1983-84

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Presented and read a first time, 13 September 1984

(*Minister Assisting the Treasurer*)

A BILL

FOR

An Act to amend the *Income Tax (International Agreements) Act 1953*

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title, &c.

1. (1) This Act may be cited as the *Income Tax (International Agreements) Amendment Act 1984.*

(2) The *Income Tax (International Agreements) Act 1953*[1] is in this Act referred to as the Principal Act.

Commencement

2. This Act shall come into operation on the day on which it receives the Royal Assent.

Interpretation

3. (1) Section 3 of the Principal Act is amended—

(a) by omitting from sub-section (1) the definition of "the Belgian agreement" and substituting the following definitions:

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" 'the Belgian agreement' means the Agreement between Australia and the Kingdom of Belgium for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (being the agreement a copy of which in the English language is set out in Schedule 13), as amended by the Belgian protocol;

" 'the Belgian protocol' means the Protocol amending the Agreement between Australia and the Kingdom of Belgium for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the protocol a copy of which in the English language is set out in Schedule 13A;";

(b) by inserting after the definition of "the Malaysian agreement" in sub-section (1) the following definition:

" 'the Maltese agreement' means the Agreement between Australia and Malta for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the agreement a copy of which is set out in Schedule 24;"; and

(c) by adding at the end thereof the following sub-sections:

"(11) Where—

(a) a beneficiary of a trust estate (not being a corporate unit trust) who is a resident of a country with which, or with the government of which, Australia, or the Government of Australia, has made an agreement before the commencement of this sub-section is presently entitled, either directly or through one or more interposed trust estates, to a share of the income of the trust estate derived from the carrying on by the trustee in Australia of a business through a permanent establishment in Australia; and

(b) under the agreement, the income is to be dealt with in accordance with the article (in this sub-section referred to as the 'business profits article') of the agreement relating to the taxing of income of an enterprise of a Contracting State where the enterprise carries on a business in the other Contracting State through a permanent establishment in the other Contracting State,

for the purpose of determining whether the beneficiary's share of the income may be taxed in Australia in accordance with the business profits article—

(c) the beneficiary shall be deemed to carry on in Australia, through a permanent establishment in Australia, the business carried on in Australia by the trustee; and

(d) the beneficiary's share of the income shall be deemed to be attributable to that permanent establishment.

"(12) In sub-section (11)—

'Contracting State', in relation to an agreement, means a country which, or the government of which, is a party to the agreement;

'corporate unit trust' means a trust estate that is a corporate unit trust for the purposes of Division 6B of Part III of the Assessment Act;

'income' includes profit;

'permanent establishment' in relation to an agreement, has the same meaning as in the agreement.".

(2) The amendment made by paragraph (1) (c) applies to a share of the income of a trust estate to which a beneficiary became or becomes presently entitled after 19 August 1984.

4. After section 11C of the Principal Act the following section is inserted:

Protocol with the Kingdom of Belgium

"11CA. (1) Subject to this Act, on and after the date of entry into force of the Belgian protocol, the provisions of the protocol, so far as those provisions affect Australian tax, have the force of law in relation to tax in respect of income of any year of income commencing on or after 1 July in the calendar year immediately following that in which the protocol enters into force.

"(2) As soon as practicable after the entry into force of the Belgian protocol in accordance with Article V of the protocol, the Treasurer shall cause to be published in the *Gazette* a notice specifying the date on which the protocol entered into force.".

5. After section 11M of the Principal Act the following section is inserted:

Agreement with Malta

"11N. (1) Subject to this Act, on and after the date of entry into force of the Maltese agreement, the provisions of the agreement, so far as those provisions affect Australian tax, have the force of law—

(a) in relation to withholding tax—in respect of dividends or interest derived on or after 1 January in the calendar year next following that in which the agreement enters into force and in relation to which the agreement remains effective; and

(b) in relation to tax other than withholding tax—in respect of income of any year of income commencing on or after 1 July in the calendar year next following that in which the agreement enters into force and in relation to which the agreement remains effective.

"(2) As soon as practicable after the entry into force of the Maltese agreement in accordance with Article 27 of the agreement, the Treasurer shall cause to be published in the *Gazette* a notice specifying the date on which the agreement entered into force.

"(3) As soon as practicable after an exchange of letters for the purpose of the making of an agreement under paragraph (2) of Article 14 of the Maltese agreement to vary the amount specified in sub-paragraph (1) (c) of that

Article, the Treasurer shall cause to be published in the *Gazette* a notice specifying particulars of the variation so agreed.

"(4) As soon as practicable after an exchange of letters for the purpose of the making of an agreement under sub-paragraph (3) (a) of Article 23 of the Maltese agreement that provisions are of a substantially similar character to the provisions of the Aids to Industries Ordinance 1959 referred to in that sub-paragraph, the Treasurer shall cause to be published in the *Gazette* a notice specifying particulars of the first-mentioned provisions.

"(5) As soon as practicable after an exchange of letters for the purpose of the making of an agreement under paragraph (4) of Article 23 of the Maltese agreement fixing a date, the Treasurer shall cause to be published in the *Gazette* a notice specifying the date so fixed.".

