the ordinary maritime law'. In framing the section the Legislature would be cognisant of the shipping practices and the various transportation arrangements entered into by shipping operators for the carriage of goods by sea at the time. The very fact that the section brings 'charterers' within its scope and uses words of wide ambit rather than the restrictive word 'for' in relation to payments suggests that the section is to apply to various payments made under 'charterparties' and 'bills of lading'.

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[12] *FC of T v. Scully* (1999-2000) 201 CLR 148; by Deane, Dawson and Toohey JJ in *Workers' Compensation Board (Q) v. Technical Products Pty Ltd* (1988) 165 CLR 642 at 653-654.

[13] By Brennan, Deane and Gaudron JJ in *Technical Products Pty Ltd v. State Government Insurance Office (Qld)* (1989) 167 CLR 45 at 47.

[14] By Gibbs CJ in *Storey v. Lane* (1981) 147 CLR 549 at 557; *Fraser v. Commissioner of Taxation* (1996) 69 FCR 99 at 113.

[15] See *J & G Knowles v. Commissioner of Taxation* (2000) 96 FCR 402 and cases cited therein; *FC of T v. Scully* (1999-2000) 201 CLR 148.

[16] *Ocean Steamship Company Limited v. Federal Commissioner of Taxation* (1918) 25 CLR 412.

81. The meaning of the similar phrase 'in relation to' was considered by the House of Lords in *Gatoil International Inc. v. Arkwright-Boston Manufacturers Mutual Insurance Co.* in the context of a provision which referred to 'any agreement relating to the carriage of goods in any ship whether by charterparty or otherwise'.[17] Lord Keith of Kinkel made specific reference to the fact that the provision spoke of an agreement 'in relation to' and not 'for' the carriage of goods in a ship. His Lordship concluded that the meaning must be wider than would be conveyed by the preposition 'for'. As regards the connection required, His Lordship indicated that there must be some reasonably direct connection.

82. It is considered that there is **a material discernible and rational link** between the payments made under each of the arrangements covered in this Ruling and the carriage of goods 'shipped' in Australia in those cases where the payment is made by a 'shipper' under a 'bill of lading' and by a 'shipper charterer' in those cases where the goods are carried by a ship which is under a 'charterparty', be it a 'time charterparty' or 'voyage charterparty'. This is reinforced when considering the special characteristics (discussed below) of 'charterparties', which under maritime law are regarded as or assimilated to contracts of carriage. For example, 'bills of lading', 'voyage charterparties' and 'time charterparties' are often referred to in shipping parlance as contracts of affreightment thus reflecting the business and practical nature of each arrangement as contracts of carriage.

Carriage under a 'bill of lading' contract

83. A 'bill of lading' is one of the main documents evidencing the contract of carriage of goods by sea between 'shipper' and carrier. The 'bill of lading' also serves two other purposes – it is a receipt and a negotiable document of title to the goods 'shipped'.

84. A 'bill of lading' is issued by the carrier to the 'shipper' at the time the goods are put on board the ship. However, it often happens that a contract of carriage has already been made between the 'shipper' and the carrier before loading commences. It follows from this that the 'bill of lading', which is issued after receipt of the goods by the carrier, is not itself a contract of carriage since that has, in the usual case, already been made.[18]

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[17] *Gatoil International Inc. v. Arkwright-Boston Manufacturers Mutual Insurance Co.* [1985] 1 AC 255 at 270 & 271.
[18] *The 'Ardennes'* [1950] 84 LI L Rep 340; [1951] 1 KB 55 (CA); *Pyrene v. Scindia Navigation* [1954] 2 QB 402.

85. However, the booking note may expressly incorporate the terms of the carrier's usual 'bill of lading', and even without express incorporation the 'bill of lading' is very cogent evidence of the terms of the contract. There are several reasons for this. A term is implied into the original contract between 'shipper' and carrier that the goods will be carried upon the terms of the 'bill of lading' customary in the trade. 'Shippers' or their agents are usually well aware of the terms of the 'bill of lading' used in any regular trade, and usually have supplies of blank 'bill of lading' forms which they fill in and present to the carrier for signature. The 'bill of lading' is usually filled in by the 'shipper' or his agent and presented to the master or some other agent of the carrier who signs it. When this occurs, each party's conduct indicates that he assents to the terms of the 'bill of lading'. And, a 'shipper' who receives a 'bill of lading' and raises no objection to its terms will be bound by them except those which are onerous and unusual.

