

Commissionaire Agency Permanent Establishments

1. Concept of Permanent Establishment in CITC and OECD Model

In Art. 5 of the Corporate Income Tax Code (CITC), the definition of the permanent establishment is extensively dealt with in terms similar but not entirely identical to the OECD Model Convention (OECD Model).¹ In what concerns the agency permanent establishment, Paras. 6 and 7 of Art. 5 of the CITC provide as follows:

6. It is considered that there is also a permanent establishment when a person, that is not an independent agent in the terms of paragraph 7, acts in Portuguese territory on behalf of an enterprise and has, and habitually exercises, powers of intermediation and conclusion of contracts that bind the enterprise, in the terms of the latter business.

7. It is not considered that an enterprise has a permanent establishment in Portuguese territory by the mere fact that it there exercises its activity through a general commission agent or any other independent agent, provided that such persons are acting in the ordinary course of their business, bearing the entrepreneurial risk.²

The permanent establishment concept in Art. 5 of the CITC also contains a paragraph similar to Art. 5(4) of the OECD Model but, contrary to this, it does not contain a paragraph similar to Art. 5(7) of the OECD Model.

Despite the similarities between the OECD Model and domestic law, the latter considers that the dependent agent must have the authority not only to conclude the contracts that bind the enterprise,³ but also to intermediate the conclusion of those contracts, which admits the argument that, for instance, where a contract is intermediated by a broker and then signed by a dependent agent of the enterprise with the capacity to bind the enterprise, that dependent agent does not qualify as a permanent establishment in Portugal, under domestic law, as that agent did not intermediate the negotiations.⁴

Furthermore, with regard to the independent agent, Portuguese law supplementary to the OECD Model also provides that in order to qualify as such, the independent agent must bear the entrepreneurial risk of its activity.⁵ As noted by Miguel Serrão in the Portuguese National Report at the 2009 International Fiscal Association (IFA) Congress:

... in the Budget Law for 2002, the government was authorized to amend the PE definition of article 5 of the [CITC]. This authorization foresaw (...) the amendment of the domestic provision corresponding to paragraph 6 of Article 5 of the OECD Model so that it would expressly state that an "independent agent" had to be independent both legally and economically (following paragraph 37 of the OECD commentary on Article 5). However, possibly due to the change of government, the domestic law definition of PE was not in fact amended.⁶

However, notwithstanding in this specific regard the minor differences between domestic law and the OECD Model as well as the Portuguese income tax treaty network, one can easily conclude that the Portuguese concept of permanent establishment is clearly inspired by the conventional concept.⁷

A major difference, however, with regard to the OECD Model, in the authors' opinion, is that the absence of a provision similar to Art. 5(7) of the OECD Model clearly makes it even more difficult to accept that a Portuguese resident subsidiary of a parent company resident in a state with which Portugal has not concluded an applicable income tax treaty, may be considered a permanent establishment of the latter.⁸ However, according to Miguel Serrão of the Portuguese Centre for Fiscal Studies of the Ministry of Finance:

... in some opinions recently issued about particular cases, the tax authorities have stated that for the purposes of determining the existence of a dependent agent PE, the same criteria must be applied, whether the companies are related or not, following the interpretations given in paras. 40-42 of the OECD commentary on Art. 5.⁹

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1. With regard to personal income tax, the parliament opted to establish that the definition of permanent establishment in the CITC is also applicable mutatis mutandis with regard to permanent establishments of individuals.

2. Author's translation.

3. Normally the board of directors has the power to bind the enterprise and may appoint others to perform acts on its behalf. A discussion of the legal consequences of cases where a person erroneously creates the impression in the mind of the other party that it has the power to bind the company, is beyond the scope of this article.

4. According to Miguel Serrão, "Is there a permanent establishment – Portugal branch report", *Cahiers de Droit Fiscal International*, vol. 94a (2009), at 527, the wording of Portuguese law seems to reflect Paras. 32 and 33 of the Commentary to Art. 5 of the OECD Model. In the authors' understanding, even if those paragraphs of the Commentary were the inspiration for the drafting of Art. 5(6) of the CITC, it did not achieve that result as, contrary to the Commentary, the law seems to demand that in order for an agency permanent establishment to exist, the agent must not only intermediate, but must also conclude contracts that bind the company.