Provisions relating to certain income derived from sources in certain countries

6. Section 12 of the Principal Act is amended—

(a) by omitting from paragraph (1) (as) "or" (last occurring); and

(b) by inserting after paragraph (1) (as) the following paragraph:

"(at) income being interest or royalties to which paragraph (1) of Article 11 or paragraph (1) of Article 12 of the Maltese agreement applies, where the income is derived, in the year of income commencing on 1 July in the calendar year next following that in which the agreement enters into force, or a subsequent year of income, from sources in Malta; or".

Source of dividends

7. Section 18 of the Principal Act is amended by omitting from sub-section (1) "the government of which" and substituting "which, or with the government of which,".

Schedules 13A and 24

8. The Principal Act is amended—

(a) by inserting after Schedule 13 the Schedule set out in Schedule 1 to this Act; and

(b) by adding at the end thereof the Schedule set out in Schedule 2 to this Act.

SCHEDULE 1

Section 8

SCHEDULE TO BE INSERTED AFTER SCHEDULE 13 TO THE PRINCIPAL ACT

"SCHEDULE 13A

Section 3

PROTOCOL AMENDING THE AGREEMENT BETWEEN AUSTRALIA AND THE KINGDOM OF BELGIUM FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

SIGNED AT CANBERRA ON 13 OCTOBER 1977

Australia and the Kingdom of Belgium,

Desiring to amend the Agreement between Australia and the Kingdom of Belgium for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed at Canberra on 13 October 1977 (in this Protocol referred to as 'the Agreement'),

Have agreed as follows:

ARTICLE I

Article 7 of the Agreement shall be amended by deleting paragraphs (8) and (9).

ARTICLE II

Article 9 of the Agreement shall be amended by:

(a) deleting from paragraph (2) 'of this Article' and substituting 'of paragraph (1)'; and

(b) adding at the end thereof the following paragraph:

'(4) Notwithstanding the provisions of this Article, an enterprise of one of the Contracting States may be taxed by that State as if this Article had not come into effect but, so far as it is practicable to do so, in accordance with the principles of paragraph (1).'.

ARTICLE III

Article 10 of the Agreement shall be amended by adding at the end thereof the following paragraph:

'(6) Nothing in this Agreement shall be construed as preventing one of the Contracting States from imposing on the profits of a company which is a resident of the other Contracting State tax in addition to or at a higher rate than the tax which would be imposed on the profits of a company which is a resident of the first-mentioned State. However, if the provisions of the law in force in either Contracting State which relate to such additional tax or such higher rate are varied (otherwise than in minor respects so as not to affect its general character) the Contracting States shall consult with each other with a view to agreeing to such amendments to this Article as may be appropriate.'.

ARTICLE IV

Article 12 of the Agreement shall be amended by omitting paragraph (3) and substituting the following paragraph:

'(3) The term 'royalties' in this Article means payments (including credits), whether periodical or not, and however described or computed, to the extent to which they are made as consideration for the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trade-mark or other like property or right, or industrial, commercial or scientific equipment, or for the supply of

SCHEDULE 1—continued

scientific, technical, industrial or commercial knowledge or information, or for the supply of any assistance of an ancillary or subsidiary nature furnished as a means of enabling the application or enjoyment of such knowledge or information or any other property or right to which this Article applies, and includes any payments (including credits) to the extent to which they are made as consideration for the use of, or the right to use, motion picture films, films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, or for total or partial forbearance in respect of the use or supply of a property or right referred to in this paragraph.'.

ARTICLE V

This Protocol, which shall form an integral part of the Agreement, shall enter into force on the fifteenth day after the date on which the Contracting States exchange notes through the diplomatic channel notifying each other that the last of such things has been done as is necessary to give this Protocol the force of law in Australia and in Belgium respectively, and thereupon this Protocol shall have effect:

(a) in Australia, in relation to income of any year of income beginning on or after 1 July in the calendar year immediately following that in which the Protocol enters into force;

(b) in Belgium, on income of any accounting period beginning on or after 1 January in the calendar year immediately following that in which the Protocol enters into force.

IN WITNESS WHEREOF the undersigned, duly authorized thereto, have signed this Protocol.

DONE in duplicate at Canberra this twentieth day of March One thousand nine hundred and eighty-four in the English, French and Dutch languages, the three texts being equally authentic.

PAUL KEATING
FOR AUSTRALIA

A. DOMUS
FOR THE KINGDOM OF BELGIUM".

SCHEDULE 2

Section 8

SCHEDULE TO BE ADDED AT END OF PRINCIPAL ACT

"SCHEDULE 24

Section 3

AGREEMENT

BETWEEN

AUSTRALIA

AND

MALTA

FOR

THE AVOIDANCE OF DOUBLE TAXATION

AND

THE PREVENTION OF FISCAL EVASION

WITH RESPECT TO TAXES ON INCOME

Australia and Malta,

Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,

Have agreed as follows:

CHAPTER 1

SCOPE OF THE AGREEMENT

ARTICLE 1

Personal Scope

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 2

Taxes Covered

(1) The existing taxes to which this Agreement shall apply are:

(a) in Australia:

the Australian income tax, including the additional tax upon the undistributed amount of the distributable income of a private company;

(b) in Malta:

the income tax, including prepayments of tax whether made by deduction at source or otherwise.