86. A contract of carriage may thus be contained in or evidenced by other documents such as a **sea waybill** or **mate's receipt** which are also receipts for the goods 'shipped' and a document of title (but not negotiable) (see Article 1(b) *Carriage of Goods by Sea Act 1991*).

87. The payment of 'freight' by the 'shipper' to the carrier under a 'bill of lading', seaway bill, mates receipt or similar instruments that constitute or evidence a contract for the carriage of goods is clearly a payment for the carriage of goods and thus come within the section.

Carriage under charterparties

In general

88. The shipping of goods in a chartered ship also involves the issue of a 'bill of lading'. The 'bill of lading' may be issued to a person who is also the 'charterer' of the carrying ship or to a person other than the 'charterer'. This gives rise to a number of special issues such as: the status of the 'bill of lading' in the hands of the 'shipper', the 'charterer' or a third party; whether the goods are carried on the terms of the 'bill of lading' or the 'charterparty'; the identity of the carrier and which document constitutes the contract of carriage. A shipowner may also carry the goods of several 'shippers' and the contract of carriage is the 'bill of lading' for one 'shipper' and the 'charterparty' for the other. It is this diversity of situations surrounding the carriage of goods by sea that leads the Tax Office to adopt a practical and commonsense approach to the interpretation of section 129.

89. As a general rule, where goods are 'shipped' in a ship chartered by the 'shipper' directly from the shipowner, any 'bill of lading' issued to the 'charterer' by or on behalf of the shipowner operates as between the shipowner and 'charterer', as a mere receipt. It is evidence of the facts stated in it, such as the receipt of the goods by the shipowner, the time of shipment and the apparent order and condition of the goods. But it is not evidence of the terms of a contract of carriage, for that contract will normally be contained in the 'charterparty'.[19] This rule also applies in those cases where a 'bill of lading' is first issued to a 'shipper' who is not the 'charterer' and later endorses it to the 'charterer'. This occurred in *The Dunelmia*[20] where a F.O.B. seller had 'shipped' goods on a ship chartered by the buyer for the purposes of taking delivery of the goods and the seller later endorsed the bill to the buyer.

90. On the other hand, where the 'bill of lading' has been endorsed by the 'shipper charterer' to a third person, as a general rule, the bill will operate between 'shipper' and transferee as a document of title, and constitute the contract of carriage between the carrier and transferee. A variant of this is the case where there is a 'charterparty' to which no transferee is a party. For example, a ship may be chartered by her owner to a 'charterer' and then sub-chartered by the 'charterer' to a 'shipper', to whom a 'bill of lading' is later issued by the shipowner. As there is no 'charterparty' between shipowner and 'shipper', the 'bill of lading' is regarded as evidencing a contract of carriage between the shipowner and 'shipper'. The position would change where the 'bill of lading' is issued by or on behalf of the 'charterer'. In this case the 'bill of lading' would not be a contract of carriage between 'shipper' and shipowner. However, as between the 'charterer' and 'shipper' the contract of carriage would be contained in the sub-charter, so that the 'bill of lading' would prima facie be a mere receipt.

91. The identification of the carrier can be a matter of difficulty. The carrier is rarely expressly identified in the 'bill of lading'. The fact that the 'bill of lading' may be issued in the name of the shipowner, the 'charterer', a sub-charterer or the agent of any of them raises the question of 'who is the carrier?' Standard 'charterparty' forms usually contain a clause requiring the Master of the ship or its agent to sign 'bills of lading' 'as presented' by the 'charterer' or for the 'charterer' or its agent to sign the 'bill of lading' itself on behalf of the Master. In both situations, the shipowner is regarded as the contracting carrier with the 'shipper' both at law and under the special Rules referred to in paragraph 35. A 'bill of lading' issued in these circumstances is often referred to as an '**owner's bill**'. In the less common case, the terms of a 'charterparty' may allow a 'bill of lading' to be signed in the charterer's own name or by agents on its behalf. Such a bill is known as a '**charterer's bill**' and the shipper's contract of carriage is usually with the 'charterer'.

