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The Subsidiary as a Permanent Establishment

In this article, the authors summarize the discussion on the topic of the subsidiary as a permanent establishment, which was considered by Seminar A of the 64th Congress of the International Fiscal Association, held in Rome, Italy on 30 August 2010.

1. Introduction

At the 2010 International Fiscal Association (IFA) annual congress held in Rome, Italy, from 29 August to 3 September, the subject of Seminar A (the "Seminar") was "The subsidiary as a permanent establishment".[1] In this respect, the following four international tax law cases were considered: (1) *Zimmer*[2] (France); *InverWorld*[3] (United States); *Rolls Royce*[4] (India); and "*Philip Morris*"[5] (Italy).

2. The Subsidiary as a Permanent Establishment in the OECD Model

When an enterprise of a contracting state carries on business in another contracting state, the following two questions must be asked before the second state can levy tax on the profits of the enterprise: (1) whether or not the enterprise has a permanent establishment (PE) in this state; and (2), if the answer to question (1) is affirmative, what, if any, the profits are on which the PE should pay tax.[6]

A PE is, however, not always easy to identify. This is particularly true where a PE is hidden behind a dependent operating company, i.e. if an operating company in addition to its own business also carries on another company's business as a PE of the latter. In this regard, the 2010 OECD Model Tax Convention (the "OECD Model") states in Art. 5(7) that:

> [t]he fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other state (whether through a permanent establishment or otherwise), shall *not of itself* constitute either company a permanent establishment of the other (emphasis added)

This follows from the principle that, for the purpose of taxation, such a subsidiary constitutes an independent legal entity.[7] Accordingly, both companies are subject to unlimited tax liability in the state in which they are resident or where their place of management is located.

However, by using the wording "not of itself", the provision clarifies that a parent company (parent) can have an (agent) PE in its subsidiary's state of residence if the general requirements for a PE set out in Art. 5(1) to (5) of the OECD Model are met. Accordingly, any space or premises belonging to the subsidiary that is at the disposal of the parent (the "right-to-use test") and that constitutes a fixed place of business (the "location test" and the "duration test") through which the parent carries on its own business (the "business activity test"), gives rise to a PE of the parent under Art. 5(1), subject to Art. 5(3) and (4), of the OECD Model.[8] In addition, under Art. 5(5) of the OECD Model, a subsidiary constitutes an agency PE of its parent if the subsidiary has the authority to conclude contracts in the name of its parent and habitually exercises this authority, unless these activities are limited to those referred to in Art. 5(4) or unless the subsidiary does not act in the ordinary course of its business as an independent agent within the meaning of Art. 5(6). Several examples of controversial arrangements with potential PE exposure may be noted, such as stripped distributors or commissionaires, personnel of the parent seconded to its subsidiary, supervision of toll manufacturing arrangements, managers shared with the parent, and subsidiary and partnership or joint-venture arrangements.

3. *Zimmer*

One recently decided international tax law case on the issue of the subsidiary as a PE is the French case of *Zimmer*.[9] Specifically, on 31 March 2010, the French Supreme Administrative Court (*Conseil d'État*) held that