(2) This Agreement shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of this Agreement in addition to, or in place of, the existing taxes. As soon as possible after the end of each calendar year, the competent authority of each Contracting State shall notify the competent authority of the other Contracting State of any substantial changes which have been made in the laws of his State relating to the taxes to which this Agreement applies.

SCHEDULE 2—continued

CHAPTER II

DEFINITIONS

ARTICLE 3

General Definitions

(1) In this Agreement, unless the context otherwise requires:

(a) the term 'Australia' means the Commonwealth of Australia and, when used in a geographical sense, includes:

(i) the Territory of Norfolk Island;

(ii) the Territory of Christmas Island;

(iii) the Territory of Cocos (Keeling) Islands;

(iv) the Territory of Ashmore and Cartier Islands;

(v) the Coral Sea Islands Territory; and

(vi) any area adjacent to the territorial limits of Australia or of the said Territories in respect of which there is for the time being in force, consistently with international law, a law of Australia or of a State or part of Australia or of a Territory aforesaid dealing with the exploitation of any of the natural resources of the sea-bed and subsoil of the continental shelf;

(b) the term 'Malta' means the Republic of Malta and, when used in a geographical sense, means the Island of Malta, the Island of Gozo and the other islands of the Maltese archipelago, including the territorial waters thereof, and any area outside the territorial sea of Malta which, in accordance with international law, has been or may hereafter be designated, under the law of Malta concerning the continental shelf, as an area within which the rights of Malta with respect to the sea-bed and subsoil and their natural resources may be exercised;

(c) the terms 'Contracting State', 'one of the Contracting States' and 'other Contracting State' mean Australia or Malta, as the context requires;

(d) the term 'person' includes an individual, a company and any other body of persons;

(e) the term 'company' means any body corporate or any entity which is treated as a company or body corporate for tax purposes;

(f) the terms 'enterprise of one of the Contracting States' and 'enterprise of the other Contracting State' mean an enterprise carried on by a resident of Australia or an enterprise carried on by a resident of Malta, as the context requires;

(g) the term 'international traffic' means any transport by a ship or aircraft except where the ship or aircraft is operated solely between places within a Contracting State;

(h) the term 'tax' means Australian tax or Malta tax, as the context requires;

(i) the term 'Australian tax' means tax imposed by Australia, being tax to which this Agreement applies by virtue of Article 2;

(j) the term 'Malta tax' means tax imposed by Malta, being tax to which this Agreement applies by virtue of Article 2;

(k) the term 'competent authority' means, in the case of Australia, the Commissioner of Taxation or his authorized representative, and in the case of Malta, the Minister responsible for finance or his authorized representative.

(2) In this Agreement, the terms 'Australian tax' and 'Malta tax' do not include any penalty or interest imposed under the law of either Contracting State relating to the taxes to which this Agreement applies by virtue of Article 2.

SCHEDULE 2—continued

(3) In the application of this Agreement by a Contracting State, any term not defined in this Agreement shall, unless the context otherwise requires, have the meaning which it has under the laws of that State relating to the taxes to which this Agreement applies.

ARTICLE 4
Residence

(1) For the purposes of this Agreement, a person is a resident of one of the Contracting States:

(a) in the case of Australia, subject to the provisions of paragraph (2), if the person is a resident of Australia for the purposes of Australian tax; and

(b) in the case of Malta, if the person is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. A person is not a resident of Malta if he is liable to tax in Malta in respect only of income from sources therein.

(2) In relation to income from sources in Malta, a person who is subject to Australian tax on income which is from sources in Australia shall not be treated as a resident of Australia unless the income from sources in Malta is subject to Australian tax or, if that income is exempt from Australian tax, it is so exempt solely because it is subject to Malta tax.

(3) Where by reason of the preceding provisions of this Article an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules:

(a) he shall be deemed to be a resident solely of the Contracting State in which he has a permanent home available to him;

(b) if he has a permanent home available to him in both Contracting States, or if he does not have a permanent home available to him in either of them, he shall be deemed to be a resident solely of the Contracting State with which his personal and economic relations are the closer.

(4) In determining for the purposes of paragraph (3) the Contracting State with which an individual's personal and economic relations are the closer, the matters to which regard may be had shall include the citizenship of the individual.

(5) Where by reason of the provisions of paragraph (1), a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the Contracting State in which its place of effective management is situated.

ARTICLE 5
Permanent Establishment

(1) For the purposes of this Agreement, the term 'permanent establishment', in relation to an enterprise, means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

(2) The term 'permanent establishment' shall include especially:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g) an agricultural, pastoral or forestry property;

SCHEDULE 2—continued

(h) a building site or construction, installation or assembly project which exists for more than 183 days in any twelve-month period.

(3) An enterprise shall not be deemed to have a permanent establishment merely by reason of:

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of activities which have a preparatory or auxiliary character for the enterprise, such as advertising or scientific research.

