EC and International Tax Law Series

Volume 15

# Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties

Guglielmo Maisto / Series Editor

IBFD

# Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties

**Why this book?**

Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties, comprising the proceedings and working documents of an annual seminar held in Milan in November 2016, is a detailed and comprehensive study on the taxation of highly transnational industries engaged in the shipping and air transport sectors. It begins with a comparative analysis of the domestic regulatory and tax regimes of such industries and then examines the influence of EU law on national law, with a particular emphasis on the jurisprudence of the Court of Justice of the European Union on tonnage taxation systems and VAT regimes.

The book then moves to selected tax treaty issues. In particular, it analyses: (i) the historical background and the proposed changes to articles 8 and 15(3) of the OECD Model Convention; (ii) the recent developments concerning article 8 of the OECD Model Convention and the application of the place of effective management criterion, instead of the residence criterion, as connecting factor; (iii) the most relevant tax treaty issues related to the qualification, allocation and apportionment of income derived by shipping and air transport activities; and (iv) the taxation of the remuneration of crews of ships and aircraft.

Individual country surveys provide an in-depth analysis of the domestic tax regimes and actual tax treaty application and practices of various states, including Australia, Austria, Brazil, Canada, China and Hong Kong, Denmark, Germany, Greece, Italy, Liberia, the Netherlands, Spain, Switzerland and the United Kingdom.

This book presents a unique and detailed insight into the taxation of shipping and air transport activities in an international context and is therefore an essential reference source for international tax students, practitioners and academics.

| | |
|---|---|
| **Title:** | Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties |
| **Series:** | EC and International Tax Law Series |
| **Editor:** | Guglielmo Maisto |
| **Date of publication:** | April 2017 |
| **ISBN (print/online):** | 978-90-8722-403-5 |
| **ISBN (eBook):** | 978-90-8722-404-2 |
| **Type of publication:** | Book |
| **Number of pages**: | ± 732 |
| **Terms:** | Shipping fees apply. View shipping information |
| **Price (print/online):** | EUR 125 / USD 135 (VAT excl.) |
| **Price (eBook):** | EUR 100 / USD 108 (VAT excl.) |

**Order information**

To order the book, please visit www.ibfd.org/IBFD-Products/shop. You can purchase a copy of the book by means of your credit card, or on the basis of an invoice. Our books encompass a wide variety of topics, and are available in one or more of the following formats:

- IBFD Print books
- IBFD eBooks – downloadable on a variety of electronic devices
- IBFD Online books – accessible online through the IBFD Tax Research Platform

IBFD Publications BV

*Visitors' address:*
Rietlandpark 301
1019 DW Amsterdam
The Netherlands

*Postal address:*
P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Telephone: 31-20-554 0100
Fax: 31-20-622 8658
www.ibfd.org



ISBN 978-90-8722-403-5 (print)
ISBN 978-90-8722-404-2 (eBook)
ISSN 1574-969X
NUR 826

# Table of Contents

**Sample Chapter**

# Chapter 5

# Historical Background of Proposed Changes to Articles 8 and 15(3) OECD Model

by Jacques Sasseville[1]

## 5.1. Introduction

This chapter deals with the history of certain aspects of articles 8 and 15(3) of the OECD Model.[2] The analysis is intended to provide a historical perspective on the changes currently being contemplated by the OECD[3] to article 8 and the accompanying provisions in article 3(1)*e*) (the definition of "international traffic"), article 15(3) (the rule concerning employment exercised aboard a ship, boat or aircraft) and the consequential changes to articles 6(2), 13(3) and 22(3). These proposed changes may be summarized as follows:

– The replacement of the rule in article 8(1) according to which profits from the operation of ships or aircraft in international traffic are taxable only in the state in which the place of effective management of the enterprise (POEM) is situated by a rule according to which these profits are taxable only in the state of the enterprise, which, pursuant to the definition of "enterprise of a Contracting State",[4] means the state of residence of the person or persons carrying on that enterprise.

– The consequential deletion of the rule in article 8(3) dealing with the situation where the POEM of a shipping enterprise is aboard a ship or boat.