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1. The panel members consisted of Paolo Valerio Barbantini (Italy, Chief, Large Business Division, Italian Revenue Agency), Dr Xaver Ditz (Germany, Partner Flick Gocke Schaumburg), Steven P. Hannes (United States, Partner in McDermott Will & Energy LLP), Anita Kapur (India, Chief Commissioner of Income Tax, Indian Revenue Agency) and Michael Lennard (Chief, International Tax Cooperation and Trade, UN Financing for Development Office). Seminar A was chaired by Luís Eduardo Schoueri (Brazil) with the help of Oliver-Christoph Günther (Austria) as Panel Secretary.
2. Supreme Administrative Court, 31 March 2010, *Société Zimmer Limited v. Ministre de l'Économie, des Finances et de l'Industrie*, Nos. 304715 and 308525.
3. US Tax Court, 12 May 1997, *InverWorld Inc. et al. v. Commissioner*, T.C. Memo 1997-226 (1997).
4. Delhi Income Tax Appellate Tribunal, 26 October 2007, *Rolls Royce Plc v. Deputy Director of Income Tax*, ITAT Nos. 1496 to 1501/DEL of 2007.
5. Supreme Court, 7 March 2002, "*Philip Morris*", Nos. 3667, 3368, 7682 and 1095.
6. Para. 1 of the Commentary on Art. 5 of the OECD Model.
7. Para. 40 of the Commentary on Art. 5 of the OECD Model.
8. Para. 41 of the Commentary on Art. 5 of the OECD Model; M. Görl, "Art. 5", in K. Vogel et al. (eds.), *Klaus Vogel on Double Taxation Conventions* (London: Kluwer Law International, 1997), m.no. 192; and M. Lang, *Introduction to the Law of Double Taxation Conventions* (Amsterdam: IBFD, 2010), m.no. 248 et seq.
9. *Zimmer*, supra note 2.

a French commissionaire does not constitute a PE for its foreign parent under the 1968 France–United Kingdom tax treaty.[10]

The facts of the case were that Zimmer SAS, a French commissionaire, sold products in France under a civil law commercial arrangement in its own name, but on the account of, and at the risk of, its UK parent (Zimmer Limited). With regard to the French customers, Zimmer Limited was an undisclosed principal. Before the commissionaire agreement was signed, Zimmer SAS had only been a French distributor of the products sold by Zimmer Limited.

The French tax authorities were of the opinion that Zimmer Limited had a PE in France and also that, whilst acting as a commissionaire, Zimmer SAS was a dependent agent with the power to bind its UK parent in respect of commercial transactions relating to the latter's own activities. Accordingly, Zimmer Limited was deemed to be liable to tax in France. The taxpayer challenged the relevant assessment before the Administrative Court of Appeals of Paris (*Cour Administrative d'Appel de Paris*).[11] The Administrative Court of Appeals rejected the claim.[12]

The Supreme Administrative Court, however, disagreed with the Administrative Court of Appeals. The findings of the Supreme Administrative Court were based on the examination of French commercial law. In particular, the Supreme Administrative Court stated that, even though Zimmer SAS's contracts with customers were concluded on account of Zimmer Limited, they did not bind the latter with regard to the customers. Under commercial law, for the commissionaire to bind its supplier, either the contract of commission or other factual elements relating to appointment must make the "principal" personally bound by contracts concluded by commissionaire with its customers.

It should be noted that the Supreme Administrative Court only considered French private law. This approach prevailed over the economic approach of the Administrative Court of Appeals and the tax authorities, which was based on a purely factual analysis of the condition regarding the "authority to bind".

On the other hand, in its ruling, the Supreme Administrative Court admitted the possibility for the tax authorities to requalify the commissionaire agreement if it appeared that the commissionaire legally bound its principal. According to the Supreme Administrative Court:

> contracts concluded by a commissionaire, even though they are concluded for the account of its principal, do not bind the latter directly vis-à-vis the counterparties of the commissionaire. It follows, that a commissionaire cannot in principle constitute a permanent establishment of the principal, solely because in execution of its contract of commission it sells – while signing contracts in its own name – products or services of the principal for the latter's account.[13]

Zimmer is, therefore, a case in which a PE was not recognized due to the (formal) civil law peculiarities of the case. The case reveals that a subsidiary could be deemed to be a PE, but only if it could legally bind its principal.

4. *InverWorld* and the 2009 IRS Interpretation

In *InverWorld*,[14] the US Tax Court examined in detail contractual rights and obligations of a US subsidiary (USCO) of a Cayman Islands affiliate (CICO). Both of these companies were owned by InverWorld Mexico (IW Mexico). IW Mexico had established CICO to provide Mexican investors with access to non-Mexican financial markets, in particular the United States. USCO was set up to receive investment instructions from clients, to make such investments and to maintain a record of actions. USCO invested funds that were held by USCO through CICO by purchasing and selling debt instruments and securities. USCO also opened, maintained and closed accounts with any broker, dealer or investment concern at which CICO maintained accounts for Mexican investors. The consulting agreement between USCO and CICO allowed USCO to engage in these activities. The agreement also specified that USCO was for all purposes "an independent contractor" and not an agent or employee of CICO and "shall have no authority to act for, represent, bind or obligate" CICO.

