

Case Study X: Permanent Establishments (PEs) in MNE here Agency PEs

Modul 7

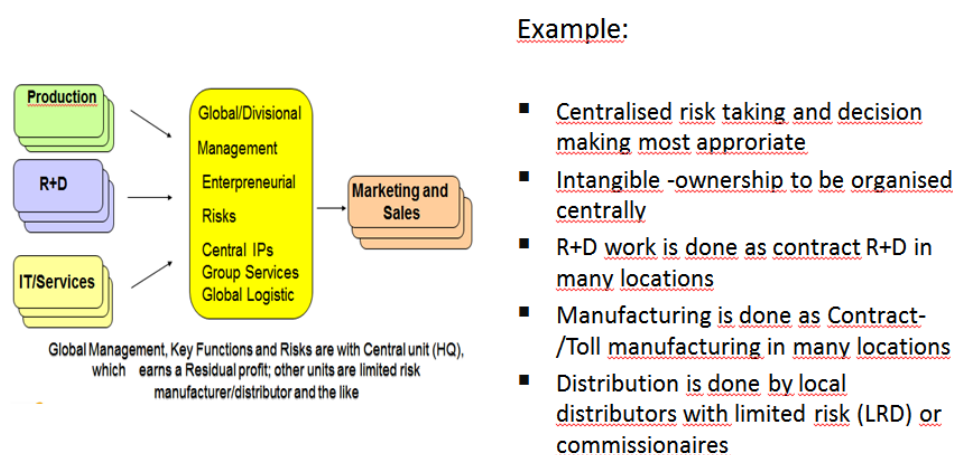
Facts:

Pharma Group domiciled in Switzerland applies for its global business a business model, which is often used by Pharmaceutical companies and can be described as **central entrepreneur** (also called a principal structure).

The key features of such model are:

- All intangibles are owned centrally by the Swiss Holding/principal , which grants licenses to operative companies (OPCos)
- R+D is done decentrally by OPCOs/Research centers in many countries by way of contract R+D and remunerated by the holding/principal at “cost plus “
- Manufacturing is done by local OPCOs as contract- or toll manufacturers and remunerated at “cost plus” by the holding/principal
- The sales OPCOs are low risk distributors or commissionaires and getting remunerated by way of a “commission”by holding/principal

The facts are illustrated by the following graphic:



The questions:

Please comment with regard to the **distribution activities** of the Pharma Group on the potential existence of an **Agency PE** under Art. 5 para 5 or 6 of the **OECD model tax convention 2017 (as amended by BEPS Action 7)** in connection with sales companies acting as **commissionaires**.

1. Please compare both the **Pre- and Post BEPS OECD Guidance** to Art 5 (5) + (6) MC – What are the key changes?
2. What **type of Agency PE** - dependent or independent agent - are you considering for the 100% owned sales subs of Pharma Group and under what rationale?
3. Is there a difference in the tax qualification under Art 5 (5) and (6) OECD MC between **Agents and Commissionaires** and **“Low-Risk Distributors”** (Pre- and Post BEPS)?
4. Please describe **the taxation concept** under the assumption an Agency PE exists. Which entity is taxable under the agency PE? What is the taxable income?

Literature:

- Skript Modul 8 Vertreterbetriebstätte
- VPR Tz 161-178,209-217,234-240
- **Bendlinger,S**, „Additional Guidance“ der OECD zur Gewinnabgrenzung neuer Betriebsstätten nach BEPS-Aktionspunkt 7, in TPI 2018, S. 53-62
- **Kunas/Margerie/Sprenger**, Gewinnermittlung von Betriebsstätten gemäss AOA in der Praxis, in TPI 2017, S 125-127
- **Storck, A., Petruzzi, R.**, “Permanent Establishments: Proposals Related to Agency Permanent Establishments – Article 5(5) and (6) of the OECD Model Convention”, in: Lang, Pistone, Rust, Schuch, Staringer, *Base Erosion and Profit Shifting (BEPS): The Proposals to Revise the OECD Model Convention* (Vienna: Linde, 2016), pp. 83-106