5. Which, in spite of not being present in the drafting of Art. 5 of the OECD Model, is the OECD position in the Commentary (Para. 38 Commentary to Art. 5).

6. Note 4, at 521.

7. In the same vein, Alberto Xavier (with the collaboration of Clotilde Celorico Palma and Leonor Xavier), *Direito Tributário Internacional*, 2nd ed. (Almedina, Coimbra, 2007), at 315; Manuela Duro Teixeira, *A Determinação do Lucro dos Estabelecimentos Estáveis* (Almedina, Coimbra, 2007), at 23; Miguel Serrão, note 4, at 515.

8. In a case of 16 March 1988, the Supreme Court seems to have implicitly taken the view that a Portuguese subsidiary of a non-resident group the object of which was market research and the promotion of sales that were made directly by the non-resident associated companies and their Portuguese clients, could be taxed on the profit derived from the sales made by those associated companies. For a critical analysis of this decision, see J. L. Saldanha Sanches, "Actividade comercial e lucro tributável" *Fisco* 7 (April 1989), at 34.

9. Note 4, at 528.

2. Agency Permanent Establishment under Portuguese Law

Portuguese civil law¹⁰ expressly foresees a number of cases connected with the tax concept of agency permanent establishment and which have some features in common, such as the representative, the agent, the commissionaire and the mediator.

2.1. Agency permanent establishment compared to representative

The representative is a *mandate with representation*, i.e. the representative acts in the name, in the interest and on behalf of the principal. The agent is a concept similar to the representative, but unlike the latter, the main feature of an agency agreement for Portuguese law purposes is that the agent has the primary obligation to promote the business of the principal, i.e. both cases involve a mandate with representation, but while the agent mainly engages in material acts, the representative mainly engages in legal acts, i.e. acts that produce legal effects to the principal.¹¹ The agency agreement, under Portuguese civil law, is also characterized by the fact that it usually implies a relation with a certain degree of stability, i.e. an agent is usually contracted to an undefined number of operations. Another typical feature of the agency agreement is the remuneration, which is essentially established based on the number of agreements achieved by the agent. It assumes the form of a commission or a percentage on the amount of agreements obtained. Finally, for civil law purposes an important distinction is made between the agent and the dependent worker that is also relevant for tax law purposes:

Contrary to the dependent worker, legally subordinated to the employer through a labour agreement, being under the authority and direction of the latter, the agent is independent and acts with autonomy. However, the autonomy of the agent vis-à-vis the principal is not absolute as [the agent] should, namely, conform to the guidance received from the principal, appropriate to the economic policy of the principal, and should regularly report to the principal.¹²

On the other hand, the commissionaire represents a case of a *mandate without representation*, i.e. the commissionaire engages in acts in the interest and on behalf of the principal, but in its own name.

Finally, a mediator has a common feature with the agent, in that both act as intermediaries. However, unlike an agent, a mediator generally limits its acts to connecting with the two parties and facilitating the signing of the agreement. Moreover, a mediator acts with impartiality, in the interest of both parties, and without being especially connected to either of them.¹³

According to the above, one can then conclude that a representative and an agent are examples of a mandate with representation, i.e. persons acting on behalf of the principal so that the legal effects of their acts are binding on the principal. In these a permanent establishment may be deemed to exist provided that the other conditions established under tax law are met. These conditions are much more of an economic nature (economic

dependency, risk, etc.) and should be assessed individually.

2.2. Commissionaire

On the other hand, according to Alberto Xavier,¹⁴ a mandate without representation (and the more typical example of a commissionaire) does not qualify as a mandate with representation or as a permanent establishment. Under such a contract, the commissionaire acts in its own name (and is thereby not a representative) but is obliged to transfer to the principal the effects of the contracts that the commissionaire has concluded. In this case, there is no permanent establishment.¹⁵ Furthermore, the commissionaire does not have the authority to conclude contracts to bind the principal, contrary to what occurs in a mandate with representation.