1. Head, Tax Treaty Unit, OECD Centre for Tax Policy and Administration, Paris. This chapter reflects the personal views of the author, which should not be attributed to the OECD or to any of its member countries.
2. A more complete history of the early development of the provisions of article 8 of the OECD Model can be found in G. Maisto, *The History of Article 8 of the OECD Model Treaty on Taxation of Shipping and Air Transport*, 31 Intertax 6/7, p. 232 (2003).
3. *See* OECD, *Proposed Changes to the OECD Model Tax Convention Dealing with the Operation of Ships and Aircraft in International Traffic, Public Discussion Draft, 15 November 2013 – 15 January 2015*, at http://www.oecd.org/tax/treaties/Discussion-draft-international-taffic.pdf.
4. *OECD Model Tax Convention on Income and on Capital* art. 3(1)*d*) (15 July 2014).

– The deletion of the rule, included in article 8(2), applicable to profits from the operation of boats engaged in inland waterways transport, together with the consequential deletion of the references to boats in articles 6(2), 13(3) and 22(3).

– The replacement of the rule in article 15(3) concerning the taxation of remuneration derived in respect of employment exercised aboard a ship or aircraft operated in international traffic by a rule that will provide for the exclusive taxation of such remuneration in the state of residence of the employee who derives such remuneration.

– The amendment of the definition of "international traffic" in a way that will allow its application to an enterprise that is not an enterprise of either contracting state, which will ensure that article 15(3) will now apply to a resident of a contracting state who is an employee of such an enterprise of a third state.

The historical background included in this chapter suggests that these changes are entirely in line with the original policy underlying article 8 and, in the case of article 15(3), actually correct what appears to have been a mistake made when the first version of what is now article 15 was finalized by the Organisation for European Economic Co-operation (OEEC) shortly before its publication in 1959.

## 5.2. The early 1920s' reciprocal agreements concerning the taxation of shipping

As indicated by Maisto,[5] the adoption of tax treaty rules concerning the taxation of shipping appears to have been the direct result of pre-1920 attempts by the United Kingdom and the United States, as well as a few other countries, to tax profits of foreign shipowners that could be considered to have their source in these countries.[6]

5. *Supra* n. 2, at pp. 232-233.
6. The US rules for taxing the domestic income of foreign shipowners were summarized as follows in a 1918 publication: "Foreign steamship lines, touching American ports and carrying freight and passengers, must make return showing as gross income, total receipts from all outgoing business, whether freight or passenger. The ratio should then be determined between such gross income and that from all posts within and without the United states in order that deductions permitted under the law may be computed. In other words, the net income will be ascertained for purposes of the tax payable to the United States by deducting from gross receipts from outgoing business, such a portion of the aggregate expenses, losses, etc. as such receipts bear to the aggregate receipts

The end of the First World War, which made it possible to eliminate unpopular or inefficient taxes, led the United States and the United Kingdom to reconsider the taxation of shipping profits of foreign shipowners. The tax practices of both countries had been criticized by other countries by the shipping industry and it seems clear that both the United States and the United Kingdom gave due regard to the fact that their attempts at taxing foreign shipowners would logically lead other countries to tax British and American shippers.

In 1921, the United States therefore decided to exempt the shipping profits of a corporation organized in another country as long as that country provided a similar exemption to corporations organized in the United States. That reciprocal exemption was provided by section 213(8) of the 1921 Revenue Act:

> (8) The income of a nonresident alien or foreign corporation which consists exclusively of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States.

The Senate Committee's report on the Revenue Act of 1921 made clear that the purpose of that new provision was to convince other countries to eliminate double taxation of shipping profits by ensuring that such profits would only be taxable in the state of residence:

> In order to encourage the international adoption of uniform tax laws affecting shipping companies, for the purpose of eliminating double taxation, paragraph 8 of subdivision (a) of this section….

The United Kingdom quickly followed and, in 1923, adopted a provision that allowed the government to conclude bilateral arrangements with the government of another state in order to provide relief in case of double taxation of "profits and gains arising from the business of shipping":[7]

---

from all ports…." Guaranty Trust Company of New York, *Income Tax Law of the United States affecting Non-Resident Aliens*, p. 19 (1918). The tax issues that foreign shipowners were facing in the United States were exacerbated by the new taxes adopted as part of the 1917 War Revenue Act, whose main purpose was to provide increased financing for the United States participation in the First World War. Title V of the Act (entitled *War Tax on Facilities Furnished by Public Utilities and Insurance*) included a tax of 3% on receipts from freight carriage and 8% on passenger transportation, taxes that had to be collected by the carrier. Title VIII, entitled *War Stamp Taxes*, included a tax of USD 1 to USD 4 on "passage tickets to ports not in the United States, Canada, or Mexico". *See* R.G. Blakey, *The War Revenue Act of 1917*, 7 The American Economic Review 4, pp. 798-800 (Dec. 1917).

