



January 15, 2014

Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy and Administration
Organization for Economic Co-Operation and Development

Via email: transferpricing@oecd.org

Re: Cruise Lines International Association Comments regarding the Proposed
Changes to the OECD Modal Tax Convention Dealing with the Operation of
Ships and Aircraft in International Traffic

To Whom It May Concern:

On November 15, 2013 the OECD published proposed changes to Articles 8 and 15(3) of the OECD Model Tax Convention and the related Commentary, concerning the application of the Convention to ships and aircraft engaged in international traffic and their employees and contractors. Comments by interested parties were invited. On behalf of the Cruise Lines International Association (CLIA) I am pleased to respond to this request.

CLIA Background

The Cruise Lines International Association (CLIA) is the world's largest cruise industry trade association with representation in North and South America, the United Kingdom, Europe, Asia and Australasia. A list of CLIA's cruise line members is attached as **Appendix A**. CLIA is the cruise industry's representative at the International Maritime Organization (IMO), actively providing input on maritime policies and submitting policy proposals for consideration by the IMO's member states.

General Comments on the Proposed Changes

CLIA commends the OECD for its work addressing the issues facing international transportation by ships and the individuals employed on its vessels towards avoiding double taxation of each. We note that the current work is limited to a modernization of the wording of Article 8 and to addressing interpretive issues related to Article 15(3) and

our comments are limited accordingly. We believe that a comprehensive review of the treaty provisions applicable to international transportation by ship and air is advisable.

We encourage the OECD to delay the proposed amendments of Articles 8 and 15 of the Model Convention until a broad-based review that considers potential conflicts with other treaties, be concluded. We also believe that the changes we suggest to the Commentary with respect to Article 3(e), limitation on the possible definitions of “international traffic” for purposes of Article 15, and the interrelationship of article 15(2) and 15(3) be adopted.

Specific Comments

Taxation of Crew

Although we agree that residence-based taxation of crew is a laudable goal and the elimination of multiple taxation in triangular situations, we believe that exclusive residence taxation conflicts with the express terms of the United Nations Convention on the Law of the Sea¹ (hereinafter, “UNCLOS”) and, due to its primacy, UNCLOS would prevail. Accordingly, we believe that the present Model Convention Article 15 should be retained until this conflict is satisfactorily resolved.

In part, Article 92(1) of UNCLOS provides:

Ships shall sail under the flag of one State only and, *save in exceptional cases expressly provided for in international treaties or in this Convention*, shall be subject to its *exclusive* jurisdiction on the high seas.

[emphasis added].

Deletion of the permissive ability of the state in which the place of effective management of an enterprise is located to tax a crew member fails to satisfy the exceptional case requirement of UNCLOS.

Article 91 requires States to fix the conditions for the grant of its nationality to vessels which, in practice, includes regulation of on-board activities and the taxation of the vessel and its crew. Articles 27 and 28 provide for flag state control of criminal and civil matters on board a ship, respectively. Under limited circumstances, a coastal state’s jurisdiction over a foreign vessel is recognized.

Under the revised Model Convention, taxing jurisdiction for an individual is ceded to the state of his/her residence by the state of source. However, under UNCLOS, the flag state has taxing rights which are not addressed and, unless an identical revised convention is in

¹ Dec. 10, 1982, 1833 U.N.T.S. 397.

effect between the flag state and the individual's state of residence, double taxation may be required.²

Should the appropriate treaties be concluded we are not convinced that a routine factual situation will qualify as an "exceptional case" under UNCLOS. Assuming that an exceptional case exists, the further requirement that the exception to UNCLOS Article 92(1) be "express" is not satisfied without a direct reference to UNLCOS.

Consistent with the broad objective of Model Convention Article 15(3), we suggest the following changes to the Commentary.

The preferred definition of "international traffic" in Article 3(e) and as explained in para. 6.3 of the Revised Commentary is one dependent on the voyage of a vessel or aircraft. The alternative definition of "international traffic" looks at the origin and destination of each passenger or item of cargo. The parenthetical insertion in Article 15(3) makes the exception applicable on a voyage basis which, in our view, is the only appropriate method as a crew member may have no information by which to determine the portion of a voyage constituting international traffic if measured on a passenger or item basis.

We suggest that the Commentary be modified to exclude the alternative definition of "international traffic" contained in revised paragraph 6.3 from applying for purposes of Article 15.

A second consideration for crew is the possibility that, in the course of a tax year, the vessel on which an employee works may engage in a mixture of international and non-international traffic. We believe that Article 15(3) should operate as an exclusion from the 183 day provision for taxation by the other state contained in Article 15(2). Presently, the application of Article 15(3) on the 183 day provision of Article 15(2) for crew partially employed in the course of international traffic inter is unclear.

For example, a crew member, resident in Country A, spends 40 days present in Country B on board a ship transporting cargo between ports within Country B. In addition, (s)he is present in Country B for 150 days while the ship transports cargo between Country B and Country C.