The US Tax Court concluded that the provisions authorizing specific agent-type activities were exceptions to the contract's general agency prohibition. USCO had, and exercised, specific rights to enter into and conclude contracts and, therefore, acted on behalf of CICO. Accordingly, USCO was the agent of CICO and USCO's US office was to be treated as the US office of CICO and, therefore, subject to US income tax.

InverWorld is the subject of a controversial 2009 interpretation by the Internal Revenue Service (IRS).[15] The decision is based only on US internal law, as the case involves taxable years in which no tax treaty in respect of taxes on income were in force either with the Cayman Islands or with Mexico. However, the IRS has argued in a recent legal advice memorandum that internal law principles would apply in a US PE analysis under a US tax treaty. This relies in part on *InverWorld* and states that a foreign corporation has a US trade or business because of the activities of a US corporation, even though latter does not enter into contracts in the name of a foreign corporation. The IRS did not argue that, in fact or in sub-

10. For further details, see B. Gouthière, "*Zimmer*: 'Commissionaire' Agent Is Not a Permanent Establishment", *European Taxation* 8 (2010), p. 350 et seq. and S. Gelin and D. Gutmann, "France: Commissionaire as PE?", *Tax Planning International*, European Union Focus (2010), Vol. 12, No. 4, p. 10 et seq.
11. Administrative Court of Appeals of Paris, 2 February 2007, *Société Zimmer Limited*, No. 05-2361.
12. S. Gelin and D. Sorel, "French Commissionaire: A PE for Its Foreign Principal", *Tax Notes International* (6 August 2007), p. 581 et seq.
13. *Société Zimmer Ltd v. Ministre de l'Économie, des Finances et de l'Industrie*, *International Tax Law Reports* 12 ITLR 739 (772) (2010).
14. *InverWorld*, supra note 3.
15. IRS Generic Legal Advice Memorandum (GLAM): Lending in the United States by Foreign Person Giving Rise to Effectively Connected Income (22 September 2009), AM2009-010.

stance, a US corporation made commitments on behalf of a foreign affiliate. The opinion of Steven P. Hannes in the Seminar was that the IRS had misinterpreted *InverWorld* in an attempt to expand US net source basis taxation by characterizing a US person as an "agent" of a foreign person and viewing such activities as creating a US trade or business.

5. *Rolls Royce*

Another important international tax law case concerning subsidiaries as PEs is the Indian case of *Rolls Royce*.[16] Rolls Royce plc (RR) was incorporated and, therefore, liable to tax in the United Kingdom without limit. RR supplied aero-engines and spare parts to customers in India and wholly owned a UK-incorporated subsidiary, Rolls Royce India Limited (RRIL), which had offices in India. RRIL entered into an agreement with RR to provide certain support services to RR on a cost-plus basis. The Indian tax authorities were of the opinion that RR had a PE in India due to the offices of its UK subsidiary. On appeal, the Commissioner of Income Tax confirmed the view of the tax authorities and the matter was appealed further to the Delhi Income Tax Appellate Tribunal (ITAT).

