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Committee of Experts on International Cooperation in Tax Matters

Article 8

SHIPPING, INLAND WATERWAYS TRANSPORT AND AIR TRANSPORT

Article 8 (alternative A)

1. Profits from the operation of ships or

5. The provisions of paragraphs 1 and 2 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

5. Subparagraph 3(1)(d) of the UN Model defines the term “international traffic” used in Article 8. That subparagraph, which is the same as the corresponding OECD Model definition, relevantly provides as follows:

Article 3

GENERAL DEFINITIONS

1. For the purposes of this Convention, unless the context otherwise requires:

[. . .]

(d) 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

according to the UN Model Commentary, appears to the Secretariat to be that a transport of passengers on a cruise will *prima facie* be within the definition of “international traffic” as a prerequisite for the application of Article 8.

17. In its terms, a cruise ship transports passengers, and the ports of call are generally important to decisions about which cruises passengers take, even if the purely transport component of the cruise experience is less significant relatively to other aspects (notably the on-board experience) than in air transport. Taken these contexts into consideration, the Secretariat is of the view that “international traffic” would generally be interpreted as including a cruise, as a transport of passengers, as long as its other requirements are satisfied.

18. If this is the general view among the Committee, it could be clarified by an example or other explicit reference to cruise shipping in the Article 3 or 8 Commentaries.

Journey of Ships/Aircraft or Passengers?

19. In order for cruise shipping, or a transport of passengers generally (such as by “tramp shipping” that lacks a regular schedule or published ports of call) to fall within the scope of “international traffic”, it has to be “international”, as opposed to being “domestic”. As noted above, the definition in Article 3 does not extend to cases where “the ship or aircraft is operated solely between places in [a] Contracting State”.

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Commentary after the most recent substantive changes to the UN Model Commentary on Article 3 in 1999.

29. The language of the UN Model is not clear and appears to accommodate both of the positions suggested in the OECD Model Commentary, although the exception in the definition “when the ship or aircraft is operated solely between places in the other Contracting State” does track the vessel not the individual passengers. The reference in the Commentary to taking a broad view of what constitutes “international traffic” does not speak directly to this issue of what movements should be focused on. Members might wish to consider whether or not to draw upon those paragraphs of the OECD Model Commentary addressing this issue.

30. If the Committee considers that both interpretations are open under the UN Model, countries focusing on voyages of individual passengers might consider some component of profits from cruises as not covered by Article 8 – profits from passengers travelling from one domestic port to another.

Profits from Activities Auxiliary to the Operation of Ships

31. In cruise shipping, shipping enterprises earn profits by providing passengers with various additional services, not just limited to a mere transport of the passengers. As such, whether and to what extent such profits can be covered by Article 8 as “profits from the operation of ships or aircraft” is an issue of relevance.

32. Cruise lines have been at the forefront in developing non-ticket revenue, which in that industry is called “on-board and other revenue”.¹² It is similar to what is called “ancillary revenue” in the airline industry and is addressed in paper E/C.18/2014/CRP.1 for consideration by the Committee at the Tenth Annual Session. A 2012 Report on such revenue in both industries noted:¹³

Cruise prices typically include sleeping accommodations, meals in certain dining facilities, and many onboard activities such as entertainment, poolside activities, and sports programs. Norwegian [Cruise Lines] generates additional revenue on its ships principally from casino operations, beverage sales, specialty dining, shore excursions, gift shop purchases, and spa services. This “onboard and other revenue” yields more than \$51 per cabin day (not per passenger).

Revenue managers on ships and in headquarters monitor spending and work in real time to increase the revenue produced by individual cabins during the cruise. For example, they may create offers for the occupants of an individual cabin.

Norwegian’s Freestyle Cruising provides complimentary meals in main dining rooms, buffets and for room service. Premium dining is available for a “cover charge” of \$10 to \$30 per person in a variety of upgraded dining experiences such as steakhouse, Asian fusion, and French gourmet formats. [. . .]

¹² As to some components of this revenue, see e.g., Brian Sozzi, Norwegian Cruise Line Finds Ways to Boost Onboard Spending, *Forbes*, 15 July 2014.

¹³ Jay Sorensen, Profit from Innovation: Benefits of Ancillary Revenue Reach all over the World, Amadeus and IdeaWorks sponsored 2012 Report: http://www.amadeus.com/airlineit/docs/2012_ideaworks_report_airlines_profit_from_innovation.pdf, at 8-9.

A recent announcement by Carnival Cruise Line should remove any doubt others are watching ancillary revenue developments in the airline industry. The “Faster to the Fun” service provides priority embarkation, early cabin availability, priority dinner reservations, express access to the guest services desk, and faster luggage delivery. It was introduced August 2012 on a pilot basis with two ships starting at a price of \$49.95 per cabin. Carnival commented in its press release, “The program was developed based on extensive passenger surveys, indicating a strong interest in a fee based package of priority access and benefits.”

In another nod to the airline industry, the service will be provided as a free perk for top tier members of Carnival’s loyalty program.

The UN Model Commentary on Article 8 (“Auxiliary Activities”)

33. As regards “profits from the operation of ships or aircraft” to be covered by Article 8, the UN Model Commentary on Article 8 cites the following paragraphs from the OECD Model Commentary on Article 8 in 2003:¹⁴

4. The profits covered consist in the first place of the profits obtained by the enterprise from the carriage of passengers or cargo. With this definition, however, the provision would be unduly restrictive, in view of the

operation of ships and aircraft, called “auxiliary activities” in the UN Model but now referred to as “ancillary activities” under the OECD Model. The change of OECD Model Commentary