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[19] *Rodoconachi Sons & Co v. Milburn Brothers* [1886] 18 QBD 67 and *The Ship 'Socofl Stream' v. CMC (Australia) Pty Ltd* (2001) FCA 961.
[20] *The President of India v. Metcalfe Shipping Co. Ltd (The Dunelmia)* [1970] 1 QB 289.

92. When discussing this issue, *Carver On Bills of Lading*[21] states at paragraph 4-027:

> The question is one of considerable difficulty because underlying commercial considerations may well suggest different answers to it. On the one hand, the negotiations preceding the making of the contract of carriage are likely to be conducted between shipper and charterer, and this fact might point in the direction of the bill's being a charterer's bill. But it will not invariably lead to this conclusion, since regard must be had to the different practical or commercial purposes which may be served by various types of charterparties.
>
> Again this conclusion will not invariably follow, but the present point does provide a commercial context for the strange conclusion that a relationship created by negotiations between shipper and charterer may, and quite commonly will, give rise to a bill of lading contract between shipper (and hence between a transferee of the bill) and shipowner. Moreover, the person who actually performs the carriage operation will, in the cases with which we shall be principally concerned, (i.e. with cases in which the charterparty is not by way of demise) be the shipowner; and this fact, to which the courts have tended to attach considerable weight points, though not decisively, in the direction of the bill's being an owner's bill.

93. It is clear that where there is a contract of carriage between 'shipper' and shipowner or 'charterer', whether the contract be the 'bill of lading' or 'charterparty', the amount paid by way of 'freight' under a 'bill of lading' or 'voyage charterparty' and the amount of 'hire' paid under a 'time charterparty' is an amount paid in respect of the carriage of goods.

'Hire' under a time charterparty

94. As can be seen from the discussion under the previous sub-heading, the function and purposes of a 'time charterparty' and 'voyage charterparty' can be very similar and they share similar legal issues. Although a 'voyage charterparty' is often described as a contract of carriage[22] it does not serve that purpose all of the time.

[21] Sir Treitel, G & Reynolds, FMB 2001, *Carver On Bills Of Lading*, Sweet & Maxwell.
[22] Wilson, JF *Carriage Of Goods By Sea*, 3rd edn, Pitman Publishing, Chapters 1 & 3; Davies, M & Dickey, A 2004, *Shipping Law*, 3rd edn, Lawbook Co, Chapters 10 & 13.

95. The fact that various descriptions are given to a 'time charterparty' by case law and maritime writers suggests that a 'time charterparty', depending on the context, can serve various purposes. For example, a 'time charterparty' has variously been described as a contract of carriage, a contract for services, a contract for the use of a ship, a contract for transportation services, a contract of affreightment, a contract under which the owner places a crewed ship at the disposal of the 'charterer' and a contract for the hiring of a ship.[23] Such characterisations reflect, in part, the fact that a 'time charterparty' is itself a particular kind of commercial bargain between owner and 'charterer' and partly from the characteristics and hazards of carriage by sea.

96. It is the function that a ship under a 'time charterparty' performs that is important and not the description given to the arrangement. Section 129 speaks in terms of carriage on a ship shipping goods in Australia. In this regard it is clear both at law and according to maritime practice that the ship performs the function of carrying the goods that the 'charterer' puts on board the ship. Where the 'charterer' is also the 'shipper', the 'time charterparty' is itself the contract of carriage, which by its very nature is a contract for transportation services. This in part explains why 'bills of lading', 'voyage charterparties' and 'time charterparties' are grouped together and generally classified as contracts of affreightment. For instance, *Scrutton on Charterparties and Bills of Lading*, states that 'depending on the manner in which the ship is employed, the contract of affreightment may be contained in a charterparty or evidenced by a bill of lading'.[24]

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[23] For various descriptions given to time charterparties see: *Carriage of Goods by Sea*, (footnote 22) at 4, 5, 86 & 92; *Shipping Law*, (footnote 22) at 161; Wilford, M, Coghlin, T & Kimball, JD 1995, *Time Charters*, 4th edn, Lloyd's of London Press Ltd at 530 & 536; White, MWD 2000, *Australian Maritime Law*, 2nd edn, The Federation Press, at 122 & 137; Colinvaux, R 1982, *Carver's Carriage by Sea*, 13th edn, Stevens & Sons, London, at 413, 416-418, 460, 473, 482 & 1234; Boyd, SC, Burrows, AS & Foxton D 1996, *Scrutton on Charterparties and Bills of Lading*, 20th edn, Sweet & Maxwell, London, at 59; *Australasian United Steam Navigation Co. Ltd v. The Shipping Control Board* (1945) 71 CLR 508; *Sea and Land Securities Ltd v. Dickenson* [1942] 2 KB 65; *Federal Commerce and Navigation Ltd v. Molena Alpha Inc*. (*The 'Nanfri'*) [1979] 1 Lloyd's Rep 201 (HL) and *Whistler International Limited v. Kawasaki Kisen Kaisha Limited* [2001] 1 AC 638.

