Dell case, SUPREME COURT OF NORWAY, 2 December 2011

HR-2011-02245-A, (case no. 201 1/755), civil case, appeal against judgment ,

(1) Judge **Utgård:** The case concerns the review of a settlement decision where the Irish company Dell Products has been taxed in Norway for the years 2003 to 2006. The crucial point is whether Dell Products had a permanent establishment in this country according to the tax agreement between Ireland and Norway of 22 November 2000 , Article 7 No. 1, cf. Article 5 No. 5 .

(2) The Dell group manufactures and sells computer machines and computer equipment all over the world. Dell Computer Corporation is at the forefront of the group and belongs in the USA. The other companies mentioned are wholly owned companies in the group. When I refer to the organization in the group, I do so based on the situation in the relevant tax years.

(3) Dell Products (Europe) BV is a company with limited liability which is established and registered in the Netherlands, but which does not operate there. The company has production in Ireland, is managed from there and pays taxes there. Dell Products (Europe) BV has the subsidiary Dell Products, which , like the parent company , is a company with limited liability registered in the Netherlands, and otherwise belongs in Ireland. Dell Products is the group's unit for the distribution of Dell products in Europe, the Middle East and Africa. The company buys products from Dell Products (Europe) BV and also additional products from other suppliers.

(4) In the years in question, Dell Products had no employees, but purchased services from the parent company and others. It is stated that the parent company had approximately 4,000 employees.

(5) Dell Products in the case of com m itted product to special commission agents in the individual countries, who then sell to end users. The commissioner in Norway is Dell AS, which is also a company in the group . The sale through the commissioner applies to private companies with more than 200 employees and to the public sector. Dell Products (Europe) BV sells to smaller companies and private individuals in Norway using the Internet and telephone from a customer center in Denmark.

(6) To show whether the activity in Norway is captured, I mention that the annual report for Dell AS for 2003 shows a gross turnover of over NOK 1.4 billion and a taxable income of NOK 10.1 million . For 2004, the corresponding figures are just over NOK 1 billion and just under NOK 10.3 million .

(7) Dell AS has deemed itself liable to tax in Norway for income gained from operations as a commission agent and has been taxed accordingly . The Irish company Dell Products has not considered itself liable to tax in Norway , and therefore originally did not send a self-declaration. Following an order from the Norwegian tax authorities, Dell Products has later sent self-declarations for the years in question, where 0 income was entered.

(8) In 2002, the Akershus county tax office started a book audit at Dell AS, which led to a final book audit report in 2005. As a result of the book audit, Dell Products was notified in September 2005 that the tax authorities had come to the conclusion that there was a tax liability to N reg. Notice was also given of changes to the calculations for 2003 and 2004.

After extensive proceedings, the Tax Appeal Board for Tax East made a decision on 8 October 2008. The calculations were based on Dell Products having a permanent establishment in Norway in 2003 and 2004 according to Article 5 of the tax agreement no. 5, so that the company was liable for tax here. 60 percent of Dell Products ' net profit on the part of the production that was sold here was assigned to the permanent establishment here in Norway .

(9) In a letter of 8 September 2008, Dell Products was notified of changes to the calculations for the income years 2005, 2006 and 2007. The tax authorities informed in a letter of 10 February 2009 that the company would still not be assessed for income in Norway for the income year 2007. In a decision of 25 February 2009, later amended on 1 July 2009, the taxable income in Norway for Dell Products was set at NOK 10.0 million and NOK 7.8 million for the income years 2005 and 2006. The decision was based on the same legal understanding and factual basis as the decision for the first two years.

(10) On 24 April 2009, Dell Products filed a case at the Oslo District Court for review of likning sved tak a.

(11) The Oslo District Court gave judgment on 16 December 2009 with the following conclusion:

"1. The state v/Skatt East is acquitted.

2. In court costs, Dell Products pays the State v/Skatt Øst 707,314 - seven hundred and seven thousand one hundred and fourteen - kroner within 2 - two - weeks from the service of the judgment."

(12) The district court came to the conclusion that Dell AS - as commissioner - had the right to enter into contracts that were in fact binding on Dell Products - the commission agent - and that this satisfied condition **3** of the tax agreement article 5 no . 5. The court came to the conclusion further to the fact that Dell AS was clearly not an independent person, so that this part of the conditions in article 5 no. 5 was also fulfilled.

(13) As the district court saw it, no mistake had been made in the allocation of how much of Dell Products' income should be taxed in Norway .

(14) Dell Products appealed to the Court of Appeal. The City Court of Appeal ruled on 2 March 2011 with the following conclusion:

"1. The appeal is dismissed.