(4) An enterprise shall be deemed to have a permanent establishment in one of the Contracting States and to carry on business through that permanent establishment if:

(a) it carries on supervisory activities in that State for more than 183 days in any twelve-month period in connection with a building site, or a construction, installation or assembly project which is being undertaken in that State;

(b) there is being used in that State by, for or under contract with the enterprise substantial equipment including, but not limited to, an installation, drilling rig or ship used for, or in activities connected with, the exploration for or exploitation of natural resources; or

(c) it carries on supervisory activities in that State in connection with the use of equipment referred to in sub-paragraph (b).

(5) A person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State—other than an agent of an independent status to whom paragraph (6) applies—shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State:

(a) in respect of his activities in that behalf, if he has, and habitually exercises in that State, an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph (3) and are such that, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph; or

(b) if, in so acting, he manufactures or processes in that State for the enterprise goods or merchandise belonging to the enterprise.

(6) An enterprise of one of the Contracting States shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where that person is acting in the ordinary course of his business as such a broker or agent.

(7) The fact that a company which is a resident of one of the Contracting States controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself make either company a permanent establishment of the other.

(8) The principles set forth in the preceding paragraphs of this Article shall be applied in determining for the purposes of this Agreement whether there is a permanent establishment

SCHEDULE 2—continued

outside both Contracting States, and whether an enterprise, not being an enterprise of one of the Contracting States, has a permanent establishment in one of the Contracting States.

CHAPTER III

TAXATION OF INCOME

ARTICLE 6

Income from Real Property

(1) Income from real property may be taxed in the Contracting State in which the real property is situated.

(2) In this Article, the term 'real property':

(a) in the case of Australia, has the meaning which it has under the laws of Australia, and shall also include:

(i) a lease of land and any other interest in or over land, whether improved or not; and

(ii) a right to receive variable or fixed payments as consideration for the working of, or the right to work or to explore for, mineral deposits, oil or gas wells, quarries or other places of extraction or exploitation of natural resources; and

(b) in the case of Malta, means immovable property according to the laws of Malta, and shall also include:

(i) property accessory to immovable property;

(ii) rights to which the provisions of the general law respecting landed property apply;

(iii) usufruct of immovable property; and

(iv) rights to variable or fixed payments in respect of the operation of mines or quarries or of the exploitation of or exploration for any natural resources.

Ships, boats and aircraft shall not be regarded as real property.

(3) A lease of land, any other interest in or over land and any right referred to in any of the sub-paragraphs of paragraph (2) shall be regarded as situated where the land, mineral deposits, oil or gas wells, quarries or natural resources, as the case may be, are situated or the exploration may take place.

(4) The provisions of paragraph (1) shall apply to income derived from the direct use, letting or use in any other form of real property.

(5) The provisions of paragraphs (1), (3) and (4) shall also apply to the income from real property of an enterprise and to income from real property used for the performance of professional services.

ARTICLE 7

Business Profits

(1) The profits of an enterprise of one of the Contracting States shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

(2) Subject to the provisions of paragraph (3), where an enterprise of one of the Contracting States carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that

SCHEDULE 2—continued

permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment or with other enterprises with which it deals.

(3) In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses of the enterprise, being expenses which are incurred for the purposes of the permanent establishment (including executive and general administrative expenses so incurred) and which would be deductible if the permanent establishment were an independent entity which paid those expenses, whether incurred in the Contracting State in which the permanent establishment is situated or elsewhere.

(4) No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

(5) Nothing in this Article shall affect the application of any law of a Contracting State relating to the determination of the tax liability of a person, including the determination of such liability by the exercise of a discretion or the making of an estimate by the competent authority of that State in cases in which, from the information available to the competent authority of that State, it is not possible or not practicable to ascertain the profits to be attributed to a permanent establishment, provided that that law shall be applied, so far as the information available to the competent authority permits, consistently with the principles of this Article.

(6) For the purposes of the preceding paragraphs of this Article, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

(7) Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

(8) Nothing in this Article shall affect the operation of any law of a Contracting State relating to taxation of profits from insurance with non-residents provided that if the relevant law in force in either Contracting State at the date of signature of this Agreement is varied (otherwise than in minor respects so as not to affect its general character) the Contracting States shall consult with each other with a view to agreeing to any amendment of this paragraph that may be appropriate.

ARTICLE 8
Shipping and Air Transport

(1) Profits from the operation of ships or aircraft derived by a resident of one of the Contracting States shall be taxable only in that State.

(2) Notwithstanding the provisions of paragraph (1), such profits may be taxed in the other Contracting State where they are profits from operations of ships or aircraft confined solely to places in that other State.

(3) The provisions of paragraphs (1) and (2) shall apply in relation to the share of the profits from the operation of ships or aircraft derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organization or in an international operating agency.

(4) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise shipped in a Contracting State for discharge at another place in that State shall be treated as profits from operations of ships or aircraft confined solely to places in that State.

SCHEDULE 2—continued

(5) Notwithstanding the provisions of this Article, profits from the operation of ships in international traffic derived by a company which is a resident of Malta may be taxed in Australia unless the company proves that such profits are not relieved from Malta tax under the provisions of the Merchant Shipping Act, 1973, or under any identical or similar provision. The foregoing sentence, however, shall not apply if the company proves that not more than 25 per cent of its capital is owned, directly or indirectly, by persons who are not residents of Malta.