[24] *Scrutton on Charterparties and Bills of Lading* (footnote 23) Art. 1 p. 1 and *Australasian United Steam Navigation Co Ltd* (footnote 23) where Rich J at 525 stated that a time charterparty was a charter in respect of the use or services of ship and performed the ordinary function of a charter of affreightment.

97. Where the 'time charterparty' is not itself the contract of carriage between the shipowner and 'charterer', the purpose served is generally acknowledged to be the provision of transportation services by the owner to the hirer (see the similar conclusion reached in TR 2003/2 at paragraph 60). In that context section 129 has no role to play because no goods have been 'shipped' pursuant to that contract. In such a case, the person reaping the benefits of carrying the 'shipper's' goods is likely to be the 'charterer' or a sub-charterer. The arrangement that section 129 is concerned with is the arrangement between the 'shipper' of the goods and the person that he pays to carry his goods which in the industry is referred to as the 'freight beneficiary'. Put differently, section 129 is concerned with amounts paid by the 'shipper' to the person who carries his goods in a ship which either belongs to or is chartered by that person. Adopting this approach meets the object of section 129 as a simple tax and also accords with the nature of a 'time charterparty' and the various purposes it serves. Indeed, section 129 would have an absurd operation if 'hire' paid under a 'time charterparty' in the circumstances where the 'charterparty' is the contract of carriage is included, while 'hire' paid in those cases where the 'charterparty' is not a contract of carriage, in the strict sense, but the time 'charterer' as operator is still providing transportation services to the 'shipper', is excluded.

98. As explained by the House of Lords in *Whistler International Limited v. Kawasaki Kisen Kaisha Limited*,[25] the crucial element of a 'time charterparty' is that there is a division in the ship's management between the owner and the 'charterer'. The ownership and possession of the vessel remain in the owner who is responsible for the navigation of the vessel. The owner has to bear the expense of maintaining the ship and the crew who are the owner's employees; carries the risk of marine accidents and has to insure the vessel in return for the payment of 'hire'. On the other hand, the economic exploitation of the ship rests with the 'charterer'. He bears the full commercial risk and expense of finding and contracting with customers and enjoys the full benefit of the earnings of the vessel.

[25] *Whistler International Limited v. Kawasaki Kisen Kaisha Limited* [2001] 1 AC 638.

99. The fact that the 'charterer' finds the 'shippers' and arranges a contract of carriage with them entitles him to the 'freight' or 'hire' payable by the 'shipper' unless the arrangement entered into between the 'charterer' and the 'shipper' provides to the contrary. This division of management of the ship and the consequential division of profits reflected in the different payments made by the 'charterer' to shipowner and 'shipper' to 'charterer' is an essential aspect of the carriage of goods by sea where several 'charterparties' are involved. It is well understood in the shipping industry and often commented on by case law. Channell J in *Wehner v. Dene SS. Co.*[26] made the following comment on the rights of the shipowner and the 'charterer' or sub-charterer to 'freight' under a 'bill of lading' issued as an owner's bill:

> Now, although the owner has the right to demand the bill of lading freight from the holder of the bill of lading because the contract is the owner's contract, yet the owner has also, of course, contracted by the charterparty that for the use of his ship he will be satisfied with a different sum, which will also in the great majority of cases be less than the total amount of the bills of lading freights; and, therefore, if the owner were himself to demand and receive the bills of lading freight, as he might do if he chose, he would still have to account to the charterer or the sub-charterer, as the case might be, for the surplus remaining in his hands after deducting the amount due for hire of the ship under the charterparty.