7. UK: Finance Act, 1923, sec. 18, [13 & 14 Geo. 5].

18.—(1) If His Majesty in Council is pleased to declare—

(a) that any profits or gains arising from the business of shipping which are chargeable to British income tax are also chargeable to income tax payable under the law in force in any foreign state; and

(b) that arrangements, as specified in the declaration, have been made with the government of that foreign State with a view to the granting of relief in cases where such profits and gains are chargeable both to British income tax and to the income tax payable in the foreign State;

then, unless and until the declaration is revoked by His Majesty in Council, the arrangements specified therein shall, so far as they relate to the relief to be granted from British income tax, have effect as if enacted in this Act, but only if and so long as the arrangements, so far as they relate to the relief to be granted from the income tax payable in foreign State, have the effect of law in the foreign state

[…]

(4) In this section the expression “business of shipping” means the business carried on by an owner of ships, and for the purposes of this definition the expression “owner” includes any charterer.

Between 1924 and 1926, Japan, Norway, Italy and France also adopted legislative provisions intended to provide relief from the double taxation of shipping profits.[8]

The wording of the legislative provisions that were adopted by these six countries shows significant differences. Looking at how the provisions applied to companies:

- *In the United States:* Profits from the operation of ships were exempted if these profits were derived by a company incorporated in a foreign country (a “foreign corporation”) but only as regards the operation of ships registered in a foreign country (which could be different from the country of incorporation of the company); the reciprocal exemption condition was applicable to the country of registration of the ship rather than the country of incorporation of the company.

- *In the United Kingdom:* Profits from the operation of ships were entitled to any kind of relief that was specified in arrangements concluded with

8. Maisto, *supra* n. 2, at p. 232, who also indicates that, since 1914, the Netherlands had exempted shipping profits without any condition of reciprocity and, as early as 1819, had introduced a reciprocal exemption for foreign ships applicable to the licence tax (at p. 233).

a foreign state. The form of the relief was not specified and the only condition was that the profits be chargeable to both British income tax and to the income tax payable in another state (it is interesting to note, however, that the UK provision expressly stated that the "'business of shipping' means the business carried on by an owner of ships", and, as explained below, under UK jurisprudence a company was resident in the United Kingdom if its "real business was carried on" in the United Kingdom).

– *In Japan:* Profits from the operation of ships were exempted if these profits were derived by an "alien corporation not domiciled in Japanese territory" but only as regards the profits derived from ships registered in a foreign country; the reciprocal exemption condition was applicable to the country of registration of the ship rather than the country of domicile of the company.[9]

– *In Norway:* Profits from the operation of ships were exempted if these profits were derived by companies "belonging in a foreign country" but only as regards profits from ships engaged in traffic on a Norwegian port or between Norwegian ports and profits from the sale of tickets for the transportation of persons out of Norway; the exemption did not appear to require reciprocity.[10]

– *In Italy:* Profits from the operation of ships were exempted if these profits were derived by "foreign corporations" or "companies having their headquarters and main business establishments abroad" but only as regards profits from shipping business in Italian ports; the reciprocal exemption condition was applicable to the country to which the foreign corporations or companies "belong". The exemption was not automatic but had to be granted by Royal Decree after consultation of the Council of Ministers.[11]

– *In France:* Profits from the operation of ships were exempted if these profits were derived by enterprises established abroad but only as regards profits from foreign ships; the reciprocal exemption condition was applicable to the country of registration of the ship rather than the country of the enterprise. The exemption was not automatic but had to

9. Id., at n. 8.
10. Id., at n. 9.
11. Id., at n. 10.

> be granted through diplomatic agreements ratified by the French legislature.[12]