2. In case costs for the Court of Appeal, Dell Products pays NOK 369,312 - three hundred and sixty thousand one hundred and twelve - to the state v/Skatt East within two weeks of service of this judgment."

(15) The Court of Appeal essentially looked at the questions in the same way as the district court had done.

(16) Dell Products appealed further to the Supreme Court and applied the same views as for the earlier instances, nevertheless so that it was not appealed that the Court of Appeal had reached the conclusion that Dell AS was not an independent agent. The Appeals

Committee allowed the appeal to be submitted in relation to the question of whether there was a permanent establishment and the general interpretation of Article 7 of the tax agreement, cf. H R-201 1-01127-U.

(17) The appellant – *Dell Products* – has essentially maintained:

(18) The tax agreement must be interpreted according to the usual principles for convention interpretation. The tax agreement article 5 no. 5 cannot be understood to mean that Dell Products has a permanent establishment in Norway . The starting point is the wording. Both the Norwegian and the English language versions must be understood to mean that there is only a fixed place of business if, in a mainly different legal sense, it is bound to third parties . It therefore does not come under the provisions of the tax agreement when Dell AS acts in its own name, and no legal relationship was established between the relevant third party and the Dell Products that came into contact.

(19) Objective views - which otherwise go in both directions - cannot have particular weight in a situation where a negotiated agreement is so clear. Such opinions also have limited weight in that the understanding of Article 5 No. 5 can be clarified through other legal sources.

(20) Great emphasis must be placed on the tax agreement being in accordance with the OECD's model agreement. The opinions of other OECD countries must also have weight. Dell Products has the same arrangement in 15 countries, and it is only Norway that has stated that the company has a permanent establishment in the commissioner country . The situation in Spain is not yet clear.

(21) A judgment from the French Administrative High Court underlies the view held by Dell Products . Jurisprudence from other countries' supreme court chairs must have weight in the interpretation.

(22) Even if the Supreme Court were to find that Dell Products has a permanent place of business in Norway, the decision can still not stand when it concerns the allocation of income to Norway .

(23) The allocation of the income must take place after a functional analysis. First, there is the question of what will happen in each of the states. Next, there is the question of how the income should **4** be distributed according to article 7 of the tax agreement. As long as nothing more happens in Norway than what happens through Dell AS, it is the value of this hall function that must be assigned. B use of the principle in the tax agreement, article 7 no. 4 assigns the income to the wrong tax subject in this case.

(24) Dell Products has made the following claim:

"1. The equation of Dell Products for the income years 2003-2006 is cancelled.

2. Dell Products is awarded legal costs for the District Court, the Court of Appeal and the Supreme Court."

(25) The respondent – *the state at Skatt öst* – has mainly maintained:

(26) The principle of interpretation in Article 31 of the Vienna Convention must be used as a basis when interpreting the tax agreement. It is central there that there should be a correct understanding of the wording.

(27) Article 5 no. 5 of the tax agreement uses the expression "on behalf of". This is an open wording. There is no requirement in the wording for authorization to enter into legally binding agreements or the like. This speaks for a functional assessment of whether the committee is in reality bound by the agreement.

(28) The purpose of this provision is that a company must tax where the value is created. This source principle also supports the purpose of preventing circumvention. The rules must not be interpreted so that tax for permanent establishment can be avoided through a formality . Throughout, the interpretation must take place in such a way that it provides a reasonable and rational solution to the circumvention problem, also based on the legal tradition in the individual country.

(29) The OECD's comment is based on the fact that the commissioner must involve the principal in the relevant state in order for a permanent establishment to arise . It speaks for a functional understanding. The comment shows that the OECD is aware that commission agreements can represent a problem.

(30) The French Supreme Court judgment , however, cannot have particular weight. Among other things , in France - unlike here - there is no opportunity to emphasize later changes in the OECD commentary . And it is also unclear whether the commission legislation is the same in France and Norway.

(31) The legal sources show overall that a functional assessment must take place on a concrete basis. It must, as the Court of Appeal did, assess whether the connection between the parties is such that the conditions in Article 5 No. 5 of the tax agreement are met. In this case, there is no real difference to an arrangement with a branch - the only difference is that it is said in the agreement between Dell AS and Dell Products that it is a commission agreement. It cannot be enough.

(32) Dell AS thus binds Dell Products in effect . All sales are under the Dell brand . The sale takes place according to standard terms set by Dell Products, unless special terms are negotiated in individual cases, which must also be approved by Dell Products. In practice, there is not enough testing at Dell Products of the individual sales, and the reality is that the sale is, in a financial and practical sense, final when Dell AS has completed them.