ARTICLE 9
Associated Enterprises

(1) Where:

(a) an enterprise of one of the Contracting States participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one of the Contracting States and an enterprise of the other Contracting State,

and in either case conditions operate between the two enterprises in their commercial or financial relations which differ from those which might be expected to operate between independent enterprises dealing wholly independently with one another, then any profits which, but for those conditions, might have been expected to accrue to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

(2) Nothing in this Article shall affect the application of any law of a Contracting State relating to the determination of the tax liability of a person, including the determination of such liability by the exercise of a discretion or the making of an estimate by the competent authority of that State in cases in which, from the information available to the competent authority of that State, it is not possible or not practicable to determine the income to be attributed to an enterprise, provided that that law shall be applied, so far as the information available to the competent authority permits, consistently with the principles of this Article.

(3) Where profits on which an enterprise of one of the Contracting States has been charged to tax in that State are also included, by virtue of paragraph (1) or (2), in the profits of an enterprise of the other Contracting State and taxed accordingly, and the profits so included are profits which might have been expected to have accrued to that enterprise of the other State if the conditions operative between the enterprises had been those which might have been expected to have operated between independent enterprises dealing wholly independently with one another, then the first-mentioned State shall make an appropriate adjustment to the amount of tax charged on those profits in the first-mentioned State. In determining such an adjustment, due regard shall be had to the other provisions of this Agreement in relation to the nature of the income and for this purpose the competent authorities of the Contracting States shall if necessary consult each other.

ARTICLE 10
Dividends

(1) Dividends paid by a company which is a resident of one of the Contracting States for the purposes of its tax, being dividends to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

SCHEDULE 2—continued

(2) Such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident for the purposes of its tax, and according to the law of that State, but:

(a) in the case of tax charged by Australia:

that tax shall not exceed 15 per cent of the gross amount of the dividends;

(b) in the case of tax charged by Malta:

(i) such tax on the gross amount of the dividends shall not exceed that chargeable on the profits out of which the dividends are paid;

(ii) where such dividends are paid out of profits of a company which are subject to tax at a reduced rate of tax under special provisions designed to promote investments necessary for the economic development of Malta, the rate of Malta tax on the dividends shall not exceed such reduced rate.

The provisions of this paragraph shall not affect the taxation of the company on the profits out of which the dividends are paid.

(3) The term 'dividends' in this Article means income from shares and other income assimilated to income from shares by the taxation law of the Contracting State of which the company making the distribution is a resident for the purposes of its tax.

(4) The provisions of paragraph (2) shall not apply if the person beneficially entitled to the dividends, being a resident of one of the Contracting States, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In any such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

(5) Dividends paid by a company which is a resident of one of the Contracting States, being dividends to which a person who is not a resident of the other Contracting State is beneficially entitled, shall be exempt from tax in that other State except insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or fixed base situated in that other State. Provided that this paragraph shall not apply in relation to dividends paid by any company which is a resident of Australia for the purposes of Australian tax and which is also a resident of Malta for the purposes of Malta tax.

ARTICLE 11

Interest

(1) Interest arising in one of the Contracting States, being interest to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

(2) Such interest may be taxed in the Contracting State in which it arises, and according to the law of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the interest.

(3) The term 'interest' in this Article includes interest from Government securities or from bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and interest from any other form of indebtedness as well as all other income assimilated to income from money lent by the taxation law of the Contracting State in which the income arises.

(4) The provisions of paragraph (2) shall not apply if the person beneficially entitled to the interest, being a resident of one of the Contracting States, carries on business in the other Contracting State, in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the indebtedness in respect of which the interest is paid is effectively

SCHEDULE 2—continued

connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

(5) Interest shall be deemed to arise in a Contracting State when the payer is that State itself or a political subdivision or local authority of that State or a person who is a resident of that State for the purposes of its tax. Where, however, the person paying the interest, whether he is a resident of one of the Contracting States or not, has in one of the Contracting States or outside both Contracting States a permanent establishment or fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

(6) Where, owing to a special relationship between the payer and the person beneficially entitled to the interest, or between both of them and some other person, the amount of the interest paid, having regard to the indebtedness for which it is paid, exceeds the amount which might have been expected to have been agreed upon by the payer and the person so entitled in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the amount of the interest paid shall remain taxable according to the law of each Contracting State, but subject to the other provisions of this Agreement.

ARTICLE 12

Royalties

(1) Royalties arising in one of the Contracting States, being royalties to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

(2) Such royalties may be taxed in the Contracting State in which they arise, and according to the law of that State, but the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

(3) The term 'royalties' in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:

(a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trademark or other like property or right;

(b) the use of, or the right to use, any industrial, commercial or scientific equipment;

(c) the supply of scientific, technical, industrial or commercial knowledge or information;

(d) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in sub-paragraph (a), any such equipment as is mentioned in sub-paragraph (b) or any such knowledge or information as is mentioned in sub-paragraph (c);

(e) the use of, or the right to use:

(i) motion picture films;

(ii) films or video tapes for use in connection with television; or

(iii) tapes for use in connection with radio broadcasting; or

(f) total or partial forbearance in respect of the use or supply of any property or right referred to in this paragraph.