100. It is worth emphasising that section 129 is predicated on the premise that the goods are carried on a ship which is either operated by the owner himself or is under charter to another person. It's not a requirement of the section that the owner or 'charterer' has a contract of carriage with the 'shipper'. The section looks at the payments made by the 'shipper' for the carriage of his goods in that context. Indeed, where the shipowner or 'charterer' directly enters into a contract of carriage with the 'shipper' in the form of a 'time charterparty', the amount of 'hire' paid is clearly a payment in respect of the carriage. Where the 'charterer' carries the goods of the 'shipper' in a ship it has chartered but the contract of carriage is with the shipowner, only the amounts payable by the 'shipper' to the 'charterer' for such carriage are to be brought to account under section 129. It is the ATO view that in both of the situations discussed above the 'hire' paid to the shipowner or the 'charterer' by a 'shipper' is an amount paid or payable in respect of the carriage of the 'shipper's' goods. In both cases there is a **material discernible and rational link between the payment of the 'hire' and the carriage of the shipper's goods**.

[26] *Wehner v. Dene SS. Co.* [1905] 2 KB 92 and also in *Tradigrain v. King Diamond Marine Limited* [2000] 2 Lloyd's Rep 319.

101. The circumstances discussed above as to when a 'time charterparty' itself constitutes a contract of carriage and the commercial considerations involved in the division of the ship's management under a 'time charterparty' tend to explain why historically 'freight' paid under a 'voyage charterparty' and 'hire' paid under a 'time charterparty' were considered to be similar. That history was considered in *The 'Nanfri'*[27] and in *The 'Cebu' No. 2*.[28] The cases show that despite modern technical differences for certain purposes of the law between the two it was at one time common to describe the sums payable under a 'time charterparty' as 'freight'.

102. In *The 'Nanfri'* Lord Denning MR said at page 139:

> At one time it was common to describe the sums payable under a time charter-party as 'freight'. Such description is to be found used by judges and text book writers of great distinction. But in modern times a change has come about. The payments due under a time charter are usually now described as 'hire' and those under a voyage charter as 'freight'.

103. The court in *The 'Cebu' No. 2* traced the history of the use of the word 'freight' and concluded that a change in the use of the term in the shipping trade came about in modern times. That is, sometime before 1946 when the widely used standard NYPE time charter amended form was published which consistently uses the word 'hire'. By 1950, at least, the popular Baltime form also consistently called the periodic payments under a time charter 'hire'. The change was also reflected over time in specialist dictionaries and by legal textbooks.

104. As mentioned in paragraphs 28 and 80 in interpreting the scope of section 129 it is appropriate to have regard to maritime law and practice. The history of the description given to 'freight' and 'hire' suggests that the two may be similar depending on the purpose they serve. Section 129, in its current form, was introduced into the ITAA 1936 in 1935 by the Income Tax Assessment Bill 1935 but its federal income tax predecessor dates back to the *Income Tax Assessment Act 1915-1916* (ITAA 1915-1916). In the circumstances, it could reasonably be assumed that the Legislature at the time intended that time charter freight would come under the section. While a change has occurred in modern times, so that 'freight' is now regarded as a payment **for** the carriage of goods, the payment of 'hire' in the context of the situations discussed above is so closely associated with the carriage of goods that it would clearly be regarded as an amount paid 'in respect of' the carriage of goods.

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[27] *Federal Commerce and Navigation Ltd v. Molena Alpha Inc*. (*The 'Nanfri'*) [1978] 2 Lloyd's Rep 132 (CA) per Lord Denning.

[28] *Care Shipping Corporation and Others v. Itex Itagrani Export S.A (The 'Cebu' No. 2)* [1992] 1 All ER 91; [1990] 2 Lloyd's Rep 316.

Apportionment of 'hire' where ship is used to ship goods in Australia and in other countries

105. The circumstances under which a time-chartered ship is used for the carriage of goods can vary greatly. A ship under a 'time charterparty' may be used by the 'charterer' to ship goods partly from Australia and partly from other countries. For example, a time chartered ship may be used to ship goods in Australia exclusively for nine months of an income year and the other three months to ship goods exclusively from, say, New Zealand. The ship could also be, in the main, devoted to shipping goods in Australia but on occasions go to New Zealand for a top-up cargo for discharge overseas. The ship may be on a ballast voyage or laid-off for a period of time due to the lack of cargo. Where this occurs, only that part of the 'hire' paid under a 'time charterparty' that relates to the shipment of goods in Australia will fall within section 129. This requires the adoption of a reasonable basis of apportionment.

