



14 October 2013

VIA E-MAIL

Mr. Michael Lennard  
Chief, International Tax Cooperation Section  
Financing for Development Office  
UN Department of Economic and Social Affairs  
2 UN Plaza, Room DC2-2172  
United Nations  
New York, NY 10017  
USA  
[lennard@un.org](mailto:lennard@un.org)

Re: United Nations Model Double Taxation Convention, Article 8

Dear Mr. Lennard :

On behalf of the International Air Transport Association (IATA), I am writing to express our interest in the work to be undertaken by the United Nations Committee of Experts on International Cooperation in Tax Matters (the Committee) on Article 8 (Shipping, inland waterways transport and air transport) of the UN Model Double Taxation Convention.

IATA is the trade association for the world's airlines, representing some 240 airlines or 84% of total air traffic. We will be represented at the Committee's Ninth Session in Geneva on 21-25 October 2013 by Messrs. Dane Clapson and Auguste Hocking from IATA's legal department and Mr. Frédéric Roch of Air France (Chairman of IATA's Industry Taxation Working Group), and they look forward to the opportunity to meet you and speak with you there.

In connection with the discussion to take place at the Geneva meeting, we have prepared the attached preliminary comments on Article 8 and its Commentary under the UN Model. I would be very grateful if you could make a copy of these comments available to the Committee members in advance of the meeting.

I would also like to take this opportunity to express IATA's interest in contributing further to any ongoing work the Committee may undertake with respect to Article 8 after this month's meeting. The outcome of the Committee's discussion on Article 8 is extremely important to the IATA membership, and we believe

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we could contribute very constructively to the Committee's analysis of the policy considerations relevant to Article 8. Please do not hesitate to contact me and/or IATA's tax counsel, Mary Bennett of Baker & McKenzie LLP ([mary.bennett@bakermckenzie.com](mailto:mary.bennett@bakermckenzie.com)), if you would like to pursue this offer of further dialogue.

Thank you very much for your kind consideration of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Charlotte Fantoli". The signature is fluid and cursive, with a long horizontal stroke at the end.

Charlotte Fantoli  
Manager, Industry Taxation  
[fantolic@iata.org](mailto:fantolic@iata.org)

Attachment: Appendix, IATA Preliminary Comments on Article 8

**INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA) :**  
**PRELIMINARY COMMENTS ON ARTICLE 8 OF THE UN MODEL TAX CONVENTION**

***MEETING OF THE COMMITTEE OF EXPERTS ON INTERNATIONAL COOPERATION IN TAX MATTERS***  
***GENEVA, 21-25 OCTOBER 2013***

***Introduction***

1. IATA is the trade association for the world's airlines, representing some 240 airlines or 84% of total air traffic. Our member companies are based in over 125 countries and engage in air transport operations in virtually every country around the globe.
2. Our member companies' ability to conduct their air transport operations without facing crippling compliance burdens and multiple taxation risks depends almost entirely upon the consensus in favor of exclusively residence-based taxation of airlines' income from international traffic, as reflected in Article 8 (Shipping, inland waterways transport and air transport) of the UN Model Tax Convention and in the identical language of Article 8 of the OECD Model Tax Convention.
3. Accordingly, IATA has a strong interest in the manner in which Article 8 is interpreted and applied.
4. The UN Model is an important manifestation of the UN's policy to contribute to the development aims of developing countries by eliminating, on politically and economically acceptable terms, the international double taxation that would otherwise inhibit the growth of investment flows from developed to developing countries.
5. The UN's International Civil Aviation Organization (ICAO) has long recognized the fundamental importance of international air transport services to the development of the economies of developing States, and it has strongly endorsed the Article 8 exemption as a key factor in fostering sustainable economic development by removing the threat of double taxation of international civil aviation.<sup>1</sup> The 38th session of the ICAO Assembly earlier this month endorsed the reinforcement of its policies on taxation in the field of international air transport with ICAO contracting states.<sup>2</sup>
6. We understand that in connection with the preparation of the 2011 update to the UN Model, the Committee discussed the question of whether the Commentary on Article 8 of the UN Model should be revised to align more closely with the Commentary on Article 8 of the OECD Model, including the amendments made to the latter in 2005 to refer to income directly connected with the operation of aircraft in international traffic and income from activities "ancillary" to such operation.
7. The Committee declined to adopt the OECD changes as part of the 2011 update, with members noting that the changes needed to be discussed in more detail to assess their implications.

