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The Norwegian *Dell* Case and the Spanish *Roche* Case

DIE FÄLLE *DELL* UND *ROCHE*: KOMMISSIONÄRSBETRIEBSSTÄTTE JA ODER NEIN?

Konzernstrukturänderungen (Business Restructurings) und deren steuerliche Implikationen beschäftigen sowohl multinationale Konzerne als auch die Steuerverwaltungen seit Längerem. In der jüngsten Vergangenheit mussten sich aber auch einige Höchstgerichte mit einschlägigen Fällen befassen. Die Höchstgerichte kommen auf den ersten Blick zu einem uneinheitlichen Ergebnis.

I. Introduction

The recent Norwegian *Dell* case[1]) posed the question whether an agent selling products in its own name, but at the risk and on account of the principal constitutes a dependent agent permanent establishment (PE) in its own country.

The issue at stake represents one of the crucial topics multinationals have to face in these times, and so far there has not been a clear and unanimous answer to this question. The Norwegian case confirmed the conclusions reached by the previous French *Zimmer* case.[2]) The subsequent Spanish *Roche* case,[3]) however, contradicts the earlier French and Norwegian court decisions at first sight, leaving taxpayers without a clear definition of the PE concept.

II. The Facts of the *Dell* Case

Dell Group is a multinational group having its headquarters in the United States and subsidiaries around the world. *Dell Group* also has subsidiaries in Ireland and in Norway.

The Irish subsidiaries are *Dell Products (Europe) BV* and its subsidiary *Dell Products* (*Dell Ireland*). The Irish parent company manufactures computers for the Europe, Middle East and Africa (EMEA) region. The subsidiary purchases computers from its parent and sells them in the various markets around the world through local subsidiaries of *Dell Group*.

The Norwegian subsidiary *Dell AS* (*Dell Norway*) performs two kinds of activities: on one hand, it sells accessories on its own account to end users (sales to small companies and

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1) Dell Products v. Staten v/Skatt øst, Case HR-2011-02245-A, 2 December 2011.

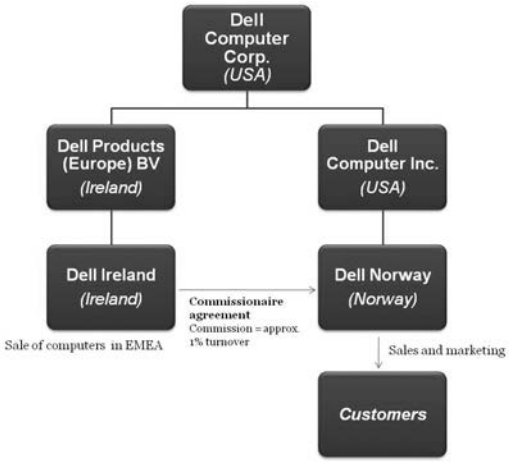
2) Supreme Administrative Court, *Société Zimmer Limited*, Decisions No. 304715 and No. 308525, 31 March 2010. For further comments see *Arnold*, Tax Treaty News, Bulletin for International Taxation (July, 2010), p. 354; *Wustenberghs/Puncher*, Zimmer à la Belge: Could a Commissionaire Arrangement Create an Agency Permanent Establishment in Belgium?, Bulletin for International Taxation (April/May, 2010), pp. 237–248; Comparative Survey, The Concept of Dependent Agent Permanent Establishment in Transfer Pricing Theory, International Transfer Pricing Journal (September/October, 2010, pp. 347–376; November/December, 2010, pp. 430–450; January/February, 2011, pp. 28–38; March/April, 2011, pp. 128–134); *Bourtourault/Bénard*, French Tax Aspects of Cross-Border Restructurings, Bulletin for International Taxation (April/May, 2011), pp. 179–187; *Jensen*, Permanent Establishments and Allocation Questions Pertaining to Them – Judgements of the Norway Supreme Court, Bulletin for International Taxation (August/September, 2002), pp. 392–400; *Innamorato*, The Concept of a Permanent Establishment within a Group of Multinational Enterprises, European Taxation (February, 2008), pp. 81–84; *Gouthière*, Zimmer: "Commissionaire" Agent Is Not a Permanent Establishment, European Taxation (August, 2010), pp. 350–358; *Douvier/Lordkipanidze*, Zimmer Case: The Issue of the Deemed Existence of a Permanent Establishment Based on Status as a Commissionaire, International Transfer Pricing Journal (July/August, 2010), pp. 266–269.