As can be seen above, the conclusion of bilateral agreements or arrangements was an absolute requirement for any form of relief in the United Kingdom and for the granting of the reciprocal exemption in France. Also, given the differences in the conditions under which the reciprocal exemption was granted, it is not surprising that the United States, Japan, Norway and Italy also felt the need to clarify bilaterally the exact scope of the shipping exemptions provided under their domestic law. Some countries that did not have specific legislative exemptions but had never tried to tax shipping profits, as well as countries that wished to deal with the taxation of shipping profits for periods preceding the adoption of the legislative provisions by the United States,[13] also felt the need to clarify the tax treatment of shipping profits. A number of treaties, agreements and exchanges of diplomatic notes dealing with that topic were therefore concluded during the 1920s and 1930s; this practice was in fact officially recommended in 1924 by the Sub-Committee for Ports and Maritime Navigation of the Advisory and Technical Committee for Communication and Transit of the League of Nations.[14]

As could have been expected, the treaties/exchange of notes concluded by the United States and the United Kingdom mirrored the differences found in the domestic legislative provisions under which these two countries granted relief.

For instance, the Exchange of Notes constituting an Arrangement for the reciprocal Exemption of Shipowners from Income Tax concluded between the United States and Denmark and Iceland, signed in Washington on 24-28 October and 5 December 1922,[15] uses the following wording to refer to the shipping profits that will benefit from the reciprocal exemption:

> [I]nasmuch as the income from sources in Denmark and Iceland of a citizen of the United States or of a corporation organized therein which consists exclusively of earnings derived from the operation of ships documented under the laws of the United States is not and has not been subject to income tax since

12. Id., at n. 11.
13. E.g. *see* the 1922 exchange of notes between Sweden and the United States (*Exchange of notes at Washington January 27, February 24, May 16 and 30, and August 9, 1922*, 1923 For. Rel. (II) 875) and between the United States and Denmark and Iceland (note 15), which show that the issue of the United States' taxation of shipping for the 1917-1920 period was a main concern for these countries.
14. Maisto, *supra* n. 2, at p. 236.
15. League of Nations, *Treaty Series*, No. 2649, volume CXIII, 1931, 381.

> January 1, 1921 or previously, it is held that Denmark and Iceland satisfy the equivalent exemption provision of Section 213 (b) (8) of the Revenue Act of 1921. In case any Federal income taxes have been collected from nonresident aliens or foreign corporations on income which consists exclusively of earnings derived on or since January 1, 1921, from the operation of ships documented under the laws of Denmark or Iceland, such taxes will be the proper subject of a claim for refund.

By contrast, the Agreement for the Reciprocal Exemption from Income Tax in certain Cases of Profits accruing from the business of Shipping signed by Great Britain and Sweden in London on 19 December 1924[16] uses a different formulation and provides a reciprocal exemption that applies to

> [A]ny profits which accrue from the business of shipping carried on by an individual resident in *[Sweden] [Great Britain or Northern Ireland]* or by a company managing and controlling such business in *[Sweden] [Great Britain or Northern Ireland]*.

Although the reference to "a company managing and controlling such business" appears very different and more factual than the pure legal test of "corporation organized" used in the United States' exchange of notes, it is important to remember that the "management and control" test used by the United Kingdom was essentially the test for determining the tax residence of companies that was developed by the UK House of Lords in its 1907 seminal decision in *De Beers Consolidated Mines Ltd* v. *Howe,*[17] which found that "a company resides, for purposes of income-tax, where its real business is carried on … and the real business is carried on where the central control and management actually abides".[18]

Both the United States and the United Kingdom were therefore using their domestic law test for distinguishing between a company subject to worldwide taxation (what is now referred to as a "resident" company for treaty purposes) and a foreign company that is only subject to source taxation. The difficulty, however, was that since each state used a different test to determine the residence of a company, it was possible for a company to be a resident of each state and it was therefore necessary to find a way to resolve this dual-residence issue in order to ensure that the reciprocal exemption would apply in a satisfactory way.

