

# Kluwer International Tax Blog

## Agency Permanent Establishments: Commissionaires in the frame

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Wednesday, December 16th, 2015

The Spanish National Court has recently ruled (case no. 182/2012) that a Spanish affiliate of Dell that sold Dell computers in Spain under a commissionaire agreement with Dell Ireland constituted a permanent establishment of the Irish group sales company. The decision is in line with earlier Spanish Supreme Court Decisions in *Roche Vitamins Europe SA* (case no. 1626/2008) and *Borax Europe Ltd* (case no. 1933/2011) but inconsistent with rulings of other leading European Supreme Courts.

The status of commissionaire agreements in the PE context has given rise to considerable anxiety among tax administrators in recent years. It lays bare one of the fundamental challenges in international taxation, that is, how commonly recognised tax rules apply to legal institutions that exist in some, but not all legal systems.

### Model tax treaties

Article 5(5) of the OECD and UN Model treaties deem a permanent establishment to exist where a person habitually exercises an authority to conclude contracts in the name of a non-resident enterprise. No permanent establishment exists in the case of independent agents and others within article 5(6) of the models.

This simple proposition has been one of the cornerstones of the PE definition throughout the modern history of tax treaties and its language has remained largely unaltered throughout the period. Similarly, the commissionaire is not a new legal concept but one deeply rooted in civil law legal systems. In recent years, it has, however, become the relationship of choice for the distribution of goods in many civil law countries.

### European judicial opinion

Recent judicial examination of the tax consequences of commissionaires was initiated in 2010 by the French Conseil d'Etat (Supreme Administrative Court) in *Société Zimmer Limited*, who ruled that a French commissionaire was not the PE of its UK principal. The court reasoned that the commissionaire was a specific legal relationship under the French Commercial Code that does not include an authority to conclude contracts in the name of a principal. Thus it cannot be an agency permanent establishment. The same approach has been followed by other European Supreme courts, notably in Norway in *Dell Products (Europe) BV v Skatt Øst* and in Italy in *Boston Scientific SpA*.

The Spanish National Court in *Dell* considered that under Spanish law, the principal assumes the commercial consequences of the actions of its commissionaire, and that, accordingly, direct representation between the principal and the commissionaire is not required to act on behalf of an enterprise.

The very different line taken by the Spanish courts is difficult to reconcile with the majority of European Supreme courts. Caution must however be exercised with any treaty interpretation, because of the need to interpret the language of the particular treaty. For example, the term “commissionaire” is used in the French version of article 5(6) (independent agents) of the OECD Model as the equivalent to “general commission agent”. Does that mean that commissionaires must be excluded from the deemed PE in article 5(5)?

Linguistic differences should not provide a basis for distinction between the Spanish *Dell case* on the one hand and the Norwegian *Dell case* and the *Zimmer case* on the other. In all three cases, the treaties were with English speaking countries (Ireland in the *Dell cases* and the UK in *Zimmer*). Interpretative techniques for treaties in more than one language should have the effect of harmonising meaning in this situation (I examine the *Zimmer* and *Borax cases* in *Schwarz on Tax Treaties* 4th edition para. 15-400 and 15-600 and interpretation of treaties in more than one language at 12-350).

### **OECD work on commissionaires**

The effect of commissionaire agreements on agency PE was first raised in the OECD during discussion on business restructuring. The PE issues of business restructuring were not addressed in the context of that work and left to the project initiated in 2011 on the interpretation and application of article 5 generally (See OECD: [Public discussion draft Interpretation and Application of Article 5 \(Permanent Establishment\) of The OECD Model Tax Convention](#) 12 October 2011). At that stage, tax officials were still of the belief that they could make treaties mean what they wanted merely by including their views in the Commentary.

Such complacency was destroyed by the pressures that gave rise to the BEPS project and amendments proposed in Action 7 are aimed at changing the meaning of agency PE in article 5(5) of the OECD Model to capture commissionaires within that article. Is the debate of commissionaires over as a result? The answer so far is no. The BEPS Action 7 proposals are to be included in the multilateral instrument proposed by Action 15. However, it is too early to say whether the Action 7 proposals will be mandatory or optional for states signing up to the multilateral instrument. Recent treaties conclude by OECD and G20 countries during the development of the Action 7 proposals reveal no influence of the BEPS proposals – the traditional article 5(5) language continues to be included even in the most recent treaties.

### **The future of commissionaires**

Either way, it seems that companies like Dell may well continue to find that the same commercial arrangement adopted in different countries, can give rise to very different tax treatment. The potential for the increased international conflict foreseen by BEPS Action 14 is obvious in these cases. Would a French or Norwegian company with a commissionaire in Spain qualify for relief from Spanish tax imposed by Spain on a PE that, under French or Norwegian interpretation of the treaty does not exist?

I wish all readers a happy new year. It is certain to be an interesting one.

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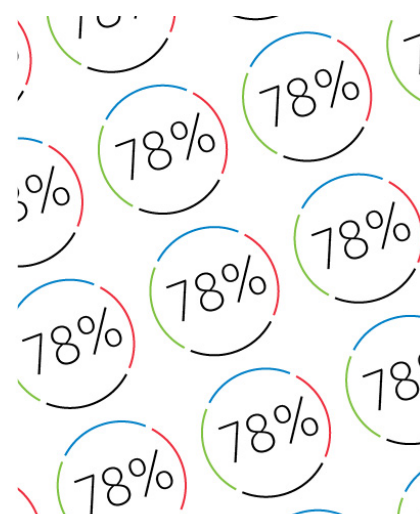
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