(33) When Dell Products has a permanent establishment in Norway, income must be allocated to Norway. Article 7 no. 4 of the tax treaty allows for the use of the indirect method of discretionary distribution. Dell Products does not have calculators that make it possible to use a direct method. Such discretionary distribution is common in Norway. And the method provides a solution in accordance with the arm's length principle.

(34) The State at Skatt öst has put forward the following claim:

"1. The appeal is dismissed.

2. The State v/Skatt öst is awarded the costs of the case before the Supreme Court."

(35) *I then go on to* explain my view on the matter.

(36) Tax liability to Norway for persons and companies that do not belong in this country is

regulated in the Tax Act § 2-3. According to the provisions of the first paragraph, letter b, tax must be paid on "assets and income from activities that the person concerned carries out or participates in and that is run here or managed from here". The right to Norwegian taxation can be limited by tax agreements with other countries, cf. the Double Taxation Act of 28 July 1949 No. 15 § 1. Such an agreement has been concluded between Norway and Ireland. The agreement was signed on 22 November 2000, made in two equal versions, in Norwegian and in English. The tax liability under the Tax Act is more extensive than under the tax agreement, and the content of the tax agreement is therefore decisive for Dell Products ' tax liability to Norway.

(37) It follows from the tax agreement article 7 no. 1 that a company in Ireland can only be taxed there, if the company does not conduct business "through a permanent establishment" in Norway . The question of permanent establishment is regulated in article 5. The parties agree that the question of whether Dell Products has a permanent establishment in Norway must be decided on the basis of an interpretation of the tax agreement, article 5 no. 5 first sentence, which reads as follows:

"When a person, who is not an independent intermediary to whom paragraph 6 applies , acts on behalf of an enterprise and has, and usually exercises, in a contracting state authority to enter into contracts on behalf of the enterprise, the enterprise shall, notwithstanding the provisions of the paragraphs 1 and 2 are considered to have a fixed place of business in this state for any activity that this person undertakes for the enterprise."

(38) For the Supreme Court, it is not in dispute that Dell AS is not an independent intermediary. The question is how the expressions "on behalf of" and "authorized to conclude contracts on behalf of" in Article 5 No. 5 are to be understood. As I have explained , Dell Products believes that there is a requirement in this that the contracts must be legally binding. The state believes that a functional understanding must be based, among other things, on the basis of the purpose of the tax agreement, and that the decisive factor must be whether there is an agreement that is legally – but not necessarily legally – binding. In the main, the state has agreed with the reasoning of the Court of Appeal. For the sake of clarity, I add that the state has neither made it valid that there is a pro forma nor that there is a basis for tax law through transfer.

(39) It is plain and undisputed that Dell Products is not legally bound by the agreements Dell AS makes with its customers. Between Dell Products and Dell AS there is a commission agreement, dated 1 February 1995. From the agreement it is clear that the relationship between commission agent and commission agent is regulated

by the Norwegian Commission Act from 1916. According to this law an agreement the commissioner makes with a third party is not binding on the commission . Nothing has come to light that points in the direction of the commission agreement

has a content that deviates from what is the normal situation according to the Commission Act. In the agreements with customers, Dell AS has not stated that it was a commission room , and therefore also not that Dell Products were commissioned.

(40) The state has made it valid that the condition is that Dell AS in reality binds Dell Products. I will not now go into what, in any case, must be the decisive factor in an assessment according to such a criterion. The appeal must easily be presented if the tax agreement article 5 no. 5 must be understood to mean that he set a condition that Dell Products must be legally bound.

(41) It is therefore the understanding of the tax agreement article 5 no. 5 that is decisive. Regarding the interpretation of tax agreements, I content myself with referring to what is said in Rt. 2008 page 577, cf. let the Rt. 201 1 page 755 section 36. It is stated in the 2008 judgment:

”46) Tax agreements must be interpreted in accordance with international law rules on the interpretation of treaties. Although Norway has not ratified the Vienna Convention on the Law of Treaties, it must be assumed that Article 31 No. 1 of the Vienna Convention expresses customary international law, cf. Rt. 2004 page 957. The article reads:

'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

47) According to the Vienna Convention, article 31 no. 2, 3 and 4 , emphasis can also be placed on

other circumstances relating to the agreement. According to practice, the comments to the model agreement are weighted during the interpretation, cf. Rt. 1994 page 752, Rt. 1997 page 653 and Rt. 2004 page 957. Comments that are more recent than the current double tax agreement are also given weight. As pointed out in Rt. 2004 page 957 section 49 , changes in the comments will aim to express changing practices between OECD countries, also where the articles themselves remain unchanged. "

(42) I have all quoted the Norwegian version of the tax agreement. According to this , in order for it to be a permanent establishment , it is necessary that the person in question has acted "on behalf of an enterprise" and has "authority to enter into contracts on behalf of the enterprise". In the English language version, the corresponding words are "acting on behalf of an enterprise" and "authority to conclude contracts in the name of the enterprise".