16. League of Nations, *Treaty Series*, No. 820, volume XXXII, 1925, 291.
17. UK: [1907] UKHL 626.
18. Id. at 627.

This is exactly what the representatives of both states realized when they discussed and ultimately resolved the issue between 1924 and 1925, as documented in the Exchange of Notes constituting an Arrangement for the reciprocal Exemption of Shipping Profits from Income Tax concluded between 11 August 1924 and 16 March 1925 by the United States and the United Kingdom.[19]

This Exchange of Notes includes a letter dated 11 August 1924 by the acting Secretary of the United States Treasury to the United Kingdom Ambassador in Washington.[20] That letter first describes how the problem of dual residence had so far prevented an agreement to be reached:

> The question of the exemption from tax of income derived from the operation of British vessels has, as the Embassy has observed, previously been discussed by officials of the Treasury Department with Sir Percy Thompson, Deputy Chairman of the British Board of Inland Revenue, who came to the United States for that purpose. I am informed that these discussions proved fruitless because Sir Percy Thompson did not feel at liberty to recede from the British position that the taxability of a corporation as a resident of the United Kingdom should depend not upon the place of incorporation but upon the place "where its real business is carried on and that is carried on where the control and management of the company abide. (American Thread Company v. Joyce, 6 T.C. 163, 164).[21]
>
> The navigation laws of the United States require that a corporation owning a vessel of the United States be a corporation organized in the United States and that its president and managing directors be citizens of the United States, but there is no requirement that the president and managing directors be residents of this country. It was conceivable therefore that the president and managing directors might reside in the United Kingdom, hold their meetings there, and there exercise control of the corporation. In such a case, the corporation would, under British law, have been deemed a resident of the United Kingdom and as such subject to tax on all its income. It is equally clear, however, that such a corporation would be a corporation organized in the United States….

---

19. League of Nations, *Treaty Series*, No. 2639, volume CXIII, 1931, 105.
20. At pp. 106-108.
21. The House of Lords' decision of *American Thread Co v. Joyce*, [1913] UKHL TC 6, 163, dealt with a company incorporated in the United States but whose parent company and majority of directors were residents of the United Kingdom and whose board of directors met in the United Kingdom. That decision was presumably quoted in the letter because it dealt with a company incorporated in the United States. The decision relied expressly on the previous decision of *De Beers* and concluded that the company was clearly resident of the United Kingdom, the Earl of Halsbury even expressing surprise "that after the findings of the Commissioners one has had so long to come to the conclusion which was very manifest I think at first" (at 164).

The letter then goes on to explain how the issue was finally resolved, which is when the United Kingdom agreed to adopt the US test of incorporation for the purposes of applying the reciprocal exemption:

> The British Government proposes, according to the understanding of the Secretary of the Treasury, to exempt from British income tax (including super-tax) "any profits accruing from the business of shipping carried on with ships documented under the laws of the United States to a citizen of the United States resident outside the United Kingdom *or to a corporation organized in the United States*". Upon the explicit understanding that the American corporation is thus exempted regardless of whether it does business in the United Kingdom or has an office or place of business therein or whether directors' meetings are held in the United Kingdom and the control of the corporation is there exercised,[22] the Secretary of the Treasury is of the opinion that the offer communicated in the Embassy's note of February 11, 1924, satisfies the requirements of Section 213 (b) (8) of the Revenue Act of 1924, so far as the United Kingdom is concerned.
>
> […]
>
> The exemption from tax of income derived from the operation of ships of British registry will be confined to individuals resident in the United Kingdom, other than citizens of the United States, *and to corporations organized under and existing by virtue of the laws of the United Kingdom*. [emphasis added]

In the early 1920s, it therefore seems that both the United States and the United Kingdom, the two countries which initiated the practice of concluding agreements for the reciprocal exemption of shipping profits, wanted to exempt profits derived by resident companies, which logically required addressing the issue of dual residence.

## 5.3. Work of the League of Nations

Given the United States' adoption of its provision on the reciprocal exemption of shipping profits in 1921 and the subsequent flurry of activity related to the negotiations of agreements providing for such reciprocal exemptions,

22. Interestingly, the letter of the acting Secretary of the United States Treasury refers to a situation where the "directors' meetings are held in the United Kingdom and the control of the corporation is there exercised", which omits any reference to "management" even though the test adopted by the United Kingdom in *De Beers* was "where the control and management of the company abide". It is also interesting to note that in *De Beers,* the House of Lords put the word "control" before "management" whereas the 1924 agreement with Sweden (*supra* n. 16) put "managing" before "controlling". Arguably, a typical Anglo-Saxon board of directors does more control than management, which suggests a subtle difference between the different formulations.

it is not surprising that the taxation of shipping became an important topic during the 1920s' work that resulted in the development of the early models of the League of Nations. It is also in 1921 that this work began, when the Financial Committee of the League of Nations decided to ask economists to prepare a report on double taxation.