3) *Roche* case, Sentencia de 12 enero 2012, JUR\2012\41054.

consumers in the Scandinavian market through a call center in Denmark) and, on the other hand, it sells *Dell Ireland's* products under a commissionaire agreement with it.

This second activity is performed by *Dell Norway* in its own name, but at the risk and on account of the principal (i.e. *Dell Ireland*). This commissionaire agreement covers sales to large customers and customers in the public sector. The commission for these services amounts to approximately 1 % of sales.

The following diagram represents the legal and commercial organization of sales.



It is worth mentioning that, at that time, *Dell Products (Europe) BV* had approximately 4,000 employees, *Dell Ireland* had 600–800 employees (formally not employed by the company, but, for practical reasons, by its parent, even if the cost was booked in *Dell Ireland*), whereas *Dell Norway* had approximately 50 employees. Besides, the commission agreement between *Dell Ireland* and *Dell Norway* was in line with Norwegian domestic law, and *Dell Norway* did not inform its customers that it was acting as a commissionaire for *Dell Ireland*.

The Norwegian tax authorities assessed the taxpayer (i.e. *Dell Ireland*) on the basis that it had a dependent agent PE in Norway, under Art. 5, para. 5 of the Ireland–Norway tax treaty[4]), and that the profits to be attributed to the PE could be determined by an indirect method of apportionment in accordance with Art. 7, para. 4 of the Ireland–Norway tax treaty. Therefore, they allocated 60 % of the profits to the Norwegian PE and 40 % to the Irish Company. The taxpayer presented the case to the court.

III. Previous Judgments

The court of the first instance (Oslo District Court)[5]) and the Borgarting Court of Appeal,[6]) on March 2nd, 2011, both rejected the taxpayer's appeal.

The courts justified their opinions through different points.

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[4]) Convention Between Ireland and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital (22 November 2000).

[5]) *Dell Products (NUF) v. Tax East* (Oslo District Court 2009). For further comments see *Arnold*, Tax Treaty News, Bulletin for International Taxation (December, 2010), pp. 604–605.

[6]) Borgarting Court of Appeal, 2 March 2011, Case 10-032855ASD-BORG/03. For further comments see *Arnold*, Tax Treaty News, Bulletin for International Taxation (July, 2011), pp. 368–370; *Leegaard*, Commissionaire Structure as an Agency Permanent Establishment – Uncertain Profit Allocation, European Taxation (June, 2011), pp. 263–267.

First of all, they recalled the wording of the Ireland–Norway tax treaty and the differences between the English and the Norwegian version. In order to have a dependent agent PE, the Norwegian version requires the agent to have an *"authority to conclude contracts on behalf of the company"*, whereas the English version requires an *"authority to conclude contracts in the name of the enterprise"*.

Then, the courts analyzed the OECD Commentary on Art. 5, para. 5 of the OECD Model Convention, with specific reference to Paragraph 32.1. In doing so, they highlighted that the expression *"in the name of"* has to be interpreted in a functional approach and not in a literal way. The reason for that, in the courts' views, was that art. 5, para. 5 had the object of protecting the principle of source taxation from possible tax avoidance arrangements.

The support to this thesis also derived from the General Report from the 2009 International Fiscal Association (IFA) Conference,[7]) the Italian *Philip Morris* case[8]), a 1978 decision of the Court of Appeals of Amsterdam[9]) and a Swedish binding ruling.[10]) All these opinions were supporting the idea that a commissionaire may be regarded as binding the principal, even if the contracts were not entered into in the name of the principal.

Besides, the courts found support in a statement of practice from the Norwegian Ministry of Finance (from 2000) and in a Norwegian tax authorities' binding ruling (from 2003).[11])

In the end, the courts concluded that *Dell Norway* was financially and legally dependent on *Dell Ireland* (having, from a substantial point of view, an *"authority to conclude contracts in the name of the enterprise"* under Art. 5, para. 5 of the Ireland–Norway tax treaty); therefore, it was considered a PE of the principal.