2.3. Conditions for the agency permanent establishment to exist

In the authors' opinion, in order to ascertain whether there is an agency permanent establishment, it is important to consider a number of different factors that should be carefully assessed. In this regard, in order to have a permanent establishment it is not sufficient merely to have the authority to conclude contracts in the name of the principal; it is also necessary to engage in this activity with a certain regularity.¹⁶ Additionally, the dependence on the principal should be both legal and economic. In this context, with regard to the remuneration of the agent, while a dependent agent will typically receive a more or less fixed remuneration, an independent agent typically receives a commission that takes account of the results it obtains for the enterprise. From an economic perspective, an independent agent typically bears the risks of its activity, while in the case of a dependent agent it is the enterprises for which it works that bears the risk.¹⁷ However, the dependency test should also be seen from a functional perspective. If the agent is subject to strict control and detailed instructions from the principal, this is a clear sign of dependency. Moreover, the

10. Civil law in this context refers to private law that governs contracts between individuals (or entities), and also encompasses commercial law that governs contracts between individuals (or entities) in the pursuit of their business activity.

11. This does not mean that the agent may not be authorized to engage in legal acts in the name of the principal, but in any case these acts will be merely ancillary. Other differences between these two concepts include that the agent generally does not have the right to be reimbursed for its expenses (unlike a representative), and a representative is usually remunerated independently of the results of performing his or her job. See António Pinto Monteiro, *Contratos de Distribuição Comercial* (Almedina, Coimbra, 2002), at 99 (Authors' translation).

12. António Pinto Monteiro, note 11, at 93.

13. See António Pinto Monteiro, note 11, at 102; José Engrácia Antunes, *Direito dos Contratos Comerciais* (Almedina, Coimbra, 2009), at 460-462.

14. Note 7, at 318 et seq.

15. See also Manuel Pires, *Da Dupla Tributação Jurídica Internacional sobre o Rendimento* (Lisboa: CEF, 1984), at 747.

16. Maria Margarida Cordeiro de Mesquita, "As convenções sobre dupla tributação", *CTF 179* (1998), at 105; Carla Palmeira, "O estabelecimento estável nas convenções modelo da OCDE e da ONU", *IDET Miscelâneas 4* (Almedina, Coimbra, 2006), at 86.

17. Carla Palmeira, note 16, at 88.

number of principals for which the agent works should also constitute an indicator of economic dependency.

Manuela Duro Teixeira, one of the authors that has written more extensively about permanent establishments in Portugal, observes that only in very few cases have the Portuguese tax authorities questioned the existence of a permanent establishment when the non-resident did not expressly declare it.¹⁸ However, according to Miguel Serão:

...in recent years, the tax authorities have tried to deem ex post a considerable number of PEs which had not been registered for income tax purposes. This might lead in the future to litigation and/or availability of more guidance regarding the interpretation of the PE concept.¹⁹

3. Transfer Pricing and Permanent Establishments

3.1. General considerations

The Portuguese tax authorities have not adopted any specific action since the *Zimmer* case was decided, and thus it cannot be said to have had a major impact in Portugal to date, most notably on the field of transfer pricing implications and the permanent establishment concept.

With regard to the implications of transfer pricing on the concept of permanent establishment, Portuguese tax law expressly provides that the dealings of a permanent establishment with the enterprise's head office or other permanent establishments of that same enterprise, are subject to transfer pricing rules.²⁰ As a consequence, it seems understandable that possible developments with regard to the transfer pricing treatment of transactions and dealings of permanent establishments might have a direct impact on the concept of permanent establishment, namely on the attribution of profits to a Portuguese permanent establishment.

Furthermore, it seems that the Portuguese tax authorities will closely follow the OECD Transfer Pricing Guidelines (OECD Guidelines) and possible developments, as the current Portuguese transfer pricing regulations²¹ are patterned along the lines of the OECD Guidelines. Therefore, the possible adoption of the OECD Draft Report "Transfer Pricing Aspects of Business Restructurings" might lead in the future to modifications of the application of transfer pricing rules to permanent establishments and the concept of the permanent establishment itself.