106. One basis of apportionment that can be used, in the context of the above circumstances, is the time basis. Some members of the shipping industry have suggested that apportionment should be based on the time that a ship comes on hire to the time it ceases to be on hire in respect of each voyage for goods shipped in Australia. The daily rate of 'hire' is then applied to this time to give the total amount of 'hire' referable to the shipment of goods in Australia. The information required to adopt this basis of apportionment is readily available from the ship's Statement of Facts. Apportionment would thus be based on the following period:

(a) For voyages outside Australia – From the time a ship arrives at the pilot station at its first port in Australia to the time of completion of discharge at its final port outside of Australia.

(b) For Australian coastal voyages – From the time the ship arrives at the pilot station at its first port in Australia to the time of completion of discharge at the last Australian port.

The above time basis of apportionment is acceptable to the Tax Office. It is up to taxpayers to demonstrate that other circumstances may require the adoption of some other reasonable basis of apportionment so that only the amount of 'hire' referable to the carriage of goods etc 'shipped' in Australia is brought to account under section 129.

'Demurrage'

107. An important clause in a 'voyage charterparty' and in some liner 'bills of lading' is that which specifies the amount of time allowed for loading and unloading the cargo. The time allowed is referred to as 'laytime' which is free of charge to the charterer. If the 'laytime' is exceeded, the 'charterer' has to pay compensation to the shipowner in the form of 'demurrage'.

108. The nature of 'demurrage' has been variously described and the term is also used in other detention cases outside the field of loading and unloading a ship.[29] This Ruling applies to 'demurrage' payable in the field of carriage by ship. The two main theories of 'demurrage' are, first, that it is additional 'freight' and, secondly, that it is damages for breach of contract. The preference for any one view differs in various jurisdictions. However, it should be noted that the contract of carriage may be, and is usually, governed by foreign law. Under English law there are arguments either way, but the prevailing view is that 'demurrage' is regarded as agreed damages for breach of contract and is recoverable without proof of loss by the shipowner[30] (see contra view in *Burmah Steam Ship Co. Ltd v. Commissioners of Inland Revenue*[31] where Lord Sands considered 'demurrage' to be additional 'freight').

109. The 'demurrage' rate is usually a daily rate fixed by reference to the 'freight' rates payable under the 'voyage charterparty'. The time of payment varies and depends on express provisions in the 'charterparty'. 'Demurrage' incurred upon loading may be payable on completion of loading or on completion of discharge. 'Demurrage' incurred on the unloading of cargo is normally payable at that point.

110. Irrespective of whether 'demurrage' is considered to be additional 'freight' or damages for breach of contract there is a sufficient and direct connection between the 'demurrage' payment and the carriage of the goods to bring 'demurrage' within the provisions of section 129. The loading and unloading of goods are, like the transportation of the goods, an integral part of the business of carriage by sea. In fact, the loading and unloading operations are seen as identifying the first and last operations in a series of operations that constitute the carriage of goods by sea. For instance, for the purposes of the Hague Rules (see paragraph 35) loading and discharge form part of the carriage operations.

111. To reiterate, the object of section 129 (see paragraphs 57 to 60) is to assess the profits of a shipowner or 'charterer' albeit as an arbitrary amount of taxable income. The 'demurrage' rate fixed by the parties is intended to cover the ship's daily running costs plus the profit the ship operator would have been able to earn had the ship not been delayed. 'Demurrage' payments clearly contain a profit element materially linked with the carriage of goods by sea. In the circumstances, it is the ATO view that the words 'in respect of' are broad enough to cover 'demurrage' even if it is a payment for damages for breach of contract. This view accords with the Tax Office's long standing view contained in various Canberra Income Tax Circular Memoranda (CITCMs) that 'demurrage' payments fall within section 129 (see CITCM 580 as amended by CITCM 756).

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[29] Tiberg, H 1995, *The Law of Demurrage*, 4th edn, Sweet & Maxwell, Chapter 12; Schofield, J 2000, *Laytime and Demurrage*, 4th edn, LLP Chapter 6.
[30] See: *Carriage of Goods by Sea* (footnote 22) at 51 & 52; *Australian Maritime Law* (footnote 23) at paragraph 6.3.8.
[31] 16 TC 67 at 73.