Moreover, the courts approved the indirect method of apportioning the income to the PE (and the percentages of apportionment determined by tax authorities) since it was considered to be compliant with Art. 7, para. 4 of the Ireland–Norway tax treaty and in accordance with the arm's length principle. The practical reason for this was that the PE did not have a separate accounting system (since it was not considered, by the taxpayer, to be a PE).

IV. The Judgment of the Norwegian Supreme Court

On December 2nd, 2011, the Norwegian Supreme Court overturned the two previous judgments and stated that *Dell Ireland* did not have a PE in Norway.

The arguments of the Supreme Court were based on the Vienna Convention,[12]) on Art. 5, para. 5 of the tax treaty, on the OECD Model and its commentaries, and on case law.

First of all, the court looked at the wording of the Ireland–Norway tax treaty (in the English version) and stated that the expressions *"acting on behalf of an enterprise"* and "*authority to conclude contracts in the name of the enterprise"* clearly suggest that the contracts must be legally binding for *Dell Ireland*, in order to have a PE in Norway.

Second, the court approached the OECD Commentary on Art. 5, para. 5 of the OECD Model and sustained that paragraph 32.1 was introduced under a common law system point of view irrelevant to the Norwegian civil law approach.

Then, the court also referred to the abovementioned French *Zimmer* case: According to the French Supreme Court, a commissionaire acts in its own name and cannot bind its

7) Sasseville/Skaar, General Report, Cahiers de droit fiscal international, Vol. 94a (2009), pp. 21 et seq.
8) Supreme Court, 7 March 2002, Decision Nos. 3367, 3368 and 3369; 26 March 2002, Decision No. 431926; 25 May 2002, Decision Nos. 7682 and 7689; 22 September 2002, Decision No.10925 and 6. December 2002, Decision No. 17373.
9) Amsterdam Court of Appeal, 20 June 1978, No. 1106/761, BNB 1979/190.
10) SRN 7 March 2008.
11) Utv. 2000, p. 949 (FIN) and BFU 107/03.
12) Vienna Convention of the Law of Treaties (23 May 1969).

principal. As a result, a commissionaire cannot constitute a dependent agent PE of its non-resident principal, even if the commissionaire is clearly not independent.[13])

Moreover, the court underlined that *Dell Ireland* had in place the same commissionaire arrangement that was at stake in the case in 15 other jurisdictions, and in none of the other cases was any PE issue raised.

Finally, it was also stated that using a different approach from the legal and formalistic one could involve substantial practical and technical difficulties related to the uncertainty of applying a uniform practice to the other similar commissionaire arrangements.

Therefore, based on this reasoning, the Norwegian Supreme Court affirmed that *Dell Ireland* did not have any PE in Norway and, consequently, no income should have been assessed.

V. The Spanish *Roche* Case

A recent decision of the Spanish Supreme Court[14]) reached an opposite conclusion from the *Dell* case regarding – at first sight – a similar issue.

In the *Roche* case it was stated that the dependent agency clause, present in both the Swiss-Spanish tax treaty and the OECD Model convention, had to be interpreted in a broad way.

In brief, a Spanish subsidiary and its Swiss parent company concluded two contracts:

- a manufacturing contract (the subsidiary agreed to produce and package products for the parent, applying a cost-plus pricing with 3,3 % mark-up);
- an agency contract (the subsidiary agreed to be the agent of the parent in promoting the sale of products in Spain and in *"presenting, protecting and promoting"* the interest of the principal, in exchange of a fee of 2% on the sales promoted).

The Supreme Court in this case agreed with the view of the Spanish tax authorities, the Central Tax Court and the National High Court and affirmed that:

- the Swiss parent did neither have any fixed place of business in Spain (since it only could dispose of a warehouse, rented from its subsidiary) nor any human or material resources to perform its activity; therefore, the activities carried out by the warehouse were considered to be auxiliary; but
- the Spanish subsidiary was acting as a dependent agent of the Swiss principal since its activity:
  - was limited to manufacturing products for its parent;
  - was limited to just following the orders of its parent; and
  - assumed the only risk of respecting the quality standards of the products.

Therefore, without explaining the reason for agreeing with the decision of the National High Court,[15]) the Supreme Court rejected the appeal of the taxpayer: Even though the agency agreement did not involve the authority of concluding contracts binding on the principal, it resulted, nevertheless, in an involvement of the subsidiary in the business activities in the national market.