(43) In my view, a purely linguistic understanding of these expressions clearly indicates that there is a demand for legally binding agreements for the company for which the husband is responsible . This applies to both the Norwegian version, where " vävenge av" directly corresponds most closely to "on behalf of". But it also applies to the English version, where the expression is "in the name of". Nothing was said at the conclusion of the agreement between Ireland and Norway to

indicate that a dissenting opinion was intended. The question is whether there are other legal sources that advocate a different solution than what the wording in isolation suggests .

(44) The tax agreement between Ireland and Norway is based on the OECD model agreement for tax on income and capital. The English language version of the tax agreement article 5 no. 5 is completely identical to the model agreement article 5 no. 5. Thus it must be possible to assume that the two contracting states have had no wish for a deviating arrangement in relation to the model agreement.

(45) The commentary to the model agreement has weight in the interpretation, see the quoted from Rt. 2008 page 577, cf. more closely Rt. 2004 page 957 section 46. I start by referring to the comment to the model agreement dated 1 September 1992. It says in point 32:

"It would not have been in the interest of international economic relations to ensure that the maintenance of any dependent person would lead to a permanent establishment for the enterprise. Such treatment is to be limited to persons who in view of the scope of their authority or the nature of their activity involves the enterprise to a particular extent in the State concerned. Therefore, paragraph 5 proceeds on the basis that only persons having the authority to conclude contracts can lead to a permanent establishment for the enterprise maintaining them such a case the person has sufficient authority to bind the enterprise's participation in the business activity in the State concerned."

(46) These formalities are similar in later editions, including the one from 2010. The commentary is based on what will be the best view of international economic relations. In this point, it is stated that only activities from "persons having the authority to conclude contracts" can provide a basis for permanent establishment.

(47) By a decision of the Council of the OECD on 28 January 2003, the commentary to the model agreement received a new point 32.1, which reads as follows:

"Also, the phrase 'authority to conclude contracts in the name of the enterprise' does not confine the application of the paragraph to an agent who enters into contracts literally in the name of the enterprise; the paragraph applies equally to an agent who concludes contracts which are binding on the enterprise even if those contracts are not actually in the name of the enterprise. Lack of active involvement by an enterprise in transactions may be indicative of a grant of authority to an agent possess actual authority to conclude contracts where he solicits and receives (but does not formally finalise) orders which are sent directly to a warehouse from which goods are delivered and where the foreign enterprise routinely approves the transactions.

(48) The addition of the first sentence up to the semicolon is linked to a note from the UK where attention was drawn to the fact that under common law the commissioner is bound by an agreement made by the commissioner , regardless of whether hall has happened in name net only two

came the missionary . The situation with this has been explained in an article by John F. A very Jones and David A. Ward in European Taxation, IB FD, 1993 on page 154. The background for and purpose of the note was therefore mainly to clarify the special problems a commission raises under common law , and which therefore have a different content than under Norwegian law.

(49) For taxation in Norway , "commission" is to be understood based on the content of the measure under Norwegian legislation, cf. tax treaty article 3 no. 2. I remind you of what I have said before about the Norwegian system. It seems to be in accordance with what is referred to as civil law.

(50) The rest of section 32.1 applies to intermediaries - "agents" - purely generally. I understand what is said there as a discussion of the proof requirement for situations other than ours - especially where a sales agent takes orders for the company he is dependent on. It is therefore not a question of a change in what is required for a dependent person to bind the company it represents, but of what is purely concretely required for binding to take place.

(51) When understanding tax agreements based on OEC D's model agreement, it is naturally also of interest how the relevant article is understood in other countries. And not least it applies to cases where there are pending decisions from the highest courts in a state. The Supreme Court is informed of such a judgment, the judgment in the so-called Zim er case of 31 March 2010, decision 304715, from the Administrative Supreme Court in France, Conseil

d'Etat. An unofficial translation into English is included in International Tax Law Reports 12.