'Deadfreight'

112. Standard forms 'voyage charterparties' normally contain a clause for the 'charterer' to provide a 'full and complete' cargo. If the 'charterer' fails in his obligation the shipowner is entitled to damages for breach of contract – otherwise known as 'deadfreight'. The amount due to the shipowner is generally calculated on the basis of the 'freight' appropriate to the amount of unutilised cargo space. The time of payment varies according to express terms in the 'charterparty'. 'Deadfreight' clauses also appear in some liner 'bills of lading'.

113. The payment of 'deadfreight' does not occur regularly in the industry. One reason for this is that a replacement cargo is often found to fill the ship's holds that the original 'shipper' could not fill. Here, 'deadfreight' does not arise since the contract between the shipowner and 'shipper' is fulfilled by providing a complete cargo. However, the finding of a replacement cargo may entail a separate payment of 'freight' (sub-freight) by the second 'shipper' of goods to the original 'shipper' as a sub-charterer. The sub-freight would also fall within section 129 and assessable in the hands of the original 'shipper' since it is a payment made in respect of the carriage of a separate shipment of goods belonging to the second 'shipper'. In the circumstances, this may entail an adjustment to be made to the amount of freight paid by the original shipper to the shipowner so that only the amount paid in respect of the carriage of the goods of the original shipper is assessed in the hands of the shipowner.

114. Payments for 'deadfreight' occur because a quantity of goods has not been 'shipped'. It is a penalty or compensation not in respect of the carriage of goods but rather one for non-carriage of a particular quantity of goods. Therefore, such payments are outside the scope of section 129 and are not to be taken into account in determining the deemed taxable income under the section.

115. However, as the terms and context of 'deadfreight' clauses may differ under a 'voyage charterparty' there may be circumstances where that item can be taken into account – for example, where the clause establishes a minimum charge for the specified voyage.

'Dispatch (or despatch) money'

116. These payments also occur under a 'voyage charterparty' and 'bill of lading'. They are normally dealt with in the same clause as the Demurrage Clause. The payment is made by the shipowner to the 'charterer' or 'shipper' as an inducement to complete the loading and unloading operations as quickly as possible. The 'dispatch money' is a payment for any 'laytime' saved. Normally the rate for 'dispatch money' is fixed at 50 per cent of the agreed 'demurrage' rate. Settlement time is similar to the payment for 'demurrage'.

117. The payment of 'dispatch money' by the shipowner to a 'charterer' or 'shipper' relating to time saved in Australia for the loading of goods and the time saved for the discharge of the goods should be deducted from the amount which would otherwise be treated as the amount paid or payable for the carriage of goods under section 129.

118. At common law 'freight' is payable only on delivery of the goods at the port of discharge. The agreed 'freight' is also payable in full with no deduction allowed, for example, by way of set-off. However, stipulations as to the payment of 'freight' vary greatly between contracts. In practice, 'bills of lading' and 'voyage charterparties' expressly provide for the whole or part of the 'freight' to be paid in advance and in some cases permit some deductions. A usual clause in a 'bill of lading' and 'voyage charterparty' is 'The freight shall be deemed earned as the cargo is loaded on board and shall be discountless and non-refundable, vessel and/or cargo lost or not lost'. It would appear, however, that it is customary for 'dispatch money' to be deducted from 'freight'.

119. The payment of 'freight' under maritime law and practice may raise some issues about the time of derivation of 'freight' and when the adjustment for 'dispatch money' can be made. Irrespective of whether 'dispatch money' represents an amount of 'freight' unearned or not, the amount that would otherwise be treated as derived under section 129 should be reduced by any 'dispatch money' paid.

Cleaning charges

120. The condition of a ship is the responsibility of the shipowner. The shipowner has to provide a ship that is seaworthy and fit for the voyage and to carry the particular cargo. For example, a ship that previously carried coal may need to be cleaned in order to make it fit to carry some other cargo.

121. Some 'voyage charterparties' expressly provide that the cleaning of the ship's tanks etc. is the responsibility of the owner and the expense incurred on its account. Generally speaking, the practice in the industry is that the shipowner is responsible for cleaning the ship both before and after a voyage for goods carried under a 'voyage charterparty' or 'bill of lading'. Where a 'time charterparty' is involved the shipowner is obliged to deliver a clean ship to the 'charterer' but the 'charterer' is responsible for cleaning the ship during its use and on re-delivery to the shipowner. Cleaning costs are also normally factored in the 'freight' charged to the 'shipper' rather than carved out as a separate payment.