### 5.3.1. The four economists' report (1923)

In their report produced in 1923,[23] the four economists[24] appointed by the Financial Committee of the League of Nations attempted to determine basic principles for eliminating the double taxation of various types of income and capital. These principles were based on an analysis of the factors that seemed to link these types of income and capital to the territory of one or more states (i.e. the process of determining the "economic allegiance" of these types of income). This allowed the economists to develop a theoretical framework for assessing the validity of the competing taxation claims of the origin and domicile states (we would now refer to the states of source and residence) over each type of income.[25]

The report shows that the four economists felt the need to distinguish shipping profits from other types of business profits. It includes a relatively long discussion of shipping activities and concludes, somewhat surprisingly, that taxation rights should be allocated to the state in which the ship is registered (except in the case of inland waterways transport), a conclusion that was generally ignored in subsequent treaty practice:[26]

> *TANGIBLE OR CORPOREAL MOVABLES NOT ORDINARILY CAPABLE OF A FIXED LOCATION*. The most striking example of this is vessels. There are in reality three classes of vessels: a) ocean tramps, b) regular ocean liners plying the high seas, and c) vessels engaged in coastwise traffic or internal navigation where the coast or the navigable water fronts on, or traverses, different countries. The fact that the same vessel may shift from one to another of these classes is embarrassing. But at any given time the distinction as generally observable.

---

23. *Report on Double Taxation submitted to the Financial Committee Economic and Financial Commission Report by the Experts on Double Taxation*, League of Nations Document E.F.S.73. F.19 (5 April 1923), as reproduced in the SETIS database of the University of Sydney.
24. Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp.
25. *Report on Double Taxation*, *supra* n. 23, at pp. 24-39.
26. Id., at pp. 33-34 (formatting and emphasis added).

*1. Origin*. If the vessels ply the high seas, there is no particular country to which the origin of the yield can be ascribed. If, however, they ply navigable waters which traverse different countries, we have, as in several of the preceding categories, not one, but several, places of origin, that is o1, o2, o3, and we are confronted by a problem which must be solved in a similar way. Moreover, in the case of ocean liners there are apt to be in several countries large and extensive docks and appurtenant property which materially contribute to the profitable operation of the vessels. Finally, it may be remarked that, inasmuch as the economic yield of vessels depends partly on the seamanship of the captain and to a larger degree upon the business sagacity of the owner, the element of personal management becomes of importance, and that this management may be carried on in the one or the other country. But, as in the case of immovables, the controlling consideration is the existence of the traffic: origin therefore re-enforces domicile (the home of the owner) only to a partial extent.

*2. Situs*. There is no permanent physical situs in any taxable sovereignty. The mere fact that the vessel happens at any particular time to be in one port as compared with another is of very little significance.

*3. Enforceability*. This is a consideration of great importance. Practically it means the country where the ships are registered and the flag of which they fly. This is perhaps the only modern instance where political allegiance still plays a rôle: for the registry of a ship is its nationality. But it plays a rôle only because of its economic implications.

*4. Domicile.* The domicile of the owner is in itself of slight consequence as compared with the other elements of economic allegiance. It becomes of importance only in so far as it is re-enforced by some of the preceding elements. In the main, then, in the case of sea-going tramps, *the country of registry possesses the chief claim to economic allegiance*. If, as frequently occurs, there is a distinction between the country of registry and the country of domicile or direction, the greater part of the tax ought to go to the country of registry. Where the country of registry is changed in order to evade certain obligations to the country of domicile or direction (as in the recent transfer of American vessels to the Panama flag in order to escape the rigours of the 18th amendment with reference to intoxicating liquors), there is no reason why the country of registry should not receive a preponderant share of the tax. When we are dealing, however, with vessels plying navigable waters which traverse different countries, the place of (1) origin becomes, at least for the purpose of the income tax, more important than (3) place of registry and should be substituted for it. It would be a case of $o^1$, $o^2$, $o^3$, as found in ordinary business enterprises. A Dutch flag on a boat plying on the German Rhine should not exempt the vessel from its economic allegiance to Germany. For purposes of the property tax or death duties, however, registry should be the paramount consideration. Similar conclusions, although in a somewhat modified form, would seem to apply to ocean liners. Registry is the chief consideration, but for purposes of income tax

> (rather than of property tax or death duties) the other country, where expensive docks and shipping offices are found, might reasonably prefer a claim to a part of the earnings.