Based on these facts, the crew member is present in Country B a total of 190 days. Although Country B cedes taxing jurisdiction under Article 15 with respect to the 150 days the individual is employed in connection with international traffic, has the 183 day threshold been exceeded, permitting Country B to subject earnings during the 40 day period to source-based taxation? As an alternative, are the 150 days excluded in determining if the 183 day threshold has been exceeded limiting, for purposes of Article

² We also question if the crew member is a third party beneficiary of this provision of UNCLOS and could assert this status to prevent taxation by any UNCLOS-signatory state other than the flag state of a vessel on which (s)he is employed.

15, the individuals presence to 40 days and preventing taxation of the individual by Country B?

We suggest that the Commentary be clarified in such a manner to exclude time present in a contracting state that is described in Article 15(3) from the calculation of physical presence in Article 15(2).

International Traffic Definition

There has been some confusion concerning the application of the exception from “international traffic” for voyages when a ship is “operated between two places in a Contracting State”. Unlike aircraft, ships may not have a clearly defined place of arrival or departure – loading and unloading cargo or embarking or disembarking passengers continuously. Another alternative is that a single voyage may have a number of stops in which passengers may disembark for hours or days and return to the same ship, as is the case in a voyage around the world. There a many similar voyages of lesser duration and the concepts should be equally applied.

A voyage around the world will begin and end in the same country and could, in an academic sense, be considered to be operated between two places (or the same place), within a Contracting State. Such voyages should constitute “international traffic” and this is recognized in the proposed Revised Commentary in paragraph.. 6.4 (“Thus, for example, a cruise beginning and ending in that State *without* a stop in a foreign port does not constitute a transport of passengers in international traffic.” [emphasis added]). Conversely, a voyage beginning and ending in a State *with* a stop in a foreign port constitutes a transport of passengers in international traffic.

We suggest that para. 6.4 of the Revised Commentary be modified to emphasize these points.

We also recommend that such a review of Article 8 be conducted to minimize conflict between the Model Convention and other treaties, most UNCLOS.³ Both the right of free navigation granted vessels and aircraft which is identified and the ability of Contracting States to territorially impose taxes are restricted within this convention. Further, consistency between the Model Convention and various immigration and customs conventions as they relate to the admission of passenger and import of goods and the definition of international traffic would be beneficial.

³ See, *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, ITLOS Case No. 2, Judgment of July 1, 1999.

Enterprise of a Contracting State

Since taxing rights are granted the flag state under UNCLOS, it is possible under the current Model Convention and, following the changes proposed, that a shipping company may be an enterprise of more than one Contracting State – each vessel's flag state, its place of management if a corporation or the residences of its partners if transparent. The factual variations which may arise and complexity and uncertainty in the application of the Model Convention and these issues should be addressed as part of a comprehensive review.

Contact Information

CLIA appreciates the opportunity to comment on the Proposed Changes to the OECD Modal Tax Convention Dealing with the Operation of Ships and Aircraft in International Traffic. If the OECD believes that continued involvement by CLIA in the review and development of changes is warranted, we would be pleased to do so. These comments were prepared by CLIA's Global Tax Committee. If you have any questions about the submission, please contact me at +1 305 406 5450, jborder@carnival.com or Ms. Christine Duffy, CLIA President, at +1 703 552 8463, cduffy@cruising.org.

Respectfully,



James R. Border
Chairman, Global Tax Committee

Submission to the Australian Taxation Office

Appendix A

CLIA Cruise Line Members

1. AMAWATERWAYS
2. AIDA Cruises
3. Amadeus by Luftner
4. American Cruise Lines
5. Andrew Weir Shipping Co. (St. Helena Line)
6. APT Group
7. Aqua Expeditions
8. Avalon Waterways
9. Azamara Club Cruises
10. Captain Cook Cruises
11. Carnival Cruise Lines
12. Celebrity Cruises
13. ClubMed
14. Compagnie du Ponant
15. Costa Cruise Lines
16. Croisieres de France
17. CroisiEurope River Cruises
18. Cruise & Maritime Voyages
19. Crystal Cruises
20. Cunard Line
21. Disney Cruise Line
22. Evergreen Tours
23. eWaterways
24. Fred Olson Cruise Lines
25. Hapag Lloyd Cruises
26. Hebridean Island Cruises
27. Holland America Line
28. Hurtigruten
29. Iberocruceros
30. Island Cruises
31. Louis Cruises
32. MSC Cruises
33. Norwegian Cruise Line
34. Oceania Cruises
35. Orion Expedition Cruises
36. P&O Cruises (Australia)
37. P&O Cruises (UK)
38. Paul Gauguin Cruises
39. Pearl Seas Cruises
40. Phoenix Reisen Cruises
41. Princess Cruises
42. Pullmantur
43. Regent Seven Seas Cruises
44. Riviera Travel
45. Royal Caribbean International
46. Saga
47. Scenic Tours
48. Seabourn Cruise Line
49. SeaDream Yacht Club
50. Shearings Holiday
51. Silversea Cruises
52. Star Cruises
53. Swan Hellenic
54. Tauck River Cruises
55. The River Cruise Line
56. Thomson Cruise
57. Titan HiTours Elegant River Cruises
58. Travel Marvel
59. TUI Cruises
60. Un Cruise Adventures
61. Uniworld Boutique River Cruise Collection
62. Voyages of Discovery
63. Voyages to Antiquity
64. Windstar Cruises