(4) The provisions of paragraph (2) shall not apply if the person beneficially entitled to the royalties, being a resident of one of the Contracting States, carries on business in the other Contracting State, in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed

SCHEDULE 2—continued

base situated therein, and the property or right in respect of which the royalties are paid or credited is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

(5) Royalties shall be deemed to arise in a Contracting State when the payer is that State itself or a political subdivision or local authority of that State or a person who is a resident of that State for the purposes of its tax. Where, however, the person paying the royalties, whether he is a resident of one of the Contracting States or not, has in one of the Contracting States or outside both Contracting States a permanent establishment or fixed base in connection with which the liability to pay the royalties was incurred, and the royalties are borne by the permanent establishment or fixed base, then the royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

(6) Where, owing to a special relationship between the payer and the person beneficially entitled to the royalties, or between both of them and some other person, the amount of the royalties paid or credited, having regard to what they are paid or credited for, exceeds the amount which might have been expected to have been agreed upon by the payer and the person so entitled in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the amount of the royalties paid or credited shall remain taxable according to the law of each Contracting State, but subject to the other provisions of this Agreement.

ARTICLE 13
Alienation of Property

(1) Income or gains from the alienation of real property may be taxed in the Contracting State in which the real property is situated.

(2) Income or gains from the alienation of shares or comparable interests in a company, the assets of which consist wholly or principally of real property, may be taxed in the Contracting State in which the assets or the principal assets of the company are situated.

(3) For the purposes of this Article:

(a) the term 'real property' has the same meaning that it has in Article 6; and

(b) any lease, interest or right referred to in any sub-paragraph of paragraph (2) of that Article shall be regarded as situated where the land, mineral deposits, oil or gas wells, quarries or natural resources, as the case may be, are situated or the exploration may take place.

ARTICLE 14
Independent Personal Services

(1) Income derived by an individual who is a resident of one of the Contracting States in respect of professional services or other independent activities of a similar character shall be taxable only in that State. However, if such an individual:

(a) has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; or

(b) in a year of income or in the year immediately preceding a year of assessment, as the case may be, stays in the other Contracting State for a period or periods aggregating more than 183 days for the purpose of performing his activities; or

(c) derives, in a year of income or in the year immediately preceding a year of assessment, as the case may be, from residents of the other Contracting State gross remuneration exceeding twelve thousand five hundred Australian dollars or its equivalent in Malta pounds from performing his activities in that State,

so much of the income derived by him as is attributable to activities so performed may be taxed in the other State.

SCHEDULE 2—continued

(2) The Treasurer of Australia and the Minister responsible for finance in Malta may agree in letters exchanged for the purpose to variations in the amount specified in sub-paragraph (c) of paragraph (1) and any variations so agreed shall have effect according to the tenor of the letters.

(3) The term 'professional services' includes services performed in the exercise of independent scientific, literary, artistic, educational or teaching activities, as well as in the exercise of independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

ARTICLE 15
Dependent Personal Services

(1) Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived from that exercise may be taxed in that other State.

(2) Notwithstanding the provisions of paragraph (1), remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

(a) the recipient is present in that other State for a period or periods not exceeding in the aggregate 183 days in the year of income or in the year immediately preceding the year of assessment, as the case may be, of that other State; and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and

(c) the remuneration is not deductible in determining taxable profits of a permanent establishment or a fixed base which the employer has in that other State; and

(d) the remuneration is, or upon the application of this Article will be, subject to tax in the first-mentioned State.

(3) Notwithstanding the preceding provisions of this Article, remuneration in respect of an employment exercised aboard a ship or aircraft operated in international traffic by a resident of one of the Contracting States may be taxed in that State.

ARTICLE 16
Directors' Fees

Directors' fees and similar payments derived by a resident of one of the Contracting States in his capacity as a member of the board of directors, or other comparable body however described, of a company which is a resident of the other Contracting State may be taxed in that other State.

ARTICLE 17
Entertainers

(1) Notwithstanding the provisions of Articles 14 and 15, income derived by entertainers (such as theatrical, motion picture, radio or television artistes and musicians and athletes) from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

(2) Where income in respect of the personal activities of an entertainer as such accrues not to that entertainer but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer are exercised.

SCHEDULE 2—continued

ARTICLE 18

Pensions and Annuities

(1) Pensions (including government pensions) and annuities paid to a resident of one of the Contracting States shall be taxable only in that State.

(2) The term 'annuity' means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

(3) Notwithstanding anything in this Agreement, any pension or allowance that is paid by one of the Contracting States in respect of wounds, disabilities or death caused by war, or in respect of war service, and is exempt from tax under the law of that State, to a resident of the other Contracting State shall be exempt from tax in that other State.

ARTICLE 19

Government Service

(1) Remuneration, other than a pension or annuity, paid by one of the Contracting States or a political sub-division or local authority of that State to any individual in respect of services rendered in the discharge of governmental functions shall be taxable only in that State. However, such remuneration shall be taxable only in the other Contracting State if the services are rendered in that other State and the recipient is a resident of that other State who:

(a) is a citizen of that State; or

(b) did not become a resident of that State solely for the purpose of performing the services.