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<sup>1</sup> See ICAO Assembly Resolution A37-20, Appendix E, and ICAO's Policies on Taxation in the Field of International Air Transport (Third Edition – 2000), Doc 8632.

<sup>2</sup> See [http://www.icao.int/Meetings/a38/Documents/WP/wp055\\_en.pdf](http://www.icao.int/Meetings/a38/Documents/WP/wp055_en.pdf).

8. The Committee decided to add the issue of revising the Article 8 Commentary to the catalogue of issues and to consider the issue further at its 2013 meeting.
9. IATA strongly supports the idea of aligning the Commentary on Article 8 of the UN Model with the Commentary on the identical language of Article 8 of the OECD Model, and we are pleased to present the preliminary comments below to explain our reasons for that view.
10. IATA also wishes to confirm to the Committee its interest in contributing constructively to the Committee's ongoing examination of the policy considerations relevant to this decision, and we would be grateful for the opportunity to provide a more thorough analysis after the Committee's October 2013 meeting. We are prepared to engage with the Committee in any way you would find helpful as you pursue this work.

***Article 8 -- General***

11. The policy of including in treaties a reciprocal exemption for income from the operation of aircraft in international traffic dates back as far as the 1928 League of Nations Model Tax Convention. The rationale then was the same as it is today, namely a recognition that for businesses operating in this sector, "lack of implementation of this rule of reciprocal exemption involves either multiple taxation or considerable difficulties of income allocation in a very large number of taxing jurisdictions."<sup>3</sup>
12. As the ICAO has further noted, decisions in favor of reciprocal exemptions were made because "multiple taxation on the ... income of international air transport, as well as taxes on its sale and use, were considered as major obstacles to further development of international air transport. Non-observance of the principle of reciprocal exemption envisaged in these policies was also seen as risking retaliatory action with adverse repercussions on international air transport, which plays a major role in the development and expansion of international trade and travel."
13. IATA worked closely with the OECD in analyzing issues relevant to the scope of the Article 8 exemption during the period leading up to the 2005 changes to the Commentary on Article 8 of the OECD Model. We would be glad to provide the Committee with a detailed review of the considerations that led to the adoption of those clarifications, but for present purposes let us highlight the major points.

***Treatment of "ancillary"/ "auxiliary" income***

14. Much of the discussion leading to the changes to the OECD Commentary related to the application of the Article 8 exemption to income that was not from the direct operation of aircraft in international traffic but was from activities sufficiently closely connected to that operation to be considered to fall within the scope of the exemption.
15. Prior to 2005, paragraph 7 of the OECD Commentary used the term "auxiliary" to refer to such activities. The 2005 OECD Commentary changed the terminology for that concept to "ancillary". It was IATA's understanding that the primary reason for this change was to avoid confusion with the concept of "preparatory or auxiliary" under Article 5, particularly since the latter is interpreted

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<sup>3</sup> ICAO's Policies on Taxation in the Field of International Air Transport (Third Edition – 2000), Doc 8632.

as referring to activities that are “remote from the actual realisation of profits”.<sup>4</sup> It was clear that the examples of so-called “auxiliary” activities described at paragraph 8 of the pre-2005 OECD Commentary on Article 8 (e.g., the sale of passage tickets on behalf of other enterprises, the operation of a bus service connecting a town with its airport, etc.) did not meet the description of being remote from the actual realization of profits. The term “ancillary” to the operation of aircraft in international traffic, adopted at paragraph 4.2 of the 2005 OECD Commentary, was considered a more appropriate description of the activities intended to be covered by Article 8.

