

Norwegian Supreme Court judgment on commissionaire PE - Dell Products Ireland

In its December 2 2011 judgment in the Dell Products case, the Norwegian Supreme Court found, in a very clear and unanimous judgment, that the Norwegian company Dell AS acting as a commissionaire did not create a permanent establishment for the nonresident principal Dell Products (HR-2011-02245-A).

The judgment in the Norwegian Supreme Court is well received by businesses and advisors as Dell Products was found to have a permanent establishment both in the Lower Court and in the Court of Appeal. It is in line with the judgment in the French Zimmer Case.

The State and Dell Products agreed that Dell AS was a dependent agent of Dell Products and that the principal was not legally bound by the agreements entered into with the customers by the commissionaire in its own name. The key question before the court was whether art. 5 paragraph 5 of the tax treaty should be interpreted such that it was a requirement that the principal had to be legally bound or, as the State asserted, that it was enough to create a PE that the agreements entered into by the commissionaire “in reality was binding” for the principal.

The Supreme Court considered the Vienna-convention, the tax treaty between Norway and Ireland Art. 5 paragraph 5 in Norwegian and English language, the OECD Model Tax Treaty with commentaries and case law with special emphasis of the French Zimmer case from 31 March 2010.

The clear conclusion was that the parties to the tax treaty had chosen an arrangement where it is decisive whether the commissionaire legally binds the principal. Another criterion did not have support in the text of the treaty or the Model Tax Treaty and it could create substantial practical and legal technical difficulties in practice. Dell Products won the case and the State had to pay the legal costs.

Facts of the case

Dell Products is a company resident in Ireland for tax purposes, while Dell AS is resident in Norway. Both companies are subsidiaries in the Dell-group. Dell AS sells products in Norway as a commissionaire for principal, Dell Products, and has been taxed for the income from the commissionaire business. The arrangement is based on a written commissionaire agreement which refers to the Norwegian Law on Commissionaires. Norwegian Tax Authorities concluded in a tax assessment that the arrangement created a permanent establishment for Dell

Products and taxed the company in Norway for 60% of its profits from sales in Norway.

Judgment

The key question before the Norwegian Supreme Court was how the terms “on behalf of” and “has the authority to conclude contracts in the name of” should be understood, reference is made to the Double Taxation Treaty between Norway and Ireland section 5 paragraph 5.

Dell Products asserted that the wording implies that the contracts must be legally binding for Dell Products for a PE to be created. The Norwegian Tax Authorities adopted a so called functional approach and asserted that it was sufficient to constitute a PE that the contracts entered into by Dell AS with the Norwegian customers in reality was binding for Dell Products.

It should be noted, as also referred to by the Supreme Court, that it was not disputed by the parties that it followed from Norwegian domestic law on commissionaires that an agreement concluded between a commissionaire and a third party is not legally binding for the principal. The commission agreement between Dell Products and the commissionaire Dell AS was in line with Norwegian domestic law. Dell AS had not informed its customers that it acted as a commissionaire for Dell Products. The Supreme Court based its judgment on an interpretation of the wording of the tax treaty and expressed that the wording clearly indicates that the contracts must be legally binding for Dell Products if a PE is to be created.

Thereafter, the Supreme Court considered whether other relevant sources of law could give another result than the interpretation of the wording in the tax treaty.

The Supreme Court found that the change in the Comments to the Model Tax Convention paragraph 32.1 in 2003 partly refers to a common law system which is not relevant to the Norwegian civil law approach. Secondly, the other parts of paragraph 32.1 were found to be a discussion of the standard of proof for agent arrangements which is different from a commissionaire arrangement.

The Supreme Court also refers to the French Zimmer case and concludes that according to the French Supreme Court something additional had to be present in the arrangement between the commissionaire and the principal beyond an ordinary commissionaire agreement in order for the commissionaire to bind the principal legally towards a third party.

It is also underlined in the Supreme Court judgment that the commissionaire arrangement in the Dell case is accepted in 15 other jurisdictions, among them Sweden, without any questions being raised related to permanent establishment for Dell Products.

The Norwegian Tax Authorities had forcefully asserted that the purpose of the art. 5 paragraph 5 was to secure the tax revenue for the source state. The court replied to this assertion by stating that the treaty partners had chosen an arrangement where decisive issue was whether (the principal) was legally bound. The wording of the tax treaty is clear and other sources of law also support the result. On this basis, considerations of objective could not break through in relation to the clear legal sources in this case. Furthermore, the court emphasized more technical aspects; that

an alternative criterion (than legally bound) would have to be established without support in the text of the tax treaty or the Model Tax Treaty. This would in itself be uncertain and there could be substantial practical and legal technical difficulties in getting a reasonably uniform practice considering the many tax treaties applying such wording.

The Norwegian Tax Authorities had assessed Dell Product in Norway based on a PE up to and including 2006. From 2007 it appears that the tax authorities were of the opinion that Dell Products did not have a PE in Norway. Although the Supreme Court had already concluded on the case in favor of Dell Products, it commented on this situation. The court quoted a letter from the tax office that this change was “ due to an overall evaluation of the available information in the case with special emphasis on factual circumstances in 2007”. The factual change in 2007 was that the organization in Ireland was changed as the responsibility for the employees that worked for Dell Products had been transferred from the parent company to Dell Products. The Norwegian Tax Authorities had asserted that Dell Products in Ireland had appeared to be a “flow through company” without independent activity. The Supreme Court simply commented that it was not easy to see how a change of the organization in Ireland should have effects on whether a PE existed in Norway.

The consequences of the Judgment

The Dell Products commissionaire PE case is one of several cases, and the first to go before the courts, from a project on commissionaires started many years ago by the Norwegian Tax Authorities. The project includes PE cases and attribution of additional commission/profit to the commissionaire as it is believed that functions and risk of the commissionaire in Norway is more valuable than those of the principal. We expect that the pending commissionaire PE cases are stopped. The focus of the Norwegian Tax Authorities for the profitability level of commissionaires and agents will certainly increase. Let us hope the Supreme Court in turn also will judge wisely in these cases.

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