(2) The provisions of paragraph (1) shall not apply to remuneration in respect of services rendered in connection with any trade or business carried on by one of the Contracting States or a political sub-division or local authority of that State. In such a case, the provisions of Article 15 or Article 16, as the case may be, shall apply.

(3) Where remuneration is paid under a development assistance programme of a Contracting State, out of funds exclusively supplied by that State, to a specialist or volunteer seconded to the other Contracting State with the consent of that other State, such remuneration shall be deemed to have been paid by the first-mentioned State and shall be taxable only in that State.

ARTICLE 20

Students

Where a student, who is a resident of one of the Contracting States or who was a resident of that State immediately before visiting the other Contracting State and who is temporarily present in that other State solely for the purpose of his education at a university, college, school or other similar educational institution, receives payments from sources outside that other State for the purpose of his maintenance or education, those payments shall be exempt from tax in that other State.

ARTICLE 21

Income Not Expressly Mentioned

(1) Items of income of a resident of one of the Contracting States which are not expressly mentioned in the foregoing Articles of this Agreement shall be taxable only in that State.

(2) However, any such income derived by a resident of one of the Contracting States, from sources in the other Contracting State, may also be taxed in that other State.

SCHEDULE 2—continued

(3) The provisions of paragraph (1) shall not apply to income derived by a resident of one of the Contracting States where that income is effectively connected with a permanent establishment or fixed base situated in the other Contracting State. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

ARTICLE 22
Sources of Income

Income derived by a resident of one of the Contracting States which, under any one or more of Articles 6 to 8, Articles 10 to 19 and Article 21, may be taxed in the other Contracting State shall, for the purposes of Article 23 and of the income tax law of that other State, be deemed to be income from sources in that other State.

CHAPTER IV
METHODS OF ELIMINATION OF DOUBLE TAXATION

ARTICLE 23

(1) Subject to the provisions of the law of Australia from time to time in force which relate to the allowance of a credit against Australian tax of tax paid in a country outside Australia (which shall not affect the general principle hereof), Malta tax paid under the law of Malta and in accordance with this Agreement, whether directly or by deduction, in respect of income derived by a person who is a resident of Australia from sources in Malta (not including, in the case of a dividend, tax paid in respect of the profits out of which the dividend is paid) shall be allowed as a credit against Australian tax payable in respect of that income.

(2) A company which is a resident of Australia is, in accordance with the provisions of the taxation law of Australia in force at the date of signature of this Agreement, entitled to a rebate in its assessment at the average rate of tax payable by the company in respect of dividends that are included in its taxable income and are received from a company which is a resident of Malta. However, should the law so in force be amended so that the rebate in relation to the dividends ceases to be allowable under that law, Australia shall immediately advise Malta of the change and enter into negotiations with Malta in order to establish new provisions concerning the credit to be allowed by Australia against its tax on the dividends.

(3) For the purposes of paragraph (1) and of the income tax law of Australia:

(a) a resident of Australia deriving income from sources in Malta consisting of dividends to which sub-paragraph (2) (b) (ii) of Article 10 applies, interest to which Article 11 applies or royalties to which Article 12 applies, being income in respect of which Malta tax has been wholly relieved or reduced for a limited period of time under the provisions of the Aids to Industries Ordinance 1959, so far as they were in force on, and have not been modified since, the date of signature of this Agreement, or have been modified only in minor respects so as not to affect their general character, or under any other provisions which may subsequently be agreed by the Contracting States in letters exchanged for the purpose through the diplomatic channel to be of a substantially similar character, shall be deemed to have paid Malta tax in an amount, or the Malta tax paid shall be deemed to have been increased by an amount, equal to the amount by which the Malta tax that otherwise would have been payable (which tax, in the case of dividends, shall not exceed 15 per cent and, in the case of royalties or interest, 10 per cent of the gross amount thereof) is reduced by the exemption or reduction granted; and

(b) the amount of the said dividends, interest or royalties shall be deemed to be the amount that would have been the amount of the dividends, interest or royalties if no Malta tax had been paid, increased by the amount by which the tax that otherwise would have been payable is reduced by the said exemption or reduction.

SCHEDULE 2—continued

(4) Paragraph (3) shall not apply in relation to income derived in any year of income after the year of income that ends on 30 June 1989 or on any later date that may be agreed by the Contracting States in letters exchanged for this purpose.

(5) (a) Subject to the provisions of the law of Malta from time to time in force which relate to the allowance of a credit against Malta tax of tax paid in a country outside Malta (which shall not affect the general principle hereof), Australian tax paid under the law of Australia and in accordance with this Agreement, whether directly or by deduction, in respect of income derived by a person who is a resident of Malta from sources in Australia (not including, in the case of a dividend, tax paid in respect of the profits out of which the dividend is paid) shall be allowed as a credit against Malta tax payable in respect of that income.