Nevertheless, Portugal has taken a cautious approach at the OECD level to the recent amendments to the Commentary on the OECD Model Convention (e.g. the adoption in the 2008 update of the OECD Model of the OECD report "The Attribution of Profits to Permanent Establishments"), introducing observations on some of the controversial issues where reports have been adopted. For instance, Portugal has expressly stated that with regard to the issue of the attribution of free capital to a permanent establishment, Portugal wished to "reserve its right not to follow the position expressed in paragraph 45 of the Commentary on Article 7 except

whenever there are specific domestic provisions foreseeing certain levels of 'free' capital for permanent establishments."²² Furthermore, for the same reason of non-existent domestic tax provisions on this particular issue,²³ Portugal expressed that it would "reserve its right not to follow the 'symmetry' approach."^{24,25}

3.2. Practice of transfer pricing in relation to agency permanent establishments

Currently, there is no known administrative guidance or case law on the use of transfer pricing as a means to challenge commissionaire structures. Furthermore, it is unclear whether the Portuguese tax authorities, when faced with a commissionaire structure that might be said to be devised without sufficient economic substance, would resort to transfer pricing rules or the Portuguese general anti-abuse rule (GAAR).²⁶ The different approach taken by the tax authorities might be relevant, as the special procedure²⁷ with stringent requirements for the application of anti-abuse rules would be deemed applicable if the GAAR is used, and it is debatable if that same special procedure is required where transfer pricing adjustments based on anti-abuse grounds are made.²⁸

Also, there seems to be no administrative preference by the tax authorities regarding the use of a specific method to attribute profits to a commissionaire. However, the Portuguese tax authorities seem to apply preferentially the traditional transaction-based methods of the OECD Guidelines, and thus it is expected that the resale price

18. Note 7, at 28.

19. Note 4, at 516.

20. See Art. 63, Para. 9 CITC. Although the letter of the law specifies only that the dealings of a permanent establishment with the enterprise's head office or other permanent establishments of that same enterprise are covered by transfer pricing rules, it is to be expected that the Portuguese tax authorities would take the view that transactions of such a permanent establishment with an associated enterprise would also fall within its scope of application.

21. See Decree 1446-C/2001 of 21 December 2001.

22. Para. 70 OECD Model Convention Commentary on Art. 7.

23. Portugal has a fixed debt-to-equity ratio of 2:1 for thin capitalization purposes (Art. 67 CITC), but the rule is applicable only to non-residents having their tax residence outside of the European Union and the Economic European Area. There is no known administrative guidance that might lead one to consider this ratio as a possible safe harbour.

24. See Para. 72 of the OECD Model Convention Commentary to Art. 7. Portugal also states in the same observation that for the purposes of elimination of double taxation, "the home country, determines the amounts of profits attributable to a permanent establishment according to the domestic law", which might lead in the future to possible issues of unrelieved double taxation.

25. Irrespective of the position taken on the observations made for Paras. 70 and 72 of the OECD Model Commentary on Art. 7, in certain specific industries (e.g. banking), the Portuguese tax authorities have been analysing whether a permanent establishment attributes any free capital for the purposes of determining its taxable income in the course of tax audits.

26. Art. 38, Para. 2 General Law on Taxes (*Lei Geral Tributária*).

27. Art. 63 Tax Procedure and Process Code (*Código do Procedimento e Processo Tributário*).

28. The Portuguese tax authorities have issued a ruling in which it is understood that the mentioned specific procedure for the application of anti-abuse provisions is not applicable to tax adjustments determined on the basis of transfer pricing rules. However, that ruling is not binding on taxpayers and the interpretation of the ruling has been subject to controversy, as it takes a narrow and formalistic view of the anti-abuse definition used to determine the scope of application of the special procedure and overlooks the complex nature of transfer pricing rules.

method would be the preferred method for the purpose of attributing profits to a permanent establishment where its functions are essentially those of performing a service for its principal in Portugal.

Portugal also has no rules deeming that a business restructuring in itself might be seen as a taxable event and that the economic transfer of title of any assets or potential profit from activities upon conversion might necessarily be said to lead to a tax liability. There is no administrative guidance that might lead to the same result of deeming that a tax event would exist through the use of transfer pricing rules, and it is suggested that

such understanding without any express amendment being introduced to the CITC might lead to a discussion regarding its compatibility with the Portuguese Constitution and the specific provisions dealing with the definition of tax liability.

Finally, it is expected that the possible adoption at the OECD level of the report "Transfer Pricing Aspects of Business Restructurings" might have an impact on the analysis of commissionaire structures in Portugal, as the Portuguese transfer pricing regulations closely follow the OECD Guidelines.

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