



PROPOSED OECD CHANGES RELATED TO INTERNATIONAL TRANSPORT

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Current proposals for changes

- November 2013 Discussion draft (see OECD web site)
- Comments received
 - - Cruise Lines International Association (CLIA)
 - International Chamber of Shipping (ICS)
 - Rödl & Bartling GmbH
 - Royal Association of Netherlands Shipowners (KVNR)



Changes to Article 8

~~INTERNATIONAL SHIPPING, INLAND WATERWAYS TRANSPORT AND AIR TRANSPORT~~

- ~~1. Profits *of an enterprise of a Contracting State* from the operation of ships or aircraft in international traffic shall be taxable only in the ~~Contracting~~ *that* State in which the place of effective management of the enterprise is situated.~~
24. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.



Changes to Article 8

~~2. Profits from the operation of boats engaged in inland waterways transport shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.~~

~~3. If the place of effective management of a shipping enterprise or of an inland waterways transport enterprise is aboard a ship or boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident.~~



The treaty practice before the Models

- *Agreement between Great Britain and Norway for the Reciprocal Exemption from Income Tax in Certain Cases of Profits Accruing from the Business of Shipping*, signed in London, 18 December 1924
- Provides for a reciprocal tax exemption for
 - “any profits which accrue from the business of shipping carried on by an individual resident of [Norway] [Great Britain or Northern Ireland] or *by a company managing and controlling such business in [Norway] [Great Britain or Northern Ireland]*



The technical experts report (1925)

The Resolutions.

I. IMPERSONAL OR SCHEDULAR TAXES (*Impôts réels*).

“2.....If the enterprise ***has its head office*** in one of the States and in another has a branch, an agency, an establishment, a stable commercial or industrial organisation, or a permanent representative, each one of the contracting States shall tax that portion of the net income produced in its own territory. ...”



The technical experts report (1925)

“a) in the case of maritime navigation undertakings, in view of the very particular nature of their activities and of the difficulty of apportioning their profits, particularly, in the case of companies operating in a number of countries, the experts admit ***an exception to this principle — to the effect that the tax should, subject to reciprocity, be imposed only by the country in which the real centre of management and control of the undertaking is situated.***”



1927 Draft conventions

Article 5

Income from any industrial, commercial or agricultural undertaking and from any other trade or profession shall be taxable in the State in which the persons controlling the undertaking engaged in the trade or profession possess permanent establishments. The real centres of management, affiliated companies, branches, factories, agencies, warehouses, offices, depots, shall be regarded as permanent establishments. ... Should the undertaking possess permanent establishments in both Contracting States, each of the two States shall tax the portion of the income produced in its territory. ... ***Nevertheless, income from maritime shipping concerns shall be taxable only in the State in which the real centre of management is situated.***



UN Model

- Article 8 (alternative A): same as OECD Model
- *Article 8 (alternative B):* same as OECD Model except for source taxation of profits from ships operated in international traffic (“unless the shipping activities arising from such operation in the other Contracting State are more than casual ...”)
- Alternative B has the OECD inland waterways transport provision: what happens if inland waterways transport is also international traffic?



Ship or boat?

- “A ship has three or more square rigged masts”
- “A ship can carry a boat. A boat cannot carry a ship”
- “A ship rolls outboard in a turn while a boat rolls inboard”
- “if it has a permanent crew with a commanding officer, it’s usually a ship. If it’s only crewed when actually in use and has no official CO, then you’re probably dealing with a boat”
- “The function of a boat happens on its deck, the function of a ship happens inside it”



Ship or boat?

- “A ship has more than one through deck ABOVE the water line”
- “A ship is a vessel that's ocean going. A boat is a vessel that's inshore/coastal.”
- “When a ship sinks you get in a boat, when a boat sinks you get in the water”



New Commentary

- “Whilst the above alternative provision uses the word “boat” with respect to inland waterways transport, this reflects a traditional distinction that should not be interpreted to restrict in any way the meaning of the word “ship” used throughout the Convention, which is intended to be given a wide meaning that covers any vessel used for water navigation.”



Changes to Art. 6(2) (same in UN Model)

2. The term “immovable property” shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. ... ; ships, ~~boats~~ and aircraft shall not be regarded as immovable property.

[strictly consequential on deletion of Art. 8(2)]



Changes to Art. 13(3) (same in UN Model)

- ~~3. Gains from the alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to the operation of such ships, aircraft or boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.~~
Gains that an enterprise of a Contracting State that operates ships or aircraft in international traffic derives from the alienation of such ships or aircraft, or from movable property pertaining to the operation of such ships or aircraft, shall be taxable only in that Contracting State.

[strictly consequential on changes to 8(1) and deletion 8(2)]



Changes to Art. 22(3) (same in UN Model)

3. ~~Capital represented by ships and aircraft operated in international traffic and by boats engaged in inland waterways transport, and by movable property pertaining to the operation of such ships, aircraft and boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated. **Capital of an enterprise of a Contracting State that operates ships or aircraft in international traffic represented by such ships or aircraft, and by movable property pertaining to the operation of such ships or aircraft, shall be taxable only in that Contracting State.**~~

[strictly consequential on changes to 8(1) and deletion 8(2)]



Current Art. 15(3) (same in UN Model)

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.



Reasons for changes to Art. 15(3)

- Current drafting is an historical accident: seems clear that taxation in State of source (i.e. where employment is exercised) was not intended
- How many countries have the domestic law right to tax employment income merely because the employer has its POEM in the State?
- Technical issues related to triangular cases:
 - Employee resides in State A, works in State A and C for an airline of State B
 - A-C treaty applies but Art. 15(3) of that treaty is not applicable
 - Does B-C treaty applies to salary of employee (who is a resident of State A)?



Technical issues

STATE C

STATE B

STATE A

Employer: B airline

Resident of A





Changes to Art. 15(3)

- 3. Notwithstanding the preceding provisions of this Article, remuneration derived ***by a resident of a Contracting State*** in respect of an employment exercised aboard a ship or aircraft operated in international traffic (***other than aboard a ship or aircraft operated solely within the other Contracting State***), ~~or aboard a boat engaged in inland waterways transport,~~ ***shall be taxable only in that State*** ~~may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.~~



Changes to Introduction (made in 2014)

25.1 It follows from the preceding explanations that, throughout the Convention, the words “may be taxed in” a Contracting State mean that that State is granted the right to tax the income to which the relevant provision applies and that these words do not affect the right to tax of the other Contracting State, except through the application of Article 23 A or 23 B when that other State is the State of residence.



Current definition of international traffic

- the term “international traffic” means any transport by a ship or aircraft operated by an enterprise that has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;



Changes to “international traffic”

e) the term “international traffic” means any transport by a ship or aircraft ~~operated by an enterprise that has its place of effective management in a Contracting State~~, except when the ship or aircraft is operated solely between places in ~~the other~~ a Contracting State ***and the enterprise that operates the ship or aircraft is not an enterprise of that State***



US Model

the term “international traffic” means any transport by a ship or aircraft, except when such transport is solely between places in a Contracting State



Resident and
citizen of US

CANADA



Employer: US airline