



International Association of Tax Judges

Agency permanent establishment – the Norwegian view

Clemens Endresen

International sources of law submitted to the Supreme Court in the Dell case

- OECD articles of the Model convention – as they read on 18 July 2008 + earlier versions and condensed version July 2010
- International guidelines and commentaries
- Court decisions from other jurisdictions
- Administrative practice
- Extracts from articles and textbooks from other jurisdictions

Court decisions from other Jurisdictions

- The Danish Supreme Court 25 June 1996
- WTO-decision 22 April 1996 by the Appellate Body
United States – Standards for Reformulated and Conventional Gasoline
- ICJ-decision in the Donau-case 1997
(case concerning the Gabčíkovo-Nagymaros project)
- Several decisions by courts in Denmark and Sweden – other than the Supreme Court
- The Italian Supreme Court 20 December 2001 – the Phillip Morris Case
- Judgement by Conseil d'Etat including 31 March 2010 – with English and Norwegian translation

Administrative practice

- A published opinion from the Danish tax authorities 18 December 1991
- From the Homepage of Her Majesty's Revenue and Customs (GB) Non-residents trading in the UK:
 - Treaty permanent establishment
 - Agent as permanent establishment

Extracts from articles and textbooks from other jurisdictions

- Vogel (editor), "Klaus Vogel on Double Taxation Conventions", Third Edition p 329-351
- Mark E Villiger, "Commentary on the 1969 Vienna Convention on the Law of the Treaties", Martinus Nijhoff Publishers, 2009
- John F. Avery/David A. Ward, "Agents as Permanent Establishments under the OECD Model Tax Convention", IFBD 1993
- Dr. Heinz-Klaus Kroppen and Stephan Hüffmeier, "The German Commissionaire as a Permanent Establishment under the OECD Model Treaty", International Tax Review, Volume 24, April 1996
- Charles H. Berry, "Berry ratios: Their Use and Misuse", Global Transfer-Pricing, June/July 1999
- Antonio Cassese, "International Law", Oxford University Press, 2005
- Darby/Lemaster, "Double Irish More than Doubles the Tax Saving: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation", Practical US/International Tax Strategies
- Ernst & Young, "International Tax Alert – French court rules French commissionaire of a UK principal does not qualify as a permanent establishment in the Zimmer case", 5 April 2010
- Brian Arnold, "Tax Treaty News", Bulletin for international taxation, July 2010
- Pierre Jean Douver and Xenia Lordkipandize, "Zimmer Case: The Issue of the Deemed Existence of a Permanent Establishment Based of Status as Commissionaire", International Transfer Pricing Journal, July/August 2010

Extracts from articles and textbooks from other jurisdictions

- Svein G Andresen and Eivind Furuseth, "Agency Permanent Establishments", International Transfer Pricing Journal, November/December 2010
- Brian Arnold, "Tax Treaty News", Bulletin for International Taxation, December 2010
- T. Miyatake, "Dell Products (NUF) v Tax East", International Tax Law Reports, Part 5, 2011
- Kevin A. Bell, "Officials concur with Zimmer ruling, disagree with finding of PE in Dell case", BNA Tax 2011
- Fredrik Zimmer, "News analysis: Norwegian Courts sides with tax authorities in Dell", Tax Notes International, March 2011
- Tim Wustenberghs/Ethel Puncher: "Zimmer à la Belge: Could a commissionaire arrangement create an agency permanent establishment in Belgium?", Tax Treaty Law Monitor, May 2011
- Thor Leegaard, "Commissionaire structure as an agency permanent establishment – Uncertain profit allocation", European Taxation, June 2011
- Hans-Martin Jørgensen and Nick Pearson-Woodd: "Norway Court of Appeal rules that a commissionaire company constitutes an agency PE of its principle company", International Tax review, June 2011
- Brian Arnold, "Norwegian Court of Appeal confirms commissionaire arrangement can result in a PE", July 2011
- Gary D. Sprague, "Applying (and Misapplying) the OECD Commentary in Commissionaire PE Cases", International Journal (BNA), August 2011

Dell Products (NUF) v Tax East

Borgarting Appeal Court

- The ITLS commentary, Toskio Miyatake
"The Court of Appeal does not seem to understand this dividing line well."
- "However, those factors are not determinative for regarding a commissionaire to be an agent PE."
- "The Court of Appeal's arguments are not free form flaws."
- There is a case comment on this judgement. Fredrik Zimmer, *Norwegian Court Sides With Tax Authorities in Dell*, in Tax Notes International, 28 March 2011, p 991, offers a critical review of this judgement.

Fredrik Zimmer

Tax Notes International, Volume 61 Number 13, 28 March 2011

- "Further, several of the court's references made to legal literature and the International Fiscal Association reports to the 209 Vancouver congress seemed to concern the typical agent situation and not the commissionaire case. The general report, in fact, discusses commissionaire arrangements (without offering a definitive view). The same seems to apply to references to Skaar and Vogel.
- That doesn't necessarily mean the decision is wrong. But it would have benefited from a more critical examination of the government's arguments as well as of what it meant that Dell Products was "in reality" bound by the contracts (it certainly wasn't bound under domestic law) and which arguments support that view."