The four economists' report also identified, but did not attempt to resolve, the issue of dual residence, which would be addressed 1 year later in the Exchange of Notes between the United Kingdom and the United States:[27]

> It is clear, therefore, that, in order to avoid double taxation, domicile or habitual residence must everywhere be interpreted alike for the purposes of taxation. One of the very first points preliminary to making international conventions or agreements on double taxation is to define the terms so that there will be no possibility of misinterpretation. We should like to make the suggestion that the Legal Section of the League of Nations consider this matter and prepare a memorandum on the present use of the term "domicile" and on a possible approach to some international agreement on this subject.

## 5.3.2. The work of the technical experts (1922-1925) and the 1927-1928 models

In 1922, the Financial Committee of the League of Nations appointed senior tax officials from Belgium, Czechoslovakia, France, Great Britain, Italy, the Netherlands and Switzerland to study the questions of double taxation and tax evasion. This Group of Experts, which was chaired by Prof. Pasquale d'Aroma, Director-General of Direct Taxation for Italy, prepared a set of resolutions and a report that was presented to the Financial Committee of the League of Nations in 1925,[28] the same year that the United States and United Kingdom concluded their exchange of notes.

This report makes it clear that the shipping industry discussed the issue of the reciprocal exemption of shipping profits with the experts and that the experts were made aware of the agreements for reciprocal exemption recently concluded by the United Kingdom:

> The League of Nations Sub-Committee on Ports and Maritime Navigation, which is a sub-section of the Advisory Committee for Communications and Transit, requested us to hear its representatives during our fourth session in Geneva. In October 1924, these representatives explained to us the

27. *Supra* n. 19, at p. 25.
28. League of Nations: Technical Experts to the Economic and Financial Committee, *Double Taxation and Tax Evasion Report and Resolutions submitted by the Technical Experts to the Financial Committee*, Document F.212, Geneva, 1925, as reproduced in the SETIS database of the University of Sydney.

> Sub-Committee's views on double taxation in the case of the shipping industry, which are practically the same as those of the International Chamber of Shipping.
>
> […]
>
> One particular class of industrial and business enterprise, namely maritime shipping concerns, has engaged our special attention, and forms, as will be seen, the subject of a special resolution. The International Chamber of Commerce and the special Sub-Committee of the League of Nations which deals with maritime transit communicated to us their views on this subject. For several years past, negotiations have been in progress between seven or eight leading countries for the regulation, by bilateral agreements, of the system of taxation to be applied (on the basis of reciprocal exemption) to maritime shipping concerns. England, the Netherlands, the United States and Japan have enacted domestic laws providing for such exemption, applicable to all taxes without exception, both taxes in rem and the general tax on income. The United States, Norway, Sweden and Denmark have recently concluded conventions of this kind with Great Britain. We have taken these recent cases into account, but have paid even greater attention to the very special character of the maritime transport industry. When an industrial concern carries on its activities throughout the whole world, the importance of the actual headquarters, or the "brain" of the enterprise, becomes paramount; and, above all, very serious technical difficulties may be encountered in determining an apportionment of the profits. The representatives of the Maritime Sub-Committee of the League of Nations have asked how it is possible to determine the profits earned in each of the twenty or twenty-five ports at which a vessel belonging to a trans-Atlantic company may have loaded or discharged cargo, when ten or fifteen different countries have to be taken into consideration.

The "Resolutions" included in the last part of the report include the Group of Experts' recommendation concerning the taxation of shipping profits:

> I. IMPERSONAL OR SCHEDULAR TAXES (*Impôts réels*).
>
> 2. a) … 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.…
>
>    b) 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*.

# Contributors

# Contributors

**Haroun Asghar** is Head of Tax at Etihad Airways in Abu Dhabi, United Arab Emirates.

**Raphaël Baeriswyl** is a Partner with Meyer Avocats in Geneva. She can be contacted at www.meyer-avocats.ch.

**Clive M. Baxter**, MA, FCA, is Head of Tax Governance and Policy, Maersk Group in Copenhagen.

**Silvia Boiardi** is a Dottore Commercialista and Senior Associate at Maisto e Associati in Milan.

**James R. Border** is Global Tax Counsel to the Cruise Lines International Association and practises at The Law Office of James R. Border, P.A. Fort Lauderdale, Florida. He can be contacted at jborder@globaltaxes.net (tel: +1-954 328 4347).