The ITAT took the position that the premises in India, which were ostensibly occupied by RRIL, were maintained and used by RR for its business. RR's employees visited India frequently and occupied and used these premises. Activities conducted from these premises formed an essential and significant part of the activity of RR. Some of RR's employees present in various locations in India reported to the director of RRIL. RRIL operated like a marketing office in receiving orders and undertook activities that converted a request for quotations into orders. Some senior employees of RRIL, including the Marketing Director, were functionally responsible to RR. The employees of RRIL participated in business meetings of RR with clients with authority to take decisions in such meetings. All requests for quotations or time extensions were routed through RRIL so that only the correspondence setting out standards was forwarded. The employees of RRIL commented on contract clauses, delivery schedules and payment timetable. The employees also analysed proposals, sought clarifications from the customers and had a significant role in the sale of products in India. In addition, the employees had the authority to sign documents on behalf of RR and gave certificates binding on the part of RR (for example, they issued certificates under the Foreign Corrupt Practices Act, certificates of origin of goods manufactured and warranty statements on behalf of RR). RRIL was totally dependent on RR and operated wholly and exclusively for RR and habitually secured orders exclusively for RR. Accordingly, RRIL was deemed to be a "customer facing business unit" of RR. The activities of the fixed place were considered to be the core activities of marketing, negotiating and selling products, and were not of a preparatory or auxiliary character. For all these reasons, the ITAT stated that Art. 5 of the 1993 India–United Kingdom tax treaty, which differs significantly from the OECD Model, should apply. Consequently, the UK subsidiary had created by way of its offices in India an agency PE for its UK parent.[17]

The case reveals that the Indian courts tend to adopt a very broad PE approach. Specifically, the ITAT held that RRIL constituted a fixed place as well as an agency PE of RR, as RRIL also habitually secured orders wholly exclusively for RR. However, RRIL did not have the legal authority to negotiate and enter into contracts on behalf of RR. As a result, RR was not "bound" if RRIL "secured" orders. This interpretation is not in line with the international standard, which focuses on the legal aspects. Accordingly, it is difficult for international companies to know whether or not their business activities constitute an Indian PE. The decision may also cause such companies to remove global support services from India.[18]

6. *Philip Morris*

Another very important case that raised wide-ranging debate regarding its consistency with international tax law in the scientific tax community is the noted Italian case of *Philip Morris*.[19] *Philip Morris* is not a recent case, but due to its importance with regard to discussion of the extension of PEs to subsidiaries, its peculiarities were considered in the Seminar.

The Italian Tobacco Administration paid royalties to companies that were members of the Philip Morris group in respect of the licence to manufacture and distribute cigarettes with the Philip Morris trademark in Italy. Intertaba Spa, a Philip Morris group member, which had the manufacture and distribution of cigarette filters in Italy and abroad as its main business purpose, supervised the execution of the contract with the Italian Tobacco Administration. According to the Italian tax authorities, the activities of Intertaba Spa created a "disguised" PE in Italy in respect of other Philip Morris group members. The evidence for such a conclusion included participation of Intertaba Spa in the negotiation of the licence contract, the carrying-out of a number of activities (falling outside of the corporate purpose of Intertaba Spa) for the sole interest of foreign companies and incurring costs without compensation. Consequently, according to the tax authorities, the royalties derived by the Philip Morris group members from the Italian Tobacco Administration were subject to tax in Italy. Intertaba Spa appealed to the competent tax court.

The Italian Courts of First and Second Instance (the Provincial Tax Court of Milan, *Commissione Tributaria*

16. *Rolls Royce*, supra note 4.
17. For further details, S. Kapoor, "*Rolls Royce* Decision: Income Attribution to Permanent Establishments", *International Transfer Pricing Journal* 3 (2008), p. 141 et seq.; S. Sharma, "Attribution to Profits to Permanent Establishments – The Indian Experience", *Asia-Pacific Tax Bulletin* 2 (2008), p. 93 et seq.; and S. Goradia and S. Kapila, "India", in J. Sasseville and A.A. Skaar (eds.), "Is there a permanent establishment?", *Cahiers de droit fiscal international* (The Hague: Sdu Uitgevers, 2009), p. 345 et seq.
18. Kapoor, supra note 17, Sec. 4.
19. *Philip Morris*, supra note 5.

