IMPACT OF JUDGEMENT IN SPANISH DELL TAX CASE

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On 8 June, 2015, the Spanish National Appellate Court gave its judgment on the Spanish Dell case confirming the conclusion reached in the prior Decision delivered by the Spanish Central Tax Tribunal (TEAC), that the activities of the Spanish subsidiary of Dell (Dell Spain) constituted a permanent establishment (PE) of an Irish sales group company (Dell Ireland).

Therefore, the court determined that all the sales made by Dell Ireland in Spain (minus commissions

paid to Dell Spain and other related allocable expenses) should be attributed to Dell Ireland's Spanish PE.

Dell's commercial structure for EMEA and in particular for Spain was operated through several companies forming a complex, blurred and fragmented model for carrying out the business activities of the multinational company in Spain.

The court's ruling was made on the basis of the following reasoning:

— **Dependent agent:** The court concluded that the construct of the commercial commission under Spanish legislation is not incompatible with a close connection between the principal and the third party (the commissionaire's customer), since the principal is required by law, even if the contracts were not actually in its name, to accept all the consequences derived from the commercial commission, implying that Dell Spain had authority to conclude contracts that were binding on Dell Ireland. Moreover, and in view of the concrete facts of the case, the court determined that Dell Spain acted under comprehensive supervision and control of Dell Ireland, and its activities were not limited to those of an auxiliary nature.

— **Fixed place of business:** The court basically held that Dell Ireland had a fixed place of business in Spain, giving rise to a PE, through the operational set-up provided by Dell Spain's facilities and activities, despite the absence of any formal ownership or rental of such facilities. The OECD CMCs to Article 5 expressly provides that a parent company can have a PE in the State where a subsidiary has a place of business (e.g. space or premises belonging to the subsidiary that is at the disposal of the parent company).

On the other hand, although the court did not examine whether the Dell website could be characterised or not as a fixed place of business, the court mentions that, according to OECD CMC criteria, an online website does not in itself have a location that can constitute a PE, although such can be the place where the server of that website is located.

This court judgment confirms the wide interpretation of the PE clause of the Spain- Ireland double taxation treaty, which largely supports the Spanish Supreme Court's decision in Roche Vitamins and in the *Borax*Case, among others.

Although this approach raises a number of doubts from a technical OECD CMC perspective5, it is in line with the new Base Erosion and Profit Shifting (BEPS) framework. In this sense, action 7 of the OECD Action Plan on BEPS specifically states the need to update the treaty definition of PE in order to prevent abuses of that threshold in particular, through the use of commissionaire arrangements as in the case heard by the court.

Hence, not only the court but also the OECD validate the approach of the Spanish tax administration considering that rather than a legalistic point of view, a functional and substantialist interpretation of the PE clause (article 5) is more consistent with the spirit and finality of this treaty clause: a more balanced division of the tax power between the contracting states in accordance with the activities carried out in each country.

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