**Micah Burch** is a Senior Lecturer at the University of Sydney Law School, Sydney, Australia.

**Jérôme Bürgisser** is an Attorney-at-Law and holds a BSc from HEC Lausanne; he is a Research Assistant and PhD Candidate at the University of Lausanne, Switzerland.

**Giancarlo Chamma Matarazzo** is a Tax Partner at Pinheiro Neto Advogados, São Paulo, Brazil.

**Elena E.N. Christensen** holds LLM and MSc degrees and is Manager at KPMG Accor Tax, Denmark in Copenhagen.

**Theophilus Dekonty Joseph**, MS, MBA, CPA, CFE, FCPA, is Managing Partner of Baker Tilley Liberia.

**Michael P. Hansen** has a BSc degree and is Senior Tax Manager at Maersk Group in Copenhagen.

**Alexander Hemmelrath** is Honorary Professor at the Institute of Finance and Tax Law, Osnabrück University and Partner at Hemmelrath Steuerberatungsgesellschaft mbH in Feldafing, Germany.

**Katarina Johannessen** holds an LLM and is Head of Group Indirect Taxes at Maersk Group in Copenhagen.

**Georg Kofler** holds an LLM from New York University and is Professor of Tax Law at the Johannes Kepler University in Linz, Austria.

**Zigurds G. Kronbergs**, BSc, ARCS, MA, ACA, FCCA, is an independent tax writer and editor. He can be contacted at zigurds@zigurdskronbergs.co.uk.

**John J. Lennard** is an Advocat and Associate with Davies Ward Phillips & Vineberg LLP in Montreal, Quebec, Canada.

**Na Li** is a Lecturer at East China University of Political Science and Law in Shanghai, China. She can be contacted at na.li@wu.ac.at.

**Lars Marquardsen** is a Research Associate at the Institute of Finance and Tax Law of Osnabrück University, Osnabrück, Germany.

**Stefan Maunz** is a lawyer and Certified Tax Advisor and Partner at Küffner Maunz Langer Zugmaier Rechtsanwälte in Munich.

**Taco Mooren** is a Tax Lawyer with Loyens & Loeff in Rotterdam.

**Tiago Moreira Vieira Rocha** is a Tax Associate at Pinheiro Neto Advogados, São Paulo, Brazil.

**Ana Pita Grandal** is a Professor at the Universidad de Vigo, Vigo, Spain.

**Frank P.G. Pötgens** is Professor of International and European Tax Law at the Free University Amsterdam (Vrije Universiteit Amsterdam) and a tax lawyer with De Brauw Blackstone Westbroek.

**Isabelle Richelle** is Co-President of the Tax Institute of the University of Liège (Belgium) and a member of the Brussels Bar (Liedekerke).

**Carmen Ruiz Hidalgo** is a Professor at the Universidad de Vigo, Vigo, Spain.

**Jacques Sasseville** is Head of the Tax Treaty Unit at the OECD Centre for Tax Policy and Administration in Paris.

**Ton Stevens** is Professor of International Tax Law at the Erasmus School of Law of Erasmus University and heads the Maritime Tax Law Program. He is also Of Counsel at Loyens & Loeff in Rotterdam.

**Michail Tegos** holds an Adv. LLM in International Tax Law from the International Tax Center of Leiden University, Leiden, The Netherlands.

**Trine Thomsen** holds an LLM and is an Attorney at Law and Senior International Tax Manager, Maersk Group in Copenhagen.

**Maurits van de Sande** is an Intern at Loyens & Loeff in Amsterdam.

**Mees M. Vergouwen** is a Tax Law Assistant with De Brauw Blackstone Westbroek in Amsterdam.

**Dennis Weber** is a Tax Adviser and Of Counsel at Loyens & Loeff in Amsterdam and Professor of European Corporate Tax Law at the University of Amsterdam.

**Christiane Zöhrer** holds an LLM and is a PwC Research Associate at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business).

# Notes

## Notes

**Contact**

IBFD Head Office
Rietlandpark 301
1019 DW Amsterdam
P.O. Box 20237
1000 HE Amsterdam, The Netherlands
Tel.: +31-20-554 0100 (GMT+1)
Email: info@ibfd.org
Web: www.ibfd.org