Provinciale di Milano,[20] and the Regional Tax Court of Milan, *Commissione Tributaria Regionale di Milano*)[21] found in favour of the taxpayer, as the tax authorities had failed to prove that the Philip Morris group members had the physical space available in Italy through which their business could be carried on and that Intertaba Spa was a dependent agent of the Philip Morris group companies in participating in and concluding agreements with the Italian Tobacco Administration. The tax authorities appealed to the Italian Supreme Court (*Corte Suprema di Cassazione*), which held in favour of the tax authorities. The case was remitted to another section of the Court of Second Instance and the following five principles were established by the Supreme Court that were to be taken into account in deciding the case:

(1) an Italian resident company may take the role of a multiple PE of foreign companies belonging to the same group and pursuing a common plan;
(2) the supervision or control of the performance of a contract cannot, in principle, be considered to be auxiliary activities within the meaning of Art. 5(4) of the OECD Model;
(3) the participation of representatives or employees of a resident company in a phase of the conclusion of a contract between a foreign company and another resident entity may fall within the concept of authority to conclude contracts in the name of the foreign company, even in the absence of a formal power of representation;
(4) if an Italian company is entrusted with the management of business transactions of a non-resident company, such an activity may constitute a PE; and
(5) the fulfilment of the conditions for a PE must be verified using a substantive, as opposed to a formalistic, approach (authors' unofficial translation).

The case was settled by the taxpayer and no final decision was issued by the Court of Second Instance. Nevertheless, the case raised intense international debate and, in reaction to the decision and the subsequent discussion at the international level, the OECD clarified in the 2005 OECD Model that the principles in Art. 5(7) apply to any company forming part of a multinational group. However, the determination of the existence of a PE must be carried out separately for each company of the group and not the group as a whole.[22] In addition, no PE exists when a company that is a member of a multinational group provides services to another group company as part of its own business carried on in premises that are not those of that other company and using its own personnel.[23] The fact that a person has attended or even participated in negotiations in a state between an enterprise and a client is, in itself, insufficient to conclude that the person has exercised in that state an authority to conclude contracts in the name of the enterprise.[24] Italy, in reaction, made an observation in respect of these updates in the Commentary on the 2005 OECD Model.[25] The observation was inserted to clarify that Italian jurisprudence should prevail over the OECD interpretation.[26]

7. Subsidiary as a PE in the UN Model

Art. 5 of the 2001 UN Model Tax Convention (the "UN Model") differs significantly from its counterpart in the OECD Model in various ways, i.e.:

– The scope of Art. 5(3)(a) of the UN Model additionally includes "assembly projects" and "supervisory activities" in connection with building sites or construction, installation or assembly projects. The required PE duration is also reduced from twelve to six months.

– The UN Model includes a special PE provision for services (Art. 5(3)(b)). Accordingly, an enterprise is deemed to have a PE in the other contracting state as a result of the performance of services exceeding a period or periods of more than six months in aggregate in any twelve-month period.[27]

– Art. 5(4) of the UN Model is narrower than its counterpart in the OECD Model, as facilities used solely for the purpose of delivery and stock maintained only for the purpose of delivery are not referred to.

– According to Art. 5(5)(b) of the UN Model, the actions of a "dependent agent" may constitute a PE, even without having and habitually exercising the authority to conclude contracts in the name of the enterprise, where that person habitually maintains a stock of goods or merchandise and regularly makes deliveries from the stock.

– The UN Model includes an additional provision on the PEs of insurance companies (Art. 5(6)).

– In contrast to Art. 5(6) of the OECD Model, the corresponding provision in the UN Model (Art. 5(7)) specifies that an agent is not considered to be an agent of independent status if the activities are devoted wholly or almost wholly on behalf of one enterprise and non-arm's length conditions are made or imposed between the agent and the principal.

