



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF  
CHIEF COUNSEL

CC:INTL:Br1  
SPR-110554-98

UILC: 4461.00-00  
894.00-00  
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INTERNAL REVENUE SERVICE NATIONAL OFFICE TECHNICAL ASSISTANCE

SEP 23 1998

MEMORANDUM FOR: Joetta Malone  
Group Manager, Tax Treaty Group 4 CP:IN:I:T:4  
Office of International Programs

FROM: Elizabeth U. Karzon *ewk*  
Senior Technical Reviewer, Branch 6  
CC:INTL:Br6

SUBJECT: U.S. Harbor Maintenance Tax and Tax Treaties

This Technical Assistance responds to your memorandum dated April 30, 1998, in which you asked for information regarding the Harbor Maintenance Tax (HMT). Technical Assistance does not relate to a specific case and is not binding on Examination or Appeals. This document is not to be cited as precedent.

ISSUES

Issue 1. Whether the United States' income tax treaties and/or Tax Information Exchange Agreements (TIEAs) have any provisions that address the HMT.

Issue 2. Whether this office has access to any information that addresses the questions being researched by the U.S. Army Corps of Engineers, as reflected in the letter dated April 10, 1998, to Mr. John Lyons from Paul M. Murphy, Assistant Counsel for Fiscal and International Law for the U.S. Army Corps of Engineers.

CONCLUSIONS

Issue 1. The HMT is not a covered tax under United States' income tax treaties, but the Exchange of Information Articles in the treaties with Japan, France and Mexico can be used to obtain information regarding a Federal excise tax. It is not appropriate, however, to make a request under these Exchange of Information Articles for the information needed by the U.S. Army Corps of Engineers, since this information is not relevant for carrying out the provisions of the conventions or the domestic tax laws of the United States with respect to taxes covered by

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the tax treaties. This information is more appropriately requested informally by the Revenue Service Representatives from the treaty partners.

There are no TIEAs currently in effect between the United States and the five countries identified in your request for assistance.

Issue 2. This office does not have any information regarding whether or how foreign countries collect user fees or excise taxes from commercial users of their ports, the types of tax/user fees that may be imposed, the size of the tax/user fees, the revenues they generate, or the use of any such revenues.

#### FACTS.

The U.S. Army Corps of Engineers has requested information on international analogs to the United States' HMT. The HMT, as it applies to exports, was struck down by the U.S. Supreme Court in U.S. v. United States Shoe Corporation, 118 S. Ct. 1290 (March 31, 1998), as being in violation of Article 1, Section 9, Clause 5 of the United States Constitution (the Export Clause). An interagency group is analyzing potential legislative solutions to the Supreme Court's decision. The United States is engaged in formal consultation procedures with the European Union, Canada, Japan, and Norway about the implications of the Supreme Court's decision on the United States' obligations as a member of the World Trade Organization.

The Corps of Engineers is researching how other nations (including the European Union, as a whole and as individual nations) collect taxes or user fees from commercial users of their ports or harbors for the purpose of maintenance of such ports or harbors. He would like any data that we can supply regarding the type of such taxes or user fees, the size of the taxes or user fees, the revenue they generate, and how the revenue is used. He requested that Tax Treaty make inquiries to our treaty partners to obtain such information within the bounds of the limits of the treaties and TIEAs.

#### LAW AND ANALYSIS

Under section 4461 of the Internal Revenue Code (Code), the United States' Harbor Maintenance Tax (HMT) obligates exporters, importers, and domestic shippers to pay 0.125 percent of the value of the commercial cargo they ship through the nation's ports. The HMT is imposed at the time of loading for exports and unloading for other shipments. In U.S. Shoe, the Supreme Court addressed the question of whether the HMT, as applied to goods loaded at United States ports for export, is an impermissible tax on exports or, instead, a legitimate user fee.

The export clause of the U.S. Constitution, Article I clause 5, states that "[n]o tax or duty shall be laid on articles exported from any state." In U.S. Shoe the government argued that the HMT is a statutorily mandated user fee, not an unconstitutional tax on exports. The Court held that the HMT, which is imposed on an ad valorem basis, is not a fair approximation of services, facilities, or benefits furnished to the exporters and, therefore, does not qualify as permissible user fee. The Court held that the HMT is a tax that violates the export clause as it applied to the export of commercial cargo.

Since the HMT is an excise tax determined entirely on an ad valorem basis, see, U.S. Shoe, 118 S. CT. at 1291; 26 U.S.C. 4461(a); 26 U.S.C. 4462(f)(1)(2), it is not an income tax within the meaning of the Code.