16. The 2005 OECD Commentary included elaborations on the types of income that would be considered directly related or ancillary to the operation of aircraft in international traffic.<sup>5</sup> This was done to update the Commentary to reflect more usefully the actual state of cooperation among airlines. IATA had provided background information to the OECD to explain the need for this greater clarity, including the following:

The practice of airlines to perform various ancillary activities for one another at airports around the world has existed for many decades and has intensified with the growing development of strategic alliances. The reasons for this practice are basically economic. Everywhere a foreign airline flies it must operate, or otherwise provide for, terminal facilities, baggage and ground handling, load control and communications, ramp services, security services, catering, aircraft servicing and maintenance, hangars, and other capital-intensive functions and equipment. These functions must be performed and equipment provided even where the airline’s service of a particular airport is minimal. Similarly, pilots, flight attendants, mechanics, baggage handlers, reservation agents, gate agents, security guards, cooks, cleaners, and other personnel, usually highly unionized, must be provided in each location notwithstanding thin traffic. The evolving demands of modern travelers also require the airlines to provide other amenities, including in-terminal lounges, eating facilities, business facilities, and in-flight entertainment. Almost from the beginning of commercial aviation, airlines have entered into cooperative arrangements to perform these activities for one another in order to maximize the efficient use of available resources. This practice, which has been recognized and encouraged by governments for decades, improves the economic situation of the airlines and their customers alike.

17. IATA urges the UN similarly to recognize that income attributable to these types of activities carried out by airlines on behalf of their passengers and on behalf of one another falls within the scope of the Article 8 exemption for income from operation of aircraft in international traffic.
18. Another important issue addressed by the OECD’s 2005 Commentary relates to the income earned by airlines from the extraordinarily common cooperative arrangements that have grown up with respect to the actual provision of transport, including code-sharing arrangements. Code-sharing is a form of marketing arrangement in which airlines agree to allow each other to put their own designator code on flights operated by the other airline in order to be able to sell itineraries they otherwise could not offer to their customers. For example, if a European airline (“EuroAir”) and a US airline (“StatesAir”) had a code-sharing arrangement, they might both be

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<sup>4</sup> See paragraph 23 of the Commentary on Article 5 of the OECD Model, reproduced at paragraph 18 of the Commentary on Article 5 of the UN Model.

<sup>5</sup> See, e.g., paragraph 10 of the OECD Commentary on Article 8.

able to market themselves as offering a Paris-Chicago-Detroit itinerary without regard to which airline was going to operate the individual legs. Thus, a customer purchasing the trip from EuroAir might receive a ticket showing Flight EU123 from Paris to Chicago and Flight EU456 from Chicago to Detroit, and a customer purchasing the same trip from StatesAir might receive a ticket showing Flight ST123 from Paris to Chicago and Flight ST456 from Chicago to Detroit. Airlines that enter into these kinds of code-sharing arrangements typically negotiate a split of revenues and/or profits from the code-shared flights that could take into account various factors, such as which airline operates the actual flights, which airline sells the tickets, relative contributions to marketing expenses, increased revenue and profitability due to code-share, etc.

19. The OECD's 2005 Commentary recognizes the application of Article 8 to income realized by an airline from a code-sharing arrangement in which its passengers are transported internationally on aircraft operated by another enterprise where that arrangement is directly connected or ancillary to the airline's operation of aircraft in international traffic,<sup>6</sup> and IATA likewise urges the UN to adopt this clarification.

#### ***Treatment of "inland legs" of international transport***

20. IATA also urges the UN to confirm the application of Article 8 to income attributable to the "inland leg" of international transportation sold to the customer by the airline.
21. Paragraphs 6-8 of the OECD Commentary on Article 8 provide helpful examples of the types of situations that are covered by this principle, and IATA urges adoption of these by the UN:
  - Airline that operates a bus service primarily to transport its passengers between town and airport;
  - Airline which transports passengers or cargo in international traffic which undertakes to have those passengers or cargo picked up in the country where the transport originates or transported or delivered in the country of destination by any mode of inland transportation operated by another enterprise;
  - Income from sale of a ticket issued by another enterprise for the domestic leg of an international voyage offered by the airline.

#### ***Income from the provision of goods or services to other carriers***

22. IATA likewise urges the UN to adopt clarifications relating to the application of Article 8 to income from an airline's provision of goods or services to other carriers.
23. Examples of this can be found at paragraphs 10 and 10.1 of the OECD Commentary on Article 8, which address, respectively, income a foreign airline earns from providing ground services to other airlines and income an international airline earns from its participation in pooling arrangements, such as the International Airlines Technical Pool (IATP) (e.g. by providing spare parts or maintenance services to other airlines landing at a particular location).

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<sup>6</sup> See paragraph 6 of the OECD Commentary on Article 8.

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24. IATA appreciates the opportunity to provide these comments and looks forward to working with the Committee on possible amendments to the Commentary on Article 8.