Art. 5(8) of the UN Model has the same wording as Art. 5(7) of the OECD Model. However, the Commentary on the UN Model cites the Commentary on the 2000 OECD Model – the applicable OECD Model when

20. Provincial Tax Court of Milan, 12 September 1997, "*Philip Morris*", No. 238.
21. Regional Tax Court of Milan, 24 March 2000, "*Philip Morris*", No. 313/99.
22. Para. 41.1 of the Commentary on Art. 5 of the OECD Model.
23. Para. 42 of the Commentary on Art. 5 of the OECD Model.
24. Para. 33 of the Commentary on Art. 5 of the OECD Model.
25. Para. 45.10 of the Commentary on Art. 5 of the OECD Model. For further details, see R. Russo and E. Pedrazzini, "Permanent Establishments under Italian Tax Law: An Overview", *European Taxation* 8/9 (2007), p. 389 et seq.; C. Romano and R. Russo, "Italian Tax Consequences of Permanent Establishments", *Bulletin for International Taxation* 8/9 (2010), p. 456 et seq.; M. Gazzo, "Permanent Establishment through Related Corporations: New Case Law in Italy and its Impact on Multinational Flows", *Bulletin for International Fiscal Documentation* 6 (2003), p. 257 et seq.; and L. Favi, "Italy", in Sasseville and Skaar, supra note 17, p. 393 et seq.
26. C. Innamorato, "The Concept of a Permanent Establishment within a Group of Multinational Enterprises", *European Taxation* 2 (2008), p. 81 et seq.
27. See also Para. 42.23 of the Commentary on Art. 5 of the OECD Model.

the UN Model was effectively finalized. Accordingly, changes made to the Commentary on the 2000 OECD Model (for example, after *Philip Morris*) are not included in the Commentary on the UN Model. The proposed Commentary on the 2011 UN Model will follow the Commentary on the 2008 OECD Model, i.e. post-*Philip Morris*. However, the text regarding Art. 5(8) of the UN Model is preceded by the words "[t]his paragraph reproduces article 5(7) of the OECD Model. The Commentary on the OECD text is as follows:...". In the view of the Seminar panel members, it is questionable if this is an endorsement by implication.

In addition, according to Michael Lennard's information as provided in the Seminar, the UN Committee plans to make the following comment between Paras. 41.1 and 42 of the Commentary on Art. 7 of the OECD Model:

> The Committee notes that determining on a separate entity basis whether or not a permanent establishment exists may be vulnerable to abusive arrangements. Depending on the domestic law of States, safeguards against purely artificial structures may be found in applying a rule that substance overrides form. The Commentary of the OECD Model also states the following: [the Commentary on Art. 7 of the 2011 UN Model will then quote Para. 42 of the Commentary on Art. 7 of the OECD Model]

During the Seminar, questions were raised that revealed that the treatment of a subsidiary as a PE is not clear. For instance, it should be decided as to whether this approach differs according to the extent to which legal form can be disregarded, as in the Commentary on the OECD Model, or whether this just states the obvious. The reference to, and/or relevance of, a background of group policies that are intended to convert manufacturing or marketing subsidiaries into toll manufacturers or agents, with the subsequent risk and profit shifting, also require further discussion.

8. Attribution of Profits to a Subsidiary Considered to Be a PE in the OECD and UN Models

Once it is accepted that a subsidiary may be considered to be a PE of its parent, the next problem to solve is how to attribute profits to this subsidiary. A subsidiary usually has its own activities and if these activities are performed on an arm's length basis, profits must be attributed to the subsidiary according to transfer pricing rules. When the subsidiary is deemed to be a PE of its parent, it is also necessary to consider that the parent's profits (if any), when attributed to the PE, are subject to tax. Accordingly, two different amounts must be considered for the purposes of taxation, i.e. the subsidiary's profits and the PE's profits. The Seminar only examined the latter.

In this regard, the following two levels of legislation must be taken into account: (1) treaty law; and (2) national law. As there had been considerable variation in the interpretation of the attribution of profits, the OECD undertook work on the "Report on the Attribution of Profits to Permanent Establishments" (the "Report").[28] The Report considers the "functionally separate entity approach" to be the guiding principle. Under the "authorized OECD approach" (AOA), a functional analysis must be carried out before the arm's length principle can be applied to internal "dealings" between a headquarters and its PE.[29]

In a first step, the significant people functions performed, the risks assumed and the assets employed are analysed in respect of attributing profits to the PE.[30] In principle, the more functions a PE performs and the more risks it assumes, the greater its profits should be. The international dealings between the PE and the other parts of the enterprise must also be identified, analysed and documented, especially those relating to its headquarters. In addition, capital must be attributed to the PE in line with the assets and risks allocated to it.