#### Issue 1. The HMT and Tax Treaties or TIEAs

##### Tax Treaties

You have asked whether the income tax treaties (treaties) between the United States and France, Germany, Japan, Mexico and the Netherlands provide exemptions from the HMT. In each of these treaties the "Taxes Covered" article identifies those taxes for which the treaty may provide an exemption.<sup>1</sup> In each of these treaties, the "Taxes Covered" article states that the treaty covers federal income taxes imposed by the Code. These articles also cover certain other special purpose taxes such as the accumulated earnings tax, personal holding company tax, or social security taxes. The identified special purpose taxes in these treaties, however, do not include the HMT. Thus, the HMT is not a covered tax under the Taxes Covered article of these treaties and the treaties do not provide for an exemption from the HMT.

In some cases, certain information on taxes not considered a covered tax under the Taxes Covered article can, nevertheless, be exchanged between treaty partners under the Exchange of Information Article of a treaty. In such cases, the competent authorities of the United States and its treaty partners generally agree to exchange information to administer and enforce the domestic laws of the contracting states concerning taxes covered by the Exchange of Information article. This includes information to effect the determination, assessment, and collection of tax, the recovery and enforcement of tax claims, or the investigation or prosecution of tax crimes involving the contravention of tax administration.

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<sup>1</sup> The Taxes Covered Articles in these treaties are numbered as follows: France, Article 2; Japan, Article 1; Germany, Article 2; Mexico, Article 2; and the Netherlands, Article 2.

The Exchange of Information Article (Article 30) in the treaty with the Netherlands limits the exchange of information to those taxes covered by the treaty, and, as stated above, the HMT is not a tax covered by the treaty. The Exchange of Information Article (Article 26) in the treaty with Germany provides that information on noncovered taxes, such as excise taxes, can only be exchanged pursuant to an exchange of notes between the competent authorities. No such exchange of notes has taken place with the German competent authority.

Under the Exchange of Information Articles in the treaties with Japan (Article 26), France (Article 27) and Mexico (Article 27), information regarding all federal excise taxes can be exchanged. While, as an excise tax, the HMT may technically be subject to the Exchange of Information Articles of these treaties, the purposes discussed above suggest that the Exchange of Information Article would not apply to this request regarding the HMT.

For example, the HMT is collected by Customs Department agents at each U.S. port when cargo is unloaded upon arrival (or when cargo is loaded prior to departure before the U.S. Shoe decision) of a vessel as though the HMT were a Customs duty. All relevant information is available on required Customs Department forms. Therefore, it is highly unlikely that further information would be needed from the treaty partner to administer and enforce the HMT or to effect the determination, assessment, and collection of tax, the recovery and enforcement of tax claims, or the investigation or prosecution of tax crimes involving the contravention of the HMT administration.

Mr. Murphy isn't seeking taxpayer information, but tax administration information from the treaty countries. Further, Mr. Murphy has stated that he intends to use the requested information for analyzing potential legislative solutions to the Supreme Court's U.S. Shoe decision, rather than for the administration and enforcement of the HMT. In fact, the U.S. Army Corps of Engineers is not authorized to engage in the administration and enforcement of the HMT.

#### Tax Exchange of Information Agreements

You have also asked whether the HMT is covered under any of the United States' tax information exchange agreements (TIEAs). While every U.S. income tax treaty contains information exchange provisions, there are numerous countries with which the United States does not have a tax treaty relationship but with which the United States would like to exchange tax information. Congress authorized such agreements and provided limited tax benefits to countries and territories in the Caribbean Basin that enter into TIEAs with the United States. Currently there are twenty-nine countries and territories that are eligible under the Caribbean

Basin Initiative program to participate in TIEAs. Fourteen countries have entered into TIEAs, including Bermuda, Mexico, Peru, and the Marshall Islands, which are not Caribbean Basin countries.

All of the TIEAs currently in effect either cover all taxes imposed by the Code (including excise taxes), or specifically include excise taxes within their scope. However, none of the TIEAs are between the United States and the five countries addressed in your request.

Issue 2. International Analogs to HMT

Mr. Murphy's letter requests information on international analogs to the United States' HMT. This office does not have any information regarding whether or how foreign countries collect user fees or excise taxes from commercial users of their ports, the types of tax/user fees that may be imposed, the size of the tax/user fees, the revenues they generate, or the use of any such revenues.

If you would like to assist Mr. Murphy in obtaining such information, we suggest that you contact the various revenue service representatives around the world to request their assistance. You could also suggest to Mr. Murphy that he may be able to obtain the information directly from various shipping industry groups, such as the Baltic International Maritime Council (BIMCO) or the admiralty section of the New York State Bar Association. He might also consider speaking directly with representatives of the larger U.S. and foreign shipping companies and asking for their experiences regarding harbor tax/user fees imposed in various foreign countries.

We hope this information will help you respond to Mr. Murphy's request. If you have any further questions, please call Patricia Bray at (202) 622-5871.