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[13]) *Zimmer Limited* was a UK resident corporation engaged in the business of selling orthopedic products. Until 1995 the distribution and marketing of the products in France were conducted by *Zimmer SAS*, a wholly owned French subsidiary of *Zimmer Limited*. In 1995 *Zimmer SAS* sold its assets to its parent company, but continued to distribute the parent's products as a commissionaire of the parent. Under the commissionaire arrangement, *Zimmer SAS* could accept orders, make offers, negotiate prices and terms of payment, grant discounts, and conclude contracts with both new and existing clients without the prior approval of its UK parent, *Zimmer Limited*.

[14]) *Roche* case, Sentencia de 12 enero 2012, JUR\2012\41054.

[15]) In fact, it looks as though the Supreme Court, in its decision, limited itself simply to "copy and paste" the reasoning of the National High Court.

It is the wider scope of activities of the Spanish *Roche* subsidiary that distinguishes this case from the Norwegian and the French case. As a consequence, it is doubtful whether these court cases are directly comparable, specifically so, as it is an open question whether the Spanish Supreme Court would still have ruled in favor of the existence of a PE had the Spanish subsidiary been limited to mere commissionaire activities as in the *Dell* and *Zimmer* cases.

VI. The Austrian Tax Authorities' Perspective

Under the Austrian tax authorities' point of view, in order for *Dell Norway* to constitute an agent PE of its principal, two crucial points have to be taken into consideration.[16])

- The first is the so-called "dependency issue".[17]) Whenever an Austrian commissionaire is legally or economically dependent on its principal, the former would be considered to be a PE of the latter. Specifically, the economic dependency would occur when, for example, the commissionaire has a long-term relationship with one single principal,[18]) or when it is obliged to follow its instructions.[19])
- The second relevant aspect refers to the *"authority to conclude contracts in the name of"* the principal.[20]) This element refers to the consequences that contracts signed by the commissionaire have on the principal's obligations. In fact, in order for those contracts to be binding on the latter, they have to be able to create either legal or economic obligations. The economic obligations, in particular, can occur, for instance, every time the commissionaire uses, with its final customers, contracts that were pre-approved by the principal (e.g. standardized format contracts), irrespective of the legal consequences they have on the latter or its signature on those contracts. Moreover, in accordance with the Austrian tax authorities' perspective, it already lies within the nature of a commissionaire agreement that the principal is obliged to fulfill a sales contract the commissionaire has entered into with the customer.

Therefore, in the *Dell* case, with the agent having the ability to sell products in its own name, but at the risk and on account of the principal, Austrian officials would most likely adopt the same approach used by the Norwegian tax authorities, i.e. affirming the existence of a PE.

Quite obviously, in the *Roche* case, where the subsidiary's activities are not limited to those of a commissionaire, but include manufacturing under a contract with the principal, the Austrian tax authorities would follow the view of the Spanish tax authorities, taxing a PE of the principal.

VII. Conclusions

The issue at stake is crucial in every country. The problem of establishing the existence of a PE, based on a commissionaire agreement, can basically be seen either from a formal or from an economic point of view.

The arguments in favor of the formal approach, as shown by both the *Zimmer* case and the *Dell* case, go in the direction of interpreting the rules and the agreements from a literal point of view, thus giving taxpayers more certainty.

On the other hand, arguments in favor of the substantial approach, sustained by most of the tax authorities (including the Austrian), by the *Roche* case and by the recent OECD

[16]) See *Jirousek*, Kommissionärstochtergesellschaften als Vertreterbetriebsstätten?, in *BMF/JKU* (eds.), Einkommensteuer – Körperschaftsteuer – Steuerpolitik, Gedenkschrift für Peter Quantschnigg (2010), pp. 133–144; *Dommes/Greinecker*, Fallbeispiel Transfer Pricing – Vertreterbetriebsstätte, SWI 2010, pp. 414 et seq.; *Prillinger*, SWI-Jahrestagung: Kommissionär als Vertreterbetriebsstätte, SWI 2009, pp. 496 et seq.; *Bendlinger*, Sinn und Zweck der Vertreterbetriebsstätte, ÖStZ 2010, pp. 140 et seq.; *Hack*, Vom Eigenhändler zum Kommissionär, ÖStZ 2008, pp. 229 et seq.