Dell Products (NUF) v Tax East

Borgarting Appeal Court

- "The tax treaty between Norway and Ireland has been constructed in accordance with the OECD model agreement. The commentaries to this agreement are therefor seen as an important source of law ..."
- Case law from third countries, mainly judgments from the highest authority, should also be considered relevant, cf Zimmer op cit p 77.
- "... – it is a condition that Dell AS can enter into binding contracts in behalf of Dell Products."
- The appellant things that his must be understood literally, particularly on the basis of the English text 'in the name of', which is similar to the text on the OECD model treaty."
- "The government in the other hand believes that a more functional approach should be applied, by questioning if Dell AS 'in reality' bind Dell Products. Paragraph 32.1 of the commentaries to art 5(5) of the OECD model treaty, which corresponds to art 5(5) of the tax treaty reads:"
- "In the view of the Court of Appeal, the approach taken by then government is justified."
- "A more functional approach such as this cannot in the view of the Court of Appeal be limited to the situations which the text in para 32.1 were based in. The objective of art 5(5) is to protect the principle of source taxation, i e that the tax shall be due to the country where the revenue was created."
- "To ask if Dell AS "in reality" bind Dell Products is therefore in accordance with the functional interpretation of the wording 5 (5), cf art 31 of the Vienna Convention."

Dell Products (NUF) v Tax East Borgarting Appeal Court

The Appeals court also make references to:

- "On p 1226 of the report the following appears regarding the situation in Austria: '... A commission agent can constitute the principal's PE in case of dependency'".
- "... the so-called Phillip Morris case in 2002 (see *Ministry of Finance (Tax Office) v Phillip Morris GmbH* (2002) 4 ITLR 903."
- "... decision by the Court of Appeal in the Netherlands from 1978"
- "... a Swedish lower court judgment from 2008"
- "The French Administrative Supreme Court (Conseil d'Etat) in a decision of 29 January 2010, the so-called Zimmer-case ... This case incidentally concerned a tax treaty from 1968, and under French law the court was unable to consider later statements on the interpretation of the OECD model treaty, hereunder the comments to para 32.1"

Dell Products (NUF) v Tax East

Borgarting Appeal Court

- "The Court of Appeal is not aware that any explicit support exists in legal literature for the government's view that an agency permanent establishment may be created by a commissionaire relationship, as in this case. (An exception is Arnold, who in *Bulletin for International Taxation* 2010 p 602 et seq, is positive to the district court judgment in this case."
- "As mentioned above, the Court of Appeal finds that, in order to make a real assessment, as opposed to a purely literary interpretation, the objective of the provision is important."
- "The question is if Dell Products in reality is bound by the agreements which Dell AS enters into with customers."

Dell Products (NUF) v Tax East

The Supreme Court judgement

- "... the government has not argued that a sham is in existence or that the general anti-avoidance standard may be applied."
- "It is evident, and the parties also agree, that Dell Products is not legally bound by the agreements entered into with customers by Dell AS. Between Dell Products and Dell AS, a commissionaire agreement has been entered into, dated 1 February 1995., It is said in the agreement that the Norwegian Commissionaires Act 1916 applies to the agreement. Under the Act, an agreement entered into with third parties by the commissionaire, is not binding for the principal."
- "... [46] Tax treaties must be interpreted in accordance with the rules of public international law on the interpretation of treaties. Even if Norway has not ratified the Vienna convention on the law of treaties, it is accepted that art 31 no 1 of the Vienna Convention reflects accepted principles under public under international law ..."
- "In my view, a literal understanding of the terms strongly indicates that it is required that legally binding contracts are entered into on behalf of the enterprise for which the agent is acting."
- "The question is therefore whether there are other sources of law which may lead to a different solution than which follows from a literal interpretation."
- "The Commentaries to the model tax treaty are important sources of interpretation ..."

Dell Products (NUF) v Tax East

The Supreme Court judgement

- "The addition of the first sentence until the semi colon relates to a comment from the UK ... The background and purpose of the comment was mainly to clarify the special issues arising from commissionaire arrangements under common law, which deviate from Norwegian law."
- "The reminder of para 32.1. concerns agents in general. I understand what is said as a discussion about the proof required in other types of cases than ours – in particular where a sales agent takes orders for the enterprise of which he is dependent. It is therefore not a change of when a dependent agents binds the principal, but a discussion of the proof required for a binding agreement to exist."
- "The wording is clear and the solution is also supported by other sources of law. I cannot see that a teleological view can be decisive in light of the very clear sources of law which exist."

DSM Nutritional Products Europe Ltd.

The Spanish Supreme Court, 12 January 2012

Editors note

- A very confusing and troubling case
- No fixed place of business, no authority to conclude contracts (binding on the Swiss company)
- Nevertheless the Spanish company was a dependent agent
- So, what is the basis of the Supreme Court's decision? Was there a fixed place of business permanent establishment, or a dependent agent PE, or is this another Philip Morris (Ministry of Finance (Tax Office) v Philip Morris GmbH (2002 ITLR 903) style aberration?"
- It is said that this is another commissionaire case: that is far from clear.
- This is indeed not clear

DSM Nutritional Products Europe Ltd.

The Spanish Supreme Court, 12 January 2012

- "These production resources pertain to Roche Vitamins, SA but, by virtue of the relationship between it and the claimant, it is clear that the latter makes use of the facilities and we note that they are used exclusively to serve the Swiss company. It cannot therefore be maintained that the manufacturing and sales activities carried out in Spain consist of a business activity carried out by Roche Vitamins, Sa, but rather by the claimant. Using the definition of business activity that the claimant itself invokes, it must be taken into account that the management of the production resources is carried out by the claimant and the financial results from the activity, whether favourable or unfavourable and the risks inherent to the manufacturing and sale of the products affect the claimant not Roche Vitamins, SA. The Spanish company does not carry out a manufacturing activity or the sale of products on its own behalf but rather on the behalf of the other company and it is limited to managing, in accordance with the orders received, the resources made available to the Swiss company. We must therefore conclude that in this case the first circumstance is regulated by art 5 of the treaty exists and, accordingly, the claimant carried out its operations using a permanent establishment in Spain."