(52) The judgment applies to a commission case, and it concerns factual circumstances that are largely parallel to those in our case. The Conseil d'Etat assumes that a commissioner cannot bind a commission in relation to third parties in the sense of the convention, but has an additional note. In the French text, it is stated that this clarification applies where "des term es m êm es du contrat de commission, soit de tout autre élém ent de l'instruction" provides a basis for a power of attorney vis-à-vis third parties. In the unofficial English version of the statement, it is shown that the principle of non-binding applies "unless it appears either from the express terms of the contract of commission, or from other factual elements relating to its appointment". I understand this clarification to apply to situations where power of attorney follows from the wording of the commission agreement or from factual circumstances connected to the conclusion of this. In the view of the French Supreme Court , there must therefore be something added to the contractual relationship between commissioner and principal beyond a normal commission agreement, in order for the commissioner to be able to legally bind the principal in relation to third parties.

(53) According to what has been stated, similar assessments have been made in many other states as here regarding tax liability for Dell. It appears from the district court judgment that the Dell group has similar agreements in 15 states, without any of the others having meant that

the commission scheme provided the basis for permanent establishment in the commission state . It is still not clear how the tax administration acts in Spain assess the question . In particular, it must be mentioned that the Swedish Tax Agency, in its decision

of 24 November 2010, assumed that Dell AB should be taxed for commission income , without the question of permanent establishment being raised.

(54) The state has forcefully emphasized that the primary purpose of article 5 no. 5 is in particular to secure the tax base for the source state. To this I would say that the contracting states here have chosen an arrangement where the decisive factor is whether there is a legal binding. The same arrangement as in the model agreement has also been chosen. The wording is clear, and the solution is also supported in other legal sources. For my part, I cannot see that pre-trial approaches can prevail here in relation to the clear legal source picture that lies ahead.

(55) When I have thus come to the conclusion that the appeal is brought forward, I also place a certain weight on legal technical and practical views. An alternative criterion would have to be established without support in the text of the tax agreement or in the model agreement. That in itself would be uncertain. I point to that

these are formalities that must be considered to be repeated in a great many tax agreements. With such a fairly loose delimitation of criterion one, there could be great practical and legal technical difficulties in achieving a reasonably uniform practice.

(56) The tax authorities have chosen not to compare Dell Products for permanent establishment for the tax year 2007. It is clear from a letter dated 10 February 2009 from Tax East that this was done "on the basis of an overall assessment of the available information in the case, with particular emphasis on actual conditions in 2007". The actual change in 2007 was that the organization in Ireland had changed in that Dell Products had been transferred from the parent company responsibility for the employees there who worked for Dell Products. The state has made it valid that Dell Products in Ireland has appeared as a "through streaming company" . From my legal point of view, I do not need to go into this further . But I would add that it is not easy to see that a change in organization in Ireland should have an effect on whether it is a permanent establishment in Norway . This also shows the problematic nature of establishing a real bond, possibly a real financial bond, as a decisive criterion.

(57) It is then not necessary to go into the other questions raised in the case.

(58) In my legal view, the immediate result must be that Dell Products does not have a permanent establishment in Norway. I have thus come to the conclusion that the appeal is successful.

(59) Dell Products should then be awarded legal costs for all instances, cf. Swedish Disputes Act section 20-2 first paragraph. Dell Products has claimed legal costs with the addition of value added tax. It must be assumed that Dell Products, which is a foreign business, is entitled to a refund for input VAT according to the Value Added Tax Act § 10-1. Value added tax should therefore not be awarded, cf. Rt. 201 1 page 852.

(60) The claim for legal costs for the district court is a total of NOK 893,918, of which NOK 834,100 are fees and NOK 59,818 are disbursements. The other party has had no objections to the amount, which does not deviate particularly from what the state demanded and was accepted in the district court. The demand from Dell Products before the district court should be accepted.

(61) Before the Court of Appeal, Dell Products has demanded a total of NOK 1,021,380, of which NOK 993,000 are fees and NOK 28,380 court fees. As can be seen from the conclusion in the Court of Appeal, the state there demanded substantially less. I am of the opinion that the amount exceeds what is reasonable and necessary, and that the fee should be reduced to NOK 600,000. It is then taken into account that Dell Products found it necessary to go deeper into some circumstances for the Court of Appeal than for the District Court, and also that Dell Products does not have any organization in this country that could support the legal representative. For the Court of Appeal, the costs are therefore set at NOK 628,380.

(62) For the Supreme Court , NOK 203,220 is claimed, of which NOK 180,000 are fees and the rest court fees. The claim should be accepted.

(63) After this, the legal costs can be set at NOK 1,725,518.

(64) I vote for this because so

VERDICT :

1. The comparisons of Dell Products for the income years 2003–2006 are cancelled.

2. In case costs for the district court, court of appeal and the Supreme Court, the state pays Dell Products 1,725,518 -