[17]) Reference to this issue can be found in the 2010 Austrian Transfer Pricing Guidelines, point 174.

[18]) This interpretation is in line with point 38.6 of the OECD Commentary on Article 5.

[19]) This interpretation is in line with point 38 of the OECD Commentary on Article 5.

[20]) Reference to this issue can be found in the 2010 Austrian Transfer Pricing Guidelines, point 175.

Public discussion draft on Art. 5,[21]) would analyze the issue on a case-by-case basis, trying to avoid aggressive tax planning schemes.

It is clear that, whenever countries do not reach consensus on such an issue, the risk of double taxation or double non-taxation will drastically increase.

Moreover, the *Dell* case raised the important question of apportionment of profits to the PE. As a matter of fact, every time the agent's country finds the existence of a PE, it will attribute income to it based either on a formulary apportionment (if the new Authorized OECD Approach[22]) has not been implemented in the tax treaty) or on the arm's length principle.

From a transfer pricing perspective, the adoption of the formal approach to the PE issue will keep the tax authorities of the agent's country from making any possible use of arbitrary and distortive formulas in attributing its own income. Therefore, also in this case, this method would reduce the probability of double taxation as well as double non-taxation.

In conclusion, both the *Dell* case and the *Roche* case will most probably have a great impact on the international debate and will, hopefully, persuade countries to reach consensus on the approach that has to be followed in such cases.

[21]) OECD Public discussion draft on Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention (12 October 2011 to 10 February 2012).
[22]) OECD Report on the Attribution of Profits to Permanent Establishments (2008).

„Carried Interest" im Fall einer vermögensverwaltenden deutschen KG

Sind in Österreich ansässige Investoren an einer deutschen vermögensverwaltenden (und nicht gewerblich geprägten) KG beteiligt, deren Aufgabe im Erwerb, Halten, Verwalten und Veräußern von Beteiligungen an nicht börsenotierten Unternehmen besteht (und die nicht unter die Investmentfondsregelungen nach § 188 InvFG 2011 fällt), unterliegen sie mit den hierbei erzielten Kapitaleinkünften der inländischen Besteuerung mit dem besonderen Steuersatz von 25 %. Dieses inländische Besteuerungsrecht wird durch Art. 10 und 11 DBA Deutschland für die anteiligen Einkünfte aus der Überlassung von Kapital und durch Art. 13 DBA Deutschland für die anteiligen Einkünfte aus realisierten Wertsteigerungen abkommensrechtlich abgedeckt.

Erhält aufgrund der schriftlichen gesellschaftsrechtlichen Vereinbarungen eine als Gesellschafterin beteiligte deutsche Kapitalgesellschaft einen erhöhten Anteil an den KG-Einkünften, falls sie durch ihr Management bestimmte Erfolgsziele erreicht (*„carried interest"*), so mindert eine solche Gewinnverteilungsabrede wohl die Gewinnanteile der übrigen Gesellschafter, kann aber nicht in „Aufwendungen" dieser übrigen Gesellschafter umqualifiziert werden. Denn in dem höheren KG-Gewinnanteil kann keine grenzüberschreitend von den österreichischen Gesellschaftern nach Deutschland fließende „Managementgebühr" gesehen werden. Auch in EAS 2698 vom 6. 2. 2006 wurde (in einem reziproken Fall) einer derartige Umqualifizierung eines erhöhten Anteiles an Kapitaleinkünften (*„carried interest"*) in Einkünfte aus selbständiger Arbeit eine Absage erteilt. *„Carried interest"* wird daher nicht durch das Abzugsverbot des § 20 Abs. 2 EStG berührt.

Vorsorglich wird allerdings darauf hingewiesen, dass für die Gewinnverteilung in einer Personengesellschaft wohl in erster Linie die Vereinbarungen der Gesellschafter, insbesondere jene des Gesellschaftsvertrags, maßgebend sind. Die Gewinnverteilung wäre allerdings für steuerliche Belange zu korrigieren, wenn sie in einem offenbaren Missverhältnis zu der Beteiligung und der Mitarbeit der einzelnen Gesellschafter steht (Rz. 5883 EStR). Dies gilt auch dann, wenn es durch *„carried interest"* zu einem derartigen Missverhältnis käme.

(EAS 3280 v. 14. 5. 2012)