(b) Where a company which is a resident of Australia pays a dividend to a company which is a resident of Malta and which controls directly or indirectly at least 10 per cent of the voting power in the first-mentioned company, the credit shall take into account (in addition to any Australian tax for which credit may be allowed under sub-paragraph (a)) the Australian tax payable by that first-mentioned company in respect of the profits out of which such dividend is paid.

(6) Where under this Agreement income is to be relieved from tax in one of the Contracting States and, under the law in force in the other Contracting State, a person, in respect of the said income, is subject to tax by reference to the amount thereof which is remitted to or received in that other State and not by reference to the full amount thereof, then the relief to be allowed under this Agreement in the first-mentioned State shall apply only to so much of the income as is remitted to or received in the other State.

CHAPTER V
SPECIAL PROVISIONS

ARTICLE 24
Mutual Agreement Procedure

(1) Where a resident of one of the Contracting States considers that the actions of the competent authority of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State of which he is a resident. The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with this Agreement.

(2) The competent authority shall endeavour, if the claim appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Agreement. Any solution so reached shall be implemented notwithstanding any time limits in the national laws of the Contracting States.

(3) The competent authorities of the Contracting States shall jointly endeavour to resolve any difficulties or doubts arising as to the interpretation or application of this Agreement.

(4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of giving effect to the provisions of this Agreement.

ARTICLE 25
Exchange of Information

(1) The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Agreement or of the domestic laws of the Contracting States concerning the taxes to which this Agreement applies insofar as the

SCHEDULE 2—continued

taxation thereunder is not contrary to this Agreement. The exchange of information is not restricted by Article 1. Any information received by the competent authority of a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which this Agreement applies and shall be used only for such purposes.

(2) In no case shall the provisions of paragraph (1) be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;

(b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or to supply information the disclosure of which would be contrary to public policy.

ARTICLE 26
Diplomatic and Consular Officials

(1) Nothing in this Agreement shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special international agreements.

(2) Notwithstanding Article 4, an individual who is a member of a diplomatic mission, consular post or permanent mission of one of the Contracting States which is situated in the other Contracting State or in a third State shall be deemed for the purposes of this Agreement to be a resident of the sending State if he is liable in the sending State to the same obligations in relation to tax on his total income as are residents of that sending State.

(3) This Agreement shall not apply to International Organizations, to organs or officials thereof or to persons who are members of a diplomatic mission, consular post or permanent mission of a third State, being present in a Contracting State and who are not liable in either Contracting State to the same obligations in relation to tax on their total income as are residents thereof.

CHAPTER VI
FINAL PROVISIONS

ARTICLE 27
Entry into Force

This Agreement shall enter into force on the date on which the Contracting States exchange notes through the diplomatic channel notifying each other that the last of such things has been done as is necessary to give this Agreement the force of law in Australia and in Malta, as the case may be, and thereupon this Agreement shall have effect:

(a) in Australia:

(i) in respect of withholding tax on income that is derived by a non-resident, in relation to income derived on or after 1 January in the calendar year next following that in which the Agreement enters into force;

(ii) in respect of other Australian tax, in relation to income of any year of income beginning on or after 1 July in the calendar year next following that in which the Agreement enters into force;

SCHEDULE 2—continued

(b) in Malta:

in relation to taxes which are levied for the year of assessment beginning on 1 January in the second calendar year following that in which the Agreement enters into force and for any subsequent year of assessment.

ARTICLE 28

Termination

This Agreement shall continue in effect indefinitely, but either of the Contracting States may, on or before 30 June in any calendar year beginning after the expiration of 5 years from the date of its entry into force, give to the other Contracting State through the diplomatic channel written notice of termination and, in that event, this Agreement shall cease to be effective:

(a) in Australia:

(i) in respect of withholding tax on income that is derived by a non-resident, in relation to income derived on or after 1 January in the calendar year next following that in which the notice of termination is given;

(ii) in respect of other Australian tax, in relation to income of any year of income beginning on or after 1 July in the calendar year next following that in which the notice of termination is given;

(b) in Malta:

in relation to taxes which are levied for the year of assessment beginning on 1 January in the second calendar year following that in which the notice of termination is given and for subsequent years of assessment.

IN WITNESS WHEREOF the undersigned, duly authorised thereto, have signed this Agreement.

DONE in duplicate at Malta this ninth day of May One thousand nine hundred and eighty-four in the English language.

N. ROSS-SMITH
FOR AUSTRALIA

ALEX SCEBERRAS TRIGONA
FOR MALTA".

NOTE

1. No. 82, 1953, as amended. For previous amendments, see No. 25, 1958; No. 88, 1959; Nos. 19 and 29, 1960; No. 71, 1963; No. 112, 1964; No. 105, 1965; No. 17, 1966; Nos. 39 and 86, 1967; No. 3, 1968; No. 24, 1969; No. 48, 1972; Nos. 11 and 216, 1973; No. 129, 1974; No. 119, 1975; Nos. 52, 55 and 143, 1976; No. 134, 1977; No. 87, 1978; Nos. 23 and 127, 1980; Nos. 28, 110, 143 and 154, 1981; and Nos. 51 and 57, 1983.

Printed by Authority by the Commonwealth Government Printer (58/84)