122. It would appear that the circumstances in which a 'shipper' of goods is required to indemnify a carrier against the costs of cleaning and testing to make a vessel cargo-worthy for particular goods arise where the goods concerned have an unusual quality or character that requires a higher degree of cleaning prior to shipment (being a requirement of the 'shipper') or following discharge (for the cargo holds to be left in an acceptable condition for subsequent goods).

123. In *Case No. K 12*,[32] the carrier was responsible for cleaning the ship and making it fit to carry a cargo of oil. However, a clause in the 'bill of lading' provided that the 'shippers' undertake to reimburse the carriers for any expense actually incurred in preparing and testing the tanks. The 'bill of lading' was endorsed with the amount payable for 'Freight' as well as 'Cleaning charges'. The Taxation Board of Review held that the cleaning charges fell outside the provisions of section 129. The reasoning for this was that only 'freight' is caught under the section.

124. It is understood from the industry that the cleaning of a ship is rarely done by the 'shipper'. The circumstances, as discussed in paragraph 122, where the shipowner (who normally has the responsibility for cleaning the ship) separately charges the shipper for cleaning the ship is also rare. In the circumstances, the Tax Office accepts that cleaning charges fall outside section 129. However, it does not accept the Board's reasoning that only 'freight' falls within the section. Where cleaning charges are separately charged to the 'shipper' and the charges are excessive, consideration will be given to other provisions of the ITAA 1936 or the ITAA 1997 to ensure that the correct amounts paid or payable in respect of the carriage of goods etc. are brought to account under section 129.

[32] [1959] 10 TBRD 74.

Appendix 2 – Alternative views

This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the binding public ruling.

Alternative view

125. The alternative view is that 'hire' paid under a 'time charterparty' would be excluded from section 129, in those cases where the 'time charterparty' is not itself the contract of carriage, on the basis that the 'time charterparty' is only a contract for the provision of transportation services. This view stems from the decision of the Taxation Board of Review in *Case No. K 12* in that section 129 only captures amounts paid by way of 'freight'. That is, section 129 only envisages payments made '**for**' the carriage of goods.

126. For the reasons advanced in this Ruling, this view is not accepted. The Taxation Board of Review in *Case No. K 12* referred to the High Court decision in *Ocean Steamship Co. Ltd*[33] in support of its reasoning. That case was concerned with 'freight' (not 'hire') payable to a shipowner in respect of the transhipment of the goods by a ship overseas other than the ship that originally shipped the goods in Australia. The question as to the scope of the operation of the words 'in respect of' and its application to 'hire' did not arise. The issue was simply whether the section only caught 'freight' earned by the ship leaving Australia.

127. Indeed, Barton J when quoting a passage in the section as appeared in the ITAA 1915-1916, namely, 'goods shipped in Australia' and 'full amount payable to him ... in respect of the carriage' made the comment at 414 of the CLR:

> The passage just quoted follows the ordinary definition of freight, and means the freight payable to the shipowner in or out of Australia on the goods.

His Honour's comment was made in the context of the discussion on whether the section referred to a particular ship (that is, the ship leaving Australia) or more than one ship that was involved with the carriage. It was not an observation as to the scope and meaning of the words 'in respect of'. On the same page, His Honour also commented that: 'It must be assumed that the legislature in framing this section…… had in mind the ordinary maritime law'. As explained above, at that time maritime law treated the remuneration paid under a 'time charterparty' as 'freight'. His Honour's comments may well have been made in the light of this knowledge.

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[33] *Ocean Steamship Company Limited v. Federal Commissioner of Taxation* (1918) 25 CLR 412.

128. While carriage arrangements existing at the time may not have involved a proliferation of charterparties, time charterparties would have been in use as is evident from early decisions of the courts. These early court decisions recognised that in some context 'time charterparties' serve as contracts of carriage and in others that the profits made in respect of the carriage of goods is shared because of the dual management of the ship by the owner and charterer – one receiving the 'freight' under the 'bill of lading' or 'voyage charterparty', the other the 'hire' under the time charterparty.

Appendix 3 – Detailed contents list

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- bill of lading
- carriage of goods
- coasting trade
- cleaning expenses
- deadfreight
- demurrage
- dispatch money
- freight
- hire
- time charterparty
- voyage charterparty

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