In a second step the internal dealings must be valued on the basis of the arm's length principle. The OECD Transfer Pricing Guidelines(the"Guidelines")[31] that have been developed for transactions between associated enterprises should be also applied by analogy for the purpose of Art. 7 of the OECD Model. As a result, the principles and transfer pricing methods set out in the Guidelines also apply to determine the PE's profit. A global profit split is not feasible. In this regard, the AOA was fully implemented in the 2010 OECD Model.[32]

National tax law then regulates on how to determine the taxable income of a PE in general. Among others, it defines the realization of profits (for instance, the transfer of an asset to a foreign PE entails the realization of profits and tax-deductible expenses) and may set out indirect methods of determining the amount of the PE's profits.

The general rule in Art. 7(1) of the 2010 OECD Model that a state may only tax profits attributable to the PE is slightly amended in the UN Model. Specifically, Art. 7(1)(b) and (c) of the UN Model provides for the "limited force-of-attraction principle", which permits the enterprise, once it carries out business through a PE in the source state, to be taxed on business profits in that state that arise from transactions of the same or similar kind outside the PE.[33] The UN Tax Committee currently does not intend to adopt the OECD standard in the planned 2011 UN Model. In this respect, the new OECD approach was considered to be too complicated and, therefore, not administrable for the tax authorities in developing countries. Such an approach could also limit the taxation rights of source states in an undesirable way, again from the perspective of developing countries.[34]

28. OECD, "Report on the Attribution of Profits to Permanent Establishments" (Paris: 2010).
29. Lang, supra note 8, m.no. 263.
30. D. Oosterhoff, "The True Importance of Significant People Functions", *International Transfer Pricing Journal* 2 (2008), p. 68 et seq.
31. OECD, "Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" (Paris: 2010).
32. Lang, supra note 8, m.no. 264 and J. Malherbe and P. Daenen, "Permanent Establishments Claim Their Share of Profits: Does the Taxman Agree?", *Bulletin for International Taxation* 7 (2010), p. 359.
33. Lang, supra note 8, m.no. 245 and A. Hemmelrath, "Art. 7", in Vogel, supra note 8, m.no. 35.
34. "UN Committee of experts on international cooperation in tax matters holds sixth meeting in Geneva", *Tax News Service* (27 October 2010).

9. Cases Revisited

In cases where it is decided that no PE exists, naturally the courts do not provide any indications regarding the way in which profits should be allocated to a PE. Accordingly, for example, no indication regarding this question can be found in *Zimmer*. In *Philip Morris*, there is also no indication in this regard, as the case was settled by the taxpayer. Consequently, the Italian Court of Second Instance (to which the Italian Supreme Court had remitted the case) could not issue a final decision. However, assuming the existence of a PE in Italy, the primary issue to be determined would have been the royalties. In *Philip Morris*, the questions would have been which significant people functions could be identified and who actually carried them out.[35]

In *Rolls Royce*, the ITAT stated that manufacturing and research and development activities outside India and marketing activities were carried out by RRIL as a PE of RR in India. RRIL's activities went beyond the support services noted in the agreement. The agent's remuneration did not represent the value of profit attributable to all of the activities of RR in India. As the activities of RR in India were not wholly replaced by the agent in India, the agent did not, therefore, extinguish the tax liability of RR. On the basis of these facts, the ITAT held that domestic law had to be applied to determine the profits attributable to the marketing activities. As a result, 35% of the global profits in respect of sales made in India were chargeable to tax in India.

10. Conclusions

The PE concept in international tax law has been used for many years for the taxation of a taxpayer's business activities in other states. However, when defining if a subsidiary has a PE in another state and how much profit, if any, is attributable to this PE, the decisions of courts from around the world reveal that the concept is interpreted in many different ways. The Seminar at the 2010 IFA Annual Congress illustrated this fact in its discussion of four relevant international tax law cases.

35. Oosterhoff, supra note 30.